

UNICEF New Zealand Submission to *The Justice and Electoral Select Committee on the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill.*

Oral Submission

UNICEF New Zealand requests the opportunity to make an oral submission to the Committee.

1 UNICEF New Zealand

UNICEF is an international children's organisation that promotes the rights of children around the world and works extensively to aid development, provide disaster relief and promote child protection. The primary function of UNICEF New Zealand is to raise money for UNICEF's international work but it also has a domestic advocacy function. Domestic advocacy is increasingly a function of UNICEF agencies in developed countries.

UNICEF, as an agent of the United Nations regards the United Nations Convention on the Rights of the Child as the foundation of its work. The United Nations Convention on the Rights of the Child was developed over many years in consultation with Governments and NGOs throughout the world. It has been signed by every country in the world other than the USA. The New Zealand Government has signed and ratified the Convention and is obligated to comply with its provisions.

2 UNICEF New Zealand's position on section 59 Crimes Act 1961

UNICEF New Zealand supports full repeal of section 59 and is therefore fully supportive of the direction of Sue Bradford's *Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill*. UNICEF's position is based on "the best interests of the child" principle captured in Article 3 of the United Nations Convention on the Rights of the Child.

UNICEF New Zealand seeks full repeal of section 59 because:

- It legitimises physical punishment. Physical punishment had many negative outcomes (Office of the Children's Commissioner and Children's Issues Centre, 2004) Children are the smallest and most vulnerable members of our society and court cases show that children can be seriously injured by parents and carers who may initially intend only to punish the child.
- It is an anomaly within New Zealand law in that it effectively excuses and thereby endorses the physical force against children. If the same force were used against another adults it would be assault in law and a criminal offence. While there is a restriction on the degree of force used (it must be reasonable) the decisions of the New Zealand courts show huge variations in what will be considered reasonable (Hancock, 2003).
- It breaches international standards of human rights and has been condemned by the United Nations Committee on the Rights of the Child (the group that monitor countries' compliance with the United Nations Convention on the

Rights of the Child) (Appendix 1) and the Human Rights Commission in its action plan on human rights. (Human Right Commission, 2005)

- It conflicts with the principles of the *Children, Young Persons and Their Families Act 1989* (child care and protection), the *Domestic Violence Act 1995* (protection from family violence) and *Care of Children Act 2004* (day to day care and contact with children). Because s59 provides a defence in civil as well as criminal law proceedings it inhibits the civil courts and child protection authorities from fully protecting children.

Furthermore repeal of section 59 is an integral part of changing attitudes in New Zealand about the use of physical discipline of children.

3 Physical discipline and children's rights

Article 19 of the United Nations Convention on the Rights of the Child requires that children be given full protection from all forms of violence and abuse. The Committee on the Rights of the Child consistently recommends to all countries that have ratified the Convention and report regularly on compliance that they should prohibit all forms of corporal punishment.

The last UN Committee on New Zealand's Compliance with the Convention had explicit observations and recommendations to New Zealand in regard to corporal punishment (Appendix 1).

The New Zealand Plan of Action on Human Rights published in 2005 explicitly recommends repeal of section 59 (Human Rights Commission, 2005)

4 Physical punishment of Children

New Zealand children will be well served when they no longer experience physical punishment. International research conclusively demonstrates that physical punishment is ineffective in helping children learn how to behave well and there is ample evidence of many poor outcomes associated with the use of physical punishment. (Office of the Children's Commissioner and Children's Issues Centre, 2004).

Repeal of section 59 would remove an endorsement of physical punishment and contribute significantly to the message that physical discipline is a risk factor for many poor outcomes for children and should not be used. Repeal of section 59 is therefore an essential component of social change.

Research in New Zealand and elsewhere shows that children themselves regard physical discipline ineffective, hurtful and unfair. Many experience forms of physical punishment that far exceed the light tap or smack promoted by supporters of the use of physical punishment (Dobbs, 2005). Use of physical discipline can have a number of unintended consequences. Among these are damage to the parent child relationship, because of children's resentment about their treatment, or in the case of very young children damage to the attachment process because of loss of trust in those on whom their security depends. Another unintended consequence is teaching

children that use of physical force (violence) is acceptable when one is angry does not get what one wants.

5 Physical punishment and child abuse

New Zealand statistics for child deaths from maltreatment are among the worst in OECD countries (UNICEF, 2003). New Zealand is troubled by the extent of child abuse that exists, by the rising rates for referral to the Children, Young Persons and Their Families Service and the escalating demands this service experiences. While in the short term repeal of section 59 would not solve this problem repeal will over time contribute to a change in attitudes about the use of physical force with children. Repeal of section 59 would contribute to a change in the culture of violence that leads to New Zealand having the high rates of child abuse that it does. Physical abuse happens because quite a large proportion of New Zealand society regard use of physical force as acceptable in family relationships.

Physical punishment and child abuse are not completely separate entities. They are part of a continuum of violence to children. Physical abuse of children is often explained by its perpetrators as efforts to discipline a child, mild physical punishment sometimes escalates into abuse and in order for parents to physically abuse a child they must be part of a culture that regards the use of force with children as legitimate.

Research has demonstrated that physical punishment is a risk factor for child abuse. Children in homes where physical punishment is the norm are more likely to be abused than children in homes where it is not (Durrant, 2002 and Straus 2000).

6 Physical punishment and family violence

Child abuse and domestic violence are serious problems in our society (UNICEF, 2003 and Fanslow, 2005). Family violence currently costs New Zealand a great deal in expenditure on prevention, crisis intervention and police action and in its downstream effects on health and well-being and human capital.

Physical punishment, however mild, is a form of family violence. In its more harsh expressions it is very violent and contributes significantly to the high rates of family violence New Zealand experiences. Changing the law would help ensure consistent messages about the inappropriateness of violence. Physical punishment sets a bad example to children modelling, as it does, violence as a way to express anger or resolve conflict. Children learn from their own experiences.

Children exposed to direct or indirect physical assault not only come to regard this form of behaviour as normal or acceptable but children exposed to violence also have reduced empathy with victims of violence, and are angry and aggressive and behave violently with peers and later with spouses and/or their own children.

State excusing of physical discipline of children symbolically supports a form of violence and perpetuates its use. It is a sad fact that because of the controversial nature of the issue of physical punishment of children, and reluctance of society to change, brave political leadership on the issue of physical discipline of children, is for the most part missing.

8 The place of legal reform in promoting cultural change

Repeal of section 59 would not only result in the removal of an outdated piece of legislation but also add weight to other efforts to change the way children are disciplined in New Zealand.

The Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill is a significant opportunity for Parliament to lead the way in changing New Zealand's attitudes about child discipline by repealing section 59 Crimes Act 1961. Experience overseas has shown that over time law change does lead to changes in behaviour in regard to use of physical punishment (Bussman, 2002 and Durrant 2004).

In Sweden, the country that has the longest history of action against the use of physical discipline and the country where the effects of change have been most studied, the statutory defence (similar to section 59) was repealed over 50 years ago. This was followed by an explicit ban on the use of corporal punishment in 1979. Studies there show a consistent trend in both attitude and behaviour against the use of physical punishment (Durrant, 2004).

Many European countries have explicit bans on the use of physical punishment. In many cases such bans follow removal of statutory defences. The explicit bans are not made in the form of new criminal legislation but rather set as principles in family law (Appendix 2)

New Zealand may not yet be ready for an explicit ban on corporal punishment such as has been included in codes in a number of European countries. However, at some point in the near future New Zealand should introduce a principle in legislation that explicitly bans physical punishment. The General Principles of the Children, Young Persons and their Families Act 1989, or the Care of Children Act 2004 would be suitable places for such a principle to be included.

However, it will be critical that repeal of section 59 is accompanied by clear messages about repeal signalling the unacceptability of physical discipline.

9 Public disquiet about repeal of section 59 and support for the use of physical discipline of children

There are some indications that the use of physical punishment of children is declining amongst some groups of parents and that many young parents believe that physical discipline is ineffective (MSD, 2005 and Sanders, 2005).

Surveys about use of physical discipline are very influenced by the nature of the questions asked and there is has been no consistent monitoring of attitudes and behaviour in regard to physical discipline in recent years and it is not possible to say how many children experience physical discipline and whether the discipline is moderate or harsh.

Over 130 organisations that work with children and families (including many family violence agencies) publicly support full repeal of section 59 Crimes Act 1961 maintained by EPOCH New Zealand (Appendix 3)

However there are also loud voices for maintaining the status quo. Many adults simply do not have, or want to know, information about the poor outcomes that accompany the use of physical discipline and the value of effective positive alternatives. Some adults are convinced, sometimes because of religious beliefs, that physical punishment is essential.

Most protest about repeal of section 59 seems to arise from fear of prosecution for minor assaults (sometimes this is simply an excuse to maintain violent behaviour). Repeal of section 59 removes the defence used by parents who commit an assault on their child and technically makes any assault, however minor, a crime.

Adults are rarely prosecuted for minor or technical assaults and in reality complaints to the police are unlikely to be made in cases of minor assault to children. Prosecutions are even more unlikely because police have discretion about what they prosecute. Police also have power to use diversion.

The issue the legal status of using physical restraint with a child, to keep them safe (eg removing a child's hand from the stove) or provide normal care and control (carrying a reluctant child to his or her room to go to bed, for example) has also been raised by some alarmists who warn that prosecutions may result from such action. Commonsense indicates this is unlikely.

However, it will not be in children's best interests to have their parents prosecuted for minor and occasional use of force in discipline or situations of care and control, or to have warring parents take private prosecutions against each other.

There are a range of options for reform. These are reviewed in the next section. There are some that provide limited protection for parents. The underlying principle must be that physical discipline is not approved in legislation and is in fact clearly discouraged.

10 Options for reform

Simple Repeal

Simple repeal of section 59 of the Crimes Act 1961 (accompanied by a statement that common law in so far as it nullifies the effect of repeal will not apply) would serve children well by making it clear that children are to be protected in the same as adults in regard to assault.

However, reassurance that the Police will not prosecute parents for minor assault may not be enough to reduce public anxiety and fear mongering.

Repeal with "reassurances" outside the legislation

If public reassurances are considered necessary it would be desirable that appropriate mechanisms are placed outside of legislation so that they do not provide excuses in law for assault, and legal excusing of assault. Some of the options worth exploring include:

- Strengthening police prosecution guidelines – perhaps to be specific about what constitutes prosecutable assaults on children.
- A filter system (Senior Police Officers, judges etc) to review all complaints and potential prosecutions to ensure that intervention is in the best interests of the child.

- Guidelines/Framework for Police Diversion.

Repeal with “reassurances” within the legislation

In collaboration with lawyers UNICEF has identified two options within law that may provide some public reassurance in regard to protection from prosecution for minor assault. These and an accompanying short paper are provided in Appendix 4.

Of critical importance is that such legislative change is accompanied by a purpose statement that makes it clear the legislation:

- A Does not excuse or justify use of any physical force in discipline.
- B Provides limited protection for parents from prosecution in some circumstances because prosecution in such circumstances would not be in a child’s best interests.
- C Makes it explicit that physical discipline is not good for children and is unacceptable.

Amendment to define reasonable force

Some of the criticism of the present legislation lies with the fact that reasonable force is judged inconsistently by judges and juries. Defining what is reasonable may lead to more consistent judgements and better protection in court for children. However this approach implies that there is a place for reasonable force in disciplining children and sends out unfortunate and confusing public message that is inconsistent with Government initiatives and positive parenting programmes. s It is clear that no force is desirable in discipline. Additionally such an approach is fraught with difficulties of definition eg. how hard, what with, how often, what age, how many times, by whom, on what part of the body, and with what intent? This approach is also unlikely to meet the compliance requirements of the UN Committee on the Rights of the Child.

4.4.2e Amendment to define force that is unreasonable (prosecutable)

This option would no better than *amendment to define reasonable force*. Definitional problems still exist and it implies that some use of force in discipline is reasonable.

11 Ongoing parent education and family support

Further progress in reducing the use of physical punishment will be slow without removal of section 59 and ongoing parent education about alternatives. It is essential that any law change is accompanied by ongoing public and parent education that:

- A Clearly identifies the risks associated with physical discipline.
- B Publicises and explains the law change.
- C Provides information about positive, non-violent disciplinary methods.

Strategies with Children: Information for Parents (SKIP) is regarded positively in many communities. It should be sustained and built on.

Recommendations

- 1 That the *Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill* is adopted without amendment.**

- 2 **That if public fears about prosecution for minor assaults are deemed of such concern that limited protection of parents is necessary such protection is provided in a way that does not suggest any use of physical force in discipline is acceptable.**
- 3 **That law reform is accompanied by ongoing public and parent education about the risks associated with the use of physical discipline and about alternative positive parenting methods.**

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Appendix 1

United Nations Committee on the Rights of the Child Observations and recommendations on corporal punishment – Report to New Zealand Government – September 2003

Corporal punishment

1. The Committee 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.

2. **The Committee recommends that the State party:**
 - a) **Amend legislation to prohibit corporal punishment in the home;**

Strengthen public education campaigns and activities aimed at promoting positive, non-violent forms of discipline and respect for children's right to human dignity and physical integrity, while raising awareness about the negative consequences of corporal punishment

Appendix 2 Legal reform in Europe

From “Ending legalised violence against children: Report for Europe and Central Asia Regional Consultation – The UN Secretary General’s Study on Violence against Children”. Ljubljana, Slovenia 2005.

**Published by Global Initiative to End All Corporal Punishment of Children.
www.endcorporalpunishment.org**

EUROPEAN STATES WITH EXPLICIT LAWS PROTECTING CHILDREN FROM ALL CORPORAL PUNISHMENT

1979
Sweden

“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.” (*Parenthood and Guardianship Code*, as amended 1979, article 6.1)

Note: In 1957, the legal defence for the use of corporal punishment by parents was removed from criminal law. In 1966, a provision allowing “reprimands” was removed from the *Parenthood and Guardianship Code*.

1983
Finland

“A child shall be brought up in the spirit of understanding, security and love. He shall not be subdued, corporally punished or otherwise humiliated. His growth towards independence, responsibility and adulthood shall be encouraged, supported and assisted.” (*Child Custody and Rights of Access Act*, 1983, in force 1984, article 1.3)

Note: In 1969, the Criminal Code was amended to remove parents’ defence against prosecution for petty assault if committed during the exercise of their lawful “right” to chastise their child.

1987
Norway

“The child shall not be exposed to physical violence or to treatment which can threaten his physical or mental health.” (*Parent and Child Act*, as amended 1987)

Note: In 1972, parents’ “right” to use moderate physical punishment was removed from the Criminal Code provisions on assault. Physical restraint is permissible if the child is at risk of injury to him/herself or others.

1989
Austria

“The minor child must follow the parents’ orders. In their orders and in the implementation thereof, parents must consider the age, development and personality of the child; the use of force and infliction of physical or psychological suffering are not permitted.” (*General Civil Code*, 1989, section 146a)

Note: In 1977, the defence of “reasonable” punishment was removed from the law on assault.

1994
Cyprus

Law prohibits “any unlawful act or controlling behaviour which results in direct actual physical, sexual or psychological injury to any member of the family”. (*Family (Prevention and Protection of Victims) Law*, 1994)

Note: It is also an offence for violence to occur in the presence of a child.

1997
Denmark

“The child has the right to care and security. He or she shall be treated with respect as an individual and may not be subjected to corporal punishment or any other degrading treatment.” (*Parental Custody and Care Act*, amended 1997)

Note: In 1985, the Custody and Care Act was amended to state “Parental custody implies the obligation to protect the child against physical and psychological violence and against other harmful treatment”, but further explicit prohibition was found to be necessary.

1998
Latvia

“A child cannot be treated cruelly, cannot be tormented and physically punished, and his/her dignity and honour cannot be offended.” (*Law on Protection of the Rights of the Child*, 1998, article 9.2)

The law criminalises “failure to discharge parental obligations ... the malicious usage of parental authority, the physical punishing of a child, as well as cruel behaviour against him/her” (*Law on Protection of the Rights of the Child*, 1998, article 24.4)

1998
Croatia

“Parents and other family members must not subject the child to degrading treatment, mental or physical punishment and abuse.” (*Family Act*, 1998, in force 1999, article 87)

Note: The Family Act also obliges parents to protect the child from degrading treatment and physical

“Children have the right to a non-violent upbringing. Corporal punishment, psychological injuries and other humiliating measures are prohibited.” (*Bürgerliches Gesetzbuch* [German civil law], as amended 2000, article 1631)

Local authorities have a duty to “promote ways in which families can resolve conflict without resort to force” (*Socialgesetzbuch* [German childcare law])

Note: In 1998, an amendment to the Civil Law prohibited “degrading methods of discipline including physical and psychological abuse”, but further explicit prohibition was found to be necessary.

“Every child has a right to protection against all methods of upbringing, that undermine his or her dignity, against physical, psychical or other types of violence; against all forms of influence, which go against his or her interests.” (*Child Protection Act*, 2000, article 11.2)

Note: The complexity of provisions relating to “trivial” bodily injury in the Penal Code seem to limit the protection available to children, and there has been little public education concerning the prohibition.

“It is the parents’ obligation to protect their child against any physical or mental violence and other degrading or humiliating behaviour.” (*Children’s Act*, 2003)

Parents have an obligation “to treat their children with care and consideration” and “to safeguard their welfare at all times”. (*Child Protection Act*, 2002)

The law concerning the responsibilities of parents towards their children prohibits corporal punishment and any other humiliating punishment or treatment (*Family Code*, 2003 in force 2004, article 150).

Note: The Prevention of Domestic Violence Act (2001, in force 2002) also outlaws violence against children in the home. It defines domestic violence as “any intentional action of one family against another family member if such action infringes Constitutional and civil rights and freedoms of a family member and injures his physical, mental and moral health, and as well as child’s development”, and physical domestic violence as “an intentional beating, body injuring of one family member by another as well as intentional limitation of freedom, place of residence, food, clothing and other normal life conditions, which may result in victim’s death or may cause disturbance of his physical and mental health or may harm his honor and dignity” (article 1).

“(1) The child has the right to be shown respect for his or her personality and individuality and may not be made subject to physical punishment or to other humiliating or degrading treatment. (2) Disciplinary measures concerning the child can only be taken in accordance with the child’s dignity, and, under no circumstances are physical punishments allowed, or punishments which relate to the child’s physical and mental development or which may affect the child’s emotional status.” (*Law on Protection and Promotion of the Rights of the Child*, 2004, in force 2005, article 28)

“It is forbidden to enforce physical punishment of any kind or to deprive the child of his or her rights, which may result in endangerment of the life, the physical, mental, spiritual, moral and social development, the bodily integrity, and the physical and mental health of the child, both within the family, as well as in any institution which ensures the protection, care and education of children.” (*Law on Protection and Promotion of the Rights of the Child*, 2004 in force 2005, article 90)

“The child has the right to be respected his/her human dignity, to be protected against abuse – physical, sexual and mental violence –, failure to provide care and injury caused by any information. The child shall not be subjected to torture, corporal punishment and any cruel, inhuman or degrading punishment or treatment.” (*Act on the Protection of Children and Guardianship Administration*, 1997, as amended 2004, in force 2005, article 6.5)

2000
Germany

2000
Bulgaria

2003
Iceland

2003
Ukraine

2004
Romania

2004
Hungary

Appendix 3 Organisations publicly supportive on repeal of section 59 Crimes Act 1961.

- Action for Children and Youth
Aotearoa (Auckland)
- Ahu Whakatika Challenge Violence
Trust (Rotorua)
- Alternatives to Violence Project
- Amnesty International New Zealand
- Anger Change Trust Auckland
- Aotearoa New Zealand Association
of Social Workers
- Arai Te Uru Whare Hauora
(Dunedin)
- Auckland Women's Centre
- Awhina Whanau Services Inc
(Hastings)
- Barnardos
- Bream Bay Community Support
Trust (Ruakaka)
- Birthright New Zealand Inc
- Canterbury Home Birth Association
- Catholic Social Services (Wellington)
- CCS
- Central Plateau Reap (Taupo)
- Central Hawkes Bay Support and
Counselling Services
- Centre for Effective Discipline (USA)
- Child Abuse Prevention Services
(National Office Wellington)
- Child Abuse Prevention Council,
(Windsor, Canada)
- Child Development Foundation
(Auckland)
- Child Helpline Trust (Christchurch)
- Children's Agenda (Auckland)
- Children's Issues Centre (Dunedin)
- Child Poverty Action Group
- Childwise Methodist Mission
(Christchurch)
- Dannevirke Family Services Inc
- Domestic Violence Centre
(Preventing Violence in the Home –
Auckland)
- Dove Hawkes Bay
- Eastbay REAP (Whakatane)
- Education for Change (Christchurch)
- EPOCH USA
- Family Focus (Greymouth)
- Family Help Centre (Rotorua)
- Family Support Services Whanganui

Trust

- Foundation for Peace Studies (Auckland)
- Hamilton Abuse Intervention Project
- Hamilton Refuge and Support Services
- Hauraki Safety Network
- Healing and Rape Crisis Centre (Te Awamutu)
- Hinengakau Maatua Whangai (Taumarunui)
- Home and Family Society Inc (Auckland)
- Horowhenua Family Violence Intervention
- Human Rights Foundation of Aotearoa New Zealand
- Inner City Group for Men (Auckland)
- Inner City Women's Group (Grey Lynn)
- James Family Presbyterian Support Northern (Auckland)
- Kaitaia Homebased Whanau Support
- Kapiti Men for Non Violence Inc
- La Leche League NZ
- Living Without Violence (Porirua)
- Living Without Violence (Waiheke Network)
- Mana Social Services Trust (Rotorua)
- Manawatu Alternatives to Violence
- Methodist Mission Northern (Glen Eden)
- Motueka Women's Support Link
- Naku Enei Tamariki (Lower Hutt) Women
- **Napier Women's Refuge**
- National Collective of Independent Women's Refuges
- National Council of Women of New Zealand
- National Network of Stopping Violence Services
- Nelson Rape and Sexual Abuse Network
- New Zealand Association for Adolescent Health and Development
- New Zealand Association of Counsellors
- New Zealand Family Planning Association
- New Zealand Family Research Trust (Auckland)

- New Zealand Federation of Business and Professional
- New Zealand Playcentre Inc
- New Zealand Psychological Society
- North Harbour Living Without Violence Inc (Takapuna)
- North Shore Women's Centre (Glenfield)
- North Taranaki Kindergarten Association (New Plymouth)
- Office of the Children's Commissioner
- O Le Laitaga Trust (Auckland)
- OMEP (World Organisation for Early Childhood)
- Pacific Foundation (Auckland)
- Paediatric Society of New Zealand
- Parent and Family Counselling Service (Whangarei)
- Parent Help Wellington Inc
- ParentingWorx
- Parentline Charitable Trust (Hamilton)
- Parentline Hawkes Bay Inc
- Parentline Manawatu
- Parent's Centre NZ Inc
- Peace Movement Aotearoa
- Peppertree House – South Auckland Family Refuge
- Presbyterian Support New Zealand
- Public Health Association of New Zealand Inc
- Quakers
- Quaker Peace and Service
- Rahui Pokeka Maatua Whaangai Justice (Huntly)
- Relationship Services NZ Inc
- Rodney Stopping Violence Services
- Royal New Zealand Plunket Society
- Safer Families Foundation (Takapuna)
- Save the Children
- South Canterbury Women's Refuge
- South Canterbury Violence Intervention Project
- Start Inc (Christchurch)
- Stopping Violence Services Nelson
- Stopping Violence Services Wairarapa
- Supportline Women's Refuge (Auckland)
- Taranaki Social Services (New

- Plymouth)
- Te Aupouri Iwi Social Services (Kaitaia)
 - Te Awamutu Womens' Centre
 - Te Awamutu Women's Refuge – Nga Maunga Hei Kakahu Inc
 - Te Awhina Support (Murupara)
 - Te Hauauru Mahi A Iwi (Kaikohe)
 - Te Korowai Aroha O Ngati Whatua (Wellsford)
 - Te Manawa Services (Fielding)
 - Te Puna O Te Aroha Maori (Women's Refuge (Whangarei)
 - Te Roopu Whakaruruhau (Palmerston North)
 - Te Ruru Resources
 - Te Tari Puna o Aotearoa/NZ Childcare Association
 - Te Whare Oranga Wairua Women's Refuge (Taupo)
 - Te Whanau O te Mangarongo (Lower Hutt)
 - Te Whariki Manawahine O Hauraki (Thames)
 - Thames Women's Resource Centre
 - The Body Shop
 - The Brainwave Trust
 - The Dove Group for Children (New Plymouth)
 - Tongan Tamaki Community Centre (Auckland)
 - Tongariro Whanau Support Trust (Turangi)
 - Tupoho Maatua Whangai Trust (Whanganui)
 - Tu Tama Wahine o Taranaki Inc (New Plymouth)
 - UNICEF New Zealand
 - Violence Free Waitakere
 - Wairarapa Community Counselling Centre
 - Wairarapa Women's Refuge
 - Waitakere Abuse and Trauma Counselling Service Inc
 - Wesley Community Action
 - Wellington Community Law Centre
 - Wellington Ending Violence and Abuse
 - Whanau Awhina Women's Refuge(Whanganui)
 - Whanganui Living Without Violence Trust
 - Women of the Kaipara Resource

Centre (Dargaville)

- Youth Law/Tino Rangatiratanga
- Youthline Auckland Charitable Trust
- Zealot Group Consultancy
(Wellington)

Appendix 4 Legal options for repeal of section 59 Crimes Act 1961

1 Purpose of this paper

To present the rationale for the attached legal options and to encourage further consideration of options for reform of section 59 Crimes Act 1961. These options do not include defining reasonable or unreasonable force and do not endorse the use of physical punishment but at the same time provide some public reassurance about reducing the risk of prosecution for minor assault or restraint of a child.

2 Background

The future of section 59 Crimes Act 1961 will be reviewed in the new year because of Government obligations under the United Nations Convention on the Rights of the Child Work Plan and because of Sue Bradford's Bill for repeal of section 59 Crimes Act 1961.

Simple repeal is the best option because it gives children the same legal status as adults in regard to the law on assault by repealing the statutory defence that exists at present. It is very unlikely that repeal will result in increased prosecutions for minor assaults.

However public anxiety about possible prosecutions for restraining or smacking children and opposition to state interference in family life is such that politicians and officials may look for options that provide some reassurance to the public.

From children's rights and children's best interests perspective there are many disadvantages to any approach that suggests that any use of force in discipline is reasonable. It is adult centred and does not send a public message consistent with what is now known about the negative outcomes associated with the use of physical discipline.

3 The opportunity repeal of section 59 presents

Repeal of section 59 of the Crimes Act 1961 and ongoing parent education about positive non-physical discipline represents the least expensive and most valuable contribution New Zealand can make to reducing family violence, including child abuse, over time. It should be accompanied by public information about what research tells us about the risks associated with the use of physical discipline. It should also be accompanied by ongoing parent education and support about alternative disciplinary measures – the continuation of *Strategies with Kids: Information for Parents* (SKIP).

What is required most in New Zealand if family violence is to be reduced is a shift in a cultural norm that regards the use physical force in human relationships as acceptable. Most parents want their children to do well and parents should know about the risks they expose their children to if they are disciplined with physical force. Children learn about the use of violence in their own homes. Recent studies into human brain development tell us that those children who are exposed to harsh

physical discipline at a young age will suffer damage to their neurological development.

4 Exploring legal options

Recognising that it is likely that politicians and officials will need to manage risk around reform of section 59 of the Crimes Act 1961 UNICEF New Zealand has sought support from sympathetic lawyers to explore options for reform of section 59 that do not endorse physical punishment but provide some public reassurance. The options presented in the appendix of this paper represent where we have got to at this point and there are likely to be refinements made as consultation continues.

5 The options

Two options are presented at the end of this paper. They have been prepared for UNICEF New Zealand by Bill Atkin (Family Law) and Fran Wright (Criminal Law), both lecturers in law at the Victoria University School of Law.

The first (Amendment to the definition of “Assault” in Crimes Act 1961) simply addresses commonly promoted myths about parents potentially being prosecuted for assault when they use restraint in situations of care and control of young children if section 59 is repealed. UNICEF understand that such reassurance is not strictly speaking necessary because various provisions already exist in law or are covered by common law or common sense, but codifying them in one place may be reassuring.

The second (Care and control of a child) replaces section 59 with new legislation that protects parents and some caregivers from prosecution when providing children with normal care and control. You will note that it does not include light smacking with an open hand in the list of actions defined as **not** normal care and control.

UNICEF New Zealand would find the second option **unacceptable** unless accompanied by a purpose statement that clearly indicates that physical punishment is unacceptable and strongly discouraged but that limited protection is provided only because it is clearly not in the best interests of a child to have his or her family prosecuted for minor use of force.

The options are:

Option 1 – Amendment to the definition of Assault in Crimes Act 1961.

1 Repeal section 59

and

2 Amend the definition of “assault” in the Crimes Act 1961.

[amend the definition of “assault” in section 2 of the Crimes Act 1961. Existing definition of “assault” becomes (a). What follows is added as new (b)]

(b) It is not an assault if a parent or carer of a child uses reasonable physical contact or restraint with the sole or primary purpose of:

- (i) protecting the child from danger, injury or harm;
- (ii) guiding, moving or carrying the child to ensure his or her safety or protection;
- (iii) confining the child to some appropriate place for a short period of time;
- (iv) preventing the child from harming himself or herself;
- (v) preventing the child from causing harm or injury to the parent or carer or some other person or animal;
- (vi) preventing the child from causing significant damage to property;
- (vii) performing the normal day-to-day tasks incidental to good care and parenting other than correction.

Option 2

1 Repeal of section 59

2 Replace with new section 59

Section 59 Care and control of a child

- 1 Every parent of a child, and subject to subsection 3, every person acting in the place of a parent of a child may use reasonable minor or incidental contact, restraint or threats when caring for or controlling a child.
- 2 Reasonable minor or incidental contact, restraint or threats do not include repeated or heavy blows with the open hand, punching, striking with an object, whipping, kicking, hitting around the head or neck, limb twisting, pinching, or any other action which has, or is likely to have, an injurious effect on the physical or mental health of a child.
- 3 Nothing in subsections 1 and 2 justifies the use of force towards a child in contravention of section 139A of the Education Act.

6 Public consultation

Submissions on Sue Bradford's Bill provide an opportunity for informed comment on section 59 and the use of physical punishment with children. However there is also likely to be a great deal of opposition to repeal from those who believe that physical violence is a part of child rearing and many submissions will oppose reform or suggest options that retain some form of statutory defence.

Submissions will ultimately be only one of the influences on the final decision government makes about the future of section 59. UNICEF requests that Government consult with organisations that are experts in children's development and protection from violence and place the best interests of children foremost in its decision making.

A list of agencies that have agreed to be publicly named as supportive of full repeal of section 59 is attached. It is indicative of the support there is for full repeal among organisations that are well informed about children's interests and family violence.

Recommendations

- 1 That government consult with appropriate child related organisations in the process of making decisions about the future of section 59.**
- 2 That the Government reform of section 59 in a way that does not include defining any physical discipline as reasonable or unreasonable and that signals the unacceptability of the use of force in discipline.**
- 3 That the public are well informed about the risks associated with the use of physical discipline.**

Beth Wood

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