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TO: Family First
FROM: Chen Palmer New Zealand Public and Employment Law Specialists
DATE: 17 January 2018
SUBJECT: **Legal analysis of section 59 Crimes Act – the anti-smacking legislation –
Update of previous opinion**

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INSTRUCTION

- 1 In 2014 you instructed us to determine whether statements made by politicians that “good parents” will not be criminalised for lightly smacking a child are consistent with the amendments to section 59 of the Crimes Act 1961 and the cases which you provided to us. As agreed, we also researched other relevant cases and analysed a selection of the key cases from the preceding three years.
- 2 You have now instructed us to review relevant case law since our previous opinion and also to consider other cases which may since have become available.
- 3 Our legal analysis is set out below as follows:
 - (a) In Part 1 we set out the legislative history of section 59, highlighting some of the statements made by politicians during the various stages of the parliamentary debate of the Crimes (Substituted Section 59) Amendment Bill (the Bill), which suggest that it was Parliament’s intention that “good parents” would not be criminalised for lightly smacking a child.

(b) In Part 2 we analyse the legal effect of the amended section 59 and how that section has been applied by the Courts.

4 The cases we have analysed, and which are referred to in our legal analysis, are as follows:

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- (a) *T v NZ Police* [2016] NZHC 1773
- (b) *DC v R* [2013] NZCA 255;
- (c) *New Zealand Police v T* CRI-2012-070-005867, 30 May 2013;
- (d) *H v R* [2012] NZCA 198;
- (e) *New Zealand Police v Lorraine Cummins* DC Waitakere CRI-2010-090-002779, 22 July 2010; and
- (f) *New Zealand Police v Graham Macdonald Young* DC Porirua CRI-2007-091-004295, 19 December 2007.

Other relevant case law

- (a) *New Zealand Police v XX* CRI-2012-032-002626, 14 December 2012;
- (b) *Mason v R* [2010] NZSC 129;
- (c) *New Zealand Police v XX* DC Lower Hutt CRI-2012-032-002626, 14 December 2012;
- (d) *L F H v N J M* [2012] NZFC 3350; and
- (e) *M T A v B L P* FC Hamilton FAM-2009-019-00175/176, 20 May 2009.

5 **In 2017 we were unable to obtain copies of a number of the District Court cases which were referred to in the media reports which you provided to us.** Many of the cases are decided at District Court level, are not appealed and are not electronically reported. Even when specifically requested they were not made available to us. When we contacted the courts we were given various reasons for this. In some cases the name of the defendant was not reported, in other cases, the judgment had not been transcribed and the “recording had been lost”. In one case the District Court Judge declined to provide us with a copy of the judgment or sentencing notes on the basis that “the case was decided on its own facts and had no precedential value.”

6 **While District Court cases may have limited precedential value, the difficulty of obtaining copies of judgments at this level prevents a comprehensive analysis of how the relevant law is being interpreted at the level which most affects parents. Such analysis is desirable where amendment or clarification of the law is sought.**

7 You have advised that the Police are not able to provide an analysis of how many parents are prosecuted under this section, how many are discharged without conviction and why, and how many are convicted. The absence of this key data is a further impediment to an analysis of whether the law is working as Parliament intended.

8 However what we were able to access confirmed our conclusions based on the earlier cases up to 2014.

SUMMARY

- 9 In our opinion, statements made by politicians to the effect that “good parents” will not be criminalised for lightly smacking their child appear to be **inconsistent** with the legal effect of the amendments to section 59 and the cases we have analysed, which confirm our interpretation of section 59.
- 10 The effect of the repeal and replacement of section 59 in 2007 is that it became illegal for parents to use **any** force against their children “for the purposes of correction”. That is, parents can now only use reasonable force for **non-disciplinary** purposes.
- 11 Therefore, whether or not section 59 will protect a parent in using force against their child depends on the **subjective purpose** for which the parent is undertaking the action. The problem, which makes the application of section 59 difficult, is that parents act for a range of subjective purposes and sometimes it is hard to separate them.
- 12 While it has always been illegal for parents to use force against (i.e assault) their children, section 59 previously provided a defence for parents using reasonable force for the purposes of correction (i.e. discipline). Following the amendment in 2007, using reasonable force will only be justified in the limited circumstances prescribed in the defences set out in section 59(1)(a) to (d), and even then, not where force is used for the purposes of correction. Therefore, the amendments to section 59 have criminalised parents who smack their children, even if only lightly, for the purposes of correction or in any circumstances outside those prescribed in section 59(1).
- 13 An analysis of section 59 and the relevant case law shows that non-lawyers, including parents and the Police, struggle to understand and apply section 59. The cases also demonstrate that even lawyers and judges struggle to apply section 59 correctly, with examples of cases going to the District Court, the High Court and then being overturned by the Court of Appeal, as well as equivocal guilty pleas¹ being accepted.²
- 14 Finally, subsection (4) is a significant aspect of s 59, yet there is little to no guidance available as to how the Police *should* exercise its discretion, nor information available as to how it *has* and *does*. Consequently, it is worth considering making a request to try to obtain data in respect of this. While the type of information requested would need to be redacted by the Police before it could be disclosed, we do not see any reason why it could not otherwise be provided.

PART 1: PARLIAMENTARY INTENTION

Background – Legislative history

- 15 Prior to the enactment of the Crimes (Substituted Section 59) Amendment Act 2007, section 59 provided as follows:

59 Domestic discipline

- (1) Every parent of a child and, subject to subsection (3) of this section, every person in the place of the parent of a child **is justified in using force by way of correction** towards the child, if the force used is **reasonable** in the circumstances.

¹ An “equivocal guilty plea” is when a defendant pleads guilty but offers arguments in mitigation which contradict or put into question the guilty plea.

² See discussion in respect of *NZ Police v XX* below.

- (2) The reasonableness of the force used is a question of fact.
- (3) Nothing in subsection (1) of this section justifies the use of force towards a child in contravention of section 139A of the Education Act 1989.

(Emphasis added)

- 16 Under section 194(1)(a) of the Crimes Act, it was (and still is) an offence, for which a person is liable to up to two years in prison, to assault a child under the age of 14 years. "Assault" is defined in section 2 of the Crimes Act as:

...the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has or causes the other to believe on reasonable grounds that he or she has present ability to effect his or her purpose.

- 17 Therefore, section 59 provided a statutory defence for parents and every person in the place of a parent who used reasonable force against their children for the purpose of "correction". In other words, it was illegal for a parent or person in the place of a parent to use any force, other than reasonable force by way of correction, against their child.

Repeal and replacement of section 59

- 18 In 2007, the Crimes (Substituted Section 59) Amendment Act 2007 was passed repealing and replacing section 59.

- 19 The Bill was introduced to Parliament (as the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill) on 9 June 2005. The stated purpose of the Bill was "to stop force, and associated violence, being inflicted on children in the context of correction and discipline." The Bill, as introduced, proposed a complete repeal of section 59.

- 20 In introducing the Bill at its First Reading, then Green MP Sue Bradford stated:³

What I am **not** doing is proposing a new law that might, for example, **make it a crime to lightly smack a child** or to physically restrain a child when such restraint is manifestly necessary...I **am not seeking in any way to criminalise ordinary parents**...

...The aim of this repeal is not to subject parents to prosecution for **trivial assault**.

- 21 Other MPs during the Bill's first reading also said that that the aim of the Bill was not to "criminalise" parents who smack their children. For example:

- (a) Steve Chadwick – "The Bill does not criminalise parents who smack their children..."⁴
- (b) Rod Donald – "Repeal of Section 59 is not about criminalising parents or introducing a new law against smacking."⁵

³ Sue Bradford speaking during the first reading of the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill (27 July 2005) 627 NZPD 22086 (emphasis added).

⁴ (27 July 2005) 627 NZPD 22092

⁵ (27 July 2005) 627 NZPD 22098

- (c) Martin Gallagher, quoting Dr Cindy Kiro, then Children’s Commissioner, and Paul Baigent, then Chief Executive of Plunket – “We do not believe repeal would criminalise parents who occasionally use physical punishment.”⁶

Select Committee

- 22 After its first reading, the Bill was referred to the Justice and Electoral Select Committee on 27 July 2005. The Select Committee received 1,718 submissions on the Bill, the majority of which (1,471) came from individuals. The Select Committee also received advice from the Ministry of Justice, the Ministry of Social Development, the New Zealand Police, the Department of Child, Youth and Family Services, and the Law Commission.
- 23 In particular, the Law Commission provided the Select Committee with advice on legally effective options for the reform of section 59, on the basis that the straight repeal of section 59 was not acceptable to the Select Committee. The Law Commission recommended two further options to the Select Committee:
- (a) Under the first option, parents would be justified in using reasonable force for specified **non-disciplinary purposes** (i.e. **not for “correction”**), thus **protecting “good parenting” interventions**.⁷ This option was the one ultimately recommended by the Select Committee.
- (b) The second option envisaged a continuation of the previous position under section 59, by allowing parents to use reasonable force against children for correctional purposes.⁸
- 24 Although the Select Committee was unable to reach consensus, it recommended by a majority that the previous section 59 be repealed and replaced with a new section 59 as follows:
- 59 Parental control**
- (1) Every parent of a child and every person in the place of a parent of the child is justified in using force if the force used is reasonable in the circumstances and is for the purpose of—
- (a) preventing or minimising harm to the child or another person; or
- (b) preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence; or
- (c) preventing the child from engaging or continuing to engage in offensive or disruptive behaviour; or
- (d) performing the normal daily tasks that are incidental to good care and parenting.
- (2) Nothing in subsection (1) or in any rule of common law justifies the use of force for the purpose of correction.
- (3) Subsection (2) prevails over subsection (1).

⁶ (27 July 2005) 627 NZPD 22099.

⁷ Law Commission, *Section 59 Crimes Act 1961 Amendment: Options for Consideration*, Advice to the Justice and Electoral Committee, 8 November 2006 at 10 (emphasis added).

⁸ Law Commission, *Section 59 Crimes Act 1961 Amendment: Options for Consideration*, Advice to the Justice and Electoral Committee, 8 November 2006 at 17.

- 25 In responding to concerns that “good parents” would be criminalised for lightly smacking their children as a result of the proposed law reform, the Select Committee noted:⁹

As with any other offence, the prosecution of parents and every person in the place of a parent for the use of force against children **for the purpose of correction** will be a matter for police discretion...

...The police are obliged to investigate any reports they receive, but such reports may not require significant investigation, other than, for example, follow-up with the adult concerned and witnesses. While Police may investigate (or make inquiries about) reports of alleged assault, not all such cases will require prosecution or other action.

There are safeguards in the criminal justice system to minimise the likelihood of parents and every person in the place of a parent being prosecuted for minor acts or physical punishment. Various options other than formal prosecution are available to police, including warnings and cautions...We would not expect prosecutors to bring trifling matters before the court...

...We expect the police and Child, Youth and Family to develop effective operational guidelines and protocols and to maintain a close working relationship...

We consider that there is widespread misunderstanding about the purpose and possible results of the bill as introduced. **We do not consider that the repeal of section 59 will lead to the prosecution of large numbers of parents and persons in the place of parents in New Zealand...**We note that there are several potential offences directly related to the care of children that are rarely prosecuted¹⁰...We consider that logic dictates the police will adopt a similar approach to parents who use minor physical discipline following the changes to section 59.

- 26 These comments suggest that the majority of the Select Committee thought that parents would only be “criminalised” if they were prosecuted, and the MPs appear to be referring to correction under section 59(2) and not “preventing offensive or disruptive behaviour under section 59(1)(c), or “good care and parenting” under section 59(1)(d).

- 27 The National Party minority expressed concerns that the proposed law reform was too uncertain and unclear for parents to regulate their conduct appropriately. In highlighting the importance of certainty and clarity of law, the National Party members of the Committee noted that:¹¹

The repeal of section 59 but retention of some protection for parents by way of guidelines for practise or commentary on this bill are insufficiently precise for parents to have confidence that they live within the law.

- 28 The Select Committee’s amendments were agreed to at the Bill’s second reading, at which stage the Bill’s name was changed to the Crimes (Substituted Section 59) Amendment Bill.

Amendment

- 29 During the Committee stage of the Bill, an amendment was proposed by Hon Peter Dunne, to include the following subsection:

(4) To avoid doubt, it is affirmed that the Police have the discretion not to prosecute complaints against a parent of a child or person in the place of a

⁹ Select Committee Report on the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill, 271-2, 20 November 2006, at 5-7 (emphasis added).

¹⁰ The Select Committee gave the example of a child being sent to their bedroom, which technically constitutes kidnapping under section 209 of the Crimes Act.

¹¹ Select Committee Report on the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill, 271-2, 20 November 2006, at 8.

parent of a child in relation to an offence involving the use of force against a child, where the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution.

- 30 This amendment was expressed to be a “compromise” which would ensure that:¹²

We will not see the sort of situation tolerated where a horse crop or some other implement can be used to assault children, and where children can live in mortal fear of their own lives. **But, equally, we will not see a situation where parents who go about the good and normal activity of parenting will be compromised or convicted of any criminal offence.**

- 31 It is not clear whether Mr Dunne was referring to “good care and parenting” under section 59(1)(d) or “correction” under section 59(2).

- 32 Hon Peter Dunne’s amendment was agreed to with 117 votes in favour, and 3 votes against.

Third Reading

- 33 The Bill was read a third time on 16 May 2007. Statements made by politicians during the Third Reading reveal what the MPs understood the effect of the law reform to be. For example, the Hon Chester Borrows (as he now is) stated:¹³

What the new bill does is threefold. First, it provides in law a counter to current police practice in that it **confers upon an individual officer discretion**—so it will be case by case—which has, up until now, been removed by the police family violence policy, which is to prosecute on every occasion. Second, **it provides a defence to parents who use reasonable force for the purpose of correction in the same way as section 59 does presently, though in a more limited form.** It does this by allowing a court to read widely the terms “inconsequential” and “not in the public interest”. **This means that parents should not be held liable for what we would call light smacking**—no parent wishes to smack a child in more than an inconsequential manner, in any event. Third, for the purpose of clarity, it should be explained that a narrow reading of the law as it is now written would see the court hold that the amendment acts only as a guide to police. This narrow reading would be inconsistent with the court’s usual interpretation in such matters. It is important to state these points now, because parliamentary debates form a secondary source in statutory interpretation, so in making these points today, in the way I am making them now, we provide another defence to parents by way **of the expectation that the amendment will be used in this way.**

Those parents who are worried that this legislation will criminalise lightly smacking a child can rest assured that Parliament’s intention is that this should not be the case, and if at some future time they find themselves on such a charge, they should advise counsel to research *Hansard* and cite these comments in their defence.

- 34 The Bill received royal assent on 21 May 2007. The Crimes (Substituted Section 59) Amendment Act 2007 came into force one month later, on 21 June 2007.

- 35 We note, that while the courts will look to *Hansard* as an aid to interpreting legislation¹⁴, as suggested by the Hon Chester Borrows (as he now is), the courts will only refer to extrinsic materials such as *Hansard* where the meaning of the legislation is not clear on its face¹⁵.

¹² Hon Peter Dunne speaking in support of the amendment moved in his name during the debate of the Crimes (Substituted Section 59) Amendment Bill, In Committee (2 May 2007) 638 NZPD 8852 (emphasis added).

¹³ (16 May 2007) 639 NZPD 9287 (emphasis added).

¹⁴ *Art Deco Society (Auckland) Incorporated v Auckland City Council* [2006] NZRMA 49 (HC) at [34].

¹⁵ *R v A and B* [2003] 1 NZLR 1 (CA) at [10] (per Williams J)

- 36 However, the Court of Appeal in *Terranova Homes & Care Limited v Service and Food Workers Union Nga Ringa Tota Incorporated* said in relation to Parliament's amendment of the Equal Pay Act:¹⁶

To the extent any inconsistency does arise, it results not so much from the provisions of the Acts themselves but rather from the parliamentary materials relating to the 1990 legislation and its repeal. This somewhat lessens the importance of the inconsistency.

- 37 Similarly, it is difficult to accord much weight to the argument in this case that section 59 should be interpreted consistently with the politicians' comments reflected in *Hansard* because although section 59 is complicated to apply in practice (as discussed further below) the meaning of section 59, and section 59(2) in particular, is clear from the words of the section.

Interpreting Parliament's intention – a definitional issue

- 38 The problem with interpreting Parliament's intention as expressed by the politicians during the various stages of the debate on the Bill is that much depends on the definition of the words used by the politicians - to "criminalise" and "good parents".

"Criminalise"

- 39 As noted above, the statements made by politicians seem to suggest that by "criminalise" the politicians meant "prosecute". However, according to the Oxford Dictionary, "criminalise" is defined as "[turning] (someone) into a criminal by making their activities illegal". Based on this definition, the mere act of making a particular behaviour illegal will criminalise anyone who engages in that behaviour. It does not require the person to be prosecuted for, or convicted of, an offence. A person only needs to be liable for prosecution to be "criminalised".
- 40 Therefore, the definition of "criminalise" includes anyone who engages in criminal conduct (i.e. where their behaviour constitutes an offence), as well as those who are formally charged and prosecuted, and those who are ultimately convicted for an offence.
- 41 Even where a person is not convicted, or ultimately has a conviction overturned on appeal, that person is likely to have suffered serious consequences as a result of being engaged in a criminal proceeding. For example, in the case of *DC v R*¹⁷ (discussed in more detail in paragraph 55 below), the Court of Appeal commented on the serious consequences of Mr DC's conviction in the District Court, where the subjective purpose of Mr DC's actions in smacking his children was for correction. First, the Court noted that as a result of his conviction, Mr DC lost custody of, and became estranged from, his sons.¹⁸ The Court also noted that it was "inevitable that Mr DC's convictions would have real consequences for his employment."¹⁹ Finally, the Court of Appeal stated:²⁰

In our judgment the consequences of a conviction for Mr DC are out of all proportion to the gravity of offending. His offending lay in his administration of about a dozen smacks in total to his two sons in the two and a half year period covered by the offending. He used his hand, not a weapon. He administered the blows for

¹⁶ [2014] NZCA 516 at [199]

¹⁷ [2013] NZCA 255

¹⁸ At [17] and [53]

¹⁹ At [45]

²⁰ At [48] and [51]

correctional purposes only. He did not participate in gratuitous violence. And what he did had been lawful for most of the boys' lives.

...Our recital of these events is not to be construed as condoning Mr DC's conduct. But it does introduce a degree of perspective and context.

- 42 Even though Mr DC was ultimately discharged without conviction, this did not occur until after an appeal to the Court of Appeal, and in the meantime he suffered the serious consequences of his convictions.
- 43 Similarly, in the case of *H v R*²¹, another case involving an appeal of a conviction and sentence entered in the District Court and confirmed in the High Court (discussed in more detail in paragraph 80 below), the Court of Appeal noted the mitigating factors of the case and the serious consequences H had faced as a result of her conviction:²²

We have considerable sympathy for H. She was dealing with a child with clearly identifiable behavioural problems after an incident which any parent would find very challenging to deal with. She had sought appropriate expert assistance with the child and had utilised a range of non-physical measures to address the child's behaviour. While not condoning the use of physical violence for disciplinary purposes, the actions taken by G at H's request on this occasion were at the lower end of the scale...

The consequences of her conviction have been extremely serious given the nature of her employment. She has lost her employment despite her skills in early childhood education and has not been able to obtain employment since. The appellant has now completed the 300 hours of community work imposed. This is a substantial penalty in itself.

- 44 H's husband (G) had also lost his job by the time of the appeal to the High Court, at which stage the High Court decided that the outcome for G was out of all proportion to his offending:²³

...it was a one-off incident where a poor choice was made in response to a difficult situation; it arose against a background where consistent efforts had been made to cope with the challenges presented; and the loss of his employment was an outcome which was out of all proportion for a first transgression.

- 45 There is no doubt that both H and G's actions had been criminalised by the amendments to section 59, despite the fact that their convictions and sentences were ultimately quashed.

“Good parents”

- 46 There is no statutory or legal definition of what constitutes “parenting” or a “good parent”. The Oxford Dictionary defines “parenting” as “taking care of one's children”. The Collin's Dictionary defines it as “the care and upbringing of a child”. As such, parenting necessarily involves promoting and supporting the development of child, in all aspects of life, from infancy to adulthood.
- 47 “Good care and parenting” is the phrase used in section 59(1)(d). However, part of the confusion around the application of section 59 is distinguishing what constitutes use of force in “performing the normal daily tasks that are incidental to good care and parenting” (section 59(1)(d)) and what constitutes “for the purposes of correction” (section 59(2)). The

²¹ [2012] NZCA 198

²² At [37]

²³ At [24]

test is the subjective purpose of the parent in applying force, and this can be difficult to determine.

- 48 The concept of a “good parent” will mean different things to different people. It is however, generally accepted that “good parents” do not use gratuitous violence or unreasonable force against their children. In particular, as Anderson J noted in a 1989 case decided under the previous section 59, “[i]t is not good parenting to whack kids and beat kids...”²⁴ It is also generally accepted that while parenting necessarily involves discipline, “good parents” will generally use non-physical forms of discipline, and will only use reasonable force against their children in limited and extreme circumstances.

PART 2: LEGAL ANALYSIS OF THE NEW SECTION 59 AND THE CASE LAW

- 49 Section 59 was repealed and replaced by section 5 of the Crimes (Substituted Section 59) Amendment Act 2007. The purpose of the Amendment Act, as stated in section 4 of that Act, is:

To amend the principal Act to make better provision for children to live in a safe and secure environment free from violence **by abolishing the use of parental force for the purpose of correction.**

(Emphasis added)

- 50 Following the amendment in 2007, section 59 now provides as follows:

59 Parental control

- (1) Every parent of a child and every person in the place of a parent of the child is justified in using force if the force used is reasonable in the circumstances and is for the purpose of—
 - (a) preventing or minimising harm to the child or another person; or
 - (b) preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence; or
 - (c) preventing the child from engaging or continuing to engage in offensive or disruptive behaviour; or
 - (d) performing the normal daily tasks that are incidental to good care and parenting.
- (2) Nothing in subsection (1) or in any rule of common law justifies the use of force for the purpose of correction.
- (3) Subsection (2) prevails over subsection (1).
- (4) To avoid doubt, it is affirmed that the Police have the discretion not to prosecute complaints against a parent of a child or person in the place of a parent of a child in relation to an offence involving the use of force against a child, where the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution.

- 51 The legal effect of the amended section 59 is that it is now illegal for parents to use force against their child (even if the force used is reasonable) for **the purposes of correction** or for any other reason outside of the specified circumstances in subsection (1).

²⁴ *Gerrard v The Police* HC Hamilton AP96-89, 6 November 1989, at 3

- 52 Therefore, the starting point in any case involving the use of force by a parent against their child is whether the force was used for the purposes of correction. This requires an examination of the parent's **subjective purpose**. If force was used for the purposes of correction, then the parent will be guilty of an offence and liable for prosecution, regardless of whether the force used was reasonable or not, and whether the case falls within the circumstances prescribed in subsection (1)(a) to (d) or not. This is because section 59(3) says that subsection (2) overrides subsection (1).
- 53 If force was not used for the purposes of correction, the only circumstances in which a parent is justified (under section 59(1)) in using reasonable force against their child are: preventing or minimising harm to the child or another person; preventing the child from engaging or continuing to engage in criminal, offensive or disruptive behaviour; or performing the normal daily tasks that are incidental to good care and parenting. An example of this as an acceptable defence is the case of *New Zealand Police v Lorraine Cummins*. This case and the application of section 59(1) is discussed in more detail at paragraphs 66 to 72.

Criminalisation of the use of force for the purposes of correction

- 54 Case law confirms that the section 59 amendment has criminalised the use of force by a parent against their child for the purposes of correction.
- 55 For example, in the case of *DC v R*²⁵, Mr DC admitted to smacking his two sons on the bottom for the **purposes of correction** from time to time. In this case, Mr DC's actions clearly fell under section 59(2) and therefore constituted assault under the Crimes Act.
- 56 Mr DC had assumed full time care of his two sons after separating from his wife. However, there was a great deal of tension in the household after Mr DC's former wife had returned to live with him and their sons after having had intermittent contact with them for some time. The former wife disagreed with Mr DC's parenting style, which was described by the Court as "a disciplined regime" whereby Mr DC:²⁶
- ...required [the boys'] attendance at school and completion of homework and household chores as a priority to participation in leisure activity, particularly playing computer games or watching television.
- 57 The boys' mother's approach to parenting was quite different – she allowed the boys to do as they wished, including missing school if they did not want to go. As explained by Harrison J, the former wife's presence "upset the family dynamics, setting up conflicting emotional responses from the boys".
- 58 Shortly after the former wife moved out of the house, Mr DC "castigated" his son for rudeness when responding to a direction to complete his homework. The son went to a neighbour's house where his brother was playing, and told the neighbour that his father had assaulted him. The neighbour then called the boys' mother who took the children away, and a complaint was later made to the police. Mr DC denied specific allegations made by his sons, but admitted that from time to time – no more than a dozen times – he had used physical discipline on his sons by smacking them on the bottom, which was "consistent with his own upbringing in the United Kingdom".

²⁵ [2013] NZCA 255

²⁶ At [9]

59 The charges stemming from a range of other more serious allegations of assault made by the boys were dropped when the boys either recanted or accepted innocent explanations for the events. However, Mr DC pleaded guilty to the charges relating to smacking, and was subsequently convicted in the District Court. Mr DC appealed directly to the Court of Appeal, which overturned the conviction and sentence, instead entering a discharge without conviction. The Court of Appeal's judgment notes that Mr DC's admission was intentionally limited and carefully circumscribed to highlight the fact that Mr DC's conduct would not have been criminal before the enactment of the new section 59 on 21 June 2007.²⁷ Harrison J, in giving the Court's reasons, also commented on the nature of the smacking and the gravity of Mr DC's offending as follows:²⁸

We accept that smacking a child occasionally on the bottom would be unwelcome. But any resulting pain would only have been fleeting and moderate given that the smacks were inflicted by hand. Similarly, the Judge's description of a climate of fear with "quite significant mental consequences" seems exaggerated without independent evidence or victim impact reports from the boys themselves.

- 60 This shows that although Mr DC had only "lightly" smacked his sons on the odd occasion, he had nevertheless committed a crime and was not protected by the new section 59. The fact that he was ultimately discharged without conviction at the Court of Appeal does not change the fact that he had broken the law, and thus been "criminalised" for his actions.
- 61 Another example is the case of *New Zealand Police v Graham Macdonald Young*²⁹, in which Mr Young was convicted in the District Court for assaulting his 13 year old daughter. Mr Young had been informed by his daughter's school that his daughter was not at school. Mr Young went to look for his daughter, finding her in a carpark with her 16 year old boyfriend. The summary of facts from the case notes that Mr Young "was frustrated and upset" and that he grabbed his daughter by the arm and walked her to his car parked nearby. As they were driving home, Mr Young tried to get his daughter to explain her behaviour. She refused to say anything, and Mr Young slapped her on the leg with an open hand to try and get her to respond. Mr Young's actions clearly fell within the ambit of section 59(2), as they were "for the purposes of correction".
- 62 On sentencing, Judge Mill noted that Mr Young had gone too far for him to consider entering a discharge without conviction, but that the seriousness of the offence was such that no further penalty was warranted. Mr Young was therefore convicted for his actions in "lightly" smacking his daughter, but was discharged without further penalty.
- 63 A further example is *NZ Police v T*³⁰. Mrs T pleaded guilty to assault on a child. The assault involved smacking one of her children on the hand with a spoon as a form of discipline. Her actions fell within section 59(2) as they were for correction. There were no injuries sustained by the child, and the offence was considered to be at the low level of offending. Mrs T sought a discharge without conviction to avoid the likely effect of a conviction on future immigration applications. There had been an early guilty plea, no previous convictions and the likelihood of reoffending was assessed as low. However a discharge without conviction was not granted by the District Court.³¹ Ultimately Mrs T was

²⁷ At [39].

²⁸ At [40].

²⁹ DC Porirua CRI-2007-091-004295, 19 December 2007.

³⁰ [2016] NZDC 9160, Notes of Judge AC Roberts on Sentencing

³¹ The case was appealed in *T v NZ Police* [2016] NZHC 1773. The District Court judge's finding that he was prevented by Court of Appeal authority from taking into account the effect of a conviction on immigration prospects

criminalised for smacking that was considered to be at the low end of the scale, contrary to the repeated assertions in Parliamentary debates that parents would not be criminalised for “light smacking”.

- 64 Our interpretation of section 59 is also supported by the Family Court’s decision in *M T A v B L P*³². Although this case involved an application for a protection order under the Domestic Violence Act as opposed to a prosecution of a parent for an assault against their child, in the course of the judgment, the Judge discusses section 59 and the effect of the law reform in 2007. In particular, the Judge notes:³³

...Under the previous law a parent could justify discipline of a child on the ground that it did not constitute physical abuse. That allowed the use of reasonable force.

With the change of the law on 21 June 2007, a new regime has been implemented. **The new s 59 allows a parent to use force against a child subject to certain conditions and providing the force is not used for the purpose of correction...**

In other words, a parent cannot slap, kick, punch, hit or physically chastise a child solely for the purpose of correcting that child. A parent may use reasonable force to prevent or minimise harm to a child, or to prevent a child from engaging in behaviour which might amount to criminal behaviour or to prevent the child from engaging in offensive or disruptive behaviour. The section also allows reasonable force to be used for the purpose of performing the normal daily tasks that are incidental to good care and parenting. I emphasise the force used must be reasonable in the circumstances. It is unfortunate that the law change was not accompanied by a campaign to educate the public about s59. **Misunderstanding abounds** nearly two years after the law was passed. **The section does not prevent physical chastisement of a child. But it does restrict the circumstances where physical force can be used.** If parents understood the distinction, they might be more ready to employ other options to discipline a child – time out, removal of privileges and so on.

Subsection (1)

- 65 Section 59(1) provides a defence for a parent or person in place of a parent who uses reasonable force in one of the circumstances set out in subsection (1)(a) to (d). The fact that section 59 is a defence provision is confirmed by the location of section 59 in Part 3 of the Crimes Act, which relates to “Matters of justification or excuse”. In other words, **but for section 59**, it is illegal for a parent or person in place of a parent to use **any force** against their child in **any circumstances**.
- 66 It was held in the case of *L F H v N J M*³⁴ that subsection (1) would apply where a parent grabbed the hand of a child in his care and forcefully removed a plate from him to prevent him from throwing the plate at his mother, and later forcefully removed the child from his bed. Although this case did not involve a prosecution for assault, section 59 was raised in relation to an application for a parenting order where one parent accused another parent of using inappropriate physical discipline. The Judge found that even if the parent had been charged with assault, he would be completely exonerated of any criminal wrongdoing in that his actions fell under sections **59(1)(a)** (minimising harm to the child or another person) and **59(1)(c)** (preventing disruptive behaviour).

was overturned. However a discharge without conviction was not granted by the High Court, due to lack of substantive evidence of the likely extent of the effect of the conviction on Mrs T’s employment and immigration prospects.

³² FC Hamilton FAM-2009-019-00175/176, 20 May 2009

³³ *M T A v B L P FC Hamilton* FAM-2009-019-00175/176, 20 May 2009 at [39] to [41] (emphasis added)

³⁴ [2012] NZFC 3350

- 67 Another example of a case in which subsection (1) was held to apply is *New Zealand Police v Lorraine Cummins*³⁵. Ms Cummins was discharged in relation to an assault charge on the basis that her actions came within the circumstances prescribed in section 59(1)(b). In this case, Ms Cummins had poked a pen into the leg of a boy in her care, James, after he had “stabbed” his brother with the pen.
- 68 James’ leg was bruised as a result of Ms Cummins’ actions. However, Ms Cummins denied being angry, and justified her actions by saying that James needed to know what he had done. Ms Cummins and her partner had offered to be the primary caregivers for James and his brother after Child Youth and Family indicated that they intended to separate the boys after their parents had left them, and after difficulties had arisen in their previous placement.
- 69 From the evidence presented to the Court, the Judge concluded that “it is quite clear” that Ms Cummins’ actions were intended to teach James, who had a history of problems and had been diagnosed with various disorders, a lesson.³⁶ James had a propensity to find objects such as steak knives, scissors, and paper clips with which to stab his brother, and Ms Cummins had become fearful for the safety of his brother. James’ behaviour towards his brother had seemed to have arisen out of jealousy when his brother was succeeding at school and getting “kudos” for that. In dismissing the charge, the Judge stated that this situation would not normally be covered by section 59(1) (as it looked more like correction, and therefore would come under section 59(2)), but in the particular circumstances of the case, the intention was to educate in order to prevent the child from engaging in conduct (stabbing) that amounts to a criminal offence (therefore coming within the ambit of section 59(1)(b)).³⁷

Force which is “reasonable in the circumstances”

- 70 Finally, in order to rely on any of the defences in subsection (1), the force used must have been reasonable in the circumstances. In the case of *Mason v R* the Supreme Court noted.³⁸

There is a spectrum against which Courts will assess the use of force, and while some force will be reasonable and justified under section 59(1), some force is clearly outside the scope of the defences in section 59(1) and is therefore illegal.

- 71 Mr Mason had been convicted in the District Court of assaulting his four year old son, by pulling his ear and punching him in the face. Mr Mason denied punching his son in the face, but admitted pulling “a great hunk” of the boy’s hair and pulling him towards himself, to prevent him from riding his bike down a ramp, which Mr Mason’s younger son had just injured himself doing. Therefore, Mr Mason had arguably acted so as to prevent or minimise harm to his son in terms of section 59(1)(a). Nevertheless, he was found guilty and sentenced to nine months’ supervision. Mr Mason appealed to the Court of Appeal, which dismissed his appeal. Mr Mason then appealed to the Supreme Court on the basis that the combination of the two allegations (punching the child and pulling his ear) in a single count in the indictment resulted in a miscarriage of justice.

³⁵ DC Waitakere CRI-2010-090-002779, 22 July 2010

³⁶ At [15]

³⁷ At [22] and [23]

³⁸ [2010] NZSC 129 at [13]

- 72 In allowing the appeal, the Supreme Court held that the inclusion of both allegations in one charge denied Mr Mason the defence under section 59(1)(a) which could have been available in relation to the ear pulling, but not the punch to the face (as that would not be considered to be reasonable force).

Is anger relevant?

In *New Zealand Police v Lorraine Cummins* the Judge noted that:³⁹

This legislation was brought in to ensure that parents were not simply able to use physical discipline to achieve a purpose in parenting.

...this action taken on [Ms Cummins] part was not one carried out in anger which is what this particular law is all about.

- 73 In other words, the Judge suggests that the policy behind section 59 is to prevent people from correcting children by way of force **when angry**. However, the District Court Judge in *H v R*⁴⁰ considered the lack of anger in using force for the purposes of correction to be an **aggravating** factor (i.e. because it was calculated and therefore intentional). This is further confused by the fact that the High Court Judge in *H v R* disagreed with the District Court Judge on this point.⁴¹ This is despite section 59(2) and (3) making it clear that any force used for the purposes of correction (regardless of the emotional state of the parent) is illegal and overrides any defence in section 59(1).

Subsections (2) and (3)

- 74 Subsection (2) provides that **no** use of force by a parent against their child for the purpose of **correction** is justified, and subsection (3) provides that subsection (2) prevails over subsection (1).
- 75 This means that in order to rely on one of the defences in subsection (1), a parent will need to establish that the relevant defence applies, **and** that the force used was not used for the purposes of correction.
- 76 However, as noted in paragraph 68 above, the distinction between what constitutes “for the purposes of correction” in relation to subsection (2), and when the defences in subsection (1) might apply, is unclear.
- 77 In particular, it can be difficult to ascertain whether force was used for the purposes of correction, as it depends on the subjective intention of the person applying force. This was noted by Fisher J in the case of *Sharma v New Zealand Police*, a case decided under the previous section 59.⁴²

The expression “by way of correction towards the child” is a reference to the **subjective** purpose of the defendant.

- 78 Fisher J went on to state that:⁴³

Correction implies that the object of the punishment was to deter repetition of improper conduct.

³⁹ At [24] and [25].

⁴⁰ *New Zealand Police v G* DC Nelson CRI-2011-042-1402; CRI-2011-042-1403, 21 June 2011.

⁴¹ See *H v R* [2012] NZCA 198 at [23].

⁴² HC Auckland A168/02, 7 February 2003, at [13] (emphasis added).

⁴³ At [15].

- 79 As a result, non-lawyers, including parents and the police, will have difficulty applying section 59 in practice. Parents will struggle to know whether their actions constitute an offence under section 59 or not, and in cases of doubt, the police will prosecute and leave it up to the Court to determine. This is demonstrated in the cases we have analysed. Further, the cases also show that even lawyers and judges struggle to understand and apply section 59 correctly, with cases such as *DC v R*⁴⁴ and *H v R*⁴⁵ going to the District Court and High Court and then being overturned by the Court of Appeal.
- 80 For example, in *H v R*⁴⁶, H, the mother of a child with ADHD, had pleaded guilty to a charge of assault whereby she had asked her husband to discipline their child with a belt, following an incident of a sexual nature with a younger female cousin. H was convicted in the District Court and sentenced to 300 hours of community work. The Judge in the District Court considered as aggravating factors the facts that H was the child's mother, and that she had not acted in anger.
- 81 H's husband (G) was also convicted, but his sentence of community work was quashed on appeal to the High Court and a discharge without conviction entered instead. H's appeal to the High Court was dismissed on the basis that she had previously hit the child with a wooden spoon. H then appealed to the Court of Appeal.
- 82 The Court of Appeal found that the High Court had not approached the appeal on the appropriate appellate principles – the High Court had applied a “plainly wrong” standard (as would be applied in relation to an appeal of a discretionary decision), as opposed to evaluating the District Court's decision afresh as was required in this case which involved applying a proportionality test under section 107 of the Sentencing Act (relating to discharge without conviction).⁴⁷ The Court of Appeal therefore undertook its own evaluation, overturning H's conviction, and instead entering a discharge without conviction on the basis that the consequences of a conviction for H were out of all proportion to the gravity of her offending. This case highlights the fact that the law is complicated and difficult to apply, such that even the lower courts are getting it wrong.
- 83 Another example is the case of *New Zealand Police v XX*.⁴⁸ In that case, Madam X pleaded guilty to a charge of assaulting her 3 year old grandchild. The Judge noted that the child was “loved and doted upon” by Madam X who provided day to day care for her grandchild while the child's parents were working long hours in their business.⁴⁹ Madam X was supervising her grandchild at a playground, when the child began to misbehave in a way that was harmful to her playmate. Madam X stepped in to restrain the child, after which the child threw a tantrum on the ground at Madam X's feet. Madam X then used her foot to restrain the child from returning to her previous hurtful activity. Madam X used her foot because given her age and a back condition it would have been difficult for her to have bent down to restrain the child.⁵⁰

⁴⁴ [2013] NZCA 255

⁴⁵ [2012] NZCA 198

⁴⁶ [2012] NZCA 198

⁴⁷ *H v R* [2012] NZCA 198 at [36]

⁴⁸ DC Lower Hutt CRI-2012-032-002626, 14 December 2012

⁴⁹ At [6]

⁵⁰ At [8]

- 84 The matter of *XX* is concerning as an example of a case where neither the Judge nor defence counsel nor prosecution counsel (who is obliged to prosecute fairly) recognised that Madam X had a defence to the allegation of assault on a child. Even though the circumstances in this case as accepted by the Judge appear to be such that section 59(1) (a) (preventing the child from harming another child) or 59(1)(c) (preventing the child from engaging in offensive or disruptive behaviour) might have applied, this was not raised or discussed – in spite of the fact that the Judge recognised that Madam X had not used force for the purposes of correction.
- 85 Of particular note are the following comments contained in the Reasons of Judge G F Ellis:⁵¹
- I do find that she used her foot to restrain the child. I do not find that that use of the foot was intended as a means of discipline or correction, but was certainly to restrain the child both from her tantrum behaviour and from a return to the other playmate. To the extent that Madam X used force by means of her foot, or otherwise against the person of another human being that technically can amount to an assault, and it is in that technical use of force by means of her foot which Madam X accepts through her counsel does amount to an infringement in this context.
- 86 Although Madam X received a discharge without conviction it is concerning that a valid defence was not recognised and pleaded. **This would appear to support the view that the wording of the Act is unclear.**

Subsection (4)

- 87 We disagree with the description of subsection (4) given by Hon Chester Borrows (as he is now) during the Bill's Third Reading, as set out in paragraph 33 above. In particular, Hon Chester Borrows stated:⁵²
- ...[the Bill] provides a defence to parents who use reasonable force for the purpose of correction in the same way as section 59 does presently, though in a more limited form. It does this **by allowing a court to read widely the terms "inconsequential" and "not in the public interest". This means that parents should not be held liable for what we would call light smacking...**
- 88 From this statement, it appears that Hon Chester Borrows may have mistakenly understood that subsection (4) in some way added a further defence to section 59 (other than section 59(1)) that would prevent parents from being liable for prosecution (i.e. criminalised) for using reasonable force against their children, even where that force was used for the purposes of correction; rather than affirming the police's general discretion as to whether or not to prosecute..
- 89 We do not interpret section 59(4) in that way, and our interpretation is supported by the case law. For example, as noted by the Court of Appeal in *Mason v R*, subsection (4):⁵³
- ...does no more than draw attention to the well-settled principle that the Police possess a discretion, of which the Law Officers are the ultimate judges, whether the public interest warrants prosecution in any particular case.
- 90 Subsection (4) simply **affirms** the Police's general prosecutorial discretion – it does not add anything new as the Police would have had prosecutorial discretion in any case.

⁵¹ At [9].

⁵² (16 May 2007) 639 NZPD 9287 (emphasis added).

⁵³ [2010] NZCA 170 at [20].

Subsection (4) is **descriptive** only, as compared to subsections (1) and (2) which are prescriptive.

- 91 Further, the reference in section 59(4) to “where the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution” is the threshold to be used by the **Police** when deciding whether to prosecute complaints in relation to the use of force against a child. It is not a test which will be applied by the courts.
- 92 Therefore, the prosecutorial discretion affirmed in subsection (4) does not change the fact that it is now illegal for a parent or person in the place of a parent to use any force against their child for the purposes of correction, as section 59 no longer provides a defence for the use of force for correction. Smacking a child for the purpose of correction is illegal regardless of whether the Police decide to prosecute or not.

Sentencing

- 93 The defences available under the amended section 59 constitute a low threshold for conviction. The Courts have the power to address this if necessary at the time of sentencing.
- 94 Section 107 of the Sentencing Act 2002 allows the Court to discharge a parent (or individual acting in that capacity) without conviction where the consequences of the conviction would be out of all proportion to the gravity of the offence:

107 Guidance for discharge without conviction

The court must not discharge an offender without conviction unless the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.

- 95 The Courts' consideration of the consequences of a conviction has tended to take into account the effect of a conviction on a parent's ability to retain their ability to work, and there have also been examples of argument in respect of consequences for immigration or travel. However the Courts have varied considerably in the weight they have given to these very likely consequences of a conviction for parents.
- 96 Some Courts have downplayed the impact of being unable to continue a job or profession and few have explicitly balanced the effect on the child, if their parent has no job and no income as a result.⁵⁴
- 97 Arguments for discharge on the basis of potential travel and immigration problems are, almost without exception, very difficult ones to make in the context of any type of criminal allegation and will rarely succeed without substantial evidence, even if the offending is at a low level of gravity.⁵⁵

⁵⁴ For example, *T v NZ Police* [2016] NZHC 1773

⁵⁵ Two examples that illustrate the argument regarding the impact on visas in different ways are the cases of *NZ Police v T* (paragraph 55) and *T v NZ Police*. ([2016] NZHC 1773) In the former case, the Defendant (who was a lawyer) demonstrated that he would be required to travel, and provided evidence as to the specific barriers to this that a conviction would cause. He was ultimately granted a discharge without conviction.

In the second case, the Defendant's circumstances were somewhat different. She was a Tongan in New Zealand illegally, and her concern related to the impact of a conviction on her ability to apply for a visa in the future. The Judge concluded at paragraph 27 that there was no evidence that a conviction would result in such an application being automatically declined, and placed reliance on the fact that an immigration officer would consider all of the surrounding circumstances.

- 98 Finally, **we have not been able to find any decision where the Court has, at sentencing, explicitly balanced the long term effect of the prosecution or the conviction on the parent-child relationship against the level and frequency of the physical discipline the parent is being charged with.**
- 99 Such a balancing act is also clearly relevant to the way the Police exercises its discretion in determining whether to prosecute, and it may be that this occurs as part of the process that is undertaken. Unfortunately, once again, this information is not available to us; however, it is worth making enquiries with the Police in respect of any informal policy that has been established to consider the weight to be given to the various factors involved.

CONCLUSION: CONSISTENCY OF LAW WITH PARLIAMENTARY INTENTION

- 100 Our interpretation of section 59 (as a defence provision) is that it is illegal for a parent to use force against their child (even if the force used is reasonable) for the purposes of correction or for any other reason outside of the specified circumstances in subsection (1). That interpretation is consistent with case law, including those cases that we have reviewed since 2014.
- 101 Therefore, in our opinion, statements made by politicians to the effect that the amended section 59 does not criminalise "good parents" for lightly smacking their children are inconsistent with the legal effect of section 59 and the application of that section in practice.



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A significant factor here was the limited evidence of potential detriment in employment and immigration that was tendered by Mrs T. While the Judge fully accepted that the gravity of the offending was "at the minor end of the scale", (at paragraph 14) this by itself is not enough. Unless the Defendant can provide sufficient evidence that the consequences are "out of all proportion to the gravity", a discharge will not be granted, regardless of the low level of the offending.

