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**THE AMENDMENT TO SECTION 59 OF THE CRIMES
ACT 1961: A CASE STUDY IN THE PROCESS OF
LEGISLATIVE CHANGE**

A thesis
submitted in fulfillment
of the requirements for the degree
of

Master of Laws

at

The University of Waikato

by

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2010

ABSTRACT

In June of 2007 the New Zealand Government passed the Crimes (Substituted section 59) Amendment Act 2007, legally abolishing the right of parents to physically discipline their children and making New Zealand one of 29 States to have (so far) achieved full prohibition of corporal punishment. However the hypothesis of this thesis is that this process of abolishing corporal punishment can be characterised as a lost opportunity - the opportunity to engage in productive debate about the way in which our country's children are viewed and raised and to address some of the underlying practices and attitudes which contribute towards our appalling rates of child abuse. Instead it degenerated into one of the most contentious debates in recent political history. Rational debate deteriorated into abuse, misunderstandings and deliberate thwarting of reasoned discussion. As a result in 2010 we are in a position where the boundaries surrounding permissible and impermissible discipline are arguably less clear than they were before.

This thesis analyses the process of legislative change with a view to showing how, why and where things went wrong. It argues that this process was stymied by two crucial factors; firstly the influence of right wing lobby groups who garnered support for their religiously motivated viewpoints by capitalising on the public's misplaced fears and underlying attitudes towards children ; and secondly the failure of the Government to adequately advocate for, and educate the public on, the law which it passed. Ultimately these two factors were heavily influenced by the fact that our collective and individual opinions on physical discipline have arisen as a result of the historically dominant construction of children as inherently evil – a construction which we inherited from Britain and which is intrinsically aligned with the practice of corporal punishment. The thesis then demonstrates that the negative repercussions of the debate process could be partially ameliorated through education and that lessons learned in this process can be utilised in the future.

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INTRODUCTION

Background

Prior to 2005, s 59 of the Crimes Act 1961 provided that a parent, or person in place of a parent, was justified in using reasonable force against their child for the purpose of correction. Thus actions which would have constituted assault if they had been committed by one adult against another were legal if committed by an adult against his or her child. Actions such as smacking, slapping, hitting, whipping or punching were defensible if the force used was reasonable and for the purposes of correction. Punishing children physically, particularly by smacking, had been an intrinsic part of the cultural and social fabric of New Zealand society for well over 100 years.

In 2010, the situation is different. As a result of the enactment of the Crimes (Substituted section 59) Amendment Act 2007, it is now illegal for a parent or person in place of a parent to use force for the purposes of correction against a child.¹ This change occurred because of Green MP Sue Bradford's member's bill. As a result, New Zealand society was forced to confront whether or not parents should still be allowed to use physical discipline against their children. Four years of political and social debate ensued, of an intensity and duration rarely seen in New Zealand. As a result, we now have a new s 59 which effectively bans all forms of physical discipline against children.

Sue Bradford's original bill sought only to remove the s 59 defence leaving the legislation otherwise silent. Her aim was to get New Zealand "to take a step into the future and rid ourselves of an archaic law that legitimises the use of quite serious force against our children".² The focus was to be on the serious assaults committed by parents under the guise of discipline, not minor smacking. In her own words, the "climate of public opinion is so manifestly not ready for a ban on smacking."³ The removal of this archaic defence which had, on occasion, protected child abusers from conviction and had legitimised the use of force against children for decades should have been an "easy sell" in a country like New

¹ For text of the new s 59 see appendix one

² (27 July 2005) 627 NZPD 22086

³ Ibid.

Zealand with appalling rates of child abuse. However this was not to be the case. Sue Bradford recognised at the outset that “[t]he issue is highly controversial. It is one that cuts deep into our national psyche, and it is a debate that needs to happen.”⁴ Despite the recognition of the depth of feeling that this issue engendered in people, the furore that this bill caused was almost unprecedented in our recent political history.

The uproar caused by the Bradford bill resulted in heated debate which struck at the heart of our beliefs about parents, children, the state and the relationships between all three. Did parents have the right to discipline their children as they saw fit provided that they did not cause serious injury? Did any government have the right to step in and interfere? Did physical punishment harm children or was it beneficial to building their moral character? Was there any link between “commonplace” discipline such as smacking and the abuse meted out to far too many of New Zealand’s children? Would the prohibition of physical discipline result in changing attitudes towards children, resulting eventually in a reduction in our child abuse rates? Was New Zealand obliged by international law to eliminate physical discipline or was this just kowtowing to international pressure which should have been withstood? Was it possible to raise respectful children without the use of physical punishment or would children run roughshod over their parents and other authority figures? Coming as it did after the introduction of Civil Unions and the legalisation of prostitution, was this just yet another example of a Labour led “Nanny State” which was intent on destroying New Zealand’s traditional and proper values by its interference in the domestic sphere?

Ultimately though, the public and political debate narrowed to centre on the “light smack” hence the popular labelling of the bill as the “anti-smacking” bill. Most people appeared to believe that the “light smack” (as they personally defined it) was not harmful and was not something that otherwise fit parents should be punished for.

The factors which piqued my original interest in this issue

I was initially intrigued by the passionate polarisation of opinion. What was it about this particular issue which incited such an unprecedented and unexpected

⁴ Ibid.

public outcry, including mass demonstrations? Outraged New Zealanders jammed talkback lines, vented on online message boards and forums, picketed Parliament and tried hard to make the government pull back from passing the Crimes (Substituted section 59 Amendment Act) 1961. Even after the law was enacted, the dissent did not die down and two years later the topic was still being debated in the wake of the Citizens Initiated Referendum that asked whether or not a smack as part of good parenting should be a criminal offence. The referendum polarised public opinion even more and many of those at both ends of the spectrum appeared to find it almost impossible to see the value in the arguments put forward by the opposition and stridently defended their position.

I also became concerned that most of the people commenting on the law did not actually understand it. I found that this incomprehension was not limited to average members of the public but extended to supposedly educated media commentators and even politicians themselves. How could a piece of legislation which was so widely publicised and debated be so misunderstood? Alarming, I even found myself confused at times when faced with the conflicting information being provided.

Finally, I became interested in whether or not the passage of this law could be deemed to be a success or a failure. I would have *expected* that the success or failure of this law would have been determined by factors which were related to the effect of the law on the wellbeing and safety of children. I was therefore surprised to find out that three years after the passing of the Act, the definition of success seemed to be related to the number and type of prosecutions involving s 59. The law was “failing” in the eyes of the adversaries either because there were *too few* prosecutions and this was obviously a sign that the law was a waste of time, or it was failing because there were *too many* prosecutions and investigations and this was obviously a sign that innocent good parents were being targeted unfairly. In the government’s eyes, the law was a success because no one had been unfairly targeted for prosecution. The few “smacking” incidences which reached the stage of prosecution in fact involved greater violence than a “light smack” and were therefore justified.

My opinion on the passing of this law

As can be seen from the factors cited above, my interest in this matter is with process, rather than rationale. For me, the rationale behind the prohibition of corporal punishment was, and is, sound. There is extensive research supporting the abolition movement and I believe that the vast majority of countries will eventually pass legislation abolishing corporal punishment of children. New Zealand reached the point of having to tackle this issue earlier than expected, due to the random drawing of Sue Bradford's member's bill from the Parliamentary ballot. I maintain that this provided an unexpected, but fortuitous, opportunity for the Government to make significant headway in championing the rights of New Zealand children to live free from all forms of violence and abuse, including corporal punishment. The Government had an opportunity to make a decisive stand against some of the attitudes which contribute directly or indirectly to New Zealand's horrific child abuse rates by challenging old ideas about the nature and role of children. This was a golden opportunity to educate parents and future parents on how to discipline their children without the use of physical force and thus have a discernable impact on the lives of New Zealand children. The Government thus had a choice – to strike down the bill in its early stages and delay this discussion to a later date or to forge ahead with clear goals of abolition and a desire to tackle this contentious subject head on.

Unfortunately, neither option was taken. The Government forged ahead without clear goals and without a strong desire to tackle this issue, and became embroiled in a legislative process that was flawed and occasionally bordered on farcical. At the end of four years of debate we have ended up with a law which prohibits the use of smacking, but which came with the confusing message that smacking children is still an acceptable parenting practice and there will be no prosecutions unless unreasonable force is used. This is a situation which can really please no one and which results in a similar uncertainty for parents and police as that which existed with the original s.59.

We now have an unacceptable situation. Those who are opposed to physical punishment have the law behind them, but this is tempered by the fact that the law will not be enforced and the fact that our Prime Minister John Key has stated that

smacking is acceptable behaviour.⁵ Conversely, those who support the use of physical discipline and wish to continue using it, in accordance with John Key's reassurance, cannot be sure what disciplinary actions may trigger prosecution.

Whereas once a parent had to prove "reasonableness" against established judicial guidelines, now a parent needs to be sure that his or her actions are "trivial and inconsequential" or only involve "light smacking." These are concepts and terms which are potentially as subjective to parents as "reasonable force" was, but which we currently have no judicial interpretation of. Insufficient time has passed to be able to determine what the result of this situation will be.

Due to a failure by the Government to implement mechanisms to monitor attitudes towards the law and compliance by parents, we cannot conclusively say whether the process of attitudinal change has begun or whether practical change has occurred. However it appears from the informal and unofficial information available that antipathy towards the concept of prohibiting smacking is still high and parents are still choosing to smack their children. Those golden opportunities have been largely wasted.

My opinion on how this happened

It is the purpose of this thesis to analyse the process of amending s 59, identify what went wrong and why and then look to the future to see if anything can be salvaged from this situation and whether any lessons can be learnt.

It is my hypothesis that one of the primary reasons this law failed was that the Government did not recognise and respond to the dominant construction of children which underpinned negative public attitudes towards this law.

"Construction" in this context means the way in which we view children, our deep seated attitudes towards them and our beliefs about them.

I maintain that in New Zealand, our views on corporal punishment have arisen because we have traditionally viewed children as being born inherently prone to sin. This construction of children was inherited from British settlers who brought with them their attitudes and ideas about children, parenting and discipline. These attitudes were informed by the primarily (but not exclusively) Protestant view that

⁵ Claire Trevett "PM: It's okay to give light smacks" The New Zealand Herald (New Zealand, 8 December 2009)

children are born inherently sinful and must be subjected to corporal punishment in order that they submit to God's will and thus are able to attain eternal salvation.

Thus over a period of time, the idea that children needed corporal punishment, for their own good and the good of the wider community, became entrenched in the individual and collective New Zealand psyche. Most of us no longer believe that children will go to hell if they are not hit with a rod. Competing constructions of children, particularly the construction of children as being inherently innocent, are also present in our society and have certainly contributed to the movement away from corporal punishment which was evident prior to the passing of the law in 2007. Yet underlying attitudes and beliefs about punishment, obedience, submission, control and control still persist, without us even been consciously aware of them. When the smacking issue arose, New Zealanders were effectively required to confront these deep seated ideas; this was always going to be a challenging process. In order to facilitate this process, the Government needed to recognise and respond appropriately to these underlying beliefs and begin the process of replacing outdated and inappropriate ideas with new attitudes towards children and discipline. It failed to do so.

One of the major reasons for this failure is that rather than proactively advocating for the abolition of corporal punishment, the Government ended up running a defensive campaign against well-funded, organised and very persuasive conservative lobby groups which opposed the law. I maintain that these lobby groups were motivated by a desire to retain the right of parents to physically chastise their children in accordance with the principles of biblical correction. In a wider sense, the goal is to ensure that their conservative and religiously based viewpoints are reflected in legislation wherever possible. However, their campaign was not run on this basis. Instead, they waged a very successful campaign which took the fears of the public, regardless of how valid, and the flaws in the legislation and then exploited these fears and flaws wherever possible. By using catchy slogans and media bombardment, they were able to garner significant public support and force the Government in to making compromise after compromise.

I vehemently disapprove of the way that these lobby groups minimised the role of religion in the debate and deliberately and provocatively inflamed the debate

wherever possible. I believe that to argue against a law on the basis of your beliefs is a valid use of the democratic process but to hide behind deliberate misconceptions and garner support using fear does nothing to facilitate the process of healthy debate. In that, this thesis is a case study of how fundamentalist groups, although comprising just a small portion of the population, can have a significant impact on the democratic process and not always in a positive way.

However pro-smacking lobby groups would not have been so successful in this debate if it was not for other factors. The first of these was the legislation itself which has been comprehensively misinterpreted by the public and by media commentators. The misunderstanding as to the meaning and effect of the law was perpetuated by the fact that the Government failed to initiate any form of education programme whatsoever. There was a distinct lack of concise and cohesive explanation from the government and I will demonstrate that one of the reasons for this was because of a lack of *desire* on the part of the government to promote the letter of the law as it was drafted.

Politicians are public servants who want to appease and not alienate their constituents. Career survival for seat politicians hinges on whether or not they are re-elected by their constituents and all political parties want to obtain or retain a dominate role in the government⁶. The public outcry over this law made this issue a political “hot potato.” The letter of the law provided that smacking was now illegal. Yet this was such an unpalatable concept for most New Zealanders that none of the major political parties were willing to risk alienating the very people who held their future in their hands.

As a result, the process of legislative change was characterised by reactive measures from the Government which aimed to appease and not alienate the public. This was evident in the amendments made to the Bradford bill, specifically the parental control section and the police discretion section, both of which were arguably unnecessary and contributed to the confusion surrounding the meaning and effect of the law.

⁶ New Zealand’s MMP system means that a political party need not win a majority of votes to still have a dominant role in the government.

This thesis will build on these concepts and follow a loosely chronological structure.

Chapter Structure

The first chapter concentrates on the historical context of child discipline in New Zealand. I will show how corporal punishment in pre-colonial times was uncommon but with the arrival of settlers and missionaries from Britain, we inherited British attitudes towards children and discipline. These British attitudes were rooted in conservative Christian theologies and arose from a construction of children as being born inherently evil. As well as showing the practical effect of this construction on parenting, using the Protestant family as an example, I will examine the competing construction of children as being inherently innocent. Following this background to the attitudes underpinning the use of corporal punishment, I will focus on the legal situation in New Zealand prior to the law change in 2007 and the use of corporal punishment by New Zealand subsequent to the passing of the Crimes Act 1961.

In the second chapter I will focus on the movement to abolish the use of corporal punishment in New Zealand. First I will put forward some of the reasons why corporal punishment was waning in popularity among the general public. I will then focus on the three main factors which underpinned the academic discourse against the use of corporal punishment; the influence of the child rights movement and the United Nations Convention on the Rights of the Child (UNCROC); research showing negative effects of corporal punishment and difficulties with s 59 itself. These three factors all contributed to a change in the way children and discipline have come to be viewed.

The fourth chapter focuses on the opposition to the law. I will show how the construction of children as inherently evil underpinned the opposition to the law in two ways. Firstly, through the overt influence of religious groups who wanted to perpetuate the use of corporal correction and secondly, as an unrecognised and underlying attitude held by a significant proportion of New Zealanders, which coloured their perception of this law and the issue of smacking.

The fifth chapter will concentrate on the law itself. This will involve an analysis of the legislation as it was enacted. I will show how and why the drafting of the

section led to widespread confusion in the public sphere about what the law meant and how it was to be enforced. In particular, the parental control section and the police discretion section.

In the sixth chapter I will evaluate the Government's role. I will show that there was a failure on the Government's behalf to take responsibility for this law and to promote and advocate for it. I will show that education was blatantly lacking and that this was a failure and a major contributor to the problems with this law. I will show that the lack of education can be partly explained by the fact that all the concessions given by the government to opposition groups undermined the government's ability to effectively and accurately promote and educate about the law. Given that the government clearly did fully support the law change, I will look at whether or not the government should have legislated differently – or not at all.

In the seventh and final chapter I will look to the future and show that for the time being, the only way to salvage anything from this situation is to educate parents and future parents on positive parenting techniques and non-physical ways of disciplining children. However this education must be directed at targeting the underlying attitudes towards children which come from the construction of children as inherently evil. Education is crucial to both changing the dominant construction of children but also to simply showing that regardless of the inherent nature of children, corporal punishment simply does not work and is unnecessary. Finally I will look to whether any of the lessons learnt during this process could be used in future in relation to other child related legislation and conclude that yes, whenever issues relating to children and families are involved, the government must be aware of how pervasive these underlying ideologies are, recognise how this will effect public acceptance and uptake of the law, and legislate and educate accordingly.

CHAPTER TWO

THE HISTORICAL CONTEXT OF CHILD DISCIPLINE IN NEW ZEALAND

Corporal Punishment in New Zealand during pre-colonial times

Children were not the subject of any significant academic research until the 1960's. Consistent with this, we find that there is limited direct information available concerning the treatment of children in indigenous Maori communities. In the accounts of early European settlers very little attention was paid to the role of children within the community. However, indirect information is available from secondary sources such as missionary diaries and peripheral observations.⁷

Traditional Maori society was divided into three social groupings - the whanau, hapu and iwi. The whanau, or family, was at the epicentre of Maori society and would generally consist of three generations of the family. Unlike in today's society, the responsibility for the raising of children was not the sole responsibility of the biological parents. The job of nurturing and caring for children was often undertaken by Kuia and Kaumatua who acted as guides and mentors for their grandchildren, thus allowing the younger parents to attend to the more practical tasks required for survival.⁸ Children were fully involved in the community and learnt by observation and involvement in all the aspects of village life, as appropriate to their age. This communal style of living meant children were not excluded from the adult society, but nor were they treated as miniature adults. They were nurtured and taught the dynamics of group living – skills essential to the livelihood of the group.⁹ Historical accounts would suggest that Maori children lived a happy, carefree and active life, free from harsh discipline and subject to the affection of indulgent parents and whanau.¹⁰

⁷ Sharon L Rickard "Koi Patu Koi Mamae: Disciplining Maori children" (December 1998) Number 11 Social Work Now 4 at 4

⁸ Ibid, at 5.

⁹ Ibid.

¹⁰ Ibid.

Research suggests that physical punishment of children was not common in early indigenous societies, including Maori society.¹¹ As described by Tariana Turia “... in early times Maori children were not physically disciplined in order to develop and nurture their fearless spirit.”¹² If children who had ancestor names, for example, were hit, it was interpreted as the hitting of that ancestor and therefore the damaging of the mana of that ancestor.¹³ Pita Sharples also described the status of Maori children prior to settlement by Europeans as “in the olden Maori days kids were noa, they were common, and therefore they had no restrictions, and they weren’t hit or chastised or anything...”¹⁴ There is research to suggest that punishment was used in early Maori education but for instructive rather than punitive purposes.¹⁵

Interestingly, the information which is available stands in stark contrast to our current impression of the way Maori raise and discipline their children.¹⁶ In today’s society, Maori are disproportionately represented in child abuse and child homicide statistics. Maori children are four times more likely to be hospitalised as the result of deliberately inflicted physical harm. In the period from 1991 – 2000, the most at risk child was aged under one year, male and Maori.¹⁷ By gender, Maori ethnicity is a risk factor associated with a threefold increased risk of death or serious injury resulting from assault for girls and for male children that risk is sixfold.¹⁸ Sadly, many of the highest profile and severe instances of child abuse have arisen from within Maori families.¹⁹

Into this traditional Maori culture came the influence of the early British settlers and missionaries.

¹¹ Beth Wood, Ian Hassall, George Hook and Robert Ludbrook *Unreasonable Force: New Zealand’s journey towards banning the physical punishment of children* (Save the Children New Zealand, Wellington, 2008) at 32

¹² (16 May 2007) 639 NZPD 9284

¹³ Rickard, above n 7, at 5

¹⁴ Wood, Hassall, Hook and Ludbrook, above n 11, at 91

¹⁵ In one example, a child who has fallen over and started to cry is not picked up and fussed over, but is hit with a stick. The blow causes the child to get up and run to safety. This shows the “young warrior” what will happen in battle if he falls and does not immediately get up.

¹⁶ Rickard, above n 7 at 4

¹⁷ Hone Kaa “Papaki Kore: No Smacking for Maori” 2009 <<http://ips.ac.nz>>

¹⁸ Mavis Duncanson, Don Smith and Emma Davies “Death and serious injury from assault of children aged under 5 years in Aotearoa New Zealand: A review of international literature and recent findings” (Office of the Children’s Commissioner, 2009) at 11

¹⁹ Delcelia Witika, Craig Manukau, Veronika Takerei-Mahu, Tichena Crosland, James Whakaruru, Hinewaoriki (Lilly-bing) Karatiana-Matiana, Mereana Edmonds, Tamati Pokai, Tangaroa Matiu, Ngatikaura Ngata, Nia Glassie, Chris and Cru Kahui, Dylan Hohepa Tonga Rimoni

British discipline and its roots in religion

Original sin and discipline

The traditional Maori view of children is in stark contrast to the attitudes towards children which were brought to New Zealand by the early European settlers. From the early days of colonisation came the increasing influence of missionary settlers from whom we inherited attitudes, customs and laws relating to corporal punishment. Missionaries favoured the “spare the rod spoil the child” form of child rearing and over time, physical punishment of New Zealand children became commonplace.²⁰

The basis of the British attitude towards children can be found in the construction of children as inherently evil – a construction which has its original roots in the concept of “original sin.” The belief in the concept of original sin was a fundamental part of the protestant religion²¹ and the view of children being born prone to depravity is one of the dominant viewpoints of children in western European history. This construction had considerable ramifications for child rearing practices and the physical punishment of children. The belief that children are inherently evil and destined for hell has historically been used as a rationale for acts of monstrous cruelty to children under the guise of physical punishment.²²

For the dire belief that humans are born sinful and depraved, we can thank the bible for the story of Adam and Eve. “Behold I was shapen in iniquity: and in sin did my mother conceive me.”²³ According to the book of Genesis, Adam and Eve lived with God in a state of innocent obedience in paradise. They were forbidden to eat the fruit from the Tree of Knowledge of Good and Evil but were tempted by the serpent to do so. Their disobedience caused God to expel them from paradise.²⁴

“The Original Sin” was the action of Adam causing his fall from grace and which caused “original sin” - the state into which humans are born and from which they can only be saved by the grace of God. According to the religious

²⁰ Wood, Hassall, Hook and Ludbrook, above n 11, at 32

²¹ Philip Greven *Spare the Child: the religious roots of punishment and the psychological impact of physical punishment* (Random House, New York, 1991) at 6

²² Ibid, at 60.

²³ Psalm 51:5

²⁴ Chapter 3 of the book of Genesis

doctrine which supports this view, all humans bear the consequence of Adam's original act of disobedience. The only way for sinful humans to be saved is by the grace of God.²⁵

The actual concept of original sin, as opposed to the story of Adam and Eve, is not specifically found in the bible, nor is it found in Judaism or Islam. It was propounded by St Augustine (354-430). Under the doctrine of original sin according to St Augustine, humans were born as wilful and sinful creatures.

"No man is free from sin, not even a child who has lived only one day on earth."²⁶

The concept of children being born under the cast of original sin found much favour with many Christian theologians and doctrines. The following examples show the pervasiveness and the strength of the belief.

- According to a German sermon dated in approximately the 1520's, infant hearts craved after "adultery, fornication, impure desires, lewdness, idol worship, belief in magic, hostility, quarrelling, passion, anger, strife, dissension, factiousness, hatred, murder, drunkenness, gluttony" and more.²⁷
- John Calvin (1509-1564), one of the early leaders of the Reformation was a believer in original sin and described it thus: "

Original sin, then, may be defined a hereditary corruption and depravity of our nature, extending to all the parts of the soul, which first makes us obnoxious to the wrath of God, and then produces in us works which in Scripture are termed works of the flesh."²⁸

He further commented specifically about children "Their whole nature is a certain seed of Sin, therefore it cannot be but hateful and abominable to God."²⁹

²⁵ McGrath, Alister *Christian Theology: An Introduction* (Basil Blackwell In, Cambridge Mass, 1994) at 22

²⁶ Colin Heywood *A history of Childhood: children and childhood in the West from medieval to modern times* (Polity Press, Cambridge(UK), 2001) at 33

²⁷ Ibid

²⁸ John Calvin *The Institutes of the Christian Religions, Volume 1* (BiblioLife, 2009) at 326

²⁹ Anthony Synnott 'Little Angels, Little Devils: A Sociology of Children' in Gerald Handel (ed) *Childhood Socialization* (Aldine Transaction, New Brunswick, c2006 at 26

- English and American Puritans believed that children were born with evil lurking in their hearts and that they were “‘narrow mouth’d vessels’ which were ‘ready to receive good or evil drop by drop.’ They were compared to young twigs which could be bent the right or wrong way.”³⁰
- William Wilberforce (1759-1833), the great English abolitionist and evangelical Christian also believed in the inherent evilness of children .

“Remember that we are fallen creatures, born in sin and naturally depraved, Christianity recognises no innocence of goodness of heart.”³¹

- Evangelical English philanthropist Hannah More (1745-1833) wrote in 1799 that it is a “fundamental error to consider children as innocent beings” rather than as beings of “corrupt nature and evil dispositions”³²

So how did this concept of “original sin” influence beliefs concerning physical punishment? The easiest way to illustrate the answer to this question is by looking at the “Protestant family”. It is essential to point out that the relationship between the Bible and the physical disciplining of children is a much studied and much disputed topic. I am using the “Protestant family” in a generic sense and am not suggesting that *all* protestant families conformed to this stereotype rather than many, particularly fundamentalist denominations did, or attempted to.

Discipline in the Protestant Family

Protestantism is inexorably linked with the concept and practice of physical punishment of children.³³ Protestantism is one of the four main divisions of Christianity and is most closely related to the groups who separated from the Roman Catholic Church during the Reformation. There are many Protestant denominations but the key beliefs are; the Bible as the ultimate authority, the priesthood of all believers and justification by grace through faith and not by works. Outside these fundamental tenets, beliefs vary between denominations.

³⁰ Heywood, above n 26, at 33

³¹ Synnott, above n 29, at 26

³² Ibid

³³ Greven, above, n 21 at 5

The majority of early Protestants and particularly evangelical Protestants, believed in the concept of original sin. The only way that children could be saved from the hell fires of eternal damnation was for them to receive God's grace. To do this they needed to be bought to God and physical punishment was the means to do this. The justifications for the Protestant reliance on physical punishment have been summarised by Philip Greven in his book *Spare the Child* as: biblical roots; the concept of eternal justification and the concept of breaking the will.

The biblical roots of corporal punishment are often debated. The Book of Proverbs contains numerous sayings which have become so entrenched that the themes remain within our secular culture as well as within Christianity. The concept of "sparing the rod"³⁴ is one such theme; "He that spareth his rod hateth his son:" but he that loveth him chasteneth him betimes"

In a more abstract sense, the Old Testament brims with the concept of punishment for wrongdoing, perpetrated by an authoritarian figure that often punishes for the good of the punished. The Old Testament God was willing to go so far as to kill to demonstrate his supreme authority and to punish or destroy those who showed disobedience to Him.³⁵ When criticism is levelled at the jealousy and wrath shown by the Old Testament Jehovah, the response is that the people brought God's punishment on themselves as a result of their disobedience and sin. The comparisons to the justifications for corporal are clear. Disobedience to an authority figure is punished corporally.

Punishment is an overriding theme in Christian theology and the ultimate punishment is consignment to hell. The threat of hell provides the concept of eternal justification. For most Christians and almost all fundamentalist Protestants, hell was (and is) a real place of unimaginable terror. Submission to God's will and the grace of God were the only ways one could escape the horror of the hell fires.

Do but consider what it is to suffer extreme torment forever and ever; to suffer it day and night, from one year to another, from one age to another, and from one thousand ages to another... in pain, in wailing and lamenting, groaning and

³⁴ Proverbs 13:24

³⁵ Greven, above, n 21 at 46-47

shrieking, and gashing your teeth; with your souls full of dreadful grief and amazement...³⁶

Preachers tried to describe through words what hell would be like and to impress on their congregations the need to repent and be saved. The threat of final judgment was ever-present and all-pervading.³⁷ Therefore many Christians latched on to the instruction given in Proverbs 23:13-14 “Withhold not correction from the child... Thou shalt beat him with the rod, and shalt deliver his soul from hell.” If one could save one’s child from eternal damnation, the ultimate punishment, by the use of temporal corporal punishment then surely suffering on earth was a small price to pay for an eternity in paradise? The threat of hell has been referred to as “one of the greatest sources of anxiety and terror ever known”³⁸ and is said to have underpinned the painful corporal punishment which has been practiced and advocated for centuries in western society.³⁹

The way to salvation was through the use of the rod and the breaking of the will of the child. Salvation required God’s divine grace *and* submission to God’s will. Submission was a key component of salvation because self-will would lead to damnation.

Heaven or hell depends on this alone; so that the parent who studies to subdue it [self will] in his child works together with Good in the renewing and saving a soul. The parent who indulges it does the Devil’s work; makes religion impracticable, salvation unattainable and does all that in him lies to damn his child body and soul forever.”⁴⁰

The relationship between God and people was seen to mirror the relationship between parents and children. God was loving and punitive and both embraced and chastened his children. God therefore provided the model for parenting. Fear in the parenting relationship was also essential because it mirrored the dichotomous relationship of love and fear between God and His people.

³⁶ Jonathon Edwards *The works of Jonathon Edwards Volume II* (William Ball, London, 1839) at 88

³⁷ Greven, above, n 21 at 55-60

³⁸ Ibid, at 60.

³⁹ Ibid.

⁴⁰ Susana Wesley *The Museum of Foreign Literature and Science*, Volume 23 (E Littell, Philadelphia, 1833) at 385

It was essential to break the child's will because the child needed to be completely subdued in order to submit entirely to the parents and ultimately to God. Total obedience to one's parents and to God was a fundamental tenet of Protestantism.

Obedience is the foundation for all character. It is the foundation for the home. It is the foundation for a school. It is the foundation for a country. It is the foundation for a society. It is absolutely necessary for law and order to prevail.⁴¹

The blueprint for Protestant parenting was clear but it is less clear how the theory translated into actual practice. Historically, Protestantism had very real effects on the family dynamic. The family was seen as a mini-church and the members of the family a community of worshippers. The family was seen as the stem organisation for all other organisations, including the state. This placed a significant responsibility on the parents and in particular on the father who was seen as the head of the household.⁴²

Success in protestant child rearing was achieved by early training in good habits. Advice books at the time used horticultural metaphors to describe the tasks. The preparing of good soil, rooting out weeds and training young shoots to grow in the correct way. These advice books proliferated during this time due to rising rates of literacy and an accompanying desire for the written word.⁴³ Along with the advice books and the many religious sermons dedicated to this topic, printed catechisms were instrumental in spreading the fundamentals of protestant child rearing to the masses.⁴⁴ These documents were printed in huge numbers after the 15th century and the format of the catechisms, combined with the invention of the moveable printing press, made it possible for there to be catechisms in almost every household.⁴⁵ Schooling built on the religious education provided in the family and education and school ordinances reflected similar ideals as those expounded in the catechisms.

⁴¹ Jack Hyles *How to Rear Children* (1972) < <http://jackhyles.net/children.shtml> >

⁴² As per the instruction in 1 Corinthians 11:3 "But I want you to understand that the head of every man is Christ, the head of a wife is her husband and the head of Christ is God." and Ephesians 6:4 "Fathers do not exasperate your children; instead, bring them up in the training and instruction of the Lord"

⁴³ A. R. Colon *A history of children: a socio-cultural survey across millennia* (Greenwood Press, Westport, Connecticut, 2001) at 285

⁴⁴ Catechisms are printed question and answer sessions which could be used between minister and congregation or between parent and child.

⁴⁵ Colon, above n 43, at 291

The huge volume of material printed on this subject in the form of catechisms, ordinances and advice books, together with the verbal directives given by ministers and preachers make it likely that to some extent at least, the teachings on child rearing and physical punishment were incorporated into the daily practice of almost all Protestant families. However, not all families would have taken the edicts on physical punishment to the extremes recommended by some of the preachers of the time. Evidence has been obtained by Philip Greven that suggests that the evangelical mode of parenting, characterised by a lack of affection and harsh physical discipline, was most likely found amongst only the most strident Puritans and evangelical Protestants. There is evidence that at times, even these parents struggled to keep up the task of breaking their children's wills.⁴⁶ More moderate parenting was likely more common. In this moderate form there was still significant emphasis on obedience, but there was a greater recognition that obedience could be obtained through less punitive measures.

The competing view of original innocence.

Competing against this pessimistic view of children as inherently sinful was the construction of children as inherently innocent. This viewpoint also has its roots in religious doctrine. Jesus himself appears to have believed in the inherent innocence of children and says in Matthew 18:3 "Verily I say unto you, Except ye be converted, and become as little children, ye shall not enter into the Kingdom of Heaven" and in Mark 10:14 "Suffer the little children to come unto me, and forbid them not; for of such is the kingdom of God." Rather than thinking of children as being depraved creatures, Jesus appears to have seen children as innocent beings. Contrary to the concept of original sin, in the 12th century, philosophers and theologians Peter Abelard and Peter Lombard denied the view that unbaptised children go straight to hell. To solve the problem of what to do with these unsaved souls, St Thomas Aquinas decided on the concept of limbo. In "limbus puerorum" the souls of infants were spared the fires of hell but were deprived of the beautiful vision.⁴⁷ This provided an alternative to the belief that children are born evil and unsaved.

⁴⁶ Hugh Cunningham *Children and childhood in western society since 1500* (Pearson Longman, Harlow, England, 2005) at 54

⁴⁷ Heywood, above n 26 at 34

Although the Christian viewpoint of the “child as innocent” had been present as a concept for two millennia, it was not until the time of the 18th century Romantics that this construction of childhood really took hold. For perhaps the first time in history, the 18th century heard a debate on the very nature of the child. Therefore the voices and opinions heard during this time are fundamental to many of our modern ideas on the nature of childhood and children.

In particular, 18th century philosopher Jean-Jacques Rousseau was instrumental in propounding the idea of children as inherently innocent and pure and was instrumental in identifying “the child within the child”.⁴⁸ This recognition of the special nature of “the child” was quite revolutionary. Rousseau acknowledged that children had certain qualities simply by virtue of being children and believed that a child was a *moral innocent* who was close to nature and deserved to be free to express herself.⁴⁹ In relation to the idea of children being born sinful and full of depravity, Rousseau countered with “God made all things good, man meddles with them and they become evil.”⁵⁰ In Rousseau’s mind “there is no original sin in the human heart.”⁵¹ In his seminal work *Emile* (1762) Rousseau espoused the natural goodness of children and the corrupting nature of some forms of education.⁵² In *Emile* Rousseau advocated for a “natural upbringing”, sometimes referred to as negative education and encouraged mothers to take more interest in the daily lives of their children.⁵³ Rousseau’s attitude towards children was vastly different to the fundamentalist approach to children.

The “Protestant child” was viewed in a supremely negative and pessimistic way while the “romantic child” was the opposite and was viewed in a revered, almost idolatrous manner. Religious leaders and preachers perpetuated the “child as evil” construction but it was artists, authors and other creative types who disseminated the romantic view of the child as pure and innocent.

⁴⁸ Harry Hendrick, ‘Constructions and Reconstructions of British Childhood: An Interpretive Survey, 1800 to the present in Allison James and Alan Prout (eds) *Constructing and reconstructing childhood: contemporary issues in the sociological study of childhood* (Falmer Press, London, 1997) at 36

⁴⁹ David Archard *Children: rights and childhood* (Routledge, London; New York 1993) at 30

⁵⁰ Synnott, above n 29, at 28

⁵¹ Ibid.

⁵² Hendrick, above n 48, at 36

⁵³ Joseph Hawes and N. Ray Hiner (eds) *Children in historical and comparative perspective: an international handbook and research guide* (Greenwood Press, New York, 1991) at 287

The hum of multitudes was there, but multitudes of lambs,
Thousands of little boys & girls raising their innocent hands⁵⁴

Romantic poets such as William Wordsworth and William Blake all used their writing to celebrate and promote the original innocence of childhood.⁵⁵ They delighted in their spontaneity, their passionate expression of emotions and the depths of their imaginations.⁵⁶ In Wordsworth's *Ode: Intimations of Immortality from recollections of Childhood* (1807) the speaker talks of the purity of childhood and of his regret that childhood is transitory and that age causes us to move further from God, nature and our youthful innocence.

But trailing clouds of glory do we come
From God, who is our home:
Heaven lies about us in our infancy!
Shades of the prison-house begin to close
Upon the growing Boy⁵⁷

The romantic childhood was seen as a time of wonderment and joy and the child was viewed as full of imagination and instinctive sensibility. Reaching adulthood meant the loss of that natural enthusiasm. The Romantics depicted children as “creatures of deeper wisdom, finer ascetic sensitivity and a more profound awareness of enduring moral truths.”⁵⁸ Children were pure, unsullied, born of nature, created in the image of God, full of promise and free from sin. In respect of their relationship to the adult world, the world of childhood was infinitely preferable. Childhood was a concept to be protected, cosseted and envied by adults. This Romantic ideal of the child as the embodiment of innocence and purity and all that is right with man is in overwhelming contrast to the conflicting view that children were inherently evil and depraved.

Original innocence and historical child rearing

The concept of original sin and the preaching of evangelical Christians had an unmistakable impact on the parenting practices of generations of parents. The

⁵⁴ William Blake “Holy Thursday” in *Songs of innocence and experience* (1789)

⁵⁵ Archard, above n 49, at 30

⁵⁶ Ashley Burgamy “Children and the Romantics” Association of Young Journalists and Writers <<http://ayjw.org>>

⁵⁷ William Wordsworth “Ode: Intimations of Immortality from Recollections of Early Childhood” (1803-1806) Stanza 5

⁵⁸ Heywood, above n 26 at 24-35

impact of the conception of children as innocent is less marked and harder to establish. However we do know that 18th and 19th century Romantic ideals did have an influence on practical views of family and childhood. Colin Heywood opines that Wordsworth's ideas on childhood as found in his Ode were as influential on 19th century ideas of childhood as Freud's ideas of childhood were on the 20th century.⁵⁹ Lawrence Stone provides an example to show that Rousseau's writings on marriage and child-rearing were widely read and that people did attempt to incorporate his edicts into their day-to-day lives. As an example, the author of the following paragraph was a member of the French Bourgeoisie and was about to marry at age 29.

All that friend Jean-Jacques [Rousseau] has written about the duties of married couples, of father and mothers had much affected me, and I assure you that they will be the rules for my conduct.⁶⁰

However Rousseau's ideas on the rearing, and particularly the education of children may have been too impractical for families to sustain. Richard Lovell Edgeworth was inspired by Emile to try and educate his eldest son using Rousseauvian principles. Unfortunately he failed, most likely due to the lack of practical application of Rousseau's methods. Undeterred, he and his daughter Maria Edgeworth later wrote *Essays on Practical Education* (1798) which was an attempt to make the educational theory practical, accessible and digestible for busy families.⁶¹ These new Romantic ideas had the greatest impact on the middle class where there was a pre-existing interest in education and domestic matters upon which the Romantic ideals could build.⁶²

The Romantic view of children provided a significantly different message about the value and nature of childhood than that proposed by evangelical Christians at the time. However, the original sin concept did not disappear, to be taken over by a totally new way of looking at children and childhood. The rise of the evangelical movement in the late 18th century sparked resurgence in the views of

⁵⁹ Ibid, at 26-27.

⁶⁰ Lawrence Stone *The family, sex and marriage in England 1500-1800* (Weidenfeld & Nicolson, London, 1977) at 322-323

⁶¹ Gillian Dow "Rooms of Our Own: Maria Edgeworth (1768-1849)"
<www.artichokewebdesign.com/roomsofourrown/essays/maria_edgeworth.pdf>

⁶² Heywood, above n 26 at 27

the earlier Reformers.⁶³ Moreover theoretical and philosophical discussions on the innocence or depravity of children had very little relevance to the majority of young people who were still entering into the working world of adults at a very young age.

Also working against romantic notions of childhood was the reactionary political climate of 19th century Britain.⁶⁴ The reaction to the French revolution as well as the impact of the industrial revolution resulted in a movement away from the type of parent-child relationship promoted by the Romantics. In the 1820's, Hannah More, the evangelical founder of the Sunday School Movement had over taken Maria Edgeworth⁶⁵ in popularity. The optimism of the Romantics gave way to the pessimism of the evangelicals during the early 19th century.⁶⁶

On a purely practical level, one must also think that the Romantic ideals would have seemed somewhat farfetched to the majority of parents. While children are clearly a joy to their parents at various points, surely children also cause their parents annoyance and grief at other times? In those times when children were misbehaving, the instructions to step in and strongly deal with the errant behaviour must have seemed more logical and reasonable than whimsical notions of childhood innocence and wonder.

The interrelationship between competing constructions

Although I have presented these constructions as two dichotomous viewpoints, it is important to explain how they have co-existed. Throughout history, people have differed in the way they view children and childhood. Sometimes these variations occurred at the same point in time. For example, the contrast of the attitudes held by Maria Edgeworth and her contemporary Hannah More. At other times, one construction was the dominant construction and overshadowed the other. For example, the dominance of the concept of original sin following the Reformation, at a time when the Romantic ideals of childhood had yet to fully their mark. At some points in history life was just being lived, with little active thought about the role and nature of children. At other points, such as during the Romantic period or during the 15th century when the printing press was invented,

⁶³ Ibid

⁶⁴ Hendrick, above n 48, at 38.

⁶⁵ The daughter of Richard Edgeworth, as referred to above.

⁶⁶ Hendrick, above n 48, at 39.

technological advances or significantly active periods of philosophical debate, caused opinions to be discussed, disseminated and debated. Additionally, there are other constructions of children which have existed, and still do. For example, the argument of predestination which is the basic nature and intellect of the child is pre-ordained either by God or by genetics. Little can be done to thwart the true character of the child appearing. The view that there was little one could do to influence a child's nature gained ground in the 19th century as rapid developments in the study of genetics were made. "The influence of environment is nowhere more than one-fifth that of hereditary, and quite possibly not more than one-tenth of it."⁶⁷

None of these conceptions are static, they evolve and develop, they wax and wane in popularity and influence. In the next section, I will show that the construction of children as inherently evil has had an undeniable and obvious influence on New Zealand's laws and attitudes towards corporal punishment.

New Zealand's child discipline laws before 2007

The religious belief in the need for corporal punishment informed the laws of Britain and resulted in the concept of reasonable chastisement forming part of the British common law. In 1860 Lord Justice Cockburn laid down the concept of reasonable chastisement in the case of a schoolmaster who had flogged a child to death for being slow to grasp basic arithmetic. He stated that "A parent... may for the purpose of correcting what is evil in the child, inflict moderate and reasonable corporal punishment." From this we see the earliest limits of the infliction of corporal punishment and also the underlying belief in the reason for it – to drive out "evil."

When the British settled New Zealand they brought with them their religious beliefs and attitudes towards children and discipline, and also their common law. Because of British settlers, the principle of "reasonable chastisement" came to form part of the common law of New Zealand.⁶⁸ Parents, caregivers and teachers were able to use reasonable force for the purpose of correcting the behaviour of children. The following example illustrates the severity of the

⁶⁷ Heywood, above n 26 at 36

⁶⁸ The law gave powers of discipline to a wide range of people including masters of apprentices, captains of vessels, the lord of the manor over his serfs, the keeper of the poorhouse and husbands over wives.

chastisement which was legally and socially acceptable. On January 25 1890, the Bush Advocate reported on the case of a teacher who had been charged with assaulting a pupil. The girl had refused to sing the words to a hymn and then refused to do the sums which were given in punishment. The teacher thrashed the girl with a stick. The child, following the advice of her mother who had told her to run away if she was ever beaten by a teacher, had tried to escape but was caught and flogged again. The court was horrified, not at the severity of the thrashing given to a young girl, but at her “grossly insubordinate” behaviour. They criticised the “foolish advice” of her mother saying it was “surprising to find parents so blind to their children’s welfare as to bestow such an injunction on them.” What interested me about this case was that the mother of this child had instructed her daughter on how to best protect herself from harm but was considered by the court to have been blind to her child’s welfare. The lack of obedience shown by the child was seen by the court as being more detrimental to her wellbeing than the beating she received. As per the protestant worldview, obedience and submission were essential for both individual wellbeing and community order.

The common law principle of reasonable chastisement came to form part of the statutes of New Zealand in 1893 when the Criminal Code⁶⁹ was enacted.

68 (1) It is lawful for every parent or person in 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 or on a voyage to use force for the purpose of maintaining good order and discipline on board of his ship: provide 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 of the grounds on which such force was believed to be necessary, shall be a question of fact and not of law.

One of the earliest reported cases to discuss the issue of parental chastisement under the Criminal Code was *R v Drake*.⁷⁰ Mrs Drake was convicted of the manslaughter of her 8 year old daughter and appealed the admissibility of

⁶⁹ Criminal Code Act 1893, s 68.

⁷⁰ *R v Drake* (1902) 22 NZLR 478 (CA)

evidence as to the relationship between herself and her daughter. Mrs Drake had severely beaten her daughter and allowed her elder daughters to beat her as well. The beating caused the death of the child who had been living with an Aunt and had only recently returned to the family home. There was evidence that the child was disliked by her mother and treated poorly in comparison to the other children. Mrs Drake sought to use the defence under s68 of the Criminal Code Act 1893. The Court of Appeal held that evidence as to the relationship between the parties was extremely relevant as it went to the questions of whether the “discipline” was for the purpose of correction and whether the discipline was reasonable.

If the mother was animated by dislike of the child, and took the occasion of a slight offence to cruelly beat it, then the force would not have been honestly used for the purpose of correction, and the defence must fail.⁷¹

R v Drake is historically interesting for the viewpoints on corporal punishment which it illustrates. In its dicta, the Court indicates that a much harsher level of physical punishment was accepted and expected at this point in New Zealand’s history. For example the Court stated:

If, for instance, a lad of seventeen, a scholar at a public school, should deliberately set himself to destroy the discipline of the school, and, after repeated mild punishments and kindly warnings, should be guilty of a further act of insubordination, it is plain that the schoolmaster would be justified in inflicting—nay, that in the interest of the offender himself he ought to inflict—a much more severe punishment in respect of such an act of insubordination than would be reasonable if such act stood alone.⁷²

In *R v Drake* we again see the fixation on the need for obedience to be beaten into the child for their own benefit and presumably for the good order of the school and wider community. On the other hand, this case confirmed that parents were not allowed to beat their children with impunity and that corporal punishment was only to be carried out within the parameters of the law (wide as these parameters may appear to our modern sensibilities). The punishment not only had to be of a reasonable level, but it had to be for the purposes of correction only and not motivated by malice or ill will toward the child.

⁷¹ Ibid, at 485 .

⁷² Ibid, at 479-480.

The punishment and its result [the death] were so monstrously disproportionate to any offence which could be said to have been committed by the child that it at once raises the question, and must necessarily have suggested to the prosecution the possibility, that what was done was not really done by way of punishment, but was a means adopted by the accused of wreaking her dislike or malice upon this child.⁷³

It is horrifying to our modern sensibilities that a “domestic discipline” defence could even be raised in a situation where the child victim was killed. Clearly the court agreed that Mrs Drake’s actions could not be justified but the important point to note is that this defence was even able to be argued in a court of law. This case serves to show that in our history, children have been subjected to significant abuse under the guise of discipline and that parents have attempted, for over 100 years, to justify their actions using the defence of reasonable chastisement.

The Crimes Act 1908, which superseded the Criminal Code of 1893, included section 85 which was identical to section 68 of the Criminal Code Act 1893. The Crimes Act 1961 replaced the Crimes Act 1908 but retained a more limited defence of reasonable chastisement. The Crimes Act 1961, s 59 allowed parents, caregivers and teachers to use reasonable force for the purpose of correction of children⁷⁴ but dropped the provisions from the laws of 1893 and 1908 which provided that masters could use force over servants or apprentices.⁷⁵

The use of corporal punishment by New Zealand parents

Along with the legal justification for corporal punishment went cultural acceptance. Corporal punishment of children by parents was commonplace in the first eight decades of the twentieth century. The legal position validated and supported the reality of parenting in New Zealand. Very little research had been undertaken into corporal punishment in New Zealand until the groundbreaking research of Jane and James Ritchie. The Ritchies research in this area has been instrumental in providing us with information about the prevalence and patterns of corporal punishment from the 1960’s right through the late 1980’s. The following

⁷³ Ibid, at 486

⁷⁴ Wood, Hassall, Hook and Ludbrook, above n 11, at 32

⁷⁵ Jane Ritchie and James Ritchie *Spare the rod* (George, Allen and Urwin, Sydney, 1981) at 124

table show the prevalence of corporal punishment in each of the three main studies undertaken by the Ritchies.

	Never smack	Once a year	Once a month	Once a week	Daily
1963	1%	31%	25	26	18%
1977	10%	14%	21%	39%	16% ⁷⁶
1987	2%	-	-	-	14% ⁷⁷

From this data we can see that in 1963, punishment was socially acceptable and widely used. 99% of mothers resorted to it on occasion with almost one quarter of mothers using physical punishment on a daily basis. The Ritchies commented on how socially acceptable the practice was among those interviewed:

They spoke about it[physical punishment] freely, felt justified in using it (in most cases) and regarded it as being as necessary for child rearing as the mid-morning cup of tea is for sanity – mother’s ever present help in time of trouble and not to be missed.⁷⁸

In the 1960’s there was very little shame or guilt associated with corporal punishment. This is understandable given the history which has already been discussed. The Ritchies maintained that in 1963 New Zealand mothers relied on very few of the available disciplinary techniques, used predominantly negative forms of discipline, made infrequent use of positive parenting techniques and placed a strong emphasis on physical punishment.⁷⁹

In 1977 more parents were prepared to go against the tide of social convention and eliminate smacking entirely. Interestingly, 41% of mothers in 1963 had found smacking to be unequivocally effective but only 14% of the mothers in 1977 thought the same. Only a small minority of mothers found smacking unequivocally effective, yet the vast majority resorted to it, at least on occasion.⁸⁰

⁷⁶ Jane Ritchie “Child Rearing Patterns: Further Studies” Psychology Research Series No 11 (University of Waikato, 1979) at 82

⁷⁷ Jane Ritchie and James Ritchie *The Next Generation: Child Rearing In New Zealand* (Penguin, Auckland, 1997) at 88

⁷⁸ Jane Ritchie and James Ritchie *Childrearing patterns in New Zealand* (A.H & A.W Reed, Wellington 1970) at 112

⁷⁹ Ritchie and Ritchie, above n 75, at 27

⁸⁰ Ibid.

This shows how entrenched the practice of physical punishment was in New Zealand, regardless of its perceived effectiveness.

In 1987 the Ritchies found that parents were now employing a wider range of disciplinary techniques than in the previous surveys and the focus was also turning to more positive forms of discipline and control. Parental “concern for control had become more relaxed, more reasonable...”⁸¹ The survey found that mothers felt guiltier about their use of physical punishment than mothers in the previous two surveys.⁸² Yet despite these positive changes, the practice of smacking still persisted, with more than two thirds of parents smacking on a weekly or daily basis.

In the 1990’s roughly half of parents were hitting their children once a week or more. Of the mothers that smacked, 21% felt a bit bothered when they smacked their children and half actually felt guilty. The changes in attitudes towards smacking between the 1960’s and the 1990’s are more interesting than the prevalence data because the changing attitudes show that even with greater knowledge of disciplinary options, a declining social acceptance and a feeling that smacking was wrong, parents still found it difficult to give up entirely.⁸³

Over a period of approximately 150 years New Zealand had moved from a culture where indigenous Maori children were not subjected to physical discipline, to the introduction and then entrenchment of corporal punishment of New Zealand children and then as the end of the twentieth century approached, to a situation where there was a waning in the popularity of corporal punishment. In chapter three I will examine the factors contributing to this movement away from the reliance upon, and acceptance of, corporal punishment.

⁸¹ Ritchie and Ritchie, above n 77, at 88

⁸² Ibid.

⁸³ Jane Ritchie “Parents: Discipline, Punishment and Child Abuse” (2002) in The New Zealand Psychological Society Inc publication The Bulletin, No. 100, 30 at 33

CHAPTER THREE

THE MOVEMENT AGAINST CORPORAL PUNISHMENT

When Sue Bradford's original member's bill⁸⁴ was drawn from the ballot box and this issue was debated in the political and public arena, the outcry was phenomenal. Sue Bradford became the target of significant criticism and in some cases, vitriolic abuse. Many of the ills of society were laid squarely at her feet.

Sue Bradford and the like is responsible for the lack of discipline and respect that parents and teachers have now come to expect from some young people.⁸⁵

Bradford is an irrelevant [sic] MP in parliament and she deserves to be treated with complete disdain and contempt for interfering in our lives....She is a disgrace.⁸⁶

Sue Bradford and other supporters were so vilified that they were compared to the instigators of the worst genocide in modern history; "What's next from these Nazis? Mass child camps?"⁸⁷ The impression that many members of the general public seemed to have was that this was a new issue which had only been brought up by a meddling "greenie" MP. However this was simply not the case. In the following section I will show how New Zealand had been debating the value of corporal punishment for many decades and I will analyse the arguments in favour of abolishing the s 59 defence.

The decline in the use and acceptance of corporal punishment

It would be misleading to imply that disapproval of corporal punishment arose only at the end of the twentieth century. There have always been small pockets of disapproval however they were often very lone voices. In 1904 the Wanganui Herald published an article on the use of corporal punishment in schools stating that "...there is much diversity on the subject. Some people maintain that it should

⁸⁴ See appendix two

⁸⁵ "Your views on the smacking conviction" The New Zealand Herald (New Zealand, 10 December 2007) quoting Grandma from Auckland

⁸⁶ "Do you still smack your children" The New Zealand Herald (New Zealand, 26 May 2008) quoting KC Franklin

⁸⁷ "Bradford Continues to defend anti-smacking bill" *3News.co.nz* (New Zealand, 29 October 2007) comment by "Philip" <www.3news.co.nz>

be entirely abolished...⁸⁸ In 1906 an interesting article appeared in the Otago Witness. The full extract of this article is illuminating and can be found in appendix three. The article commented on an article which had been published in the International Journal of Ethics called *The Ethics of Corporal Punishment*.

[Mr Salt contends that] corporal punishment ought still to be condemned on the ground that of its immortality. In short, the claim is that corporal punishment is useless and that even when it appears to be effective it is wrong, and in the end is gained at too great a cost. In [favour] of this view is urged a growing detestation and abhorrence of the practice by all social reformers, and the outrage violence inflicts on the sacred supremacy of the human mind and the dignity of the human body.

This argument could have been written in the twentieth century. 100 years later we are still discussing the issues of whether corporal punishment works, and even if it does work, should it be prohibited on the grounds that it inflicts violence on the dignity of the human body. The author goes on to point out that corporal punishment does seem to provide satisfactory results in a “semi-civilised” race and so the ability of Mr Salt to convert people to his view at that point was doubtful. However:

Yet he may without much hesitation claim the following tide and the future. The history of the past and the growing sentiment of to-day certainly indicate that whether by the preaching of abstract ethical doctrines or by the argument from results, corporal punishment will surely be deposed to a lower and lower position.⁸⁹

This article was written during a time when children were beaten at home and at school and when flogging of criminals was legal. Obviously the author was living in a time when one person could justifiably inflict a great deal more harm on another person than is the case now. However, the importance of this article is that it foreshadows that due to the fact that corporal punishment was both ineffectual and immoral, it would eventually weaken in popularity.

⁸⁸ “Corporal Punishment in Schools” *The Wanganui Herald* (New Zealand, 16 May 1904) at 4

⁸⁹ “Ethics of Corporal Punishment” *Otago Witness* (New Zealand, 12 September 1906) <<http://paperspast.natlib.govt.nz>>, at 44

Indeed as predicted, New Zealand had been progressively removing the legal rights of various people to inflict bodily punishment on other people for decades.⁹⁰ In 1968 corporal punishment as a means for punishing juvenile offenders was rejected by the Justice Department on the basis that it was ineffective, degrading and unsuitable. In 1985 child care workers were prevented from using physical discipline in child care facilities. In 1986 the use of corporal punishment in Department of Social Welfare residential institutions was banned⁹¹ and in 1991 the Department adopted a policy that the use of physical punishment in foster homes was unacceptable. Finally, by 1990 corporal punishment in schools was banned.⁹²

By 1990, the only people who had the “right” to hit another person under the guise of discipline were parents or people acting in place of parents. Section 59 of the Crimes Act now provided that a parent or person in place of parent was justified in using force for the purposes of correction, provided that the force was for the purposes of correction and reasonable in the circumstances.

Even though this “right” existed, the prevalence and acceptance of physical discipline in New Zealand was waning. In research conducted by Gabrielle Maxwell and published in 1993, there were indications that attitudes to physical punishment in New Zealand amongst the general public were changing. According to this research, parents reported using mainly non-physical responses to misbehaviour. The practice of using explanation as a parenting tool, rarely used in 1963 and 1977, had become more common and severe forms of physical punishment such as hitting with an object or thrashing were rarely reported and not endorsed by parents.⁹³

The reasons behind the decline in the use of corporal punishment

What could explain this slow and stuttering, but definite, movement away from corporal punishment when legally parents were still allowed to do smack their

⁹⁰ Beth Wood, Ian Hassall, George Hook and Robert Ludbrook *Unreasonable Force: New Zealand's journey towards banning the physical punishment of children* (Save the Children New Zealand, Wellington, 2008) at 33-35

⁹¹ Children and Young Persons (Residential Care) Regulations 1986, s 22

⁹² Education Act 1989, s 139A inserted as from 23 July 1990 by s [28\(1\)](#) of the Education Amendment Act 1990

⁹³ Gabrielle Maxwell *Physical punishment in the home in New Zealand* (Office of the Commissioner for Children, Wellington, 1993) at 11-12

children? I contend that towards the end of the twentieth century, the view of children as needing to be beaten into shape was being challenged by viewpoints which were influenced much more by the principles underpinning the construction of children as innocent beings. In chapter two I outlined the romantic view of the child and explained how this contrasted with the pessimistic view of children held by those who believed in the concept of original sin. It is my contention that this viewpoint had evolved over time and by the latter part of the twentieth century it was having a marked effect on parenting practices and attitudes towards the corporal punishment of children. It was characterised by the following attitudes:

1. A belief that children are naturally innocent and pure.
2. A belief that children develop and grow best under benign and loving parenting where they are respected and honoured.
3. A belief that the family needs to adjust and respond to the special needs of the child and not force the child to conform to adult expectations.
4. A belief that all children have rights of their own.

In its modern form, the doctrine of innocence is about respecting, honouring and nurturing children. It is about working alongside children to help them to develop their potential without needing to constantly exert parental authority over them. It is about respecting their rights as individuals and accepting that occasionally those rights might be in conflict with parental rights and that sometimes the child's rights will take priority. Discipline is less about punishment for wrong-doing and more about teaching and guiding.

In the domestic sphere, more and more parents were learning about these new ways to parent. New ideas were disseminated via books and magazines and from professionals such as doctors, nurses, teachers and midwives who had taken on board the new research and new ideas which were challenging the accepted views on children and parenting.

In the legal, academic and political sphere, the morality, necessity and efficacy of s 59 was being debated and this debate being enhanced and informed by these alternative ways of viewing what was best for the child. It is this debate upon which I will concentrate in this section.

The three main factors contributing to the repeal movement.

I have chosen to divide the main contributing factors, or arguments in favour of repeal, into three main areas. Firstly, the influence of the child rights movement and the obligations on the New Zealand Government to ensure that our domestic legislation concerning corporal punishment was in line with the principles of UNCROC. Combined with this was growing international movement to ban corporal punishment which had been gathering pace in more recent years. Secondly, the growing body of research which suggested strongly that corporal punishment of children was ineffective and had unwanted negative repercussions both in the short and long term. Thirdly, the difficulties caused by s 59 in terms of interpretation, conflict with other related legislation and by the fact that it perpetuated the message that physical violence towards children was acceptable.

The United Nations Convention on the Rights of the Child.

Summary

One of the primary arguments against the use and legality of corporal punishment is that it infringes on the rights of the child to live free from bodily assaults and that New Zealand has an obligation under UNCROC to ensure that the rights of children are upheld. UNCROC is a legally binding international instrument which has been ratified by every nation state in the world with the exception of Somalia and the United States of America. It incorporates the full range of human rights, being civil, cultural, economic, political and social rights and recognises that children hold these human rights not only as autonomous rights holders but also that they have special requirements for care and protection necessitating their own convention.⁹⁴ In a simplified form, the important parts of the Convention are:

- That children are to be protected from things such as discrimination, torture, cruel, inhuman or degrading treatment, exploitation, abuse, abduction, illegal arrest.
- That children have many rights including:
 - A right to have a say in matters affecting himself or herself.
 - Rights to name, culture and nationality.
 - Right to life

⁹⁴ UNICEF “Convention on the Rights of the Child” <www.unicef.org/crc/>

- Right to remain with parents (unless it is not safe)
- Rights when adopted
- Right to be treated fairly and with respect
- Right to not be hit by other people
- Right to standard of living.
- Rights of education
- That Government's must respect the rights of child.

Upon ratification States can choose to make reservations about any of the provisions of the Convention. Reservations are to be used temporarily when a party knows that it is unable to comply with a provision within the short term but does agree with the provision in principle.⁹⁵ With the exception of any reservations, once the Convention has been ratified States agree to hold themselves accountable to the international community and commit to the protection of children's rights. This is not just a moral obligation. States which become a party to the Convention agree to implement the rights which are set out in it. There is an obligation on parties to submit reports to convention organs which state how that party is performing in relation to their obligation. Each nation is then "graded" and a report on their performance is given. If States fail to perform adequately, then international pressure can be brought to bear.⁹⁶ It is impossible to ignore the phenomenal effect of UNCROC and this is summed up as "...a century that began with children having virtually no rights is ending with children having the most powerful legal instrument that not only recognizes but protects their human rights."⁹⁷

New Zealand was the 131st country to ratify UNCROC in March 1993.

Ratification came after a comprehensive review of New Zealand's domestic legislation⁹⁸ and at the time of ratification New Zealand made three reservations.

⁹⁹ The Ministry of Youth Affairs delivered its first report to the UN Committee in

⁹⁵ Child Rights Information Network "A to Z of Child Rights" <www.crin.org>

⁹⁶ Alfred Glenn Mower *The Convention on the Rights of the Child: International Law Support for Children* (Greenwood Press, Westport, 1997) at 3-4

⁹⁷ Attributed to Carol Bellamy UNICEF Executive Director (2004)

⁹⁸ John Hancock and Vanushi Walters "Seen but not yet heard" (13 November 2009) NZLawyer 125 <www.nzlawyermagazine.co.nz>

⁹⁹ Ibid.

1995, its second in 2003 and its third and fourth consolidated report in November 2008.¹⁰⁰

UNCROC and discipline

Abolitionists contend that UNCROC prohibits the use of corporal punishment against children. Consequently, the argument followed that New Zealand was obliged to amend its legislation to ensure that the physical punishment of children was outlawed. The Convention contains several provisions relating to the prohibition of corporal punishment:¹⁰¹

- Article 19 which requires parties to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of *physical or mental violence, injury or abuse*...while in the care of parent(s)...”
- Article 5 which states that states parties shall “respect the responsibilities, rights and duties of parents...to provide in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.”
- Article 6 which contains the child’s right to life and development.
- Article 3 which provides for the paramountcy of the best interests of the child.
- Article 12 which provides that the child’s voice must be heard which is linked to the idea that the child must be accorded respect and dignity.

There is nothing in the Convention which specifically states that children are not to be disciplined physically. Article 19 comes closest to this point however there has been criticism that equating mild corporal punishment with “violence” is to

⁹⁹ Articles 22.1, 32.2 and 37(c), which relate to children seeking refuge status, minimum employment age and the separation of child prisoners from adults.

¹⁰⁰ In addition there have been two reports submitted in 1997 and 2003 by Youthlaw and Action for Children in Aotearoa and Action for Children and Youth in Aotearoa.

¹⁰¹ Claire Breen “The Corporal Punishment of Children in NZ: The Case for Abolition” [2002] NZ Law Review 359 at 372

“conflate two distinct phenomena.”¹⁰² Furthermore, according to the *travaux préparatoires* there was no discussion of corporal punishment during the drafting sessions.¹⁰³

However even if this argument can be sustained, the law is constantly changing as society and technology evolves. Laws that were appropriate half a century ago are no longer appropriate. Furthermore, as time moves on, statutes are interpreted in line with evolving social expectations. Consider the way the Adoption Act is now interpreted and how this would not have been the interpretation intended by the original legislators.¹⁰⁴ In the same way, the Convention needs to be regarded as a living instrument and the interpretation of the articles of the Convention need to develop over time. Since the Convention was adopted, corporal punishment has become more visible as a result of the reporting mechanisms of the Convention and the increased research and advocacy of human rights organisations and Non Governmental Organisations (NGOs) and other individuals. As a result of this increased visibility it became clear that corporal punishment was in direct conflict with the “equal and inalienable rights of children to respect for their human dignity and physical integrity.”¹⁰⁵

The Convention sets the standard and the spirit with which States need to advance the rights of the child.¹⁰⁶ In respect of corporal punishment, this means that even if it could be considered that the original articles do not specifically prohibit corporal punishment, they should now be interpreted as supporting this prohibition. The United Nations Committee on the Rights of the Child (the Committee) has consistently stated that it believes that corporal punishment of children is contrary to the Convention and has been advising States to address this issue since the first periodic reports were given.¹⁰⁷

New Zealand’s responsibilities

¹⁰² Rex Ahdar and James Allan “Taking Smacking Seriously: The Case for Retaining the Legality of Parental Smacking in New Zealand” [2001] NZ Law Review 1 at 32

¹⁰³ *The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment* at [20] CRC/C/GC/8 (2007)

¹⁰⁴ For example, now de facto couples can adopt but in the 1950s the intention was that only married couples could adopt.

¹⁰⁵ CRC/C/GC/8, above n 103 at [20-21]

¹⁰⁶ Breen, above n 101, at 375

¹⁰⁷ CRC/C/GC/8, above n 103 at [5]

The Committee has clearly indicated that it considers that articles 5 and 19, along with the other supporting fundamental articles of 3, 6 and 12, together require that State parties prohibit the use of corporal punishment.¹⁰⁸ In 2003, in its response to New Zealand's second periodic report, the Committee recommended that New Zealand:

- (a) Amend legislation to prohibit corporal punishment in the home;
- (b) Strengthen public education campaigns and activities aimed at promoting, 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.¹⁰⁹

However, even if we accept that the Committee has rightly interpreted UNCROC as prohibiting corporal punishment, was New Zealand free to ignore the Committee's recommendations? According to Adhar and Allan the Convention was illegitimately used by activists in order to "defeat democratic wishes" but that even if the Convention did in fact prohibit corporal punishment, New Zealand could have given a reservation on the issue and endured the disapproval of the Committee.¹¹⁰ Their argument was that New Zealand should decide for itself whether or not to ban smacking and not be capitulating to an international convention.¹¹¹ The number of countries which have ratified the Convention vastly outweighs the numbers of countries which have prohibited all corporal punishment.¹¹² Clearly many countries either disagree with the argument that the Convention prohibits smacking, are making official reservations or are just passively ignoring the issue.

As New Zealand is a dualist state, international treaties ratified by our government do not immediately become part of our domestic law.¹¹³ The relationship between international treaties to which New Zealand is a party, and New Zealand domestic law is discussed in the Law Commission report *A New Zealand Guide to*

¹⁰⁸ United Nations Committee on the Rights of the Child *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations New Zealand* at [29] CRC/C/15/Add.216 (2003)

¹⁰⁹ Ibid, at [30]

¹¹⁰ Ahdar and Allan, above n 102, at 32

¹¹¹ Ibid, at 33.

¹¹² Close to 200 countries have ratified UNCROC but less than 30 of these countries have a full ban on smacking.

¹¹³ Breen, above n 101, at 365

International Law and its Sources.¹¹⁴ If New Zealand is a party to a treaty, then it is required to comply with the relevant provisions of that treaty. Where necessary, it is required to amend domestic legislation so that it conforms to the relevant treaty. The *Cabinet Office Manual* stipulates that when a Minister is proposing new legislation to the Cabinet Legislation Committee, it must report on the proposed legislation's compliance with New Zealand's international treaty obligations.¹¹⁵ When making new law or amending existing law, the Government will take into account any relevant treaty obligations and also any international standard which may be relevant.¹¹⁶ By signing the Convention, New Zealand agreed to ensure that its domestic laws comply with the principles of the treaty and article 27 of the Vienna Convention on the Laws of Treaties states that inadequate domestic law does not excuse non-compliance.¹¹⁷ Failing to comply with the Committee's recommendations makes a mockery of ratification.

I contend that the Government was obliged by UNCROC to prohibit physical punishment through legislation but that the sanction for failing to comply was likely to be no more than sternly worded reports which could have been ignored by the Government for the foreseeable future. However New Zealand still needed to make a decision on the issue and the opinion of the Committee was a viable and important source of guidance. Those who proposed abolishment were more than entitled to use the thoughts, interpretation and suggestions of the Committee in advancing the case for abolition. Even if the Convention could not compel immediate change, it certainly provided a very strong justification for it.

International Influences

New Zealand was by no means the only country to have tackled the issue of corporal punishment against children and our debate needs to be seen in the context of the wider international movement to prohibit all forms of corporal punishment against children. The first country to have instituted a complete ban on corporal punishment was Sweden in 1979. By 2005 when the Bradford Bill was drawn, Sweden, Finland, Norway, Austria, Cyprus, Denmark, Latvia, Croatia,

¹¹⁴ Law Commission A New Zealand Guide to International Law and its Sources (NZLC R3, 1996)

¹¹⁵ Ibid, at 2.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

Bulgaria, Israel, Germany, Iceland, Ukraine, Romania and Hungary had already attained full prohibition. By the end of 2007, Greece, Netherlands, New Zealand, Portugal, Uruguay, Venezuela and Spain had been added to this list. It was clear that there was an accelerating movement towards prohibition and this worldwide movement contributed to the movement towards repeal in New Zealand.

Incidentally, this trend continues today. As at 10 August 2010 a total of 29 states now have full legal prohibition and a further 21 states are either committed to prohibition or have the process of legal reform underway.¹¹⁸

Sweden's experience of banning corporal punishment has been influential worldwide and this was no different during the New Zealand debate. As the first country to ban corporal punishment, Sweden has been a very important case study and significant research has been done in to the effects of prohibition. In particular, Canadian psychologist Joan Durrant's work *A Generation Without Smacking: The impact of Sweden's ban on physical punishment*¹¹⁹ has been heavily cited as providing justification for the banning of corporal punishment worldwide. In this work she argued that since corporal punishment had been banned there had been in a decline in the acceptance of corporal punishment, a decrease in the use of physical punishment, rates of youth crime had remained steady and rates of alcohol and drug use and suicide among youth had decreased. Furthermore no children died at the hands of their parents during the 1980's and only one in the period 1990-1996. She also found that there was no evidence of an increase in prosecutions for minor assaults and there had in fact been a decrease in the numbers of children being removed from their parents¹²⁰ Ms Durrant clearly pointed out that these results could not be directly attributed to the banning of corporal punishment however it could be shown that banning corporal punishment had had no negative effects.¹²¹ Joan Durrant spoke in New Zealand at the 10th Australasian Conference on Child Abuse and Neglect held in Wellington in 2006 and her findings and opinions were used to support the abolitionists' stance.

¹¹⁸ "Countdown to Universal Prohibition" <www.endcorporalpunishment.org>

¹¹⁹ Joan Durrant *A Generation Without Smacking* (Save The Children, London, 2000)

¹²⁰ Ibid, at 6.

¹²¹ Ibid.

The accelerating movement towards abolition worldwide further supports the proposition that even if the Bradford Bill had not been drawn in 2005, New Zealand would eventually have had to deal with this issue.

Research in to the effects of corporal punishment

Research limitations and difficulties

It has only been in more recent years that the effects of corporal punishment have been studied in any depth. The study of corporal punishment within a domestic setting is challenging. Parents may inaccurately recall, or deliberately minimise its use and an adult's memories of what occurred to them in childhood may not be accurate. Research by observers within the home setting may also not elicit accurate data due to the fact that the family's behaviour may change in the presence of a researcher.¹²² The *prevalence* of physical punishment is easier to ascertain than the *effect* of physical punishment but the effect is what most people (perhaps with the exception of those whose concern lies purely with the "rights" argument¹²³) are concerned with. Does physical punishment harm children and is it effective?

It is difficult to link negative outcomes directly or indirectly to a parent's disciplinary style. How can researchers prove that a negative outcome, such as aggressive behaviour towards peers, was actually caused by the fact that the child or young adult in question was smacked by his parents? How can we control for other factors such as the child's inherent personality, the family's financial and social circumstances and the child's (negative) relationships with other people in his or her life? Longitudinal studies are limited simply because it is only in recent decades that researchers seriously considered that smacking might have long-term negative effects. Also, until recently in western countries such as America, England and New Zealand, smacking occurred to almost everyone at some point in their childhood, but at greatly varying degrees. It is therefore somewhat

¹²² Anne Smith *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, Dunedin, 2004) at 11

¹²³ Breen, above n 101, at 359

difficult to prove conclusively that negative life outcomes were the result of corporal punishment – the “control group” was almost non-existent.

The messages from the main researchers

Nonetheless, in spite of these difficulties, there has been a significant amount of quality research carried out which contributed to the debate over the efficacy and effects of corporal punishment.¹²⁴ Without question, the foremost New Zealand researchers in this area were Jane and James Ritchie, whose work has already been quoted. Internationally, one of the most prolific producers of research in the area of the effects of corporal punishment is American Professor of Sociology, Murray Straus. Straus’s research has indicated that¹²⁵:

- Corporal punishment is associated with higher rates of depression, alcohol abuse, spousal violence, physical violence to children, and suicidal ideation.¹²⁶
- The use of corporal punishment predicted antisocial behaviour at a two year follow up.¹²⁷
- Adults who were subjected to corporal punishment as teenagers were less likely to get a college degree and if they did get a degree, they were then less likely to obtain high level employment and income.¹²⁸

¹²⁴ Unfortunately the scope of this thesis prohibits a detailed analysis of the work of these researchers and consequently the information provided is a very brief summary of a significant body of work.

¹²⁵ Nancy Asdigian and Murray Straus ‘There was an old woman who lived in a shoe: number of children and corporal punishment’ in Murray Straus, Emily Douglas and Rose Anne Medeiros *The Primordial violence: corporal punishment by parents, cognitive development and crime* (AltaMira Press, Walnut Creek CA, 2003) <<http://pubpages.unh.edu/~mas2/CP20.pdf>>

¹²⁶ Murray Straus and Glenda Kaufman Kantor "Corporal Punishment of Adolescents by Parents: A Risk Factor in the Epidemiology of Depression, Suicide, Alcohol Abuse, Child Abuse, and Wife Beating." (1994) *Adolescence*, 29(115) 543

¹²⁷ Murray Straus, David Sugarman and Jean Giles-Sims “The Boomerang Effect” in Murray Straus, Emily Douglas and Rose Anne Medeiros *The Primordial violence: corporal punishment by parents, cognitive development and crime* (AltaMira Press, Walnut Creek CA, 2003)

¹²⁸ Murray Straus and Anita Mather “Corporal Punishment of Adolescents and Academic Attainment” in Murray Straus, Emily Douglas and Rose Anne Medeiros *The Primordial violence: corporal punishment by parents, cognitive development and crime* (AltaMira Press, Walnut Creek CA, 2003) and Murray Straus and Holly Gimpel “Corporal Punishment by Parents and Economic

- The experience of corporal punishment as a child is linked with the desire for sexual violence (in the form of sado-masochism) in later life. The more a child is hit by their parents, the more likely they are to be interested in masochistic sex in adulthood, although the relationship was even stronger for adults whose parents showed little warmth and affection.¹²⁹
- "Corporal Punishment of Adolescents by Parents: A Risk Factor in the Epidemiology of Depression, Suicide, Alcohol Abuse, Child Abuse, and Wife Beating." *Adolescence*, 29(115):543-561. (with Glenda Kaufman Kantor).
- Corporal punishment adversely affects children's academic achievement.¹³⁰
- There is a link between the prevalence of child-to-parent violence (particularly of children hitting their mothers) and parent- to- child violence in the form of corporal punishment. Corporal punishment provides a powerful model of behaviour and can also breed resentment, leading to "a pattern of mutually coercive acts" including child-to-parent violence.¹³¹
- The more corporal punishment received by a child from his or her mother, the more that child fell behind children who were not physically punished, in terms of their cognitive ability.¹³²

These are compelling statements and significantly contributed to the body of knowledge about corporal punishment and lent weight to the arguments against the use of corporal punishment.

Achievement: A theoretical model and some preliminary empirical data" (paper presented at the annual meeting of the American Sociological Association in Pittsburgh, Pennsylvania, 2002)

¹²⁹ Murray Straus *Beating the Devil out of Them: Corporal Punishment in American Families and its effects on Children* (2nd ed, Transaction Publishers, New Brunswick, NJ, 2001) at chapter 8

¹³⁰ Murray Straus, Emily Douglas and Rose Anne Medeiros *The Primordial violence: corporal punishment by parents, cognitive development and crime* (AltaMira Press, Walnut Creek CA, 2003) <<http://pubpages.unh.edu/~mas2/CP20.pdf>>

¹³¹ Arina Ulman and Murray Straus "Violence by children against mothers in relation to violence between parents and corporal punishment by parents"(2003) 34 *Journal of Comparative Family Studies* 41

¹³² Murray Straus and Mallie Paschall "Corporal Punishment by mothers and development of children's cognitive ability: A longitudinal study of two nationally representative age cohorts." (2009) *Journal of Aggression, Maltreatment and Trauma* 18:459

In 2002 Elizabeth Gershoff published a meta-analysis of 92 different studies on corporal punishment to attempt to establish the outcomes for children of parental corporal punishment.¹³³ The following negative effects were suggested:

- Aggression in childhood.
- Delinquent, criminal and anti-social behaviour.
- Disruption of the parent-child relationship.
- Impaired mental health.
- Adult abuse of one's own parent or spouse.
- Becoming a victim of physical abuse.¹³⁴

This meta-analysis found that there was some agreement that smacking did have one positive effect in that it caused children to immediately comply.¹³⁵ However not all the studies reviewed showed this result, and Gershoff points out that the relationship with immediate compliance and smacking should be viewed cautiously.¹³⁶ In New Zealand research published in 2009, 9% of families interviewed found smacking to be effective¹³⁷ and anecdotally there is support for the proposition that smacking works. "Smacking isn't the be all and end all but when it works – it really works."¹³⁸

Gershoff also points out that immediate compliance is not sufficient. The child complies because of the fear of the punishment, not because she knows how or why her behaviour was wrong. This simply teaches the child to be more careful not to get caught. The risk is that the child never internalises the moral lessons which are necessary for living in society. We need to behave in a certain way because it is the right way to behave, not because we face punishment if we do not comply. Corporal punishment is inadequate for teaching these lessons.¹³⁹

¹³³ Elizabeth Gershoff "Corporal Punishment by Parents and Associated Child Behaviours and Experiences: A Meta-Analytic and Theoretical Review" (2002) 128 *Psychological Bulletin* 539 at 539

¹³⁴ *Ibid*, at 541-542.

¹³⁵ *Ibid*, at 549.

¹³⁶ *Ibid*, at 540.

¹³⁷ Anne Smith, Megan Gollop, Nicola Taylor and Kate Marshall (eds) *The discipline and guidance of children: messages from research* (Children's Issues Centre, University of Otago, Otago, 2005) at 21 <www.occ.org.nz>

¹³⁸ "Do you still smack your children" *The New Zealand Herald* (New Zealand, 26 May 2008) quoting Tom G from Canada

¹³⁹ Gershoff, above n 133, at 541

The research of Straus, Gershoff, the Ritchies and their contemporaries has not gone unchallenged. Robert Larzelere, another researcher in this area, disputes the negative outcomes claimed by Straus, Gershoff et al. Larzelere maintains that physical punishment is acceptable for children provided that: it should only be used on children who are aged 2-6 years old; the discipline must not be severe; the parent must be in control of himself or herself; the physical punishment must be supported by verbal reasoning and explanation; the discipline must be motivated by concern for the child and; the discipline must take place in a private place.

Unfortunately space precludes a more detailed analysis of the research and the counterclaims however the importance for this thesis is to show that prior to the s 59 debate there was academic research which supported what many parents knew instinctively – that physical discipline was often ineffective and could cause unwanted and unintended effects.

Issues with section 59 itself

The third and final factor contributing to the push towards abolition relates to problems with, and caused by, the law itself. These were: problems caused by the interpretation of the law; problems caused by the conflict between s 59 and other related legislation; and problems caused by the message which the law sent about children and violence.

Interpretation Difficulties

We are best able to illustrate the first two problems using the s 59 case law. The first problem concerned interpretation of the law. Section 59 did not provide a blanket right to use corporal punishment. In order to succeed with the defence, the defendant had to prove that the force was used for the purposes of correction and that the force was reasonable. *R v Drake* was one of the first legal comments on the validity of this approach.¹⁴⁰ The first point prevented a parent from taking advantage of the defence if his or her actions were motivated by something other than a desire to prevent the child from repeating bad behaviour. For example, the force is not for the purpose of correction if it comes from a desire to exert control, to appease the parent's feelings of shame or from anger and fury¹⁴¹. The second

¹⁴⁰ See chapter two

¹⁴¹ *A v A* [protection order] (1997) 17 FRNZ 13 at 22

point is that the use of the force must be reasonable. Over time, the courts developed a list of factors which were to be taken in to account in deciding whether or not the discipline was reasonable. These included:

- The age and maturity of the child
- Whether or not the force resulted in an injury:
- The place of the body which was hit.
- The reason for the discipline – the misbehaviour of the child.
- Whether or not there was a family history of domestic violence or abuse.
- External forces.
- Degree of force used.
- Characteristics of the child such as his or her size, health and sex.
- Whether there was any emotional damage caused to the child.
- Whether or not an instrument is used.¹⁴²

The average parent would have difficulty in determining the precise limits on corporal punishment in advance. For example, if the reason for the discipline is important then does this mean that a more serious “crime” warrants a more severe punishment? If the child is younger and therefore less able to make reasoned decisions, is it more acceptable to hit her on the basis that she will understand a smack whereas she will not understand an explanation of the error of her ways, or is it less acceptable because she does not have the cognitive ability to change her behaviour? Is it safer to use an instrument such as a strap to dilute the unrestrained force of the hand, or is using an instrument an indication of callousness?

The law did not provide clarity and as a result, juries acquitted parents of reasonably serious cases of assault. In *R v Newell*¹⁴³ Mr Newell was acquitted by a jury on a charge of assault with a weapon in relation to his daughter. Mr Newell had admitted to hitting his daughter 2 -3 times with a length of hosepipe and evidence showed that the daughter had bruising on her arm and buttocks and welts on her buttocks. Evidence was given as to the daughter’s bad behaviour over the

¹⁴² The factors determining “reasonableness” are discussed in *A v A* [protection order] (1997) 17 FRNZ 13 and in *S v B* (1996) 15 FRNZ 286

¹⁴³ *R v Newell* HC Palmerston North T20/02, 12 September 2002.

preceding months. The jury acquitted the defendant despite the admission of the father and the bruising caused to the daughter.

Very few acquittal cases reach the law reports and so we are also reliant on media reporting of these cases. The full facts are therefore not available, however the media reports do give a reasonable indication of the types of behaviour which juries deemed acceptable. In 1999 a Palmerston North High Court jury acquitted a man who was accused of kidnapping and cruelty to a child after he chained his 14 year old stepdaughter to himself.¹⁴⁴ A Hamilton jury acquitted a man of assault when he hit his 12 year old daughter with a hosepipe, even though she was left with a 15cm welt on her back.¹⁴⁵ In 2001 a jury in Napier acquitted a father after he hit his son several times on the buttocks using a piece of wood, despite the fact that a paediatrician had stated that the injuries received by the boy were caused by the application of considerable force.¹⁴⁶ A couple were acquitted after disciplining a 9 year old child by hitting him with a bamboo stick.¹⁴⁷ In two further cases, a father and a step father were acquitted for disciplining their children using belts.¹⁴⁸

These decisions show that juries were willing to acquit parents of assault (and other) charges in circumstances where the child had been hit with an implement, had received injuries of a more than trifling nature and where the young person involved was not a child but an adolescent. In 2001, the Ministry of Justice conducted research into public attitudes on physical punishment.¹⁴⁹ The attitudes revealed in that survey are at odds with the decisions in the above acquittal cases. In that research only 0.4% of respondents thought hitting with a piece of wood was acceptable. Smacking with an open hand was acceptable to 80% of respondents while smacking with a wooden spoon was acceptable to only 15%.¹⁵⁰ More than half of the respondents felt that physical punishment of a child aged

¹⁴⁴ "Man who chained step-daughter goes free" *New Zealand Herald* (New Zealand, 17 November 1999)

¹⁴⁵ "Father acquitted in pipe beating" *New Zealand Herald* (New Zealand, 3 November 2001)

¹⁴⁶ "Smacking father discharged" *The Dominion Post* (Wellington, 22 February 2001)

¹⁴⁷ "Parents not guilty of assault over bamboo stick beating" *New Zealand Herald* (New Zealand, 6 September 2001)

¹⁴⁸ "Smacking laws stay unchanged for now" *The Dominion Post*, (Wellington, 21 December 2001) and "Belting OK for wild boys says jury", *New Zealand Herald* (New Zealand, 21 July 2002)

¹⁴⁹ Sue Carswell *Survey on public attitudes towards the physical discipline of children* (Ministry of Justice, Wellington, 2001)

¹⁵⁰ *Ibid.*, at ch 2.

11-14 years was unacceptable and this rose even higher for the 15-17 year old age group.¹⁵¹ Overwhelmingly, respondents felt that red welts, bruising or other injuries were unacceptable.¹⁵²

This disparity shows that there was little consensus on what disciplinary actions were reasonable. Juries were prepared to acquit defendants in circumstances where the force used appeared to be excessive when judged against the social standards of the day.

On the other hand, parents assaulted their children while intending to discipline, clearly thinking at the time that they had a right to do so. Unfortunately for them, they found out in court that they had exceeded their rights. In *R v Donselaar*¹⁵³ the accused smacked his son twice on the backside after the child soiled himself. The smacking was hard enough to cause bruising and left a handprint on the child's backside. At trial he raised a s 59 defence, but the jury found that the degree of force he used was excessive. The evidence showed that the injuries required significant force and he was convicted of assault. In *Sade v Police*¹⁵⁴ the accused was seen dragging her daughter along the footpath by the arm, stopping, raising her hand and hitting the girl around the legs and buttocks a total of 4-5 times. The accused then took her daughter into a public toilet and it appeared that she continued to discipline the girl in there. The correction evidently took place because the girl had bitten the accused. The accused was convicted. In *Spence v Police*¹⁵⁵ the appellant was convicted of assault on a child after he forced his stepson to do extra homework, and when the child had difficulty, hit him with a leather dog lead causing severe bruising and red welts. The Court held that this conduct went far beyond any reasonable requirement for parental discipline, and demonstrated anger and approached the unbalanced.

These cases demonstrate that juries and judges were prepared to convict parents on assault charges regardless of the existence of the s 59 defence. According to many opponents of the law change, this was an indication that the law did not

¹⁵¹ Ibid, at ch 4.

¹⁵² Ibid, at ch 3

¹⁵³ *R v Donselaar* DC New Plymouth CRI-2004-043-201, 14 April 2005

¹⁵⁴ *Sade v Police* HC Rotorua AP 50/95, 26 October 1995

¹⁵⁵ *Spence v Police* unreported, AP53/94, High Court Wellington, McGechan J, 13 April 1994

need changing, merely amending so that anomalous decisions could be avoided.¹⁵⁶ It is a valid point that juries are tasked with the responsibility of making sensible decisions on a daily basis and that much of our criminal justice system hinges on this fact. However, this ignores one of the repercussions of the original s 59. In order for these assault cases to come to police attention, someone needs to either witness the assault or a complaint needs to be made. In a family situation where one person is using harsh physical discipline, often the only person who will witness the incidences of discipline is the spouse. If the parental relationship is sound, it is unlikely that the spouse will complain about the partner to the police, indeed the spouse may approve or, or be complicit in the discipline. How many cases, such as the ones referred to above, which were found to be assault, have gone unnoticed, unreported and unstopped because of the fact that the perpetrating adult and the wider family members believed that the actions were legal and acceptable physical discipline? These cases show that it was difficult for parents to know what was considered legally acceptable discipline and for juries and judges to make decisions on reasonableness in the unlikely event that such incidences made it to court.

Reconciling s 59 with other legislation

The second problem was the difficulty reconciling s 59 with other relevant legislation. Particularly, custody and access arrangements under the Guardianship Act 1968 and the Care of Children Act 2004 and the granting of protection orders under the Domestic Violence Act 1995. The application of a Crimes Act defence to civilian court proceedings arises because of the use of the word “justified” in s 59(1) - “every parent or person in place of a parent is *justified* in using force...” Section 2 of the Crimes Act 1961 defines “justified” as meaning to be protected from *civil* or criminal sanction. This widens the application of the section to civil proceedings, rather than restricting it to criminal cases. Thus the s 59 defence could be used to defeat the intentions of other legislation designed to protect children from violence.

¹⁵⁶Maxim Institute “Maxim Institute written submission on the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill”

One of the clearest examples of s 59 defeating the purpose of another piece of legislation is found in *Spence v Spence*¹⁵⁷. Mr and Mrs Spence were both applying for custody of their four children and Mr Spence's use of physical discipline became pivotal. Mrs Spence applied on the basis that she had always been the primary caregiver, saying she wished to relocate to Christchurch to be closer to her family. She opposed Mr Spence's application on the basis that his use of physical discipline amounted to violence. Mr Spence applied on the basis that Mrs Spence was unable to take care of the children and that his use of physical discipline was reasonable and within the law.

Mrs Spence claimed that Mr Spence had been using physical discipline against the children their whole lives, including smacking the children when they were 6 weeks old for thumb sucking. When one of the children was 8-9 months old and would not immediately go to sleep, Mr Spence would remove the child's clothes and smack the child's bare skin. The children were smacked for thumb sucking, bed wetting, failing to go to bed, disobedience or otherwise doing something that Mr Spence did not want them to do. Mrs Spence claimed that Mr Spence used implements such as spatulas, the bamboo handle of a feather duster, a piece of cane or dowel and a fibreglass mast off a bicycle. The discipline was sometimes given in a calm manner and other times when Mr Spence was yelling and enraged. Mrs Spence claimed that the beatings occurred very regularly, sometimes daily but at least weekly. The discipline caused welts and bruising and caused the children to scream.

Mr Spence did dispute some of Mrs Spence's evidence, but only in minor areas. He was very clear that the bible required that children be disciplined by the rod and that he intended to continue to discipline in that way. Mr Spence was not at all concerned that other people might see bruises or welts on the children and stated that if anyone commented on the marks he would reply that the child had been disciplined for doing something wrong. He intended to continue this form of discipline until the children were around 16 or 17 years of age.

The Court held that Mr Spence's use of force was unreasonable and not justified by s 59. He used force which was excessive in the circumstances and the force was administered without reference to age appropriateness or to the

¹⁵⁷ *Spence v Spence* [2001] NZFLR 275

developmental needs of the children. The children often did not know why they were being punished, were sometimes punished for things they had not done and were punished at an age where they did not have the cognitive abilities to understand what they had done wrong or change their behaviour. The Court decided that Mrs Spence should be allowed to relocate to Christchurch because Mr Spence had expressly stated he would not conform to an order preventing him from using physical discipline and thus the children could not be safe from further violence in his care. However, after stating that the children would not be safe from violence if custody was awarded to Mr Spence, he was then granted reasonable access on the proviso that he did not physically discipline the children.

This case is an example of the law failing all parties. While I have no sympathy for Mr Spence's use of patently excessive discipline, this case shows that s 59 validated the use of significant punishment in some parent's minds. In Mr Spence's opinion, his use of physical punishment was commanded by God and the Bible and justified by law. Requiring parents to define for themselves what constitutes reasonable force is unsafe when those parents have a distorted view of punishment due to fundamentalist religious views.

The children were also failed in this case. Despite the judge stating that the children would not be safe from violence when in the father's care, he was still awarded unsupervised access. The issue of custody and access in this case was decided under the Guardianship Act 1968. Under s16B(4) of that Act the Court is not allowed to give a person, who has used violence towards a child, unsupervised access to that child unless the court can be sure that the child will be safe during that unsupervised access. Under s16B (5), when deciding if the child will be safe, the court can have regard to matters such as the frequency of the violence, the nature and seriousness of the violence, the likelihood of the violence reoccurring, whether the other party involved believes the child will be safe and what steps the violent party has taken to prevent the violence happening again. The Court stated that Mr Spence's behaviour "was and is violence."¹⁵⁸ In granting sole custody to Mrs Spence, the court stated that Mr Spence "...has stated clearly he will not abide by any order that he not discipline the children physically. The children will

¹⁵⁸ Ibid, at 286.

therefore not be safe from further abuse if in his care.”¹⁵⁹ Yet just several paragraphs further on in the judgement, he is granted unsupervised access to those same children “provided he does not physically discipline them.”¹⁶⁰ The “responsibility and the decision¹⁶¹” was left to Mr Spence to change his ways and leaves it up to Mrs Spence to enforce the conditions imposed by the Judge through either civil or criminal law channels.

This is an unfathomable decision. A man who has stated that he will not cease his violent behaviour is granted unsupervised access to vulnerable children with the judge leaving it up to the abuser to change his ways. This is particularly serious when it had already been noted that one of the children “appeared to have accommodated her father’s style as normal” and “that it was a cause for concern that the children may model on their father’s belief system.”¹⁶² It was effectively left up to children, who clearly loved their father and wanted to spend time with him, to police the disciplinary actions of their father and keep themselves safe. How can this decision even be explained? Perhaps the judge recognised that Mr Spence’s behaviour was violent, but because it was couched in terms of “discipline” it was viewed as less serious than violence which was not justified as being for disciplinary purposes. Therefore Mr Spence just needed to make a decision to stop disciplining in that manner.

The other category of cases where a clear incompatibility is shown is in the cases involving the Domestic Violence Act 1955. *Sharma v Police*¹⁶³ involved the interplay between the Domestic Violence Act 1995 and s 59. The appellant had been convicted of breaching a protection order and of assault. Mr and Mrs Sharma had separated and there was a temporary protection order against Mr Sharma in relation to Mrs Sharma and her children. Mrs Sharma sent her 9 year old son back to the house to pick up some items belonging to her. Mr Sharma thought that the items to be picked up were baby clothes, but Mrs Sharma had instructed her son to also pick up a stereo. When the boy went to do so, Mr Sharma asked him to put it back. The boy gave Mr Sharma a rude look and Mr Sharma hit once on the head and twice on the legs.

¹⁵⁹ Ibid, at 287.

¹⁶⁰ Ibid, at 288.

¹⁶¹ Ibid

¹⁶² Ibid, at 283

¹⁶³ *Sharma v Police* [2003] 2 NZLR 473

In the District Court it was found that even if a s 59 defence was available, in this case it failed on the facts. The Court noted that the actions of Mr Sharma would, in the absence of a legal justification, clearly constitute a breach of the protection order and be an assault. The issue was therefore whether s 59 provided a justification such that Mr Sharma would not be liable for the breach of the order or the assault. In the High Court Fisher J found reluctantly that the s 59 defence would still be available to a defendant against whom a protection order had been granted, despite the overriding objectives of the Domestic Violence Act 1995.

He noted that the question of corporal punishment in harmonious families is controversial and that it must be even more dubious when it involves a family where there is a protection order in place.¹⁶⁴ However, in spite of the fact that this appears obvious, the legislation did not follow due to the inclusion of the word “justified” in the section.¹⁶⁵

In *Sharma*, the force used was patently unreasonable and there was no actual need for correction so the defence was excluded. However the case clearly demonstrated the incompatibility of the two acts. A parent who has been shown to be violent or abusive could use physical punishment against a child protected by a protection order and yet not be found in breach of that order provided that the discipline fell within the ambit of s 59.

In *A v A*¹⁶⁶ (also cited as *Ausage v Ausage*) the applicant was an 18 year old Samoan woman who sought a final protection order against her father on the grounds that he used excessive force in disciplining her and that this amounted to violence under the Domestic Violence Act 1995. Two particular instances were referred to. The first was when the respondent went in to the applicant’s bedroom in the middle of the night to confront her about allegedly stealing some money. He dragged her out of bed and punched and hit her on the arms and legs, despite her denying the accusation of theft. The second incident was a result of the respondent believing that the applicant should give the first \$150 of her income to her family and retain only \$20 for herself. An argument ensued. The respondent hit the applicant across the face, giving her a whiplash injury and causing cuts and swelling to her lips. The applicant had moved out of home and wanted the

¹⁶⁴ Ibid, at [9].

¹⁶⁵ Ibid, at [10]

¹⁶⁶ *A v A* [protection order] (1997) 17 FRNZ 13 at 22

protection order so that she would be able to have contact with her family without fear of further violence. The respondent believed that his religion compelled him to use physical discipline.

Like *Sharma*, this case helped to explain the relationship between the Domestic Violence Act 1955 and s 59 of the Crimes Act 1961: The judge found that:

It follows, therefore, that an examination of s 59(1) is essential in determining whether or not there has been domestic violence for the purposes of the Domestic Violence Act 1995. If the respondent satisfies the test in that section, he is immune from suit under the Domestic Violence Act; should he fail to satisfy that test, then an assault would have been committed which would almost inevitably be considered as an act of physical abuse.

Based on the facts, the respondent did not satisfy the test for immunity under s 59. The motivation for the “discipline” meted out by the respondent was not necessarily correction. He was motivated by his feelings of shame and his desire to retain control over his daughter. In the first incident there was no proof that the applicant was the thief and even if she had been, the act of hauling a teenage girl out of her bed in the middle of the night and hitting her was unreasonable. The court found the second case even more clear cut. This was a 17 year old young woman who was employed and earning money. She felt that her parents were exerting unnecessary control over her personal finances and this was a valid point of view which her parents did not attempt to understand. The father hit his daughter out of anger at her rejection of his control. Discussion and dialogue would have been appropriate in resolving this issue, not physical force. A final protection order was granted, however it seems unlikely that this daughter, having taken her own father to court and shamed him publicly, would have been welcomed back into that family.

In both these cases, the protection order was granted because the discipline did not meet the test under s 59. In *S v B* (also reported as *Steyn v Brett*)¹⁶⁷ the protection order was not granted. This case involved an application for a protection order by a 14 year old girl in relation to her father. The Court was required to determine whether the father had used domestic violence against the applicant during an

¹⁶⁷ *S v B* (1996) 15 FRNZ 286

access visit. The applicant and her father had got in to a heated argument. The respondent hit the applicant on the legs and then when she called him a “bastard” he slapped her across the face. The court needed to decide whether the facts showed either a one off incident of physical abuse or a pattern of behaviour that was physically abusive. Assistance was sought from the interpretation of s 59 which provided that age and maturity of a child, the child's health, the type of force and the degree of force, and the circumstances of the punishment was relevant in ascertaining the reasonableness of domestic discipline.

In *R v Habersstock (1970) 1 C.C.C. (2d) 433* at 435 it has been held that the action of slapping a child on the face was reasonable. However that was some 26 years ago. Social attitudes have changed over recent years. Indeed the Domestic Violence Act 1995 is a reflection of current social attitudes, with s 5 of the Act setting out the objects of the legislation.¹⁶⁸

Yet despite these changing attitudes, the Court decided that the applicant would not be granted a protection order against her father. The Court recognised that the behaviour was “inappropriate” but did not find that it was abusive for the purposes of the Domestic Violence Act 1955. The Court felt that granting a protection order would be giving too much power to the daughter ; “...it is clear that the power of control would be in the hands of Rebecca were she to have a protection order.¹⁶⁹” and declined to find that the father’s actions were abusive. Significant weight was given to the behaviour of the daughter. She was seen to have provoked her father’s reaction by her swearing and her moodiness.

This is not a case where the respondent has slapped Rebecca for no apparent reason. She accepts that she referred to him as “a bastard”. She also accepts that her behaviour was unacceptable. At the time this happened it would be naive to think that Rebecca was acting rationally or calmly. The reaction of the respondent was to strike her with his open hand once across the cheek. His reaction was spontaneous.¹⁷⁰

This case was not specifically about the use of domestic discipline under s 59 of the Crimes Act, but the message within this judgement hits to the heart of one of the reasons why opponents of the law wanted it changed. An adult male is not

¹⁶⁸ Ibid, at 291.

¹⁶⁹ Ibid, at 290.

¹⁷⁰ Ibid, at 292.

allowed to slap his partner on the legs and face regardless of whether she is behaving moodily or irrationally. He is required by law and by societal pressure to control his reaction. Yet we do not expect the same level of control when the woman in question is 13 years old. She is not afforded the same dignity as an adult woman and when she is slapped, it is her behaviour which is called in to question. An act which would have been considered an assault if committed by a man against an adult woman was given legal and moral justification by the interpretation and underlying message of s 59.

In *S v B* and in *R v Newell*, the child in question was effectively put on trial and the juries were encouraged to take into account whether the behaviour of the child led to and justified the assault from the parent. At issue was whether the child provoked the violence of the parent.

This issue of provocation of the parent by the child is yet another example of the difference between the way children were treated as a result of s 59, and the way adults are treated. Provocation is not available as a defence in assault cases involving adult perpetrators and victims. Whether the offender was provoked into committing a crime is relevant to sentencing but is not relevant to whether or not the defendant is guilty of the crime.¹⁷¹ Adults are expected to withstand the poor behaviour of other adults without resorting to physical actions. Yet under the prior s 59 regime, the question of whether the parent was provoked was deemed relevant to whether or not the force used was reasonable and for the purposes of correction. Rather than expecting adults to be able to react appropriately to the inevitable stress caused by raising children, poor behaviour on the part of the adult was justified and explained by the misbehaviour of the child. Trying to claim that a child deserved to be hit because they misbehaved was as abhorrent as arguing that a woman deserved to be raped if she wore a short skirt. The law needed to move on from these archaic and inappropriate justifications.

From these cases we can see that there were some significant difficulties with reconciling the need to protect children from violence pursuant to the Guardianship Act 1968 (and its successor The Care of Children Act 2004) and the Domestic Violence Act 1995, with the fact that parents were legally allowed to

¹⁷¹ Ministry of Justice “Sentencing Policy and Guidance- A discussion paper” (November 1997) at ch 5

commit acts of violence against their children provided that those acts met the test under s 59 of the Crimes Act.

Providing tacit approval of violence towards children

The third problem with s 59 was the message it sent in relation to our acceptance of violence towards children. This was a significant concern and was recognised by almost all campaigners as one of the most important reasons to abolish s 59.

This bill aims to strike a blow at the culture of violence in our society, and at the abuse of children, which is what section 59 is about. Section 59 legitimises violence¹⁷²

New Zealander's have a strong cultural heritage of tolerating violence and we are accepting of a relatively high level of aggression towards children. Sadly, we quietly accept far too much violence towards our children. We know that neighbours, teachers, friends and family members of children who are being abused, passively sit by, reluctant to get involved.¹⁷³ Sometimes this reluctance is due to fear of reprisals, other times it is an unwillingness to get involved with "family business" but sometimes it comes from an attitude that a certain amount of pain is part of childhood.

Removing the defence of reasonable chastisement sends a strong message that violence of any sort towards children is wrong and should not be tolerated in our society. This was discussed in the Hansard debates by politicians who eventually voted on the s 59 amendment.

...we are lowering the bar considerably. We are saying goodbye to horsewhips, jug cords, hosepipes, vacuum cleaners, pieces of wood, and all sorts of other implements that have been regularly used on children in the name of discipline.¹⁷⁴

Some people say that smacking or spanking is not violence...Some people say that the deaths of children like James Whakaruru or the little Ōtara boy have nothing to do with this bill. I say that they have everything to do with it. There is a spectrum of violence used against our babies and children, and one person's

¹⁷² (28 March 2007) 638 NZPD 8461

¹⁷³ For example, the neighbours who were aware of the violent abuse being perpetrated against Nia Glassie. Nia was later murdered by her mother's partner and his brother.

¹⁷⁴ (16 May 2007) 639 NZPD 9284, Katherine Rich

light, occasional tap is another person's beating or shaking to death—all in the name of so-called correction.¹⁷⁵

The final sentence of the above quotation strikes on one of the most fundamental reasons why the law needed to change. What one person views as a violent or abusive action is viewed by another as a perfectly reasonable act of parental chastisement. *Ausage* and *Spence* are examples of the differing interpretations of violence which are evident in our society. Interpretations of exactly what constitutes violence differ widely and therefore in order to protect the most vulnerable we must set the bar very low. This is so that there is no confusion and so that attitudes towards violence evolve to the point where it is socially unacceptable to hit your children.

The effect of these factors on academic and legal debate

As we have seen, New Zealand had been moving towards this change for decades and Sue Bradford was not alone in her determination to attempt to make that change happen. Major organisations, academics and politicians were actively campaigning for change. On June 21 1979 Jane and James Ritchie wrote to the Minister of Justice and proposed the repeal of s 59.

And, in fact, early this year, Sweden took the further step of actually legally prohibiting parents from striking children. While we do not consider this last step to be appropriate for New Zealand at this stage we respectfully ask that you consider the repeal of Section 59 of the Crimes Act. This would leave the law silent on the matter as is the case in all European countries with the exception of Britain.¹⁷⁶

Robert Ludbrook, a prominent lawyer specialising in children's issues was also an early campaigner against s 59 and the first Children's Commissioner Ian Hassell spoke publicly against the use of physical punishment.¹⁷⁷ In 2002 Dame Silvia Cartwright, the then Governor General gave a speech to the Save the Children conference pointing out the inconsistencies in the law and asking New Zealanders whether the right to smack children was so necessary that they were prepared to

¹⁷⁵ Ibid, Sue Bradford.

¹⁷⁶ Ritchie and Ritchie, above n 75 at 125

¹⁷⁷ Wood, Hassall, Hook and Ludbrook, above n 90, at 108 and 109

sacrifice the children who were killed or injured in the name of discipline.¹⁷⁸ In 2002 the repeal of s 59 was on the political agenda because it was the subject of two private members bills. Then Justice Minister Phil Goff had asked officials to look in to the ramifications of changing the Act but at that point was not willing to go against the sentiment of 75% of the public who did not want the Act changed. The Paediatric Society president Nick Barber had spoken out in favour of a law changing saying that doctors were seeing people getting away with abuse.

We have seen so many tragic cases of people getting away with what I would view as child abuse, where there is really quite severe bruising, that is being considered normal, appropriate discipline."¹⁷⁹

This issue did not arise unexpectedly with the drawing of Sue Bradford's bill. It had been debated and discussed for decades and the momentum towards change was building. If chance had not caused the drawing of the Bradford bill when it did, then it is still likely that New Zealand would have needed to tackle this importance issue at some point in the foreseeable future.

¹⁷⁸ "Children's advocates take heart at anti-smacking speech" The New Zealand Herald (New Zealand, 17 June 2002) <www.nzherald.co.nz>

¹⁷⁹ Ibid.

CHAPTER FOUR

OPPOSITION TO THE ABOLITION OF CORPORAL PUNISHMENT

Opposition to the law change - the role of the construction of original evil in the s 59 debate

I now move from the factors supporting repeal on to focussing on the opposition to the law change and in particular, opposition which resulted from the construction of children as inherently evil.

Essentially, this section is about the role of religion in this debate. When it came to the issue of the amendment to s 59, most of the mainstream churches either supported or were cautiously accepting. The heads of the Anglican Church, the Catholic Church and the Methodist Church were openly supportive of the new law. Whether or not individuals from the congregations were in favour is not known.¹⁸⁰ However in contrast, smaller fundamentalist, grassroots Christian organisations and groups were vehemently opposed to the new law. Examples of Christian groups who were opposed to the law included Focus on the Family, Sully Paea's Otara-based Crosspower Ministry, and Brian Tamaki's Destiny Church.

Religion and religious fundamentalism did not play an *overt* role in this debate. Most people who followed the debate through the media would have had the impression that this law was a bad idea because it turned ordinary parents in to criminals, turned children in to delinquents, took precious police resources away from serious crimes and would have no impact on the real child abusers. It was arguments such as these which were the focus of media and social attention. The Bible, and what it said about discipline, was largely kept out of the popular debate. I believe that this was deliberate and that the reason for this omission is summed up by Craig Smith from the group Family Integrity:

Today in New Zealand, it's no longer socially acceptable to publicly declare yourself a Christian," he said. "You'll get marginalized...Here, your religion is

¹⁸⁰ Simon Collins "Most mainstream churches back 'Yes' vote in smacking referendum" *The New Zealand Herald* (New Zealand, 12 August 2009)

your private affair — don't you dare bring it into the public arena. It's definitely a post-Christian society...We're not a pagan country yet, but we're moving that way pretty fast.¹⁸¹

Mr Smith makes a valid point that religion in New Zealand is largely a private affair. New Zealand is a secularised country and unlike countries such as the United States where conservative religion plays a huge role in politics, religion is generally kept out of the political arena.¹⁸² However, it is my belief, and a crucial part of my thesis, that religion did in fact play a fundamental role in this debate. I contend that the majority of the most vocal, tenacious and organised opponents of this law were campaigning against it on religious grounds. Specially, I contend that they were campaigning against it because of their belief in the biblical justification for smacking and other forms of corporal punishment but also on a wider level, because of a general desire to see their religious beliefs legislated for by the government. The removal of the parental right to smack was just another way in which the government was undermining conservative religious views concerning moral issues such as abortion, marriage, homosexuality, prostitution and pornography.

The right to assert one's religious beliefs and to be free to practice one's religion is an essential part of a free democracy, such as the one we have in New Zealand. There is nothing wrong with advocating for your religious beliefs with a view to influencing the opinions of others. People are likewise free to agree or to disagree with those viewpoints. However, I contend that the religious groups who opposed the legislation did not openly campaign on the basis that this law infringed on their (perceived) right to chastise their children in the way recommended by the bible. For the most part, they avoided the argument that this law change was akin to the other morally bankrupt laws which had been passed by the "raving homosexuals"¹⁸³ in Parliament such as the civil union legislation. Discussions centring on these arguments were largely kept out of the wider public arena.

¹⁸¹ Lee Duigon "New Zealand 'Smacking' Ban?: Abolition of Parental Authority?"(Chalcedon <<http://chalcedon.edu>>

¹⁸² The opinion voiced in the quote above did not come from a mainstream newspaper or media outlet but from the online arm of an American Christian educational organisation.

¹⁸³ Duigon, above n 181

Instead they choose to exploit the natural, but largely unfounded, fears and misconceptions about the law. This was done very effectively so as to create fear and confusion within the non-Evangelical Christian majority and garner support for a religiously motivated stance in a largely secular society.¹⁸⁴ As these groups represent a very small minority, if they were to have any hope of retaining their right to practice corporal punishment and to arrest the perceived moral decline in our society they needed to obtain support from the majority of New Zealanders. They did this by a very determined campaign based on four platforms.

1. Mass criminalisation and the cascade of effects - the law would criminalise thousands of good parents, lead to unwarranted prosecutions and result in children being taken away from their loving parents.
2. Smacking versus abuse – the law would not help reduce child abuse because corporal punishment is completely different to abuse. Abuse is already prevented by law and so forbidding smacking will have no effect on those violent parents who are impervious to the existing laws.
3. Government interference - this was another example of unnecessary government interference in the domestic sphere – the nanny state at its worst. Parents know their children best and should have the right to raise them as they see fit.
4. Parental powerlessness– smacking was a necessary and effective way of disciplining children and without it society would crumble into disorder with parents being unable to control their children.

Twenty years ago Jane and James Ritchie discussed the role of fundamentalism in the political arena:

Religious fundamentalism is only one part of the so-called ‘new right’ which encompasses many groups within our society who call for a return to fundamental principles...Whereas it was once thought that the political right was numerically tiny in relationship to the stridency of its message, that view

¹⁸⁴ In the 2006 census, 55.6% of people answering the question considered themselves to be affiliated with a Christian Religion down from 60.6% in 2001. 34.7% stated they had no religious affiliation, up from 29.6% in 2001.

obscures the degree to which substantial numbers of New Zealanders will leap upon any bandwagon that offers simplistic slogans.¹⁸⁵

In the 21st century this view is still appropriate and was evident during the s 59 debate. By using simplistic slogans, a numerically small group with a strident underlying message was able to garner the support of a significant portion of the population. However it must also be accepted that the arguments put forward by these lobby groups would not have been able to obtain such widespread support without there being a general acceptance of smacking within the community already. It is upon these two issues that the remainder of this chapter will focus – the tactics used by the conservative religious groups to gather widespread support and the underlying attitudes and beliefs which are held by many New Zealanders which allowed these tactics to succeed.

Having now set out my argument, I will turn to the answering the questions of who, why and how?

The key players in opposition

Larry Baldock

Larry Baldock was one of the main instigators of the anti-smacking referendum¹⁸⁶ and between 2007 and 2008 was instrumental in collecting the signatures required for that referendum. Larry Baldock is a former United Future MP and is the leader of the Kiwi Party, a party founded on Judeo Christian principles and which received 0.54% of the vote in the 2008 election. He was once heavily involved with the evangelical youth organisation “Youth With A Mission”¹⁸⁷ According to the Kiwi party website, the party disagreed with the s 59 amendment because a minority in Parliament were attempting to force minority beliefs onto the majority and hence criminalise the majority. The party also states that it is abhorrent for the rights of parents to discipline their children as they see fit to be taken away.¹⁸⁸ However Mr Baldock’s personal views on smacking are indicated in the

¹⁸⁵ Jane Ritchie and James Ritchie *Violence in New Zealand* (Allen & Unwin, Wellington, 1990) at 76

¹⁸⁶ Which will be discussed later in this chapter

¹⁸⁷ For information on Youth With A Mission see <www.ywam.org>

¹⁸⁸ www.thekiwiparty.org.nz

following quote; "I'm not opposed to the wooden spoon or ruler because you can control things with that better than you can with an open hand."¹⁸⁹

Craig Smith and Family Integrity

Craig Smith and his wife Barbara and daughter Genevieve facilitate the website for the group "Family Integrity."

Family Integrity is an informal association of families and individuals from all walks of life who are opposed to unjustifiable government interference in family matters. The objective is to keep the government out of where it does not belong in order to preserve and protect each family's personal integrity. Our organisation's focus at present is the bill to repeal Section 59, Sue Bradford's Crimes Amendment Bill.¹⁹⁰

Family Integrity states that its mission is to "keep the government out of where it does not belong", and its focus appears to be in the area of moral issues. Family Integrity is anti-abortion, against the cervical cancer vaccine Gardasil, pro-marriage, pro-life and anti-pornography. Family Integrity's approval of the use of corporal punishment on biblical grounds is indisputable, given the publication of the pamphlet *The Christian Foundations of the Institution of Corporal Correction* which will be discussed later in this chapter.

Sheryl Savill and Focus on the Family

Sheryl Savill was the proposer of the 2009 referendum and was the face of all "good mums" who gently smacked their children. Mrs Savill was the Programmes Manager for How to Drug Proof Your Kids at Focus on the Family NZ.¹⁹¹ Focus on the Family is "a global non-profit organization with a vision for healing brokenness in families, communities and societies worldwide through Christ."¹⁹² Focus on the Family is an evangelical parachurch organisation which actively promotes its socially conservative views. Focus on the Family is pro-marriage, pro-corporal punishment and pro-life. It promotes abstinence education rather than comprehensive sex education, supports counselling for Christians

¹⁸⁹ Simon Collins "No' vote campaigners divided on way forward after likely win" *The New Zealand Herald* (New Zealand, 20 August 2009)

¹⁹⁰ Family Integrity "About Us" <<http://familyintegrity.org.nz>>

¹⁹¹ Sheryl Savill "Standing Up For What We Believe" The New Zealand Centre for Political Research (10 August 2008) <www.nzcpr.com>

¹⁹² Focus on the Family "About Us" <www.focus.org.nz>

identifying as gay, lesbian or transgender so that sexual identity can be changed to align with their faith,¹⁹³ and promotes the value of stay at home mothering.¹⁹⁴

Bob McCroskie and Family First

Bob McCroskie facilitates the lobby group Family First. Family First was allegedly started so that it could be a voice to lobby for strong families and safe communities.¹⁹⁵ It is strongly and fundamentally pro-marriage and lobbies against violence on TV, prostitution, the “Boobs on Bikes” parade, abortion, the abortion pill RU486, the HPV vaccine Gardasil and the provision of childcare for under 2’s. It is founded, and aims to lobby based on, the foundations of Judeo – Christian principles.¹⁹⁶ The influence of Bob McCroskie on the debate cannot be underestimated. Family First issued over 90 media releases between February 2007 and August 2009 and is still making regular media statements about the Act.¹⁹⁷ The amount of media time devoted to Mr McCroskie and Family First’s opinions made them extremely influential. His personal feelings on smacking were that implements such as a wooden spoon were acceptable however he was wary of the use of belts.¹⁹⁸

The Vote No supporters

“Vote no” was the campaign to encourage voters to vote “no” in the 2009 referendum – to vote that smacking should not be a criminal offence. The organisations affiliated with this campaign were:

- Family First New Zealand
- Focus on the Family New Zealand
- Crosspowers Ministry Trust
- Family Life NZ - a ministry of Tandem ministries, an inter-denominational Christian organisation.

¹⁹³ Focus on the Family “Our position (same sex counselling)” <www.focusonthefamily.com>

¹⁹⁴ Focus on the Family “The value of stay at home Moms” <www.focusonthefamily.com>

¹⁹⁵ Family First “About Us” <www.familyfirst.org.nz>

¹⁹⁶ Ibid.

¹⁹⁷ Isaac Davison “Childcare worker wins payout over sacking” *The New Zealand Herald* (New Zealand 22 May 2010) <www.nzherald.co.nz>

¹⁹⁸ Grahame Armstrong “Smacking Plans Considered” *Sunday Star Times* (New Zealand, 24 August 2009) <www.stuff.co.nz>

- For the Sake of Our Children trust – a sponsor and supporter of, and supported and sponsored by, Family First and partnered with Church army and Beach Haven Anglican Church.¹⁹⁹
- Family and Child Trust – the link to this trust was broken on the vote no website and a standard internet search revealed no information on 26 may 2010.
- Unity for Liberty – A group established for the purpose of gathering referendum signatures. There is very little information available about this group.
- FIANZ - Federation of Islamic Associations of New Zealand
- Sensible Sentencing Trust
- Lifespring Pasifika Trust – The link to this group is broken on the vote no website and there is very little information available about it, with the exception of a Bebo homepage which refers to the trust as being a Pasifika-led organisation called to train, equip and support pasifika missionaries.²⁰⁰

It is absolutely impossible to ignore the fact that the majority of the main organisers of the referendum, its main organisational supporters and some of the most outspoken agitators against the repeal of s 59 were non-mainstream Christian groups or individuals, generally of an evangelical and extremely conservative persuasion - hardly representative of the majority of New Zealand residents.

The question of “Why?” Why was it so important for these lobby groups to retain the right to hit children?

As discussed in chapter one, the majority of early Protestants believed that physical discipline was an essential part of good parenting. Many modern day Christians still believe this. The current number of people who use the Bible to justify smacking or physical discipline is difficult to ascertain. However, the proliferation of websites dedicated to the topic is an indication that there are a significant number. The cases of *Ausage v Ausage* and *Spence v Spence* are

¹⁹⁹ For the Sake of Our Children Trust “Events” <www.forourchildren.org.nz>

²⁰⁰ Lifespring Pasifika on <<https://secure.bebo.com/Profile.jsp?MemberId=2839468755>>

examples of how the use of severe physical punishment, justified on biblical grounds, still occurs in our society.

The theological question of whether or not the bible requires Christians to practise corporal punishment is hotly debated and is unresolved. As with many such questions, biblical texts can be found and used to support both sides of the argument. Unfortunately, the focus of this thesis precludes an in depth focus on this issue. Regardless of who is “right” or “wrong” there is no doubt that there are many Christians who do believe that the bible directs them to use physical force in order to discipline and train their children. Most often this belief is found in evangelical or fundamentalist churches. For example, Bishop Brian Tamaki of the Destiny Church stated that the bill

..compromised the position of many Christians because it contradicts their God-given responsibility to raise children accordingly [sic] to biblical principle, which includes administering loving, proper corrective discipline in appropriate circumstances.²⁰¹

The practice of “administering loving, proper corrective discipline” goes by many names and takes many forms but for the purposes of this thesis, I will refer to it as Christian Corporal Correction. (“CCC”) Different proponents of CCC advocate slightly different ways of using physical punishment against children. It is illustrative to summarise some of the techniques and rationales put forward by three advocates of CCC so that we can begin to understand how important this belief is to those who practise it.

To begin with a New Zealand publication, we can look to Family Integrity’s publication “*The Christian Foundations of the Institution of Corporal Correction.*” For the chastisement of children aged 18 months or older, Craig Smith states that it is humiliating and unnecessary to carry out the punishment in public or pull down the pants of the child. The parent is advised that the process of discipline may take 10-15 minutes. The parent must take the child to a private place and collect the smacking rod before fully discussing the crime with the child. The child is required to identify which of the four “Ds”²⁰² he has broken

²⁰¹ Brian Tamaki “Destiny Churches Oppose Anti-Smacking Bill” (November 2006)
<www.destinychurch.org.nz>l

²⁰² Disobedience, disrespect, dishonesty and destructiveness

and explain to the parent why he needs a smack and not a “tongue lashing or isolation.” The child is to be given a chance to plead extenuating circumstances and the parent should call witnesses for cross examination. Once this process has taken place the parent should decline to smack if it is found to be inappropriate. When the smacking occurs, it is essential that the child complies with the direction to remain still. The parent should not restrain the child because submission and acceptance of guilt is essential to ensure the child voluntarily yields to the smacking.

American preacher Michael Pearl, from No Greater Joy Ministries is an ardent fan of CCC. In 2001 he wrote “*In defence of Biblical Chastisement, Part Two*”²⁰³ in which he states that regular and repeated use of the rod in both “training” and disciplining children is essential. He recommends the use of a light flexible instrument such as ¼ inch plumber’s supply lines which are cheap enough to be hung around the parent’s neck but also spread around the house and car so they are constantly visible and available. Pearl recognises that some parents spank too hard but maintains that most do not spank enough. When discussing the possibility of abuse he recommends asking trusted friends if the spanking has turned to abuse. However he then goes on to say that “you have no business having close friends who don’t share your views on child training.” He also recommends not being “so indiscreet as to spank your children in public” saying that he “gets letters regularly telling of trouble with in-laws who threaten to report them to authorities.” Pearl justifies the use of this constant physical discipline because the child’s “self-will may carry him into acts or motives that are evil” and when this happens the child is estranged from “all authority, from God, and from his higher impulses to be good.” Pearl counsels though that all is not lost. The child’s soul needs to be punished and he needs to “suffer for his misdeeds.” The child is in a state of guilt complex with his anger turned “inward because they hate the bad person they know themselves to be.” Parents are told to be “kind enough to punish him.” Parents need to care for and love their child enough to “pay the emotional sacrifice to give him ten to fifteen licks that will satisfy his need to experience payback.”

²⁰³ Michael Pearl “In Defense of Biblical Chastisement, Part 2” (2001) <www.nogreaterjoy.org>

On the Biblical Parenting Principles website²⁰⁴ it is recommended that a switch be used as the instrument of chastisement but that the hand is appropriate at times as well. The spanking needs to hurt and if mother becomes too emotionally involved and is unable to carry out the punishment, father needs to step in and complete the task. For parents who feared they might be damaging their child, reassurance is at hand:

..chastisement brings about a greater good that could not otherwise be accomplished. The scriptures do not deny that the child will suffer if chastised, but only that it is temporary and he will not die... Some people avoid pain and conflict at all costs-These people will not be able to care for their children. The child must experience the pain associated with chastising to be properly trained.

The authors recommend that to avoid the attention of prying neighbours and the authorities, children should be taught to cover their mouths with their hands when they cry. In apartments and other close quarters, the discipline should occur as far away from common walls as possible, air vents should be covered and if available, a walk in closet is the perfect place to carry out discipline as the sound will be best absorbed.

Despite differences in techniques, the focus is on the beliefs that; children are inherently sinful and prone to evil and that the bible requires parents to physical chastise their children in order that the foolishness and sin can be driven from the child; that the child must surrender to the authority of the parent and to God; and that although the whole process may be painful for both parent and child, it is much better than the alternative. The modern day version of CCC is almost indistinguishable from the early protestant child rearing methods which were discussed in chapter two.

There will be churches who advocate a much more moderate form of discipline than the examples given here and there can be no doubt that the practice of CCC will vary from family to family. Some parents will be able to follow the strident instructions found in these directions and will willingly inflict significant pain on their children. Other families will no doubt be more moderate in their use of

²⁰⁴ "Discipline: Loving Use of the Rod" Foundations for Freedom
<www.foundationsforfreedom.net>

CCC but will believe in its necessity and the principles underpinning it. Still others will accept it in principle but choose not to use it. What is clear from these writings is that the advocates of CCC genuinely believe that what they are doing is in the best interests of their children and is biblically justified.

Ultimately, whatever form the practice takes, the issue with the law change was that it removed the legality of behaviour which was practiced by many Christians as part of their religious observance. I surmise that this posed significant problems for those who used or supported CCC. For example:

1. It would undermine the parent's authority if their children knew that the practice of CCC was illegal.
2. Parents of the children's friends, teachers and neighbours might have been aware that the parents were using CCC due to the fact that it is generally part of a religious lifestyle choice. The law change would provide those people with a justification, even an obligation, to report the practice.
3. If the parent was reported, then it would have been difficult for the parent to exhibit the repentance necessary to avoid prosecution. It is likely that the justice system would have been lenient on parents who smacked in a moment of frustration but then expressed remorse and a desire to find better ways to parent. Deliberate and repetitive flouting of the law may have been taken much more seriously.
4. It was yet another example of how religion was being marginalised by government policy and legislation.

The stakes were high for the group of people who practiced or supported CCC and were much higher than for the average parent who occasionally gave their child a smack. It is easy to understand how they felt the need to fight this law to the bitter end. So why did they not argue against this law on the basis that it infringed on their God given responsibility and right to use corporal punishment?

I suggest that this was because the lobby groups would have been aware that New Zealander's are generally scathing of religious fundamentalism and strict adherence to biblical tenets. Outside of the communities who practice CCC, it is unpalatable to most New Zealanders and is not representative of the type of

physical correction most New Zealand parents practice. Research²⁰⁵ shows that for most New Zealand parents, smacking is carried out by the hand, when all other tactics have failed or when frustration and anger overwhelm the parent. It is not viewed as particularly effective or universally appropriate, but as having a place for certain children in certain circumstances and as being reasonably harmless. The vast majority of New Zealanders are actively opposed to the use of implements against children²⁰⁶ whereas the rod is advocated by CCC. The concept of deliberately taking your child in to a walk in wardrobe and instructing them to cover their mouth to muffle their cries of pain is abhorrent and yet doing so to avoid prying neighbours who are unable to distinguish cries from abuse from cries from “loving discipline” is acceptable for at least some advocates of CCC.

The “How” – How were opposition groups able to gather such support?

Regardless of the media tactics employed or the number of marches organised, opposition lobby groups would not have been able to keep this issue alive and heated for more than four years were it not for the fact that there was widespread support for smacking within our communities. Despite the general movement away from the use of corporal punishment, often even those who did not use physical punishment themselves were not keen to have it made a criminal offence or for there to be an explicit statement that it was wrong to smack your own children. There was an extreme reluctance to go that final step and I found this curious.

It is my contention that the reluctance to support a ban on smacking can be partly explained by the lingering effects of our corporal punishment history. As discussed in chapter one, in the 1960’s smacking was an almost universal practice in New Zealand homes. This was a direct result of the attitudes towards children which had been brought to New Zealand by British settlers and missionaries and the prevailing legal climate which encouraged the use of physical discipline. While the practice has been slowly waning and losing its dominance as the preferred form of discipline, even in 1987 two thirds of children were still being

²⁰⁵ For example, the research conducted by Jane and James Ritchie, Terry Dobbs and the Office of the Children’s Commissioner.

²⁰⁶ Carswell, above n149, at ch 2

smacked on a weekly or daily basis. Our historical and cultural connection to smacking is incredibly strong.

Corporal punishment came to New Zealand as a result of the dominant ideology of the time in Britain which was that children needed physical discipline so that obedience to parents, the State and to God was indoctrinated in to them.

Obedience led to the good order of the family and the country and ultimately to the salvation of the soul. The vast majority of New Zealanders no longer believe that physical discipline is necessary to ensure the salvation of the child's soul.

Nevertheless, ideas about punishment, sin, morality and the rights and responsibilities of parents persist. During the debate, the following themes reappeared constantly and their roots in the original basis for corporal punishment are obvious:

1. Children will inevitably behave badly.
2. Discipline is essential for keeping children in line.
3. While other forms of discipline can and should be used, the ultimate form of discipline, physical discipline, is sometimes needed for serious transgressions and is certainly necessary for the most reprobate children.
4. Physical discipline forms part of a loving relationship between a parent and a child.
5. The parent – child relationship is not harmed by the parent giving the child “loving” physical discipline so long as that discipline is inflicted in the interests of the child.
6. Appropriate physical punishment can be beneficial to the child because it promotes obedience, respect and is a means to ensure the child's physical safety.
7. Parents have both the *responsibility* to discipline children physically and the *right* to do so due to their privileged position as parents.
8. The problems seen with today's children are a result of permissive parenting and a lack of physical discipline. If the use of physical discipline is outlawed then there will be no way to control children and the good order of society will crumble further.

9. Children are necessarily subordinate to parents. Giving children “rights” which interfere with a parent’s ability to parent will lead to family and social chaos because the parents need to maintain authority over their children.

Many of the people who hold these views would not recognise that they have their basis in religious doctrine. Instead, these beliefs are just seen as morally, socially and culturally “right.” Generations of New Zealanders have been brought up with these beliefs and they are intrinsic to many people’s attitudes towards children. Asking people to stop smacking, and furthermore to attach criminal liability to it, confronts these underlying attitudes towards children and requires us to think about children and parenting in quite a different way.

So we can see that there were important reasons for religious conservatives to oppose this law and this opposition was supported by the underlying attitudes towards children which were prevalent in our society. Yet attitudes can and should change and evolve over time. I contend that it was, and is, time for an attitudinal change towards children. This change has been occurring at an increasing pace over the past two or three decades and this was a golden opportunity to accelerate a change which ultimately would have had a positive effect on child abuse rates and child welfare. Yet this goal of the legislation was stymied by the deliberate tactics used by the lobby groups and by the inadequate response from the legislature. I will now focus on those tactics employed by the lobby groups and show how focussing on these issues, rather than the honest reasons for the change, had a detrimental effect on the debate.

The platforms of opposition

Criminalisation of good parents and the cascade of effects.

One of the strongest arguments against repeal was the alleged dire consequences for the good parents who gave their children even a light smack. There are two branches to this argument. The first is that by the very act of giving their child a light smack, a parent would be criminalised. Thus the law was criminalising potentially thousands of good parents. Connected with this was the fact that under the proposed bill, even the most benign actions taken by a parent against their child would satisfy the legal definition of assault. Thus a parent was committing

multiple criminal offences when he attended to day to day parenting tasks such as feeding, dressing and bathing.

Secondly, that because they had committed these illegal acts, parents would *inevitably* be the target of unwarranted investigation by CYF and the police and that they would be prosecuted, sent to jail and separated from their children.

Then there are those loving, committed parents who on one occasion of stress take physical punishment too far. *Prosecutions are now inevitable here*, but depending on the severity of the case may still not be the best approach.²⁰⁷ [Emphasis added]

Family First was particularly keen to focus on the aspect of mass criminalisation and the cascade of negative effects. It employed a concerted media campaign which target and exploited these fears.

“Please don’t take my daughter”

“Parents assaulted with bogus smacking prosecutions”

“Reality Hits Parents”

“Will you be next?”

These quotes are taken from posters prepared and distributed by Family First and which appeared in major newspapers.²⁰⁸ Advertisements prepared and distributed by Family First claimed;

Parents assaulted with bogus smacking prosecutions. Is anyone surprised? Wasn’t the prosecution and persecution of good parents predicted even before the anti-smacking bill became law? ...our fears have been realised with good parents being prosecuted and persecuted over trivial matters or unproven claims. And the list continues to grow.....²⁰⁹

These advertisements then go on to give examples of good parents being “persecuted and prosecuted.” When taken at face value, these examples would certainly make parents fearful. The language used in the advertisements is

²⁰⁷ Bert Jackson “Stressed out parents are useless at helping children” The Kiwi Party <www.thekiwiparty.org.nz>

²⁰⁸ Reprints can be found in appendix four.

²⁰⁹ Family First “Parents assaulted with bogus smacking prosecutions” <www.familyfirst.org.nz>

deliberately provocative and designed to create an emotional reaction. Families are “traumatised,” parents are “shocked”, “surprised”, “humiliated” “horrified” “nervous” and “feel like criminals.” Children are described as being “upset and [asking] “what’s wrong mummy?” and “[pleading] with police not to take Granddad away.”

The facts are very clear that since the law was passed in 2007, parents have not been erroneously prosecuted for minor smacking. While we know this in hindsight, it was also imminently predictable from the outset. Yet Family First chose to focus a large part of its campaign on this mistaken and incorrect presumption. In the process, they garnered support from concerned parents who were unable to separate the propaganda from the facts and from those who had an inherent mistrust of the police, the courts and Child, Youth and Family.

The fear of mass criminalisation and whether or not this was a valid concern.

For the average New Zealander, it seems logical that if a person breaks the law then that person is a criminal regardless of whether the person has been apprehended, prosecuted and convicted. Parents did not want to be committing a criminal offence when interacting with their child either in the course of day to day parenting tasks, or in the course of carrying out discipline. It seemed incomprehensible that practices which had been acceptable for generations were now seen as “assaults.”

Prior to this debate it is likely that most New Zealanders would not have been able to define what an assault was. “Assault” conjures up visions of broken noses, blood, pain, aggression, bar brawls, domestic violence and so on. Yet during the debate, it was pointed out that the legal definition of “assault” under s2 of the Crimes Act 1961 is very simply:

“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”

There is no need to show malicious intent, injury or excessive force. The slightest deliberate touching of another person, or even the threat of it, is potentially a legal

assault. In relation to children and parents, this included, picking a child up to put him in time out, taking a child out of a cot or giving him a light smack on the hand or bottom. Without s 59, there would be no *specific* legal protection given to parents and these actions theoretically constituted a legal assault.

This had people very concerned but for two different reasons. The first was in relation to the day to day touching which was now going to be seen as an assault and the second was specifically in relation to light smacking.

In theory, the first fear was rational and was even supported by legal professionals.²¹⁰ There is a genuine concern that in normal adult relationships, we are usually not required to touch each other without overt or implied consent. In contrast, within the parent-child relationship there is constant touching and manhandling. Basic acts such as dressing, changing nappies or getting a child in or out of a car seat necessitate the use of (sometimes significant) force. Furthermore, parenting often requires the use of force in less mundane circumstances such as restraining a tantruming child or grabbing a child who is about to run on to the road. Thus the relationship between the parent and the child gives rise to more opportunities to potentially infringe the law. Eventually this concern was addressed in the amendment inserting the parental control section. This section will be looked at in more detail in chapter ____.

The second fear was also legitimate because it was true that a smack could easily have been construed as an assault if the s 59 defence was removed. Therefore, a parent would be committing the offence of assault if they smacked their child. However, there is a difference between doing something which is a criminal offence, and being a “criminal”. The public need not have feared being made criminals. A person is not a “criminal” until he or she has been found guilty in a court of law of breaking a law. If the situation was different, a person would be a “criminal” if they had done any of the following things:

- Left their 13 year old child alone in the house while they went to the supermarket.
- Damaged the property of a cheating partner, for example, throwing a vase at a wall.

²¹⁰ David James “Criminal Responsibility for Domestic Discipline: The Repeal or Amendment of Crimes Act 1961 section 59” (Auckland District Law Society, October 2005) <www.adls.org.nz>

- Painted the neighbours side of the fence without permission.
- Carved initials and a heart into a tree on public property.
- Urinated in public where other people might see.
- Peered into someone's house as they walked past on an evening stroll.

These are just some of the criminal offences created by the Summary Offences Act 1981. This list does not even come close to covering the myriad of other actions which are illegal under other legislation such as the Education Act 1989, The Dog Control Act 1996 or the Fencing of Swimming Pools Act 1987. Failing to fence your portable pool is an offence under the Fencing of Swimming Pools Act 1987 yet hundreds of people flout this law every year. People break laws with alarming regularity, sometimes knowing that the likelihood of being caught is minuscule and sometimes in ignorance. For example, s25 of the Education Act 1989 requires that children who are enrolled in school attend school on every day that the school is open. This law is regularly broken by parents who remove their child from school for purposes such as family holidays.

Nonetheless, even if a person was not technically “a criminal” if he lightly smacked or touched his child, he certainly may have committed a criminal offence and this was a significant cause for concern because it opened the door to the investigation, prosecution and conviction which *would* make him a criminal. This fear was equally well exploited. The public was encouraged to believe that there would be multiple unwarranted investigations and prosecutions of good parents. “Good” parents were going to be convicted and have their children taken away, all for a “light tap” on the child’s hand or bottom. According to lobby groups such as Family First, parents were paralysed with fear that almost any action of discipline against their child could be used against them by meddling neighbours, interfering teachers and vengeful children. If one had believed the hype, the court system was going to be imminently flooded with good parents being prosecuted for lightly smacking their children – inevitable given the “fact” that anyone who smacked their child was now a “criminal.” The police were going to have no choice but to investigate and prosecute, and conviction was almost certain.

It is ironic that such power and resources were ascribed to the police who are generally seen as underfunded, under-resourced and somewhat impotent in the face of rising crime. Yet the impression was that the police were suddenly going

to shift their scarce resources to the area of smacking prosecutions. This was simply never going to happen. However, it must be remembered that some sectors of our society have not had positive experiences with the police or with Child, Youth and Family and so were susceptible to claims that parents were going to be persecuted. Furthermore, corporal punishment is an integral part of everyday living for some cultures within our community. The special risks posed to these cultural groups, particularly the Pacific Island community, are outside the scope of this work but raise very valid concerns.

To counter this argument, proponents of the Bill tried to reassure the public by saying “don’t worry, minor smacking is technically illegal but the police won’t prosecute you for it.” This statement was realistic and has been borne out by two year’s worth of police statistics which show that as at September 2010 there had only been three prosecutions for “smacking events” since June 2007.²¹¹ However, it led to the inevitable rebuttable that legislation which is not going to be enforced is unnecessary and ludicrous. It became a circular argument. Opponents fed the fear of mass prosecutions and the more supporters tried to reassure parents that they would not be prosecuted, the more opponents used this reassurance to show that the law was foolish.

The difficulty faced by the promoters of the Bill was that explaining the workings of the justice system takes more than a concise sentence. Police investigating an alleged crime have the primary responsibility to decide whether or not to lay charges against an alleged offender. They must utilise their discretion. Serious assaults against children can be charged under section 194(a) of the Crimes Act 1961. Less serious assaults can be charged under s9 of the Summary Proceedings Act 1981.²¹² In the case of minor offences, the police prosecutor will try the case. More serious cases will be tried by the Crown Prosecutor. Essentially, whichever prosecutor ends up with a case needs to establish whether or not the case should be brought to trial. The Crown Law office has prosecution guidelines which guide them in the decision whether or not to prosecute an offence. The guidelines make it clear that the decision to prosecute is not one to be undertaken lightly,

²¹¹ New Zealand Police “7th review of Crimes (Substituted s 59) Amendment Act 2007” (press release, 30 September 2010)

²¹² New Zealand Police “Police practice guide for new section 59” (press release, 19 June 2007)

specifically because of the ramifications for the accused but also for the wider societal implications.²¹³

The guidelines refer to two major considerations. Firstly, evidential sufficiency and secondly, the public interest. Underneath the heading of public interest come numerous issues which must be considered. A small sample of these is:

- The seriousness or triviality of the offence – does it really warrant the intervention of the criminal law.
- Whether the prosecution might be counter-productive, for example in making the accused a martyr.
- Whether the consequences of conviction would be unduly harsh and oppressive.
- The attitude of the victim to prosecution.
- The likely length and expense of a trial.²¹⁴

The guidelines make it clear that many crimes are likely to go unprosecuted. Light smacking offences were highly likely not to be pursued, not because the law was unnecessary or ludicrous, but because in the majority of cases the public interest would not be served with prosecuting a parent for a trivial and inconsequential smack. This would have been so even without the specific direction which was eventually included in s 59(4) of the new law and which will be discussed in chapter five. Common sense prevails concerning the issue of assaults against adults. If the “assault” is trivial, inconsequential and not part of a pattern of abusive behaviour it is unlikely it will even be reported, let alone investigated or prosecuted. Unfortunately the reality was that explaining the workings of the justice system in a way which alleviated people’s natural fears while at the same time not making the law look impotent or unnecessary was difficult for supporters. It was easier for the public to be swept away with the easily understood, yet misguided idea that “all parents who lightly smack their children will be criminals.”

Family First tried very hard to “prove” that parents were being unfairly targeted and that this was resulting in investigation, prosecution and children being taken

²¹³ Crown Law Prosecution Guidelines as at 1 January 2010

²¹⁴ Ibid, at 7-12.

from their parents.²¹⁵ However, it either deliberately chose to publicise these “cases” in a manner which served its own purpose, or blindly believed the version of events told to them by the persons involved. When psychologist Nigel Latta, police commissioner Howard Broad and Social Development Ministry chief executive Peter Hughes conducted a review of the legislation in 2009, they found that the police, CYFS and other relevant authorities had acted appropriately in the cases reported by Family First.²¹⁶ The actual facts were quite different to the facts as presented by Family First. For example, Case 17, as referred to by Family First was reported as

In 2008 a grandfather was charged and convicted of assaulting his grandson for tipping him out of a beanbag type chair in order to ‘get him moving’. The boy had refused to turn the TV volume down and then refused to turn the TV off when asked. Police arrested the grandfather after the boy rang 111. When police arrived, the grandmother and grandchild pleaded with the police not to take granddad away, yet he was held in prison cells for two nights. His lawyer advised him to plead guilty to avoid cost and hassle.

This report focuses on the supposed misbehaviour of the child, giving justification to the grandfather’s actions, implies that the child maliciously rang 111 and implies that lawyers are advising innocent people to plead guilty. Yet according to the Latta report, when the man “tipped the child out of the beanbag” he hit his head on a metal pole. The man was the grandmother’s partner and entered into a verbal argument with her where he was acting aggressively and hit her with a pair of trousers he was holding. The grandmother feared for her safety and the safety of her grandchild and called the police.²¹⁷

It would be wrong to discount the possibility that some complaints concerning allegations of smacking offences, which led to investigations undertaken by the police and CYF, would be found to have little merit or even to be vexatious. For the families involved, the process of investigation would certainly be intrusive and

²¹⁵ See appendix four

²¹⁶ Howard Broad, Peter Hughes and Nigel Latta “Review of New Zealand Police and Child, Youth and Family Policies and Procedures relating to the Crimes (Substituted Section 59) Amendment Act” Report to the Prime Minister, Minister of Police and Minister for Social Development and Employment (1 December 2009)

²¹⁷ Ibid, at 25.

seriously upsetting. However, we must find a balance between avoiding unnecessary intrusion in to the family and overlooking cases of serious or ongoing abuse. It was wrong of Family First to frighten parents with the threat of bogus prosecutions before the law had even been passed and it was wrong to provide only the most rose tinted version of the cases that supposedly “proved” that this was in fact occurring. Focussing on the issue of criminalisation and the cascade of effects made the general public unnecessarily fearful of the effects of this law and the dire predictions that they made have not been borne out in reality and should never have been allowed to take hold in people’s minds.

Smacking versus Abuse: the difference between “us” and “them”

During the debate, promoters and supporters of the Bill regularly referred to a link between child abuse and smacking. The argument was that smacking, although not abusive in itself, might become abusive under the right circumstances and a “light” smack might be part of an abusive pattern of behaviour.²¹⁸ This argument provoked ire in the public and this indignation was fuelled by the pro-smacking lobby groups. Lobby groups sought to make an unequivocal distinction between those who abuse their children and those good parents who administer loving physical discipline for their child’s benefit. This was done by focussing attention on the difference between angry smacking and calm smacking, and by consistently using language to align smacking with love.

Smacking in Anger versus calm smacking

Many of the lobby groups who supported smacking were advocating for a *controlled* form of smacking. An essential part of CCC is that the spanking should only be carried out when the parent is calm and in control. During the debate, anger came to be seen as the determining factor in whether or not smacking was appropriate or not. It was the emotion which could lead parents on the slippery path to abusive behaviour. One example is this exchange between Paul Holmes and Sheryl Savill, during an interview for the TV show Q & A:

PAUL The trouble with smacking with most people is that most times it would happen in anger wouldn't it?

²¹⁸ “The Law and Child Abuse” The Yes Vote – NZ Referendum on Child Discipline 2009
<<http://yesvote.org.nz>>

SHERYL Anger's a very dangerous area to get involved with. When parents smack out in anger that is wrong, I mean we have to be really careful and I think education on it is a big issue²¹⁹

Controlled smacking was promoted by lobby groups as a benign and appropriate means of discipline. The claim of "never smacking in anger" was taken up quickly as the catch cry of many people who wanted to retain the right to smack or who wanted to justify their current or past behaviour. For example:

"It's not to be done all the time, and only with an open hand, definitely not with a closed fist or around the child's head," Ms Matena said. (...) *I never smacked them in the heat of the moment*. There's a big difference between giving a smack and a beating. I never beat my children," she said.²²⁰
(Emphasis added)

Smacking my son was a parenting strategy of last resort and was immediately effective when dealing with defiance and dangerous situations. *I've never smacked in anger* and never without issuing a final warning first. I'm a text-book smacker.²²¹ [Emphasis added]

The problems with this argument

There is academic research which supports the view that a distinction can be made between instrumental (calm) smacking and impulsive (angry) smacking. Instrumental smacking usually forms part of the parent's usual discipline repertoire and is approved of by those parents. Because its use is commonplace, children tend to be more accepting of it. This distinction has been used to differentiate discipline from abuse.²²² However, even if the children are more accepting of it, that does not adequately address the fact that it is against the child's basic human rights.

²¹⁹ "Q+A: Paul Holmes interviews Sheryl Savill and Bob McCroskie" TVNZ (26 July 2009) <<http://tvnz.co.nz>>

²²⁰ Anna Leask "Arguments for and against the right to smack" *Star Canterbury* (Christchurch, 23 October 05) <www.starcanterbury.co.nz>

²²¹ Sacha Coburn "Smack on the hand worth time in jail" *The New Zealand Herald* (New Zealand, 26 February 2008) <www.nzherald.co.nz>

²²² Elizabeth Gershoff "Corporal Punishment by Parents and Associated Child Behaviours and Experiences: A Meta-Analytic and Theoretical Review" (2002) 128 *Psychological Bulletin* 539 at 553.

Furthermore, it is impossible to know just how many parents genuinely only ever smack in a controlled manner. We may assume that there are some. However, research suggests that most do not. Returning to the research done by Jane and James Ritchie in 1963, the mothers interviewed were *in almost universal agreement* that punishment should be swift and immediate and not a deliberate act of judgement. “I never hit a child except in anger!”²²³ The Ritchies reported that

a surprising number recognise that they spank to relieve their own feelings; it “clears the air”, or “He may not act any better but I certainly feel better.”²²⁴

More recently, Masters of Arts student Terry Dobbs interviewed 80 children about their experiences of physical punishment and her findings were published in 2005 by Save the Children. One of her key findings was that children associated physical punishment with anger, both their own anger and their parents’.²²⁵ Terry Dobb’s research has been criticised by pro-smacking lobbyists and came under significant criticism in *By Fear and fallacy: The repression of reason and public good by the anti-smacking lobby in New Zealand*. However irrespective of whether there were issues with her methodology, the printed statements of the children show that parents do smack in anger. “You can’t have a say when they are angry and are hitting you, it’s too late for that” (9 year old boy)²²⁶, “Adults hit in anger, they may not mean to hurt the child but they do” (13 year old girl)²²⁷

Furthermore, research published in 2009 by the Families Commission showed that 41% of respondents smacked their children. However only 9% of respondents believed it was effective as a means of discipline.²²⁸ The question must be asked – if smacking is not effective, why would a parent do it? We can attempt to extrapolate answers to this. The parent may not know any other form of discipline or the parent may be hopeful that the smack might become effective, even though it was not effective in the past. Most likely though, the smack is administered in the heat of the moment because the parent has reached the end of

²²³ Ritchie and Ritchie n 78, at 112

²²⁴ Ibid, at 113.

²²⁵ Terry Dobbs *Insights: children and young people speak out about family discipline* (Save the Children New Zealand, Wellington, c2005) at 10

²²⁶ Ibid.

²²⁷ Ibid, at 52.

²²⁸ Julie Lawrence and Anne Smith *Discipline in context: families’ disciplinary practices for children aged under five* (Families Commission, Wellington, 2009) at 19

their tether. As per the Ritchie's earlier research, a smack in anger alleviates the pent up emotion in the parent.

So there is a wide gulf between the *concept* of calm smacking and the *reality* that smacking often occurs when parents are angry at their children. Pro-smacking lobby groups were effectively stating that incidences of physical punishment could be distinguished on the basis of the mental state of the parent at the time of the punishment. There are two problems with this. If smacking is a socially and legally sanctioned action, parents will be more likely to resort to it in times when frustration, anger or tiredness overwhelms. It is confusing to tell parents that they can smack, but only if they are calm when they do it and only when they are motivated by nothing more than a genuine desire to correct behaviour, rather than to punish.

By advocating against all smacking, we reduce the possibility of parents going too far and injuring their children. We also remove the difficulties caused by the fact that people may interpret calmness and anger differently. For one person, calmness may connote an internal sense of peace. For another person, calmness may be the absence of external signs of anger such as yelling and slamming doors. On the outside the person might be exuding "calmness" but inside they are seething with rage towards the misbehaving child.

The second problem with making a distinction between angry smacking and calm smacking is that calm smacking is not necessarily better than angry smacking. Proponents of smacking argue that it is effective - but effective at what? As we discussed in chapter three there is little solid evidence about the efficacy of smacking. However the implication from those who support smacking is that smacking is good at making the child do what the parent wants them to do. According to Craig Smith, smacking is very effective at driving the foolishness from out of the child's personality so that the child will not become a fool. It clears the air of the anger, guilt and mistrust caused by the child's sin and allows everyone to move on from the offense.²²⁹

However by necessity, *the smack must hurt to be effective*. If the smack did not hurt, it would not cause the cessation of the misbehaviour or cause the child to

²²⁹ Craig Smith "Christian foundations of the institution of corporal correction" (Family Integrity, 2005) <www.familyintegrity.org.nz>

repent and obey. Trying to argue differently is impossible. Smacking advocates were actively promoting making a conscious decision to *hurt* one's own child. Occasionally parents must allow their children to experience temporary pain for the child's own good, such as a blood tests or stitching up a cut. Should smacking be placed in this category of necessary pain? Religious advocates of smacking would argue yes.

Consider this instruction on smacking written by James Dobson Ph. D and published on the website for Focus on the Family. In answer to the question "I have spanked my children for their disobedience, and it didn't seem to help. Does this approach fail with some children?" James Dobson replies;

The spanking may be too gentle. If it doesn't hurt, it doesn't motivate a child to avoid the consequence next time...Be sure the child gets the message — while being careful not to go too far.²³⁰

Mr Dobson is right, if smacking does not hurt then it does not work. In my opinion making a calculated decision to inflict pain on one's child is potentially more callous and damaging than a swift smack delivered immediately. A swift smack can be due to many causes; anger, frustration, tiredness, reaching the end of one's tether or ignorance. The intention is often not to hurt the child. The motivation might be to stop the behaviour, shock the child, clear the air, break the pattern of relating or alleviate the emotion. Sometimes the smack is simply reflexive. These are *not* good arguments for smacking, far from it. However the aim of calm smacking is to *hurt* the child in order to drive the foolishness from her heart. In what other context do parents actively try to hurt their own children, when non-hurtful alternatives exist? Supporters of CCC will not see a problem with the paradox of hurting those we are supposed to love, but did those members of the public who were quick to claim they never smacked in anger really think about what this meant? Or did they simply latch on to a proposition promoted by the fundamentalist Christian lobby groups because on the surface it seems like a palatable justification?

²³⁰ James Dobson "Does spanking work for all kids?" *Focus on the Family*
<www.focusonthefamily.com>

The “loving smack “

A second way of distancing smacking from child abuse was to use euphemistic terms such as “light tap,” marrying the concept of discipline with the adjective “loving” and aligning smacking with “good” parenting. Equating love with smacking was a clever linguistic way of garnering support for the pro-smack campaigners and it certainly took hold in people’s minds.

“If these smug, hand wringing, know it alls you cant honestly see the difference between a *loving smack* on the botty of an errant child by a *loving parent* and the actions surrounding the likes of Lillybing or the Kahuis it is they who have the real problem.²³¹ [Emphasis added]

The implication was that corporal punishment was acceptable so long as the parent loved the child.

Whether or not he understood how serious the situation, it was with *loving fatherly discipline* that Jimmy flicked his son on the ear as he started peddling away.²³² [Emphasis added]

The deliberate equating of love with physical discipline implies that an action is acceptable or unacceptable based on the feelings of the perpetrator to the child and the relationship between them. An action, which would be illegal and morally wrong if perpetrated by a stranger against a child, is legal and morally right if perpetrated by a parent against their child. The inference is that parents always love their children.

Likewise, the constant use of minimising language by lobby groups also served to put distance between “the abusers” and “the good parents.” When talking about abuse, words such as belting, hiding and thrashing were used. When talking about good parenting words such as “light tap” and “loving smack” were used.

“A *light tap* is often the most effective way of teaching them not to do something that is dangerous or hurtful to other people - it is a preventive measure²³³ [Emphasis added]

²³¹ “So far your views are 85% against the smacking bill” *The New Zealand Herald* (New Zealand, 28 March 2007) <www.nzherald.co.nz>

²³² Family Integrity “Blog Section 59” (16 January 2008) <<http://familyintegrity.org.nz>>

Members of the public also used the power of language to minimise their behaviour.

“Some children do not respond to being told No etc but a *wee gentle* smack gets their attention and they think twice next time.”²³⁴ [Emphasis added]

Pro-smackers sought to create a wide gulf between assaults and smacking so that there was no link between the two actions. On one side were pitted the “real” child abusers and on the other side were the “good Mums and Dads” who were trying to raise well behaved children with judicious use of mild physical punishment. It was argued that there was no relationship between appropriate physical punishment and child abuse.

Of course, the beating or the thrashing of a child in anger is a totally different matter. That is exactly the point. There is a dichotomy between a smack, in the context of *loving* discipline, on the one hand, and the beating or thrashing of a child in anger, on the other.²³⁵ [Emphasis added]

Family Integrity, Family First and other conservative lobby groups chose to focus only on the “good” parents whose smacking behaviour was very mild and was at the furthest end of the discipline/abuse continuum. Their argument was that real child abusers would pay no heed to a law banning smacking because real child abusers were already ignoring the law and that good parents were acting appropriately and in the best interests of their children. This rose-tinted view of parenting was shared by Larry Baldock. In answer to the question “Will this law make children safer and families healthier? He answers

... The natural love and affection which form the unique bond between a child and their mum and dad ensures that even discipline, although painful at times, builds and enriches family life to the benefit of us all.”²³⁶

²³³ “Smacked children more successful” *The Telegraph Group: the West Australian* (Australia, 4 January 2010) <<http://nz.news.yahoo.com>>

²³⁴ “Discussion: anti smacking law” Grown ups 50+ Community quoting Nandi (23 March 2007) <www.grownups.co.nz>

²³⁵ United Future “Copeland Speech on anti-smacking bill” (Media release , 22 February 2007)

²³⁶ Larry Baldock “Will this law make children safer and families healthier” Campaign 4 Democracy <<http://4democracy.co.nz>>

This argument gained great traction during the debate because on a case by case basis it is usually true. The vast majority of parents who have administered a relatively light and inconsequential smack to their child will never go on to commit a more serious assault. Furthermore, members of the public wished to categorise themselves as “good parents” and so were susceptible to any arguments which helped to validate their behaviour.

The problem with this dichotomy

The pro-smack lobby groups used this dichotomy to advance their own purposes with little regard to the effect of polarising parental behaviour into either “good” or “bad.” Opponents of the law did not support the concept that smacking could be on the same continuum as child abuse, albeit at different ends. However, the line between abuse and discipline is very unclear. What seems to be “minor” child discipline can certainly be considered to be, or become, abusive under certain circumstances. For example:

- When each smack is relatively minor but smacking happens so frequently as to cause the child repetitive pain and anticipatory fear. Authority for the concept that repeated trivial acts can be abusive is found in the Domestic Violence Act 1995. Section 3(4) states that a number of acts which seem trivial when viewed separately may together show a pattern of behaviour which amounts to abuse. Opponents of the law were unwilling to recognise that our law already supports the view that multiple trivial acts can be experienced by the victim as abusive.
- When an attempt at discipline escalates to assault. Parents who assault their children often set out to discipline them. Studies have shown that the vast majority of non-sexual abuse cases began as disciplinary actions²³⁷ Discipline has the potential to turn to physical violence for several reasons. One is that the child no longer responds to the type or intensity of the discipline and the parent escalates the punishment in order to obtain compliance.²³⁸ Another is when a parent does not realise that their behaviour has crossed the line between discipline and abuse. Studies have

²³⁷ Joan Durrant “Physical Punishment and Physical Abuse” (4 June 2004) Children Issue 50, 4 at 4 <<http://yesvote.org.nz/files/2009/02/dr-j-durrant-children-50-20041.pdf>>

²³⁸ Ellen Whipple and Cheryl Richey “Crossing the line from physical discipline to child abuse: How much is too much?” (1997) 21 No. 5 Child Abuse & Neglect 431 at 432-433

shown that what a parent sees as the threshold for appropriate discipline is directly related to the discipline they received themselves. Thus a parent who was, for example, hit using an implement is much more likely to approve of the use of implements in disciplining their own child.²³⁹ The parent's understanding of what is abusive is coloured by the abuse they suffered themselves and thus the risk of them perpetrating similar offences against their own children is heightened.

- When discipline has an unintended consequences. Parents have learnt through experience that smacking often results in the immediate cessation of the child's negative behaviour and thus they set out to discipline with the aim of achieving this positive goal. However the heightened sense of arousal which occurs as a result of the parent's anger or stress results in the parent using a level of force which was unintended.²⁴⁰ Alternatively, a small smack can become injurious if, for example, the child accidentally stumbles as a result and hurts themselves as a result.
- When the parent believes their behaviour is reasonable but it is experienced by the individual child as emotionally abusive. The discipline may be unnecessarily harsh, inappropriate to the child's age, out of proportion to the child's offence,²⁴¹ or not accompanied by parental warmth and affection. Even if the parent cannot see their action as physically abusive, their behaviour is certainly emotionally abusive because of the fear and resentment which is created within the child.

By concentrating on the extreme ends of the discipline spectrum, these risks were ignored or minimised during the debate. Ultimately, this polarisation failed to address the fact that too many members of our community have very differing ideas on where the boundaries are between appropriate discipline and abuse, or are unwilling or unable to remain within appropriate boundaries. This puts too many New Zealand children at risk of injury every day. Banning corporal punishment had the potential to force these parents to re-evaluate their parenting. Provided sufficient resources were made available, this was an ideal opportunity to educate parents on how to discipline without risk.

²³⁹ Durrant, above n 237, at 5

²⁴⁰ Ibid.

²⁴¹ Whipple and Richey, above n 238, at 432-433

Anahera Herbert-Graves is the chief executive of the Kaitaia based Runanga A Iwi O Ngati Kahu and is a perfect example of how this law could work and has worked for some families who use or have used borderline disciplinary measures in the past. Having being raised in a family where smacking in anger and frustration was commonplace, Mrs Herbert-Graves used similar disciplinary tactics on her daughter as her father did on her. When her daughter was 4 years old she made a concerted effort to become gentler but when her daughter was 14 years old, Mrs Herbert-Graves “lost it” and physically thrashed her. Vowing never to behave in that way again, Mrs Herbert-Graves and her husband have tried to be non-abusive in every way since becoming whangai parents to their grandchild four years ago.

“We’ve had our moments of slipping – being exasperated with him and have smacked him” she admitted. But she said she would have been “more prone to slip” if the law had not changed to ban physical force for correction. “I’d like to think we would have been able to change without the law, but it gave a public face to what we were trying to do privately.”²⁴²

This law change had the potential to have a positive impact on the lives of children such as the 13 year old girl who reported “One time my mum was really angry and she like slapped me in the face and that really hurt and she called me a bitch and there was a hand mark.”²⁴³ This behaviour would be abusive if perpetrated by a man against a woman. Yet in terms of society’s views on disciplinary action, it sits on the borderline. It exists nowhere in the picture painted by pro-smack lobby groups. It is neither “the bash” nor is it “loving discipline.” It is in these grey areas that this law could have had the most valuable effect. The attitude which should have been fostered was summed up by Kerry Williamson, a writer for the Dominion Post.

I know where to draw the line, when to stop. But bad parents don’t. And if it takes a law to teach them that, then so be it, even if that means I have to sacrifice a parenting tool that I think in the right situation is okay.²⁴⁴

²⁴² Simon Collins “Law change the nudge I needed, says Maori leader” *The New Zealand Herald* (New Zealand, 30 July 2009) <www.nzherald.co.nz>

²⁴³ Dobbs, above n 225, at 46

²⁴⁴ Kerry Williamson “I won’t smack my son” *The Dominion Post* (New Zealand, 23 June 2009) <www.stuff.co.nz>

By denying the existence of the borderline cases, pro-smack lobbyists chose to prioritise their right to smack over the rights of children to a violence free upbringing.

Government interference

A common refrain during the debate was that the Government should keep out of the private sphere of the family. In particular, as we have discussed, Family Integrity stridently argued that the Government should keep out of the intrinsically private relationship between parents and children and has no business in passing legislation which impacts on a parent's ability to raise their children.

The development of government policy and legislation is by necessity going to involve a balancing of various rights and will often walk a fine line between too much and too little interference. However the generalised argument that the government should keep out of "family matters" to protect personal integrity is absurd.

This is a clear example of a misappropriation of a concept by the conservative lobby groups. Once again, the real agenda behind the argument was hidden behind catchy slogans such as "the nanny state" and "childless women telling you how to raise your kids." The real agenda was not to stop the government interfering in family matters but to stop the government passing legislation which did not support their conservative views.

Conservative lobby groups are just that – "lobby groups." They advocate for legislation and policies which accord with their views. They are no different to any other lobby groups, such as environmentalists lobby groups, which attempt to show the Legislature that their opinion is correct and should be given legislative backing. Romantic relationships between adults and a woman's pregnancy are two examples of intensely private matters. Yet conservative lobby groups are keen to promote government interference in these matters through legislation which defines who can be considered to have a legally recognised relationship, and when and how a woman can terminate a pregnancy.

It is essential that the government interferes in "family matters" to protect the vulnerable, define relationships and provide mechanisms for dealing with those relationships when they become unstable. Without this interference in family

matters we would not have laws dealing with issues such as inheritance, child support, domestic violence, adoption, marriage, bigamy or parental leave. There is no disputing that all these laws are contentious. Legislating in these matters involves a balancing of values and there are no solutions to these issues which will please every person in New Zealand. However, laws and policies concerning all sorts of “family matters” need to be made.

As we have seen, abuse often occurs as a result of disciplinary action which has gone too far. Family abuse is most definitely something which the Government should legislate against and therefore the issue of discipline is within the Government’s ambit. It was inflammatory and misleading to continually argue that the Government should stay out of disciplinary matters in the home. Admonitions for the government to “keep out of where it doesn’t belong” were overly simplistic and did not assist the standard of the debate. The government had to do *something* about this issue and trying to say otherwise was ignoring the real issues which needed to be discussed. Leaving the law as it stood was a form of interference, as was defining the limits of reasonable force. The difference was that one form of interference supported the views of conservative lobbyists and the other form did not.

Once again, opponents of the law had catchy and appealing slogans while supporters had lengthy explanations. Regardless of the fact that this was an empty and misleading argument, it was very popular amongst the general public and lead to comments such as “I choose how to discipline my children not the govt.”²⁴⁵ Despite its fundamental flaws, this is a convincing argument. Parents have the responsibility to raise their children to be responsible members of society. Every day, they are required to make decisions which affect the wellbeing of their children. Yet the Government appeared to be saying that parents could not be trusted to use appropriate discipline. All the responsibilities of parents were still there but the choices were being removed. This lead on to the final platform; parental powerlessness.

²⁴⁵ “Do you still smack your children” The New Zealand Herald (New Zealand, 26 May 2008) quoting Joe from Mt Albert

Parental Powerlessness

Lobby groups garnered support by encouraging the public's fear of parental powerlessness. Without recourse to "discipline" parents would lose the most important way of enforcing their authority. The consequences of this were dire. Children would run riot and adults would be unable to control them. The law "unfairly shackle[d] good parents."²⁴⁶

The fear of losing the "ultimate control" was best exploited by referring to the dreaded "supermarket tantrum" or other public misbehaviour. The implication was that when a parent is out in public and is being humiliated by their child, a light tap on the behind will resolve the situation quickly. Public embarrassment is a potent force and it was clear that parents were concerned about their ability to manage these public displays of misbehaviour. Comments such as this were very common:

The other day he had an absolute melt down at the Supermarket...So, I pick him up off the floor, try to reason with him while he gouges my face and when that fails I gave him a crack on back of his leg...I quickly finished my shopping and hightailed it out of there before some sanctimonious person dobbed me into the 'anti-smacking police'. In a few months time this action of disciplining my son would make me a criminal.²⁴⁷

Lobby groups attempted to foster the view that the Government was taking away the only way in which a parent could control the child's behaviour and save themselves public embarrassment.

A second way to capitalise on this fear of powerlessness was to tap in to parents' fears of harm occurring to their children. Unsurprisingly, parents were concerned at how to keep their children safe from dangers such as hot stoves, busy roads or power points. Lobby groups perpetuated the myth that children could not be kept safe from harm if parents were not allowed to smack them. This was a popular argument amongst the public and many people who did not support the general

²⁴⁶ Family First poster entitled "Reality hits parents"

²⁴⁷ Gary R "Right to Smack" (26 March 07) <www.geekzone.co.nz/Jama/2517>

use of smacking for disciplinary purposes, still thought that it played a role in keeping children safe from harm.

Touching the full-on electric or gas heater could leave a permanent and life altering scar, but a smack on the bum will cause some temporary pain but a lesson learned for life.²⁴⁸

The rationale was that being hit by a car would hurt, therefore the parent needed to hurt the child sufficiently enough so she would think twice before running on to the road again. Just as with early protestant parenting, a small amount of suffering was required to save the child from a much greater form of suffering in the future.

Parents became very concerned that they would not be able to inject sufficient fear into their child to be able to prevent them from doing or repeating dangerous acts and they would be unable to control the behaviour of their children, particularly in public places.

The basis for the fear of parental powerlessness: The meaning of discipline

The fear of parental powerlessness boiled down to a fear that parents would no longer be able to discipline their children. It was very interesting to note how closely bound the concepts of discipline and corporal punishment were in people's minds. It was not difficult for lobby groups to capitalise on this angle when people believed that "[h]alf the problems with society today are due to lack of discipline"²⁴⁹ Somehow, many members of the public had come to believe that by removing the right to use corporal punishment, the government was also removing the right to discipline.

"This attitude that we are not allowed to discipline our children is directly responsible for the out of control generation that we have now. They have no respect for authority, other people or their property. A swift smack on the bottom at the right time would have made the world of difference."²⁵⁰

²⁴⁸ "Do you still smack your children" The New Zealand Herald (New Zealand, 26 May 2008) quoting Amigo Black

²⁴⁹ Ibid, quoting Keith from Glenfield

²⁵⁰ "Discussion: anti smacking law" Grown ups 50+ Community quoting Nandi (23 March 2007) <www.grownups.co.nz>

The word discipline comes from the Latin word “disciplinare” which means “to teach.” “Discipline” has several meanings, but in this context it means to improve or attempt to improve the behaviour of (oneself or someone else) by training or rules. It also means to punish.²⁵¹

In many people’s minds, discipline is used interchangeably with “punishment” and more specifically “physical punishment.” The other equally important meaning of discipline as “teaching” or “training” was largely ignored by many of the general public who supported corporal punishment.²⁵² The argument of abolitionists was that children can be taught how to behave without the need to resort to *physical* punishment. Yet for many of the general public this was a contradiction in terms. Discipline means punishment and punishment means smacking – a simple equation which was repeated time and time again during the debate.²⁵³

Child Rights and Parental Powerlessness

The abolitionists’ focus on the child’s rights argument also fed in to this concern over parental powerlessness. Rights are a very contentious issue due to the fact that rights are often seen to compete with each other, rather than complement each other. There was a belief that children’s rights could only be gained at the expense of parent’s rights. The child’s right not to be hit came at the expense of the parent’s right to raise their child as they saw fit. Many people were very scathing of this supposed supremacy of the rights of the child.²⁵⁴ “Child rights” became synonymous with children getting their own way.

...”boozed and arrogant children considering themselves untouchable by both the law and parents”²⁵⁵

The likes of Cindy Kiro all follow the United Nations/CYF party line – little wonder we have more issue today with children than we ever have.²⁵⁶

²⁵¹ *Collins: The Dictionary* <www.collinslanguage.com>

²⁵² For example “A stupid law thought up by a stupid person. Congrats to the parents who still believe in disciplining their kids” as found in “Do you still smack your children” The New Zealand Herald (New Zealand, 26 May 2008) quoting Hawkeye Pierce from Ohakune

²⁵³ For example “Am not completely agreeing with smacking your children as some parents go over the top, but children need discipline.” As found in “Do you still smack your children” The New Zealand Herald (New Zealand, 26 May 2008) quoting Bailee from Wellington City

²⁵⁴ Wood, Hassall, Hook and Ludbrook, above n 90, at 55

²⁵⁵ “Do you still smack your children” The New Zealand Herald (New Zealand, 26 May 2008) quoting John from wellington city

The general public perception was that if children were to have rights, then they needed to earn them first and if they misbehaved, those rights could be taken away.²⁵⁷

It is not surprising that the public felt this way. The rights discourse is abstract and can be complicated. The rights discourse must deal with some very philosophical and complicated issues. For example, if a person has a right to food, then what does this mean in a country which is incapable of producing enough food to feed its citizens? If a person has a right to freedom of speech, what happens to another person's right not to be discriminated against? Does a right exist if a person cannot enforce it? Does every person have the right to the "best life" or only to the best life possible in their circumstances? Can a person lose or give up their rights?

These, and hundreds of questions like them, are not easy to answer and consequently the rights discourse can seem confusing and pointless. Parents deal with everyday practicalities of raising children, not with abstract ideas about "bodily integrity" and "freedom from assault." Rights were simply seen by many as another way that children were getting the upper hand and causing parents to lose their power and authority.

Social responsibilities and parental powerlessness

This argument was also effective because it tapped in to general feelings of frustration about the responsibilities of parents and the lack of ability parents have to carry out those responsibilities. It is seen as the parent's responsibility to ensure that children are raised to be obedient and responsible and smacking was seen by many as an essential part of the parent's role. This belief was characterised in statement such as:

The blame for these loser children rests squarely with every parent, they are solely responsible for the upbringing of their offspring.²⁵⁸

The removal of the right to choose the form of discipline to effect this raising of obedient and responsible parents was seen as putting parents in an untenable

²⁵⁶ Ibid, quoting Joe from Mt Albert

²⁵⁷ Wood, Hassall, Hook and Ludbrook, above n 90, at 55

²⁵⁸ "Do you still smack your children" The New Zealand Herald (New Zealand, 26 May 2008) quoting honest kiwi from Orewa

position. Social obligations still existed but the means to fulfil those obligations were being taken away. Family First argued that:

On one hand, a parent is responsible for the actions of their child in the community and school, but at the same time their role is being undermined by growing pressure on mothers to work and enroll their child in daycare, criminalising effective methods of parental correction, providing the Independent Youth Benefit, provision of contraception and abortion without the consent or even knowledge of the parents...²⁵⁹

With all these feelings interfacing, it is not surprising that the public were easily susceptible to the idea that this law would take away their power. Yet I contend that this is the weakest argument of all because regardless of whether or not smacking is *effective*, it is simply not *necessary*. All the situations parents feared could be managed by the use of effective discipline and positive parenting tactics.

Alternatives to smacking

There are many and varied non-physical means to “punish” a child’s indiscretions. For example, the removal of privileges or special toys or objects, temporary withdrawal of parental attention or affection, time out, verbal scolding or natural consequences. Children can be taught good behaviour from the outset which ultimately limits the need for punishment. For example, distraction from the bad behaviour to appropriate behaviour, ignoring bad behaviour and focussing on good behaviour, discussion between parents and children about good behaviour, rewards or incentives for good behaviour, verbal praising of appropriate behaviour, good role modelling of appropriate behaviour from parents and directions to children about expected behaviour prior to particularly difficult events. With all these options available to modern parents, many of which were not advocated or discussed in previous generations, physical punishment should be able to be removed from the parenting repertoire without any deterioration in the behaviour of the child.

Smacking is simply not an essential part of childcare and can be replaced by any number of other methods. The argument that parents would be powerless to

²⁵⁹ Bob McCroskie “Parents Deserve the Right To Raise Their Children” *The Dominion Post* (Wellington, 13 February 2008)

discipline their children if smacking was prohibited should never have been able to take root and was the easiest to counter through education. Unfortunately education was not forthcoming and in chapters five and six I will discuss the issue of education further.

The Citizen's Initiated Referendum

A further example of the way in which this debate was allowed to go wildly off track comes from the nonsensical Citizen's Initiated Referendum, which occurred in 2009. The Citizens Initiated Referenda Act 1993 makes it possible for any person to start a petition asking that a non-binding national referendum be held. The 2009 citizens initiated referendum on the smacking issue was proposed by Sheryll Savill and organised by Larry Baldock and posed the question "Should a smack as part of good parental correction, be a criminal offence in New Zealand?" The referendum occurred more than two years after the law was changed but signatures were being collected well prior to the enactment of the new law. Those who initiated the referendum were not concerned with how the law worked in practice and had no intention of waiting to see whether the problems they allegedly foresaw actually eventuated. This is yet another example the religious right failing to adequately advise and advertise the real reasons why they were opposed to this law.

The question posed and the resulting referendum results did little to advance the debate and in fact confused the issue further for the following reasons:

1. The referendum question itself was flawed.
 - a. The question implies that smacking is "good" parental correction which places an immediate value judgement on the action. How can something "good" be illegal or bad? If you are being a good parent, of course your actions should not be illegal. It is very difficult to answer "yes", when asked if good parenting should be illegal.
 - b. The referendum question does not define "smacking." "Pro-smackers" consistently use phrases such as "light tap" or "loving smack" to describe the actions they refer to. The concise oxford

dictionary however defines a smack as “a sharp blow or slap, typically given with the palm of the hand” and to smack is defined as “hit with a smack” or “smash, drive or put forcefully into or on to something.” One person’s interpretation of a “smack” might be a light tap on the bottom, while another person views an acceptable smack as one which is carried out with an implement with the intention of causing pain and possibly minor injuries such as a welt or a bruise. Both would want to answer the question “no” and yet the former would not agree with the behaviour of the latter.

- c. The question did not provide a clear mandate for change. A question saying “should s 59 of the Crimes (Substituted s 59) Amendment Act be repealed and the former s 59 Crimes Act be inserted in its place” or similar, would have given the government clear guidance as to what the public wanted. Just because a person answered “no” did not necessarily mean that they wanted to repeal or amend the law.
2. The question did not propose an alternative to guide the government’s decision. Should we revert to the old law? Should we draft a new law? If so, what form should that new law take? Should we keep the existing law but change the policies within CYF and the police? The solution proposed by the referendum initiators was never made clear. Even the two main advocates for the “no” vote differed on how we should move forward. Bob McCroskie supported the member’s bill proposed by the Act MP John Boscawen. This bill allows for parents to use force to correct children so long as the injury caused was transitory and trifling, did not use a weapon or instrument and was not cruel or degrading. On the other hand, Larry Baldock wanted to see two clauses deleted from the existing act, to essentially remove the prohibition on the use of force for correction. This amendment would allow parents to use implements or weapons. However, as previously discussed, the reasonable force exceptions found in s 59 were intended to refer only to force in the sense of restraint and removal so it is difficult to reconcile how removing the specific ban on force for the

purpose of correction can conclusively change the accepted meaning of the previous sections. His website does indicate his confusion over the meaning and intention of s 59(1). Perhaps this confusion is genuine or perhaps it has been enhanced and used to further his wider objectives.

Given these problems, the Government was never going to seriously consider changing the law in response to the results of the referendum. Rather than contributing in a productive way to the debate, the referendum only served to continue to focus attention on the red herrings of “good parents” and “light smacking,” criminalisation and unwanted government interference.

The remaining arguments

It must be made clear that the arguments put forward in this chapter cannot all be explained by reference to religious beliefs and constructions of childhood. For some, the law itself was of secondary importance to those who were attempting to pass it. The focus for this group of dissenters was the political parties and politicians and experts who were in favour of repealing s 59. The Labour Party was coming to the end of a long stretch in power and likewise, Helen Clark had also been Prime Minister since 1999. It would appear that some people who disliked Labour as a political party, and Helen Clark either personally or as a Prime Minister, were simply going to be against the Act regardless of its merits.

Likewise, there will always be a group of people who dislike being told what to do by so-called experts. New Zealanders, for whom the term “tall poppy syndrome” was coined, are naturally cynical and distrustful of expert opinion. Our “number 8 wire mentality” is such that we tend to believe we do not need to be told what to do and how to do it because we are quite capable of figuring it out for ourselves. People who fall in to this category are generally not susceptible to reasoned discussion on the merits of the actual law. Their complaint is not with the legislation but with the legislators. The dissenters who fall in to this category are outside the scope of this work.

After the referendum in 2009, we saw more of the argument that the government was being “undemocratic”. In this argument, the only thing that was important

was that the majority of New Zealanders wanted the law changed and the government refused to change it.

These arguments contributed to the general feelings of antipathy towards this law and wherever possible, religious lobby groups used these arguments to support their views. This led to some unlikely alliances of convenience. This was evident in the 2009 *March for Democracy* which was organised by Auckland businessman Colin Craig with the purpose of protesting the fact that citizens initiated referenda in New Zealand are non-binding.²⁶⁰ Unsurprisingly, this march was strongly supported by Family First and other pro-smacking lobby groups because it provided yet another opportunity to capitalise on any element of unhappiness with the law. I have chosen not to focus on the impact of libertarians during this debate because their role was insignificant in comparison to the role of the conservative lobby groups.

Conclusion

The intention of this chapter has not been to make generalised judgements about Christians – whether conservative or not. Nor is it to suggest that all of those who are involved with the fundamentalist Christian groups referred to in this chapter, practice or condone abusive discipline. In fact, there is no substantial evidence to link the positive attitudes towards physical discipline and/or higher prevalence rates of physical punishment in conservative Protestant groups with harsher or more severe forms of physical punishment.²⁶¹ Religion and religious beliefs are associated with a range of parenting practices including high levels of parental warmth, involvement and engagement.²⁶² I have no evidence that any of the individuals referred to, or those who support them, are anything less than the “good parents” they mean to represent.

However, there is no doubt in my mind that the debate over s 59 was effectively hijacked by the well-funded, organised and determined campaign led by the conservative lobby groups referred to. While they never deliberately hid their

²⁶⁰ “About Us” The March for Democracy: Calling the Government to Act as Directed by the People” <www.themarch.co.nz>

²⁶¹ Anne Smith, Megan Gollop, Nicola Taylor and Kate Marshall (eds) *The discipline and guidance of children: messages from research* (Children’s Issues Centre, University of Otago, Otago, 2005) at xiv <www.occ.org.nz>

²⁶² Ibid.

fundamentalist stance and backing, this information was not readily available to the average person who was watching the television coverage, looking at the posters and reading the media releases. The debate very rarely touched on the concepts of God, the Bible or Christianity and yet ultimately this was the basis for the concerted efforts by most of the main opponents of this bill. Without the need to retain smacking for religious reasons, the arguments put forward by these groups fold under the weight of logic. Without that biblical directive, the reasons for maintaining the right to hit your children are weak. I believe that if this battle had been fought more openly and honestly, then the outcome in terms of public support would have been vastly different.

CHAPTER FIVE

EVALUATION OF THE LEGISLATION: THE AMENDED SECTION 59

I have now covered the arguments in favour of repeal and the arguments against repeal and shown how both sides of the argument were representative of differing and competing ideas about the nature and role of children. Identifying and recognising the reasons for the phenomenal outcry and showing how these attitudes contributed to the public reaction to the law is the first step in learning from this debacle. The next step in this case study is to look at the role of the legislature and the legislation itself.

Goals of the legislation

The goals of this legislation were twofold. In the first instance, the legislation needed to be changed so that it conformed to the principles of UNCROC. The legal loophole which allowed parents to get away with abuse under the guise of punishment needed to be closed. The second purpose of the legislation was to contribute to attitudinal change. Attitudes towards children, discipline and abuse had been slowly evolving. Incrementally, through education and research, parents had been learning about the benefits of positive parenting. New Zealanders were, superficially at least, less accepting of violence towards children than we had been in the past.²⁶³ The law change provided an ideal opportunity to hasten this attitudinal change because of the fact that it forced the issue in to the public arena and opened up widespread debate. Changing attitudes should, in theory, lead on to an eventual reduction in child abuse as parents become more educated on alternatives to physical discipline and as society lowers its level of tolerance of violence towards children.

In order to have the best chance of success in creating attitudinal change, the prohibition on physical punishment needed to have been unambiguous and easily comprehensible so that the possibility of misinterpretation was eliminated or at least minimised.

²⁶³ See the ongoing research of Jane and James Ritchie, which was discussed in chapter two.

The role of the law itself

However, there was an acceptance amongst many politicians that the legislation which passed was something of a hotpotch of compromises – not perfect but better than what was there before. Chester Borrows referred to the bill having morphed from a “pig’s ear into not quite a silk purse.”²⁶⁴ Brian Donnelly, when referring to the fact that the police discretion amendment had allowed three of his colleagues to vote in favour of the law, pointed out that they voted for the legislation not because it was perfect but because it was better than what was there before. Nicky Wagner stated outright that the law was “not perfect” but was the best they could do.²⁶⁵ I believe that this “hotpotch of compromises” was a significant factor in the rudderless and confused debate over this issue.

I contend that the legislation can be considered a success in relation to the first factor but was monumentally flawed when it came to the second factor. I will focus on three aspects of the law to prove this assertion. Firstly, the fact that the government eventually chose to pass a law which completely prohibited physical punishment rather than opting for silent reform. This shows success in achieving the first goal. Secondly, the parental control section, the drafting of which led to an unacceptable level of confusion and misunderstanding about the law and its effects. Finally, the police discretion section which was a significant contributing factor in the watering down of the message that corporal punishment is wrong.

Silent Reform versus complete prohibition

When Sue Bradford originally proposed her bill, she did not intend that there be a *specific* prohibition on physical discipline, but rather a simple removal of the existing s 59 defence. “My bill simply seeks to repeal section 59 of the Crimes Act—nothing more and nothing less.”²⁶⁶ In fact she specifically referred to the fact that in New Zealand the “climate of public opinion is so manifestly not ready

²⁶⁴ (16 May 2007)639 NZPD 9284

²⁶⁵ Ibid

²⁶⁶ (27 July 2005) 627 NZPD 22086

for a ban on smacking.”²⁶⁷ This was the same as what the Ritchies had requested back in 1979.²⁶⁸

A straight repeal would have given children the same legal protection against assault as adults had. This was a reasonable first step and was recognised by campaigners against the use of corporal punishment as “silent reform.”²⁶⁹ Silent reform is effective in aligning children’s rights to bodily integrity with adult’s rights to bodily integrity and can often be a useful first step when a government feels that an explicit ban would be too much, too soon.

However silent reform does not send an unequivocal message that practices which were acceptable in the past are no longer acceptable. Furthermore, it potentially leaves the door open for the common law defence of reasonable chastisement to be argued.²⁷⁰ The Committee has recognised this as an issue and has acknowledged that even where there is no explicit defence or justification of corporal punishment in the legislation, traditional attitudes supporting corporal punishment may still exist and cause people to think that it is permitted. In some countries with no specific legislation prohibition, courts have acquitted parents of assault on the basis that they were just exercising a right to use “moderate correction”.²⁷¹

A specific ban makes it absolutely clear that it is not acceptable for parents to hit children, no matter what legal, social, cultural or historical justification they may think they have and is the goal of most campaigners in this area.²⁷² The law which was passed in New Zealand went further than the silent reform which was proposed by Sue Bradford and resulted in an explicit ban on the use of corporal punishment.

The specific prohibition was inserted into the text of the bill at the stage of the second reading, following the recommendation of the majority of the select

²⁶⁷ Ibid

²⁶⁸ Ritchie and Ritchie, above n 75 at 125

²⁶⁹ The Global Initiative to end all corporal punishment of children “Prohibiting Corporal punishment of Children – A guide to legal reform and other measures.” (February 2009) at 9 <www.endcorporalpunishment.org>

²⁷⁰ Wood, Hassall, Hook and Ludbrook, above n 90, at 84

²⁷¹ CRC/C/GC/8, above n 103 at [33]

²⁷² The Global Initiative to end all corporal punishment of children, above n 269

committee.²⁷³ During the select committee process, it became apparent that there was widespread concern that a straight repeal would have resulted in parents breaking the law (and therefore risking investigation and prosecution) when attending to the day to day responsibilities of child rearing. The Public Issues Committee of the Auckland District law Society stated that without s 59 “any touching by a parent could constitute an assault leading to a criminal charge.”²⁷⁴ This statement is somewhat unexpected from a law society given that the laws concerning adult assault had not caused concern in the past. As noted in *Unreasonable Force: New Zealand’s journey towards banning the physical punishment of children*;

These everyday touchings have never been a source of concern on the part of lawyers or the general public. It was only when the right of parents to hit their children was under threat that some members of the legal profession identified it as an issue.²⁷⁵

In chapter three I examined in detail the reasons why parents should not have been unduly concerned about investigation and prosecution even if they lightly smacked their child for the purposes of correction. “Everyday touching” such as hair brushing, face washing or hand wiping was simply never going to be a cause for concern.

In the first reading of her bill, Sue Bradford discussed the possibility of parents being investigated or prosecuted for such actions. She believed she was not proposing a new law which would have made it a crime to, for example, physically restrain a child who is about to poke a fork in a power point.²⁷⁶ She did not believe that police would abruptly begin arresting parents for putting their child in time out.²⁷⁷ Nonetheless, it was felt that in order to obtain the support necessary to get the bill through Parliament, amendment was necessary. The solution was the “parental control” section which was drafted during the select committee process with the assistance of the Law Commission and was crucial in

²⁷³ The Crimes (Substituted Section 59) Amendment Bill as recommended by the majority of the Select Committee in November 2006

²⁷⁴ James, above n 210

²⁷⁵ Wood, Hassall, Hook and Ludbrook, above n 90, at 82

²⁷⁶ (27 July 2005) 627 NZPD 22086

²⁷⁷ Ibid

helping to obtain sufficient support for the bill to move through to the second reading in Parliament.

The parental control section – section 59(1)

The intention of the parental control section was to reassure the public that “protective force”²⁷⁸ and day to day touching would be not be a criminal offence. The Committee noted that “The law in all States, explicitly or implicitly, allows for the use of non-punitive and necessary force to protect people.”²⁷⁹ The Committee had specifically acknowledged that there were “exceptional circumstances” where teachers, parents and those working with children in other capacities might face a child who was acting dangerously and putting himself or others at risk. The use of reasonable restraint might be required to control and protect the child and others but this was easily distinguished from the use of force to punish the child.²⁸⁰

Because of this explicit or implicit provision, the vast majority of other countries which have outlawed physical discipline did not spell out that day to day touching and protective force were acceptable. Nonetheless, the amendment to Sue Bradford’s original bill was to reassure the public and political opponents that non-violent and non-punitive applications of “force,” which might *technically* be illegal under the current definition of assault, would not be prohibited under the law.

The correct interpretation

The parental control section was not intended to refer to smacking, hitting, punching or any other “violent attack.” It was to refer to the normal incidences of parenting where a parent might be required to restrain or remove a child, or apply a protective force to the child. The section should have been understood as follows:

- a. To prevent harm to the child or another person;

²⁷⁸ The Global Initiative to End all Corporal Punishment of Children, above n 269

²⁷⁹ Committee on the Rights of the Child *General Comment No. 8* at [14] CRC/C/GC/8* (2006)

²⁸⁰ *Ibid*, at [15]

The parent is allowed to physically prevent the child from harming themselves by, for example, grabbing the child's hand or pulling the child out of harm's way.

- b. To prevent the child from engaging in criminal conduct;

Parents have a responsibility towards the victims of their under 16 year old child's crime and can be ordered to pay compensation. This section provides that a child who is about to tag a wall or about to run from a store after shoplifting can be restrained.

- c. To prevent the child from acting offensively or disruptively;

A child running rampant in a supermarket or creating a disturbance in a shop can be picked up, restrained in the trolley or removed from the premises.

- d. When performing normal day to day parenting tasks.

The parent can touch the child to perform normal parenting tasks such as getting the child out of bed, dressed and washed.²⁸¹

Section 59(2) makes it clear that "force" cannot be used for the purposes of correction. Smacking or hitting as punishment, or to teach the child a lesson, is "force for the purposes of correction" and is therefore prohibited. It is this section which specifically bans corporal punishment, including smacking. However despite the letter of the law, throughout this process it was clear that this section was seriously misunderstood. People needed to be able to understand that "smacking" in its commonly understood form was against the law. However it was clear that this was not the case.

Confusion arising from the parental control section

Confusion around this section centred on three main issues. The first was that many people incorrectly equated "force" with "smack." If the words "apply force" in s59(1) and (2) are replaced with "smack," as occurred in many people's minds, the natural confusion becomes obvious. The section then appears to say that a parent can, for example, smack the child to prevent him from engaging in offensive behaviour. If a child is spitting on the floor and the parent finds this offensive then the parent might feel justified in applying force in the form of a smack to prevent the child repeating the behaviour.

²⁸¹ Wood, Hassall, Hook and Ludbrook, above n 90, at 85

The second issue is with the use of the word “prevent” in s 59(1). A parent can use force to *prevent* her child, for example, hurting himself. When this section is correctly interpreted, the danger to the child must be imminent and the parent must be acting to stop an event or action which is about to occur. This was often erroneously interpreted to mean “prevent in the future.” For example, a child goes to touch a hot stove and the parent pulls the child back and then gives the child a smack. The parent believes he is justifiably acting to prevent the child from hurting himself. The immediate danger has passed, but he is acting to prevent a future danger which may occur seconds or months later. This interpretation is incorrect but understandable.

A third issue arises from the interpretation of “correction.” Section 59(2) states that a parent is not allowed to use force for the purposes of correction. All disciplinary smacking is done for the purposes of correction because the aim of the smack is to change, punish or otherwise correct the child’s behaviour. Smacking is therefore illegal under s 59(2). The confusion is compounded by the fact that not everyone sees smacking as being “corrective.” For example, if a small child is struggling during a nappy change, a parent might smack the child’s leg to gain immediate compliance. This is “correction” of the child’s behaviour but because the parent’s aim is simply to get the nappy on in that moment, they do not see the action as having any permanent “corrective” purpose.

The overall confusion created by this section can be illustrated by referring to the oft-cited situation of a child running on to the road. The parent can use “reasonable force” to prevent harm to the child. The parent can grab, push or pull the child away from the road. This is an acceptable use of parental force. If the parent then administers a smack to the child so they think twice before running on to the road again, this smack is for “correction” and is not legal under s 59(2).

Evidence of the nature and prevalence of the confusion

There is little official data available on the comprehension of this law. Perhaps it was expected that after all the publicity, everyone would “just know” that this law banned smacking and other forms of physical discipline²⁸² and therefore research was not required. The lack of monitoring of public comprehension is a significant

²⁸² Ibid, at 191.

failing on its own and consequently we are left to glean information on public understanding of the law from the various polls which were undertaken, together with opinions which were voiced in the public arena. Appendix five provides examples of opinions which were expressed in the public arena and illustrate that people were confused about what the law meant.

A 2009 survey commissioned by Family First NZ found that 55% of the 1000 respondents thought smacking was always illegal, 31% thought it was not and 14% did not know.²⁸³ From that small study, we can see that 45% of the surveyed people did not recognise that smacking was prohibited by law. The article in which this was reported stated that “As the law stands there are some circumstances where a light smack would not be illegal.” This statement is untrue and it demonstrates that there was widespread misinformation in the media. Mainstream newspapers also assisted with the dissemination of incorrect interpretations of the law. The New Zealand Herald published an opinion piece which stated:

Section 59 now provides that parents can use force against children to prevent harm or to stop a child’s ‘offensive or disruptive behaviour’, but cannot use force for “correction”. How dumb can you get? If you smack a child to prevent harm or to stop offensive behaviour, what else is that but correction? And if some say that it isn’t what the hell do they mean by ‘correction’?²⁸⁴

The author of this piece has fallen in to the trap of substituting “smack” for “apply force” and has unsurprisingly found the law to be incomprehensible. A further example comes from Herald contributor Tapu Misa when she commented that “[t]he law allows "inconsequential" physical force - such as a light smack - in several circumstances, including stopping a child harming themselves or others.”²⁸⁵

In a 2009 editorial from the Herald, a plainly incorrect interpretation of the Act was given.

²⁸³ “Survey suggest parents unclear on smacking law” *The New Zealand Herald* (New Zealand, 30 March 2009)

²⁸⁴ Garth George “Referendum no answer to parental worry” *The New Zealand Herald* (New Zealand, 18 June 2009) <www.nzherald.co.nz>

²⁸⁵ Tapu Misa “Key needs to hold line on smacking law” *The New Zealand Herald* (New Zealand, 24 August 2009) <www.nzherald.co.nz>

Their material did not sufficiently inform voters that parental force is already permitted for dealing with childhood risks and offences. The vast majority of voters probably cast their ballots believing Sue Bradford's bill had outlawed smacking entirely. That is a misapprehension Family First fostered by declaring the law unclear and citing instances of parents being abused or threatened with a report to the police for a witnessed smack. .. The law does not forbid it [smacking], and never has.²⁸⁶

This editorial again indicates that people view “force” as smacking. Television media also played a role. Two days before the law came into effect the police released their practice guidelines about how officers were to apply the law. Unfortunately, in headlining news reports both of the major television channels report incorrectly that the Police had indicated that it was okay for parents to smack their children to prevent them from running onto the road or committing a criminal offence or engaging in anti-social behaviour.²⁸⁷ The police guidelines in fact say that force 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))...”²⁸⁸ They go on to define “prevent” as being “to hinder or stop something from occurring.” It is reiterated 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.”²⁸⁹

The public relies on the media to obtain information and sadly the media was often unable to provide the accurate information which was needed. Perhaps it was the use of the phrase “reasonable force” which confused media commentators. Reasonable force was the phrase used in the old legislation to express how one could physically discipline one’s child. Or perhaps it was simply the fact that the legislation is not abundantly clear on its face. Whatever the reason, this is yet another illustration of the fact that s 59(1) and (2) were not explicitly clear in their prohibition of physical punishment.

²⁸⁶ Editorial “Parliament should Act to define force” *The New Zealand Herald* (New Zealand, 24 August 2009)

²⁸⁷ Wood, Beth, Hassall, Ian, Hook, George and Ludbrook, Robert *Unreasonable Force: New Zealand’s journey towards banning the physical punishment of children* (Save the Children New Zealand, Wellington, 2008) at 191

²⁸⁸ New Zealand Police “Police practice guide for new section 59” (press release, 19 June 2007)

²⁸⁹ Ibid.

The Police Discretion Section – Section 59(4)

In chapter three I discussed the widespread concern about criminalisation and the threat of multiple unwarranted prosecutions. I showed that the likelihood of minor assaults in the form of smacking would be highly unlikely to come to police attention and even less likely to result in prosecution and conviction.

Nonetheless, there was widespread concern that the police would be obliged to investigate all allegations of smacking and that this would inevitably result in prosecution. This concern stemmed from paragraph 19 of the Police Family Violence Policy which states that:

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.²⁹⁰

There was a concern that officers would be obliged to arrest parents who lightly smacked their children because smacking would have to be construed as family violence. No one who was promoting the bill intended for police officers to arrest every parent who lightly smacked their child because this would have been contrary to the best interests of the child involved and logistically impractical. Nonetheless, the fear remained and was exploited by opponents. It appeared that this issue could be a major obstacle to getting the legislation passed. The final compromise came in the form of s 59(4). In keeping with the rest of s 59, this particular clause managed to be misinterpreted and cause further confusion.

The correct interpretation

Section 59(4) provides that the police can choose not to prosecute if they believe the offence is trivial and inconsequential. This does not alter the legality of the action or make illegal actions legal. If a person uses force (such as a smack) for the purpose of correction, the smack is still prohibited by s 59(2). In chapter four I showed that even when a crime is committed, the Crown Prosecutor is not obliged to prosecute the alleged offender. This does not make the action legal, it simply means the case will not be taken to trial. Police discretion works in the same way. If the police see a person smack a child or receive a report of a

²⁹⁰ Ibid.

smacking incident they will need to investigate. The police can then choose whether or not to prosecute based on both their usual guidelines and also the direction in s 59(4). Importantly, they are not legally prevented from prosecuting a trivial offence if they, in their discretion, decide that prosecution is warranted.²⁹¹ In the vast majority of smacking incidences, the police will choose options other than prosecution, such as diversion or a warning. This should have been easy to understand and yet it raised as many issues as it solved.

The “new defence” argument

Section 59(4) raises the question; does this section create a new defence of “trivial and inconsequential” actions? If the police decide to prosecute a person for a smacking incidence, can the defendant raise a legal defence that his or her actions were “trivial and inconsequential?” National MP Chester Borrows seemed to believe that the police discretion section provided an actual defence, as per his speech given during the Bill’s third reading.

...it[s 59] provides a defence to parents who use reasonable force for the purpose of correction in the same way as section 59 does presently, though in a more limited form. It does this by allowing a court to read widely the terms “inconsequential” and “not in the public interest”...a narrow reading of the law as it is now written would see the court hold that the amendment acts only as a guide to police. This narrow reading would be inconsistent with the court’s usual interpretation in such matters. It is important to state these points now, because parliamentary debates form a secondary source in statutory interpretation, so in making these points today, in the way I am making them now, we provide another defence to parents by way of the expectation that the amendment will be used in this way.²⁹²

This statement clearly shows that Mr Borrows felt that the police discretion section provided an actual defence to a charge, rather than merely a direction to police in relation to the decision whether or not to prosecute. This contrasts with the statement of Sue Bradford during the same reading of this bill that “[t]his new provision simply affirms in law what is standard police practice under their existing prosecution guidelines...”

²⁹¹ Dean Knight “Crimes Substituted Section 59) Amendment Bill”(2007) Laws179 Elephants and the Law <www.laws179.co.nz>

²⁹² (16 May 2007) 639 NZPD 9284

It is not surprising that there was such a high level of confusion surrounding this legislation when two politicians who played pivotal roles in the debate gave such differing interpretations in the same forum and on the same day. Chester Borrows' interpretation was that under the old law, a parent could smack her child provided that she used only "reasonable force" but under the new law, she could smack her child provided that the smack was "trivial and inconsequential"

I believe that this is not the correct interpretation. This section was simply intended to make it clear that the police had the discretion whether or not to prosecute incidences of smacking. It was not designed to create a new defence. There is no evidence that this argument has been raised in court, successfully or not, however this of course does not prohibit the possibility in the future.

The judicial review argument

Despite the fact that s 59(4) does not created a new defence, it has been argued that the police decision to prosecute could be judicially reviewed on the basis that the offence was trivial and inconsequential and there was no public interest in prosecuting.²⁹³ However, as this section does not confer the discretion but merely records it, this risk was always there.²⁹⁴ In *Polynesian Spa Ltd v Osborne*,²⁹⁵ Polynesian Spa Limited was prosecuted by OSH after a woman collapsed and later died at the Polynesian Spa in Rotorua. The company applied for judicial review of the decision to prosecute. The High Court held that it would only be in very rare situations where prosecutorial discretion would be reviewed. Those rare cases would need to involve the prosecuting authority acting in bad faith or bringing the prosecution for a collateral purpose.²⁹⁶ Nonetheless, the police will no doubt seriously consider all decisions regarding prosecution of "smacking incidences." We have yet to see any prosecutorial decisions being reviewed either by way of judicial review or indirectly during a court case.

The wrong message

The police discretion section is unexpectedly damaging to the goals of the legislation in regards to attitudinal change because it undermines the message that

²⁹³ Jeremy Johnson, "'Anti-smacking' Law and Judicial Review" [2009] NZLJ 11 at 13

²⁹⁴ Knight, above n 291

²⁹⁵ *Polynesian Spa Ltd v Osborne* [2005] NZAR 408

²⁹⁶ Ibid, at [61-69]

smacking your children is no longer acceptable parenting practice. In a later section we will examine in detail the conflicting messages given during this campaign but for the moment, it suffices to say that the police discretion section perpetuates the view that smacking is acceptable. The legislation makes it clear that light smacking will not be prosecuted. The logical conclusion is that if something is not going to be prosecuted, then it is at least acceptable, if not legal. This section was not intended to give a green light to light smacking but its inclusion works to reinforce the perception that smacking is acceptable behaviour. The message that physical discipline is no longer acceptable is undermined by specifically reassuring people that there will be no penalty for the offence.

Providing a weak spot

The confusion created by the drafting and interpretation of the law provided an ideal avenue for opponents to exploit. The main concerns about the police discretion section were that a law, which was not enforced, was a farce, that “discretion” leads to uncertainty and that although the Police might have specific discretion not to prosecute trivial and inconsequential assaults, Child Youth and Family did not have the same discretion available to them. In an opinion piece for the Dominion Post, Bob McCroskie referred to the fact that people did not understand the law. He then pointed out that people could not predict how they were going to be treated under the law.

The law as it stands is confusing...Parents have been given conflicting messages by the promoters of the law, legal opinions have contradicted each other, and on top of that is police discretion but not CYF discretion to investigate. Families don't know how they will be treated.²⁹⁷

Comments by the Police Association president Greg O'Connor were also used by Bob McCroskie to continue this theme. Mr O'Connor argued that the police guidelines were more restrictive than expected and seemed to negate the effect of the police discretion section in the legislation. McCroskie then used this comment

²⁹⁷ Bob McCroskie “Smacking debate needs some correction” *The Dominion Post* (New Zealand, 12 June 2009)

to reinforce the idea that if the police did not know how to respond to allegations, then how could parents be expected to know what was acceptable?²⁹⁸

Overall assessment of the legislation

The parental control amendment and the police discretion amendment were instrumental in ensuring that the legislation obtained the necessary support to make it in to law. For that, the drafting of the legislation can be considered a success. The law as it now stands closed the legal loophole concerning assaults on children and our law now conforms to the standards expected by the UNCROC.

During the passage of the bill through Parliament, many members of Parliament who had been against the legislation were eventually converted. Unexpected compromises and co-operation between party leaders showed that parliamentarians could work together to reach politically acceptable compromises. Rodney Hide referred to “the great aroha—love—that has broken out in our Parliament in respect of the smacking issue.”²⁹⁹

Yet the aroha which was present in the House on 16 May 2007 was not reflected in public sentiment, where the law was met with an outpouring of dissent and complaint. Parliamentarians and supporters of the bill had not been able to do as good a job at converting the public as they did at converting 113 of the 121 Members of Parliament. Part of the blame for this must lie with the form of the legislation and the fact that it is open to misinterpretation and is easily misunderstood.

In other countries which have banned corporal punishment, the legislation has been more far explicit:

The child has the right to care and security. It shall be treated with respect for its personality and may not be subjected to corporal punishment or any other offensive treatment.³⁰⁰

²⁹⁸Beck Vass “Smacking rules give no leeway – police union” *The New Zealand Herald* (New Zealand, 21 June 2007) <www.nzherald.co.nz>

²⁹⁹ (16 May 2007) 639 NZPD 9284

³⁰⁰ Parental Custody and Care Act 1997 (Denmark)

Children have a right to a non-violent upbringing. Corporal punishment, psychological injuries and other degrading measures are impermissible.³⁰¹

In these examples it is made clear that corporal punishment (and other forms of offensive or degrading treatment) is unacceptable. In comparison our law does not even refer to the well understood concept “corporal punishment” but to the easily misunderstood phrase “force for the purposes of correction.”

Although I have concluded that the legislation itself was flawed and that this contributed to difficulties for the public in comprehending what was expected of them, this should have not have been fatal to the abolition cause. A much more important problem was the lack of desire on the part of the Government to promote the law as what it was – legal abolition of all forms of corporal punishment, including smacking. This will be examined in chapter six.

³⁰¹ 1631 II BGB (Civil Law 2000) (Germany)

CHAPTER SIX

EVALUATION OF THE ROLE OF THE GOVERNMENT

There can be no doubt that this law is widely misunderstood. Legislation of this type needs to be widely and easily understood by the parents who need to abide by it and the children who will benefit from it. In chapter four I established that part of the confusion was a result of the deliberate campaigns by pro-smacking lobby groups. In chapter five I showed how pro-smacking lobby groups were assisted in their endeavours to undermine this legislation by the very wording of the Act. As a result of these two factors, the public was unclear which actions were illegal, what they could and could not do and what would happen to them if they did do something they were not allowed to do. Such a high level of uncertainty was unacceptable given the amount of attention this issue received.

However, there is one remaining reason why this process of legislative change was so ineffectual: the actions and inactions of the legislature. By actions I refer to the statements and messages made by and on behalf of the Government which completely contradicted the law which was passed. By inactions I refer to the failure of the Government to provide a comprehensive education campaign.

The message the Government should have sent

To establish the message which the New Zealand Government should have been giving to citizens, we first need to answer two questions. Firstly, what did the new legislation say? New Zealand is recognised as being the 18th country in the world to have a complete prohibition on corporal punishment.³⁰² This means that it is illegal for any person to use physical force against another person for the purposes of punishment or correction, in any situation. Smacking is considered to be a form of corporal punishment and it is therefore illegal in New Zealand to smack your children. It cannot be ignored that this is what the legislation says and this is what the legislation does.

³⁰² Global Initiative to End All Corporal Punishment of Children “States with full abolition” August 2010 <<http://www.endcorporalpunishment.org/pages/frame.html>>

Secondly, given that corporal punishment (including smacking) is legally prohibited, what should the repercussions be for those who break the law? It is well recognised and accepted that parents who discipline their children physically without crossing that wavering line to abuse should be assisted to cease their use of corporal punishment through supportive and educative, not punitive, means.³⁰³ It is highly unlikely that it will be in a child's best interests for their parents to be prosecuted for the use of corporal punishment and thus decisions to proceed with prosecution must not be made lightly. Removal of the child from the parent's home is also not a decision to be taken lightly, and pursuant to article 9 of UNCROC, it must only be done in to ensure the best interests of the child.

It is on the basis of these facts that the Government should have based their message to the New Zealand public. I contend that whatever specific form or wording the message took, it needed to constantly, consistently and clearly reiterate these points:

- Corporal punishment is harmful, ineffective and a breach of the child's human rights.
- It is illegal to physically discipline your children and this includes smacking.
- The first priority is always education and support for parents to assist them in becoming "smack free."
- We recognise the serious ramifications of prosecution of a parent or removal of a child from a home and this will never be undertaken lightly.

The message that the Government did send

Instead of these clear and unequivocal messages, this process was characterised by vacillation, back tracking and compromising. The message put forward by the Government was, like the legislation itself, a hotpotch of compromise. There was "recognition" that some children needed to be smacked as a last resort and there was reassurance that smacking was definitely not the same as abuse. There was reassurance that the police would not prosecute people who smacked and there was reassurance that there was no intention to interfere with "good" parents doing

³⁰³CRC/C/GC/8, above n 103 at [3]

their jobs. The debate became about dampening down fears rather than actively promoting the goals and purpose of the legislation.

The vacillation about this law is evident upon the reading of the Hansard speeches given before the third reading of the bill,³⁰⁴ before it was passed into legislation. These statements taken from the parliamentary speeches prior to the third reading of the Act clearly show that “Good parents” were still to be allowed to smack, regardless of the law.

Neither the select committee, myself, nor anyone else supporting this bill has ever intended that all parents who ever lightly or occasionally hit their children should be subject automatically to investigation and police prosecution. What we have been simply seeking to do is remove a defence that has allowed some parents to get away with quite badly beating their children and, most significantly, that has stopped police from taking action in many situations of violence against children...³⁰⁵

... [P]arents do use smacking in the discipline of their children. We know that the vast majority of parents in this country do not believe that it is tenable for them, acting in what they believe are the best interests of their children, to be prosecuted for that. People may argue about it as long as they like, but this bill, as it is written now, protects parents now, starting from the implementation of this bill, and will in the future.³⁰⁶

Either smacking was OK or smacking was not OK, but even those who thought that smacking was not OK mostly did not want to criminalise or convict good parents for giving a light smack. ...Managing, training, disciplining, and bringing up our kids is an intensely personal experience, and decisions about these matters should be family business... Now that John Key has been able to facilitate the introduction of the amendment that will accept that ordinary, good parents may occasionally smack their kids without being charged as criminals, the bill actually manages to bridge the main area of disagreement between submitters...It is not perfect but it is the best we could do...The bill will send a strong message that the present level of violence against children in our society is unacceptable. It will

³⁰⁴ (16 May 2007) 639 NZPD 9284

³⁰⁵ Ibid, Sue Bradford

³⁰⁶ Ibid, Chester Borrowes

also prevent good parents from being prosecuted for carrying out their normal parenting duties.³⁰⁷

Any pretence that smacking was unacceptable was extinguished in 2010 by the statement of John Key that:

Lightly smacking a child will be in the course of parenting for some parents and I think that's acceptable. It is up to individual parents to decide how they're going to parent their children ... Some people will continue to lightly smack their child for correction, some will not. It is up to them to decide.³⁰⁸

This statement makes a complete mockery of the new law not only because it is in contravention of s 59(2) but it also undermines any advances that may have been made in helping people to move away from violent or physical forms of punishment.

The inadequacy of the education campaign

The importance of education as part of the abolition process cannot be underestimated. It is as important as legislative change and without it, legislative change loses its effect. “Challenging traditional dependence on corporal punishment and other cruel or degrading forms of discipline requires sustained action.”³⁰⁹

As has been established, the legislation was not immediately comprehensible to the lay person. However this should not have been fatal because legislation often requires explanation and interpretation. A comprehensive education plan could have overcome the inherent issues of comprehension.

Education was needed in two areas. Firstly, general education about alternatives to physical punishment was required as part of an ongoing and comprehensive plan to encourage positive forms of parenting. Research shows that a significant portion of parents who smack resort to it because they do not know what else to do. For people who are educated and well read in this area, it may seem inconceivable that there are parents in New Zealand who do not know how to

³⁰⁷ Ibid, Nicky Wagner

³⁰⁸ Claire Trevett “PM: It’s okay to give light smacks” The New Zealand Herald (New Zealand, 8 December 2009)

³⁰⁹ CRC/C/GC/8, above n 103 at [48]

discipline their children without hitting them. Yet this is a reality.³¹⁰ Parents who have been reliant on smacking through ignorance of other methods to suddenly become experts in positive parenting techniques. Education and support is essential.

Secondly, specific education about the law change was required which needed to encompass

1. The reasons why the law needed to be changed.
2. What the new law meant.
3. The consequences if a person broke the law.

This information needed to be provided to the public as close to the passing of the law as was feasible. Given the public interest in this law and the controversy it caused, there needed to have been a concerted education campaign to counteract the misunderstanding and confusion prevalent in the public arena.

Yet there was no rigorous, publicly funded education campaign in New Zealand and this was a significant failure on the Government's part. A concerted education plan would have clarified the confusion surrounding the law, provided accurate information for the public and for the media to disseminate and helped to mitigate the damage caused by opposition lobby groups. An education programme could have taken many forms:

- Television – public service advertisements for road safety and domestic violence help to raise awareness of both laws and acceptable behaviour. Similar advertisements could have been used to visually show what behaviour was allowed and what behaviour was not allowed.
- Internet – the internet is extremely widely accessed and provides a cost effective means of disseminating information. The responsible government departments could have established a specific website to explain the law and to provide information, resources and links. This could then have been a guaranteed accurate source of information on the meaning and effect of the law. There are difficulties with using the internet as a sole means of disseminating information. Some of the most at risk families are likely not to have internet access. According to recent

³¹⁰ Hone Kaa "Papaki Kore: No Smacking for Maori" 2009 <<http://ips.ac.nz>>

statistics released by statistics New Zealand, 80% of New Zealanders access the internet.³¹¹ This leaves 1/5th of the population not accessing the internet and of those who do, we cannot be sure how many of those access it for anything more than basic tasks such as checking emails.

Information stored on the internet must also be specifically searched for, or for a link to be specifically followed. Therefore the internet is useful as a portal and a holder of information but not necessarily as effective as reaching a wide target audience.

- Newspapers – advertisements in major newspapers would have been another option for disseminating information.
- Printed material – brochures which could be delivered to households or distributed via public places.

The precise form which an education campaign could have taken is less important than the fact *some* form of education was needed and was not forthcoming. If we look to the example set by various other countries which have also gone through this process, we can see that other countries have been more inventive and more diligent in their attempts to impart knowledge to citizens.

Sweden

When Sweden banned corporal punishment, they embarked on an extensive education campaign. The Ministry of Justice prepared a 16 page, full colour booklet entitled “Can you bring up children successfully without smacking and spanking?” The booklet was translated into 10 minority languages and 600,000 copies were distributed to households with young children.³¹² Another novel means of educating the public was the printing of information about the law onto milk cartons for a two month period. The theory was that information about the law would be present at meal times and would therefore encourage families to discuss the issue together.³¹³

The education campaign was phenomenally successful. By 1981, 99% of Swedes were familiar with the law. This level of legislative familiarity is almost unheard

³¹¹ Statistics New Zealand “Broadband in over 1 million homes” (Media Release, 16 April 2010)

³¹² Joan Durrant *A Generation Without Smacking* (Save The Children, London, 2000) at 7-8

³¹³ Joan Durrant “The Swedish ban on corporal punishment: its history and effects” in Frehsee, Detlev Horn, Wiebke and Bussmann, Kai-D (eds) *Family Violence Against Children: A Challenge for Society* (Walter de Gruyter & Co., Berlin, New York, 1996) at 22

of and is unmatched in relation to any other law in any other industrialised nation.³¹⁴ Yet the education did not stop there. The law is used as an example in schools of how law is created. Parent education classes are made available to all expectant parents and the law is taught as part of those classes. 9th grade students learn about the law as part of their lessons on child development. As part of their compulsory English language classes, students complete a vocabulary building exercise which is based on a conversation between three people, one who is against corporal punishment and another two who are in favour.³¹⁵

Finland

The Finnish education campaign involved the dissemination of a booklet entitled “what is good upbringing” which was prepared by the Ministry of Justice and the National Board of Social Affairs. 200,000 leaflets “When you can’t cope, seek help, don’t hit the child” were prepared and distributed by the Central Union for Child Welfare. Education slots during prime time television encouraged the use of reasoning and discussion.³¹⁶

Norway

Voluntary organisations prepared and distributed leaflets and placed advertisements in national newspapers. The Ombudsman for Children has a weekly television programme in which questions relating to children can be discussed.³¹⁷

Denmark

In Denmark, the education campaign coinciding with the 1997 amendment was comprehensive and was developed by the National Council for Children and partially funded by the Ministries of Justice and Social Affairs. The intention was that the information was to inform parents and professionals alike and to inspire an open, accepting and humane form of child rearing.³¹⁸

³¹⁴ Durrant, above n 312, at 8

³¹⁵ Rowan Boyson and Lucy Thorpe (ed) *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) at 17 <www.respectworks.eu>

³¹⁶ Ibid, at 25.

³¹⁷ Ibid, at 28.

³¹⁸ Ibid, at 37

A pamphlet aimed at parents with children under the age of 10 was prepared and distributed. Its intention was to educate parents on non-physical methods of child discipline and rearing in a supportive and non-judgmental manner. The pamphlet was translated into Turkish, Arabic, Yugoslav and English. A magazine was also produced which was to be given to parents whom professionals thought may be routinely using physical punishment. It contained real life stories, children's views and questions and answers. In 1998 a TV programme aired twice on Danish national TV. A family therapist, mother and various children gave their opinions. The programme was then made available as an education video.³¹⁹

Germany

What is fascinating about the German situation is that only 25-30% of the target group of parents and young people noticed the law change because it was not widely reported in the media. This was in spite of a government funded and organised publicity campaign which cost about 2.5 million Euros.³²⁰ The issue was debated publicly but it would appear it did not gain the widespread level of interest that it did in New Zealand.

The reasons for the Government's inadequacy in respect of the message

It seems clear that despite passing a law which banned corporal punishment, there was in fact little governmental support for the proposition that all physical punishment should be actively discouraged. New Zealand has a law which purports to ban physical punishment but a clear and unequivocal statement from the current Prime Minister that physical punishment is allowable which arguably results in the practical position of parents needing to determine for themselves the boundaries of reasonable discipline. Why did this happen?

Politicians are only human and consequently hold the same attitudes towards children as do other members of the public. There was very little public support for a total ban on corporal punishment and this was reflected within Parliament too. The difference with politicians and most of the rest of the public was that they were privy to all the information which they needed to make an informed and educated decision. Despite their personal opinions, almost all decided that any

³¹⁹ Ibid, at 25

³²⁰ Kai-D Bussmann "Evaluating the Subtle Impact of a Ban on Corporal Punishment of Children in Germany" (2004) 13 Child Abuse Review at 7

potential negative effects of the legislation were outweighed by the potential gains. Nonetheless, just like other normal New Zealanders, the decision to ban a practice which was probably part of their own personal history was confronting. I suggest that many politicians may have intellectually understood that passing this law was sensible but may still have had personal reservations. Reservations which manifest in a mindset where it is more comfortable to say “smacking is not a great idea but sometimes it is necessary/justifiable/harmless” than to say “smacking is wrong.”³²¹

More pragmatically, politicians are reliant on the continued support of their constituents and the popularity of their party. Politicians were in the unenviable position of having to promote wildly unpopular legislation while at the same time not aggravating their constituents and affecting their re-election chances. This proved to be a somewhat impossible position and resulted in the message “legally we’ve banned smacking but don’t worry, we know you’re going to do it and you won’t get in trouble for it.” This half way solution may be accurate and it did help to quell the fears of many members of the public, yet it negated the effect of the legislation.

Finally, this law arose through a member’s bill and not a government bill. There was thus little impetus for the Government to take responsibility for its promotion. Without strong support from the Government, practical issues such budget constraints may have proved insurmountable or perhaps there was disorganisation over which department was responsible for education.

Alternatives which were available to the Government

As a case study in the process of legislative change, the flaws in the process are clear. The Government choose to pass legislation which appears to have inadequately reflected the wishes or intentions of a considerable number of Parliamentarians who voted in favour of it and which was open to misinterpretation.

This need not have happened as there were other options available. If the Government was uncomfortable with the concept of legislating against the use of all corporal punishment, then there were three other options available.

³²¹ This mindset was evident in the Hansard speeches already referred to.

1. To define the limits of reasonable force within the legislation; or
2. To retain the status quo; or
3. To opt for simple repeal – a half way solution which, as discussed, was found to be unacceptable.

Defining the limits of reasonable force

This was, and still is, viewed by many as a viable compromise and there was both political and public support for this option. Defining the limits of reasonable force was seen as sending a clear message that child abuse and severe discipline was unacceptable, while recognising the “parental right” to smack. There are several ways in which “reasonable” force can be defined and examples are provided below.

*The New South Wales Approach*³²²

The Crimes Act 1900 (NSW) provides that physical force must not be to the head or neck or any other part of the body in such a way as to cause harm lasting more than a short period, unless the force is trivial or negligible. The physical punishment is only lawful if the application of the force was reasonable having regard to the age, health and maturity of the child and the nature of the alleged behaviour.³²³

In 2010 the New South Wales State Government indicated it had no intention of changing the law to bring it in to line with the expectations of the United Nations.³²⁴

*The Scottish Approach*³²⁵

The Scottish Executive decided to consult on the issue of where the line should be drawn in relation to acceptable physical punishment of children within the family setting. Research was also undertaken with Scottish families to determine “normal practices” and as a result, in 2003 the Criminal Justice (Scotland) Act (2003) was passed. Although the right of parents to physically punish was retained, the Act prohibited certain actions. Shaking a child; hitting on the head;

³²² See appendix six

³²³ The Crimes Act 1900 (NSW) s61AA

³²⁴ Linda Simalis “Aussie parents to defy UN smacking ban” *The Sunday Telegraph* (Australia, 21 March 2010) <www.news.com.au>

³²⁵ See appendix seven

using a belt, cane slipper, wooden spoon or other implement. Factors to be taken into consideration by the courts were the child's age, the duration and frequency, how it affects the child both physically and mentally, the reasons for the punishment and the circumstances and also issues personal to the child, such as their health or disability.³²⁶ A guide published by the Scottish Executive called "Children, Physical Punishment and the Law" states that "smacking is not advisable as a method of disciplining children..."³²⁷

The Chester Borrows Amendment and the John Boscawen amendment

The Chester Borrows amendment proposed in 2007³²⁸ and the John Boscawen amendment³²⁹ proposed in 2009 were fundamentally the same. The Borrows amendment would have legalised the use of force for the purposes of correction provided that the force used did not "cause or contribute materially to harm that is more than transitory and trifling; involve any weapon, tool or other implement; and is not cruel, degrading, or terrifying."³³⁰ The Boscawen amendment aimed to provide clarity for the public and remove a reliance on police discretion. His amendment provided that smacking (force) would be allowed for the purposes of correction, provided that it was not inflicted in a cruel and degrading way, that it did not involve the use of a weapon or other implement and that any injury caused was trifling and transitory.³³¹

The ADLS Approach

In 2005, the Auckland District Law society proposed an amendment to the existing law which would have provided that parents would be protected from criminal responsibility when using reasonably justified force for the sole purpose of correction against a child over 2 and under 13 years of age.³³² Whether the force applied could be found to be reasonably justified by a properly instructed jury, would have been a matter of law and whether the force applied was reasonably justified, would have been a matter of fact. Examples of conduct that

³²⁶ "Children, Physical Punishment and the Law: A Guide for Parents in Scotland" (Scottish Executive, Edinburgh, 2003) at 3

³²⁷ Ibid, at 6.

³²⁸ Supplementary order paper 2007 (86) Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill

³²⁹ Crimes (Reasonable Parental Control and Correction) Amendment Bill (2009)

³³⁰ Supplementary order paper, above n 328, at 2

³³¹ Crimes (Reasonable Parental Control and Correction) Amendment Bill (2009), s 59(2)

³³² James, above n 210

could not be reasonably justified included force that materially contributed to actual bodily harm, whether that result was intended or not; any striking above the shoulder; any conduct that but for this section would be an offence more serious than assault.

The Problems with Legislation Which Defines the Use of Reasonable Force

These examples are all variations aiming to define the use of reasonable force against children. Viewed in a positive light, they provide a way to reflect the common realities of parenting while making an attempt to protect children from injury. The Boscawen and Borrowes amendments were serious and genuine attempts to find a compromise between the desire to limit the use of physical punishment and the reality that corporal punishment is a widely accepted part of our child-rearing practices.³³³

Despite drafting differences, all the options are effectively saying that a parent can hit their child, as long as they do not hit them too hard. Supposedly, if legislation places limits on how and where children can be hit, children will remain safe from abuse.

Dignity, respect and rights

The fundamental problem with defining reasonable force is that it involves legal sanctioning of a behaviour which, if committed against an adult, would be a crime. It is therefore completely contrary to UNCROC and does nothing to advance the rights of children to be free from assaults upon their person.

To put this in a different context, we can compare elderly people with children and take the issue of continence. Some of the most horrific cases of child abuse in New Zealand have arisen from toileting accidents. Tangaroa Matiu was beaten to death with a fence paling by his stepfather after soiling his pants. Ngatikaura Ngata, 3, was beaten to death by his mother and step father with weapons also after soiling his pants. Before Mereana Edmonds, 6, was beaten to death by her mother and her mother's lover she had been thrown into a shed all night for bedwetting.³³⁴ In *R v Donselaar* the accused smacked his son so hard on the

³³³ MP's briefing sheet No 4 "Assessing the Chester Burrow's proposal" (March 2007) <www.savethechildren.net>

³³⁴ Pat Booth "The child abuse facts – now you know" (6 August 2007) <www.stuff.co.nz>

backside that he caused bruising. His defence was that he was disciplining his son for soiling himself. These examples range from the unacceptable to the horrific and show that some parents believe it is acceptable to physically discipline a child for a common childhood accident. Take this as the tip of the iceberg. How many other children are disciplined physically, though not as severely, for toileting indiscretions?

If we approve of the concept of “defining reasonable force” it would be acceptable to allow a parent to smack a child (albeit within the “approved” guidelines) for transgressions such as bedwetting or soiling. But if a parent can smack a child for failing (or refusing) to control their bowel or bladder, by analogy should a caregiver should be able to smack an incontinent elderly person? Smacking an incontinent elderly person is abhorrent. It is patently intolerable to suggest that we should be allowed to smack an elderly person regardless of the fact that no lasting harm was intended and regardless of what the elderly person has done to “deserve it.” It is an assault on their dignity and on their person and shows a complete lack of respect for the rights of that elderly person and any country that fails to cherish and care for its’ most vulnerable elderly citizens shows a complete disregard for the dignity and sanctity of human life.

Why should we view children any differently? It is intolerable that we would ruminate on how best to hit our children and make judgments about the legality of a hit or a smack based on the personal characteristics or behaviour of the child. Adults should have the responsibility to monitor and control their behaviour and not react to the behaviour of children.

Definition and Interpretation

Leaving aside the issue of human dignity and respect, there are still difficulties with definition and interpretation. For example, under the Boscawen Bill the court would have been required to decide whether or not the force was applied in a “cruel and degrading way”. What makes a smack degrading? Is it degrading if it occurs in front of other people? Is it degrading if it involves the removal of underclothing? Is it cruel if it is followed by a period of emotional withdrawal?

Does cruelty refer to the number of smacks? Is cruelty to be interpreted in light of the particular child's sensitivities or is it an objective test? What is cruel to one may not be cruel to another.

Furthermore, what is transitory and trifling? The definition of transitory is "not permanent or short lived."³³⁵ A bruise is arguably transitory because it is gone in days and leaves no permanent damage. Yet the force required to bruise a child is significantly more than a light smack. "Trifling" is defined as "trivial or unimportant".³³⁶ This perhaps lowers the threshold, but to whose standard? Is the smack trivial in the parent's mind, trivial in the child's mind, or trivial when viewed objectively? If a person is in the habit of using reasonably harsh physical discipline then individual acts of smacking may be unimportant to them because they are so much a part of his or her regular routine. Those acts of smacking may not be so trivial to the child, who may be hurt and embarrassed. If it was to be determined objectively, what factors would be taken into account to make such a determination?

Courts may be in a position to make judgments about whether the behaviour which comes before them stands up the legal definitions of trifling and transitory or whether the incident was degrading. However as I demonstrated in chapter three, both judges and juries had very differing perspectives on what was "unreasonable force" despite decades of available case law. These new terms would have been no less open to differing interpretations. Furthermore, these definitions do not help parents in deciding in advance whether their behaviour meets the standard and do not prevent parents whose interpretation is wider, from inflicting more harm than was intended as allowable by the legislature.

The risk of injury

Options which attempt to limit harm by making smacking or hitting illegal if done to certain body parts or with implements also pose difficulties. Avoiding hits to the head is obviously essential however smacks or hits to other parts of the body can have unintended consequences. A smack to the bottom of a small child could cause a child to stumble and hit their head on a table. A parent may aim a smack at a particular body part but the child may move causing the smack to connect to a

³³⁵ Concise Oxford Dictionary (10th ed) (Oxford University Press, Oxford, 1999) at 1523

³³⁶ Ibid

more sensitive body part. An angry parent may be unable to accurately gauge what level of force will cause harm to the child. Parents may even be unaware of the damage they have caused:

Another paediatrician at Birmingham Children's Hospital said she often sees unmarked but badly hurt children. 'There are injuries that are quite nasty that don't leave any marks at all. Often with impact injuries you do see reddening, but a blow to the abdomen doesn't leave any superficial marks at all, the child just starts to vomit.'³³⁷

These "compromises" were simply not an option at all. Sue Bradford may have only intended originally to remove the legal defence of "reasonable force" leaving the legislation otherwise silent, but inserting a new law which dictated how children could be hit was an unacceptable compromise and she, and other supporters, quite rightly refused to accept it. This is an example of a situation where principle needed to take precedence over practicality, despite the fact that it was a very unpopular move in the eyes of the public.

Retaining the Status Quo

As we have seen, the legislation which was passed was "compromise" legislation and not completely effective at doing what it was supposed to do. There was only limited parliamentary support for an explicit and uncompromising ban on corporal punishment and given this lack of support, the Government could have backed away from this issue until such time as there was sufficient backing. It is recognised that the most satisfactory way in which this legislation can be introduced is when a bill which specifically prohibits corporal punishment is produced by the Government.³³⁸ Waiting until such time as this was possible was an option. Had the Government backed right off this issue, it is possible that there would have then been an opportunity to gain the necessary support in advance and then to address and control the inevitable negative reactions.

If this issue had left the public eye for a period of time then it is possible that there would have been more opportunity for strategic debate, rather than the media debate which occurred in New Zealand. Strategic debate involves informed and

³³⁷ (28 March 2007) 638 NZPD 8465, Sue Bradford

³³⁸ Gopika Kapoor and Sharon Owen "Towards the Universal Prohibition of All Violent Punishment of Children" (Save the Children Sweden, 2008) at 35
<www.endcorporalpunishment.org>

rational debate on whether or not to ban corporal punishment using the best research and information available. It also involves gaining the support of the most senior politicians possible; those with the most influence are best able to lead from the top.³³⁹ Once a consensus is reached that the banning of corporal punishment is necessary and warranted, the debate can move to how best to do this and draft legislation can be drafted. Ideally, the debate would only enter the public fray once the government had reached this position. The position is then offensive, rather than defensive. This contrasts with the debate in New Zealand which was characterised by the Government reactively responding to opposition and arguments as they arose.

However, I conclude that the risk to retaining the existing legislation for the time being was that the issue could have taken years to come back to the governmental table, given the public dissent and the lack of strong parliamentary support. In the meantime children's rights would have remained unprotected. In an ideal situation, the process would have occurred differently but ultimately the most important goal – the immediate legal protection for children's rights – was achieved.

In the final chapter I will address the future and what can be done to build on the situation we have now which is that we have legislation which is not perfect but acceptable in terms of prohibiting corporal punishment, but a failure to adequately monitor, educate and promote the purpose of the law.

³³⁹ Ibid, at 34.

CHAPTER SEVEN

MOVING FORWARD TO THE FUTURE

In this final chapter we move from the past and look to the future by looking at what we have now and what we can do with the situation in order to continue pursuing the goals of the abolitionists. Furthermore, it is important to look at whether the lessons learned from the s 59 debate in New Zealand can have any application to future legislative change in New Zealand.

The situation in 2010

Unfortunately, there has been no government led monitoring of the effects and attitudes towards the law, outside of the reviews concerning prosecutions and investigations conducted by the Police and by Nigel Latta.³⁴⁰ Monitoring should be an integral part of the follow up to legislative change of this type. Monitoring provides information about the public understanding and acceptance (or rejection) of the law as well as providing longer term data about changing attitudes towards children and corporal punishment.³⁴¹ Without this information to hand, we can only guess at many aspects of the current situation.

So keeping this in mind, more than three years after the passing of the Crimes (Substituted s 59) Amendment Act 2007 we find ourselves in the following situation:

1. The defence of “reasonable force for the purposes of correction” has been removed from both legislation and the common law, thereby affording children the same level of protection against assaults as adults. This is a fundamental step forward.
2. New Zealand’s laws on child discipline now accord with our responsibilities under UNCROC.

³⁴⁰ As discussed in chapter four

³⁴¹ Gopika Kapoor and Sharon Owen “Towards the Universal Prohibition of All Violent Punishment of Children” (Save the Children Sweden, 2008) at 78
<www.endcorporalpunishment.org>

3. There appears to be a general public acceptance that anything *more* than the ill-defined but popular “light smack” is unacceptable when it comes to disciplining children.
4. In relation to the “light smack” there has been more limited progress and the general public and political feeling appears to be that a “light smack” is still acceptable parenting practice.
5. There is still confusion amongst the public as to what the law means.
6. There is a greater awareness of wider child disciplinary issues as a result of the discussion generated by this issue. It can be hoped that some people will have changed their opinions on discipline in response to that discussion and are now choosing to parent their children without the use of physical force.
7. Politicians have shown no signs of wanting to revisit the issue with a view to amending the legislation.
8. Pro-smacking and anti-smacking lobby groups are still active and are likely to continue to be so, dependent on developments in research and in cases. Lobby groups will continue to monitor the situation and any opportunities to lobby for or against this law will be taken. In particular, prosecutions involving discipline allegations will be closely watched and used to further the respective cases.
9. Education on positive parenting is being left up to NGOs.

We have made some important gains, but also failed to capitalise on the opportunities which were presented.

What can be salvaged from the situation?

Further Education

The community has reached saturation point on this issue for the time being and re-opening the debate with a view to clarifying and amending the legislation would be counter-productive. Furthermore, there is also absolutely no political drive to re-open the issue. Nonetheless, there is still a valuable opportunity to continue to educate parents and the wider community on positive parenting strategies and just as importantly, to promote a major attitudinal change in the way we, as a community, view children.

Despite the lack of a specific government funded education campaign linked to the s 59 amendment, there are education resources available. The Ministry of Social Development is in charge of multiple programmes which are aimed at improving the general standard of parenting in New Zealand, reaching at risk children and achieving better outcomes for all children. For example, Whānau Toko I Te Ora, an intensive home-based family parenting support programme for Māori whānau delivered by Te Ropu Wahine Māori Toko I Te Ora (The Māori Women's Welfare League) and the Parents as First Teachers programme which is a parent education and support programme that "helps parents understand how their infant develops and learns, and how best they can help their child reach their full potential". In addition, the S.K.I.P programme (Strategies with Kids: Information for Parents) is purely focused on "supporting parents to bring up their children in a positive way, using love and nurture and limits and boundaries."³⁴²

The Office for the Commissioner for Children and EPOCH NZ has published a pamphlet *Choose to Hug* which provides some great information on dealing positively with children.³⁴³

In addition to the programmes provided or supported by the Ministry of Social Development, non-governmental organisations such as Barnardos, Triple P Positive Parenting Program³⁴⁴, Plunket³⁴⁵ and Parent's Centre provide help and education to parents in relation to the use of positive discipline.

Yet these programs all have limitations. In order to take advantage of the services available to them, parents need to acknowledge that they could benefit from further education and that they may need to change some of their habits. If the desire to be educated is there, parents still need to know what programs exist and be able to access them. The programs which are available appear to tap in to two markets. The first is at-risk families who are referred for assistance. The second is parents who are already parenting well and are prepared to spend time and money to educate themselves on how to parent even better.

³⁴² Information on all these programmes can be found at www.familyservices.govt.nz

³⁴³ Office of the Children's Commissioner and Epoch NZ "Chose to Hug: Information and Suggestions for Parents" (2008) available online through <www.plunket.org.nz>

³⁴⁴ Information can be found at www33.triplep.net

³⁴⁵ Information can be found at www.plunket.org.nz

For parents in the second group, there is a proliferation of available material. Magazines play a significant role in disseminating information. *Little Treasures* and *Parenting* actively promote non-physical forms of punishment while also encouraging positive parent/child relationships. Free magazines such as *Littlies* and *Tots to Teens* are widely available in daycares, schools, kindergartens and carry articles which support positive parenting strategies. Magazines, particularly the free ones, are portable, readily available and carry less text than books. For those serious about the subject, there are a multitude of books available and the internet can also provide a wealth of information for parents. Organisations such as Parents Inc run seminars and classes aimed at helping parents to learn and to improve their parenting skills.³⁴⁶

In the middle sits the large portion of parents who are not forced to seek help and who do not actively seek out further education on their own. These are the parents who parent unconsciously, following in the pattern of the way they were raised. This is a hard group to target with education. However, I believe that this is where widespread, general education would be beneficial and public interest television advertisements are one way of achieving this. The Government is able to educate people on the dangers of speeding, alcohol, family violence and unattended cooking so the same could easily be done with smacking. It is not too late to start this.

Education needs to be targeted at the needs of the audience. The focus of this thesis has been primarily of the Pakeha response to this law. However we must recognise that different forms of education will resonate better with some cultural groups than with others. Te Kahui Mana Ririki is an organisation committed to eliminating Maori child abuse and maltreatment. One of the fundamental messages of this organisation is that “smacking is simply another expression of violence against Maori children” and is part of a context of adults hitting adults and adults hitting children.³⁴⁷ The organisation is focussed on educating Maori about alternatives to smacking using a six step programme of: Kauaka (stop), Haere (go), Kia whakaware (distract), E aro ke (ignore), Whakamihia (praise) and Kia ngahau (enjoy). The Reverend Dr Hone Kaa reported that when the developing programme was presented on the East Coast of the North Island, these

³⁴⁶ www.parentsinc.org.nz

³⁴⁷ Hone Kaa “Papaki Kore: No Smacking for Maori” 2009 <<http://ips.ac.nz>>

simple ideas were new information for some of the participants, showing that positive parenting messages are not reaching all New Zealand parents. Reverend Dr Kaa found that anti-smacking programmes for this demographic needed to take into account the fact that the existing resources were too text heavy and needed more Maori faces and concepts in them. The Maori people to whom this was presented liked the use of waiata, music, cartoons and imagery.³⁴⁸ This is an example of targeting specific groups with appropriate resources and a clear message: make your marae, your home and your life smack free and use alternatives to physical discipline. “Papaki Kore: No smacking for Maori.” Whatever form education takes, it needs to be audience appropriate and comprehensive.

The message of the education

However it may not be enough just provide alternatives to smacking and educate about the benefits of positive parenting. There needs to be a focus on changing some of the negative underlying beliefs about children. In *Papaki Kore: No smacking for Maori Children*, The Rev. Dr Kaa outlines the work of Te Kahui Mana Ririki and then goes on to say that

Between the first and second workshop, what we realized is that we are actually asking our people to do is make a major mind shift about the beliefs of parenting – away from thinking that ririki are fundamentally naughty to thinking about ririki as intrinsically pure and perfect.³⁴⁹

This hits to the heart of this thesis. Without a change in the fundamental way in which we view children, education on alternatives will fall on deaf ears. Parents will not be fully receptive to the positive parenting message if their underlying belief is that children are inherently naughty and need to be brought in to line. Changes to behaviour may occur, but there will be a greater likelihood of reversion, temporary or permanent, if underlying attitudes do not change.

To counter negative beliefs about children Te Kahui Mana Ririki have prefaced their six steps with the following fundamental ideas about children:

- Ririki are perfect

³⁴⁸ Ibid.

³⁴⁹ Ibid.

- Ririki have mana
- Ririki are tapu
- Ririki need warmth
- Ririki need structure
- Ririki need guidance
- Ririki grow in to happy, caring adults

At the top of this list is the message that children are perfect. It is a major mind shift to view children as perfect and involves us separating a child's behaviour from the essence of who they are. Children behave badly because they do not know a different way to act, because they are overwhelmed by tiredness, frustration or hunger, or because they know that bad behaviour gets a response which satisfies their need for attention. They do not behave badly because they *are* bad.

Although this thesis has been formulated around two competing constructions of children, we know that there are other constructions of children and we also know that constructions change over time. I suggest that the way forward is to find new ways to construct children and childhood. I would like to see a prevailing attitude which holds that; children are born with the right to our immediate respect, without having to earn it or prove they are worthy of it; that children need parents to guide and educate them on how to capitalise on the innate, individual skills they have been born with; and that parents have responsibilities towards their children and not rights over them.

On-going education is essential to eradicating the attitudes towards children which support corporal punishment, and replacing them with more positive views on children so that corporal punishment is eventually relegated to the annals of our history. However it is likely that the Government will not take a strong role in the provision of this education and it will continue to fall to non-governmental organisations.

Lessons for Legislation

Is it possible to learn lessons for the future from this debacle? Will we ever have a set of circumstances again which will result in the same level of public antipathy and stridency? This is difficult to answer. This issue became so big because of a confluence of several critical factors.

Firstly, this was an issue which was easily understandable to almost every person in New Zealand, children included. It boiled down to a very simple question - should it be legal for a parent to be able to smack their child if the child does something naughty? The concepts behind many laws are not this simple.

Secondly, this was an issue which resonated with almost every New Zealander. Everyone was once a child and therefore had firsthand experience of either being physically disciplined or *not being* physically disciplined. A majority of children will go on to have children of their own so will then experience being the person who has to decide whether or not to use physical discipline. People without children of their own will often have experience of looking after nieces, nephews or friends' children. Everyone who lives in our society will have contact with children and will inevitably have an opinion on the relationship between the behaviour of the child and the disciplinary tactics of the parents.

Many laws, even those involving families and children will not be as relevant to such a high proportion of the public. For example, the law relating to whether or not a parent should be allowed to relocate overseas with a child, against the wishes of the other parent is phenomenally important to families faced with this challenging issue. When presented with the question "Should a mother be able to move with her children to Australia when the father does not want them to go?" most people would be able to offer an opinion. Yet the issue is unlikely to personally touch their lives so a distance can be maintained. Child discipline touches all our lives in some way and so it is difficult to maintain objectivity.

Thirdly, there was a well-organised, well-funded and determined movement against the proposed law. New Zealanders are often politically apathetic³⁵⁰ and so the movements against various laws often come from small groups with a vested interest in the issue. However to be successful, these minority views must be able to obtain the support of the wider public. In areas concerning morality, minority

³⁵⁰ As seen in the poor response to local body and general elections.

groups are often unable to get widespread support because of a general “live and let live attitude.” This is the belief that if it does not impact directly on your life, then it is not worth arguing about. For example, the same groups who were against the repeal of s 59 were also against the civil unions and the legalisation of prostitution. However these laws passed with much less outrage. For a fundamentalist Christian, a law which (to them) undermines the sanctity of marriage is worth protesting against but for most other people, whether or not a gay couple can have their relationship legally recognised has no bearing on their day to day lives and is therefore unimportant. Smacking was different because religious groups were able to tap in to other fears and gain widespread support.

Fourthly, the law was a complete reversal of a situation which had existed for over 100 years. The law of reasonable chastisement had been part of our legal and social history for so long that changing it was a major undertaking. This was not a law that was trying to deal with new issues such as the rights of surrogate mothers or the rights of children conceived using donor sperm or eggs, it was a law that was trying to fix a wrong which few people recognised as existing. Although there had long been concerns about the law amongst lawyers, academics and those involved with abused children, for the majority of people going about the day to day tasks of raising children, there was no problem to fix and the repeal was an unnecessary and unwarranted interference.

Fifthly, this law cut right to the issue of how we see children and the relationship between parents and children. The new law was going to upset the established and accepted relationship between adult authority and child submission.

Because of these factors, we are unlikely to see a significantly similar situation arise in the foreseeable future. However, there are some more general lessons to be learnt.

Firstly, the media plays a hugely important role in debates in this age of technology. Information, both correct and misleading can be disseminated quickly and effectively. Once inaccurate information is in the public realm the effect can be damaging. The media must be given accurate information by the relevant government departments and where necessary, there must be a concerted drive to correct misunderstandings that are found in the public realm.

Secondly, lobby groups have an important role to play in the political process but they need to be viewed with caution. Well funded lobby groups are not necessarily promoting a better message than less well funded groups – they are just better able to get their message across. It is essential that the government understands the background to all lobby groups advocating for legislation (which I would hope is already the case) but there also needs to be recognition that the public may not have this understanding. Therefore public reactions or opinions which result from the actions of lobby groups should not always be relied upon as being a correct representation of opinion. If people had all the facts, opinions may be quite different. Bowing to public opinion which is based on misinformation is poor leadership and can potentially result in the dropping of good but unpopular laws.

Thirdly, the conservative forces in New Zealand are well organised, well funded and very determined. Whenever any socially progressive legislation is debated, they will be a formidable force. A rational and serious debate between liberal and conservative forces can assist the democratic process, but a stealth mission undermining the debate should not be allowed to occur again.

Fourthly, legislation without a clear intention will inevitably be less successful than legislation which is passed to give effect to clear governmental objectives.

Taking note of these lessons and learning from them in the future will be one way of salvaging positive outcomes from this process.

CONCLUSION

The process of amending the legislation concerning child discipline in New Zealand was a lengthy and fraught process. There is no doubt in my mind that this process could have been managed better so as to capitalise on the opportunity that was presented to New Zealand by the random drawing of Sue Bradford's member's bill. New Zealanders had a valuable opportunity to make real progress in the battle to keep our children safe from harm perpetrated by the people who are supposed to love and care for them.

For decades, child advocates had been waging a war against corporal punishment. Research, education and advocacy were slowly having an effect on our child rearing practices and on our attitudes towards children and discipline. Yet change brought about through education alone occurs much too slowly. When Sue Bradford's bill was drawn, the opportunity to accelerate social change through legal change was somewhat unexpectedly thrust upon the New Zealand government.

The inevitable discussion that this bill would create was the perfect opportunity to bring the issue of children and discipline into the public consciousness and to bring about constructive dialogue. Unfortunately, working against this high hope was the fact that many New Zealanders still passionately cling to traditional ideas about the nature and role of children and the place that physical discipline should take.

I do believe though, that these were largely unconscious ideas, bought about through generations of behaviour and social messages which have been part of our culture for well over 100 years. Through reasoned discussion, solid legislation and on-going education we could have begun to change these attitudes. The ground work had already been laid in the competing constructions of children which already exist. However doing so required a solid desire and commitment from the government and as we have seen, this commitment was simply not there. Reasoned discussion gave way to deliberate misinformation, confusion, vacillation and even threats of violence.

As a result, we have a compromise situation in 2010. We have legal protection for children but it is largely misunderstood and incorrectly publicised. We have improved awareness of the issue, but it is doubtful how much of this has translated in to changing attitudes. We have lobbyists on both sides that are anxious to keep the issue alive (but for differing reasons) but the general public and politicians are keen for it to disappear.

While I would like to believe that the Government would take an active role in advancing the message that corporal punishment is unnecessary and illegal, in reality, it will be left for NGO's to continue the valuable work they have been doing in educating parents on positive and appropriate ways to discipline their children. With the passage of time, the public will become more comfortable with the law and will see that it is not resulting in unwarranted persecution of innocent parents. With growing acceptance will hopefully come a change in the way New Zealanders view children and punishment as we move towards a future where all New Zealand children can expect, and receive, a violence free upbringing.

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APPENDIX ONE

New Section 59 as amended by the Crimes (Substituted section 59)

Amendment Act 2007

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).

(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.

APPENDIX TWO

Text of Sue Bradford's Original Member's Bill

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

Amendment

Bill

Member's Bill

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 principal Act".

2 Commencement

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

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.

4 Domestic discipline

Section 59 of the principal 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 THREE

Full text of the 1906 article in the Otago Witness

In a recent article on the subject of "The Ethics of Corporal Punishment" in the International Journal of Ethics, Mr Henry S. Salt puts the argument against corporal punishment of every form and degree on very high ground. It is usual to urge (says a writer in The Hospital) that, as a deterrent from evil-doing, the practice is useless and that as a matter of fact, experience proclaims its failure. To this Mr Salt firmly adheres, but he also contends, that even were the verdict in the opposite direction, corporal punishment ought still to be condemned on the ground that of its immortality. In short, the claim is that corporal punishment is useless and that even when it appears to be effective it is wrong, and in the end is gained at too great a cost. In favor of this view is urged a growing detestation and abhorrence of the practice by all social reformers, and the outrage violence inflicts on the sacred supremacy of the human mind and the dignity of the human body. This argument is not only presented against the flogging of criminals, but also against the use of the birch or can in schools and the parental chastisement of children. The paper is an interesting one and is informed by high ideals and a humanitarian motive worthy of general respect and sympathy. But whether the writer will succeed in establishing his central conclusion in the minds of the readers may, perhaps, be doubted. The world is prone to practical tests and as discipline, though not as savage punishment, some forms of bodily suffering seem to carry satisfactory results in a race "semi-civilised" as Mr Salt proclaims ours to be. Yet he may without much hesitation claim the following tide and the future. The history of the past and the growing sentiment of to-day certainly indicate that whether by the preaching of abstract ethical doctrines or by the argument from results, corporal punishment will surely be deposed to a lower and lower position.

Advertisement

Reality hits parents



Just a few months ago, the politicians refused to listen to 83% of New Zealanders who said they didn't want a ban on light smacking. Despite the outcry, the Anti-Smacking Bill was passed into law and the country's parents waited anxiously to see how things would unfold. Here are just a few examples of parents who have been reported as a result of the anti-smacking law:

School dubs mum to CYF for hand smack

Sunday Star-Times 28 October 2007

A Wellington mother says her family has been left traumatised after her son's school reported her to Child, Youth and Family for smacking him on the hand. "I don't want to feel like a child abuser, and I don't want to be labeled as a child abuser because I smacked my son," she said. "It's brought a lot of trauma to our family unit and unnecessary stress." The woman, who did not wish to be named because she fears losing her children, says another smacking several months later resulted in a visit from police and referral to a foster care agency – despite police not charging her.

Police investigate grandmother for smacking grandchild in shop

In October, a woman and her young granddaughter had been shopping for a bubble blowing kit at a Warehouse store in the Bay of Plenty. They had decided on a kit when the granddaughter spotted a more expensive version higher up and insisted they buy that one instead. When the grandmother

said no, the granddaughter made her feelings known in an offensive manner using the 'F' word amongst others. Grandma responded with a smack. As they left the store, she was surprised to find a policeman waiting to interview her. According to store management, a complaint had been made by a member of the public. They did not press charges but the grandmother was shocked.

Solo mum investigated by police when child falls over

In October, a South Auckland mother took her five year old shopping. As they were leaving the supermarket, the mother chased some money which the daughter had dropped. She then grabbed the child's hand to lead the child to the car, but the child tripped and fell over. When mum got her daughter back to the car, she gave her a hug and kiss. An hour later, two police officers were at her door interviewing both her and her five year old after a complaint had been laid. The police said it was a waste of time, but the complaint would be held on file. The mother said "They could have phoned. Their visit surprised me. It made me feel like a criminal. It made me question my parenting skills. I may have been frazzled but in no way did I abuse my child."

Boy calls 111 to report parents

Eastern Courier 3 August 2007

A boy called 111 after learning about the new child discipline regulations at school. The 11 year-old turned to police believing he had been assaulted by his parents. Upon investigation, it became clear he had simply been disciplined in an appropriate manner. "He was engaging in offensive and obstructive behaviour and his parents intervened with reasonable force," said Howick-Otara family violence coordinator, sergeant Brett Woodmass. "The boy said he had learnt about the law at school and I believe he was misinformed".

Toddler's bedtime tantrum brings three cops knocking

NZ Herald August 14, 2007

When Karyn Scherer's two year-old threw a bedtime tantrum, the last thing the busy working mother needed or expected was three police officers knocking on her door. But that's what happened on a Saturday night after a neighbour of the senior Herald journalist called 111. The responding police said they had to check everything as quickly as possible, given the number

of children who suffered harm. Police made no apologies for responding to the emergency call from a neighbour who told them: "I can hear a child screaming...and I've heard it before."

Just scaremongering?

No doubt anti-smacking proponents will call this "scaremongering". But scaremongering is the alarmist spreading of frightening rumours. The above accounts are certainly frightening. But they aren't rumours. They are the real outworkings of a law that unfairly shackles good parents.

Will you be next?

Hopefully not. But are you confident that you'll never be targeted? Meanwhile, Police and CYF resources are diverted from at-risk families that do need investigation and children that do need protection. And the government continues to fail to deal with the real causes of child abuse: (To see Family First's 5-point Action Plan, go to www.stoptheabuse.org.nz)

For more details on these cases,
go to www.familyfirst.org.nz

Defending the role of parents and the well-being of our children

**FAMILY
FIRST** NEW ZEALAND



Please don't take my daughter!

As the Anti-Smacking law takes root in mainstream New Zealand, new cases arise that reveal its fundamental flaws. The following are more disturbing examples of good mothers

and grandmothers who have been investigated by Police over trivial matters reported by members of the public. Meanwhile the unacceptable rate of child abuse continues.

Mother investigated after smacking 4 year old for running out on road

Jackie's 4 year old daughter ran across the road outside a busy supermarket when she saw a friend on the other side. Jackie smacked her once on the bottom to teach her how dangerous her actions were. A member of the public challenged the way she had disciplined her child, took her vehicle registration, and called the Police. Jackie was visited by the Police two days later.

She felt like a criminal and pleaded, "Please don't take my daughter!" The officers then carried out a Police Check to see if smacking had been reported before.

Jackie's daughter was understandably upset and asked "What's wrong mummy?"

Supermarket tantrum earns stressed mum Police warning

Wanita's 5-year old son (who is autistic) was having what his mum calls a "magic moment" in the supermarket. This included screaming, lying on the floor and waving his arms around. Despite not completing her shopping, Mum had to leave the supermarket.

Once outside, Wanita attempted to deal with the behaviour quickly, as taught to her by the specialists who work with her son. She told him to get himself under control and started counting to five. She also had to hold his arm as he was attempting to run out into the parking lot.

As all this was happening, a Policeman approached her, asked if she was aware of the anti-smacking law, and informed her that he was giving her a warning.

The mother said she had not even smacked this child and enquired whether he knew what it was like to have an autistic child. He said that he was simply doing his job. She replied that, as a mother, she was simply doing her job.

Class of eight year olds taught to report their parents

The police went to a local primary school and did a class on "Keeping Ourselves Safe." During the session, the Policeman told this particular class of 7 and 8 year olds that parents couldn't smack them, and to immediately report any smacking to their teacher.

Within days, an 8 year old girl who had been in this session was stood down for kicking the teacher in the leg. She also repeatedly told her mother "you can't make me do anything - you can't smack me."

The solo mum went to the Police to clarify what they had said and to tell them the difficulties she'd had since their visit to the school.

Two days later 2 officers arrived to supposedly reinstate the mother's authority but instead they questioned her parenting skills and told her they had investigated her background with a variety of community organisations. They had her in tears and she found them intimidating and degrading. They also proceeded to tell the children their rights. Yet amazingly, the Police said to the mother the daughter deserved a smack for kicking the teacher.

Passerby reports squealing child - Police investigate

Tanya had two Police Officers arrive on her doorstep as she was hosting visitors on a Saturday night. The Police informed her that a "passerby" had heard a

child being smacked and subsequently screaming. She explained to them that her 9 year old daughter squeals when she plays, particularly when outside on the trampoline with her brother.

"We rarely smack our kids and this incident did not occur. I informed the officers accordingly. They insisted that they needed to see my daughter."

"I have found the whole episode to be extremely distressing. I felt completely humiliated to literally be accused of child abuse and have now found it hard to sleep at night as it has upset me so much - how I look after and care for my children is being questioned. On hearsay I am now a guilty person. This new law is ending up with a lot of good innocent parents being wrongfully accused. This law needs to be changed."

Grandmother warned by police after grabbing grandchild running onto road

This grandmother had to prevent her 2 year old grandson from running onto the road by grabbing his arm and pulling him back to the footpath. A Police Officer witnessed her and said she was breaking the law by grabbing him. She was let off with a warning but was told that if it ever happened again, they would prosecute her.

She now puts him in the pram to avoid getting arrested. Her family is horrified by what's happened and she's now concerned about taking her grandchildren out in public. She feels she's been publicly humiliated.

Note: After witnessing the aforementioned incident, another grandmother came up to her and said she'd been interviewed at the Police Station for giving her

4 year old grandson a smack on the bottom in Countdown for swearing at her

Previous cases

The true accounts in this advertisement are in addition to previous cases Family First has highlighted.

- Mum investigated by Police when child falls over
- Police investigate grandmother for smacking swearing grandchild in shop
- Toddler's bedtime tantrum brings three cops knocking
- School calls mum to CYF for hand smack
- Boy calls 111 to report parents who, according to Police, were disciplining him "reasonably"

For more details on all reported cases, go to www.familyfirst.org.nz

Will you be next?

Hopefully not. But are you confident that you'll never be targeted? Meanwhile, Police and CYF resources are diverted from at-risk families that do need investigating and children that do need protecting. And the government continues to fail to deal with the real causes of child abuse:

(To see Family First's 5-point Action Plan, go to www.stopchildabuse.org.nz)

"The epidemic of child abuse and child violence in this country continues, sadly. My bill was never intended to solve that problem." Sue Bradford MP
National Radio, 21 Dec 2007

FAMILY FIRST
NEW ZEALAND

Defending the role of parents and the well-being of our children



“They had no right to make my dad look like a criminal”

Daughter (aged 12)

As New Zealanders are discovering, the anti-smacking law isn't reducing child abuse in New Zealand. Instead, it just victimises kids in a new way. By unjustly harassing their mums and dads, the anti-smacking law threatens the physical and emotional bonds that help

these children and their parents remain close. The following are more disturbing examples of good parents who have been investigated, and even taken to court, over trivial matters as a result of the new law.

CASE 11: They had no right to make dad look like a criminal

“My name is Steven and I am 11 – this is what happened. I was late home and my dad was angry with me because I was out on the street when it was dark. He smacked me a couple of times on my bum but it did not hurt.”

“The next day I told my neighbours what had happened and they rung CYF. CYF came to my school and talked to me and also my brother and sister without my mum and dad knowing. When I got home after school we were told that we could not see our dad, my brother and sisters and I were hurt by this.”

“I wish CYF never got involved, they hurt my family. Dad was allowed home again because we told them it wasn't abuse. The Police also said it wasn't.”

“I am Steven's older sister and I am 13 years old. I think what CYF did was wrong. They told my mum that my dad couldn't see us for two weeks. They didn't interview me even though Steven told them he had an older sister. If they had interviewed me I would have been outraged because my dad is hard working and watches us play sports and takes us to music lessons. Our family was in tears, even my dad. They had no right to make my dad look like a criminal.”

CASE 12: Father taken to court for “reasonable discipline”

A 30-year-old Glen Innes father was charged by Police for allegedly hitting his five-year-old daughter with an open hand on the back of the head and swinging a pair of jeans at his six-year-old daughter. He denied the allegations yet had to spend a day in the Police cells. Police actually opposed bail!

CYF also investigated the family yet found nothing to be concerned about.

When the matter eventually came to court, the Police offered no evidence and the case was dismissed.

The father's lawyer said he had pushed one of his girls to get her to hurry for school and threw the jeans at the other to get her attention. **“When the whole issue was being discussed in Parliament and in public, they said that minor matters would not end up in court, only the serious ones.”** the public were given assurances that Police would consider this ‘low carefully. In this case they have not.” Source - NZ Herald

CASE 13: Teen to mum – you can't hit me but I can hit you

Nickie is a mum who uses a smack “once a year”. But recently she was hit by her 16-year-old son when he refused to obey her request. Nickie said to him “You can't hit me.” His immediate response was “Ah, no... you can't hit me.”

Nickie has four sons and is very worried about how this attitude will affect her other children. Her 3-year-old has also started saying “you can't hit me.”

Nickie feels like her only option is to ‘hand them over to the Government – we have no control any more’.

CASE 14: Kids fighting in backseat of car earns mum a Police investigation

Rebecca* (name changed to protect her identity) was driving her parents' car with her two young boys in the backseat. They were fighting and causing a dangerous distraction to Rebecca. She turned to the back seat, pointed at each of the boys to get their attention, and told them to stop fighting and to sit quietly.

A passerby reported Rebecca to the Police for allegedly smacking a child in the front seat!

Since the vehicle was registered to Rebecca's grand-

parents, Police went to their house first. After finding the grandparents absent, the Police then questioned a number of neighbours and eventually tracked down where Rebecca lived. She wasn't home, and they refused to discuss their inquiry with Rebecca's husband. However, they did acknowledge to him how time-consuming the investigation was.

Rebecca and her husband are understandably upset by the malicious and inaccurate claims, the involvement of the Police, and the suspicion and embarrassment caused by the interviewing of various neighbours.

CASE 15: One smack for one hour tantrum – 10 year old calls 111

Joy has a special needs 10-year-old boy who has muscular dystrophy and ADHD. One afternoon, after refusing to do what his mother had asked, he started swearing at Joy, threw a knife at her, and threatened to harm himself. Joy sent him to his bedroom but every time he came back out, the tantrums continued. This went on for an hour. Finally Joy gave him one smack on the bottom, which immediately brought him under control.

He then called 111 from his bedroom and within half an hour, the Police were on Joy's doorstep. The Police realized that this was not child abuse and told the boy not to waste their time again. Joy wanted to make her son go down to the Police station to apologise for his actions, but the officer in charge told Joy that this was not allowed and that the boy had done the right thing!

When Joy realized that her son had rung the Police, she was petrified. She feared they could take her son.

The following night, as Joy's husband was playing-fighting with their son, she began to fret over the possibility of an accident occurring. If things got a bit rough and her son fell off the bed, breaking his arm, the Police would be on her door step asking questions! She says “I know that sounds extreme but it could happen; it has definitely made us cautious. Pretty sad when you feel nervous about playing with your own kid.”

Previous cases

The true accounts in this advertisement are in addition to previous cases Family First has highlighted:

CASE 1: Mum investigated by Police when child falls over

CASE 2: Police investigate grandmother for smacking swearing grandchild in shop

CASE 3: Toddler's bedtime tantrum brings three cops knocking

CASE 4: School docks mum to CYF for hand smack

CASE 5: Boy calls 111 to report parents who, according to Police, were disciplining him reasonably

CASE 6: Mother investigated after smacking 4 year old for running out on road

CASE 7: Supermarket tantrum earns stressed mum Police warning

CASE 8: Class of eight year olds taught to report their parents

CASE 9: Passerby reports squealing child – Police investigate

CASE 10: Grandmother warned by Police after grabbing grandchild running onto road

For more details on all reported cases, go to www.familyfirst.org.nz

Will you be next?

Hopefully not. But are you confident that you'll never be targeted? Meanwhile, Police and CYF resources are diverted from at-risk families that do need investigating and children that do need protecting. And the government continues to fail to deal with the real causes of child abuse. (To see Family First's 5-point Action Plan, go to www.stoptheabuse.org.nz)

FAMILY FIRST
NEW ZEALAND

Defending good parents
Demanding action on *real* child abuse

Parents assaulted

with bogus smacking prosecutions

Is anyone surprised? Wasn't the prosecution and persecution of good parents predicted even before the anti-smacking bill became law? Despite the fact that over 80% of New Zealanders rejected these anti-smacking laws, our fears have been realised with good parents being prosecuted and persecuted over trivial matters or unproven claims. And the list continues to grow...

CASE 15: Father charged for "reasonable discipline" yet case dismissed when no evidence is offered

(April 2008) A 30-year-old Glen Innes father was charged by police for allegedly hitting his five-year-old daughter with an open hand on the back of the head and swinging a pair of jeans at his six-year-old daughter.

He denied the allegations and said that he had pushed one of the girls to get her to hurry for school and threw the jeans at the other to get her attention.

The father had to spend a day in the police cells and police opposed bail. CYF also investigated the family yet found nothing to be concerned about.

When the matter eventually came to court, the police offered no evidence and the case was dismissed. Source - NZ Herald

CASE 16: Father charged and convicted for demanding respect towards mother

(2008) On the way to school, mum and dad were angry at their daughter (12) for not doing her chores that morning. Dad, who was driving, reached across to his daughter in the front passenger seat and shoved her on the upper arm 2-3 times to demand that she listen to her mother, who was in the back seat.

A driver in the vehicle behind claimed the father was punching the daughter and rang 111.

Six police in three cars turned up at the daughter's school. The police records show that the daughter didn't feel any pain from the alleged 'punching'. There was no bruising or marks of any kind yet the Police charged the father with assault.

He was banned from living at home or seeing his daughter for two weeks. He pleaded guilty to assault simply to avoid the shame, stress, and costs of a defended hearing.

His daughter (an A grade student at school) is pleased to have dad home. An MP who reviewed the case described it as "disturbing."

CASE 17: Grandfather charged and convicted for tipping child out of beanbag

In 2008, a grandfather was charged and convicted of assaulting his grandson for tipping him out of a bean bag-type chair in order to 'get him moving'. The boy had refused to turn the TV volume down and then refused to turn the TV off when asked. Police arrested the grandfather after the boy rang 111.

When Police arrived, the grandmother and grandchild pleaded with the police not to take granddad away, yet he was held in prison cells for 2 nights. His lawyer advised him to plead guilty to avoid cost and hassle.

CASE 18: Police interview step-father for 2 hours for restraining abusive daughter

In mid-2007, stepdaughter (12) was verbally and physically abusive to both her mother and step-father. The stepfather restrained her arms so she couldn't hit out any more. Her mum was grateful for the protection.

The couple were visited in January 2008 by the police because of a complaint made by the natural father - two months after the original incident. Both were taken to the police station where the step-father was video interviewed for almost 2 hours.

When these parents asked the police "What else can we do if we're not permitted to restrain her?" they were told, "We don't know." Despite numerous phone calls and visits to the police station, Police have not informed the couple of the results of the inquiry.

The parents are now afraid to restrain any of their kids - no matter what their behaviour. It is creating tension in

the family and step-father is never sure if the next car up the driveway is the police coming to arrest him.

CASE 19: Dad banned for 6 months based on smacking claim by ex-wife

In 2008, Raymond was denied access to his two young children for 6 months by CYF when his ex-wife made a complaint that he had used "physical force on one or both children".

No complaint was referred to the police, and there were no witnesses or evidence of bruising. The father actually believes it was the warning of a smack that led to the complaint (Dad had warned his youngest child about running out onto the street).

It is believed that the smacking law was used by the ex-wife so that she could take the children overseas, in breach of the family court order.

After six months and no evidence, Dad finally has access to his children again.

What a CYFS Community Panel Board Member says

(Name withheld on request)

"I was concerned about the passing of Sue Bradford's parenting bill, fearing that there would be an increase in the number of investigations of 'good' parents unnecessarily through our CYFS social services."

Sadly this concern is becoming a reality. Although I have only been involved with our community panel a year prior to the passing of Ms Bradford's anti-parent legislation, I can say without a doubt, that in my time I have seen a small but a definite increase in 'good' parents being investigated by our CYFS case workers."

Any child who mentions to a school teacher that they have been smacked or touched in any physical way is brought under investigation and their names are indelibly logged onto our data base as a potential 'abuser'."

I really feel sorry for these good parents because of the fear that we, as an organisation, are now engendering upon their parenting practice. Sadly, good parents are being lumped together with the really bad ones and the source of this injustice is the bad legislation that an idealist like Sue Bradford has put together."

Previous Cases

This true accounts in this advertisement are in addition to previous cases Family First has highlighted:

- CASE 11 Mum investigated by Police when child falls over
- CASE 21 Police investigate grandmother for smacking swearing grandchild in shop
- CASE 31 Toddler's bedtime tantrum brings three cops knocking
- CASE 41 School dobe mum to CYF for hand smack
- CASE 51 Boy calls 111 to report parents who, according to Police, were disciplining him 'reasonably'
- CASE 61 Mother investigated after smacking 4 year old for running out on road
- CASE 71 Supermarket tantrum earns stressed mum Police warning
- CASE 81 Class of eight year olds taught to report their parents
- CASE 91 Passerby reports squealing child - Police investigate
- CASE 101 Grandmother warned by Police after grabbing grandchild running onto road
- CASE 111 CYF interview kids over minor smack without parent's knowledge and told they can't see Dad
- CASE 121 Teen tells mum - "You can't hit me but I can hit you"
- CASE 131 Kids fighting in backseat of car earns mum a Police investigation
- CASE 141 One smack for one hour tantrum - 10 year old calls 111

For more details on all reported cases, go to www.familyfirst.org.nz

FAMILY FIRST NEW ZEALAND

Defending good parents
Demanding action on *real* child abuse

This advertisement was paid for with donations from concerned NZ mums and dads

Mum and Dad go for parenting HELP

The anti-smacking law gives them HELL

Green MP **SUE BRADFORD** said that her anti-smacking law was never intended to solve the problem of child abuse and violence**. And it hasn't. The only thing this law has done is **TARGET GOOD PARENTS**. Below are 5 more cases of **GOOD PARENTS BEING TRAUMATISED** by the anti-smacking law.

In contrast, the right hand panel shows 7 children who have **DIED AT THE HANDS OF ROTTEN PARENTS/CAREGIVERS** since the law was passed. We are still **FAILING TO TACKLE THE REAL CAUSES** of child abuse.

PARENTS SEEK HELP – CYF REMOVE CHILDREN

John* and Sue* sought help from a social service because of the behaviour of their 9yr old daughter. The two case workers were very affirming of them as a family and seemed both positive and helpful.

On a subsequent night, the daughter had a major tantrum which involved throwing toys, banging the bunks against the wall and verbal abuse of mum. Dad warned her that if the behaviour continued she would receive a smack on the bottom (she had already been sent to her room at this point). She continued and dad gave her a smack. She stopped the bad behaviour, and shortly afterwards came out remorseful and apologetic.

At the next meeting with the social workers, Sue mentioned that they did smack their children but only when their behaviour warranted such discipline, and that John had smacked their daughter the previous day.

That Friday, Sue received a call from CYF to inform them that an allegation of abuse had been made and that they needed to find alternate accommodation for their two children over the weekend.

They were interviewed by the police for 5 hours and later found out that the report to CYF said that 'they admitted to hitting their children'. CYF have since apologised and admitted they would learn from this.

PARENTS SEEK HELP – REFERRED TO CYF INSTEAD

Jeff* and Mary* were having behavioural problems with their 10yr old son. At times their son would scream at, kick, and hit his mother. Their usual forms of discipline were time out, writing lines, and as a last resort, a smack. They realised other help was needed and were referred to a child and youth mental health service.

At the initial interview they mentioned that as a last resort they occasionally used a smack. As soon as the social worker heard the 'smack' word, she short-circuited the conversation and insisted on interviewing the son alone while Jeff and Mary were asked to leave the room.

They were subsequently reported to CYF.

Jeff and Mary say this is a warning to parents who use physical discipline to curb absolute defiance in their children. With the law as it stands, if parents go to any health agency for help, they will be reported to CYF. The case has been subsequently closed by CYF.

MOTHER SUSPENDED FOR TAPPING CHILD ON HAND

A 3-year old was at work with her mother at a community centre. Mum was putting her to bed for an afternoon nap when the child started throwing a temper tantrum and scratching mum's arm. She didn't respond to mum's voice so mum tapped her on the back of the hand. Not a hit. Not a slap. No red marks, raised skin, bruising – just a compliant child.

For this, mum was suspended from work and charged with two counts of gross misconduct and child abuse. The employer threatened to refer the case to the police and go to CYF.

However, her lawyer successfully got the employer to drop the case. Mum is back at work but she's still feeling angry that something between her and her daughter should be met with disproportionate measures.

BOY INTERROGATED AT SLEEPOVER. CYF CALLED

Brian's* 7 year old son, John*, stayed over at a friend's house. When he returned home the next day, he told Brian that his friend's mum had interrogated him about whether Brian smacked him. John confessed to Brian that he had said that

sometimes she did (ironically, the friend's mum sometimes smacked her own children while John was staying). The friend's mum even told John to run away to her place the next time Brian gave him a smack.

Within a few days, Brian was rung by CYF and was told that an anonymous complaint of child abuse had been made and that they were going to interview Brian's other children at school.

CYF told Brian they had informed John that mum was never to smack him and if she did, he should ring CYF. A couple of months later, CYF rang Brian to say the case was closed but she was not to smack.

Since then John has become very angry, defiant and rebellious. As a solo mum, Brian is struggling to cope but is afraid to ask for help for fear of further interference.

DAUGHTER (10) DOBS MUM TO CYF AFTER GROUNDING

Two CYF workers arrived at Tania's* home to say there was a complaint by her daughter that mum had smacked her. Tania was distraught but said that they could talk to her daughter uninterrupted to determine if she was unsafe.

The social workers simply wanted to remove her. Eventually they agreed that the daughter could stay the night with the godmother (but ironically they were happy to leave Tania's 8 yr old at home with her).

The following day, the investigation found no basis for the complaint and that it had stemmed from her daughter and a friend being angry with mum for preventing her from attending the friend's party.

Mum and Dad are now feeling powerless with their parenting. They say "Every time someone gets told off in our home you feel like you'll be reported, we are being held to ransom by this new law." Their daughter has told them that if they discipline her "We'll go through this again."

REAL ABUSE CONTINUES

■ **Nia Glasie, 3, Rotuihu**, died after months of assaults by her stepfather, grandfather and extended family. Nia was dropped into an ice-cold bath, kicked in the head, spun around in a tumble dryer, spun on a clothes line until she flew off, and was used by her abusers as practice wrestling moves on.

■ **Tahani Mohamed, 2 months, Otago**, died of a skull fracture and was so malnourished she had not put on any weight since her birth. She was allegedly left alone in a car for a period of time in humid conditions. The father has been charged with murder and the mother with wilful cruelty.

■ **Sachin Dhanji, 16 months, Rangiuru**, died from blunt-force trauma to the head.

■ **Tyla-Maree Flynn, 22 months, Tokoroa**, died from severe burns believed to be caused by hot water but wasn't taken to hospital for 17 hours.

■ **Jamiah Te Awa, 10 months, Manurewa**, died from injuries after being locked, thrown against a wall, shaken and smothered by a family friend. She had been held against a gas heater, swung around by her hair, hung on a clothes line and put in a closed freezer several times.

■ **Duwayne Pailegutu, 7, Nelson**, was murdered by his stepfather after he was repeatedly kicked, beaten with a cricket stump and thrown against a wall.

■ **Riley Osborne, 16-month old, Kerikeri**, died of various head injuries. The stepfather has been charged with murder and also faces six methamphetamine-related charges.

* Names changed to protect identity **Radio New Zealand, 21 Dec 2007

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For more details on these and other cases, go to www.familyfirst.org.nz

This advertisement was paid for with donations from concerned NZ mums and dads

APPENDIX FIVE

Examples of the public misunderstanding of the Crimes (Substituted s 59) Amendment Act 2007 taken from the New Zealand Herald article “Do you still smack your children”

“The law as it stands does NOT prevent you from smacking your children, nor will you ever be convicted of smacking your child unless you assault them.”

“If you can’t impose sensible force when necessary (such as dragging into timeout) then you can’t be an effective parent.”

“I still cannot believe that there are so many people out there who do not understand this law. It does not outlaw smacking – it merely removes the defence of parenting in criminal abuse case.”

“”As someone who knows something about child behaviour management, I would not be able to specify exactly what this law means. But what it does seem to be saying is that a parent may be allowed to use (unspecified) ‘force’ to prevent a child doing something or to brush their teeth. However, they are not allowed to use force for the purposes of ‘correction.’While I may be able to abide by this law, I strongly suggest that most people don’t even know what it means, let alone how to put it into practice.”

“...take a peek at the revised s 59 of the Crimes Act. You will see it therein black and white, You can still smack your children...Smacking is still legal.”

“...So many people moaning about the anti smacking law, don’t even have the intelligence to realise it is not an anti smacking law, and that smacking is not illegal.”

“I’ve said it before and I’ll say it again. The law doesn’t prevent parents from hitting their children it prevents them from using discipline as an excuse for child abuse.”

APPENDIX SIX

New South Wales Law on Physical Discipline

CRIMES ACT 1900 - SECT 61AA Defence of lawful correction (Clauses 1-5)

(1) In criminal proceedings brought against a person arising out of the application of physical force to a child, it is a defence that the force was applied for the purpose of the punishment of the child, but only if:

- (a) the physical force was applied by the parent of the child or by a person acting for a parent of the child, and
- (b) the application of that physical force was reasonable having regard to the age, health, maturity or other characteristics of the child, the nature of the alleged misbehaviour or other circumstances.

(2) The application of physical force, unless that force could reasonably be considered trivial or negligible in all the circumstances, is not reasonable if the force is applied:

- (a) to any part of the head or neck of the child, or
- (b) to any other part of the body of the child in such a way as to be likely to cause harm to the child that lasts for more than a short period.

(3) Subsection (2) does not limit the circumstances in which the application of physical force is not reasonable.

(4) This section does not derogate from or affect any defence at common law (other than to modify the defence of lawful correction).

(5) Nothing in this section alters the common law concerning the management, control or restraint of a child by means of physical contact or force for purposes other than punishment.

APPENDIX SEVEN

Scottish Law on Physical Discipline

Criminal Justice (Scotland) Act 2003 Section 51(1-4)

51 Physical punishment of children

(1) Where a person claims that something done to a child was a physical punishment carried out in exercise of a parental right or of a right derived from having charge or care of the child, then in determining any question as to whether what was done was, by virtue of being in such exercise, a justifiable assault a court must have regard to the following factors—

- (a) the nature of what was done, the reason for it and the circumstances in which it took place;
- (b) its duration and frequency;
- (c) any effect (whether physical or mental) which it has been shown to have had on the child;
- (d) the child's age; and
- (e) the child's personal characteristics (including, without prejudice to the generality of this paragraph, sex and state of health) at the time the thing was done.

(2) The court may also have regard to such other factors as it considers appropriate in the circumstances of the case.

(3) If what was done included or consisted of—

- (a) a blow to the head;
- (b) shaking; or
- (c) the use of an implement,

the court must determine that it was not something which, by virtue of being in exercise of a parental right or of a right derived as is mentioned in subsection (1), was a justifiable assault; but this subsection is without prejudice to the power of the court so to determine on whatever other grounds it thinks fit.

(4) In subsection (1), “child” means a person who had not, at the time the thing was done, attained the age of sixteen years.