Draft article for Law Journal
Robert Hudbrook based on my Epoch speech. 1

Hitting Children: s59 Crimes Act and child protection

The arguments for and against smacking children as a means of correcting their misbehaviour are regularly discussed in the media and in academic journals and they are well understood. One school of thought believes that hitting children is an effective way of getting them to behave, that it does no lasting harm to the child and that it is a parental (or a religious) duty to bring up their children to behave correctly and to respect parental authority. Others argue that hitting children is an assault and a form of violence, that it is ineffective as a means of changing children's behaviour and that it inculcates in children a belief that it is acceptable to hit people who anger or displease you.

Arguments as to the morality and efficacy of corporal punishment have gone back and forth for generations and the situations in which the law grants an exception to the law of assault have narrowed progressively over the last sixty years (see Box). The topic has received coverage in legal journals in recent years and several New Zealand judges have expressed a view as to the state of the law.

The issue of corporal punishment again surfaced in 1997 when the United Nations Committee on the Rights of the Child politely advised the New Zealand government that s59 Crimes Act breached Article 19 of the United Nations Connvention on the Rights of the Child and recommended that it be reviewed. Then an important decision of the European Court of Human Rights in 1998 held that a stepfather's actions in caning his child amounted to inhuman or degrading punishment under the European Convention. New Zealand is required under Art 7 U.N. Covenant on Civil and Political Rights and under Art 37(1) U.N. Convention on the Rights of the Child to ensure that no child shall be subjected to cruel, inhuman or degrading treatment or punishment. It is clear that s59 breaches New Zealand's obligations under both these international treaties.

Section 59 is part of a statute which codifies New Zealand's criminal law. Even a mild smack would constitute an assault under our criminal law were it not for s59 which states that a parent or person in place of a parent is justified in using reasonable force by way of correction of a child.
If a parent or carer is charged with assault or any more serious charge involving violence it is open to the parent or carer to defend the charge by claiming that s/he was using no more than reasonable force with the intention of correcting the child's behaviour. It is less well known that

once a parent raises this defence, the onus shifts to the prosecution to prove that the force used is not reasonable.

But s59 has implications far wider than the criminal law. This is because the word 'justified' which appears in s59 is defined in s2 Crimes Act to mean 'not liable to any criminal **or civil** proceedings'. It may seem strange that a provision in our Criminal Code should apply equally to civil and family law but s59 gave statutory force to the position under English common law which gave parents both civil and criminal immunity.

In criminal cases, s59 is regularly raised as a defence in situations where a child has died, has suffered serious injuries or in cases where a child has been assaulted from what are clearly sexual motives. In the case of death or serious injury the defence is seldom successful because the prosecution can satisfy the judge or jury that the degree of force used was not reasonable. In cases of sexual assaults the defence may fail because the motive of the defendant cannot be shown to be the 'correction' of the child but for the gratification of the punisher.

The implications of s59 in civil proceedings

Defence to civil action for assault or battery

If a parent is sued by a child for damages for assault or battery, the parent can defend the proceedings claiming that the assault was justified under s59 and that it amounted to no more than the use of reasonable force by way of correction. Because of our Accident Compensation legislation it is not now possible to recover damages for physical or psychological injuries resulting from an assault unless the assault is so serious as to merit the condemnation of the Court by an award of exemplary damages. It is rare for children to sue their parents for damages for physical or psychological injury suffered by reason of an assault and there are a series of hurdles to be overcome: Accident Compensation laws, the Limitation Act and a reluctance of the Courts to award damages for poor parenting. Section 59 merely provides a further hurdle.

Defence to civil action for wrongful imprisonment

If a parent locks a child in his or her room or in a cupboard this would ordinarily amount to wrongful imprisonment unless there is some compelling evidence that such action is necessary to protect the child.

However it seems that s59 would provide the parent with a defence where the incarceration is intended as a means of correcting the child's behaviour.

Defence to child protection proceedings

The Family Court can make a declaration that a child is in need of care or protection if satisfied that the child is being or is likely to be harmed (physically, emotionally or sexually), ill-treated or abused. Once a declaration is made the Court can make any one of a variety of orders for the protection of the child.

An application to the Family Court for an order that a child is in need of care and protection is not strictly a proceeding **against** the parent or carer who has the responsibility to protect the child. It is an inquiry into the child's safety and protection of the child with the overriding consideration being the child's welfare. Nevertheless the Family Court has taken the view that in determining whether a child has suffered harm, ill-treatment or abuse the right of parents to use reasonable force by way of correction of the child should be acknowledged. *Hibbs v Police* 26/10/95 Barker J HC Akd AP 205/95; *Kendall v DGSW* (1986) 3 FRNZ 1, *DGSW v E* 2/9/96 Judge MacCormick FC North Shore CYPF4-6/96 FP 242/96. Tapp para 1-160.

The Courts have not ruled specifically on the inter-relationship of s59 with s14 Children, Young Persons and their Families Act. It is arguable that s59 is irrelevant to considerations under s14 in that an application under s14 is not a civil proceeding **against** the parent or carer within the meaning of s2 Crimes Act 1961 and therefore s59 does not provide a defence.

The Courts have taken a somewhat different approach. They have developed the principle that 'harm' in s14(1)(a) is confined to harm of a sufficient degree to warrant Court intervention in the Family and that the Court must balance the state's interest in family autonomy with the state's interest in the welfare of the child *DGSW v S* [1992] NZFLR 309, 312. If using reasonable force to correct children is seen as an acceptable child rearing practice then the 'family autonomy' principle is likely to outweigh the 'child welfare' principle and there is no need to consider the legal relevance of s59.

Child, Youth and Family Services are showing a lower degree of acceptance of frequent or severe corporal punishment. Some parents have

faced removal of their children for what they consider to be no more reasonable chastisement.

Custody and access orders

Unlike child protection and domestic violence applications in which proof of harm, ill-treatment or abuse is necessary to give the Family Court jurisdiction, custody and access disputes are resolved according to the best interests of the child. So a parent who eschews any form of corporal punishment may be favoured over a parent who regularly smacks a child. The use or non-use of corporal punishment is one of the factors which the Court is likely to weigh in the balance in making decisions about custody and access.

The situation was complicated by s16B Guardianship Act which was introduced at the same time as the Domestic Violence Act. It states that where any party to custody or access proceedings is alleged to have used violence against the child in question, against another child of the family or against the other party to the custody or access proceedings the Court must, as soon as practicable, make a determination whether the allegation is proved, and if it is found proved the Court must not make a custody or access order in favour of the violent party unless the Court is satisfied that the child will be safe.

What this means in practice is that a person who is found to have behaved violently will have an uphill battle to obtain custody of or access to their child, even though the violence may not have been to the child in question but to another child or to their spouse or partner. But if a parent smacks, straps or hits a child to correct the child's behaviour using only reasonable force can this constitute violence? The answer must surely be 'yes', because the proceedings in question, although civil proceedings, are not proceedings brought in relation to an assault - they are proceedings to determine the welfare of the child. It is 16B Guardianship Act that places an obstacle in the path of a party to custody or access proceedings who has been found to have behaved violently in the past. All this may sound confusing. It is, and it has troubled Judges who have to find their way through the statutory maze.

Defence to Domestic Violence proceedings

The Domestic Violence Act 1995 is arguably the most comprehensive domestic protection legislation in the English speaking world. The aim of

the 1995 Act was to provide comprehensive protection for family members from all forms of physical, sexual and psychological abuse. The Act provides additional protection for children by recognising that violence between spouses or other family members in the sight or hearing of children is damaging to children. The Act allows children themselves to apply for a protection order.

The Family Court can grant a protection order one member of the family or household has used domestic violence to another. Domestic violence is defined to include physical, sexual or psychological abuse (including intimidation, harassment or threats). An order to protect a child can be made where there is no suggestion that the child in question has been abused but where one family member has been violent to another family member in front of the child (sometimes called indirect or secondary violence).

Reading the 1995 Act one could easily reach the conclusion that, at last, children have been provided with full protection against violence and abuse from members of their family and household. But, although there is no reference in the Act to s59, it has been interpreted as being subject to the parental right to use reasonable force to punish children. The result is the anomalous situation that a parent or step-parent may punish a child with a belt or stick without it being 'abuse' but if the parent lays a hand on his/her spouse or partner within the sight or hearing of the child it is abuse and a protection order can be made. Children are protected from indirect violence but not from direct violence. This absurd result did not result from an oversight on the part of Parliament. On the second reading of the Bill, the Minister reassured his fellow MPs that the Act did not affect the right of parents to smack their children.

In several cases the Family Court has had to consider whether physical punishment amounts to 'physical abuse' and they have applied the 'reasonable force by way of correction' test in s59. In *Ausage* ??? the Family Court Judge accepted that s59 applied because Domestic Violence proceedings were a civil proceeding and s59 provided a defence to any civil proceeding by reason of s2 Crimes Act. Other Family Court Judges have accepted that they must read the Domestic Violence Act subject to s59. It is to be hoped that a higher Court will be asked to rule on this question.

Argument that Domestic Violence Act is not subject to s59

There is considerable force in the argument that the Domestic Violence Act should not be subject to s59:

- While an application for a protection order is clearly a civil proceeding it is a proceeding of a peculiar nature in that the focus is on the protection of children and not on the imposition of a penalty or sanction on the alleged abuser

- The Domestic Violence Act is a Code with the clearly stated object 'to reduce and prevent violence in domestic relationships by recognising that domestic violence, in all its forms, is unacceptable behaviour .. and (e)nsuring that ... there is an effective legal protection for its victims' *(s5(1))*. To interpret 'domestic violence' as subject to s59 would defeat the stated object of the legislation

- Section 59 clearly breaches international human rights treaties to which New Zealand is a party and in interpreting the law the Courts have accepted that they should lean towards an interpretation that will not breach the obligations the government assumed on ratification

- Section 9 New Zealand Bill of Rights Act 1990 states that 'Everyone has the right not to be subjected to ... cruel, degrading or disproportionately severe treatment or punishment'. The European Court of Human Rights has ruled that 'reasonable' corporal punishment of a child can constitute 'inhuman or degrading treatment or punishment' and the United Nations Commitee on the Rights of the Child has advised New Zealand that s59 is inconsistent with Art 19 which requires the government to protect all children from 'all forms of physical or mental violence, injury or abuse'. This adds further weight to the argument that the clear aims of the Domestic Violence Act should not be eroded by it being read subject to s59.

- It could also be argued that s59 exposes children to 'disproportionately severe' treatment or punishment in terms of s9 New Zealand Bill of Rights Act 1990 in that they can be slapped, smacked or hit by parent or carers whereas the same acts directed at an adult would clearly constitute an assault. While the N.Z. Bill of Rights Act does not override particular statutory provisions such as s59, the Courts should favour an interpretion of the Domestic Violence Act which is consistent with the Bill of Rights.

- There is obviously some concern on the part of the judiciary at having to make rulings on domestic protection applications where a s59 defence has been raised.

- Even if the term 'physical abuse' in s3(2)(a) Domestic Violence Act has to be read subject to s59 it should not be forgotten that corporal punishment may amount to 'psychological abuse' 'intimidation' or harassment' within the meaning of s3(2)(c) and a protection order might be made on the basis of the psychological effects of the physical punishment. These are now well documented in professional literature.

Discrepant messages given by the law

The law is giving parents discrepant messages. On the one hand s59 says you can hit your children if they are naughty provided you use no more than reasonable force. On the other hand s16B says that if you are violent to your child (or to another child of the family or to the other parent) you are likely to be penalised by being denied custody or access to the child unless you can prove that the child is safe with you. 'Safe' presumably means 'safe from violence' and 'violence' (although not defined) would probably be given the same meaning as in the Domestic Violence Act. So the Court would have to be satisfied not only that the parent will not hit the child but also that there will be no violence to another family member in the sight or hearing of the child.

Some parents are being reassured by s59 that they can hit their children with reasonable force only to find that their actions constitute 'violence' under s16B and they may lose custody of or contact with their children.

The lowering threshold of 'reasonable force'

Because Judges in earlier generations strongly supported the family autonomy principle they tended to accept that punishment imposed by a parent or carer was reasonable unless it resulted in serious injury to the child or that the principal motive was not the correction of the child. If a parent could show that the child had been hit by way of punishment the onus was on the prosecution to show that the force used was not reasonable. Earlier law reports disclose cases where children have been viciously hit with a stick, baseball bat, jug cord, razor strop or punched or slapped on the face or head and the reasonable chastisement defence has

been successful. Parents who have hit small babies and older teenagers have escaped liability through reliance on s59.

There are indications that the Courts are lowering the threshhold of what is acceptable corporal punishment. In *Y v Y* a High Court Judge expressed the view that the use of a stick or implement to smack a young woman aporoaching teenage years or a younger child would not be acceptable. In *A v A* 1997 the Family Court Judge commented that the use of force to punish a young adult would be reasonable only on the rarest of occasions. The Family Court has shown a willingness to make protection orders against parents who hit their children. In the following cases decided in the last four years the Judge found that domestic discipline exceeded the bounds of reasonable force:

- A mother hit her five year old with shoes, belts and toys *K v H* 1999
- The father of a 12 year old hit his son with a gun belt and kicked him on the buttocks causing bruising. The Judge expressed the view that the punishment exceeded what was permitted under s59 *T v T* 1999
- A 17 year old in full time employment was pulled out of bed by her father in the early hours of the morning and punched in the face and kicked on the legs *A v A* 1997
- A father kicked his 10 year old on the knee and the bottom *B v H* 1996
- A male carer hit a child with a jug cord *Arvidson v Croft* 1996

By contrast in *S v B* 1996 the actions of a father who slapped a 14 year old on the legs and cheek were deemed to be reasonable.

Many parents who where themselves physically punished in childhood assume that the manner and degree of punishment they experienced is the norm and would be accepted by the Courts as reasonable. Because of the the lowering threshold of acceptable punishment of children this is now a dangerous assumption.

Unsatisfactory state of present law

It is of great importance that the law should be clear and consistent so that people can arrange their affairs with reasonable certainty. It is particularly

important in the area of family law where parents who uses physical punishment may lose the right to care for their child or be denied rights of access if they exceed the boundary of 'reasonable force'.

The current law is anomalous and unsatisfactory:

- Our law says you can hit children if they are naughty, hit them hard if they are very naughty but you must not hit them too hard or you may face a charge of assault, removal of the children from your care or termination of your custody or access rights

- It is unclear whether our child protection laws and our domestic violence laws which are aimed to protect children from abuse and violence have to be read subject to s59 which permits reasonable corporal punishment. The Courts have accepted that s59 prevails but the issue has never been fully argued before a higher Court and the inter-relationship between s59 and child protection and domestic violence law is uncertain

- It is anomalous that a protection order can be made against a parent who hits his wife or partner in the sight of hearing of his child but not against a parent who hits his child by way of punishment

- While the law allows parents to use 'reasonable force' the threshold of acceptable force seems to be moving downwards and it appears that any physical force applied to a small child or adolescent may no longer be deemed reasonable

- Parents are receiving confusing messages from the law with hitting children being seen as acceptable in s59 yet being condemned in Domestic Violence Act and s16B Guardianship Act

Summary

Section 59 Crimes Act has implications far wider than the criminal law. Its pervasive influence extends to civil proceedings and has blunted important new protections provided for children in child protection and domestic violence law.

The right given to parents and carers to hit their children cuts across the child's fundamental human right of bodily integrity. This right is supported

by international human rights conventions and the New Zealand Bill of Rights Act. It is often said that human rights are indvisible. Our law currently denies children the right of bodily integrity which adults enjoy. Our child protection and family violence laws are seriously compromised by the overriding effect of s59 which denies full protection for the smallest and most vulnerable group in our society.

If current interpreations are correct, s59 overrides our child protection laws so that parental chastisement cannot constitute 'abuse' or 'ill-treatment' and overrides our domestic violence laws so corporal punishment cannot amount to 'physical violence'. Laws passed for the specific purpose of protecting children are limited by the fact that s59 permits the use of reasonable force by way of correction.

The result is that there are now different categorites of physical violence and different consequences:

- Children can be hit by parents and carers provided they use reasonable force

- Adults cannot hit or be hit by other adults

- A protection order can be made against a parent who hits his spouse or partner in front of the children

- A protection order cannot be made against parent who uses reasonable force to punish a child

- A parent or carer who hits a child or adult will only be granted custody of or access to his or her child if the Court considers the child will be safe.

The law has got itself into a tangle and parents and carers are likely to be the losers because they may be lulled into the belief that physical punishemnt is acceptable, unaware that it may have serious consequences for their relationship with their child.

The law needs to send a clear and consistent message that all violence is unacceptable and that violence towards children is particularly to be discouraged because of their small size and their vulnerability to physical or psychological injury. **End**