Will repeal criminalise parents?

This briefing sheet looks at one of the major concerns in the current public discussion of repeal of section 59.

Will there be an increase in the number of complaints of parents using minor physical punishment? Are parents more likely to be prosecuted should a complaint be made of a minor incident?

The briefing sheet also reviews
- options available to complainants concerned for the treatment or safety of a child,
- Police prosecution guidelines, and
- what might happen in the unlikely circumstance that a parent is taken to court on a trivial matter.

It concludes that risk of criminalisation has been hugely overstated.

Will the Crimes Amendment Bill "criminalise" loving parents?

Discussion of repeal of section 59 of the Crimes Act has been dominated by disquiet on this issue. But perhaps fear of "criminalisation" has in part been encouraged by those who want section 59 retained unchanged.

No one wants to see loving parents who conscientiously care for their children prosecuted and punished for smacking their child on occasion. Even parents who are somewhat more heavy handed would benefit from information on effective non-physical discipline and support rather than prosecution.

However if the Crimes Amendment Bill becomes law, use of force for correction will technically be an offence under the Crimes Act 1961. But for a person to become a criminal a complaint has to be laid, a decision made to prosecute and a conviction secured in court.

In fact there are significant reasons why the risk of "good" parents being criminalised is insignificant.

Avenues open to complainants

Anyone, concerned about the way in which a child is being treated, can either make a complaint to the Police or a notification to the Children and Young Persons Service (CYF). The two agencies often work in close collaboration and are influenced by the principles and provisions of the Children, Young People and Their Families Act 1989 (CYPF Act 1989).

CYF

CYF investigates complaints of ill-treatment of a child. If, after investigation, they believe a child has been ill-treated or is likely to be ill-treated their actions are guided by the principles of the CYPF Act 1989. These urge the use of the lowest level of intervention in family life necessary to keep the child safe and affirm the paramouncy of the best interests of the child.

It is not in the best interests of children to prosecute parents for minor offences, but rather to support and advise. Where a major crime has been committed, CYF involve the Police but more minor matters are addressed in supportive ways. CYF have stated that they do not expect their practices to change if section 59 is repealed — see CYF advice to the Justice and Electoral Committee in the box over the page.

The Police

Police investigate maltreatment of a child only after receiving a complaint. The vast majority of such complaints are made by teachers, social workers and health professionals who believe a child has suffered a significant assault. It is unlikely that these people will start make complaints about trivial incidents if the law is changed because they strive to maintain positive relationships with the family and to assist them when they can.

Will estranged parents or warring neighbours lay vexatious complaints against each other if section 59 is changed? Maybe, but scarcely a reason for not proceeding with important law reform.

This briefing sheet has been provided by the following organisations —
- Barnardos NZ
- EPOCH NZ
- National Collective of Independent Women's Refuges
- Plunket
- Save the Children NZ
- Unicef

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CYF advice to Select Committee.

"Child, Youth and Family have told us that it has various policies for dealing with situations that endanger children. It said that it expects the thresholds at which it removes children would remain the same if the bill were passed. Child, Youth and Family have told us that it would expect an greater volume of reports following the repeal of section 59, but that the legislative principle that intervention in family life should be the minimum necessary to ensure the child's or a young person's safety would remain…It told us that if s59 were repealed it would look at developing operational guidelines in conjunction with all affected agencies, especially the police." (p.6, Committee Report)

Once a complaint has been made the Police assess and investigate. They prosecute only after they have satisfied themselves that they have evidence of an assault, that the offence is not trivial, that there are no alternatives to prosecution and that prosecution is in the public interest. (See box below on police prosecution guidelines.)

The Police also have a range of options other than prosecution should they feel action is necessary.

In summary, both CYF and the Police have existing sensible procedures for dealing with complaints of smacking or hitting of a child.

But what if a case of trivial assault end up in court?

If, despite these sensible procedures, a parent is still taken to court for a minor infringement they have two defences available.

The first is provided by the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill itself. The Bill maintains a statutory defence for the use of force by a parent to "control" a child —

- in situations of danger such as running onto a road
- by removing a child from situations where the child is being disruptive
- by intervening to prevent the child committing a crime, and
- for purposes of normal parental care — changing the nappies of a resisting child, or carrying them to bed against their will.

Thus the Bill provides for restraining force used in normal parenting activities such as protecting a child from injury, stopping disruptive behaviour, dressing a child or putting them to bed. At the same time it removes the traditional defence for force used in correction — smacking or hitting a child.

The second defence available to parents prosecuted for trivial offences is the legal principle of *de minimus non curat lex* — the law does not concern itself with trifles.

Even if a technical violation of the law has occurred, the judge can simply discontinue the hearing on the grounds that the offence is too trivial. This principle may be used if the effect of the violation is too small to be of consequence.

In conclusion, parents can be reassured that they are unlikely to be convicted for minor assaults or for restraining a child.

Factors Police consider when deciding to prosecute or not?

The Police *Manual of Best Practice* sets out the seventeen factors to be taken into account —

i) evidential sufficiency
ii) the public interest
iii) the seriousness or triviality of the offence
iv) mitigating or aggravating circumstances
v) the youth, old age, or physical or mental health of the alleged offender
vi) the staleness of the alleged offence
vii) the degree of culpability
viii) the effect on public opinion of a decision not to prosecute
ix) the obsolescence or obscurity of the law
x) the availability of alternatives to prosecution
xi) the prevalence of the offence and the need for deterrence
xii) whether the consequences of any conviction would be unduly harsh and oppressive
xiii) the entitlement of the Crown or other person to compensation, reparation or forfeiture as a consequence of conviction
xiv) the attitude of the victim to prosecution
xv) the likely length and expense of any trial
xvi) cooperation by the accused
xvii) likely sentence of the prosecution succeeds.

Clearly some of these are highly relevant to any decision to prosecute a parent for hitting a child.