

28 February 2006

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

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1. This submission is made by Action for Children and Youth Aotearoa Incorporated (ACYA).¹ ACYA also intends to make an oral submission.

2. ACYA is a coalition of non-governmental organizations, families and individuals whose purpose is to promote the well-being of children and young people in Aotearoa New Zealand through:
 - education and advocacy on the rights of children and young people;
 - encouraging the government to act on the recommendations of the United Nations Committee on the Rights of the Child; and
 - promoting opportunities for the voice and participation of children and young people.

In 2003, ACYA produced and published *Children and Youth in Aotearoa 2003*, the New Zealand NGO Report on New Zealand's implementation of the UN Convention on the Rights of the Child (NGO Report). The NGO Report was presented to the UN Committee on the Rights of the Child in Geneva in June 2003, accompanied by a video funded by ACYA and produced by New Zealand children called *Whakarongo Mai / Listen Up*.

¹ This submission has been prepared by the ACYA Committee for ACYA. The views expressed may not represent the views of each member of ACYA.

3. ACYA submits that section 59 of the Crimes Act 1961 should be repealed. We also submit that the right of children to be protected from all forms of violence, including physical punishment, should be supported and enhanced by government through numerous measures. Such measures should include provision of appropriate support for families as well as an extensive public/parent education campaign on the reasons behind the repeal of section 59 and on alternative forms of discipline for children. Our position is based on each of the three functions of ACYA set out above.

4. ACYA submits that section 59 violates the human rights of children. New Zealand, through its ratification of numerous human rights treaties, has undertaken, in the international sphere, to promote and protect the rights of some of its most vulnerable citizens. In terms of the issue of corporal punishment, New Zealand has undertaken international obligations under the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN Convention Against Torture (CAT), and the UN Convention on the Rights of the Child (UNCROC). The rights contained in these treaties are to be extended to “all members of the human family”.²

5. The retention of, or possible amendment to, section 59 is a violation of New Zealand’s international legal obligations for a number of reasons.

6. First, the principles of dignity, non-discrimination and equality form the cornerstone of the framework of international human rights law. The defence of ‘reasonable chastisement’ provided for in section 59 is a violation of the fundamental human rights principles of non-discrimination and equality.³ It explicitly discriminates against child victims of assault by providing a defence to the perpetrator/parent when a similar defence is not available to other perpetrators of assault as between adults or even in terms of animal protection legislation. Furthermore, the definition of assault as contained in section 196 of the Crimes Act 1961, as it relates to an adult, can constitute the mere apprehension of “force”

² Preambles to, e.g., ICCPR, ICESCR, UNCAT, UNCROC,

³ Art.2 of , inter alia, ICCPR, ICESCR, UNCROC

whereas the determination of assault in relation to a child can only be satisfied if he or she has been subjected to unreasonable force.

7. These differences in the protection against assault afforded to children do not appear to be justifiable. National and international law require that in order for differential treatment to be legitimate, and therefore non-discriminatory, such treatment should have (a) an important and significant objective; and (b) be rational and proportionate.⁴ Although arguments for the retention of parental corporal punishment such as recognising the right to respect for family life, the importance of the role of the family unit in securing the rights of the child, and the consideration of parental discipline as a matter falling outside of the arena of the public sphere, the importance and significance of the objective of section 59 has not been identified. Even if such an objective was identified, there would still have to be a rational connection between s 59 and any such objectives. Finally, the limitations flowing from the objective would have to be proportionate, they would have to entail minimal impairment of children's rights and freedoms, specifically the right to be free from cruel, inhuman and degrading punishment. Much of the current focus on "reasonable force", whether it be by the Courts or those seeking simply to amend s 59 overlooks the basic legitimacy of parental physical punishment in terms of non-discrimination and equality.⁵
8. Second, the retention or amendment of section 59 is also inconsistent with New Zealand's international obligations under UNCROC. Article 3(1) of the Convention contains one of the Guiding Principles of that treaty with its provisions that,

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

⁴ See eg, *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754 (CA); *R v Oakes* [1986] 1 SCR 103, 1986 CanLII 46 (SCC); European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S., p. 221, no. 2889

⁵ See, *infra* note 9.

9. Article 3(2) also recognises the rights and duties of parents as does Article 5 with its recognition of appropriate parental direction and guidance in the exercise of the rights of their children. However, Article 5 has been interpreted by the Committee on the Rights of the Child as providing “*no place for corporal punishment within the margin of discretion accorded in article 5 to parents in the exercise of their responsibilities.*”⁶

10. Article 5 must be read in conjunction with Article 19’s directive that:

- a. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
- b. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

11. Section 59 is inconsistent with Article 19, which has been consistently interpreted by the UN Committee on the Rights of the Child to prohibit *all* corporal punishment of children. These comments have been directly aimed at New Zealand in several instances. In 1997 and again in October 2003, the UN Committee, in its Concluding Observations on New Zealand’s progress in implementing UNCROC, recommended that section 59 be repealed. In 2003, the Committee stated:

29. [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

⁶ *Committee on the Rights of the Child, (1995), Summary Record of the 205th Meeting, U.N. GAOR, Comm. on the Rts. of the Child, 8th Sess., 205th mtg., U.N. Doc. CRC/C/SR.205.*

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.

30. The Committee recommends that the State party:

- a. Amend legislation to prohibit corporal punishment in the home;
- b. 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."

12. The views of the Committee on the Rights of the Child go further those of the UN Human Rights Committee which has stated that the prohibition of torture or cruel, inhuman and degrading treatment or punishment contained in Article 7 of the International Covenant on Civil and Political Rights:

"...must extend to corporal punishment including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasise in this regard that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions. "

The UN Human Rights Committee has also stated that the provisions of Article 7 extend to individuals acting in a private capacity.

13. These comments are particularly relevant to New Zealand, as the New Zealand *Bill of Rights Act 1990* affirms New Zealand's commitment to the International Covenant on Civil and Political Rights and declares that: "***Everyone*** has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment" (emphasis added).

14. In May 2004, the UN Committee Against Torture, in its Concluding Observations on New Zealand's implementation of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, again expressed concern regarding section 59. The Committee reiterated the previous recommendations made by the Children's Rights Committee that New Zealand repeal the section and promote non-violent forms of discipline.
15. Taken together, these comments by various UN organisations make it clear that, just like adults, children in New Zealand have a human right to be protected from physical assault by anyone. In particular, ACYA encourages the Government to fulfil its UNCROC obligations and act on the recommendations of the Committee on the Rights of the Child.
16. It has been argued that, contrary to the child's right to be protected from assault, parents have a right to discipline their children and that such a right must include the ability to physically punish a child within "reasonable" limits. It is this view that is behind section 59. However, this view is changing with time, just as community and legislative attitudes towards slavery, the status of women and the treatment of animals have changed over time.
17. This change in attitude towards appropriate discipline for children is therefore already occurring on individual, community and national levels worldwide. It is partly based on international research showing a number of negative outcomes associated with physical punishment such as: decreased moral internalisation; increased child aggression, increased antisocial behaviour as a child; decreased quality of parent/child relationship; decreased child mental health; increased risk of child abuse; increased aggression as an adult; increased criminal and antisocial behaviours as an adult; decreased mental health as an adult; and increased risk of abusing one's own children as an adult.⁷

⁷ Gershoff, E.T. (2002), Corporal punishment by parents and associated child behaviours and experiences: a meta-analytic and theoretical review *Psychological Bulletin* 128(4), 539-579.

18. The fact that this change is already occurring also reflects an international progression towards a more humanitarian, compassionate and civilised society in which all individuals are appreciated, valued and respected.
19. This ongoing change in society's views on appropriate child-rearing practices should be supported and encouraged both within New Zealand and on an international scale. New Zealand can do this by repealing section 59, and, importantly, by accompanying repeal with an extensive education campaign on the harms of physical punishment and on other non-violent means of disciplining children. The education campaign should also be directed at allaying unreasonable fears that parents may be prosecuted for attempting to restrain or detain a child as part of their everyday child-care duties.⁸
20. Further, the government must commit to addressing the underlying causes of stress in families, including child poverty and adequate access to child care. By coupling repeal and an education campaign with appropriate support for families, New Zealand can join other nations in leading the way towards a future in which children are universally protected and respected.
21. Despite the ongoing change in attitudes to child discipline, there are still many parents in New Zealand who physically discipline their children. To protect them and their perceived "right" to do so, and to counteract significant inconsistencies in the interpretation and application of section 59 by the Courts,⁹ the Select Committee is being urged by some to consider amendment of section 59 rather than outright repeal. The amendments would attempt to define what sorts of

⁸ In particular, any education campaign should make clear that repeal of section 59 does not interfere with the common law rights and powers that parents and carers have (such as the right to hold or restrain a child as part of normal child care responsibilities – eg bathing, nappy changing, putting to bed etc – and the right to detain or restrain a child in a reasonable way as a means of protecting the child from danger or harm – eg grabbing a child who is about to run onto the road or restraining a child from touching a boiling pot or heater).

⁹ For example, a section 59 defence has been successfully raised in cases where parents have been prosecuted for hitting their child with a bamboo stick, hitting their child with a belt, hitting their child with a hosepipe, hitting their child with a piece of wood, and chaining their child in metal chains to prevent them leaving the house. These acquittals occurred in jury trials, where juries have found that such actions were reasonable, and therefore lawful means of domestic discipline towards children. See ACYA (2003), *Case Summaries: Parental Corporal Punishment of Children in New Zealand for the UN Committee on the Rights of the Child*. August 2003.

physical punishment are “reasonable” and therefore would continue to provide a defence to parents who injure their children in the course of “punishing” them.

22. ACYA does not support amendment of section 59 instead of repeal. Amending section 59 would continue to allow children to be assaulted and their rights to be violated, and in doing so it would not assist New Zealand in moving towards a society in which children are protected from physical harm and in which their rights are respected.
23. Further, no attempt to define “reasonable” force can cover every situation in which physical punishment might cause serious physical, mental or emotional harm to a child. For example, excluding the use of an instrument to hit a child from the definition of “reasonable force” would mean that children will continue to be hit with hands, fists, feet, arms, legs, etc, each of which could seriously harm a child. Further, defining where on a child’s body the child may be hit would leave children vulnerable to serious injury through being hit on other parts of their bodies.
24. ACYA submits that when considering whether to amend or repeal section 59, New Zealand should be guided most by the views and experiences of children.
25. Young people in New Zealand are overwhelmingly opposed to physical punishment. This was a strong theme in *Whakarongo Mai / Listen Up* and in the responses from children consulted by government in the development of the *Agenda for Children*, which outlines the government’s overarching policy for children.¹⁰
26. More recently, research on New Zealand children’s experiences of physical punishment indicates that children view physical punishment as a negative and ineffective experience, which engenders resentment and fear. Overwhelmingly, the majority of children in the study advised that physical punishment was the

¹⁰ Barwick, H., Gray, A. (2001). *Analysis of submissions by children and young people to the Agenda for Children: Children’s Discussion Pack*. August 2001. Wellington: Ministry of Social Development.

worst thing parents could do if children transgressed. Rather, the children in this study were very clear that the best things parents can do when children transgress is to stop being angry and listen; they wanted to be talked to and listened to, to be given an explanation and assisted to understand what they might have done wrong, before any punishment was administered.¹¹

27. Finally, and most specifically, at the *Children Call Symposium* in 2004, arranged by the Commission for Children, children specifically called on government to repeal section 59 and on non-government organizations, churches and communities to advocate for its repeal.¹²

28. For all of the above reasons, ACYA therefore submits that section 59 should be repealed.

¹¹ Dobbs, T. (2005). *Insights: Children and young people speak out about family discipline*. Wellington: Save the Children New Zealand.

¹² Office of Children's Commissioner (2004). *Proceedings of Children Call Symposium*, Wellington 11-12 February 2004.