

## **END PHYSICAL PUNISHMENT OF CHILDREN - NEW ZEALAND**

**Submission to the Minister of Justice, Minister of Social Services and Minister of Youth Affairs from EPOCH New Zealand on repeal or amendment of section 59 Crimes Act 1961.**

### **Executive Summary**

This paper reports on the views of EPOCH New Zealand (EPOCH NZ) on options for repeal of section 59 of the Crimes Act 1961 (s59). This is a matter currently under consideration by Government Ministers.

There are good reasons to review s59:

- It is not compliant with the recommendation of the United Nations Committee on the Rights of the Child that legislation be reviewed to effectively ban corporal punishment.
- It is not effective in promoting the legal and human rights needs of children.
- It sends an unhelpful public message at a time when society is working to reduce violence.
- There are a number of legislative and other options to achieve change about use of physical punishment of children in New Zealand. EPOCH NZ favours repeal of s59 (and related common law provisions), the introduction of education campaigns and a lead in time before enactment of legislative change.

We recommend that the Government:

- repeal s59 and the common law defence of reasonable chastisement thereby removing all statutory and common law defences against assault
- signal its public support for positive, non-physical guidance of children
- develop public education campaigns and increased support for parents
- make the implications of repeal public, that is, if a parent or caregiver is prosecuted for assault of a child there will be no statutory or common law defence
- make it clear that it is not expected that trivial offences will be prosecuted

EPOCH NZ does not support limited repeal or amendment of the Crimes Act to define 'reasonable force'.

### **1 The Purpose of this submission**

In April 2001, Cabinet directed officials in the Ministries of Justice, Social Policy and Youth Affairs to report to them by 30 October 2001:

on the likely implications if s59 of the Crimes Act 1961, concerning physical punishment, were repealed or amended, and how this could be addressed;

on educational measures that could be undertaken if s59 were repealed or amended.

EPOCH NZ is a group that has consistently lobbied for repeal of s59. EPOCH NZ wishes to place its views on the matters under consideration before the relevant Ministers.

### **Comments on EPOCH submission on repeal of s59 Crimes Act 1961.**

This paper has been prepared in consultation with members of a range of organisations and individuals interested in children's rights and reducing violence to children.

In addition to the Ministers of Justice, Social Services and Youth Affairs it will be circulated to Members of Parliament known to be supportive of repeal, to the Secretary for Justice, the President of the Law Commission and to members of the network of agencies supporting repeal and other supporters of repeal.

Representatives of EPOCH New Zealand would appreciate the opportunity to meet with Ministers to discuss the matter.

## **2 Background**

The New Zealand situation – why is change needed ?

- S59 places New Zealand in breach of the United Nations Convention on the Rights of the Child
- Hitting children is unjust and discriminatory
- It singles children out as the only people in society that it is legal to assault.
- S59 does not protect children or promote their interests
- S59 is not always effective in court in protecting children's interests and legal rights when they are seriously assaulted. There are repeated incidents where children are seriously assaulted and this is regarded as 'reasonable' by judge or jury.
- Physical punishment can cause unintentional injuries and can escalate to serious abuse
- The existence of s59 sends a confusing and unhelpful message to parents and society that violence is sometimes acceptable
- s59 does not provide clear guidelines for parents and carers as to what is acceptable punishment. Reasonable force has been subject to a range of interpretations by different judicial officers in different cases
- s59 applies to civil as well as criminal proceedings and is binding on the Family Court in disputes over custody and access and in applications for

protection orders for children under the Domestic Violence Act. Children are again denied the legal protection from physical assault that all adults enjoy.

- Children can be raised to behave well without receiving physical discipline. Harsh and frequent physical punishment is known to contribute to a range of problems later in a child's life.

### **The United Nations Convention on the Rights of the Child and the United Nations Committee on the Rights of the Child**

The United Nations (UN) Committee on the Rights of the Child has stated that retaining legal justification of assault as physical punishment is inconsistent with article 19 of the UN Convention on the Rights of the Child. In its first report to New Zealand in January 1997 the Committee recommended that the New Zealand Government review s59 to effectively ban all forms of corporal punishment.

### **Attitudes in New Zealand**

Attitudes in New Zealand and other parts of the world are changing but not fast enough for children. Children are frequently the victims of violence and changing attitudes about physical punishment is an integral part of changing attitudes about violence towards children and recognising them as holders of human rights. There are few reliable surveys of attitudes about physical punishment in New Zealand but indications are that attitudes are moving towards non-violent discipline of children. Significantly surveys and public comment indicate that some parents want to retain the right to hit but the agencies who work with children and families are very clear that too many children are hit too often and too hard.

### **Network**

EPOCH New Zealand is a Charitable trust whose aim is to change attitudes about the use of physical punishment of children. EPOCH co-ordinates a network of agencies committed to promoting positive non-violent parenting and to legislative change. Currently membership of the network is 61 agencies. (Appendix 1)

### **Global Initiative**

Recently there has been a concerted international effort initiated to stimulate change around the world. This is led and supported by key individuals and agencies with an interest in children's rights. The number of countries that have taken some legal steps to discourage physical punishment grows – it presently stands at 10. (Appendix 2)

### **Options for New Zealand**

#### **Options.**

- 1 Maintain the status quo
- 2 Amend s59 to better protect children when they experience serious assault by defining 'reasonable' with placing limits on the type and severity of corporal punishment.

- 3 Provide better protection to children by defining in law what punishment is unreasonable – that to which the statutory defence will not apply – ie the forms of assaults that must be prosecuted.
- 4 Repeal s59 and the common law defence of reasonable chastisement that would which would apply if s59 were repealed.
- 5 Repeal s59 (and the common law defence) and accompany by education campaigns.
- 6 Repeal s59 (and the common law defence), introduce education campaigns and delay the coming into force of the new law to allow parents and carers to learn other ways of discipline children..

EPOCH New Zealand favours Option 6.

**The likely implications if s59 is repealed or amended.**

*Repeal of s59 and amendment of s20 (common law provision)*

**Advantages**

- Children will be given the same legal protection from physical assault as adults enjoy.
- Legislative changes will be relatively simple – countries that have attempted to define what is reasonable have had considerable difficulty agreeing on wording that provides clear guidance to parents.
- Children will be better protected if their caregiver is charged with assault.
- The message from the Government about positive, non-violent discipline will be clear and parents will be required to learn non-violent methods of disciplining children.
- New Zealand will bring itself into compliance with the United Nations Convention on the Rights of the Child and avoid criticism from the Committee on the Rights of the Child when it considers New Zealand's second report.
- In time attitudes and behaviour on the part of adults towards children may change – especially if repeal is accompanied by public education about positive non-violent guidance of children and social services are supported to provide increased family support services.

**Possible Risks**

- Parents may be prosecuted for a trivial assault

The aim of repeal is not to subject parents to prosecution for trivial assaults. Other countries that have changed legislation have not experienced a marked increase in prosecutions.

Parents will not become criminals unless they are charged and convicted. We believe that this fear will be best dealt with by having a transparent prosecuting policy whereby the Police develop, and make public, guidelines on prosecutions in situation where children are assaulted. Under such a system Police or the Department of Child Youth and Family Services would have the discretion to record, but not take action, on certain complaints beyond reminding caregiver of the legal situation; or recommend or require caregivers receive counselling;

make referrals to parenting programmes and family support.  
undertake fuller investigation and possible action under the Children, Young Persons and Their Families Act or the Crimes Act where the child is thought to be at risk of abuse or where there has been assault with injuries.

- Parents may be asked to change their ways without adequate education and support

The answer to this fear lies in putting good education and family support programmes in place and in having a lead in time before repeal is effective – possibly one year.

- Cultural Concerns

New Zealand Courts have taken the view that cultural factors are irrelevant in deciding whether the force in punishing the child is irrelevant.

Violence towards children is not exclusive to any one cultural group in New Zealand. Cultures are not static and customs that disadvantage any section of society cannot be justified on the grounds of tradition alone. All cultural groups need information and education on non-violent behaviour with children. There has been fear expressed that members of Maori and Pacific Island communities are already disproportionately represented in the statistics of court appearances relative to their numbers in the population, and may be similarly disadvantaged if s59 is repealed. If this issue is real it is larger than the question of repeal of s59 and needs addressing but is not in itself a reason not to repeal s59.

- Some opinion favours the rights of parents to treat their children as they think best

While attitudes towards children and their rights are slowly changing a limited number of parents believe they have the right to hit and indeed to make all decisions related to the care of their child free from state direction. There are already many areas in which parents do not have wholesale right to do as they wish with their children when the actions are disadvantageous to the children.

EPOCH NZ argues that Government has a duty to take a lead in this matter of social change and not wait for the tide of opinion to turn completely. Previous Governments have taken action on matters that there has not been majority support (eg smokefree legislation) and this has positively influenced public opinion. This did not noticeably disadvantage the government politically.

- Increased Police and Court workload and increased numbers of children stressed by court appearances in which they have to give evidence against their parents.

Some commentators have raised a concern that there may be significant numbers of cases at present where children are injured, eg with bruises and cuts, but where no complaint is made to the Police even when the children have come to the notice of the Department of Child, Youth and Family Services. It is possible that complaints are

not laid because the statutory defence provided by s59 means that prosecutions may not be successful.

However reluctance to make complaints is in part a reflection of our confused standards about violence towards children and a belief that physical assault is not as serious as sexual assault and that all that is needed is support for the parents. The number of children re-notified to the Department of Child, Youth and Family Services is a clear indication that family support is not always enough. Children have the same rights as adults to have offenders held accountable. Outcomes of complaints and prosecution, when they occur, can be constructive. They can be restorative and supportive rather than punitive.

It is difficult to assess the relative impact of different options on Police and Court workloads. It is also difficult to assess what an optimal level of Police and Court workload would be in the area, especially given that the high downstream costs of violence, a bigger workload may be a good outcome.

If repeal of s59 resulted in increased numbers of cases of assault affecting children coming (for injuries) before the courts there may well be issues of court overload. This is not a reason not to better protect children. The Domestic Violence Act put huge strains on the court system but no one argued that the changes should not be made.

Likewise the fact that our court procedures are stressful for children is a real problem and one that needs addressing in its own right. It is not a reason not to repeal s59.

#### **Amendment to define "reasonable force"**

Some countries are trying to deal with the issue of children having inadequate rights and protections in the courts by trying to define what degree of force is 'reasonable', unreasonable or physically safe. This is the approach that the opposition Member of Parliament, Mr Bob Simcock, is promoting in a Members Bill he recently announced.

The disadvantages of this approach are that:

- it does not afford children their full human rights
- it still sends an unhelpful message to caregivers
- it is unlikely to conform with the United Nations Convention on the Rights of the Child (and possibly other international instruments that ban cruel or degrading punishment)
- defining reasonable or unreasonable is problematic – at what age can a child be hit, how hard, what with, how often, in what circumstances and by whom?
- the result may be a law that is even more unclear than the present law
- children will be no better served if the definition remains open to interpretation by judges and juries.

EPOCH New Zealand is strongly opposed to limited repeal.

#### **What else is needed?**

Public awareness and information An effective campaign to increase knowledge and practice of non-physical methods of fair and effective discipline of children might include Government and non-government agencies working together to produce:

- Mass media messages.
- Ensuring that teenagers and prospective parents received information about non-violent discipline.
- Increased support for NGOs/organizations providing parent education for prospective and new parents.
- Increased support for NGOs/organizations teaching methods of effective discipline for parents.
- Deferring commencement of changes in legislation

A lead-up time would give the public:

- time to learn about and adjust to change
- time to learn about non-physical methods of disciplining children.
- During the lead-up time Government could review the availability of relevant social services and address any other problems and requirements that might arise from change. The Government might choose to defer the actual change in the law, say by one year, after legislative change is enacted.

#### **Conclusion**

EPOCH New Zealand believes that it is appropriate now for the New Zealand Government to take a lead on the issue of changing attitudes about the use of force in the discipline of children and to ensure better protection of their legal and human rights by:

- signalling its support for positive, non-physical guidance of children publicly
- introducing public education campaigns and increased support for parents
- repealing s59 and related common law provisions
- making the implications of repeal public, that is, if a parent or caregiver is prosecuted for assault of a child there will be no statutory or common law defence. However it is not expected that trivial offences will be prosecuted.

Beth Wood

For EPOCH New Zealand Trust Inc

September 2001