

**Submission to Justice and Electoral Select Committee:  
Re- Crimes (Abolition of Force as a Justification for Child Discipline)  
Amendment Bill  
January 2006  
from Peter Newell, Coordinator, Global Initiative to End All Corporal  
Punishment of Children**

**Introduction**

1. This submission is made in support of full repeal of Section 59 of the Crimes Act 1961, to secure respect for New Zealand children's human rights. New Zealand has prohibited corporal punishment of children outside the family/home. To fulfil its international human rights obligations it needs to ensure children's equal respect for their human dignity and physical integrity and equal protection under the law on assault.
2. The submission emphasises the importance of clear law in this area. Complete removal of section 59 will send a clear and unequivocal message to parents and all others that hitting children is as unlawful and unjustified as hitting anyone else. This is the only just and safe basis for child protection and for the effective promotion of positive, non-violent forms of discipline, which the New Zealand Government is already engaged in..
3. The submission reviews the relevant international human rights standards under the International Bill of Human Rights and the Convention on the Rights of the Child. It also briefly summarises the accelerating progress of reform towards making Europe a corporal-punishment-free-zone for children and global progress in the context of the current UN Secretary General's Study on Violence against Children.
4. The Global Initiative was launched during the 2001 session of the Commission on Human Rights in Geneva to highlight the growing human rights consensus against all corporal punishment of children and to support its elimination by sharing information and strategies. Our website includes a report on the legal status of corporal punishment in all states and dependent territories [www.endcorporalpunishment.org](http://www.endcorporalpunishment.org).
5. The current UN Secretary General's Study on Violence Against Children is encouraging all states to examine their legislation and ensure that it is fully in compliance with human rights standards, protecting children effectively from all forms of violence. The Independent Expert appointed by the Secretary General to lead the Study, Professor Paulo Pinheiro, has made it clear, following nine regional consultations held in connection with the Study, that his report, to be delivered to the UN General Assembly this autumn, will recommend prohibition of all corporal punishment including in the family. Each of the nine regional consultations adopted recommendations which included a call for prohibition of all corporal punishment.

6. When Professor Pinheiro addressed a meeting in the Westminster Parliament in December 2005 he stated:

*“I have to say I have been surprised at the controversy aroused in some quarters by my statement, made after the regional consultations, that the study report will certainly recommend a universal ban on all corporal punishment. Surely, it would be strange indeed if the “expert” leading a study on violence against children would suggest that it is OK to hit children?”*

*“My study is human rights based, and again it would be strange if I should contradict the Committee on the Rights of the Child, which has been telling states consistently for more than a decade that the Convention requires prohibition of all corporal punishment...”*

*“If I was conducting a study on violence against animals, would I be expected to defend smacking puppies and kittens? The fact is, I could not look those many children I have met around the world in the eyes and say that I had decided they were worthy of less legal protection from assault than myself or other adults. Really, it is absurd... It is sad and ironic that children, the most vulnerable of people, should have had to wait until last for this basic protection. We cannot draw lines and try and define acceptable ways of hitting children. There can be no compromise, any more than we compromise in challenging all violence against women.”<sup>1</sup>*

### **Convention on the Rights of the Child**

7. Before the adoption of the Convention on the Rights of the Child in 1989, the International Bill of Human Rights – the Universal Declaration and the two International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights – upheld “everyone’s right to respect for their human dignity and physical integrity and to equal protection under the law. The Preamble to the Convention on the Rights of the Child affirms, in accordance with Principles in the Charter of the United Nations, repeated in the Preamble to the Universal Declaration, that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. The Preamble also reminds us that the Universal Declaration “has proclaimed that childhood is entitled to special care and assistance”.
8. Some states had already reformed their legislation to give children equal protection under the criminal law on assault before the Convention on the Rights of the Child was adopted in 1989. But it is undoubtedly the adoption and almost universal ratification of the Convention that has led to a rapidly accelerating challenge to the legality and social acceptance of corporal punishment, in the family and in other settings, throughout the world. The issue is being further highlighted, and more progress made, in the context of the UN Secretary General’s Study. The human rights consensus on this issue makes universal law reform inevitable. The only question is how much longer children are going to have to wait for adults to concede, and legislate to reflect, their equal right to full protection. Some suggest that children are “different”, but their differences, their initial fragility and developmental state, their additional vulnerability, and the

particular difficulties they face in seeking help when suffering harm, suggest that they should have more, rather than less, protection from deliberate assault.

9. It has been the particular task of the Convention and its monitoring treaty body, the Committee on the Rights of the Child, to challenge the traditional view of children as possessions or simply objects of concern, to move governments and societies on to respect for each and every child as an individual human being and rights holder.
10. The Committee has from its earliest sessions in 1993 paid special attention to challenging corporal punishment. The CRC is the first international instrument to expressly require protection of children from “all forms of physical or mental violence”, while in the care of parents or others (article 19). The Convention also includes the general principle (article 3(1)) that the best interests of the child shall be a primary consideration in all actions concerning children.
11. Those who still challenge the Committee’s consistent interpretation of article 19, read in the context of the whole Convention, as requiring prohibition of all corporal punishment however light, appear to be asserting that corporal punishment is not “violence” and is only administered “in the best interests of the child”. The Committee, from early in its life, has shown little patience with such adult double standards. The Committee started examining reports from states which had ratified the Convention in 1993. That year, in the report of its fourth session, it “recognised the importance of the question of corporal punishment in improving the system of promotion and protection of the rights of the child and decided to continue to devote attention to it in the process of examining States parties reports”<sup>2</sup>
12. In the same year, the Committee held a General Discussion Day on “Children’s Rights in the Family”, organised as its contribution to International Year of the Family. The then Vice-Chair stated:  
*“As for corporal punishment, few countries have clear laws on this question. Certain states have tried to distinguish between the correction of children and excessive violence. In reality the dividing line between the two is artificial. It is very easy to pass from one stage to the other. It is also a question of principle. If it is not permissible to beat an adult, why should it be permissible to do so to a child? One of the contributions of the Convention is to call attention to the contradictions in our attitudes and cultures.”*<sup>3</sup>
13. **Consistent recommendations to states:** The Committee meets for three sessions a year to examine state reports, with an oral hearing at which Committee members question state representatives. At the end of each examination the Committee issues “concluding observations”. During its first decade of examining states’ reports, the Committee has recommended prohibition of all corporal punishment, in the family and all other settings, to more than 130 states in all continents.<sup>4</sup>
14. In September 2000, the Committee held the first of two General Discussion Days on violence against children. It focused on “State violence to children” and after it the Committee adopted detailed recommendations, including for the prohibition of all corporal punishment:

*“The Committee recommends that States parties review all relevant legislation to ensure that all forms of violence against children, however light, are prohibited, including the use of torture, or cruel, inhuman or degrading treatment (such as flogging, corporal punishment or other violent measures) for punishment or disciplining within the child justice system, or in any other context. The Committee recommends that such legislation incorporate appropriate sanctions for violations and the provision of rehabilitation for victims...”*

*“The Committee urges the launching of public information campaigns to raise awareness and sensitize the public about the severity of human rights violations in this domain and their harmful impact on children, and to address cultural acceptance of violence against children, promoting instead ‘zero-tolerance’ of violence.”<sup>5</sup>*

15. In recommendations adopted following its second General Discussion Day, on “Violence against children in families and schools”, held in September 2001, the Committee proposed that States should “enact or repeal, as a matter of urgency, their legislation in order to prohibit all forms of violence, however light, within the family and in schools, including as a form of discipline, as required by the provisions of the Convention...”<sup>6</sup>

16. Earlier in 2001, the Committee had adopted its first General Comment on “The aims of education” (general comments are authoritative statements of the Committee’s interpretation of the Convention’s articles). In it, the Committee re-emphasises that corporal punishment is incompatible with the Convention:

*“... Children do not lose their human rights by virtue of passing through the school gates. Thus, for example, education must be provided in a way that respects the inherent dignity of the child, enables the child to express his or her views freely in accordance with article 12(1) and to participate in school life. Education must also be provided in a way that respects the strict limits on discipline reflected in article 28(2) and promotes non-violence in school. The Committee has repeatedly made clear in its concluding observations that the use of corporal punishment does not respect the inherent dignity of the child nor the strict limits on school discipline...”<sup>7</sup>*

17. Some states, including New Zealand (in 1997 and 2003) and the UK (in 1995 and 2002), have received more than one strong recommendation from the Committee. When the Committee examined New Zealand’s second report, in 2003, it stated that it “is deeply concerned that despite a review of legislation, the State party has still not amended section 59 of the Crimes Act 1961, which allows parents to use reasonable force to discipline their children. While welcoming the Government’s public education campaign to promote positive, non-violent forms of discipline within the home, the Committee emphasizes that the Convention requires the protection of children from all forms of violence, which includes corporal punishment in the family and which should be accompanied by awareness-raising campaigns on the law and on children’s right to protection.”<sup>18</sup>

18. The English common law defence of “reasonable chastisement” and reflections of it like that in section 59, forms part of the law in around 70 countries worldwide, a very dubious colonial legacy. These countries are now under very strong pressure, from the Committee on the Rights of the Child and other international and European human rights treaty bodies, to remove any existing justification of violence completely to give children equal protection.
19. The Committee has in particular criticised attempts to define some arbitrary level of violence against children as lawful. During the examination of the United Kingdom’s first report under the Convention, the Vice-Chair of the Committee explained the Committee’s position:
- “It was the Committee’s experience that difficulties arose whenever a ‘reasonable’ level of corporal punishment was permitted under a State’s internal law. To draw an analogy, no-one would argue that a ‘reasonable’ level of wife-beating should be permitted. His [the Vice-Chair’s] conclusion was that the United Kingdom position represented a vestige of the outdated view that children were in a sense their parents’ chattels. In the Scandinavian countries and Austria, stricter legislation had resulted in fewer cases going to court than in the United Kingdom, rather than the reverse... The notion of a permissible level of corporal punishment was thus best avoided.”<sup>9</sup>*
20. When the Committee examined the UK’s second report in 2002, it re-emphasised:
- “The Committee is of the opinion that governmental proposals to limit rather than to remove the ‘reasonable chastisement’ defence do not comply with the principles and provisions of the Convention and the aforementioned recommendations, particularly since they constitute a serious violation of the dignity of the child. Moreover, they suggest that some forms of corporal punishment are acceptable and therefore undermine educational measures to promote positive and non-violent discipline...”<sup>10</sup>*
21. Writing the foreword to a report on research into young children’s views on “smacking”, published in the UK in 2004, Jaap Doek, who has chaired the Committee since 1999, explains and summarises its position:
- “Mr. Jones is a well-respected employer and he loves his employees. He wants his business to be as successful and productive as possible. He needs well-disciplined workers to achieve that. He makes a rule that an employee who is not following his instruction, is late for work or responds too slow, will be subject to ‘reasonable chastisement’. He specifies what that chastisement will be – e.g. two slaps on the left hand of the worker (or the right hand if the worker is left handed) if he or she is 10 minutes late. It will be done in the office of the Director to avoid public embarrassment.*
- “Such a practice would be entirely unacceptable in every State in the world, result in a public outcry and, most likely, serious legal consequences, including prosecution of that employer. But if we replace the employer with a parent and the worker with a child, ‘reasonable chastisement’ all of a sudden becomes acceptable. The excuse is usually that parents hit their children out of good intentions, or that it is in their ‘best interests’. But excuses are not justifications. An employer who hits one of his or her workers, even if done*

*with the best intentions, commits an assault and violates the human dignity and physical integrity of that worker...*

*“In this world, 192 governments have promised that they will take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of violence (article 19 of the United Nations Convention on the Rights of the Child)...*

*“The Committee on the Rights of the Child, in charge of monitoring this Convention, has recommended that governments should systematically: prohibit all forms of violence, including all corporal punishment however light, in the upbringing of children in their homes, in schools, in care institutions and any other place; undertake – at the same time – educational and awareness-raising campaigns to inform parents and other caretakers about children’s right to protection and about the non-violent methods of disciplining and raising children.*

*“Many citizens and politicians regularly express their concern about increasing violence in their societies. The credibility of this concern is questionable as long as they are not willing to seriously address the use of violence against children. And don’t suggest that a little bit of violence is acceptable. It is not! That applies equally for adults and children...”<sup>11</sup>*

22. When the Joint Committee on Human Rights in the UK Parliament considered the implications of complete or partial removal of the reasonable punishment defence in 2004, it concluded:

*“We do not think that the very clearly expressed views of the Committee on the Rights of the Child can be ignored. As the only body charged with monitoring compliance with the obligations undertaken by states in the CRC, its interpretations of the nature and extent of those obligations are authoritative. In our view, the Committee has consistently made clear that corporal punishment of children is a serious violation of the child’s right to dignity and physical integrity, and that states must both introduce a legislative prohibition of such punishment at the same time as measures for educating the public about the negative consequences of corporal punishment. In the light of this, we do not consider that there is any room for discretion as to the means of implementing Article 19 CRC as interpreted by the Committee on the Rights of the Child: it requires the reasonable chastisement defence to be abolished altogether”<sup>12</sup>*

### **Support from other human rights Treaty Bodies**

23. Other UN human rights Treaty Bodies have moved to support the Committee on the Rights of the Child in its pursuit of equal protection for children’s human dignity and physical integrity. For example, in May 2002 the Committee on Economic, Social and Cultural Rights, referring to its General Comment on “The Right to Education”, recommended that the UK should prohibit corporal punishment in the family, “Given the principle of the dignity of the individual that provides the foundation for international human rights law...”, and in line with the recommendation of the Committee on the Rights of the Child.<sup>13</sup> In 2005, it made a similar recommendation to Malta.<sup>14</sup> Similarly, in 2004, the Committee against

Torture echoed the recommendation of the Committee on the Rights of the Child to New Zealand that it should prohibit corporal punishment in the family.<sup>15</sup>

### **The European human rights standards and mechanisms**

24. The Council, which now has 46 member states, was established to defend human rights, parliamentary democracy and the rule of law. The regional human rights mechanisms of the Council have been pursuing abolition of corporal punishment for three decades, starting with a series of judgments of the European Court of Human Rights, on first judicial and then school corporal punishment, all against the UK.<sup>16</sup> It was these judgments which effectively forced the UK Government to introduce legislation, first to prohibit all corporal punishment in all state-supported education (coming into effect in 1987) and then in 1999 to extend abolition to cover private schools.
25. It is not easy for children to challenge breaches of their rights by their parents. Nevertheless, an application by a young English boy led to a judgment by the European Court in 1998 on parental corporal punishment.<sup>17</sup> The boy had been beaten with a garden cane by his stepfather, who was prosecuted for assault, used the defence of “reasonable chastisement” in an English court and was acquitted. The European Court found unanimously that the beating amounted to degrading punishment in breach of the European Human Rights Convention. The UK Government was responsible because its domestic law, allowing “reasonable chastisement”, did not provide adequate protection including effective deterrence.
26. The European Court has not as yet explicitly condemned all corporal punishment, but nor has it implied that any level of corporal punishment is permitted under the Convention. Traditionally, the Court limits its consideration to the particular circumstances of the case before it, and “A v UK” involved a severe beating with a cane. But the case was introduced more than 10 years ago, and it is clear that the jurisprudence of the Court, interpreting the Convention as a “living instrument”, develops over time. Supervision of execution of judgments of the European Court is carried out by the Council of Europe Committee of Ministers. The Committee is still supervising the execution of “A v UK” and is not satisfied with the UK’s response to the judgment.
27. In its 2004 report on this issue, the UK Parliamentary Committee on Human Rights notes that the European Court is increasingly referring to the standards of the Convention on the Rights of the Child in its judgments on issues involving children, and that it is likely that in any future case the Court would find that anything less than equal protection for children is in breach of the European Convention. The Committee notes:

*“Children are vulnerable to exploitation and oppression in ways that adults are not. They need protection, including from themselves, but it is certainly not self-evident that such protection requires them to be deprived of the protection that the law offers to everyone else. We therefore think it likely that in a future case before the European Court of Human Rights, the UK will be required under article 14 [the anti-discrimination article in the European Human Rights Convention] to justify the less favourable treatment of children under the law of common assault”.*<sup>18</sup>

28. The Court has indeed begun to refer to the CRC and use its standards in its judgments. In “A v UK” it refers, without elaboration, not only to article 37 (which, like article 3 of the European Convention on Human Rights, requires protection from inhuman or degrading punishment) but also to article 19, requiring protection from “all forms of physical or mental violence” while in the care of parents and others. In another judgment in 2003, against Germany, the Grand Chamber of the European Court stated: “The human rights of children and the standards to which all governments must aspire in realising these rights for all children are set out in the Convention on the Rights of the Child. The Convention entered into force on 2 September 1990 and has been ratified by 191 countries, including Germany. The Convention spells out the basic human rights that children everywhere – without discrimination – have...”.<sup>19</sup>
29. The European Commission and Court of Human Rights have also emphasised that prohibiting all corporal punishment does not breach other Convention rights (for example to family or private life or religious freedom). In 1982, the Commission rejected an application by Swedish parents who alleged that Sweden’s 1979 ban on parental physical punishment breached their right to respect for family life and religious freedom.<sup>20</sup> In 2000, the Court declared inadmissible an application challenging the abolition of corporal punishment in private schools in the UK on grounds that it breached rights to family life and religious freedom.<sup>21</sup>
30. A very clear and consistent challenge to all corporal punishment across the 46 member-states of the Council is coming now from the European Committee of Social Rights. This Committee monitors states’ compliance with the European Social Charter and the Revised Social Charter which will eventually replace it; the Charters guarantee citizens’ economic, social and cultural rights and cover child protection. In a general observation issued in 2001, the Committee concludes that it considers “that article 17 requires a prohibition in legislation against any form of violence against children, whether at school, in other institutions, in their home or elsewhere. It furthermore considers that any other form of degrading punishment or treatment of children must be prohibited in legislation and combined with adequate sanctions in penal or civil law.”
31. In its observation, the Committee highlights the consistent abolitionist recommendations of the Committee on the Rights of the Child as well as the European Court judgment, “A v UK”. It pursues the need for equal protection for children: “The Committee does not find it acceptable that a society which prohibits any form of physical violence between adults would accept that adults subject children to physical violence.”
32. The Committee also states: “To prohibit any form of corporal punishment of children is an important measure for the education of the population in this respect in that it gives a clear message about what society considers to be acceptable. It is a measure that avoids discussions and concerns as to where the borderline would be between what might be acceptable corporal punishment and what is not”.<sup>22</sup>
33. Between 2003 and May 2005, the European Committee of Social Rights, having examined reports under article 17 of the Charters, has concluded that France, Slovak Republic, Romania, Hungary, Poland, Slovenia, Turkey, Spain, Malta and



the UK are not in conformity with the Charter because they have not effectively prohibited all corporal punishment in the family. Since the issue of the relevant conclusions, Romania and Hungary have gone ahead with prohibition and Slovenia and the Slovak Republic have indicated they will do so.<sup>23</sup>

34. Also under the Charters, five “collective complaints” were submitted in 2003 against Belgium, Greece, Ireland, Italy and Portugal (five of the 13 member states which have so far accepted the Additional Protocol to the Charters establishing the collective complaints procedure). These allege that the states are in breach of article 17 of the Charters because they have failed to effectively prohibit all corporal punishment. In decisions that became public at the end of May 2005, the Committee found that Belgium, Ireland and Greece were not in compliance because their laws did not prohibit all violence against children. Greece has already announced that it will go ahead with full prohibition. In the case of Ireland, the decision states: “The Committee notes that the corporal punishment of children within the home is permitted by Ireland by virtue of the existence of the common law defence of reasonable chastisement. Although the criminal law will protect children from very serious violence within the home, the fact remains that certain forms of violence are permitted. The Committee therefore holds that the situation is in violation of Article 17 of the Revised Charter.”
35. In the case of Italy and Portugal, the Committee decided that the existence of Supreme Court decisions in each country interpreting the law as prohibiting all violence including all corporal punishment was adequate for compliance, although the decisions have not as yet been reflected in legislation. The decision on Portugal states that “the prohibition of all forms of violence has a legislative basis; it has the potential to reach all forms of violence regardless of where it occurs or to the identity of the alleged perpetrator and it is backed by adequate, dissuasive and proportionate sanctions”.<sup>24</sup>
36. In June 2004, the Parliamentary Assembly of the Council of Europe adopted a detailed recommendation, with overwhelming support, which states:

*“The Assembly considers that any corporal punishment of children is in breach of their fundamental right to human dignity and physical integrity. The fact that such corporal punishment is still lawful in certain member states violates their equally fundamental right to the same legal protection as adults. Striking a human being is prohibited in European society and children are human beings...”*

*“The Assembly therefore invites the Council of Europe's Committee of Ministers to launch a co-ordinated and concerted campaign in all the member states for the total abolition of corporal punishment of children. The Assembly notes the success of the Council of Europe in abolishing the death penalty and the Assembly now calls on it to make Europe, as soon as possible, a corporal punishment-free zone for children.”*<sup>25</sup>
37. By the end of 2005, 16 of the 46 member states had achieved full prohibition (in Italy and Portugal by Supreme Court decision), Greece and the Netherlands have introduced legislation to prohibit and at least four other states have committed themselves to full prohibition.

## **The process of abolition in European states**

38. Sweden was the first country to add to its law an explicit prohibition of parental corporal punishment, in 1979. A provision was added to the Parenthood and Guardianship Code stating: “Children are entitled to care, security and a good upbringing. Children are to be treated with respect for their person and individuality and may not be subjected to corporal punishment or any other humiliating treatment”.
39. The purpose and effect of this reform in civil law is often misunderstood. Back in 1957, a provision in Sweden’s criminal law which excused parents who caused minor injuries through physical punishment (an equivalent of section 59) was repealed. From that date the criminal law on assault applied equally to “disciplinary” assaults by parents on their children. Section 5 of Chapter 3 of the Swedish Criminal Code covers assaults which cause “bodily injury, illness or pain”, which covers any corporal punishment which would be prosecutable.
40. Recent court decisions in Sweden have confirmed this. In October 2004, the first instance court of Varberg acquitted a man who had “smacked” (with his open hand) and pushed his 15 year-old step daughter of charges of “petty assault” (*ringa misshandel*). The court implied that this smacking was to be considered a “justified” trivial reprimand. But on May 4 this year, the court of second instance of Western Sweden (*Hovrätten för Västra Sverige*), overturned the acquittal and sentenced the stepfather to pay a fine for “petty assault”. The court of second instance noted that the prohibition against corporal punishment in the parental code is considered to clarify that corporal punishment of a child is a criminal act and punishable in the same manner as assault on any other person.<sup>26</sup>
41. In many of the other countries which have implemented an explicit ban on corporal punishment, removal of similar defences came first. So for example in Finland, the criminal law on assault was amended to remove a provision stating that a petty assault was not punishable if committed by parents or others exercising their lawful right to chastise a child. In Norway, a similar provision was removed from the criminal code in 1972. And Austria repealed the explicit authorisation of parental corporal punishment in 1977. These repeals were “silent” reforms – removing special defences for violent punishment, so that the criminal law on assault applied equally to “punitive” or disciplinary assaults on children. But they did not positively state that corporal punishment of children was prohibited. Sweden was the first state to recognize the need for explicit prohibition to challenge the traditional acceptance of violent discipline.
42. Explicit removal of section 59, as proposed in the Crimes Amendment Bill, would have the same effect as Sweden’s 1957 and 1979 reforms, emphasizing that the criminal law on assault does apply equally to so-called “disciplinary” assaults on children by their parents and others.

## **Criminalising parents**

43. Governments’ hesitations over this reform tend to focus on the dangers of “criminalizing” parents for “minor” assaults on their children. Human rights obligations require New Zealand to ensure children the same protection under the

law on assault as adults. But plainly implementation and enforcement of the law when parents are the perpetrators and their children the victims must take account of the dependent status of children and the sensitive nature of family relationships. The primary purpose of law reforms to prohibit corporal punishment in the family is educational – to change attitudes and practice and reduce and eliminate violence against children.

44. Prosecution and other formal interventions should only be pursued when judged after careful inter-disciplinary assessment to be both necessary to protect the child from significance harm and to be in the best interests of the child victim. In any case, it is clear that prosecutions are not pursued – except in very special circumstances - for assaults which cause no injury or pain, whether the victim is a child or an adult. The *de minimis* principle applies, that the law does not concern itself with trivial matters. It is common sense that prosecution of parents is very seldom in the interests of their children. Prosecution in this context is invariably an indication that the child protection system has failed. When an assault on a child is reported (now or after law reform) there must of course be some investigation to establish whether the child is at risk of significant harm. Such investigations should be carried out in a sensitive and supportive manner. Guidance to all those involved in child protection, including the police and prosecuting authorities, should stress the best interests of the child.
45. The UK Parliament last year adopted a provision in the Children Act 2004 (section 58) which removes the availability of the reasonable punishment defence in relation to serious charges of actual and grievous bodily harm, wounding, etc. It leaves the defence available in relation to charges of common assault and leaves the UK in breach of its human rights obligations, as both the Committee on the Rights of the Child and the European Committee of Social Rights have made clear (see above, paras. 19, 20 and 32).
46. During the provision’s parliamentary passage, some argued that complete removal of the “reasonable punishment” defence would create legal uncertainty, because parents would not know whether they would face prosecution for “trivial” smacking. When the UK Parliamentary Joint Committee on Human Rights considered the implications of complete removal of the “reasonable punishment” defence for prosecution policy, it concluded:

*“We consider that a total prohibition of corporal punishment provides a greater degree of legal certainty than either the present law or the new clause restricting the scope of the reasonable chastisement defence. Complete repeal sends a very clear message that any parent who smacks their child is liable to prosecution. Whether they will in fact be prosecuted will of course depend on how the DPP [Director of Public Prosecutions] exercises his prosecutorial discretion in such cases. We do not consider the mere existence of this discretion to be incompatible with the requirements of legal certainty. A degree of prosecutorial discretion is inevitable in relation to all criminal offences. The enforcement of the law of assault between adults already requires prosecutorial discretion to be exercised in individual cases. If this is compatible with the requirements of legal certainty (and there is no suggestion that it suffers from a lack of legal certainty), we find it difficult to see why*

*applying the same law as between adults and children is any less legally certain.”*

47. In contrast to the proponents of partial removal of the defence, the Committee states:

*“We are not persuaded that abolishing the defence leaves the scope and definition of the law to the discretion of the prosecuting authorities. The scope of the law will be clear: all physical assaults by one person on another will be treated equally, and will be liable to prosecution taking account of the circumstances of each individual case. The prosecutor will not be left to define the law, any more than he is left to define the law of assault as it applies between adults. This will involve the ordinary exercise of prosecutorial discretion. As the DPP said in evidence, ‘the reality is that, just as most minor assaults against adults are not prosecuted, I suspect most minor assaults against children would not be either.’ Technically, any adult who taps another adult on the shoulder without that person’s consent is liable to prosecution for assault. We are not aware of any practice on the part of the CPS [Crown Prosecution Service] of bringing inappropriate prosecutions for technical assault between adults, or of any single instance of such a prosecution. The application of a criminal law which is very broad in scope is properly regulated through the exercise of prosecutorial discretion. The same would be true of the application of the same law if its protection were extended to children within the family.”<sup>27</sup>*

### **Progress in other regions**

48. Human rights mechanisms in other global regions do not appear, as yet, to have specifically considered cases involving corporal punishment of children in the home. But the Inter-American Court of Human Rights has emphasised states’ obligations to protect children from all forms of violence, including by “private” individuals, referring to the conclusions of the Committee on the Rights of the Child and the European Court of Human Rights judgment, “A v UK”. It did this in an advisory opinion on “The legal status and human rights of the child”, requested by the Inter-American Commission on Human Rights in 2002.<sup>28</sup> In October 2005 the Inter-American Commission on Human Rights held a hearing on ending corporal punishment in the region, and intends to ask for an advisory opinion on the need for prohibition across the Americas. Five Latin American states now have bills before their Parliaments which would prohibit all corporal punishment in the family. In Brazil and Costa Rica, the bills have already made substantial progress.

49. In January 2005 in Nepal, the Supreme Court declared that a section in the Child Act excusing “minor beating” of a child by parent or teacher was unconstitutional.<sup>29</sup>

### **Conclusion**

50. New Zealand’s Parliament has an immediate opportunity to implement a reform that will fulfil its human rights obligations and underline its commitment to children’s welfare. Complete and explicit removal of section 59 will send a clear and unequivocal message to parents and all others that hitting children is as unlawful and unjustified as hitting anyone else. This is the only just and safe basis

for child protection and for the effective promotion of positive, non-violent forms of discipline, which the New Zealand Government is already engaged in. New Zealand can provide a lead in the region, in the context of the UN Secretary General's Study on Violence against Children.

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<sup>1</sup> Professor Paulo Pinheiro, presentation on "Ending legalised violence against children", Westminster Parliament, December 5 2005

<sup>2</sup> Committee on the Rights of the Child, Report on the fourth session, 25 October 1993, CRC/C/20, para. 176.

<sup>3</sup> Committee on the Rights of the Child, Summary report, 10 October 1994, CRC/C/SR 176, para. 46.

<sup>4</sup> All the Committee's reports can be viewed at [www.unhchr.ch](http://www.unhchr.ch)

<sup>5</sup> Committee on the Rights of the Child, Day of General Discussion on State violence against children. Report on the 25<sup>th</sup> session, September/October 2000, CRC/C/100, paras. 668 - 688.

<sup>6</sup> Committee on the Rights of the Child, Day of General Discussion on Violence against children within the family and in schools, Report on the 28<sup>th</sup> session, September/October 2001, CRC/C/111, paras. 701 - 745.

<sup>7</sup> Committee on the Rights of the Child, General Comment No. 1, The aims of education, 17 April 2001, CRC/GC/2001/1, para. 8.

<sup>8</sup> Committee on the Rights of the Child, Concluding observations on second report of New Zealand, 27 October 2003, CRC/C/15/Add.216, paras. 4, 5, 29 and 30 (a and b))

<sup>9</sup> Committee on the Rights of the Child, summary report of examination of UK report under the Convention on the Rights of the Child, January 1995, CRC/C/SR.205, para. 63.

<sup>10</sup> Committee on the Rights of the Child, concluding observations on the second periodic report of the United Kingdom, 4 October 2002, CRC/C/15/Add.188, paras. 36 and 37.

<sup>11</sup> Doek, Jaap, Foreword in *It hurts you inside – Young children talk about smacking*, Children's Rights Alliance for England and Save the Children UK, London UK, pages 3 to 4

<sup>12</sup> UK Parliamentary Joint Committee on Human Rights, 19<sup>th</sup> Report of 2003-4 Session, *Children Bill*, HL Paper 161, HC 537, 21 September 2004; available at <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/161/16102.htm>

<sup>13</sup> Committee on Economic, Social and Cultural Rights, concluding observations on the fourth periodic report of the UK under the International Covenant on Economic, Social and Cultural Rights, 17 May 2002, E/C.12/1/Add.79, para. 36.

<sup>14</sup> Committee on Economic, Social and Cultural Rights, concluding observations on Malta's initial report, 26 November 2004, E/C.12/1/Add.101

<sup>15</sup> Committee against Torture, concluding observations on New Zealand's third periodic report under the Convention against Torture, 19 May 2004, CAT/C/CR/32/4, para. 7(e)

<sup>16</sup> European Court of Human Rights, see in particular *Tyrer v. UK*, 1978; *Campbell and Cosans v. UK*, 1982; *Costello-Roberts v. UK*, 1993. All judgments of the Court are available at <http://hudoc.echr.coe.int/hudoc/>

<sup>17</sup> European Court of Human Rights, 23 September 1998, *A v UK*.

<sup>18</sup> UK Parliamentary Joint Committee on Human Rights, 19<sup>th</sup> Report of 2003-4 Session, *Children Bill*, HL Paper 161, HC 537, 21 September 2004; available at <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/161/16102.htm>

<sup>19</sup> European Court of Human Rights, Grand Chamber, 8 July 2003, *Sahin v Germany*, paras. 39 and 40.

<sup>20</sup> European Commission on Human Rights, *Seven Individuals v Sweden*, Admissibility Decision, 13 May 1982.

<sup>21</sup> European Court of Human Rights, *Philip Williamson and Others v UK*, admissibility decision, 7 September 2000.

<sup>22</sup> European Committee of Social Rights, general observation in General Introduction to Conclusions XV-2, Volume 1, p. 27.

<sup>23</sup> All conclusions of the European Committee of Social Rights can be found at [http://www.coe.int/T/E/Human\\_Rights/Esc/](http://www.coe.int/T/E/Human_Rights/Esc/)

<sup>24</sup> Details of the collective complaints procedure and the decisions of the European Committee of Social Rights are at [http://www.coe.int/T/E/Human\\_Rights/Esc/](http://www.coe.int/T/E/Human_Rights/Esc/)

<sup>25</sup> Council of Europe Parliamentary Assembly Recommendation 1666/2004, "Europe-wide Ban on Corporal Punishment of Children", 24 June 2004, paras. 5 and 7.

<sup>26</sup> Information from legal adviser at office of Sweden's Children's Ombudsman, May 2005

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<sup>27</sup> UK Parliamentary Joint Committee on Human Rights, 19<sup>th</sup> Report of 2003-4 Session, *Children Bill*, HL Paper 161, HC 537, 21 September 2004; available at <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/161/16102.htm>

<sup>28</sup> Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, 28 August 2002, Legal Status and Human Rights of the Child, requested by the Inter-American Commission on Human Rights. San Jose, Costa Rica.

<sup>29</sup> Supreme Court Bulletin, Issue 300, Nepal, January 6 2005