THE PROBLEM OF PARENTAL CONTROL

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Introduction

On 22 June 2007 Section 59 of the Crimes Act 1961 was amended by the Crimes (Substituted Section 59) Amendment Act (the Amendment) to remove the defence of reasonable force for the purposes of disciplining children. According to Sue Bradford, the MP behind the change, the removal of the defence was aimed "to make better provision for children to live in a state free from violence by abolishing the use of parental force for the purposes of correction."[1] The original Bill was also about bringing children's human rights to bodily integrity[2] and equality under the law in line with other members of society.[3]
Under the old law, a parent, or person in the place of a parent, was justified in using force by way of correction towards a child if the force used was reasonable in the circumstances.[4] The Amendment removed the justification for using force against children in circumstances where the force is used for the purposes of correction[5], however it created a fresh justification for parents to use force on children in other specified circumstances.[6]

In its initial stages, the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill (the Bill), or as it came to be known,

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[1] Justice and Electoral Select Committee, "Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill (271-272) and petition of Barry Thomas and 20,750 others" [2006], 2.
[2] Equal human rights for children is advocated by the United Nations Convention on the Rights of the Child 1989. See p. 3.
[3] While equal rights were a major incentive for the reformers, the success of the Bill required the case to be argued in the context of a right to protection: Wood, B., Hassall, I., Hook., G, 'Unreasonable Force. New Zealand's journey towards banning the physical punishment of children'*, Save the Children New Zealand*, 2008, p. 57.
[4] Section 59 'Domestic Discipline', Crimes Act 1961, prior to the 2007 amendment.
[5] Section 59(2) Crimes Act 1961 as substituted by s 5 Crimes (Substituted Section 59) Amendment Act.
[6] Current s59(1)(a)-(d) Crimes Act 1961.

the "anti-smacking bill", proposed to simply remove the s59 defence to assault from the Crimes Act 1961.[7] By the time it reached its third reading however, the Bill had been amended to represent a political compromise, in the wake of intense debate and public concern.

This paper will demonstrate that the amendments made to the Bill have compromised its original purpose by replacing one form of justification for the use of force against children with another. The amendments were drafted to placate resistance to the Bill, however they failed to address the issue that the public was most concerned about, which was 'smacking.' Instead, in an attempt to fill the gap in an already unproblematic area of the law, the amendments have created ambiguities and loopholes that could potentially disguise the use of force for the purposes of correction. The purpose behind the Bill would have been better achieved if s59 had simply been repealed. Ironically, the law would be clearer if it was silent on the use of force against children, and children would have maintained an equal status with adults with respect to bodily integrity.

A Section 59 of the Crimes Act: Parental Control

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

> **59 Parental Control**
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> (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—
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> (a) preventing or minimising harm to the child or another person; or
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> (b) preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence; or

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

(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.

The removal of the defence of reasonable force for the purposes of correction was a step towards equal rights for children, bringing them on par with adults in the context of bodily integrity. However, the creation of a new defence of reasonable force has arguably put children in their place again, as citizens with lesser rights.

New Zealand's ratification of the United Nations Convention on the Rights of the Child[8] (the Convention) in 1993 was a significant step towards the recognition of children as bearers of human rights. While the Convention does not necessarily advocate full autonomy for children, the various articles set out fundamental rights which State Parties are required to promote, and where necessary, amend domestic law to accommodate.[9] The Convention supports the premise that the right to bodily integrity, or more specifically, the right not to be hit, is a fundamental human right[10]. This right is innate in every human,[11] and

[8] Adopted by the United Nations General Assembly on the 20th of November 1989.
[9] Article 4 of the Convention requires that state parties "undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention."
[10] Specifically, Article 19 requires that state parties "protect the child from all forms of physical or mental violence, injury or abuse, neglect or neglectful treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has care of the child." Article 37 requires that state parties ensure

does not require capacity to be exercised. Dependency and capacity are often regraded as the necessary elements that disqualify children from being treated as fully autonomous. Freeman remarks that the convention has not done enough to reduce the idea that being 'dependent' means being deprived of basic rights.[12] Children should not be denied basic human rights or 'dignity-based' rights by virtue of their incapacity. These rights recognise their status as individual persons. Dignity-based rights are different from 'needs-based' rights which recognise that children are different from adults, and require protection and nurture.[13]

The United Nations Committee on the Rights of the Child (the Committee) has expressly disapproved of the legal use of corporal punishment[14] as it disregards a child's right to be free from violence[15] and the right to physical integrity and basic human dignity.[16] The Committee defines "corporal" or "physical" punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ("smacking", "slapping", "spanking") children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc.[17]

New Zealand's attempt to abolish corporal punishment has answered the Committee's concerns in one respect, however the defence of reasonable force that replaced the domestic discipline section has not properly addressed the child's right to physical integrity, human dignity,

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that "no child shall be subjected to cruel, inhuman or degrading treatment or punishment." While the words of these articles do not specify corporal punishment, the Committee has expressly denounced it in its definition of physical punishment. See n. 14.

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

[12] Freeman, M., *The Sociology of Childhood,* The International Journal of Children's Rights, 6, 1998, page 440.

[13] Woodhouse, B., 'Re-visioning Rights for Children' in *Rethinking Childhood,* Pufall et al, eds. Rutgers Press 2004, p. 234.

[14] *General Comment No. 8*, United Nations 2006, page 4, accessed 17 April 2008 from http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.GC.8.En?OpenDocument.

[15] Ibid., p 3.

[16] Ibid., p 7.

[17] Ibid., p 4.

or equality before the law. The Committee clearly states that the child's right to human dignity and bodily integrity in the Convention was built upon principles in international human rights law, which state that these rights belong to *everyone*: [18]

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

The effect of codifying the circumstances where parents can use force has on one hand reassured parents that they can still legally use force on their children. On the other hand it has once again set children apart from other groups in society as the group who can still be legally assaulted. Although it would be impractical to assert that parents should not have the ability to use force against their children in emergency situations, the fact that it has been spelt out in the criminal code, where it was never needed before, says something about the way we view children as rights bearers. It tends to show that as a society, while we *liked* the idea of bringing a child's right to bodily integrity to the level of an adult, we were not ready to give children complete equality under the law, preferring a "compromise" instead. Leaving the law silent on this issue would not have prevented parents being justified in using force against their children to protect them. The common law already protects the use of force against adults in similar situations.
The codifying of the parental control justification was unnecessary for several reasons:

1. The non-existence of the defence prior to June 2007

Before the Amendment, parents could be found guilty of assaulting their children in two ways. Firstly, if the force used for the purpose of

[18] Ibid., para 16.

correction was considered *not* to be reasonable in the circumstances[19] and secondly if the force used was not for the purposes of correction.[20] The Amendment has removed the first situation, and has tried to clear up the second by codifying it.

Where there is no statutory justification for the use of force, an action technically amounts to assault under The Crimes Act 1961.[21] Section 2 defines assault as:

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

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

> **59 Domestic discipline**
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> (1) Every parent of a child and, subject to subsection (3) of this section, every person in the place of the parent of a child is justified in using force by way of correction towards the child, if the force used is reasonable in the circumstances.
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> (2) The reasonableness of the force used is a question of fact.
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> [(3) Nothing in subsection (1) of this section justifies the use of force towards a child in contravention of section 139A of the Education Act 1989.]

This does not include for the purposes of changing a nappy for example or other normal parenting tasks. Technically, before the law change parents could legally smack their children for the purposes of

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[19] *Y v Y* Unreported, High Court Auckland, HC 122/97, 27 February 1998, Baragwanath J.

[20] *Ausage v Ausage* [1998] NZFLR 72, 80. See also, Ahdar, R. and Allen, J., 'Taking Smacking Seriously: The case for Retaining the Legality of Parental Smacking in New Zealand' [2001] *New Zealand Law Review* 1, p. 3

[21] Section 196. An assault provision specific to children and male assaults female exists under s194.

correction, but uses of force for other purposes, e.g. holding a child down to change a nappy, could have amounted to assault.

The Crimes Act itself does not include a definition of correction. The relevant definitions from the Shorter Oxford English Dictionary are:[22]

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

The Justice and Electoral Committee in recommending the amendments to Sue Bradford's Bill stated that the provisions under the new Parental Control defence would address the gap in the law: [23]

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

However, in attempting to legislate for parental uses of force in situations that would technically amount to assault, the amendments to the original bid for a full repeal have undermined one of the crucial purposes, to give children equal protection from assault under the law.[24] Sue Bradford's Bill intended for children to be equal citizens in the eyes of the law with equal rights to bodily integrity.[25] The inclusion of a new defence of reasonable force has not achieved this. While the removal of corporal punishment brought children's rights in line with adults', the defence of Parental Control has set them apart again

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[22] Brown (ed) *Shorter Oxford English Dictionary* (5th Edition, Oxford University Press, 2002) Volume 1, 523.
[23] Supra No. 1, page 2.
[24] In the explanatory note to Sue Bradford's Members Bill (Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill 2005, no 271-1) it states that the effect of the amendment is that parents and guardians will be "in the same position as everyone else so far as the use of force against children is concerned."
[25] In the first reading of the Bill, Sue Bradford said about its purpose, "It is about giving children and young people the same legal protection from physical assault that adults have. I do not understand at all why it is illegal in New Zealand to beat my spouse, another adult, a policeman, or even an animal harshly with a horse crop or a piece of wood, but it can be legal to do the same thing to my child." (2005) 627 NZPD 22086.

because has explicitly singled out children in an area of law where there is no statutory adult equivalent.

Prior to 2007, the "gap in the law" did not present a problem. The absence of this defence in the past never caused any ridiculous outcomes, because checks and balances already existed in common law[26] and the ability of police to exercise prosecutorial discretion.
In recommending the changes to the original Bill, the Justice and Electoral committee conceded that the purpose of the amendments is clarity in the wake of widespread misunderstanding, rather than a genuine need to have the gap in the law filled: [27]

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

However, in attempting to achieve clarity, the amendments to the Bill have caused two main problems. Firstly, children's rights to bodily integrity and equality under the law, the original purpose behind seeking repeal of s59, have been compromised, because children have once again been set apart from adults. Secondly, over-legislating the point has created new ambiguities and loopholes by framing legitimate uses of force very widely,[28] and fails to cover a circumstance involving force that parents were perhaps most concerned about.[29]

The Committee acknowledges that there are everyday occurrences in

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[26] See below at page 413, "The availability of alternative defences."
[27] Supra No. 1, page 7.
[28] See below at page 415, "the prescriptive quality of the parental control defence."
[29] See below at page 426, "putting a child on the naughty step."

child rearing that technically amount to an offence, however the reality of the situation means that parents will not get prosecuted. They illustrate this point with the kidnapping example above. By the same token, a parent doing any of things contemplated by s59(1)(a)(d) would be unlikely to be prosecuted if the statutory defence did not exist, because the current police guidelines recommend that there should be public interest in proceeding with a prosecution.[30] Arguably, there is little public interest in prosecuting a parent for the use of force against a child intended to protect them from harm, or holding a child down while changing a nappy.

2. The availability of alternative defences

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

The Law Commission, in para.8 of its report, expressed the view that the non- disciplinary interventions which parents are permitted to make under subclause (1) cover a gap in the law that needed to be addressed, "because, on the wording of section 59, the application of force from any motivation other than correction *is an offence currently*" (Law Commission emphasis). I doubt that the gap is as wide as the Law Commission suggests. The common law defence of necessity which is preserved by s.20 of the Crimes Act is likely to cover interventions which are needed in order to prevent harm to the child or prevent the child from engaging in criminal activity or disruptive behaviour. In my opinion, the defence of necessity would under the present law cover interventions such as restraining a child from walking in front of traffic and removing an offensive weapon or seriously harmful drugs from a child.

The Courts have recognised in cases such as *Kapi v. Ministry of Transport* (1991) 8 CRNZ 49 (CA) and *Police v. Kawiti* [2000] 1 NZLR 117 that the defence of necessity may be available not only if there are grounds of imminent peril of death or serious injury to the accused, but also

[30] Prosecution Guidelines, Crown Law Office, March 1992, para 3.3.1.

danger to another person where "necessity of circumstances" justifies the accused breaking the law. [31]

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

> **41. Prevention of suicide or certain offences**
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> Every one is justified in using such force as may be reasonably necessary in order to prevent the commission of suicide, or the commission of an offence which would be likely to cause immediate and serious injury to the person or property of any one, or in order to prevent any act being done which he believes, on reasonable grounds, would, if committed, amount to suicide or to any such offence.

Arguably, this defence would have been sufficient to cover the sorts of situations contemplated in s59(1)(b). However, it is strange that the words "criminal offence" were used rather than "crime", which is defined in s2 of the Crimes Act 1961.[32]

Adams on Criminal Law points out that s59(1)(a) is unnecessary because it closely resembles self defence: [33]

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

While it would be difficult to establish that children impliedly *consent* to everyday uses of force upon their bodies, Lord Justice Goff in *Collins v*

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[31] McKenzie, P. *Crimes (Abolition of Force as a justification for Child Discipline) Amendment Bill-Effect on Parental Corrective Action*, legal opinion prepared for Gordon Copeland MP, 21 March 2007, page 5. Reference to Law Commission report to the Justice and Electoral Committee: *Section 59 Amendment: Options for Consideration,* 8 November 2006. See below at footnote 60.

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

[33] Ibid.

Wilcock[34] suggests that the common law might excuse "all physical contact which is generally acceptable in the ordinary conduct of daily life". This might include parental uses of force that have always been generally accepted in New Zealand before we felt the need to codify them.

Finally, judges have the power to discharge without conviction[35] where the indirect consequences of a conviction would be out of proportion to the gravity of the offence.[36] This would be one more safeguard against parents being prosecuted for uses of force that technically amount to assault, in the absence of the unnecessary parental control provision. *R v Hende*[37] illustrates this point, where a crèche worker was discharged without conviction for smacking a child on the bottom: [38]

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

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

B. The prescriptive quality of the parental control defence

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

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[34] [1984] 1 W.L.R. 1173. In this case it was held that everyday jostling does not constitute assault.
[35] Sentencing Act 2002 s106.
[36] Sentencing Act 2002 s107.
[37] [1996] 1 NZLR 153.
[38] At 158.

Section 59(1)(a)-(d) is intended to fill the gap in the law, to provide a statutory defence for parents in situations where technically their use of force would amount to assault. However, by setting out all of the situations in which a child's bodily integrity can be legitimately invaded, the amended s59 has developed a prescriptive quality. In essence, by listing all of the circumstances where children do *not* have the right to bodily integrity, it demonstrates that children are not equal citizens deserving of equal rights. Before the amendment, children enjoyed the same right to bodily integrity as adults in the Crimes Act, except of course when the force used on them was for the purposes of correction. Now that the correction defence has been removed, it would be logical to think that children would be *completely* equal to adults, however the amendments have prevented that from happening. What we are left with is an exhaustive, unnecessary and largely ambiguous list of ways parents can use force against their children.

For example, subsection (1)(c) allows parents to use force to prevent the child from engaging in offensive or disruptive behaviour. Woods, Hassell and Hook suggest that this provision seeks to cover the situation of a child having a tantrum in a supermarket, to allow a parent to remove or restrain the child, as opposed to smacking to stop the anti-social behaviour.[39] However, there is no requirement in s59(1)(c) that the behaviour be public, or that any person needs to be disturbed or offended by it.[40] The term is deliberately vague to cover a whole host of situations, but the sorts of situations contemplated by this provision would probably be such minor instances of assault, there would be no public interest in prosecuting them anyway,[41] rendering the section redundant and unnecessary.

The justification of parental force in s59(1) has presumably been drafted in such a way as to maximise the cover for potential situations where parents use force. However, the lack of specificity, and failure to define terms has perhaps blurred the boundary between force used to *correct* a child and the listed 'legitimate' uses of force.[42] The difference between legitimate uses of force in s59(1)(a)-(d) and the uses of force

[39] Supra n. 3, p. 85.
[40] Supra n. 32.
[41] Supra n. 30, para 3.3.
[42] Supra n. 32.

for the purposes of correction lies in the motive of the parent, and this may often be difficult to establish. The section is so vague that it would be relatively easy to reclassify a corrective use of force within one of the four situations set out in s59(1).[43]

The terms "child",[44] "person in the place of a parent", "reasonable force" and "correction" have still not been defined by this Amendment, which is strange considering the Justice and Electoral Committee was trying to clear up the law in this area. The Police Practice Guide highlights the lack of formal definitions, and consequently there is an attempt to fill the gap, which in itself is problematic. For example, the guideline for "force used is reasonable in the circumstances" reads: [45]

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

This definition reads into s59(1)(d) the legitimate use of force *to ensure compliance*. Arguably, the definitions of 'ensuring compliance' and 'correction' are interchangeable, and in some cases it would be difficult to assess whether the force used was to ensure compliance, or whether it was for the purposes of correction. Too much responsibility is left with the prosecutor to distinguish the purpose behind the use of force, that in some circumstances may be indistinguishable.[46] This problem

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[43] See below at page 418, for a hypothetical application of s59(1) in a situation where parental force is used in reaction to a child talking back.

[44] "Child" means a person 17 years of age or under in the Care of Children Act 2004, but means a person of 14 years of age or under in the Children, Young Persons and Their Families Act 1989. The practice guide suggests that the age of the child will impact on the reasonableness of the force used. The older the child gets, the less justifiable the uses of reasonable force listed in s59(1) will become.

[44] *Police Practice Guide for new Section 59*, 19 June 2007, accessed 6 March 2008 at http://www.police.govt.nz/news/release/3149.html, page 2.

[45] Ibid., p. 3.

[46] Supra No. 31, page 8. Peter McKenzie QC expressed a concern for the amount of discretional responsibility entrusted in the police. He felt that there was a danger in

would not exist if s59 had simply been repealed, because the police would not have had to assess the motive behind each use of force, in addition to its inconsequentiality.

This lack of clarification in an Amendment which is meant to provide clarity means that the justifications in s59(1) could potentially be used as a 'loophole' to evade the prohibition of force for the purposes of correction in s59(2). The above example of the police definition illustrates this point, as does the situation where a child is talking back to his parent at home. If the parent picks the child up and puts him in his room as punishment for his behaviour, there has technically been an assault[47] however, a parent could reasonably justify the action under s59(1) as preventing the child from continuing to engage in offensive or disruptive behaviour. This justification does not require the behaviour to be public, nor for it to be established that anyone was actually offended or disturbed. By the same token, if the parent gave the child a small smack on the hand instead of taking him to his room, the same justification could be raised, and it makes a difficult task for the prosecutor to establish the motive behind the force. Of course, this kind of situation is so inconsequential that it would be very unlikely to be prosecuted, however it demonstrates that the amendments have not sufficiently clarified matters to a degree that warrants their existence in the first place.

The Law Commission highlights the fact that the requirement that motive is established may cloud the issue: [48]

> We need to emphasise that, in any given case, the parental motive will be a question of fact that varies in the circumstances of each case. This means that it is impossible for us to provide a blanket reassurance that prosecution will never be appropriate when force has been used to achieve "time out". It will be a matter for prosecutorial discretion and, ultimately (if the discretion is taken to prosecute) the decision of a jury.
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> However, in this regard, there is a very important point to note. The "Solicitor-General's Prosecution Guidelines" require prosecutors, in the exercise of their discretion, to assess the likelihood of achieving a

leaving the police with too much discretion, because invariably the outcomes would be inconsistent.

[47] See below at p. 426 "Putting the child on the naughty step."

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

> conviction. We suggest that, in the vast majority of "time out" cases, parents will be prompted by a mix of motives, which may include prohibited correctional purposes, but in all likelihood will also include other permitted purposes. It is thus questionable whether in such cases a jury could ever properly convict a parent beyond reasonable doubt, which in turn may tell against the likelihood of prosecution.

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

C. The effect of affirming police discretion

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

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

The inclusion of this affirmation was to further address public and political anxieties about the Bill.[49] It was the work of Prime Minister, Helen Clark, and former Prime Minister, Geoffrey Palmer, who then gained the approval of the Bill's creator, MP Sue Bradford. The Amendment was also approved by the leader of the opposition, in a political about-turn to support the Bill. Affirmation of the police discretion, while it did nothing to change the current practical situation, seemed to be the magical cure for the major discord in the House of Representatives. Following an historic press conference where the Prime Minister and leader of the opposition formed a united front, the House voted overwhelmingly in favour of the Amendment. There were speeches applauding the cooperation of people who worked to resolve the "impasse".[50] It appeared that a simple recognition of something

[49]Supra n. 3, p. 183.
[50]Ibid., pp. 183-184.

that already existed was enough to reassure those who feared a change in the law would bring the worst.

However, the inclusion of an affirmation that the police have discretion not to prosecute inconsequential offences is unusual and unnecessary.[51] The purpose of its inclusion was to ensure that the Bill made it through its final reading, by calming the nerves of those who feared the prosecution of parents was going to be widespread and out of control. In that sense, its inclusion is more of a political tool than a necessary element of the parental control provision. While it was successful in getting the law passed, its overall effect is perhaps the most damaging to our perception of children in New Zealand and their status as equal rights bearing citizens. The motivation for including an additional point to a piece of legislation should never be getting it passed into law, rather it should be because it is necessary to achieve the original purpose. In this case, the inclusion of an affirmation of police discretion actually does more damage than good, because it seriously compromises the entire purpose and essence of the Bill. Furthermore, the damage is not confined to children's rights. The affirmation of police discretion dilutes the perception of children as equal rights bearers, but its inclusion in statute might also be problematic for judicial review of police discretion.[52]

1. Police discretion already exists

The existing prosecuting guidelines assist the police with the decision of whether or not to prosecute an offence. Two major factors must be taken into account when making the decision to prosecute or not to prosecute. The first is evidential sufficiency, which requires the prosecutor to ask whether there is sufficient reliable and admissible evidence that an offence has been committed by a particular person, and additionally whether a properly directed jury could find the person guilty beyond reasonable doubt. The second factor to be taken into account is the public interest in proceeding with prosecution. The guidelines set out 16 additional factors to be considered when assessing the public interest in prosecution. Some of the more relevant factors in

[51] Supra n. 11. Judge Paul von Dadelszen remarks that the addition of the affirmation of police discretion is "a little superfluous, as the Police have this discretion in any case."
[52] See below at page 424, "Integrity of the Crimes Act and Immunity From Review".

a child assault decision might be: [53]

a) the seriousness or, conversely, the triviality of the alleged offence; i.e. whether the conduct really warrants the intervention of the law;
b) all mitigating and aggravating circumstances;
e) the degree of culpability of the alleged offender;
f) the effect of a decision not to prosecute on public opinion;
i) the availability of proper alternatives to prosecution;
j) the prevalence of the alleged offence and the need for deterrence;
k) whether the consequences of any resulting conviction would be unduly harsh and oppressive;
n) the likely length and expense of the trial;
p) the likely sentence imposed in the event of conviction having regard to the sentencing options available to the Court.

The fact that this discretion already exists was considered by the Justice and Electoral committee when they recommended the amendments to the original Bill: [54]

> As with any other offence, the prosecution of parents and every person in the place of a parent for the use of force against children for the purpose of correction will be a matter for police discretion, although private prosecutions remain a possibility. We were advised that all prosecution decisions are guided by the Solicitor-General's Prosecution Guidelines. The guidelines state that police must decide whether a prosecution is required in the public interest. They also state that ordinarily a prosecution will not be in the public interest unless it is more likely than not that it will result in a conviction… There are safeguards in the criminal justice system to minimise the likelihood of parents and every person in the place of a parent being prosecuted for minor acts of physical punishment. Various options other than formal prosecution are available to police, including warnings and cautions. Under the Solicitor-General's Prosecution Guidelines, a prosecution should proceed only where it is in the public interest and there is sufficient evidence.

This recognition of existing police discretion supported their belief that a change in law would not lead to a significant increase in prosecutions. The Justice and Electoral Committee did not recommend an affirmation of police discretion within the words of the Act, and remarked, "We do not believe that the changes we have proposed to

[53] Supra n. 30, para 3.
[54] Supra n. 1, p. 5.

s59 of the Act will lead to a large increase in convictions or the removal of children from their families for the use of minor physical discipline."[55]

2. How s59(4) effects the underlying message of the provision

Repealing s59 was intended to put children's right to bodily integrity on an equal footing with adults. In the second stage of the Bill the Justice and Electoral committee deviated from that purpose by creating amendments that would legitimise certain forms of force used against children but not adults. At least however, in the second stage, the message was very clear about the use of force for the purposes of correction. Subsection 2 specifically prohibits this use of force, and subsection 3 reinforces the importance of this message by making it prevail over anything in subsection 1. Unfortunately, by the third stage of the Bill, even the message about the use of corrective force is weakened, by the inclusion of an affirmation of police discretion. John Key, in explaining his support for the addition of subsection 4, effectively hit the nail on the head when he stated that the purpose of the affirmation was to[56]

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

Mr Key succinctly implied that the intention of s59(4) is to undermine the whole purpose of the act, which is to abolish the use of parental force for the purposes of correction.[57] He has affirmed that smacking is acceptable, so long as it is not more than inconsequential.

Inclusion of an affirmation of police discretion changes the very essence of s59. It has the effect of diluting the message that it is no longer acceptable to use force against children. Instead, it implies that

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[55] Ibid., p. 7.
[56] Key, John, Some sense on smacking - at last! *Newsletter: Keynotes No 9*, http://johnkey.co.nz/index.php?/archives/101-NEWSLETTER-KeyNotes-No-9.html, May 2 2007.
[57] Section 4 Crimes (Substituted Section 59 Act) Amendment Act 2007.

the use of force against children is only important if it meets a certain threshold, i.e. more than inconsequential. If this was the *actual* intention of the Bill, then the integrity of the Act would have been better served by being clear about its purpose.[58] Even though this discretion exists for every offence, the fact that it is reiterated *only* in s59 weakens the strength of the purpose of that section.

To make a comparison, s219 of the Crimes Act 1961, 'Theft or Stealing' does not affirm the police discretion not to prosecute inconsequential cases within the words of the section. The message about theft is clear, that it is wrong to steal. If this section were the *only* section in the whole of the Crimes Act to include an affirmation of police discretion, the message would become compromised. The message might instead be that it is wrong to steal in general, but minor thefts are not so bad. This is not ideal. The criminal code of a country should be able to be relied upon to tell the people what is expected of them, without vague qualifications. In the context of children's rights, s59 does not properly convey that children have the right to bodily integrity, or even that they are completely deserving to be free of the use of force for the purposes of discipline.

The underlying message of the Bill was originally intended to be that 'children are the same as adults with respect to bodily integrity and assault'. The amendments and the unnecessary inclusion of the affirmation of police discretion have transformed this message into, 'Here are the ways children are not equal to others and their bodily integrity can be invaded. Do not use force against them for the purposes of correction, but if you do, make sure it is sufficiently inconsequential so as to avoid prosecution'.

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

3. Integrity of the Crimes Act and immunity from review

The police discretion not to prosecute is affirmed in only one section of the entire Crimes Act, s59. In practice, police have discretion not to prosecute *any* of the offences if they do not have sufficient evidence or if it would not be in the public interest. The fact that this discretion is affirmed in only one section of the statute not only undermines that section, it undermines the Act as a whole.

Having the discretion affirmed in only one section implies that that section is somehow different from the others. It implies that this section really only has face value, or that perhaps police have *extra* discretion in these cases because the discretion has not been affirmed anywhere else. While this was probably not the intention of the legislature, the absence of the affirmation in any other section implies that it is somehow more relevant in s59.

This could potentially cause problems if a police decision not to prosecute an offence is challenged. Traditionally, the courts have been reluctant to review the exercise of discretion,[59] however it is debatable whether the inclusion of the discretion in statute brings its application within the judicial realm. In *Polynesian Spa Ltd v Osborne*[60] it was held that while review of discretion can not be completely ruled out, "it will only be in rare cases",[61] that is "if it were established that the prosecuting authority acted in bad faith or brought the prosecution for collateral purposes".[62] The judge in the case found that the decision *not* to prosecute is also amenable to review: [63]

> *Hallett*[64] is authority for the proposition that judicial review is only likely to be obtained in such a case where there has been a failure to exercise discretion, such as by the adoption of a general policy that in certain classes of cases, prosecutions will not be brought. There may be other grounds but it is likely only to be in exceptional cases that a court would intervene where a decision has been taken not to prosecute in a specific case not affected by factors such as the adoption of a general policy.

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[59] *Fox v Attorney General* [2002] 3 NZLR 62.
[60] [2005] NZAR 408.
[61] Ibid., at para 62.
[62] Ibid., at para 64.
[63] *Polynesian Spa v Osborne* at para 69.
[64] *Hallett v Attorney-General (No.2)* [1989] 2 NZLR 96, 100.

It is possible the courts will remain reluctant to review the exercise of discretion, except in cases of bad faith, despite it now being affirmed within the Act.[65] Before the discretion was included in statute, it was difficult yet possible to challenge it by way of judicial review. However now that it has been codified to form a substantial part of s59 it could potentially be open to more direct review in a criminal prosecution. Nevertheless, it is difficult to predict whether the legislative reference to police discretion will allow the courts will find *more* legitimacy in reviewing it in s59 cases. Some theorists believe that the affirmation will not further fetter the discretion to prosecute or not, because the statute itself does not confer the discretion, but merely recognises it.[66] Regardless, the inclusion of the affirmation in the section has permitted people to feel entitled to a fair and *transparent* exercise of discretion,[67] which was not the purpose of the Bill. The criminal code should set society's minimum standard of behaviour, without qualification.[68] The practical application of the code should be kept quite separate.

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

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[65] Knight, Dean, 'Crimes (Substituted Section 59) Amendment Bill', *Laws 179 Elephants in the Law*, http://www.laws179.co.nz/2007/06/crimes-substituted-section-59-amendment.html, June 20 2007.

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

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

[68] Supra n. 3, p. 87.

D. Putting a child on the 'naughty step'[69]

The purpose of amending s59 was to make better provision for children to live in a safe and secure environment free from violence by abolishing the use of parental force for the purposes of correction.[70] Parents today are being discouraged from raising their children in a context of discipline and punishment, and instead are persuaded to use positive encouragement techniques and child guidance.[71] The introduction of the Crimes (Substituted Section 59) Amendment Act meant that parents in New Zealand could no longer resort to the use of physical force for the purposes of correction and would have to learn new ways of dealing with problem behaviour. The task of explaining the new law and assisting parents to find alternatives to physical discipline has, at this point, been left with non-governmental organizations (NGO's).[72] The Families Commission website[73] recommends several positive reinforcement techniques, and provides links to other NGO's with advice on alternatives to smacking. The use of 'time-out" is recommended by "Littlies",[74] specifically, the picking up and removing a child to a room, corner, or step for bad behaviour.
In a legal opinion for Gordon Copeland MP, Peter McKenzie QC concludes that the application of force to carry a child to a "naughty mat" or another room for the purposes of "time-out" amounts to use of force for the purposes of correction, and therefore constitutes assault. [75]

> The "justifications" for parental intervention set out in s.59(1) which is proposed to be inserted into the Crimes Act by clause 4 of the Crimes

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[69] The 'naughty step' was an alternative to smacking advocated by Supernanny, TV2's popular parenting show. Supernanny, Jo Frost, recommended physically putting misbehaving children on the naughty step or naughty mat as a form of time-out: The Naughty Mat, accessed 5 April 2008 from <http://www.supernanny.co.uk/Advice/-/Parenting-Skills/-/Discipline-and-Reward/The-Naughty-Mat.aspx>

[70] Crimes (Substituted Section 59) Amendment Act 2007, s4.

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

[72] Supra n. 3, p. 87.

[73] 'Positive Discipline', accessed 5 April 2008 from <http://www.nzfamilies.org.nz/parenting/positive-discipline.php>

[74]Littlies for Practical Parenting, 'Time Out', accessed 5 April 2008 from <http://www.littlies.co.nz/page.asp?id=246&level=3>

[75] Supra n. 31, p. 9.

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

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

1. Is this another "gap in the law"?

The media fuelled public hysteria and concern around the repeal of s59 was focused on *physical punishment,*[76] not on non-disciplinary uses of force.[77] When the amendments were made by the justice and electoral committee after considering over 1700 submissions, the uses of force for non-disciplinary reasons was legitimised, but the non-violent uses of force for the purposes of correction, such as picking a child up for time out were not. People and politicians[78] seemed to be reassured that this

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

[77] The Family First petition for a referendum had, at 29 April 2008, gathered approximately 269,500 signatures. One of the questions they aim to have a referendum on is, "Should a smack as part of good parental correction be a criminal offence in New Zealand?" Clearly, the focus is still on the use of force for the purposes of correction, not on other uses of force: Watkins, T., 'Smacking petition falls short',*The Dominion Post* accessed 29 April 2008 from <http://stuff.co.nz/print/4501944a19715.html >

[78] See above at n. 27. The Justice and Electoral Committee state that they have drafted the amendments to achieve clarity amongst widespread confusion about the purpose and possible results of a law change. Implicit in this is also the attempt to reassure those who misunderstand the Bill, by legislating further protections for them.

gave them further protection, but in reality *it changed nothing*. People felt further relieved when the police discretion not to prosecute was affirmed,[79] but again, in reality, *it changed nothing*. People wanted to be reassured that they were not going to be made criminals for disciplining their children, but the focus on 'smacking' meant that less attention was paid to the fact that *any* use of force for the purposes of correction amounts to assault, not just hitting or smacking.

2. What was the point in the amendments? Why not just repeal s59?

The Justice and Electoral Committee felt there was a gap in the law that needed to be addressed, and there was widespread misunderstanding about the effect of the Bill that would be cleared up by spelling out the law regarding the use of force against children.[80] However, there is still a gap, and it is the one that people were concerned about. It is the gap concerning physical punishment.[81]

When Sue Bradford introduced her Bill, it quickly became known as the "anti-smacking bill" despite the fact that Bill sought to abolish *all* uses of force against children for the purposes of correction, not just smacking. Wood, Hassell and Hook suggest that this label originated from opponents of the Bill, who wanted to alarm the public with the notion that good parents would be made criminals for light smacking.[82] As result, the public's attention turned toward smacking, despite the fact that the concern for this issue stemmed from the successful application of the s59 defence in cases where the force used was far more severe than smacking. The amendments were introduced, especially in the final stages, to create enough reassurance that there would not be widespread criminalisation in an effort to get the law passed. It was meant to be a compromise, a less severe form of Sue

[79] The Police Guidelines specifically refer to time out situations, classifying them under either s59(b)(c) and (d). This lends further support for the notion that the use of force for the purposes of discipline can easily be reinterpreted to fit within the four legitimate uses of force in s59.
[79] Supra No. 46, p. 4.
[80] See above at n. 27.
[81] Supra n. 50. The Law Commission suggests that to legislate for the 'timeout' scenario would have created a loophole in the law for parents to use force for the purposes of discipline.
[82] Supra n.3, p. 140.

Bradford's original bid, but all the amendment did was to answer a completely different issue.

The issue of the use of force was split in two by the Bill time reached its third reading:

> Issue 1. Physical force for the purposes of correction.
> Issue 2. Physical force for purposes other than correction.

The amendments made to the Bill answered the second issue, but this was not what was concerning the New Zealand public. The proposed law change was still as severe as Sue Bradford's original Bill in the context of physical force for the purposes of correction, therefore there was no reason for people to feel reassured by the amendments. The addition of the affirmation of the police discretion was meant to further reassure people, but again, it did nothing to change the current reality, because police discretion has always existed. We would be in a better, clearer position if we had simply repealed s59 and simply left it at that. The fact that a defence has been legislated to appease the concerns for something completely different is illogical, especially when it does nothing to change the current reality.

Conclusion

The decision to amend s59 of the Crimes Act 1961 rather than simply repeal it was motivated by a desire to fill an existing gap in the law and to reassure an uneasy nation that there would not be widespread criminal prosecutions of parents for touching their children. However, the amendments have caused problems in their own right, by adding ambiguity and loopholes rather than clarity. The amendments were drafted in an attempt to damper resistance to the Bill, however they did not address the central concern of people opposing it. Additionally, the creation of a fresh defence of reasonable force has not served the original purpose of the Bill, which was to recognise children as equal citizens under the law, deserving of the same rights to bodily integrity as everyone else. Instead, it has unnecessarily codified a set of circumstances that already exist, and in the process has set children apart as a group in society not deserving of basic human rights.