

## Children and the Law 2007

From Robert Ludbrook  
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### How did children fare in 2007?

On the whole, 2007 was a good year for New Zealand children and their rights. It is useful from time to time to take stock of developments and identify positive achievements.

#### Changes to law

##### ***Removal of parental power of physical punishment***

The most important legal change affecting children in 2007 was undoubtedly the replacement of s59 Crimes Act 1961 which removed the long standing defence of reasonable chastisement. From 17 June 2007 parents who punish their children by hitting or smacking them have no longer been able to rely on the defence that they used only reasonable force. New Zealand is the first English-speaking country to ban corporal punishment of children in all its forms.

It was not the government but a Green party MP, Sue Bradford, who introduced the Bill to repeal s59. Prime Minister Helen Clark and former Minister of Social Development Steve Maharey have from time to time expressed a personal view that s59 should be repealed but seemingly could not get sufficient support from their colleagues to initiate the necessary change.

Despite the furore of protest that greeted the Bill the Select Committee that considered the Bill supported the amendment and went further in providing guidance intended to reassure parents that Bill would not remove or reduce their ability to care for, restrain and protect their children. This neutralised much of the ill-informed criticism of the Bill which included suggestions that they would be prosecuted for giving their children 'time out', stopping them from running onto the road or from hitting another child or rearranging the shelves in a supermarket.

The battle over s59 was a clear cut children's rights issue as it aimed to give children the same protection from assault that adults have always enjoyed. One gratifying aspect was that, when it came to the final vote in Parliament, the Bill passed with overwhelming support. The lives of children will be greatly improved by the ban on corporal punishment and great credit must go to Sue Bradford MP who had the courage to introduce the Bill (and refused to settle for partial reform) and those others within and outside New Zealand who worked hard for years to

achieve this result. Some of those involved have written an account of the journey towards repeal<sup>1</sup>.

### **New Bill amending care and protection and youth justice laws**

Children, Young Persons and their Families Amendment Bill (No 6)

This Bill, introduced on 3 December 2007, will make significant changes to the Children, Young Persons and their Families Act following on a review of the Act undertaken by Ministry of Social Development (MSD). Positive changes include:

- The definition of 'young person' will be amended so that 17 year olds will fall within the child protection and youth justice systems. This will align the ages in the Act with the UN Committee on the Rights of the Child which defines 'child' to mean 'every human being below the age of 18 years'. As a result of the amendment 17 year olds who offend would usually be dealt with in the Youth Court rather than the adult courts;
- MSD will set up a system for dealing with individual complaints by children and by whanau/family members;
- Children's participation rights will be strengthened in all care and protection processes and especially in family group conferences and in planning and reviews;
- Encouragement will be given to information-sharing between agencies and the legal powers to share information and the limits on those powers will be clarified;
- Family group conference processes will be strengthened to reduce delays and to ensure that conferences have accurate information about children and young persons, including information about their health and education;
- Greater support will be provided for children leaving long term care to assist them in making the transition to independence;
- Provisions for the long term care of children with a disability will be improved and options for family support and in-family care will have to be explored before a disabled child is taken into long term care. Where a child is in out-of-family care there will be regular family group conference reviews.

Some changes to the youth justice provisions of the Act foreshadow a tougher line in dealing with young offenders, while avoiding the very harsh measures proposed in Ron Mark MP's Young Offenders (Serious Crimes) Bill (see below).

The changes would mean that:

- 14 year olds who have committed serious offences could be transferred to the District Court for sentencing. Currently only young persons aged 15 years or older can be transferred;

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<sup>1</sup> Beth Wood, Ian Hassall and George Hook with Robert Ludbrook *New Zealand's journey towards banning the physical punishment of children*, Save the Children New Zealand publication date February 2008.

- The Youth Court will be able to make a community work order or a supervision with activity order even where the young person refuses consent to the such an order;
- A 'supervision with activity' order (involving compulsory attendance at activities and programmes) could be made by the Youth Court for a period of up to six months (currently there is a three month maximum);
- A 'supervision with residence' order (involving detention in a Child, Youth and Family residence) could be made by the Youth Court for up to six months (currently three months maximum).

These youth justice changes have obviously been made in response to strongly voiced community concern about youth offending and the significant increase in violent offending by young people. The new power to order 'supervision with residence' for up to six months is likely to exacerbate the current shortage of beds in Child, Youth and Family residences with the result that more young people will spend longer periods in police cells.

### **Reports of Parliamentary Committees**

#### ***Babies able to spend more time with mothers in prison***

Corrections (Mothers with Babies) Amendment Bill

A Bill introduced by Green Party MP, Sue Bradford, aims to extend the period for which the babies of women prisoners can be accommodated with their mothers in prison. Under the Corrections Regulations 2005, a female prisoner who gives birth while in prison or who has a baby under six months on her admission to prison may seek approval from the manager of the prison to have her child with her in prison until the child is six months old. The Bill would allow the mother to have her child with her for 24 months for the purpose of breastfeeding and bonding. It would require that every prison in which female prisoners are detained have appropriate facilities for the accommodation of children under two years.

The Bill was reported back from the Law and Order Select Committee in November 2007. The Committee considered that the changes proposed in the Bill were in the best interests of the children concerned and potentially beneficial to their mothers. The Committee proposed a number of changes:

- Clarifying that the scheme would apply not only to mothers who are breast feeding but also where it is desirable to provide continuity of care for the child;
- Remand prisoners as well as convicted prisoners should qualify to have their babies with them in prison;
- Broadening the scheme so that it applied to women who were the primary caregiver of a child, whether or not they were the biological mother;
- Ensuring that the backgrounds of prisoners are checked before their acceptance into the scheme, including a check on convictions for sexual or violent offending against children. The women would have to agree to be screened for mental health issues and substance abuse;

- The chief executive of the Department of Corrections would have a discretion whether to admit a mother to the programme;
- Because significant alterations will be necessary to women's prisons to accommodate mothers and their young children, one of the criteria for admission to the scheme would be the availability of sufficient accommodation;
- A new provision would require the chief executive to take into account the principles in s5 Care of Children Act 2004 when making an assessment of the child's best interests;
- Mandatory provisions would be included in parenting agreements including provisions that the mother participate in parenting education programmes and that she and her child be provided with health checks and health care at the cost of the Department of Corrections;
- Facilities provided for mothers with children should include facilities which support the child's development;
- Remand prisoners as well as convicted prisoners should qualify to have their babies with them in prison.

### ***Move to get tough on young offenders not supported***

#### Young Offenders (Serious Crimes) Bill

This is a private members Bill introduced by New Zealand First MP Ron Mark. Its aim is to get tough on youth crime and it included draconian measures which would have had the effect of bringing many more under-17s into the adult criminal justice system and allowing children as young as ten years to be prosecuted for serious offences and sentenced to imprisonment. The Bill was castigated by the Principal Youth Court Judge, the Children's Commissioner, the Human Rights Commission and the New Zealand Law Society for its poor drafting and because it would have the effect of dismantling New Zealand's much-admired youth justice system and treating many young offenders as if they were adults. It was also pointed out that the changes proposed in the Bill were inconsistent with the UN Convention on the Rights of the Child, other international human rights instruments and, arguably, in conflict with the New Zealand Bill of Rights Act.

The Law and Order Parliamentary Committee considered submissions from 66 individuals and groups and spoke to young people in the Child, Youth and Family residence at Rolleston, Christchurch. While expressing concern at the marked increase in violent crime committed by young people, the Committee noted the lack of mental health and addiction services available for young offenders, the number of young offenders who had dropped out of education and the lack of resourcing of Police Youth Aid and other youth justice services. While acknowledging that there is much work to be done to improve the youth justice system, the majority of the Select Committee did not accept that the Bill was an effective tool for improving the system. It recommended that the Bill not be passed.

### ***Progress towards equal pay for children's work***

### Minimum Wage (Abolition of Age Discrimination) Amendment Bill 2005

This Bill, introduced by indomitable Green Party MP Sue Bradford, seeks to remove the provisions in the Minimum Wage Act 1983 that fix a lower minimum wage for workers aged 16 and 17 years. It has often been claimed that the denial of equal pay for equal work for young workers discriminates against them on the grounds of their age, such discrimination being unlawful under s21(1)(i) Human Rights Act 1993. The Bill was considered by Transport and Industrial Relations Select Committee which reported back in July 2007. The majority of the Committee supported the rationale of the Bill but accepted that young workers joining the workforce for the first time were likely to lack basic work skills and experience and therefore initially needed more supervision and training than adult workers. The Committee opted for a compromise which would allow a lower minimum wage rate to be paid to 'new entrants'. The Committee's view was that the lower minimum wage should only apply to 16 and 17 year olds who had not had 200 hours of employment whether with one or several employers.

The Green Party was opposed the 'new entrant' provisions on the grounds that:

- Young workers are often part-time or casual workers and they could be nine months in one job before they clock up 200 hours;
- Young people often have many more hours work experience before they turn 16 and these are not taken into account;
- The new entrant requirements will increase the compliance costs for employers;
- The amended Bill will not comply with the anti-discrimination protections in the Human Rights Act and New Zealand Bill of Rights Act.

A compromise was reached and the Bill was passed on 5 September 2007 with the result that, from April 2008, 16 and 17 year olds will qualify for the same minimum wage as adults after they have been in employment for 200 hours or three months after turning 16.

### ***Low pay and poor conditions for children who contract their services***

#### Minimum Wage and Remuneration Amendment Bill

This is private member's Bill introduced by Labour MP, Dariel Fenton, to extend the minimum wage to persons working under a contract for services.

People who are engaged as contractors have few of the protections of employees. While the Bill would improve the position of adults as well as children, it is well established that much poorly paid part-time work is undertaken by children as contractors (especially delivery work, gardening and piece work in the garment industry). Caritas recently surveyed 30 young people aged 10 to 16 years who worked delivering leaflets and newspapers<sup>2</sup>. There is no minimum wage for

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<sup>2</sup> *Delivering the Goods*: Responses to a survey of newspaper and leaflet delivery workers aged 1- to 16 years Caritas Aotearoa New Zealand 2006.

children under 16 years and some young people were earning less than \$2 per hour. Delivery workers are usually employed under a contract and they are denied some of the special protections for young workers set out in the Health and Safety in Employment Regulations 1995. The survey showed that some young delivery persons had suffered cycle accidents, attacks or threats from dogs, and sexual harassment as well as the strain and discomfort from carrying heavy loads. Delivery work often entails work at asocial hours and in uncomfortable weather conditions.

During debate on the Bill the Committee was advised that there had been an increase in the number of self-employed and home workers including pizza and pamphlet delivery work, gardening, lawn mowing or home maintenance work. Some outworkers are trying to stretch the family income by taking in work as clothing manufacture, telephone sales, computer- based work or childcare.

The Bill was opposed by some members of the Committee on the grounds that it would impose too great a burden in terms of compliance costs on firms that enter into contracts for services. The Committee which reported back on the Bill in September could not reach agreement and therefore could not make a recommendation that the Bill be passed. Although the Bill did not progress it at least highlighted the low pay and oppressive conditions experienced by people who contract their services and, particularly, young workers..

### ***Children and electro-convulsive therapy (ECT)***

Petition of Dr Helen Smith

Select Committees also report on petitions. The Health Select Committee in November 2007 considered the use of ECT and whether it should ever be administered to children. The report discloses that there are no specific legal controls on the use of ECT and that the Royal Australian and New Zealand College of Psychiatrists has no professional standards or guidelines on its use. ECT is frequently administered without a patient's consent where the patient is deemed to lack the capacity.

The Committee recommended to government that ECT should only be used as a treatment of last resort when all other options had been considered. Some of the Committee considered that it should not ever be given to children and young people but the majority proposed that it only be given to children where, in the opinion of the certifying clinician, there is no other option available. .

### **Court decision**

#### ***Unfair expulsion of student from school***

**J v Lynfield College Justice Keane, Auckland High Court 7 July 2007**

The Ministry of Education 2006 statistics on school exclusions show that:

- the number of students stood down from school has been steadily increasing from 16,931 (24 per 1000 students) in 2000, to 22,467 (31 per 1000 students) in 2006;
- Maori students (56 per 1000) and Pasifika students (42 per 1000) are stood down at a much greater rate than NZ European students (23 per 1000) and the over-representation has increased steadily over the last three years;
- Suspension of students increased from 4898 students in 2003 to 5008 in 2006 although the 2006 figure showed a small reduction from that in 2005 and the rate per 1000 students has dropped from 2003;
- Nearly 75% of schools (one third of secondary schools) suspended no students. Seven schools suspended more than 40 students in 2006 and 65 schools suspended between 20 and 40 students in that year;
- The suspension rate for Maori students (15 per 1000 students) and Pasifika students (10 per 1000 students) is respectively nearly four times (and two and a half times) the rate for NZ European students and the differential has in both cases increased over the last six years;
- The main ground for suspension was continual disobedience (27%).

Despite strong recommendations from successive Children's Commissioners there is no Education Review Tribunal which students who feel they have been unfairly treated can turn to for an independent review. In 2007 the voice of the Chief Ombudsman was added to the chorus of criticism of the unfairness of many school exclusions. In the Annual Report of the Ombudsmen, the late Chief Ombudsman, John Belgrave criticised school boards for being 'too ready to exclude or expel students' without paying attention to natural justice. He added that there was little evidence that some Boards of Trustees (BoTs) were exploring alternative measures that might keep a student in school. He expressed concern that some Board members were ignorant of the principles governing student discipline and spoke of: 'the apparent difficulties in retaining institutional memory in the BoT sector'. The Chief Ombudsman further remarked that individual students and their families should not be adversely affected because of Board of Trustees' ignorance of established principles.

In the few cases that have been taken to the High Court, the Court has highlighted the right of the student and the family to a fair hearing. This long standing principle is now buttressed by s27 New Zealand Bill of Rights Act 1990. In *J v Lynfield College*<sup>3</sup>, the latest in a line of decisions upholding students' rights in relation to school exclusions, Justice Keane was critical of the school for not taking into account J's previous good conduct at school, the fact that over a short period he had lost one good friend by drowning and two other friends in a motor accident. He had also been bullied at school.

Justice Keane quoted the words of Lord Justice Hobhouse in an English case<sup>4</sup>:

"Permanent exclusion from the school is the ultimate disciplinary sanction ... It prefers the interests of the school, i.e. the education of the pupil body, over those of the excluded individual. Typically it is, so far as the school is concerned,

<sup>3</sup> 7 June 2007, Keane J, Auckland High Court CIV 2007-404-002684

<sup>4</sup> *In R (on the application of L) v Governor of J School* [2003] 1 All ER 1012, 1025 (HL) at para [34]

tantamount to an admission of defeat and, so far as the undisciplined pupil is concerned, merely an aggravation of his problems. It involves a final termination of the school-pupil relationship”.

In another English case<sup>5</sup>, the judge likened the severity of the consequences of exclusion from school to those of facing a criminal charge. Exclusion from school has just as serious consequences as dismissal from one’s employment but, whereas there are a range of accessible remedies available to people who are wrongfully dismissed, the only remedy by which exclusion from school can be challenged is by complaint to the Ombudsmen or by an application to the High Court for judicial review. Judicial review is beyond the means of nearly all students and most parents and the lack of an accessible remedy is a serious injustice to the students and families involved.

The *Lynfield College* case is important because it clarifies that the student and the parents must be notified in advance that the principal is contemplating standing down or suspending a student. They must be given the opportunity to be heard. Justice Keane observed that there is a need for there to be a respectful dialogue between the student, the parents, the principal and the Board and that, if the student denies the alleged misbehaviour, the parents should be invited to be present before an admission is sought from the student. The decision stresses that the principal and the Board must look carefully at the student’s previous behaviour and the possible reasons for any sudden regression in behaviour. Justice Keane pressed the point made in earlier cases that a Board of Trustees cannot merely rubber stamp the school principal’s decision to suspend a student, but must satisfy itself as to disputed facts and examine a student’s school history.

### **Changing judicial attitudes towards children and their rights**

Justice Baragwanath, an experienced High Court Judge, has long shown an understanding of children and their rights. In a 2003 decision<sup>6</sup> he referred to: “an unexpressed sentiment that, like chattels and realty, ‘children’ are things of the parents. Nothing could be further from the truth. Such attitude loses sight of the fact that [the paramountcy principle] puts the children’s interests ahead of the parents’ [interests]. [Children] did not ask to be born; and those who are responsible for their birth thereby acquire responsibilities owed to them: not rights over them. The fact that children have rights over their children vis-a-vis others is wholly beside the present point. The latter rights exist in the interests of the child, not of the parent, just as the powers of a trustee or a Judge are conferred for others’ benefit....

For a tendency towards that state of affairs the mind-set of previous attitudes within the law has much to answer. The perception of ‘custody’ as a right of the parent rather than a duty as ‘custos’ or protector of the child has distorted recognition of the child-parent relationships that, by ties of blood and sentiment,

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<sup>5</sup> *R v Governing Body of Dunraven School, ex parte B* [2000] LGR 494, 499 per Sedley LJ

<sup>6</sup> *L v A* (2003) 23 FRNZ 583 at ???

of their nature survive the parent-parent decision of those who have created them to lead separate lives. It seems even to have survived the modern Family Court parlance of 'primary care' for custody and 'shared care' or 'contact' for access."

In a decision in relation the rights of children of overstayers<sup>7</sup> Justice Baragwanath referred to the Ministry of Social Development's *New Zealand Agenda for Children* (2002) and commented:

"[Executive] policy is that nowadays the interests of children should not be identified with those of their parents but should be respected as giving rise to individual rights"

There are many other indications that the New Zealand judiciary are moving towards a reformulation of the nature of the parent/child relationship and a recognition of children's independent rights. Under this new approach:

- Parents are viewed as having responsibilities for their children rather than rights over their children;
- Any rights parents have over their children are given to them in trust to enable them to carry out their responsibilities to protect and care for the child;
- When public officials make decisions affecting children, the child's rights should not be merged into the rights of the parents but should be recognised as individual rights belonging to the child.

There are many other indications that the judiciary is embracing the concept of children's independent rights and in 2007 the Principal Youth Court Judge, Andrew Becroft and the Principal Family Court Judge, Peter Boshier have both been staunch advocates for the rights of children.

### **Government announcements**

#### ***Government will act promptly on Law Commission's recommendations***

The Prime Minister, Helen Clark, recently gave an assurance that law reform proposals put forward by the Law Commission would henceforth be considered by government in a timely fashion, and generally should result in legislation being introduced expeditiously. Progress with implementation of the Commission's recommendations will be reviewed annually by Cabinet<sup>8</sup>.

This is heartening news for those who have been pressing for years for major reform of the Adoption Act 1955. The Act is out of tune with modern social thinking and in 2007 has been described as 'an embarrassment'<sup>9</sup> and as well overdue for reform'.<sup>10</sup> The Law Commission in its 2000 report *Adoption and its Alternatives: A*

<sup>7</sup> *Ding v Minister of Immigration* (2006) 25 FRNZ 586

<sup>8</sup> Address by Prime Minister at launch of *Reflections of the New Zealand Law Commission: Papers from the 20th Anniversary Seminar* 24 July 2007: see also Cabinet Office Circular CO (07) 04

<sup>9</sup> Professor Mark Henaghan in 'Adoption – time for changes' (2006) NZFLJ 131.133

<sup>10</sup> Judge Fraser in *Re Adoption of HT*, 19 September 2007, Palmerston North Family Court FAM 2006-054-501 at para [6]

*different approach and a new framework*<sup>11</sup> provided a blueprint for adoption reform most of which the government appears to support but, for unexplained reasons, adoption reform has since been accorded low priority by the Ministry of Justice and politicians.

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<sup>11</sup> NZLC R65 September 2000