Maxim Institute supplementary material on the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill

Contents

Section one: Introduction and summary	1
Section two: The current law	3
Section three: Consequences of repeal – criminalising parents	5
Section four: Possible amendments to section 59	8
Appendix one: Case law summary	11
Appendix two: Body of case law considered	24
Appendix three: Further information on prosecutorial discretion	27
Appendix four: Further information about possible amendments to section 59	30
Endnotes	33

SECTION ONE: INTRODUCTION AND SUMMARY

INTRODUCTION

Thank you for the opportunity to present supplementary material in support of Maxim Institute's oral submission on the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill ("**Bill**"). Maxim Institute is an independent think-tank, incorporated as a charitable trust and funded by donations.

SUMMARY OF POSITION

Maxim Institute remains opposed to the Bill in its current state but supports amendment of the Bill.

Maxim Institute maintains that all children should be free from violence and abuse, especially in the home, and that the relationship between parent and child is a unique one. Any kind of child abuse and violence is unwanted in our society and both the proponents of the Bill and the opponents of the Bill agree on this point. Maxim Institute, like the majority of submitters, is motivated by a concern for children and their families. The difference in opinion arises when the effect of the Bill is considered.

Maxim Institute believes that the Bill, as currently drafted, will not make the desired difference to the rates of serious child abuse that occur in New Zealand.

In addition, Maxim Institute submits that the Bill will have far-reaching and negative consequences (many unintended), including damage to the family unit, the creation of unworkable law, undue interference in the parent/child relationship, an undemocratic transfer of decision-making power to the police and the criminalising of the vast majority of parents.

Maxim Institute submits that neither relying on police discretion in prosecuting parents nor including words in the explanatory note will provide a satisfactory solution to the criminalisation of parents for light smacks, trivial action or removing a child to "time-out", which will be a consequence of repeal of section 59 of the Crimes Act 1961 ("section 59").

SUPPLEMENTARY INFORMATION

This document sets out a summary of, and supplementary information on, three aspects of the Bill that Maxim Institute has undertaken further research into since the time of our written submission in February 2006.

These three areas are:

Current law: Section Two sets out a comprehensive and accurate picture of how the current law is working, including, in **Appendix One**, a summary of cases where the issue of reasonable discipline has been raised. Please note that not all of these cases were available to us at the time of the written submission.

Consequences of repeal – criminalising parents: Section Three sets out an analysis of one of the legal consequences of repeal – the criminalising of parents. In particular we examine the claims that:

- parents will not be prosecuted for "light" or "trivial" physical discipline because Police and prosecutors will exercise their discretion not to prosecute such cases; and
- additional words could be included in the explanatory note and/or in the Select Committee's report to clarify that parents should not be prosecuted for light smacking and removing a child to "time-out".

Possible amendments to section 59: Section Four discusses possible amendments to section 59 and an analysis of the strengths and weaknesses of each.

We conclude by restating our support of an amendment to section 59 to specify the factors that a judge or jury must take into account and an amendment to ensure that in certain cases, judges can direct the jury to find that the accused was not justified in their use of force against their child.

SECTION TWO: THE CURRENT LAW

It is important to reiterate that the words of section 59 contain two important qualifying conditions which are critical to its operation and the scope of the protection it provides. Section 59 will only protect force that (1) is reasonable in the circumstances and (2) is used by way of correction.

It is helpful to understand the body of case law that illustrates how section 59 operates. Legal counsel at Maxim Institute have read and summarised just under 50 cases where the issue of reasonable discipline has been raised, and these cases are summarised in **Appendix One** of these supplementary materials. A full list of the cases read and considered (but not necessarily summarised) are listed in **Appendix Two** of these materials.

We would draw your attention to four points from the case law analysis:

(1) Section 59 does not allow abuse. It is worth reiterating that section 59 does not allow abuse, it does not allow discipline that is unreasonable and it does not allow discipline that is not for the purposes of correction. So for example in *R v Donselaar*,[1] a father who smacked his son twice, leaving a handprint and bruising on his backside, was found guilty of assault because the force used was unreasonable and in *R v Accused*,[2] the Court said that if a defendant acted for some reason other than correction, like self-gratification, section 59 would not provide any protection.

(2) Section 59 is more likely to fail as a defence. We note, from our case law analysis that we were only able to find six cases where section 59 has been raised and successfully used as a defence to criminal charges. Our legal research shows that section 59 has failed as a defence many more times than it has succeeded. When it has succeeded, and when courts have said that the discipline used was acceptable, the type of conduct that was allowed included a smack given with a bare hand after serious misbehaviour (in *Re M (children)*[3] and *Kendall v Director-General of Social Welfare*)[4] and forcibly restraining a child who was lashing out at his father (*Shapleski v Wilson*)[5].

(3) The courts have established a number of factors that must be considered by a judge or jury in deciding whether or not certain force used was reasonable in the circumstances. These well established guidelines provide a level of protection for children in these cases and provide a level of clarity in how the law should operate. The judge or jury will need to consider the age of the child, the injury, type and degree of force used, whether an instrument was used, the area of the body struck, the offence committed by the child, and more.

So, for example in *Sharma v Police*[6] the Court said that the child's offence of misbehaviour occurred because of the situation that the accused created, so it was not reasonable for the accused to discipline the child for misbehaviour.

In *Erick v Police*[7] the Court looked at the use of an instrument (a leather belt) and the area of the body struck (the back and face) and said that this was unreasonable and in *Arvidson v Croft*[8] the Court said that hitting which left welts was excessive force.

The figure below outlines the usual effect in law of these considerations.

Consideration	Usual effect in law
Age of the child	If the child is very young or older than 16, it is less likely that the action will be protected by section 59.
Injury, type and degree of force used	Discipline causing bruising or injury is generally not protected by section 59.
Instrument	Use of an instrument is unlikely to be protected by section 59.
Area of body struck	Force applied to the head is unlikely to be protected by section 59.
Offence committed by child	Where the child was doing something she or he was entitled to do, or was doing nothing wrong, section 59 is unlikely to protect the use of force.
Rational use of force	Irrational application of force will not be protected.
Emotional damage	Where emotional damage is caused, section 59 is unlikely to protect the force used.
External or background influences	Influences such as alcohol or a background of domestic violence will render physical discipline inappropriate and unlikely to be protected.

(4) It is important to rely only on the facts of the case and not on media reports. We would like to draw the Select Committee's attention to our summary of two well-known cases; *R v S*[9] (known as the "horsewhip" case) and *R v McL*[10] (the "two-by-four" case). We note that these two cases have often been reported inaccurately: for example *R v S* did not involve a horsewhip, and *R v McL* did not involve a piece of two-by-four. It is our submission that these cases have been inaccurately represented for political purposes and when properly understood in the legal framework, can not justify a repeal of section 59 (although they may support an amendment to section 59).

The facts of both of these cases have been included in the case law summary in **Appendix One** and we would encourage members of the Select Committee to read these summaries.

In general, we would suggest that the Select Committee exercises caution before querying a jury's decision, as members will not have access to the same information that the jury had in reaching its verdict. It is difficult to know why a jury reaches a decision, as proceedings are frequently unreported by legal publications and inaccurately reported in the media. In addition, cases involving issues of discipline often have complex fact situations and there will always be borderline cases where reasonable people may disagree about the verdict.

SECTION THREE: CONSEQUENCES OF REPEAL – CRIMINALISING PARENTS

In this section, we provide further analysis of one of the legal consequences of the repeal of section 59; the criminalising of parents.

The drafter of the Bill, Ms Sue Bradford MP, has recently acknowledged that it is not her "intention to criminalise parents for putting their children into a room for "time-out" or for lightly smacking them"[11] and has proposed amendments or commentary to ensure that this is clear. Other commentators have suggested that even if section 59 is repealed, parents who lightly smack do not need to worry as police will not prosecute for actions such as a light smack or removal to "time-out".[12]

In response to this, we make three points:

- the repeal of section 59 would certainly criminalise the majority of parents and would criminalise such behaviour as putting a child in "time-out" against their wishes and giving them a light smack;

- it is an unsatisfactory and inappropriate response to hope that the police will not prosecute for trivial actions; and

- additional words in the explanatory note of the Bill or in the Select Committee's report will have little effect on whether parents would be committing a criminal offence and prosecuted if they lightly smack their child.

1. Criminalising parents

We reiterate our submission made in pages 27-28 of our written submission that the repeal of section 59 will criminalise the majority of parents, because the words of the Crimes Act 1961 are such that by removing the protection offered by section 59, any use of force on a child by way of discipline would constitute a crime, even removing a child to "time-out". We submit that it is simply not open for the Select Committee to conclude otherwise.

2. Relying on police/prosecutorial discretion

As noted above, some commentators have suggested that police will not prosecute for a light smack or removal to "time-out".[13] We submit that this is a poor response and we make five points in support of this:

(1) It impossible to know whether Police will prosecute parents for trivial offences. As noted in an internal Police email, obtained under the Official Information Act:

> ...agencies have made assumptions of what Police practice will be if s59 is repealed. Most of these assumptions are made by people who have very limited if any understanding of criminal law and/or Police procedures...

For Parliament to recommend a law and hope that the police will respond in a particular way or not enforce the law in certain circumstances, is irresponsible law making.

(2) The Police can not draw up a universal charging policy to ensure that parents who use a light smack or remove their child to "time-out" will not be prosecuted. To do so would be to contravene Police independence and discretion.[14] While the Police could develop guidelines in relation to prosecution of parents, this is not usual practice and even with guidelines, parents could still be prosecuted for minor or technical assaults.[15] Further information on prosecution guidelines is set out in Appendix Three.

(3) There is no guarantee that "trivial offences" will not be prosecuted. This is despite the existence of so-called "safeguards" in the justice system, set out in a Cabinet Paper as including "warnings, cautions and pre-trial diversion..."[16] To put families through a police investigation, a formal police warning or the strain of waiting to find out if they will be offered pre-trial diversion, where they have lightly smacked their child or removed their child to "time-out", is unsatisfactory, unjust and would cause great stress and damage to the family.[17]

(4) Prosecution decisions will remain largely a matter of police discretion according to Ministry of Justice information.[18] Placing more prosecutorial discretion in the hands of police transfers law-making and judicial power from the Legislature and Judiciary to a branch of the Executive. This is undemocratic.

(5) Private prosecutions would not be subject to the same discretion. As noted in our written submission,[19] and by Cabinet,[20] anyone may bring a prosecution for a breach of the criminal law. If section 59 were repealed, a private prosecution (for example, by a lobby group) could be brought even for "trivial" smacking or removal to "time-out". Guidelines or policies for prosecutors would not apply in such private prosecutions.

3. Relying on legislative intention and other tools of interpretation

We note the suggestion made by Ms Bradford that additional words be included in the Explanatory Note and/or in the Select Committee's report to clarify that parents who use light smacking or who remove a child to "time-out" should not be prosecuted. It is our submission that this will have little or no effect and will not safeguard parents against prosecution for light smacking or removing a child to "time-out" and we make the following three points in support of this:

(1) An Explanatory Note, or a Select Committee report will rarely be relevant. Secondary materials, such as these, are only relevant to the interpretation of a law, if that law is ambiguous so that a search is necessary to discover its true effect. Where law has a clear meaning, secondary material is not necessary and is irrelevant to the interpretation and operation of the law.

(2) There will be no need to look at secondary material if section 59 is repealed. If section 59 is repealed, the law will clearly and plainly state that any use of disciplinary force on a child constitutes a crime.[21]

There will be no cause to look further at explanatory notes or Select Committee reports – they will be irrelevant.

(3) The goal of lawmakers must be to pass clear law that is easily understood without relying on secondary material. The Select Committee has the opportunity to recommend to Parliament very clear law and we urge the Select Committee to take this opportunity and recommend law that means what it says.

In summary, the use of commentary and notes is simply not an effective safeguard to protect parents from criminal prosecution if they use minor physical discipline, such as light smacks or removing a child to "timeout".

SECTION FOUR: POSSIBLE AMENDMENTS TO SECTION 59

A number of amendments to section 59 have been suggested as possible outcomes of the Select Committee hearing. Maxim Institute favours amendments to section 59 that would provide greater clarity in the law and greater protection for children in "borderline" cases whilst having minimal negative impact on families and protecting the ability of parents to use a reasonable and minimal level of force for the purposes of correction. We have outlined three possible amendments and highlighted their relative strengths and weaknesses.

1. Defining reasonable force

We note that a suggestion has been made that section 59 could be amended to clarify what is meant by reasonable force.[22]

This approach has been taken in Canada where section 43 of the Criminal Code provides that force used must not exceed "what is reasonable under the circumstances". The Supreme Court of Canada has specified that the force used will not be reasonable if:

- it is used on children under 2 or above 12, as they are deemed incapable of benefiting from corrective force;
- it is used on children under a disability or who are affected by some other factor preventing them learning from the force in the circumstances;
- it amounts to degrading, inhuman or harmful conduct; or
- it takes the form of blows or slaps to the head or involves the use of objects.

Appendix Four sets out greater detail on section 43 of the Canadian Criminal Code.

Although an amendment of this kind would be better than a repeal of section 59, Maxim Institute remains opposed to such an amendment for the following reasons:

(1) Illogical and unjust outcomes will be reached where a rigid definition is adhered to. For example, cases will arise where certain actions of a parent do not fall within the rigid definition of "unreasonable" force, yet the actions are unreasonable and should not be protected. Likewise, cases will arise where very mild corrective action (for example a light slap with a pencil on the hand) will meet the definition of "unreasonable" and yet should not be prosecuted. A rigid definition of what is "unreasonable" denies judges and juries the ability to consider all of the facts of each individual case.

The current law (or the amendment we propose) means that in a case like *R v Donselaar*[23] a conviction for abuse can be found, even though no implements were used and even though the conduct involved was a smack was on the bottom. The current law is flexible enough to allow a different response for similar facts in *Re M (children).*[24]

(2) An amendment of this kind does not allow judges and juries to consider the complex factual situation. By focussing on a narrow definition and a subset of the facts (was there an implement? what part of the body was hit?) judges and juries are not able to consider all the facts of the case and weigh them as they see fit. This does not allow judges and juries to function as they are supposed to. The importance of jury trials is recognised in their establishment as the normal mode of criminal trial.

2. Defence only available to lesser charges

Another option is to amend section 59 in line with the recent United Kingdom amendment[25] to specify that the defence of 'reasonable force' does not apply to certain specified crimes. This means that defence of 'reasonable punishment' will never be available to offences such as battery of a child causing actual bodily harm or wounding and causing grievous bodily harm. A defence of reasonable force is only available to charges of common assault and of battery.

Further detail on the United Kingdom statute is set out in **Appendix Four**.

Maxim Institute submits that this amendment may be worth considering in greater detail but submits that there are problems with it, including:

(1) The amendment would be largely redundant in New Zealand. This is because section 59 would not succeed currently, even if it was raised, in cases where grievous bodily harm, wounding or cruelty to a child is proved.

(2) Whether a parent has a defence may depend entirely on which offence he or she is charged with, and not on all the circumstances of the case. The amendment assumes that there is a clear dividing line between the different categories of offences when different prosecutors may, in good faith, bring different charges on the same set of facts. For example, one prosecutor may decide that a charge of common assault is warranted (to which section 59 would be available) while another may decide that the same set of facts justifies a charge of assault occasioning actual bodily harm (to which the defence would not be available).[26]

(3) Amending section 59 in this way would not be straightforward. If the approach was taken that section 59 should only be available as a defence to charges of common assault,[27] assault on a child[28] and male assaults female,[29] then it would not be available for offences such as assault with intent to injure,[30] assault with a weapon,[31] or injuring with intent.[32]
Further detail on the difficulties with the drafting such an amendment are set out in **Appendix Four**.

3. Specifying the factors a judge or jury must have regard to

Another possible solution is to amend section 59 to specify a range of factors that a judge and jury must have regard to when determining whether the force used was reasonable in the circumstances. For example, section 59 could explicitly state that factors such as the age and maturity of the child, the injury, the type and degree of force used, the use of an instrument and the area of the body struck must be taken into account.

An amendment like this may address cases where juries have acquitted parents when the parents' use of force appears to be unreasonable (or at least is presented this way by the media). Specifying a non-exhaustive list of factors that judges and juries must take into account will clarify the law and ensure that there is consistency in the way that judges and juries approach cases. It would also preserve the law's ability to give each factor its appropriate weight in the particular circumstances in which it arises.

This approach is similar to that taken in the New South Wales Crimes Act 1900, which was amended in 2003 by the insertion of section 61AA. Section 61AA specifies factors that must be taken into account to determine whether the force used is reasonable (the age, health, maturity or other characteristics of the child, the nature of the alleged misbehaviour or other circumstances), and also specifies circumstances in which the force used will be deemed unreasonable.

Section 61AA is set out in full in **Appendix Four**.

4. Conclusion

We submit that the best amendment is one that specifies a non-exhaustive list of factors that must be taken into account in every case in which section 59 is raised as a justification. This approach is reflected in section 61AA(1)(b) of the Crimes Act 1900 (NSW). It will give the law the flexibility that is required to ensure that just outcomes can be reached on a case-by-case basis whilst providing a level of clarity that may be missing from the law.

In addition, we support the Auckland District Law Society's proposed amendment to allow judges to direct a conviction if no reasonably instructed jury could find an accused to be reasonably justified in his or her application of force. This will provide an additional safeguard in "borderline" cases.

APPENDIX ONE: CASE LAW SUMMARY

This section summarises almost 50 cases that we have read where the issue of reasonable discipline has been raised, with the exception of cases that have had reporting restrictions placed on them by the relevant court. Some of these cases have already been summarised in our written submission but for the sake of convenience, we have reproduced those summaries here.

Cases where physical discipline has been found to be acceptable

S v B[33]

In this case a daughter applied for a protection order under the Domestic Violence Act 1995 against her father. Her father had placed his hands on her shoulders to turn her to face him, then walked her across the room. In walking her across the room he accidentally pulled her hair. He then pushed his hands down on her shoulders to make her squat. The daughter swore at her father, who slapped her once on the legs and once on the cheek with an open hand. The father's reaction was held to be spontaneous, and the daughter did not require any medical treatment. No marks or bruises were caused.

The father's actions were held to be inappropriate but not 'abuse' sufficient to ground a protection order. It was not specifically determined whether the father's conduct was 'reasonable' under section 59, but it is implicit in the decision that it was.

Kendall v Director-General of Social Welfare[34]

An application for a licence to operate a nursery was made in this case. The applicant had been running a nursery when her licence was suspended because of allegations that, among other things, she had used inappropriate physical punishment on children in her care. It was found that the applicant had administered a smack to one problem child with his carers' consent, after he began to (literally) wreck the nursery. This was then followed up with encouragement, support and love such that the behaviour of the little boy in question was turned around. The judge noted that the applicant and the carers "were really exercising a parental judgment on a question of upbringing. It is a bold person who questions a parental judgment." The applicant also admitted smacking several children after they pulled all the heads off the flowers in her garden. The Court found that there was no evidence of maltreatment justifying the suspension of the applicant's licence, and ordered that it be reinstated.

Re M (children)[35]

Declarations had been made that five children were in need of care and protection. However, the Department of Child, Youth and Family Services had concerns about continuing the interim placement of the four eldest children with a Mrs C, on the basis that she admitted having smacked more than one of them. The Department's policy was that no caregiver appointed by the Department was to use any form of corporal punishment against children placed in his or her care, regardless of section 59.

Mrs C had administered smacks on three occasions: when one of the children let the handbrake off a car, nearly causing a serious accident; when two of the children were found poking pieces of paper into an electric radiator so as to start a fire; and when one of the children spread faeces over the toilet seat and other surfaces after being warned not to. On each occasion a smack was given with a bare hand. There was no question of excessive smacking.

The Court held that correction was necessary and justified and that the force used was mild and reasonable. Each child would have understood the reason why the punishment was necessary and would have seen it, not as a rejection by a loved and trusted adult or as an arbitrary abuse of adult power, but as decisive, instant, necessary and fair correction. The continuation of the children's placement in Mrs C's care was confirmed.

Re K, L & D[36]

The Department of Child, Youth and Family Services sought declarations that K, L and D were in need of care and protection, a custody order in favour of the Chief Executive of the Department, and a restraining order against the partner of the children's mother. It was alleged that the mother's partner had abused the children by application of force that went "far beyond reasonable parental discipline." The Court found that when physical discipline was needed it took the form of a slap on the cheek or a kick on the bottom with either bare feet or Nikes. The discipline was not of a strength to leave bruising or to create lasting resentment (with the possible exception of the eldest child). It was administered occasionally and when needed.

The Court adverted to the lack of common agreement on "matters of this kind", and held that a light kick on the bottom, not hard enough to leave a bruise, is a relatively common and traditionally accepted form of domestic discipline in some sections of the community. The Department's applications for a custody order and a restraining order were dismissed, and the application for a declaration was adjourned.

R v Wilson[37]

The accused appealed against a conviction of assault. He had struck his 6 year old stepson at least twice with a leather belt. The child was hyperactive and defiant and had severe ADHD and other behavioural problems. The charge of assault arose out of an incident where the child jumped out of his bedroom window and rode a scooter on the road, getting his friends to join in with him. The accused disciplined him with the belt because of this. The belt left a red welt on his lower back. The Court of Appeal ordered a retrial of the case for technical reasons, and at the retrial the accused was acquitted by a jury.[38]

Shapleski v Wilson[39]

This case involved an application for a protection order and raised the question whether reasonable domestic discipline by a parent is capable in law of amounting to 'domestic violence' against a child. The application was brought by the child's mother against the father. The child in question had developed a pattern of uncontrolled, frenzied and destructive rage.
On one occasion he flew into an uncontrollable rage, punching and hitting his father. In a successful attempt to bring him under control, his father put him in a headlock.

On another occasion, the child started lashing out at his father, punching and swearing. The father got hold of his collar and marched him back to the house. The child again lashed out at him, and the father put him in his bedroom.

The Court held that if the force used is reasonable, it cannot form the basis of a protection order; the Domestic Violence Act 1995 has not repealed or modified section 59, and the use of reasonable force for correction of a child, being "justified" in law, therefore cannot be domestic violence. The Court found that the father's use of force was for corrective purposes and that, objectively, it was not unreasonable for the father to believe that the degree of force employed in restraining the child was necessary. The application for a protection order was dismissed.

R v Newell[40]

A father was charged with assault with a weapon. The father's evidence (which appears to have been accepted by the jury) was that he had taken hold of the complainant's arm while she was lying on the floor and turned her over so that he could hit her across the backside with the hose. He said he had struck 2-3 blows, and that he was not angry at the time.

The complainant's evidence (which does not appear to have been accepted by the jury) was that her father had dragged her along the floor by her arm and her ankle, tearing her t-shirt, and had held her upside down while hitting her 7-8 times with a length of hose pipe. Medical evidence established bruising to the complainant's arm and across her buttocks, which the father accepted he caused.

The father gave evidence that he had severely injured his back in a workplace accident and could not have picked the complainant up and dragged her in the way she described. He also said that the complainant's behaviour had been steadily becoming worse over a period of months, and was particularly unacceptable in the few days leading up to the incident. He had tried a range of disciplinary measures, including grounding and withdrawal of privileges, none of which had worked. He said that he struck the complainant with the hose because he felt he had run out of disciplinary options and that nothing else he had tried was working.

A defence under section 59 was raised, and a jury acquitted the accused.

Brickell v Cooper[41]

An application was made for a declaration that a child was in need of care and protection. On one occasion the father made the child sit with a dog chain around his neck while counting to 60, as a punishment for hurting his father with the chain. The judge commented that this would not clearly fall outside section 59. There were allegations made that the father had hit the child over the head with an open hand. The judge commented that that kind of discipline is certainly debatable in this day and age and is arguably not justified under section 59. However, the allegations were not substantiated.

Grey v Grey[42]

A father and a mother contested custody of their children. It was found that the mother and her husband had used slaps to the face, a wooden spoon and a belt to discipline the children. The judge concluded that this was not domestic violence or abuse, but was inappropriate given a prior history of domestic violence.

R v Giles[43]

In this case, the accused faced two charges, of kidnapping or unlawful detention, and of cruelty. The charges were brought because he had chained his 14 year old stepdaughter to himself after she had been running away. The accused raised a section 59 defence to each charge.

The accused's stepdaughter had a history of running away and being truant from school, and had just been brought home by the police in the early hours of the morning after the latest incident of running away. She was abusing her mother and threatening to run away again the next day. Of particular concern was that the stepdaughter had epilepsy and admitted not taking her pills while absent. She had two seizures as a result of not taking her pills. She was also using drugs and had admitted to having sexual intercourse with a number of boys, and had been getting involved with members of a local 'white power' movement. Her mother turned to the accused for help, and said in evidence that she had no idea how to deal with the situation and just wanted some help.

The accused fastened a dog chain, 5-6 metres in length, around his waist and his stepdaughter's waist. She struggled and he had to use some force to put the chain on. She conceded that the chain was not put on "tight tight", but it was tight enough to leave a red mark. The evidence for the accused was that he was trying to demonstrate to his stepdaughter that they were reliant on each other, that they were responsible for each other, and that help was available at the end of the chain. The stepdaughter was free to go wherever she pleased, on the condition that the chain stayed on and the accused went with her, because, he said, "we are in it together".

The chain was kept on during the night. It remained on until later that day, until the police came to the house. They came because they had been called by the accused to disperse some boys who had been hanging around the house. The boys were associates of the stepdaughter. The police saw the chain and ordered the accused to take it off.

The accused was acquitted by a jury.

[Case omitted due to reporting restrictions]

[Case omitted due to reporting restrictions]

R v T[45]

The accused was charged after he struck his stepdaughter with a length of hose pipe after she interrupted him while he was talking to his other stepdaughter. The force used was sufficient to leave a raised lump approximately 15 cm long. The accused was acquitted by a jury.

R v McL[46]

The accused was charged with assault on a child after he disciplined his son with a piece of kindling wood by hitting him across the bottom with it. He had been caught stealing money from a friend of the accused and had subsequently lied about it. There was bruising on the child's buttocks, and evidence from a doctor that the force involved would have to be extensive to leave bruising like that. However, there was also evidence that the child had fallen over while rollerskating the day before, and may have injured his buttocks then.

The piece of kindling wood which was used to discipline the child was about 30 cm long and 2 cm thick, and a bit rough. The child was struck with it 4-8 times, and the accused stopped when the child began to cry. There was evidence that the child had stolen things and lied about it on more than one occasion in the past, and that disciplinary practices such as the loss of TV privileges and being sent to bed early had been used on those occasions, but without making a difference to the child's behaviour. The accused's evidence was that he decided to smack his son on this occasion because nothing else seemed to be working. He was a bit upset, but not angry, at the time.

A jury acquitted the accused.

Cases where physical discipline has been found to be unacceptable

In the following cases, the disciplinary force used was held to be unacceptable, either by a judge or by a jury. In combination with the preceding cases, where the force used was acceptable, these cases illustrate the limits of what section 59 will protect.

B v H[47]

This case concerned an application for a protection order under the Domestic Violence Act 1995 and applications for custody. The conduct complained of consisted of reasonably vigorous pushes to the shoulder, a kick to the bottom which did not cause injury, and a kick to the knee causing a cut which was not found to be serious. It was held that the kicks were an improper use of force beyond that which is usually accepted as disciplinary action. The kicks amounted to "physical abuse". It was implied that a smack on the bottom would have been appropriate discipline. However, in the circumstances of the case, the judge did not find it necessary to make a protection order on other grounds and the applications for custody were adjourned.

In re I, T, M & J[48]

An application for a care and protection order under the Children, Young Persons and Their Families Act 1989 was made in this case. The children that were the subject of the application had been disciplined regularly by their father, including by spanking and hitting with a stick that left bruising on the buttocks, regular spanking, hitting with a stick across the thighs, a blow to the head of one child causing bruising and a cut, and on one occasion a flick to the face. The care and protection order was made.

[Case omitted due to reporting restrictions]

T v T[50]

In this case there were competing applications for custody by the parents of a 12 year old boy. The mother alleged the use of excessive discipline by the father, who admitted using physical discipline on three occasions. On the first occasion he used a gun belt, apparently when the son stole some curtains and sold them. He also smacked his son when his son deliberately broke some expensive glasses, and smacked his son and kicked his bottom once when his son deliberately obliterated recordings the father had made on his work dictaphone. The force used was sufficient to cause bruising. The judge considered that this exceeded what is justified by section 59.

R v Accused[51]

The accused had been charged with wilful ill-treatment of children in a manner likely to cause unnecessary suffering under section 195 of the Crimes Act 1961. He applied for, among other things, a discharge on the basis that his conduct amounted to reasonable discipline of the children so that any suffering was not unnecessary. The Crown argued that evidence which it intended to present at trial could establish that the accused's motive was self-gratification rather than discipline. The Court held that if the jury accepted this evidence, the section 59 defence would be excluded on the basis that the force was not used for the purpose of correction. It would therefore follow that any suffering caused was unnecessary. The application for a discharge was dismissed. This case illustrates that where self-gratification, rather than correction, is the motive for the use of force on a child, the conduct will not be protected by section 59.

R v Johansen[52]

This was an appeal against sentence after the appellant had been convicted by a jury of assault. He had admitted caning boys under his supervision, and had relied on section 59 at trial. The jury had obviously not accepted that the canings were justified, and no challenge was made to this verdict on appeal.

Ausage v Ausage[53]

The applicant sought a protection order against her father on the basis that the force used in disciplining her had been excessive and therefore amounted to domestic violence. It was alleged that the father, on one occasion, hit her when she was lying in bed in the early hours of the morning because he believed that she had stolen some money. The court considered that the father's conduct on this occasion was motivated by feelings of shame and anger and therefore was not a proper exercise of disciplinary powers. On another occasion the father struck the applicant in the mouth with the back of his hand, causing bruising and cuts to her lips and whiplash. The Court found that the father was motivated by anger and a desire to exert control. The father's conduct was not protected by section 59, and amounted to assault and domestic violence. A protection order was made.

C v C[54]

One of the parties had slapped a child's face when the child swore at her. The judge held that this was not reasonable discipline "in the circumstances."

Sharma v Police[55]

This was an appeal from convictions in the District Court of assault on a child and breach of a protection order. The appellant, who was estranged from his wife, had struck his 9 year old stepson when the child returned to the appellant's house to collect items belonging to his mother. The blows took the form of a slap to the head and two slaps on the legs. The protection order was against the appellant and protected the child. The appellant argued that he was exempted from liability by section 59.

The Court accepted that the Domestic Violence Act 1995 did not exclude a section 59 defence even where a protection order is in place for the specific purpose of protecting the complainant against the defendant. Nevertheless, the Court found that the force used was not reasonable in the circumstances, particularly given the impossible situation the child had been placed in. As a result, the section 59 defence did not apply and the convictions were upheld.

Erick v Police[56]

A child had been struck in the back and face 10 times or more with a leather belt by his father. The father was convicted of assault on a child and appealed to the High Court. The injuries caused were consistent with a lot of force being used, though there was no permanent injury. The father raised a section 59 defence. The Court took into account that no alcohol or other external influences affected the father, the child was properly dressed and received some protection from his clothing, the punishment was a rational one (the child had hurt his sister after being warned not to), and the child was guilty of obdurate behaviour and suffered no emotional damage. Nevertheless, the force used was held to be unreasonable and the conviction for assault was upheld.

R v McFarlane[57]

The accused was convicted by a jury of wilfully ill-treating a child, and appealed to the Court of Appeal. The Crown's evidence, which was evidently accepted by the jury, was that the appellant and her husband regularly assaulted the child in a variety of ways using their open hands, fists, a plastic spoon and a leather belt. On one occasion the child was beaten with a wooden spoon until it broke, at which point the beating was continued with a leather belt. The jury was instructed that they had to be sure that the Crown had excluded a defence under section 59. Evidently they were sure, and no issue was taken with this on appeal. The appeal was dismissed.

Hibbs v Police[58]

The appellant and his partner were convicted of assaulting the appellant's 3 and a half year old son. The appellant smacked his son on the back of the hand and on the bottom and "lost control" and verbally abused him when the boy allowed the bath to overflow. A section 59 defence was rejected at trial. On appeal, the Court upheld the conviction.

Sade v Police[59]

The accused appealed against a conviction of assault on a child. 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 issue was whether the force used was reasonable. The Court considered that the evidence before the District Court Judge who convicted the accused demonstrated a proper basis for the conviction, and the appeal was dismissed.

Arvidson v Croft[60]

An application was made by children for protection orders against the man who their mother was living with. It was alleged that, among other things, the mother's partner had physically abused one of the children by hitting her legs with a jug cord, leaving welts. That child suffered from Downs Syndrome. The Court found that the mother's partner had used a jug cord to hit that child, and considered that the force used was excessive and could not fairly be described as a disciplinary action. Protection orders were made.

Y v Y[61]

This case involved an appeal by a father against a protection order made against him in favour of his children. He admitted using a "smacking stick". The Court held that "[t]he use of a "smacking stick" on a young woman approaching teenage or on younger children must be very difficult to justify." An interim judgment was given and the protection order was left in place.

R v Solanki[62]

A father had restrained his daughter by putting his arm around her shoulders to prevent her walking away from him. There was some evidence that he may also have put her in a headlock. His evidence was that his restraint was gentle, sensitive and paternal. The Court held that even on his version of events, an assault had occurred.

R v Drake[63]

A mother was convicted of manslaughter after her 8 year old daughter died of blows inflicted by the mother and her elder sisters. The mother appealed to the Court of Appeal, raising a defence under section 68 of the Criminal Code 1893 (the predecessor of section 59).
The Court upheld the conviction; the punishment and its result were so monstrously disproportionate to any offence which could have been said to have been committed that it suggested that "what was done was not really done by way of punishment, but was a means adopted by the mother of wreaking her dislike or malice upon this child." Additionally, what had been done could not be said to be reasonable.

Fleming v Thompson[64]

This case involved an application for custody by a father alleging violence by his former partner against their children. His partner admitted using a horse whip to discipline the children by flicking them with it, and also admitted hitting the children with a rolled-up newspaper (or "whacky stick", as she called it). She also acknowledged slapping and smacking the children. Use of physical discipline continued despite her undertaking at a Family Group Conference not to use such discipline. The Court considered that her style of discipline was inappropriate and excessive, harsh and confrontational, and would have negative consequences for the children. Custody was awarded to the father.

Re JH[65]

An application was made for a declaration that a child was in need of care and protection. The declaration was made as the child's mother admitted hitting him in a number of ways that the judge found were outside the scope of section 59 protection, such as smacking to the head, hitting with a jandal and a vacuum cleaner pipe, punching with fists and kicking with shoes. The mother often used corporal punishment as a first resort.

C v F[66]

A father applied to discharge a protection order made against him in favour of his children. The judge found that he had physically abused the children by hitting them with an open hand on their faces, bottoms, hands, legs and heads. He had also used a vacuum cleaner pipe and a belt to hit them. On one occasion he broke one child's arm when he pulled him across a bed. He often caused bruises and once caused a blood nose. At times he lost control and at times he was drunk. The children's mother was also found to have abused the children by way of discipline, by slapping them around the face and body and once by hitting one child with a jandal. On other occasions she hit with a wooden spoon.

A v S[67]

A father sought access to his children. In considering the application for access, the Court examined allegations about the father's discipline of his children. The Court found that the father had smacked his children too hard, on one occasion flung his child inside the house, and on two occasions grabbed his child by the collar or arms and dragged him. On one of those occasions he was then thrown onto a couch. On the other occasion he was dragged down to his bedroom and placed on his bed. The child was no more than 2 and a half years old when these incidents occurred. The force used was not reasonable and was motivated by frustration or anger, not corrective purpose.

Munatonu v Masters[68]

The parties had lodged competing applications for custody of their child. The father was found to have punished the child by hitting him with a broom on his back, the back of his legs and his buttocks, and was also found to have slapped, punched and kicked the child. His custody application was dismissed as the judge was not satisfied that the child would be safe with him.

Albert v Police[69]

This was an appeal against conviction for two counts of the offence of male assaults female, being assaults on the accused's wife and daughter respectively. The accused pulled his daughter backwards by her hair in a way which caused pain. The District Court Judge held that this was unreasonable force and not protected by section 59, and Doogue J could see no basis to overturn this conclusion on appeal.

In the matter of JPB[70]

An application for a declaration that a child was in need of care and protection. The mother disciplined the child by punching and hitting him when angry, including hitting him in the face. He was punished for real or imagined misbehaviour, depending on the mother's mood. The judge held that this conduct was not protected by section 59, and the declaration was made.

R v Reid[71]

An appeal from a conviction for assaulting a child. The appellant pulled his 3 year old stepdaughter by her hair to remove her from a shop window in which she was playing. The evidence was that the force used in pulling was quite hard. A section 59 defence had been raised at trial, but was obviously not accepted by the jury. The Court could find no basis to overturn the jury's verdict. The appellant had been convicted on another charge (of pushing his stepson's face into dog faeces). The Court commented that if it had not been for that conviction, the appellant may have had a case for a discharge without conviction in respect of his conduct towards his stepdaughter.

D v D[72]

This was an application to discharge a protection order and to determine custody issues. The father was found to have grabbed his son tightly by the collar and to have hit him on the back of his head with his hand once. Both the father and the mother smacked the child on the bottom, and the mother also smacked him with a wooden spoon, which on one occasion broke. Both parties' discipline was described as inappropriate.

R v Matafeo[73]

The appellants had pleaded guilty to charges of assault with a weapon and assault after they beat their adopted child with hands, shoes and a Samoan broom, causing substantial lacerations and bruising to her face, head, back, arms and legs.
They appealed against the length of their sentences. The Court of Appeal reduced their sentences to take account of their guilty pleas, but cited an earlier decision to the effect that violence of that nature could not be a legitimate means of discipline in any section of the community. The Court concluded that this was a serious case of child abuse, and sentenced the appellants to 2 years' imprisonment on the assault with a weapon charges, and 6 months' imprisonment on the assault charges.

Spence v Police[74]

This case also concerned an appeal against sentence. The appellant was convicted of assault on a child after he forced his stepson to do extra homework, and when the child had difficulty, beat him with a leather dog lead with sufficient force to cause severe bruising and red welts. The Court held that this conduct went far beyond any reasonable requirement for parental discipline, and demonstrated a degree of anger and approached the unbalanced. The sentence of 9 months' imprisonment was upheld.

DSW v W[75]

In this case, parents were held to have used excessive physical discipline. The father had kicked his daughter twice in the backside, slapped her across the back of the head with an open hand, and hit her in the jaw causing tenderness, redness and swelling. The mother had slapped the daughter in the face causing her nose to bleed.

R v Donselaar[76]

The accused was found guilty at trial of assault on a child. 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 section 59 defence, but the jury found that the degree of force he used was excessive. The evidence showed that the injuries required significant force. While the accused had not intended to hurt his son in the way that he did, the judge considered that the force used was unreasonable and sentenced the accused to 360 hours of community work and ordered him to pay emotional harm reparation of $500.

Spence v Spence[77]

A father and a mother filed competing custody applications. The outcome of the applications hinged on the father's disciplinary practices. He acknowledged physically disciplining their children from an early age, while they were still in nappies, and expected to continue the practice until they were "16 or 17", possibly longer. The children were disciplined with a thin piece of dowel or cane about three quarters of a metre long, the bamboo handle of a feather duster, a rubber spatula, a fish slice, a fibreglass mast off a bicycle (about three quarters of a metre long) and a belt. When the family went out, the father would put a spatula or a fish slice in the van. The children were hit on the bottom or legs. Custody was awarded to the mother as the Court held the father's discipline to be excessive and unreasonable, having no regard to "age appropriateness" or the children's developmental needs.
The father's disciplinary style was described as abusive and as violence, used by someone in power to control others in no position to offer any resistance.

R v Hende[78]

In this case a crèche worker appealed against convictions for, among other things, assault on a child. Section 59 was not pleaded.

The Court of Appeal said that the accused's conduct, two smacks administered to the bottom of a child at the crèche, amounted to nothing more than a pat on the bottom. While technically an assault, it did not merit the stigma of a conviction and fine, so the accused was discharged without conviction on that account.

R v Eathorne[79]

The accused husband and wife pleaded guilty to a charge of common assault. They had struck a 'young man' on the hand with a wooden spoon. The two accused were the caregivers for the child pursuant to an arrangement with Child, Youth and Family Services. Caregivers were prohibited by CYFS from physically disciplining children in their care. The two accused were convicted and fined.

Abuse cases[80]

It is worth noting that a number of horrific and high profile cases such as the deaths of Coral Burrows, Lillybing and others are often raised in the debate around the repeal of section 59. It is sometimes said that these cases are a reason why repeal is needed. It is important to note that in none of those cases did the accused raise a section 59 defence or try to justify their conduct as acceptable discipline. Section 59 would not have been applicable. It is clear that section 59 is not a barrier to conviction in cases of child abuse.

APPENDIX TWO: BODY OF CASE LAW CONSIDERED

The following are the cases which have been read and considered by Maxim Institute in preparing this submission:

1. *R v Hende* [1996] 1 NZLR 153.
2. *B v H* [1996] NZFLR 874, (1996) 15 FRNZ 275.
3. *S v B* (1996) 15 FRNZ 286, [1997] NZFLR 312.
4. *Kendall v Director-General of Social Welfare* (1986) 3 FRNZ 1.
5. *In re I, T, M & J* [2000] NZFLR 1089.
6. *K v H* unreported, FP004/889/97, District Court Auckland, Judge McAloon, 20 August 1999.
7. *T v T* unreported, FP004/919/90, Family Court Auckland, Judge Robinson, 9 July 1999.
8. *R v Accused* [1994] DCR 883.
9. *R v Johansen* unreported, CA220/95, 25 September 1995.
10. *Ausage v Ausage* [1998] NZFLR 72.
11. C v C unreported, FP091/159/02, Family Court Porirua, Judge Mill, 5 November 2002.
12. *Sharma v Police* unreported, A168/02, High Court Auckland, Fisher J, 7 February 2003.
13. *Erick v Police* unreported, M1734/84, Heron J, High Court Auckland, 26 February 1985.
14. *R v McFarlane* unreported, CA29/01, 17 May 2001.
15. *Hibbs v Police* unreported, AP205/95, High Court Auckland, Barker J, 26 October 1995.
16. *Sade v Police* unreported, AP50/95, High Court Rotorua, Williams J, 26 October 1995.
17. *Arvidson v Croft* [1996] NZFLR 741.
18. *Y v Y* unreported, HC122/97, High Court Auckland, Baragwanath J, 27 February 1998.
19. *R v Solanki* unreported, CA106/05, 30 August 2005.
20. *R v Drake* (1902) 22 NZLR 478.
21. *Fleming v Thompson* unreported, FP083/46/01, Family Court Wanganui, Judge Fraser, 27 March 2002.
22. *Chief Executive, Department of Child, Youth and Family Services v B* unreported, FAM-2005-021-000131, Family Court New Plymouth, Judge Murfitt, 11 November 2005.*

23. *C v C* unreported, FAM-2003-070-623, District Court Tauranga, Judge Somerville, 17 December 2004.*

24. *M v M* unreported, FP085/100/03, Family Court Wellington, Judge Moss, 10 November 2003.*

25. *Re M* (children) [2004] NZFLR 337.

26. *Re K, L & D* unreported, CYPF020/357/02, CYPF 020/358/02, CYPF 020/359/02, Family Court Napier, Judge Inglis QC, 12 March 2003.

27. *Re JH* unreported, CYPF054/48/02, Family Court Palmerston North, Judge Fraser, 7 March 2003.

28. *C v F* unreported, FP190/00, Family Court Porirua, Judge Mill, 10 February 2002.

29. *R v Wilson* unreported, CA216/01, 31 October 2001; unreported, TO11333, District Court Auckland, summing up of Judge Deobhakta, 12 June 2002.

30. *A v S* unreported, FP009/1280/99, Family Court Christchurch, Judge Bisphan, 23 August 2001.

31. *Re Hughes* unreported, FP083/282/92, Family Court Wanganui, Judge Inglis QC, 21 April 1999.

32. *Shapleski v Wilson* unreported, FP015/005/92, Family Court Feilding, Judge Inglis QC, 16 January 1998.

33. *Munatonu v Masters* [1997] NZFLR 769.

34. In the matter of R children unreported, CYPF031/111/95, CYPF031/112/95, CYPF031/113/95, CYPF031/114/95, Family Court Palmerston North, Judge Inglis QC, 28 May 1997.

35. *Albert v Police* unreported, AP26/97, High Court Napier, Doogue J, 27 May 1997.

36. *In the matter of JPB* unreported, FP054/034/96, Family Court Palmerston North, Judge Inglis QC, 28 March 1997.

37. *R v Reid* unreported, CA322/04, 16 December 2004.

38. *Newell v R* unreported, T20/02, High Court Palmerston North, France J, 26 April 2004.

39. *Brickell v Cooper* [2001] NZFLR 289.

40. *Grey v Grey* [1999] NZFLR 913.

41. *D v D* unreported, FP042/308/97, Family Court Nelson, Judge Grace, 8 December 1998.

42. *R v Matafeo* (1996) 14 CRNZ 276.

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

44. *DSW v W* [1994] NZFLR 179.

45. *R v Newell* unreported, T20/02, High Court Palmerston North (heard in Wellington High Court), notes of evidence and summing up of France J, 10-12 September 2002.

46. *R v Donselaar* unreported, CRI-2004-043-201, District Court New Plymouth, sentencing remarks of Judge Bidois, 14 April 2005.

47. *R v Howse* unreported, CA444/02, 7 August 2003.

48. R v Mahanga; R v Matiu unreported T001003, High Court Auckland, sentencing remarks of Rodney Hansen J, 27 September 2000.

49. *R v Witika* [1993] 2 NZLR 424.

50. *R v Paewai & Namana* unreported, T5/01, High Court Wellington, sentencing remarks of Durie J, 15 June 2001.

51. *R v Waterhouse* (2004) 20 CRNZ 897.

52. *R v Williams* unreported, CRI-2003-035-003861, High Court Wellington, sentencing remarks of Wild J, 5 February 2004.

53. *Spence v Spence* [2001] NZFLR 275.

54. *R v Giles* unreported, T42/99, High Court Palmerston North, Wild J, 16 November 1999.

55. *R v S* unreported, CRI 2005-045-191, Timaru District Court, Judge Abbott, 26 May 2005.

56. *R v T* (013959) 1/11/01.

57. *R v Haerewa* unreported, S5/99, High Court Napier, sentence of Wild J, 18 August 1999.

58. *R v McL* unreported, T002487, Napier District Court, notes of evidence, 20-21 Feb 2001.

59. *R v Eathorne* unreported, CRI-2005-086-000092, District Court Greymouth, sentencing notes of Judge Doherty, 30 January 2006.

60. *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] 1 SCR 76.

* These cases have not been summarised because they are subject to reporting restrictions imposed by the Court.

APPENDIX THREE: FURTHER INFORMATION ON PROSECUTORIAL DISCRETION

As set out in the body of this material, we submit that reliance on the exercise of police or prosecutorial discretion to avoid prosecutions for light smacking or removing a child to "time-out" is not appropriate or workable.

There are no existing guidelines or practices to support the discretion argued for, and it will not be practical to develop any. Even if guidelines were developed, they would not apply to private prosecutions. It is worth noting that when proponents of the Bill argue that police will never prosecute for a light smack or removal to "time-out" what they are arguing for is not the use of discretion, but rather a rule with the force of law. This is entirely improper.

Prosecutorial discretion no safeguard against prosecution

The exercise of a proper prosecutorial discretion would involve a case-by-case assessment of the facts of each individual case. A proper discretion could not guarantee that parents would not be prosecuted for light smacks or trivial actions.

At present, prosecutions are guided by the Solicitor-General's Prosecution Guidelines ("**Guidelines**"), which apply to the Police or other government agencies charged with enforcing the law. The Guidelines provide that, for a prosecution to be commenced, a two-part test of evidential sufficiency and public interest must be met.[81]

The public interest test is a broad one:[82]

> Factors which can lead to a decision to prosecute or not, will vary infinitely and from case to case. Generally, the more serious the charge and the stronger the evidence to support it, the less likely it will be that it can properly be disposed of other than by prosecution. A dominant factor is that ordinarily the public interest will not require a prosecution to proceed unless it is more likely than not that it will result in a conviction. ... In cases of ... doubt it may be appropriate to proceed with the prosecution as, if the balance is so even, it could probably be said that the final arbiter should be a Court.

The Guidelines set out a number of factors which may be taken into account when deciding whether this test has been met. However, "none of these factors, or indeed any others which may arise in particular cases, will necessarily be determinative in themselves; all relevant factors must be balanced."[83]

The public interest test is mirrored in the Code for Crown Prosecutors in the UK. Commenting on this test, an eminent UK barrister has said "[t]he public interest test is not a test of principle. It depends on an assessment by a prosecutor. Different prosecutors, faithfully applying the Code, may take different views on the same facts."[84]

It is obvious that the Guidelines are merely guidelines; the public interest test they contain will provide guidance to prosecutors, but will not support the discretion that is argued for by supporters of repeal.

They will not compel prosecutors to treat all cases of "trivial" physical discipline in the same way, but rather will continue to compel a case-by-case assessment of all relevant factors.[85]

Significantly, a recent report of the Law Commission concluded that:

> ... it appears that the police do sometimes persevere with minor cases where the evidential sufficiency criterion is met, but no public interest is being served in pursuing the matter before the court.

Development of practices to support the discretion impractical

The idea that prosecutorial discretion is unrealistic is reinforced by an internal Police email, obtained under the Official Information Act, which states that:[87]

> … agencies have made assumptions of what Police practice will be if s59 is repealed. Most of these assumptions are made by people who have very limited if any understanding of criminal law and/or Police procedures ...
>
> I have advised the Families Commission of the following;
> 1. Police do not have a position.
> 2. What ever is decided Police would want it to be easily understood and enforceable.
> 3. Police have to consider the operational implications of whatever is decided by Parliament.

One such operational implication is referred to in another internal Police email:[88]

... the smacking of children may be more likely to result in a person being charged than it would if two adults were involved. ... the current Domestic Violence Policy would apply and ... unless there was exceptional circumstances the offending party would be arrested.

In response to an Official Information Act request, we obtained an internal Ministry of Justice memorandum which says that, if section 59 is repealed:[89]

- prosecution decisions will remain largely a matter of Police discretion;
- it will not be possible to determine a Police charging policy for section 59-type cases, as this would contravene Police independence and discretion;
- while the Police could develop guidelines in relation to prosecution decisions, this is not usual practice. Even with guidelines, parents could still be prosecuted for minor or technical assaults;
- Police and Crown Law believe that repeal is likely to result in some increase in prosecutions of parents for assaults on children.

This conclusion is reflected in a Cabinet Paper obtained under the Official Information Act.[90]

"Trivial" offences

Sometimes reliance is placed on mechanisms that are said to exist that will prevent parents from being prosecuted for "trivial" offences. Thus, one Cabinet Paper states that:[91]

> There are already significant safeguards in the justice system to minimise the risk of parents/caregivers being prosecuted for trivial offences if section 59 were repealed. These safeguards include ... the range of options other than formal prosecution, available to Police, including warnings, cautions and pre-trial diversion.

However, the Law Commission concluded recently that the alternatives to prosecution that are available to prosecutors are often too limited in scope to be appropriate to the case, and noted a number of deficiencies with the police diversion scheme.[92]

Even if mechanisms such as pre-trial diversion are available and appropriate, there is considerable doubt about whether they are sufficient to protect parents. To put parents and their families through the strain of waiting to find out if they are lucky enough to be offered pre-trial diversion when they have committed the type of minor offence that is envisaged is unsatisfactory and, we submit, unjust.

In any case, the Cabinet Paper goes on to state that, regardless of the protective mechanisms in place, "it will not be possible, or helpful to the general goal, to provide a complete assurance that parents/caregivers wouldn't be prosecuted for trivial offences after repeal of section 59."

In fact, a Police Board of Commissioners Report records that Police:[93]

> ... has advised that, should [section 59] be repealed or amended, Police will amend their policies and procedures accordingly to enforce the law.

APPENDIX FOUR: FURTHER INFORMATION ABOUT POSSIBLE AMENDMENTS TO SECTION 59

The Canadian Criminal Code

Section 43 of the Canadian Criminal Code provides:

> Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

The effect of a recent decision of the Supreme Court of Canada has been to specify that the force used will not be reasonable if:

- it is used on children under 2 or above 12, as they are deemed incapable of benefiting from corrective force;
- it is used on children under a disability or who are affected by some other factor preventing them learning from the force in the circumstances;
- it amounts to degrading, inhuman or harmful conduct;
- it takes the form of blows or slaps to the head or involves the use of objects.

The Court held that only minor corrective force of a transitory and trifling nature is exempt from criminal sanction. In deciding whether the force used is reasonable, the gravity of the precipitating event is not a relevant consideration.[94]

The Children Act 2004 (UK)

Section 58 of the Children Act 2004 provides:

> (1) In relation to any offence specified in subsection (2), battery of a child cannot be justified on the ground that it constituted reasonable punishment.
>
> (2) The offences referred to in subsection (1) are –
>
> (a) an offence under section 18 or 20 of the Offences Against the Person Act 1861 (c.100) (wounding and causing grievous bodily harm);
>
> (b) an offence under section 47 of that Act (assault occasioning actual bodily harm);
>
> (c) an offence under section 1 of the Children and Young Persons Act 1933 (c.12) (cruelty to persons under 16).

> (3) Battery of a child causing actual bodily harm to the child cannot be justified in any civil proceedings on the ground that it constituted reasonable punishment.
>
> (4) For the purposes of subsection (3) "actual bodily harm" has the same meaning as it has for the purposes of section 47 of the Offences Against the Person Act 1861.
>
> (5) In section 1 of the Children and Young Persons Act 1933, omit subsection (7).

Further difficulties in drafting an amendment of this kind

As stated in the body of the text, different prosecutors may bring different charges on the same set of facts and the availability of a defence will depend on which yet-to-be-proved charge is brought. This has the potential to create injustice when the availability or otherwise of a defence hinges on it.

In the case of assault with intent to injure and injuring with intent, the offence is committed when the accused has intent to injure, and either actually injures someone or commits an assault. This would create difficulties because all that is necessary to constitute an injury is a hurt or injury "calculated to interfere with the health or comfort of the victim" which "need not be permanent or dangerous" but "must be more than merely transitory or trifling."[95] The definition is broad and there is unlikely to be agreement about what disciplinary conduct falls within it.

The offence of assault with a weapon is committed when someone, in assaulting another person, uses "any thing" as a weapon. "Weapon" is not defined, but the reference to "any thing" indicates that, for example, a wooden spoon used to discipline a child would count as a weapon. If the application of section 59 was restricted so that it did not apply to this offence, section 59 would not be available in many cases in which disciplinary force is at issue.

The end result of restricting the availability of section 59 to certain offences will either be injustice or ineffectiveness. Injustice will occur if the defence is restricted too far. Ineffectiveness will occur if the defence is limited only to more serious offences, as section 59 would not have succeeded as a defence to these charges in any case.

Section 61AA Crimes Act 1900 (New South Wales)

In 2003 the Crimes Act 1900 (NSW) was amended by the insertion of section 61AA, which provides:

> (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 misbehavior 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).

Endnotes

[1] Unreported, CRI-2004-043-201, District Court New Plymouth, sentencing remarks of Judge Bidois, 14 April 2005.
[2] [1994] DCR 883.
[3] [2004] NZFLR 337.
[4] (1986) 3 FRNZ 1.
[5] Unreported, FP015/005/92, Family Court Feilding, Judge Inglis QC, 16 January 1998.
[6] Unreported, A168/02, High Court Auckland, Fisher J, 7 February 2003.
[7] Unreported, M1734/84, Heron J, High Court Auckland, 26 February 1985.
[8] [1996] NZFLR 741.
[9] Unreported, CRI-2005-045-191, Timaru District Court, Judge Abbott, 26 May 2005.
[10] Unreported, T002487, Napier District Court, notes of evidence, 20-21 February 2001.
[11] http://www.nzherald.co.nz/search/story.cfm?storyid=0005709D-0915-1473-8D6783027AF1010F.
[12] http://www.nzherald.co.nz/search/story.cfm?storyid=836210B0-39E4-11DA-8E1B-A5B353C55561 and http://www.scoop.co.nz/stories/PO0605/S00275.htm
[13] http://www.nzherald.co.nz/search/story.cfm?storyid=836210B0-39E4-11DA-8E1B-A5B353C55561
[14] Internal Ministry of Justice memorandum dated 1 November 2001 Section 59 of the Crimes Act 1961.
[15] Internal Ministry of Justice memorandum dated 1 November 2001 Section 59 of the Crimes Act 1961.
[16] Cabinet paper dated 18 November 2002 (POL (02) 187) *Physical Discipline of Children: Public Education and Legislative Issues paragraphs* 8-10.
[17] See passages cited at page 28 of Maxim Institute's written submission on the Bill.
[18] Internal Ministry of Justice memorandum dated 1 November 2001 Section 59 of the Crimes Act 1961.
[19] Written submission of Maxim Institute, pages 30-31.
[20] Cabinet Paper dated 18 November 2002 (POL (02) 187) *Physical Discipline of Children: Public Education and Legislative Issues* paragraph 10.
[21] See pages 27-28 of Maxim Institute's written submission.
[22] http://www.nzherald.co.nz/search/story.cfm?storyid=0005709D-0915-1473-8D6783027AF1010F.
[23] Unreported, CRI-2004-043-201, District Court New Plymouth, Judge Bidois, 14 April 2005.
[24] [2004] NZFLR 337.
[25] Children Act 2004, s 58.
[26] Roy Amlot QC, opinion for the Christian Institute [www.christian.org.uk] on the likely effect of clause 56 of the Children Bill, 26 October 2004.
[27] Crimes Act 1961, section 196.
[28] Crimes Act 1961, section 194(a).
[29] Crimes Act 1961, section 194(b).
[30] Crimes Act 1961, section 193.
[31] Crimes Act 1961, section 202C.
[32] Crimes Act 1961, section 189.
[33] (1996) 15 FRNZ 286.
[34] (1986) 3 FRNZ 1.
[35] [2004] NZFLR 337.
[36] Unreported, CYPF 020-357-02, CYPF 020-358-02, CYPF 020-359-02, Family Court Napier, Judge Inglis QC, 12 March 2003.
[37] Unreported, CA216/01, 31 October 2001.
[38] *R v Wilson* unreported, T011333, District Court Auckland, Judge Deobhakta, 12 June 2002.
[39] Unreported, FP015/005/92, Family Court Feilding, Judge Inglis QC, 16 January 1998.
[40] *R v Newell* unreported, T20/02, High Court Palmerston North (heard in Wellington High Court), notes of evidence and summing up of France J, 10-12 September 2002.
[41] [2001] NZFLR 289.
[42] [1999] NZFLR 913.
[43] Unreported, T42/99, High Court Palmerston North, Wild J, 16 November 1999.
[45] (013959) 1/11/01.
[46] Unreported, T002487, Napier District Court, notes of evidence, 20-21 February 2001.
[47] [1996] NZFLR 874.

[48] [2000] NZFLR 1089.
[50] Unreported, FP004/919/90, Family Court Auckland, Judge Robinson, 9 July 1999.
[51] [1994] DCR 883.
[52] Unreported, CA220/95, 25 September 1995.
[53] [1998] NZFLR 72.
[54] Unreported, FP091/159/02, Family Court Porirua, 5 November 2002.
[55] [2003] 2 NZLR 473.
[56] Unreported, M1734/84, High Court Auckland, Heron J, 7 March 1985.
[57] Unreported, CA29/01, 17 May 2001.
[58] Unreported, AP205/95, High Court Auckland, Barker J, 26 October 1995.
[59] Unreported, AP50/95, High Court Rotorua, Williams J, 26 October 1995.
[60] [1996] NZFLR 741.
[61] Unreported, HC122/97, High Court Auckland, Baragwanath J, 27 February 1998.
[62] Unreported, CA106/05, 30 August 2005.
[63] (1902) 22 NZLR 478.
[64] Unreported, FP083/46/01, Family Court Wanganui, Judge Fraser, 27 March 2002.
[65] Unreported, CYPF 054-48-02, Family Court Palmerston North, Judge Fraser, 7 March 2003.
[66] Unreported, FP190/00, Family Court Porirua, Judge Mill, 10 February 2002.
[67] Unreported, FP009/1280/99, Family Court Christchurch, Judge Bisphan, 23 August 2001.
[68] [1997] NZFLR 769.
[69] Unreported, AP26/97, High Court Napier, Doogue J, 27 May 1997.
[70] Unreported, FP054/034/96, Family Court Palmerston North, Judge Inglis QC, 28 March 1997.
[71] Unreported, CA322/04, 16 December 2004.
[72] Unreported, FP042/308/97, Family Court Nelson, Judge Grace, 8 December 1998.
[73] (1996) 14 CRNZ 276.
[74] Unreported, AP53/94, High Court Wellington, McGechan J, 13 April 1994.
[75] [1994] NZFLR 179.
[76] Unreported, CRI-2004-043-201, District Court New Plymouth, Judge Bidois, 14 April 2005.
[77] [2001] NZFLR 275.
[78] [1996] 1 NZLR 153.
[79] Unreported, CRI-2005-086-000092, District Court Greymouth, sentencing notes of Judge Doherty, 30 January 2006.
[80] NZ Herald *PM Backs Smacking Ban in Wake of Coral's Death* 23 September 2003.
[81] Section 3 of the Solicitor-General's Prosecution Guidelines, which are available as Appendix C to the Crown Law Office Briefing Paper for the Attorney General dated October 2005.
[82] Section 3.3.1 of the Solicitor-General's Prosecution Guidelines.
[83] Section 3.3.3 of the Solicitor-General's Prosecution Guidelines.
[84] Roy Amlot QC, opinion for the Christian Institute [www.christian.org.uk] on the likely effect of clause 56 of the Children Bill, 26 October 2004.
[85] See also Cabinet Paper dated 2 November 2001 (CAB (01) 645) *Section 59 of the Crimes Act 1961: Implications of Repeal or Amendment* paragraphs 4-7.
[86] Law Commission Report 89 *Criminal Pre-Trial Processes: Justice Through Efficiency* (Wellington: Law Commission, 2005) paragraph 91.
[87] Internal Police email from Chris Graveson to Phil Divett dated 24 August 2005 Families Commission – s59.
[88] Internal Police email from Scott Spackman to Sarah Martin dated 22 August 2005 *Re: Query re a legal opinion given re smacking.*
[89] Internal Ministry of Justice memorandum dated 1 November 2001 Section 59 of the Crimes Act 1961.
[90] Cabinet Paper dated 2 November 2001 (CAB (01) 645) Section 59 of the Crimes Act 1961: Implications of Repeal or Amendment paragraphs 4-7.
[91] Cabinet Paper dated 18 November 2002 (POL (02) 187) *Physical Discipline of Children: Public Education and Legislative Issues* paragraphs 8-10.
[92] Law Commission Report 89 *Criminal Pre-Trial Processes: Justice Through Efficiency* (Wellington: Law Commission, 2005) paragraphs 99-101.
[93] Board of Commissioners Report dated 21 November 2005, paragraph 9.
[94] *Canadian Foundation for Children, Youth and the Law v Canada (Attorney-General)* [2004] 1 SCR 76.
[95] Adams on Criminal Law, CA2.16.01.