A referendum on S.59: who needs it?

Questions to consider

There are a number of issues which need to be considered when assessing the call for a referendum.

- Is it too soon? The ink implementing the law change is scarcely dry.
- Will a referendum at this time simply be a substantial waste of money?
- Is it not better to defer consideration of the matter until the parliamentary review (June 2009) when all the facts relating to the law will be available?
- Do the referendum questions make sense and will anything be resolved by answering them?
- Is there any immediate evidence that the new law has resulted in widespread 'criminalisation' of parents?
- Who are the people and organisations promoting the referendum?
- Is New Zealand's law change an international oddball?

This briefing sheet, we hope, will assist MPs participate in the public discussion of the referendum questions.

This briefing sheet has been provided by the following organisations —

- Barnardos NZ
- EPOCH NZ
- Jigsaw
- National Collective of Independent Women's Refuges
- Plunket
- Save the Children NZ
- Unicef
- National Network Stopping Violence Services

Section 59 of the Crimes Act was amended in May 2007 by an overwhelming majority of the House. In March 2007, before the law was changed, supporters of physical punishment of children had launched two petitions. The petitions were part of their opposition to a law change. They attempted to mobilise public opinion using the threat that changing S.59 would result in widespread 'criminalisation' of good parents.

The final version of the amendment to S.59 minimises the likelihood of parental prosecution whilst affirming the child's right to be free from violence. Opponents have continued with their opposition and now the country is confronted with a referendum on questions which were developed in the context of an earlier campaign and before the form and effect of the law change were known.

How relevant therefore are the signatures collected before the new law came into effect?

It is not surprising that a large number of New Zealanders have signed the petitions. It was clear from the public debate the previous year that many people were at best uncertain of the effect of the law change.

It is doubtful though that the 300,000 plus individuals who have signed this petition had any idea of the religious beliefs and socially conservative agendas of the promoters and their organisations. It is also likely that many of them may not have signed the petitions if they had had more information about those promoting them at the time they signed.

The questions

They are petitioning parliament on two questions:

1. Should a smack as part of good parental correction be a criminal offence in New Zealand?

2. Should the government give urgent priority to understanding and addressing the wider causes of family breakdown, family violence and child abuse in New Zealand?

The first question is a *non sequitur* — it does not follow from the law as actually amended. 'A smack as part of good parental correction' suggests a light hit in the context of a loving relationship between a conscientious parent and their child. The law quite specifically indicates that the Police are expected to exercise their discretion in the cases of 'inconsequential' physical discipline and prosecution and conviction are unlikely to follow a light smack.

The question could have relevance as an issue of public concern if in fact it was shown that the police were failing to exercise that discretion as Parliament had intended — that widespread prosecution and conviction of parents was occurring. There is no such evidence.

The second question implies that the government is failing to understand or address 'the wider causes of family breakdown, family violence and child

abuse in New Zealand'. This, of course, is a quite different topic from the use of physical punishment of children. These are complex issues that are under constant review by researchers and officials. A referendum is not an informed way of assessing whether enough is being done currently.

The review

Section 7(1) of the new law contains a very important provision, namely:

that *the Chief Executive of the Ministry of Social Development will monitor and advise the Minister of Social Development and Employment, on the effects of this Act, including the extent to which this Act is achieving its purpose as set out in section four of this Act, and of any additional impacts.*

The Minister for Social Development and Employment will table the report in Parliament in 2009. Rather than rely on newspaper reports or the published views of opponents and supporters of the law change, Parliament will have the most complete data available by which to assess Police actions and court decisions and possibly early indications of the impact of the law on attitudes and behaviour.

Community organisations supporting law change welcomed the review when it was first proposed as an amendment to the original bill. They knew how difficult it is for private organisations to obtain all the required information on police actions and lower court decisions.

The review is never referred to in the published material of the petitioners. Worse, Family First issued a press release immediately after the police three month review was published condemning it out of hand as 'totally false', 'inaccurate and misleading'.

Just what is happening in the courts?

This is the critical element in any evaluation of the new law. The Leader of the Opposition noted on National Radio on 22 February that he had no evidence to support the notion that good parents were being criminalised for a trivial offence.

Our own research supports that conclusion.

In their public report on the first three months operation of the new law the police reported:

- The new law creates no new criminal offences.
- no increase in complaints of incidents involving 'smacking' or 'minor acts of physical

S.59 – What the law now says

59 Parental control

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

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

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

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

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

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

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

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

The amending act also included this provision:

7 Chief executive to monitor effects of this Act

(1) The chief executive must, in accordance with this section, monitor, and advise the Minister on, the effects of this Act, including the extent to which this Act is achieving its purpose as set out in section 4 of this Act, and of any additional impacts.

(2) As soon as practicable after the expiry of the period of 2 years after the date of the commencement of this Act, the chief executive must—

(a) review the available data and any trends indicated by that data about the matters referred to in subsection (1); and

(b) report the chief executive's findings to the Minister.

(3) As soon as practicable after receiving the report under subsection (2), the Minister must present a copy of that report to the House of Representatives.

Just who is promoting the referendum?

Examination of the religious convictions and political aspirations of those who have promoted the petition calling for a citizen's initiated referendum is interesting. As best as can be established the petition has been promoted by fundamentalist Christian organisations and individuals pursuing a socially conservative agenda.

The strategy adopted is similar to that that comparable religious groupings have followed in the USA, where the so-called evangelical right has become a significant political force promoting socially conservative agendas such as opposition to abortion or gay/lesbian marriage or civil union.

The key players

Larry Baldock — formerly a United Future list MP, and now leader of the Kiwi Party. One of the petitions is in Larry's name. The mission statement of the Kiwi Party, recently launched, sets out the party's mission and includes;

To affirm that Christianity has played and continues to play a formative role in the development of New Zealand in terms of the nation's identity, laws, culture, beliefs, institutions and values

To be a political party that will represent and promote policies based on Judeo-Christian values.

Sheryl Savill — Programmes manager of Focus on the Family, the New Zealand branch of Focus on the Family organisation founded by James Dobson, one of the most influential of the US evangelical conservatives. The organisation gained some publicity in the media early in 2007 for introducing the 'purity' movement into New Zealand.

Bob McCoskrie — Executive Director of Family First and former Radio Rhema presenter. Bob was for a time the media face of the petition campaign. More recently he seems to have been supplanted by Larry Baldock.

Craig Smith — heads Family Integrity. Craig's booklet *The Christian foundations of the institution of corporal punishment* includes such beliefs as '*Children are not little bundles of innocence: they are little bundles of depravity*' and '*Mere words, you see, do not dislodge the foolishness and sin from the heart, whereas a smack will.*'

When the petition was presented to Parliament recently a number of people were surprised to find it linked explicitly with the Kiwi Party — the boxes of signatures were delivered in a Kiwi Party van, for example.

discipline'.
- No investigations of child assault involving 'smacking' or 'minor acts of physical discipline' resulted in court prosecution.

As far as we have been able to determine there have only been five cases of child assault in the name of physical discipline that have actually gone to court. They are:

- A Wairarapa father who pleaded guilty. The court ordered nine months supervision including parenting and anger management courses.
- A Canterbury Korean pastor who was acting as foster parent for a teenage girl. He attempted to stop her apparently excessive use of a cellphone with very harsh discipline. The court found the man guilty, affirmed the child's rights under the new law, named, fined and then discharged him without conviction.
- A Canterbury father of two is currently awaiting a jury hearing for allegedly having assaulted a small son in public, resulting in complaints to the police. Initially he received a warning. He then went to the media, the case was reviewed by the police and the decision made to prosecute.
- A Nelson man has been committed to stand trial on five charges of assaulting his son. Allegedly he repeatedly beat him with a wooden spoon until it broke.
- A Glen Innes man was charged, but when the matter came to court, the police offered no evidence and the case was dismissed.

All this is evidence of the new law working remarkably well in providing clear guidance to parents of the unacceptability of physical punishment and of both the police and the courts applying the new law with sensitivity.

Some of the publicity used by the petition's supporters refers to incidents that are imprecisely described. We have been quite unable to identify the cases involved and establish whether or not they reflect poor practice under the new law.

The need for public education

Community organisations were keen to see a public education programme mounted on the new law after it was enacted. The purpose would have been to ensure that as many parents as possible had a clear idea of what the law meant.

If more people had been better informed on the provisions of the new law and how it was working there is every likelihood that fewer people would have been inclined to sign the petitions.

A conflict of rights

The debate on physical punishment is sometimes presented by opponents of the new law as a conflict between the rights of children and the rights of parents.

Under scrutiny this argument, like many about human rights, resolves itself into the wish of one group to have unrestricted power in relation to another.

The argument is complicated in the case of children by the fact that legitimate parental authority is essential to children's good development.

This need for the exercise of parental authority, however, is all the more reason for there to be carefully designed rules of conduct which will be followed by most without serious question but which will be enforceable by law when necessary.

Children are surely entitled to the minimal human rights standard of freedom from physical assault and the threat of assault.

This is no more an encroachment on parental rights than any other legitimate restraint demanded of citizens in preservation of the rights of others.

The UN Convention on the Rights of the Child is the world's foremost human rights instrument for children. It has been ratified by New Zealand and all but two countries in the world. While it has strong statements on children's rights it is equally clear about the right of families to bring up their children according to their traditions.

Conclusion

Changing the law on S. 59 was always likely to be controversial. Public fear of intrusion by authorities into parent behaviour is easily aroused. Opponents of change have succeeded to a degree in characterising the change as licensing unwarranted intrusion.

It seems likely the petition will succeed and force a referendum. The argument for retaining the change based on fair treatment and protection of children remains.

The decision taken last year by the New Zealand Parliament was farsighted, courageous and correct. The vote was overwhelming.

If a referendum debate does occur it is vital that parliamentarians ensure that the decision that they have already made is not undermined.

The international scene

The public debate about Section 59 usually considers New Zealand in isolation. This is a mistake. Revision of the law relating to the use of physical punishment in correcting children's behaviour is a worldwide phenomenon. Since New Zealand revised its law in May 2007, a further five countries have now banned physical punishment of children, bringing the total number of countries to have implemented a legal ban to twenty three.

The full list of countries is:

Sweden (1979)
Finland (1983)
Norway (1987)
Austria (1989)
Cyprus (1994)
Denmark (1997)
Latvia (1998)
Croatia (1999)
Bulgaria (2000)
Israel (2000)
Germany (2000)
Iceland (2003)
Ukraine (2004)
Romania (2004)
Hungary (2005)
Greece (2006)
Netherlands (2007)
New Zealand (2007)
Portugal (2007)
Uruguay (2007)
Venezuela (2007)
Chile (2007)
Spain (2007)

In addition, the supreme courts in Nepal and Italy have ruled that physical punishment in childrearing is unlawful, although the legislatures have not yet passed the appropriate law changes. At least 22 other countries are either committed to full prohibition or are actively debating full prohibitionist bills in their parliaments.

Last year's law change in New Zealand is not some sort of social engineering aberration, but simply a reflection of a worldwide historic trend.