



11 April 2019

Children (Abolition Of Defence Of Reasonable Punishment) (Wales) Bill
National Assembly for Wales - Children, Young People and Education Committee
By email

SUBMISSION – Cover Letter

Lynne Neagle AC / AM
Cadeirydd / Chair

Please find attached our Submission to the Committee considering the general principles of the Children (Abolition Of Defence Of Reasonable Punishment) (Wales) Bill.

The proposal to ban smacking in Wales is motivated by a commendable desire to reduce child abuse – a desire we all share. But this particular proposal will do more harm than good, will have no effect on child abuse rates, and will criminalise good parents raising great kids.

Kiwi parents were told by politicians that good parents and smacking will not actually be targeted if the law is changed. But smacking a child will be assault. The police and social agencies will have to investigate any complaint made against a parent for smacking or even removal to ‘time out’ as this will involve a level of force, and quite probably resistance! This will immediately place a family under enormous pressure. The police have to enforce the law, regardless of what politicians say.

In fact, a recent [legal opinion](#) from a leading public law firm in NZ said that statements made by politicians to the effect that the anti-smacking law does not criminalise "good parents" for lightly smacking their children are inconsistent with the legal effect of the law and the application of the law in practice. **(2018 Legal Opinion attached)**

Banning smacking will not stop child abuse, as has been evidenced in NZ. In 2003, a [UNICEF](#) report identified family breakdown, drug and alcohol abuse, poverty, and non-biological adults living in the home – as the factors most closely and consistently associated with child abuse and neglect. Of the five countries with the lowest child abuse death rates in that UNICEF report, four allowed smacking.

We definitely need to send a strong message that violence and child abuse is unacceptable.

But in our attempts to send a clear message, we should not end up treating good parents as criminals under the law. That is an unacceptable burden to great mums and dads who should be supported, not prosecuted.

Children will never be safe until we are honest enough to identify and tackle the real causes of child abuse, rather than pass 'feel-good' but ineffectual and, ultimately, harmful laws.

The proposed ban runs counter to scientific evidence, previous experiences with similar bans, and the wisdom of previous generations.

Please find **attached** to this cover letter, our research paper on the effects of the 2007 anti-smacking law – originally published in New Zealand in 2016. This forms part of our submission to the Welsh Government.

If you require any further details, please do not hesitate to contact me.

A handwritten signature in black ink, appearing to read 'Bob McCoskrie', written in a cursive style.

Bob McCoskrie

National Director - Family First NZ

P.O.Box 276-133, Manukau City 2241 (p)

09 261 2426 (w) 09 261 2520 (f) 027 55 555 42 (m)

bob@familyfirst.org.nz (e) www.familyfirst.nz (w)

DEFYING HUMAN NATURE



Children (Abolition of Defence of Reasonable Punishment) (Wales) Bill
SUBMISSION

National Assembly for Wales - Children, Young People and Education Committee

AN ANALYSIS OF NEW ZEALAND'S 2007 ANTI-SMACKING LAW

About the Author



BOB McCOSKRIE is the founder and National Director of Family First NZ. Established in 2006, Family First NZ has quickly become a household name advocating for families and speaking common sense and values on a broad range of family issues in New Zealand.

He gained a Masters of Commerce at Auckland University, and a Diploma of Teaching at the Auckland College of Education. He lectured in a tertiary institute in accounting and tax law for four years. In 1994, he set up a charitable trust working with at-risk youth and their families in South Auckland. In 1996 he was appointed a Justice of the Peace. From 2002 - 2006 he was Breakfast /Talkback Host on the Rhema Broadcasting nationwide radio programme and television presenter on their current affairs show "N-Zone Focus".

He lives in South Auckland, is married and has three children (18, 14, and 11).



For additional copies, please contact Family First NZ:

tel: 09 261 2426

fax: 09 261 2520

email: admin@familyfirst.org.nz

web: www.familyfirst.nz

post: PO Box 276-133, Manukau City 2241, New Zealand

Copyright – This report and all information contained herein is © Family First NZ 2016.

EXECUTIVE SUMMARY

When Prime Minister Helen Clark championed Green Party MP Sue Bradford's anti-smacking bill through Parliament in 2007, she said that the law was "about trying to stop the appalling toll of death and injury for children in homes in our country." On the other side of the House, Opposition Leader John Key was more cautious: "If I see good parents getting criminalised for lightly smacking their children for the purposes of discipline, I'm going to change the law if I'm in a position to do so. It's as simple as that. It doesn't matter if there's a referendum or not. I want the law to work properly."

The proposal to ban smacking was motivated by a commendable desire to reduce child abuse – a desire we all share, but was either leader accurate in their understanding of the effect of this law? Were their statements more about justifying the ideology behind the law without any real understanding or acknowledgement of just how this law would impact families and fail to achieve its stated aims?

This paper examines the social indicators relating to child abuse affecting our children and families in the years leading up to the ban on smacking and then since the law was passed. Has there been any improvement? Have the warnings about the anti-smacking law targeting the wrong parents been proved right? Is it time for politicians to respond to the concerns of law-abiding parents?

Key findings include:

- Notifications of abuse to CYF have increased more than six-fold since 2001. There is no evidence that this can be attributed simply to increased reporting or public awareness. Cases requiring further action have more than doubled since 2001 which has created a huge workload for CYF. In addition, substantiated cases of abuse found by CYF have increased from approximately 6,000 in 2001 to as high as 23,000 in 2013. While the past two years has seen a decrease in substantiated abuse found by CYF, this decrease is not matched by police convictions for abuse.
- While physical child abuse found by CYF continued its climb from 2001 right through to 2013 but dropped very slightly in the past two years, police statistics show a 200% increase since 2000 and a 136% increase since the anti-smacking law was introduced. The increase in serious physical abuse resulting in injury has increased by 86% since the law change. The government admits that numbers are projected to rise further.
- Sexual offences recorded by police and by CYF continue to rise but, once again, while the CYF rates have started to decrease in the past 48 months, there has been no matching decrease in police rates, with a 43% increase since the law change.
- Emotional abuse found by CYF has decreased since 2013 but is still 360% higher than 2001.
- Rates of neglect and ill-treatment of children have decreased in the past two years but are still unacceptably high each year, with a 45% increase in police rates since the law change.
- Child homicides continue to be a blot on NZ's image. New Zealand has one of the highest rates of child abuse deaths in the OECD.
- There has been a statistically significant increase in children diagnosed with emotional / behavioural problems (including depression, anxiety disorder, and ADHD) – a 132% increase since the smacking law was introduced.

The proposal to ban smacking was motivated by a commendable desire to reduce child abuse – a desire we all share.

The government admits that numbers are projected to rise.

There has been a statistically significant increase in children diagnosed with emotional / behavioural problems.

- The mental wellbeing of youth in terms of suicide and self-harm continues to be a huge concern.
- A survey in 2011 – four years after the law was passed - found that almost a third of parents of younger children say that their children have threatened to report them if they were smacked. Also, almost one in four parents of younger children say that they have less confidence when dealing with unacceptable behaviour from their children since the anti-smacking law was passed. There has been a number of organisations expressing concern about children physically threatening their parents.
- Two out of three New Zealanders say they would flout the law, and three out of four New Zealanders want the law amended.
- The overwhelming majority of New Zealanders reject the notion that the anti-smacking law will reduce rates of child abuse in any significant way.
- Australia, with five-times the population of NZ, has just over double the incidence of child abuse – without a smacking ban.

In summary, **there is not a single social indicator relating to the abuse of children that has shown significant or sustained improvement since the passing of the law.** They've continued to get worse, in some cases a lot worse. Those working on the frontline in our communities are not seeing any significant improvement – in fact, they're concerned about the ongoing unacceptably high levels of abuse, and believe that child abuse is still significantly under-reported.

It also appears that CYF has reached the point of 'saturation' and can no longer handle the level of notifications it is receiving, which in turn leads to its inability to investigate and find actual cases of child abuse which we need and expect them to find. A number of reviews of CYF have all highlighted problems within the organisation. A recent review by the Ministry of Social Development found that CYF is massively understaffed and that social workers do not have manageable caseloads and workloads. If CYF was a family, it would have had state intervention by now. Despite the important work it does and some excellent social workers, there is increasing evidence of massive systemic failure in the organisation as a whole.

The anti-smacking law has targeted law-abiding parents. An independent legal analysis at the end of 2014 of court cases involving prosecutions for smacking since the anti-smacking law was passed found that the anti-smacking law is complicated, difficult to apply, and lower courts are getting it wrong. The analysis by public law specialists Chen Palmer also said that **statements made by politicians to the effect that the new 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.**

New Zealanders predicted all of this before the law was passed, but their concerns were ignored. The politicians and anti-smacking lobby groups linked good parents who smacked their children with child abusers – a notion roundly rejected by Kiwis. John Key was right - linking light smacking with child abuse was "*bloody insulting*".

The anti-smacking law assumes that previous generations disciplined their children in a manner that was so harmful that they would now be considered criminals. This undermines the confidence of parents in disciplining their children, fails to understand the special relationship and functioning of families, and has communicated to some children that they are now in the 'driving seat' and parents should be 'put in their place'.

Australia, with five-times the population of NZ, has just over double the incidence of child abuse – without a smacking ban.

Those working on the frontline are concerned about the ongoing unacceptably high levels of abuse.

CYF has reached the point of 'saturation' and can no longer handle the level of notifications.

The anti-smacking law has targeted law-abiding parents.

Since the 2007 anti-smacking law

Numbers = total cases since 2007 / % = total % increase since 2007

POLICE



136%

Physical Abuse of Children

16,128 offences



43%

Sexual Abuse of Children

12,664 offences



45%

Neglect of Children

3,779 offences

71 Deaths

71 Child Abuse Deaths

The anti-smacking law assumes that previous generations disciplined their children in a manner that was so harmful that they would now be considered criminals.

CYF



42%

24,528

Cases of Physical Abuse found by CYF since 2007

1,075,916

notifications of abuse to CYF

160,453 cases

of Substantiated Abuse found by CYF since 2007

88,803 cases

of Emotional Abuse found by CYF since 2007

36,797 cases

of Neglect found by CYF since 2007

10,325 cases

of Sexual Abuse found by CYF since 2007

MINISTRY of HEALTH



132%

Children diagnosed with emotional and/or behavioural problems

13,805 in 2007
32,000 in 2015



71%

Children hospitalised with mental and behavioural disorders

14,942 total

With police no longer reporting the effect of the anti-smacking law, it is now difficult to quantify how the law is being implemented.

In just the five years following the introduction of the law – covered by police monitoring reports - almost 600 kiwi families had a police investigation for allegations of smacking or minor acts of physical discipline, yet only 9% of them were serious enough to warrant charges being laid. That's a lot of wasted police resource. The other concern expressed by the police and families is the increase in false allegations.

This level of intervention also does not include the many more investigations by CYF. CYF claim that they can 'find' abuse where the police do not.

With police no longer reporting the effect of the anti-smacking law since 2012, it is now difficult to quantify how the law is being implemented, how police discretion is being used, and what the longer term trend is in terms of investigations.

The fact that so many social indicators around the welfare of children continue to worsen proves that we simply are not tackling the real causes of child abuse. It also proves that the law has been completely ineffective in terms of tackling the problem it was supposed to confront.

It may even suggest that the law is doing more harm than good.

Some lead researchers in this area suggest that, despite the best of intentions, **the prohibition of all forms of physical correction may inadvertently undermine appropriate parental discipline with the result that a small but increasing percentage of boys may grow up with a dangerous combination of disrespect for their mothers and a lack of self-control.** The researchers argue that physical chastisement should not be banned until there is scientific evidence that alternative disciplinary tactics are effective for defiant children as well as easily managed children. They note that neither supporters nor critics of anti-smacking laws have been able to identify alternative methods of discipline that are as effective in reducing child behaviour problems when using the same scientific methods used to denounce smacking. Without mild smacking, a parent's frustration may continue escalating in such disciplinary situations, thereby increasing the risk of exploding with overly severe physical abuse and verbal hostility. Although milder disciplinary tactics may be sufficient for easily managed children, they are inadequate for controlling the behaviour of young oppositional defiant children.

Ultimately, the supporters of smacking bans were influenced by political ideology rather than common sense, good science and sound policy-making. It also communicated the message that political parties don't trust kiwi parents to raise their own children responsibly.

We can solve the issue of child abuse, but we must be willing to confront the real issues. Criminalising good parents who simply want to raise law-abiding and responsible citizens is bad law-making.

What matters most is that the voice of New Zealanders is heard and respected!

CYF claim that they can 'find' abuse where the police do not.

A small but increasing percentage of boys may grow up with a dangerous combination of disrespect for their mothers and a lack of self-control.

The supporters of smacking bans were influenced by political ideology rather than common sense, good science and sound policy-making.

Political parties don't trust kiwi parents to raise their own children responsibly.

DEFYING HUMAN NATURE

Introduction

Interviewer: "...so, you don't want to see smacking banned..."
Clark: "Absolutely not! I think you're trying to defy human nature."
Helen Clark (right) – Election Campaign 2005^{1,2}



When 6-year-old Coral Burrows was killed by her stepfather Steven Williams in 2003, then-Prime Minister Helen Clark said that we needed to amend section 59 of the Crimes Act and ban smacking in order to address the "high level of child violence and neglect."³ Section 59 of the Crimes Act allowed a parent to use physical force to discipline a child if the force was deemed "reasonable" in the circumstances. Green Party MP Sue Bradford then introduced, what she called in her media release, an 'anti-smacking bill'.⁴ (This is ironic given that the promoter and supporters of the law change then tried to argue that it was not an anti-smacking bill.)⁵



Green Party Media Release, 6 Oct 2003

The proposal to ban smacking was motivated by a commendable desire to reduce child abuse – a desire we all share.

In 2003, UNICEF's *Innocenti Report Card "A League Table of Child Maltreatment Deaths in Rich Nations"*⁶ was the first ever attempt to catalogue physical abuse of children in the 27 richest nations of the world. **New Zealand had the third-highest child homicide rate** of children aged up to 14 years for the period studied – exceeded only by Mexico and the United States. Ironically, of the 10 top countries in the UNICEF report which had an exceptionally low incidence of child maltreatment deaths, six *hadn't* banned smacking.

However, the overwhelming majority of Kiwis rejected – and continue to reject – the anti-smacking law because they knew it would have no effect on child abuse rates, and would criminalise good parents raising great kids.

New Zealand had the third-highest child homicide rate.

Of the 10 top countries which had an exceptionally low incidence of child maltreatment deaths, six hadn't banned smacking.

1 http://www.parliament.nz/en-nz/pb/business/qoa/48HansQ_20070328_00000075/2-smacking-ban%E2%80%94prime-ministers-view

2 Clark denies U-turn on smacking – NZ Herald 15 Mar 2007 http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10428966

Audio: <https://www.familyfirst.org.nz/wp-content/uploads/2011/09/clarknotwantingsmacking-banned230805.mp3>

3 PM backs smacking ban in wake of Coral's death – NZ Herald 23 Sep 2003 http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=3524953

4 Greens draw up their own anti-smacking bill – Green Party Media Release 6 Oct 2003 <https://home.greens.org.nz/press-releases/greens-draw-their-own-anti-smacking-bill>

5 http://www.parliament.nz/en-nz/pb/debates/debates/47HansD_20050727_00001406/crimes-abolition-of-force-as-a-justification-for-child and <http://www.scoop.co.nz/stories/HL0606/S00170/bradford-intention-is-not-to-outlaw-smacking.htm>

6 <http://www.unicef-irc.org/publications/pdf/repcard5e.pdf>



Referendum question 2009

John Key's assurances that good parents wouldn't be affected by this law and that a light smack was okay were in direct conflict with what groups like Barnados, the Children's Commissioner and Plunket were telling parents, and the way the anti-smacking law is being enforced by the police, CYF and the Family Court.

Law-abiding parents are now confused.

After the law change was voted for by politicians in 2007 (including National MPs who had previously campaigned *against* the law), the anti-smacking ideology received a well-deserved 'spanking' in the 2009 Referendum⁷ – a resounding **87% saying no to the law**.⁸ Then in September 2010 all political parties, except for the ACT Party, sent a clear message that a light smack is *not* acceptable when they rejected the amendment that National MPs had been vigorously lobbying for whilst in Opposition!⁹ (*More details on the amendment page 35*)

Law-abiding parents are now confused.

This paper examines the social indicators relating to child abuse affecting our children and families in the years leading up to the ban on smacking and then since the law was passed. Has there been any improvement? Have the warnings about the anti-smacking law targeting the wrong parents been proved right? Is it time for politicians to respond to the concerns of parents?

"There are three reasons for concluding that the (anti-smacking law) was an inappropriate response to the problem. The first is that the amendment is an extremely poor piece of legal drafting in that it is calculated to create confusion rather than clarity. The second is that it criminalizes behaviour which should not be classified as a criminal offence. The third is that it fails to provide adequate protection for those whom it was designed to help.... In short, the current section is confusing, innocuous behaviour is classified as criminal, and children at risk have been short-changed in terms of the legal protection they are entitled to receive."

Grant Illingworth QC – Barrister¹⁰

"...if the reality is that no one is ever going to be prosecuted for lightly smacking their child, then don't make it illegal. Don't make it a crime. It's poor law-making to write a very strict law and then trust the police and the courts not to enforce it strongly. The law shouldn't depend on which police officer or which judge or which jury you happen to get on the day."

John Key – Salvation Army Conference 17 April 2007¹¹

Has there been any improvement? Have the warnings about the anti-smacking law targeting the wrong parents been proved right?

7 https://en.wikipedia.org/wiki/New_Zealand_citizens-initiated_referendum,_2009

8 http://www.electionresults.govt.nz/2009_citizens_referendum/ Note that in New Zealand, citizens initiated referendums are not binding on the government.

9 http://www.parliament.nz/en-nz/pb/debates/debates/49HansD_20100908_00001226/crimes-reasonable-parental-control-and-correction-amendment

10 Grant Illingworth "Good motive, but bad law" – Christchurch Press 15 July 2009. (not available online but read here -

<http://protectgoodparents.org.nz/wp-content/uploads/2014/04/GRANT-ILLINGWORTH-Good-motive-bad-law.pdf>

11 <https://www.national.org.nz/news/news/media-releases/detail/2007/04/17/speech-to-salvation-army-justaction-conference>

Good Motive, Bad Law



In many cases, parental guidance and correction will be non-physical. Time out, withdrawal of privileges, a telling-off, grounding – they can often work. However, sometimes a parent may reasonably decide that a smack is required to correct or prevent defiant or unacceptable behaviour. Anti-smacking policies are problematic because they contradict many adults' own childhood experiences with discipline and their long-term outcomes. Many of us received a well-warranted smack and didn't think of it as abuse, just as we didn't think of a good telling-off or grounding or time out as a form of abuse.

Sometimes these parenting techniques *do* become abusive, but that says more about the *type* of parent than the technique being used.

But if a parent uses a smack today, section 59 of the Crimes Act (the anti-smacking law) says that parents are committing the serious crime of assault. As a result, the law can prevent parents from parenting effectively and appropriately in the circumstances. Opinion polls consistently reveal the view that a strong majority of New Zealanders believe that parents *should* legally be able to use a mild and non-abusive degree of physical correction without fear of breaking the law.

Here's the text of the law:

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.²²

Do you understand the law as it is written? Is smacking illegal or not? If not, when is it justifiable?

If you're confused, you're one of many parents in New Zealand who share that confusion. Parents deserve to know whether they are parenting within the law or not.

The law can prevent parents from parenting effectively and appropriately in the circumstances.

Anti-smacking policies contradict many adults' own childhood experiences with discipline and their long-term outcomes.

Parents deserve to know whether they are parenting within the law or not.

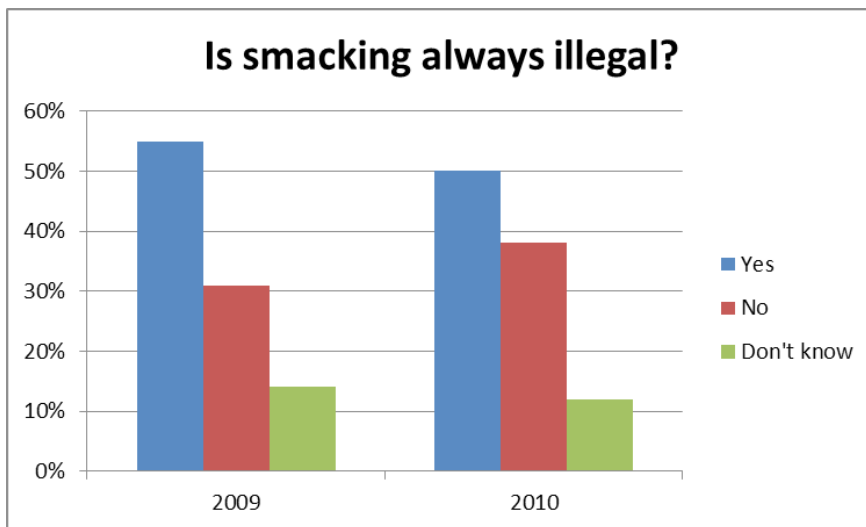
Confusion Reigns

"This is not clear legislation. In creating this law, Parliament abandoned its constitutional responsibility to say with clarity just which conduct is criminal. The section results from a political fudge. Whatever other views one takes about the topic of smacking, that much at least ought to be kept clear."
Jim Evans - Emeritus Professor of Law, Auckland University.¹³



In research done in 2009¹⁴ and 2010¹⁵, respondents were asked whether the new law makes it always illegal for parents to give their children a light smack.

As the graph shows, parents are divided on their answer.



Parents have been given conflicting messages by the promoters of the law.

This proves just how confusing the law is to parents and it is this confusion that is causing extensive harm. Parents have been given conflicting messages by the promoters of the law.¹⁶ There is no clear distinction between 'correction' which is illegal and 'prevention' which *could* be legal. Legal opinions have contradicted each other and a further complication is the allowance for police discretion, but not CYF discretion, to investigate – *"To avoid doubt, it is affirmed that the Police have the discretion not to prosecute complaints ... where the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution."* (subsection (4) of the applicable legislation).

Are the police actually using this discretion? A Nelson lawyer, who succeeded at the Court of Appeal in getting a mother acquitted after she admitted to police that she had occasionally smacked her child, said;

"I'm finding that CYFs and the police seem to prosecute on a fairly wholesale basis and they often say they'll leave it to the judge to decide... It's just my experience that a diversion is hardly ever applied in the domestic violence or child smacking area because it's seen as such a hot potato..."

(You can view his comments and the facts of the case that he took to the Court



*NZ Herald, front page
8 Dec 2009*

¹³ Jim Evans: New section 59 is clearly a mess – NZ Herald 6 Aug 2009 http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10588870&pnum=0%20

¹⁴ <https://www.familyfirst.org.nz/wp-content/uploads/2011/03/Smacking-Poll-June-2009-FULL-REPORT.pdf>

¹⁵ <https://www.familyfirst.org.nz/wp-content/uploads/2011/03/Smacking-Poll-Mar-2010-FULL-REPORT.pdf>

¹⁶ PM: It's okay to give light smacks - NZ Herald 8 Dec 2009 http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10614102

of Appeal on the 2014 documentary 'My Mummy's A Criminal' on YouTube.¹⁷⁾

As stated earlier, it is essential that public policy and laws relating to parents are clear as to what is allowed and what is prohibited. This law has just created confusion and, as a result, good parents are being victimised.

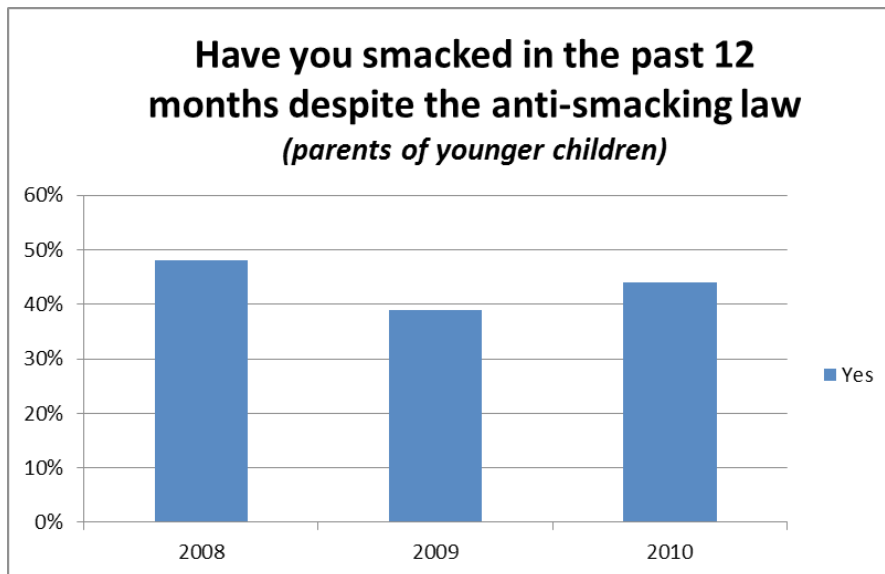
Listen to Sue Bradford attempt to explain the law to National Radio's Sean Plunket two years after the law was passed – you'll hear the confusion.

AUDIO: <https://www.familyfirst.org.nz/wp-content/uploads/2011/09/0618-National-Radio-Bradford-attempts-to-explain-the-law.mp3>

This law is held in contempt by New Zealanders.

Flouted & Less Confident

This law is held in contempt by New Zealanders. Between 2008 and 2010, surveys showed that close to half of parents of young children (aged less than 12) were flouting the law despite the threat of criminal sanction or investigation by CYF.¹⁸ This is consistent with the level of smacking before the law change.¹⁹ Most parents use smacking in an occasional and responsible way, and at the same time they don't think parents should be criminalised for it.



Most parents use smacking in an occasional and responsible way.

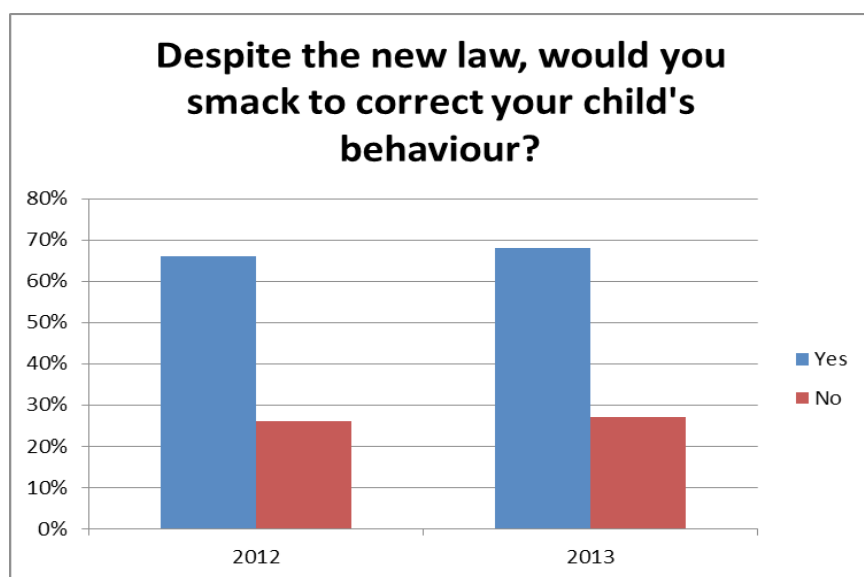
17 10 Good Reasons to Change the Anti-Smacking Law - Reason #7 - "Helen" https://www.youtube.com/watch?v=_DKYztZtOXc

18 <https://www.familyfirst.org.nz/wp-content/uploads/2011/03/Smacking-Poll-June-2008-FULL-REPORT.pdf> <https://www.familyfirst.org.nz/wp-content/uploads/2011/03/Smacking-Poll-June-2009-FULL-REPORT.pdf> <https://www.familyfirst.org.nz/wp-content/uploads/2011/03/Smacking-Poll-Mar-2010-FULL-REPORT.pdf>

19 Smacking rate way down on decades past – NZ Herald 25 Jul 2009 http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10586548&pnum=0

Further surveys in 2012²⁰ and 2013²¹ about *future* actions / intentions found that **two out of three respondents would flout the law and smack their child to correct their behaviour if they thought it was reasonable to do so.**

The authority of parents has been undermined.



Some disturbing trends have also surfaced.

A survey in 2011 – four years after the law was passed - found that **almost a third of parents of younger children said that their children have threatened to report them if they were smacked.**²² This was a predicted outcome of the anti-smacking law and comes as no surprise. The authority of parents has been undermined by this law change, and children are now telling mum or dad they cannot touch them – even when the physical action is reasonable and appropriate to deal with the unacceptable, dangerous or defiant behaviour of the child.

Almost one in four parents of younger children said that they have less confidence when dealing with unacceptable behaviour from their children since the anti-smacking law was passed.²³

Additionally, there have been a number of organisations expressing concern about children physically threatening their parents.^{24 25} The anti-smacking law has gone against traditional parenting and human nature, undermined the role of parents, failed to understand the special relationship and functioning of families, and has communicated to some children that they are now in the 'driving seat' and parents should be 'put in their place'.

There have been a number of organisations expressing concern about children physically threatening their parents.

"it's a complete and utter dog's breakfast..."

"badly drafted..."

"extremely vague..."

linking light smack with child abuse is "bloody insulting"

John Key – Radio Live, Sept 2009²⁶

20 <https://www.familyfirst.org.nz/wp-content/uploads/2011/03/Smacking-Poll-March-2012-FULL-REPORT.doc>

21 <https://familyfirst.org.nz/wp-content/uploads/2013/03/ANTI-SMACKING-LAW-2013-POLL.pdf>

22 Boy's 111 'parent assault' call unfounded – Eastern Courier 2 Aug 2007 <http://www.stuff.co.nz/auckland/local-news/eastern-courier/16503/Boys-111-parent-assault-call-unfounded>

23 <http://www.familyfirst.org.nz/wp-content/uploads/2011/03/Smacking-Poll-Mar-2011-FULL-REPORT.pdf>

24 Younger men use violence – stuff.co.nz 18 Dec 2014 <http://www.stuff.co.nz/national/crime/64260485/younger-men-use-violence>

25 Mother menaced with knife by son, 12 – Bay of Plenty Times 24 July 2009 http://www.nzherald.co.nz/bay-of-plenty-times/news/article.cfm?c_id=1503343&objectid=10984528

26 <http://bobmccoskrie.com/wp-content/uploads/2015/11/0904-John-Key-on-Radio-Live-mp3>

Has the Law Reduced Child Abuse?

"The change was about trying to stop the appalling toll of death and injury for children in homes in our country."

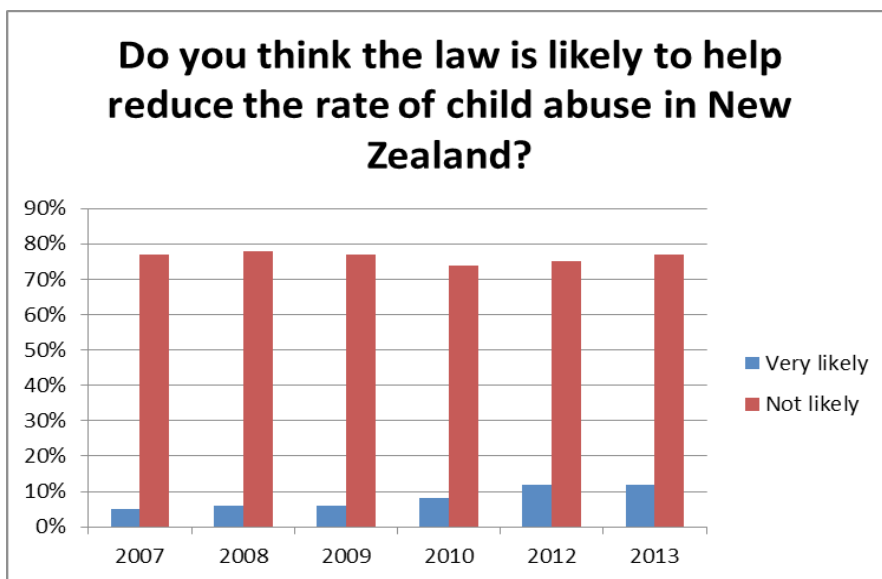
Helen Clark – Prime Minister, Dominion Post 2007²⁷

"The epidemic of child abuse and child violence in this country continues – sadly. The anti-smacking bill was never intended to solve that problem."

Sue Bradford – former Green MP, National Radio 2007

Eight years on, New Zealanders still reject the link between a smack and child abuse.

What the people say



As stated earlier, all New Zealanders are ashamed of our atrocious child abuse statistics, but they also don't want to see law-abiding parents being criminalised. Eight years on (and as summarised in the graph above showing polling on this issue), they still reject the link between a smack and child abuse.²⁸ They also continue to reject the sales pitch that an anti-smacking law is necessary to tackle the cancer of child abuse.

Are they right? Let's examine the evidence.

What the statistics show

Note: It is important to note from the outset that the following data recorded by police and CYF differs due to the nature of the information they represent. Police figures represent cases "when an offender is identified and dealt with. (E.g. prosecuted, warned, cautioned, diverted, etc.)"²⁹ On the other hand, CYF figures represent all cases where abuse has been investigated and substantiated, but not necessarily dealt with by police. The primary functions of Police are to "address the immediate safety, investigate and hold perpetrators to account wherever

Let us look at the overall picture of child abuse.

²⁷ Small, V. "Labour takes it on the chin", *Dominion Post* 29 May 2007.

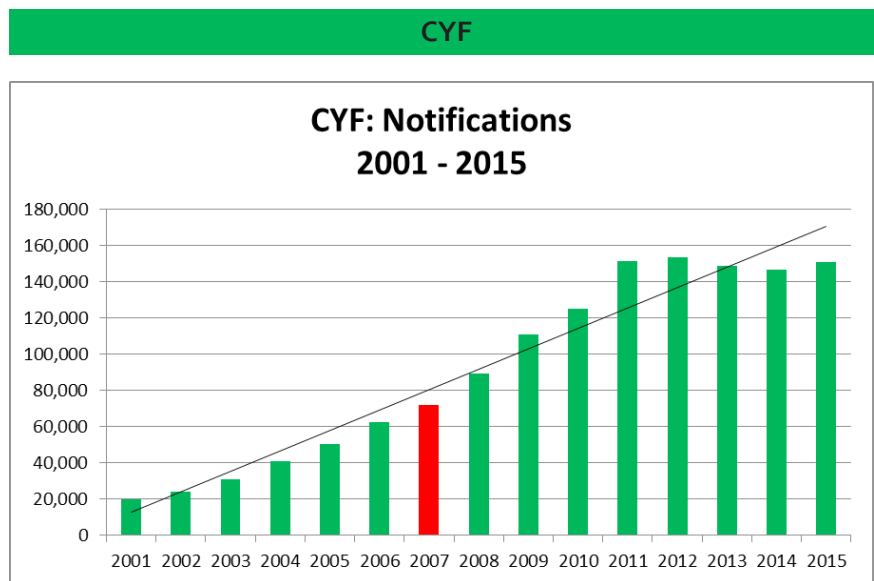
²⁸ <https://www.familyfirst.org.nz/research/anti-smacking-polls/>

²⁹ http://nzdotstat.stats.govt.nz/OECDStat_Metadata/ShowMetadata.ashx?Dataset=TABLE-CODE7405&ShowOnWeb=true&Lang=en

possible." The primary functions of CYF are to "assess the safety and wellbeing of children and provide care and protection where this is needed."^{30]}

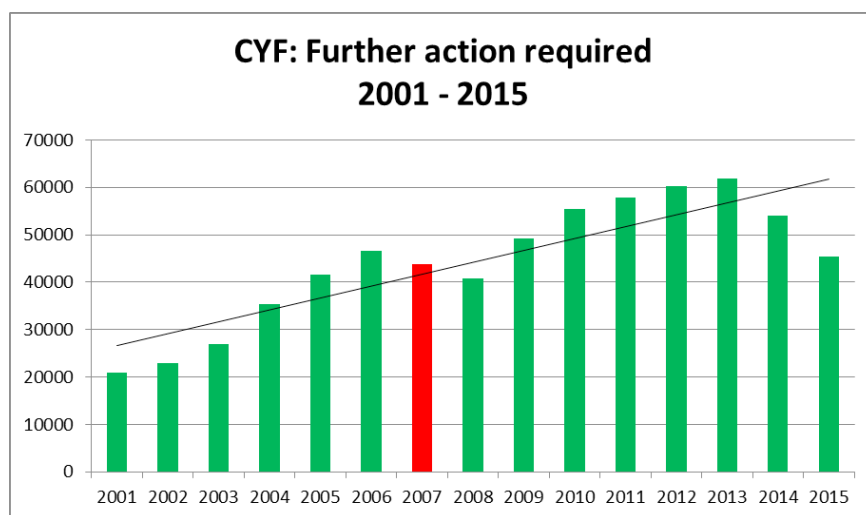
Let us look at the overall picture of child abuse as shown by CYF statistics. (Note that the population of 0-14 year olds has grown by just over 4% since 2001.^{31]}

Notifications of abuse to CYF have increased more than six-fold since 2001.



Notifications of abuse to CYF have increased more than six-fold since 2001. There is no evidence that this can be attributed simply to increased reporting or public awareness. The worsening rates started *before* these public campaigns and have continued since their introduction. (See further discussion of this issue on page 26). **This means that more than one million notifications of abuse affecting children have been made to CYF since the passing of the anti-smacking law.**

The population of 0-14 year olds has grown by just over 4% since 2001.



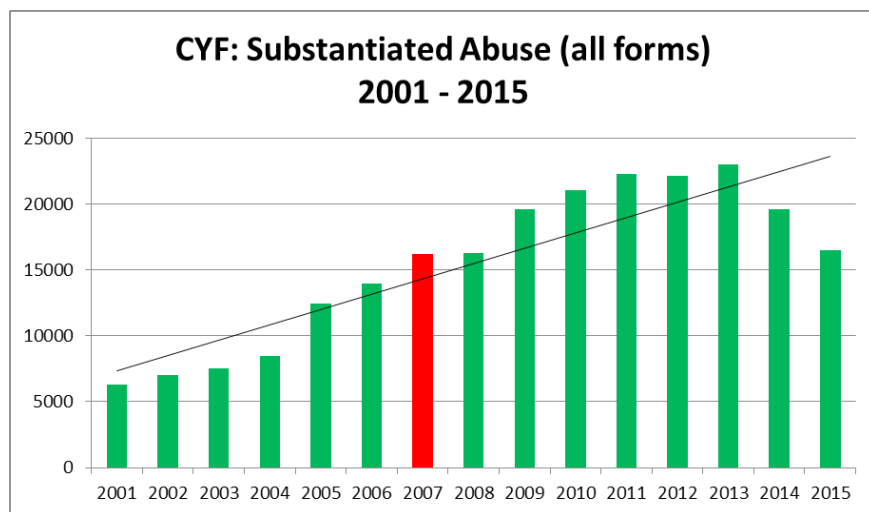
Further action having to be taken by CYF on notifications made to the agency – which has more than doubled since 2001, and was triple the rate in 2012/2013 – is evidence of the huge increase in CYF’s workload.^{32]}

The worsening rates started before these public campaigns.

30 <http://www.cyf.govt.nz/documents/working-with-others/final-child-protection-protocol.pdf>
 31 <http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7511#> and http://www.stats.govt.nz/browse_for_stats/population/estimates_and_projections/NationalPopulationEstimates_HOTPA30Jun15.aspx
 32 Information obtained under the Official Information Act – letter dated 16 December 2015. Can

Substantiated cases of all forms of abuse found by CYF have increased from approximately 6,000 in 2001 to as high as 23,000 in 2013. The past two years has seen a decrease in abuse found by CYF.³³

Government reviews of CYF suggest that they have reached saturation point.



Is this welcome decrease because of an improving trend, or has CYF reached 'saturation point' i.e. they simply can't cope with the increased level of notifications and the amount of work these notifications entail? It is actually likely that abuse is more prevalent than these figures suggest. Government reviews of CYF suggest that they *have* reached saturation point.^{34 35 36} A recent review by the Ministry of Social Development found that CYF is massively understaffed and that social workers do not have manageable caseloads and workloads.³⁷ Agencies working in the community would also seem to support the premise that CYF have reached 'saturation point'.^{38 39}

To test this premise, police statistics and child abuse death trends were examined to see whether there has been a *comparative* decrease in the past two years. Has the positive trend in CYF statistics also been seen by other child welfare and government agencies? Is there any evidence that the well-being of children is improving?

Is there any evidence that the wellbeing of children is improving?

Each type of abuse – physical, sexual, emotional, neglect, behavioural/relationship difficulties, and self-harm/suicidal – as recorded by the police and by CYF will now be examined.

be viewed here <https://www.familyfirst.org.nz/wp-content/uploads/2015/12/CYF-Abuse-Stats-2004-to-2015.pdf>. 2001/03 data sourced from "Family Violence Statistics Report 2009" - Families Commission <http://www.superu.govt.nz/sites/default/files/family-violence-statistics-report.pdf> 33 Ibid.

34 'Dump and run' culture at CYF - NZ Herald 27 Aug 2015 http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11503405

35 'We need a better system' say CYF - NZ Herald 26 Sep 2015 http://www.nzherald.co.nz/child-youth-and-family/news/article.cfm?o_id=256&objectid=11519402

36 More support required to help kids in need, says Children's Commissioner - NZ Herald 29 Aug 2015 http://www.nzherald.co.nz/child-youth-and-family/news/article.cfm?o_id=256&objectid=11504918

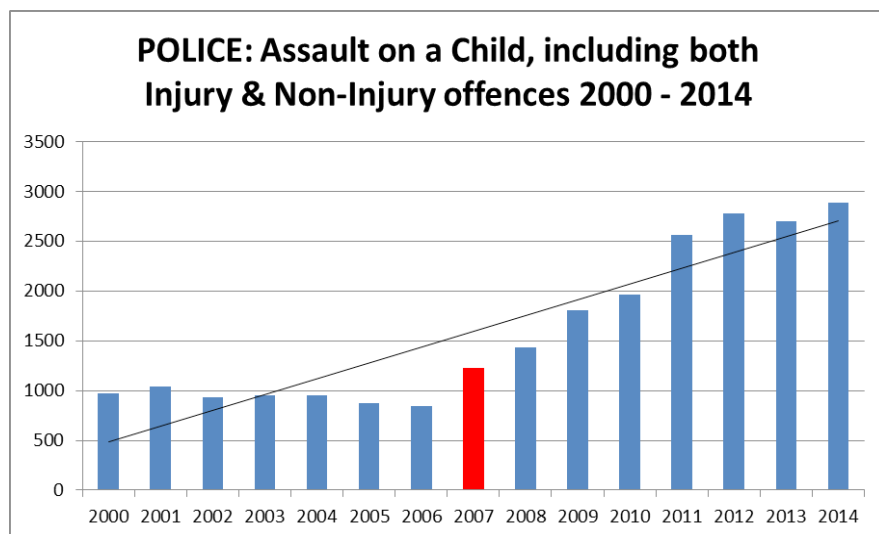
37 <http://www.msd.govt.nz/documents/about-msd-and-our-work/newsroom/media-releases/2014/workload-and-casework-review.pdf>

38 Most child-abuse victims are babies under a year old - NZ Herald 13 Jan 2015 http://www.nzherald.co.nz/child-youth-and-family/news/article.cfm?o_id=256&objectid=11385415

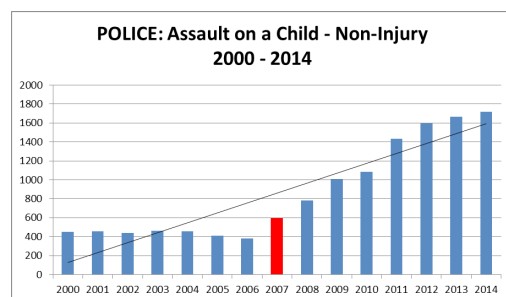
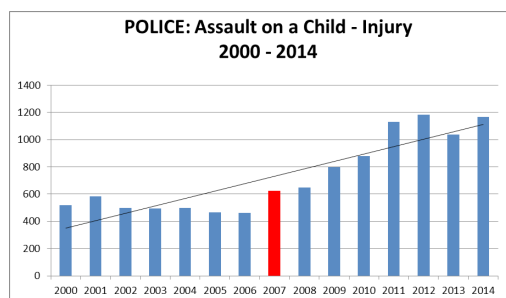
39 Surge in cases of family violence - Timaru Herald 3 Mar 2015 <http://www.stuff.co.nz/timaru-herald/news/66865722/Surge-in-cases-of-family-violence#sthash.XYlbQdHa.dpuf>

Physical Abuse

POLICE



Most disturbing is the increase in serious physical abuse resulting in injury that has increased by more than 85% since the anti-smacking law was passed.

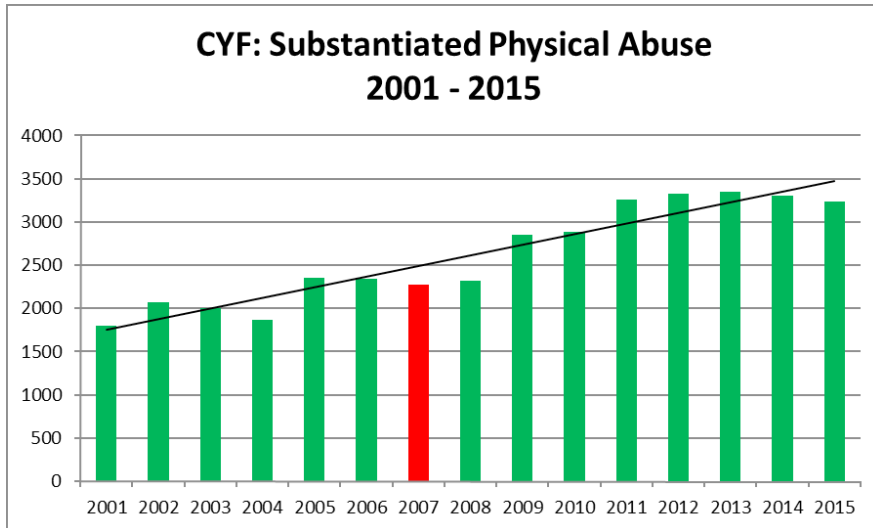


Police records show increasing rates of recorded offences of physical abuse of children.⁴⁰ While physical child abuse found by CYF has dropped slightly in the past two years (*see next graph*), police statistics show a 200% increase since 2000 and this trend shows no sign of abating. Most disturbing is the increase in serious physical abuse resulting in injury that has increased by 86% since the anti-smacking law was passed. The peaking of CYF figures is not matched by police statistics.

The peaking of CYF figures is not matched by police statistics.

In addition, according to the police, "Assaults on Child offences are likely to be significantly under-reported to police."⁴¹

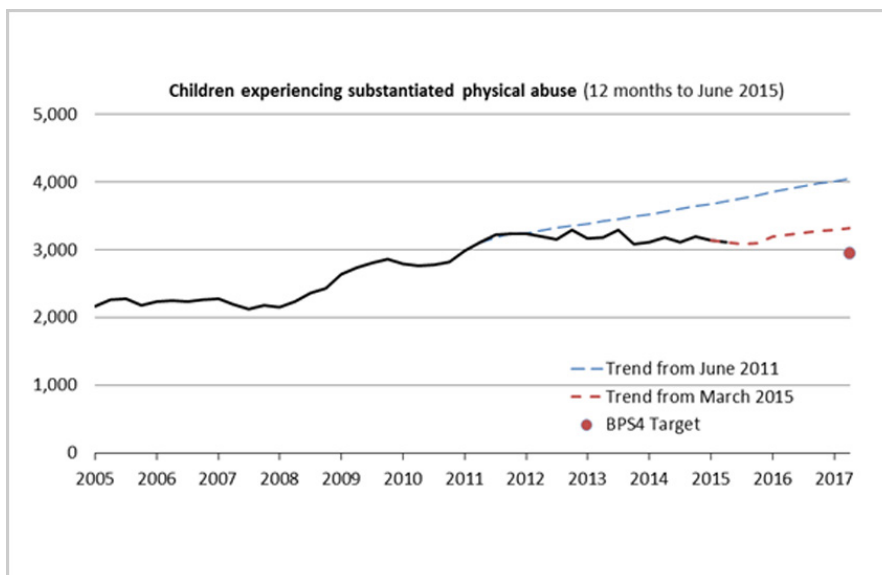
40 Information obtained under the Official Information Act – email dated 16 Dec 2015. Can be viewed here <https://www.familyfirst.org.nz/wp-content/uploads/2015/12/Police-Offences-against-children.xls>
Also <https://nzfvc.org.nz/sites/nzfvc.org.nz/files/DS3-Children-and-Youth-2015-0.pdf>
41 <https://nzfvc.org.nz/sites/nzfvc.org.nz/files/nz-police-definitions-2015.pdf>



The government is predicting higher child assaults in 2016 and beyond.

As just stated, physical child abuse found by CYF has dropped slightly in the past two years, but even the government is unconvinced by this trend. In fact, they are predicting *higher* child assaults in 2016 and beyond, as shown by the graph below.⁴²

The target to reduce child abuse was introduced by Prime Minister John Key in 2012. By 2017, the government aims "to halt the 10-year rise in the number of children experiencing physical abuse". However, they admit; "This is extremely ambitious. In 2011, numbers were rising, and projected to rise further without intervention. Meeting this target means bringing the projected number of approximately 4,000 children expected to experience substantiated physical abuse down to less than 3000 by June 2017, which is a reduction of approximately 25 per cent in projected numbers."



This target of 3,000 children attempts to reduce child abuse only to the levels reported in 2011, rather than the lower levels as experienced in 2007.

State Services Commission Better Public Services: Supporting vulnerable children: The number of children who experienced substantiated physical abuse in the 12 months to 30 June 2015

⁴² <http://www.ssc.govt.nz/bps-supporting-vulnerable-children#result4>

This government target is represented on the graph as 'BPS₄ Target' (red dot). Note that this target of 3,000 children attempts to reduce child abuse only to the levels reported in 2011, rather than the lower levels as experienced in 2007 when the anti-smacking law was passed, or even those experienced at the beginning of the decade.

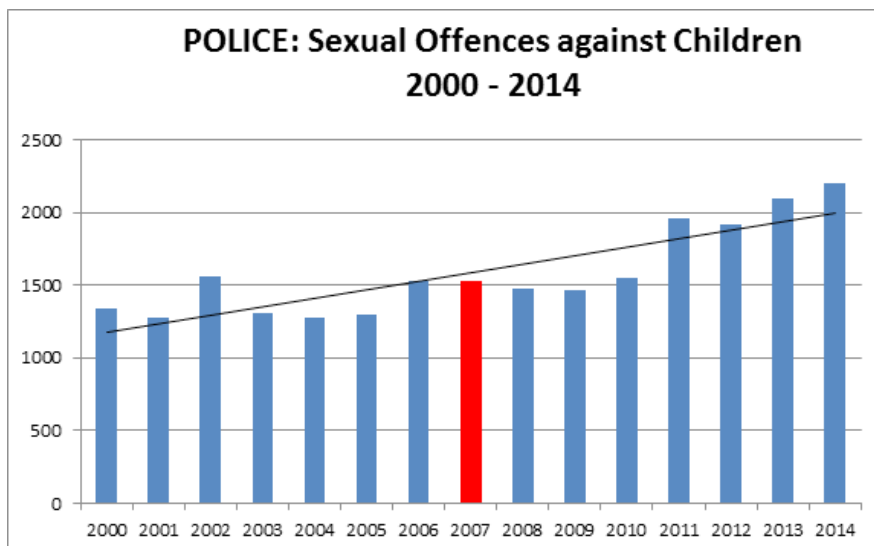
There is still much work to be done to protect our children from physical abuse.

When the 2015 figures were released, Labour Party children's spokeswoman Jacinda Ardern said the Government's targets had served to highlight its failure to tackle child abuse. "Those are dreadful figures, yet police stats tell us the situation could be even worse than that..."⁴³

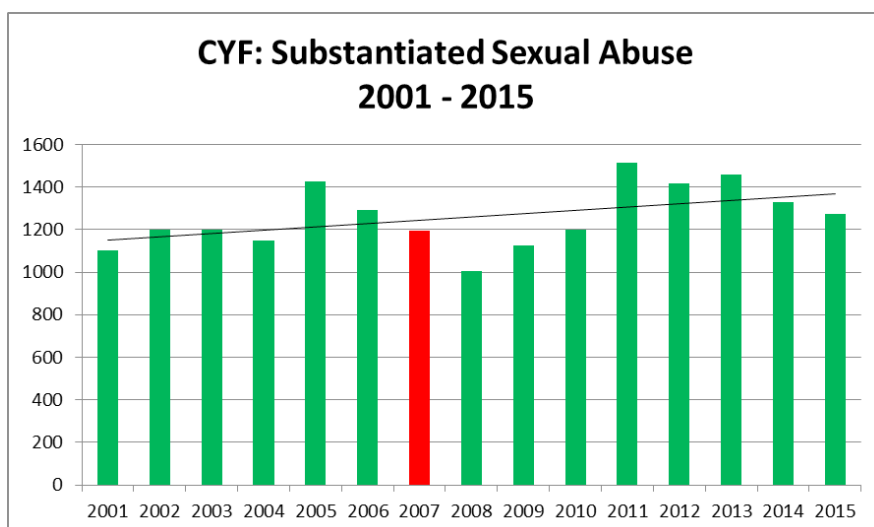
The overall increase of almost double the number of cases found by CYF since 2004 alone shows that there is still much work to be done to protect our children from physical abuse.⁴⁴

Sexual Abuse

POLICE



CYF



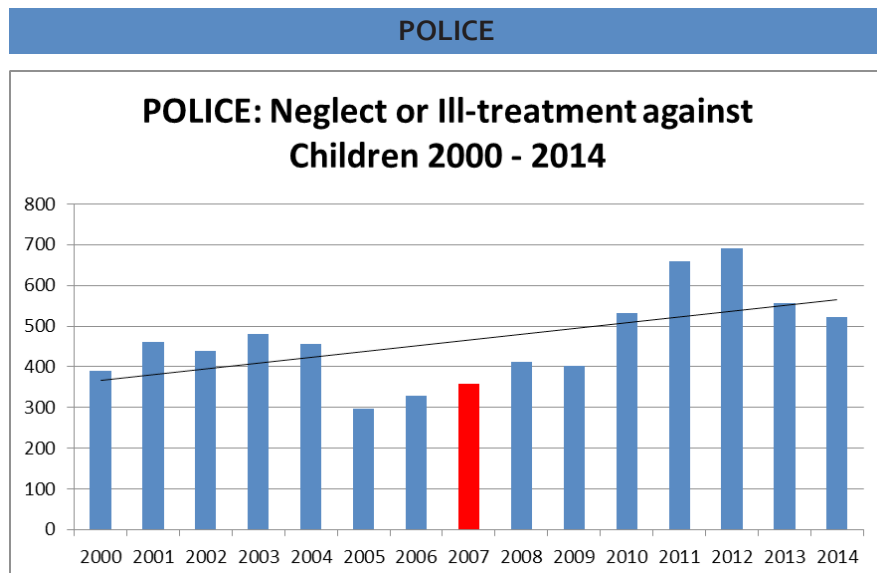
43 Increase in child abuse numbers 'dreadful' - Labour - NZ Herald 8 July 2015 http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11477624

44 Information obtained under the Official Information Act - see earlier footnote

It's significant that while the rate of child sexual abuse found by police has steadily increased (43% increase since 2007), the CYF rate has started to decline in the past two years - which supports our CYF 'saturation' argument.⁴⁵

While the rate of child sexual abuse found by police has steadily increased, the CYF rate has started to decline in the past two years.

Neglect



CYF

(Note that CYF have separate categories for neglect and for emotional abuse.)

Neglect can take a number of different forms:

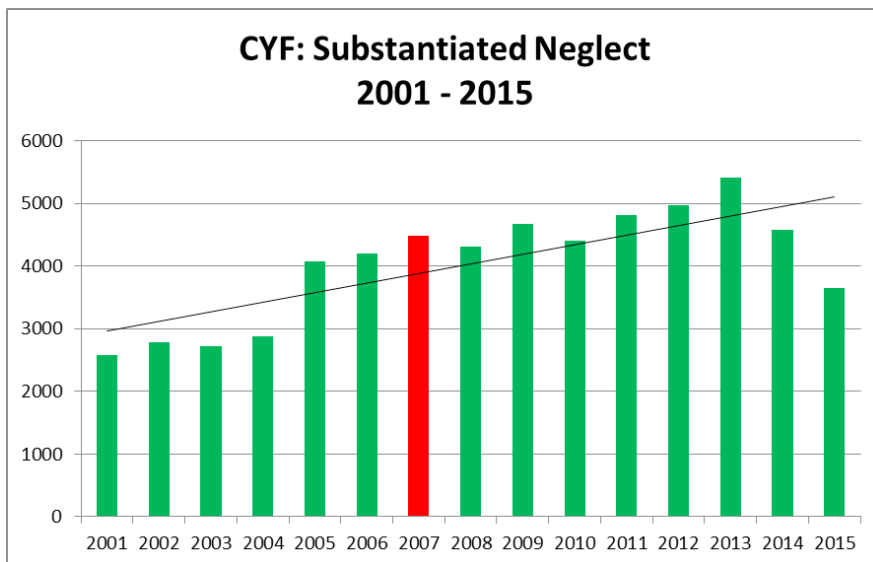
- *physical neglect - not providing the necessities of life like a warm place, enough food and clothing*
- *neglectful supervision - leaving children home alone, or without someone safe looking after them during the day or night*
- *emotional neglect - not giving children and young people the comfort, attention and love they need through play, talk, and everyday affection*
- *medical neglect - the failure to take care of their health needs*
- *Educational neglect - allowing chronic truancy, failure to enroll children and young people in school, or inattention to special education needs.*

Child Youth and Family Policy Document September 2013⁴⁶

Physical neglect - not providing the necessities of life like a warm place, enough food and clothing.

⁴⁵ Ibid.

⁴⁶ <http://www.practicecentre.cyf.govt.nz/policy/assessment-and-decision-making/key-information/what-did-we-find.html#Neglect7>



Police statistics show an almost 50% increase in cases of ill-treatment and neglect against children since 2007.

Police statistics show an almost 50% increase in cases of ill-treatment and neglect against children since 2007 when the anti-smacking law was passed.⁴⁷ Similarly, cases of neglect found by CYF were below 3,000 each year up until 2004, but have been consistently above 4,000 each year since then (reaching a peak of 5,400 in 2013), with a drop in 2014/15.⁴⁸

Emotional Abuse

CYF

Examples of behaviours that may result in emotional abuse include:

- *constant criticism, shaming and humiliating a child or young person; calling a child or young person names and making negative comparisons to others; telling a child or young person he or she is "no good", "worthless", "bad", or "a mistake"; frequent yelling, threatening or bullying*
- *ignoring or rejecting a child or young person, or giving him or her the silent treatment*
- *limited physical contact with the child or young person - no hugs, kisses, or other signs of affection*
- *corruption of the child or young person through exposure to, or involvement in, illegal or anti-social activities*
- *the negative impact of the mental or emotional condition of the parent or caregiver or anyone living in the same residence as the child or young person*
- *the negative impact of substance abuse.*

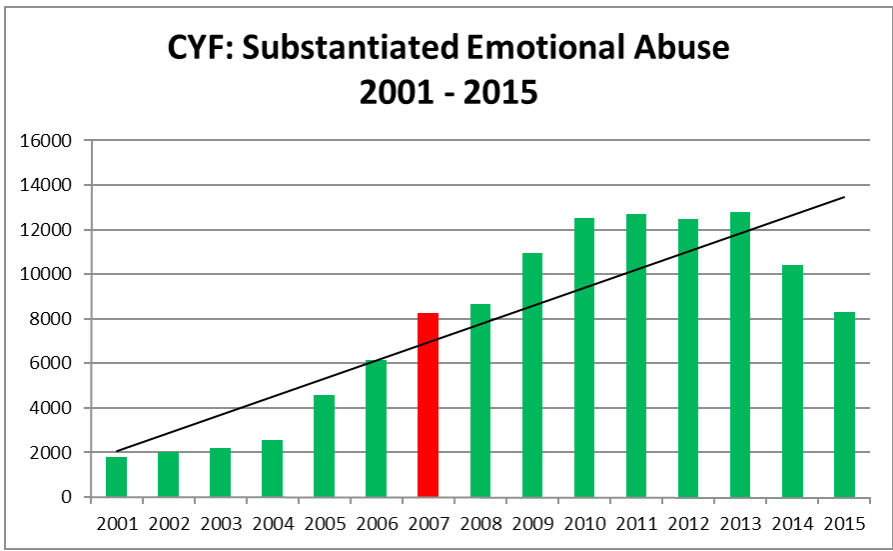
Child Youth and Family Policy Document September 2013⁴⁹

Examples of behaviours that may result in emotional abuse include constant criticism, shaming and humiliating a child.

⁴⁷ Information obtained under the Official Information Act – see earlier footnote

⁴⁸ Information obtained under the Official Information Act – see earlier footnote

⁴⁹ <http://www.practicecentre.cyf.govt.nz/policy/assessment-and-decision-making/key-information/what-did-we-find.html#Emotionalabuse6>



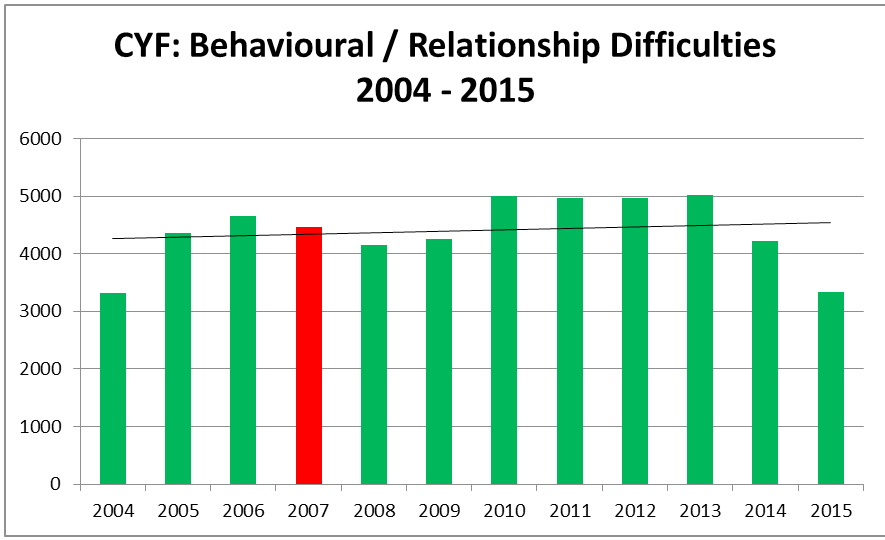
Parents may end up being verbally hostile to children when they keep getting more frustrated.

These figures highlight one of the more disturbing trends identified by the research. Consistent with the explosion in notifications (page 13), there has been a comparative explosion in cases of emotional abuse – a massive increase since 2001 from fewer than 2,000 cases per year to more than 10,000 every year since 2009 and reaching a high of almost 13,000 in 2013.⁵⁰ Family violence reporting will have contributed to part of the increase⁵¹, but this explosion began well before the "It's Not OK" campaign. This could suggest that parents may end up being verbally hostile to children when they keep getting more frustrated because they cannot stop the escalation of defiant or unacceptable behaviour with a mild smack.

It is also significant to note that while the above graph shows a decrease from 2013-2015, family violence investigations recorded by NZ Police in 2014 increased 7% from 2013.⁵² This proves that the correlation between the two is not as direct as it is argued.

Behavioural / Relationship Difficulties

CYF



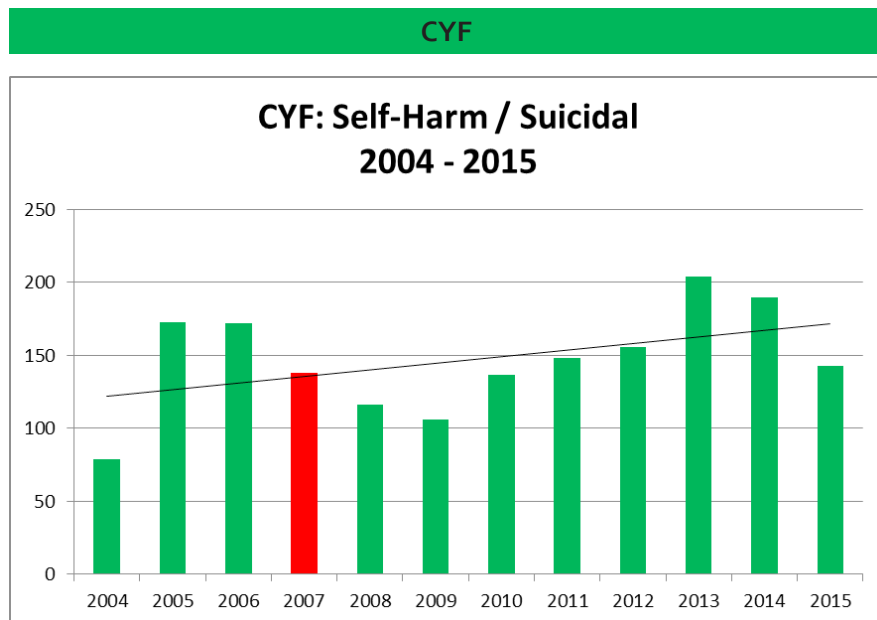
Rates have not improved since 2004.

50 Information obtained under the Official Information Act – see earlier footnote
 51 <https://nzfvc.org.nz/sites/nzfvc.org.nz/files/cyf-definitions-2013.pdf>
 52 <http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7407>

As with other CYF statistics, rates have not improved since 2004, although there has been a decrease in the last 24 months.⁵³ **We will also see that this reduction is not mirrored in Ministry of Health data (covered later in this report).**

New Zealand has one of the highest rates of child abuse deaths in the OECD.

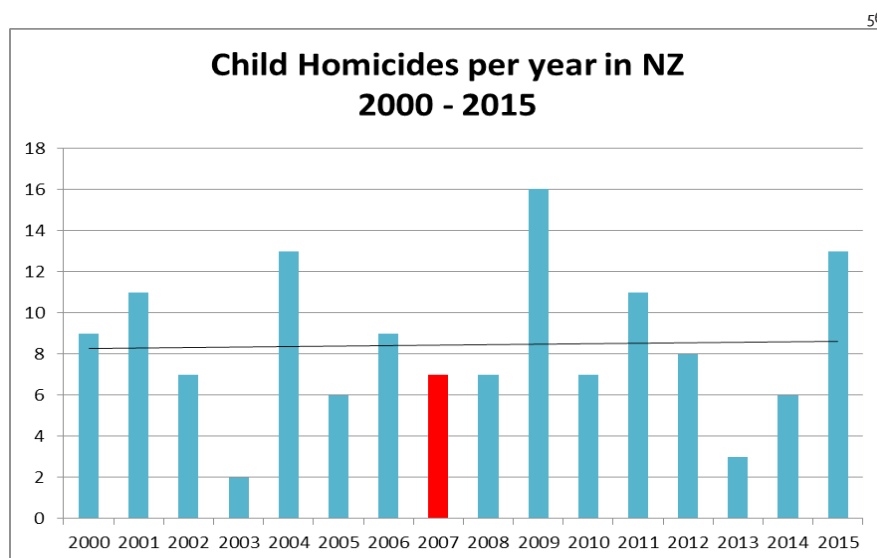
Self-Harm / Suicidal



After a welcome decrease between 2007 and 2009, there has been an almost-doubling of the numbers between 2009 and 2013/2014, with a decrease in 2015 having been reported.⁵⁴ However, it is important to note that **this decrease is also *not* matched by Ministry of Health data (covered later in this report).**

Child Abuse Deaths

New Zealand has one of the highest rates of child abuse deaths in the OECD, behind USA and Mexico.⁵⁵



2015 has been a horrific year, almost matching the worst year of 2009.

⁵³ Information obtained under the Official Information Act – see earlier footnote

⁵⁴ Ibid.

⁵⁵ http://www.oecd.org/els/soc/SF3_4_Family_violence_Jan2013.pdf

⁵⁶ Special investigation: New Zealand's shameful record of child abuse – Christchurch Press 21 Nov 2015 <http://www.stuff.co.nz/national/crime/73717177/special-investigation-new-zealands-shameful-record-of-child-abuse>

Child homicides continue to fluctuate each year with no sign of any long-term sustained improvement. It would therefore appear that the anti-smacking law has had no impact on the rates of child abuse deaths. 2015 has been a horrific year, almost matching the worst year of 2009, and equal to 2004, 1994 and 1992.

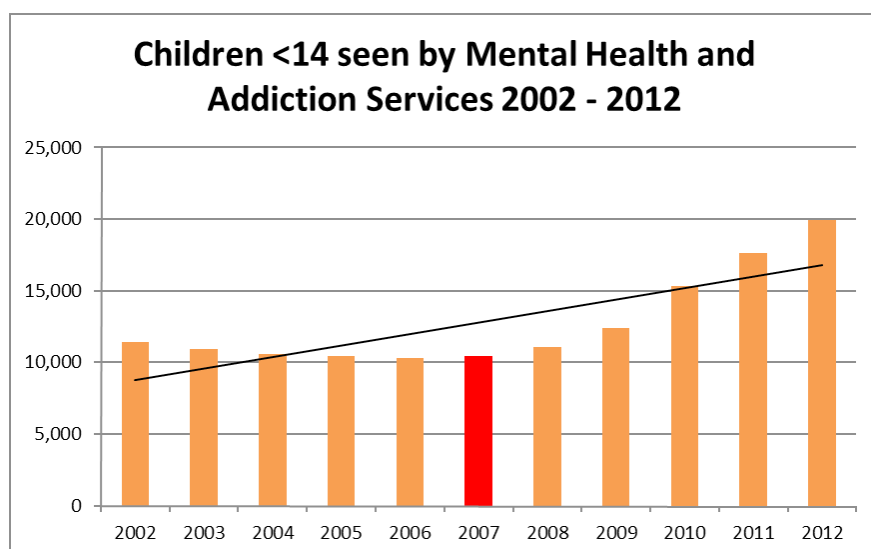
Numbers of children seen by mental health and addiction services notably worsened immediately following the introduction of the anti-smacking law.

Mental Health

MINISTRY OF HEALTH

One of the arguments frequently used by advocates of smacking bans is that smacking increases the future risk of a child suffering mental health problems.⁵⁷ One would reasonably expect that the mental health of children in New Zealand would therefore improve or show some positive indicators as a consequence of the smacking ban in 2007. As shown in the next few pages, that is not the case.

The Ministry of Health's *Mental Health and Addiction Service Use* tables⁵⁸ provide us with statistics related to the number of children seen by mental health and addiction services provided by DHBs and NGOs.



It is significant that the numbers notably worsened immediately following the introduction of the anti-smacking law – almost doubling.

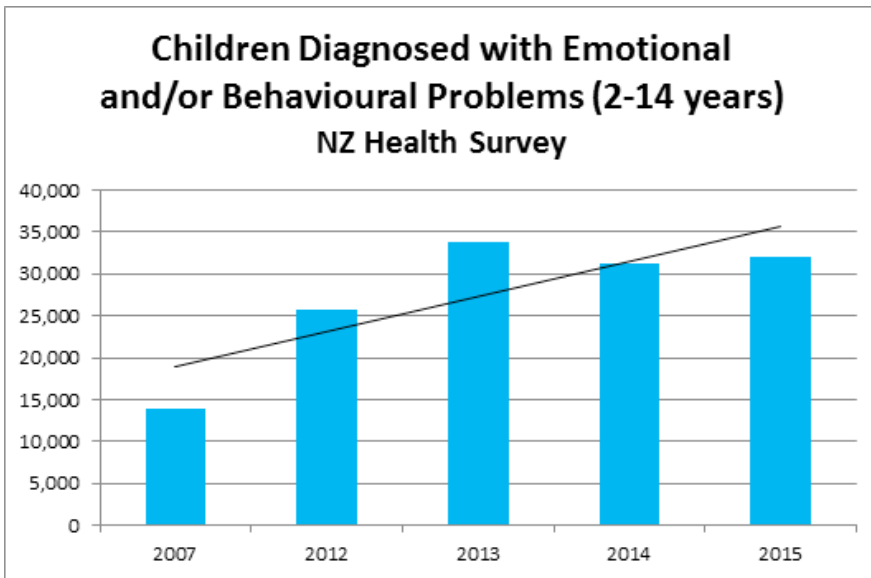
The Ministry of Health's *Annual Update of Key Results 2014/15: New Zealand Health Survey* report⁵⁹ corroborates this trend. In this report, 'emotional and/or behavioural problems' refers to depression, an anxiety disorder, attention deficit disorder (ADD) and/or attention deficit and hyperactivity disorder (ADHD).

57 Experts call for smacking children to be made illegal amid fears over future mental health risks – ABC Australia 26 July 2013 <http://www.abc.net.au/news/2013-07-26/calls-for-ban-on-parents-smacking-children/4844816>

Smacking ban and suicide link questioned – EPOCH NZ 3 Sep 2014 <http://www.epochnz.org.nz/20-news-archive/frontpage/198-smacking-ban-and-suicide-link-questioned.html?tmpl=component&print=1&page=>

58 <http://www.health.govt.nz/nz-health-statistics/health-statistics-and-data-sets/mental-health-data-and-stats>

59 <http://www.health.govt.nz/publication/annual-update-key-results-2014-15-new-zealand-health-survey>



There has been a statistically significant change since 2007.

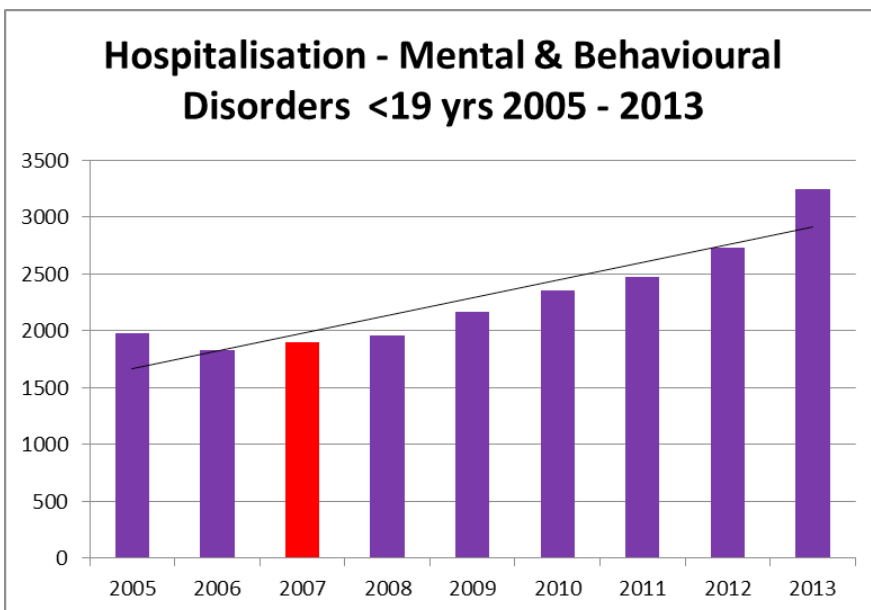
(The survey was first carried out in 2007 and then annually since 2012)

Surveyors recorded children as having been diagnosed with emotional and/or behavioural problems if their parents indicated that they had been told by a doctor at some time in their child's life that the child had one of these conditions.

In 2015, around 32,000 children aged 2–14 years (4.0%) had been diagnosed with emotional and/or behavioural problems at some time in their life. The percentage of children with diagnosed emotional and/or behavioural problems has increased since 2007 (13,805 children – 1.8%). According to the survey, **there has been a statistically significant change since 2007.**

Boys were 1.6 times more likely to have ever been diagnosed with emotional and/or behavioural problems than girls after adjusting for age differences.

Hospitalisation for children and teenagers also shows a disturbing trend with a 71% increase in admissions for mental and behavioural disorders since 2007.⁶⁰



Hospitalisation for children and teenagers also shows a disturbing trend.

⁶⁰ <http://www.health.govt.nz/nz-health-statistics/health-statistics-and-data-sets/publicly-funded-hospital-discharges-series>

Suicide / Self-Harm

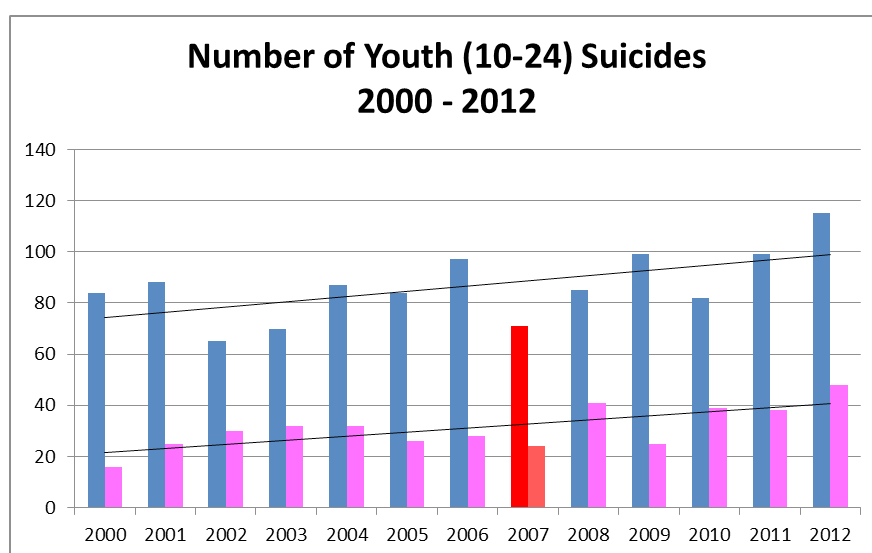
Note: As seen on page 21, CYF reports cases where there is a finding related to 'self-harm / suicide'. No attempt is being made under this heading to argue that the anti-smacking law has directly contributed to increasing rates of youth suicide or self-harm. This section is included to examine the claim that smacking increases the risk of mental health problems⁶¹, and to look at the overall picture of the wellbeing of our young people over the past decade, and especially since the law was passed.

New Zealand's most recently reported male and female suicide rates for youth aged 15-24 years were the highest of the OECD countries.

SUICIDE

The highest rate of suicide in 2012 was in the youth age group (15–24 years) with 107 male and 43 female youth suicides. Back in 2003, there were 66 male and 31 female suicides.

Males had higher rates of suicide than females for every age group. The highest rates for males were for those aged 15–19 and 40–44 years. The highest rate for females was in the 15–19 years age group.^{62 63}



■ = males ■ = females (2012 based on provisional figures)

Between 2000 and 2012, the overall rate of suicide for young people has increased 62%. In the 10-14 age bracket, there were 7 male suicides and 5 female suicides in 2012. In 2000, there were four in total. In the 15-19 age bracket, there were 42 suicides in 2000, and 77 in 2012. Disturbingly, the rate for young women and girls has tripled over this time from 16 in 2000 to 48 in 2012.

Compared with other OECD countries, New Zealand's most recently reported male and female suicide rates for youth aged 15-24 years were the highest of the OECD countries covered in the Ministry of Health's 2012 *Suicide Facts: Deaths and intentional self-harm hospitalisations* report.⁶⁴

The New Zealand male youth suicide rate in 2012 was 32.3 per 100,000, followed by Finland (2011) with 26.4 suicides per 100,000 (chart next page).⁶⁵

61 <http://www.epochnz.org.nz/20-news-archive/frontpage/198-smacking-ban-and-suicide-link-questioned.html?tmpl=component&print=1&page=>

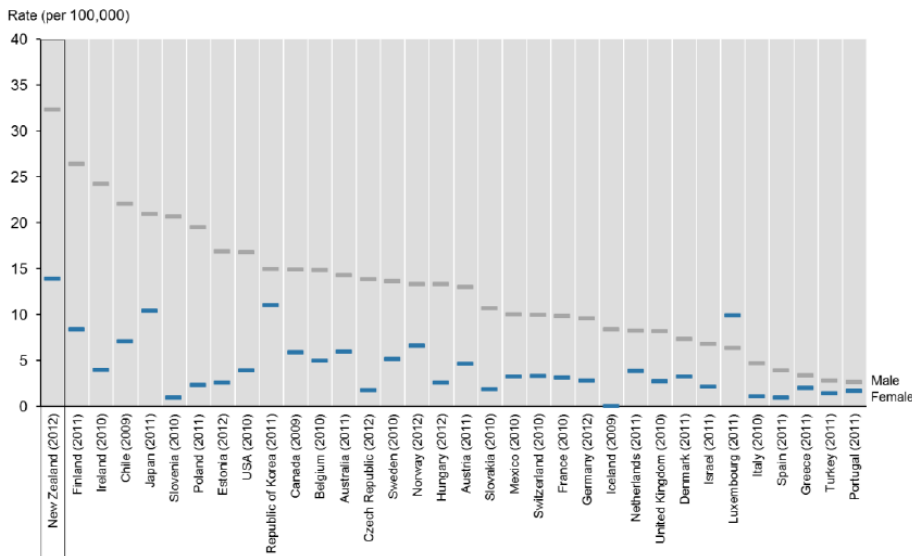
62 <http://www.health.govt.nz/system/files/documents/publications/suicide-facts-2012-may15-v2.pdf>

63 http://www.health.govt.nz/system/files/documents/publications/data_tables_suicide_facts_2012-final.xlsx

64 <http://www.health.govt.nz/publication/suicide-facts-deaths-and-intentional-self-harm-hospitalisations-2012>

65 *ibid.*

New Zealand's female youth suicide rate (2012) was 13.8 suicides per 100,000, followed by the Republic of Korea (2011) with 11.0 per 100,000.



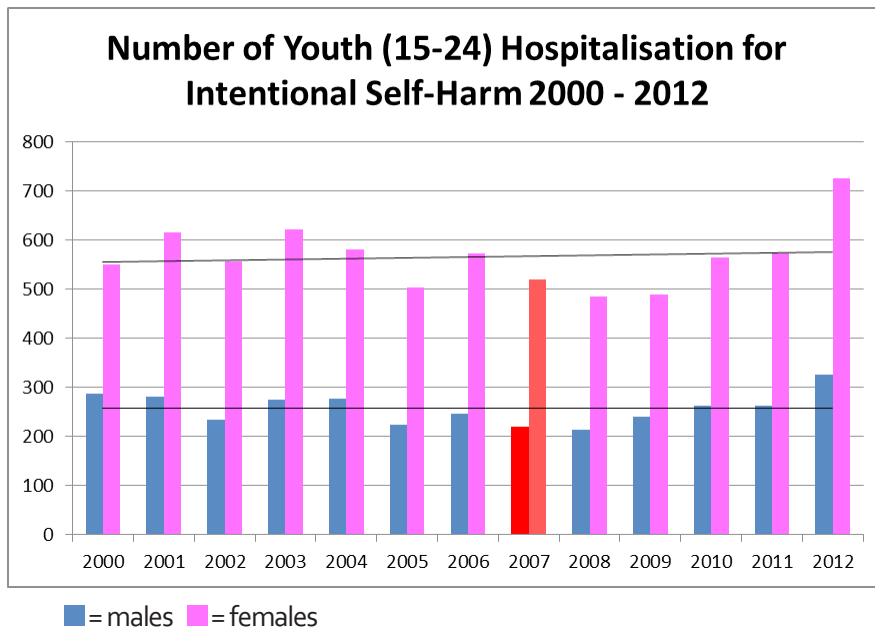
Source: OECD (nd)

Note: rates are age-specific, expressed as deaths per 100,000 population.

Youth (15-24 years) suicide age-specific rates for OECD countries, by sex

SELF HARM

In 2012, the highest rate of intentional self-harm hospitalisations for both males and females was in the 15–19 years age group (103.1 per 100,000 for males and 279.5 per 100,000 for females). Youth aged 15-24 years accounted for 34.7% (1052) of all intentional self-harm hospitalisations in 2012. **The female rate of intentional self-harm hospitalisations was 2.4 times the male rate.**^{66 67}



The female rate of intentional self-harm hospitalisations was 2.4 times the male rate.

66 <http://www.health.govt.nz/system/files/documents/publications/suicide-facts-2012-may15-v2.pdf>
 67 http://www.health.govt.nz/system/files/documents/publications/data_tables_suicide_facts_2012-final.xlsx

Are the Increases Due to Better Reporting?

Supporters of anti-smacking laws argue that the increases in child abuse that we have documented in this paper have only come about because of campaigns such as "It's Not OK"⁶⁸ and increased public awareness which were introduced at the same time as the anti-smacking law.⁶⁹

This could be a convincing argument if the rates of abuse highlighted in this research paper all experienced sharp increases following the introduction of the new law. However, **rates of child abuse were increasing before those campaigns, and have continued to increase at similar rates.** It can therefore be argued that the campaigns and the anti-smacking law have made no tangible difference.

It is accepted that *some* of the increase in *notifications* can be attributed to public campaigns and awareness.

However, there are a number of other contributing factors to consider:

- If the premise of increased reporting is true, the level of increase in negative statistics *after* the anti-smacking law was introduced would be greater than the increasing trend *before* the law was introduced. This has not happened. The situation has simply *continued* to deteriorate.⁷⁰
- The problem should peak and start to improve as awareness is raised. However, there is no evidence that the 'tide is turning'.⁷¹ Many researchers and those working in the community are seeing no real and measurable improvement.⁷²
- The real problem of the 'increase due to better reporting' premise⁷³ is that if there *was* a significant and ongoing *decrease* in an area of abuse, would that simply mean the problem is just being hidden and people don't trust the authorities or can't be bothered reporting it? (We note that the police don't use this line of thinking when crime rates *do* improve.⁷⁴)
- In addition to there being no noticeable jump related to the "It's Not OK" campaign, the increase is just as strong or stronger in statistics less susceptible to a changing threshold for what gets reported e.g. injuries in police statistics, or hospitalisations.

The fact that so many social indicators continue to exhibit negative trends indicates that the real causes of child abuse are not being tackled. It also indicates that the law has been completely ineffective in terms of tackling the problem it was *supposed* to address.

It may even suggest that the law is doing more harm than good.⁷⁵ (see further discussion page 36 onwards)

Rates of child abuse were increasing before those campaigns, and have continued to increase at similar rates.

There is no evidence that the 'tide is turning'.

The increase is just as strong or stronger in statistics less susceptible to a changing threshold for what gets reported.

68 <http://www.areyouok.org.nz/>

69 <http://www.areyouok.org.nz/utility-pages/about-us/>

70 New Zealand's shocking child abuse statistics - [stuff.co.nz](http://www.stuff.co.nz/national/crime/68936884/new-zealands-shocking-child-abuse-statistics.html) 2 June 2015 <http://www.stuff.co.nz/national/crime/68936884/new-zealands-shocking-child-abuse-statistics.html>

71 Police assign extra 25 officers to child abuse teams as cases stream in - [stuff.co.nz](http://www.stuff.co.nz/national/crime/73961316/Police-assign-extra-25-officers-to-child-abuse-teams-as-cases-stream-in?cid=app-iPhone) 24 Nov 2015 <http://www.stuff.co.nz/national/crime/73961316/Police-assign-extra-25-officers-to-child-abuse-teams-as-cases-stream-in?cid=app-iPhone>

72 Agencies doubt abuse figures - Bay of Plenty Times 6 Mar 2015 http://www.nzherald.co.nz/bay-of-plenty-times/news/article.cfm?c_id=1503343&objectid=11412873

73 More reporting of family violence - Bay of Plenty Times 25 Feb 2015 http://www.nzherald.co.nz/bay-of-plenty-times/news/article.cfm?c_id=1503343&objectid=11407689

74 Police 'on the right track' as crime falls - ONE News 1 Oct 2014 <https://www.tvnz.co.nz/one-news/new-zealand/police-on-the-right-track-as-crime-falls-6096438>

75 Sweden's smacking ban: more harm than good <http://www.families-first.org.uk/art/sweden.pdf>

Legal Analysis of the Effect of the Anti-Smacking Law

In 2014, an independent legal analysis of court cases involving prosecutions for smacking since the anti-smacking law was passed found that the anti-smacking law is complicated, difficult to apply, and lower courts are getting it wrong.

The analysis by public law specialists Chen Palmer⁷⁶ also said that **statements made by politicians to the effect that the new 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.** (To read the full opinion, go to www.protectgoodparents.org.nz)

This opinion flies in the face of assertions made by the Prime Minister John Key and CYF⁷⁷, and especially the ‘Latta Review’⁷⁸ which argued that none of the cases highlighted by Family First NZ to ‘bolster their argument that good parents were being made into criminals for smacking stood up to scrutiny’.⁷⁹

Key statements in the legal opinion by Mai Chen also include:

- *“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.”*
- *“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.”*
- *“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.”*
- *“The law is complicated and difficult to apply, such that even the lower courts are getting it wrong.”*
- *“Smacking a child for the purpose of correction is illegal regardless of whether the Police decide to prosecute or not.” (our emphasis added)*

This is despite Prime Minister John Key telling parents that a light smack is ok.⁸⁰ It is disappointing that the political parties have been so quick to mislead Kiwi families. Documents obtained under the Official Information Act reveal that the Minister of Justice Amy Adams⁸¹ and the then-Minister of Police Michael Woodhouse⁸² sought no further advice and took no actions following the release of this opinion. They simply ignored it.

Non-lawyers, including parents and the Police, struggle to understand and apply section 59.

Parents will struggle to know whether their actions constitute an offence under section 59.

The law is complicated and difficult to apply.

76 <https://www.familyfirst.org.nz/wp-content/uploads/2014/11/aaa-CHEN-PALMER-OPINION-NOV-2014.pdf>

77 <http://www.beehive.govt.nz/sites/all/files/20091110%20CE%20Monitoring%20Report%20on%20s59.pdf>

78 <https://www.msd.govt.nz/documents/about-msd-and-our-work/newsroom/media-releases/news/2009/s59-report.pdf>

79 Nigel Latta gives OK to anti-smacking law – Stuff.co.nz 8 Dec 2009

<http://www.stuff.co.nz/dominion-post/news/politics/3135921/Nigel-Latta-gives-OK-to-anti-smacking-law>

80 Smacking law appropriate as is, says Key - NZ Herald 7 Dec 2009

http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10614013

81 <https://www.familyfirst.org.nz/wp-content/uploads/2015/12/OIA-Minister-of-Justice-Amy-Adams-April-2015.pdf>

82 <https://www.familyfirst.org.nz/wp-content/uploads/2015/12/OIA-Minister-of-Police-Michael-Woodhouse-April-215.pdf>

The Minister of Justice, in a letter to Family First NZ, said;

*"I am confident that the legal provisions have struck the right balance. There are no plans to review or amend this legislation. The Government is committed to ensuring that responsible parents are not convicted for a light smack, and this is not the intention of the law."*⁸³

It is disappointing that the political parties have been so quick to mislead Kiwi families.

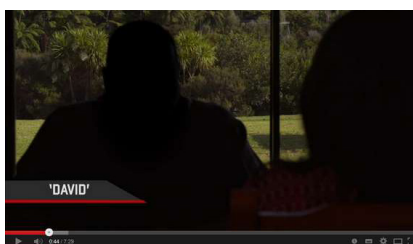
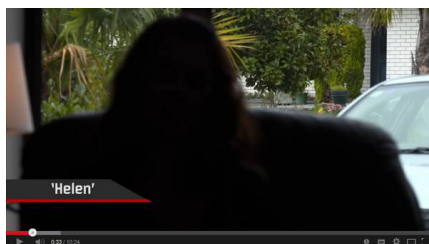
The smacking law has been so bereft of success that supporters have had to commandeer a claim that *"there has been no increase in prosecutions of parents for minor and occasional smacking of children"*⁸⁴ – a claim which has now been shown to be patently false.

View The Examples

Family First NZ has released two documentaries on the anti-smacking law – *"My Mummy's A Criminal"*⁸⁵ in 2011, and *"Mum on a Mission"*⁸⁶ in 2014 – which feature the experiences of ten families. These documentaries have been viewed on YouTube over 23,000 times (despite being 30 minute documentaries) and 15,000 copies of the DVD's have been distributed.

You can view mini-episodes which highlight the story of each family. Watch and judge for yourself. Go to www.protectgoodparents.org.nz

Investigated by POLICE



Smacking a child for the purpose of correction is illegal.

83 <https://www.familyfirst.org.nz/wp-content/uploads/2015/12/Amy-Adams-Minister-of-Justice.pdf>

84 <http://yesvote.org.nz/2010/10/17/mission-accomplished/>

85 <https://www.youtube.com/watch?v=BQn4IWNMUII>

86 <https://www.youtube.com/watch?v=f7chx3ifSL0>

Investigated by CYF



View all episodes of "10 Good Reasons to change the Anti-Smacking Law" at www.protectgoodparents.org.nz or on YouTube

Other prosecutions have included a smack on the back of a hand.

Are Parents Being Prosecuted For Smacking?



Yes, they are. Some of these cases were included in the legal analysis (*refer to page 27*). According to the police reviews for the five years up to mid-2012, there have been seven prosecutions for a smack on a nappy, smacks on the leg, or smacks on the bottom with no physical injuries at all. Other prosecutions have included open hand smacks just above or below the bottom, and even a smack on the back of a hand.

One of the last police monitoring reports on the law admitted that there had been an upward trend in smacking cases, and "*more widespread use of the legislation*" by the police.⁸⁷ The other huge concern expressed by police themselves is the increase in false allegations of assault. This may come from neighbours or even the children themselves.

In just the five years immediately following the introduction of the law – covered by the police monitoring reports⁸⁸ - almost 600 kiwi families had a police investigation for allegations of smacking or minor acts of physical discipline yet only 9% of them have been serious enough to warrant charges being laid. That's a lot of wasted police resource.

With police having ceased reporting the effect of the anti-smacking law in the middle of 2012,⁸⁹ it is difficult to analyse how the law is now being implemented, how police discretion is being used, and what the longer term trend is.

In just the five years immediately following the introduction of the law almost 600 kiwi families had a police investigation for allegations of smacking or minor acts of physical discipline.

87 Three prosecuted for smacking in last half of 2011 – NZ Herald 24 Aug 2012 http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10829314

88 <http://www.police.govt.nz/sites/default/files/resources/other-reports/11th-review-section-59.pdf>

89 <http://www.police.govt.nz/news/release/34849>

These investigations are also independent of the many more investigations by CYF. CYF admit that they can 'find' abuse where the police do not. Every NZ family should be concerned by that statement of intent!

Please note that an alleged perpetrator is not a confirmed abuser – they may not have been found guilty of any offences against children or young people. Thresholds of abuse for Child, Youth and Family and the New Zealand Police differ in that Child, Youth and Family determines abuse on the balance of probability while the Police – through the Courts – determine abuse beyond reasonable doubt. This explains how Child, Youth and Family can find abuse where the Police do not. (our emphasis added)

Official Information Act Response from CYF (2014)⁹⁰

"If I see good parents getting criminalised for lightly smacking their children for the purposes of discipline, I'm going to change the law if I'm in a position to do so. It's as simple as that. It doesn't matter if there's a referendum or not. I want the law to work properly."

John Key – PM - Investigate Magazine June 2008

CYF admit that they can 'find' abuse where the police do not.



Newspaper Advert (2009)

The Review of the Law (2009)

The Prime Minister's review of the smacking law carried out by psychologist Nigel Latta, the Police Commissioner, and the head of CYF⁹¹, in response to the overwhelming rejection of the law in the citizens initiated referendum, contained glaring errors. These included being factually wrong, misrepresenting basic facts by leaving out material information, and containing the *alleged* actions of parents which were found to have no basis in court but which still presents the parent as being abusive. The review also failed to take into account the response of the court, including discharges without conviction.

A senior Wellington lawyer described the review as a 'rubber stamping' process. Documentation obtained under the Official Information Act seems to indicate that the review involved only two meetings of the full panel⁹², rides in a police car, sitting at the police Communications Centre for a couple of hours⁹³, and misinterpreting and misrepresenting cases put forward by Family First NZ.

A group of parents, whose experiences were included in the report, released a statement immediately after the Prime Minister and Nigel Latta presented the report in 2009, saying:

A senior Wellington lawyer described the review as a 'rubber stamping' process.

90 Official Information Act Response Feb 2014 - <http://lindsaymitchell.blogspot.co.nz/2014/02/all-powerful-cyf.html>

91 <https://www.msd.govt.nz/documents/about-msd-and-our-work/newsroom/media-releases/news/2009/s59-report.pdf>

92 <https://www.familyfirst.org.nz/wp-content/uploads/2015/12/OIA-Latta-Review-CYF.pdf>

93 <http://bobmccoskrie.com/wp-content/uploads/2015/12/OIA-Latta-Review-Police.pdf>

We, the parents who were accused of misrepresenting the facts of our smacking cases and therefore misleading Family First, are refuting the claims, and reject the findings of the report commissioned by the Prime Minister.

Why were we never consulted in the process? It appears that our accounts of what happened and the supporting documentation we provided, including court, police and CYF documents, to Family First have been ignored and the only opinion that matters has been that of the police and CYF. The terms of reference of the Review failed to allow our voice to be heard.

The report contains glaring errors including

- *misrepresentation of basic facts,*
- *contains alleged actions of parents which were found to have no basis in court but which still presents the parent as being abusive,*
- *fails to take into account the response of the court including discharges without conviction for what were previously claimed as serious assaults*
- *reports a case where the police prosecution was dismissed by the court, yet the report still argues that all police action was appropriate*
- *fails to address a number of cases where parents were investigated by police or CYF for erroneous claims of smacking made by passers-by or the children themselves ringing 111*

... As parents referred to in the report, we believe that we should have had the opportunity to respond to the claims made by the police and CYF. This is a one-sided report and fails to objectively hear the evidence from both sides.

We reject the notion that we have misrepresented the facts to Family First, and that Family First has lied in their advocacy work in this area. Family First has been one of the few organizations willing to hear our side of the story and advocate for our concerns. We are not child abusers, yet this report continues to make that accusation, and does so without providing an opportunity for rebuttal or a full assessment of the facts.

The effect of the experience of being investigated and in some cases prosecuted has had a huge effect on our families including our children, yet this has been minimised or ignored.⁹⁴

Why were we never consulted in the process?



Newspaper advert (2010)

This is a one-sided report and fails to objectively hear the evidence from both sides.

94 Families reject smacking report – Scoop 16 Dec 2009
<http://www.scoop.co.nz/stories/PO0912/S00203/families-reject-smacking-report.htm>

Investigate Magazine did a full examination of the report including seeking a response from panel member Nigel Latta, who responded to *Investigate*:

"The terms of the review were very clear. We were asked to look into what happens with (sic) Child, Youth and Family and Police respond to reports of smacking. Is their response appropriate? Did they do the right thing? We were certainly not asked to say whether we thought a criminal conviction was warranted or fair." (our emphasis added)

You can read the full article on this link:

<http://protectgoodparents.org.nz/wp-content/uploads/2014/04/INVESTIGATE-ARTICLE.pdf>⁹⁵

For a summary:

<http://protectgoodparents.org.nz/wp-content/uploads/2014/04/ADVERTISE-MENT-Latta-review.pdf>⁹⁶

Didn't Almost All MPs Vote for the Anti-Smacking Law?

Yes they did,⁹⁷ but many National party MPs who were vehemently and vocally opposed to the law were suddenly, within a 24 hour period, forced to vote for it! It was supposed to be a 'conscience vote' but the two major parties – Labour and National – were 'whipped' by their leaders (had to vote along party lines) to vote for the law.

What Does the Research Really Say About Smacking?

A 2007 Otago University study⁹⁸ found that children who were smacked in a reasonable way had similar or slightly better outcomes in terms of aggression, substance abuse, adult convictions and school achievement than those who were not smacked at all. **This is significant in light of the statistics earlier in this report highlighting worsening rates of behavioural / emotional problems, self-harm, and mental / behavioural disorders amongst our young people.** A large American study reported in 2013 found similar results.⁹⁹

Further, a study by the Christchurch School of Medicine found there was no difference in outcomes between no smacking and moderate physical punishment. They said; *"It is misleading to imply that occasional or mild physical punishment has long term adverse consequences"*.¹⁰⁰

"We were certainly not asked to say whether we thought a criminal conviction was warranted or fair."

Nigel Latta



It is misleading to imply that occasional or mild physical punishment has long term adverse consequences.

95 <http://protectgoodparents.org.nz/wp-content/uploads/2014/04/INVESTIGATE-ARTICLE.pdf>
96 <http://protectgoodparents.org.nz/wp-content/uploads/2014/04/ADVERTISE-MENT-Latta-review.pdf>

97 http://www.parliament.nz/en-nz/pb/debates/debates/48HansD_20070516_00001041/crimes-substituted-section-59-amendment-bill-%E2%80%94-third

98 Smacking study hits at claims of harm – NZ Herald 7 Oct 2006 http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10404809

Submission to Select Committee considering the anti-smacking law – made by the researchers <http://bobmccoskrie.com/wp-content/uploads/2015/12/Otago-medical-School-research.pdf>

99 Gunnoe, M. L. (2013). Associations Between Parenting Style, Physical Discipline, And Adjustment In Adolescents' Reports. *Psychological Reports: Disability & Trauma*, 112(3), 933-975. <http://dx.doi.org/10.2466/15.10.49.PR0.112.3.933-975>

100 <http://www.sciencedirect.com/science/article/pii/S0145213497000215>

A recent study of teenagers by a team from the Albert Einstein College of Medicine in New York, published in the journal *Parenting: Science and Practice*, found the effects of discipline – such as verbal threats or smacking – are offset by the child’s feeling of being loved and the child believes their punishment is coming from ‘a good place’.¹⁰¹ They said; “*Maternal warmth protected adolescents from the negative effects of harsh discipline such that, at higher levels of maternal warmth, there was no relation between harsh discipline and externalising problems.*”

It also said **anti-smacking policies are problematic because they contradict many adults’ own childhood experiences with discipline and their long-term outcomes**, and that this study demonstrated one condition - maternal warmth - under which discipline does not result in negative outcomes for the child in later life.

This study joins what the researchers refer to as “*emerging theoretical and empirical evidence*” which challenges the academic and political view that smacking is child abuse and should be banned.¹⁰²

Studies cited by opponents of smacking do not adequately distinguish the effects of smacking as practiced by non-abusive parents from the impact of severe physical punishment and abuse.¹⁰³

What About Other Corrective Actions Used By Parents?

A peer-reviewed study from Oklahoma State University titled “*Making Valid Causal Inferences About Corrective Actions by Parents from Longitudinal Data*”, and published in the December 2013 edition of the *Journal of Family Theory & Review*, referred to three recent studies of 12 disciplinary tactics that parents could use instead of smacking. They found that;

“*no disciplinary tactic was ever associated with reduced child behaviour problems, and 7 of the 12 tactics predicted significantly worse behaviour problems in at least one analysis.*”¹⁰⁴

Other studies have shown that expressing disappointment and yelling or scolding were associated with as many significantly adverse outcomes as smacking, and time-out and shaming were also significantly associated with internalising problems. Psychotherapy for children and using Ritalin for ADHD appear just as harmful as smacking when using the best research methods used in anti-smacking studies.

The study by Oklahoma State University argues that selection bias taints the conclusions of most studies which criticise smacking. They say:

Anti-smacking policies are problematic because they contradict many adults’ own childhood experiences with discipline and their long-term outcomes.



Expressing disappointment and yelling or scolding were associated with as many significantly adverse outcomes as smacking.

101 <http://www.sciencedaily.com/releases/2013/04/130417114007.htm>

102 <http://onlinelibrary.wiley.com/doi/10.1111/jftr.12020/abstract>

103 Findings Give Some Support To Advocates of Spanking – New York Times 25 Aug 2001 <http://www.nytimes.com/2001/08/25/us/findings-give-some-support-to-advocates-of-spanking.html?n=Top/Reference/Times%20Topics/Subjects/C/Child%20Abuse%20and%20Neglect&pagewanted=all>

104 <http://onlinelibrary.wiley.com/doi/10.1111/jftr.12020/abstract>

“Parents are less likely to use corrective actions when children do well in school... do not smell of tobacco smoke, are not at risk for precocious sex, demonstrate trustworthiness with non-deviant peers, are cooperative, and respond well to reasoning. Quite simply, parents do not need to use corrective actions when there are no problems to correct.”

Parents do not need to use corrective actions when there are no problems to correct.

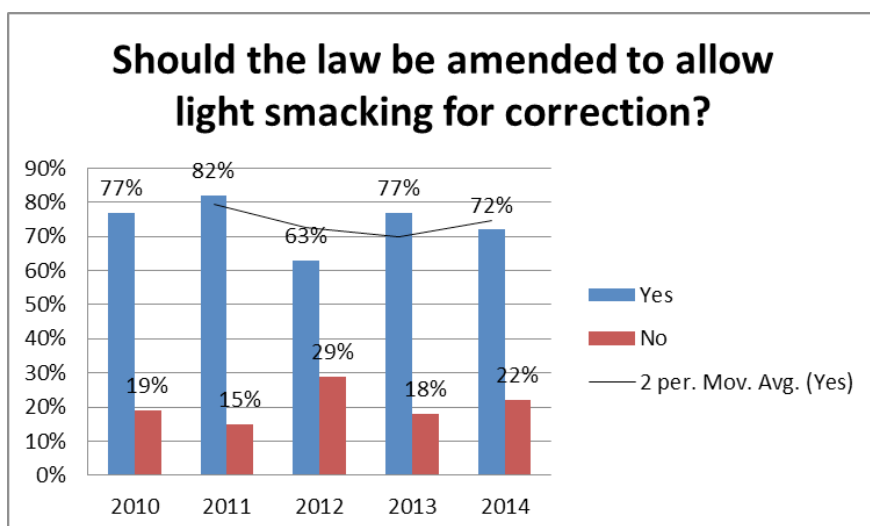
According to the researchers, this bias makes all corrective disciplinary actions look more harmful than they actually are, making it nearly impossible for research to identify effective ways to use smacking or any alternatives that parents could use instead. This failure to make obvious discriminations leads to premature absolute conclusions for or against favoured or disfavoured disciplinary actions. They conclude that studies which criticise smacking all failed to investigate alternative disciplinary tactics that parents could use in similar disciplinary situations:

“Instead, these studies implicitly compared high spanking (smacking) frequency versus doing nothing... Doing nothing, however, is not an acceptable option when parents are dealing with defiance or dangerous behaviour... Before spanking can be discounted as a viable disciplinary tactic, it needs to be compared with alternatives such as time-out which parents could use in similar disciplinary situations. The failure to make such comparisons has undermined the scientific basis for alternatives to recommend to parents when spanking is proscribed, thus undermining the success of spanking bans.”

Half the parents said the law change had caused a decline in discipline.

NZ'ers Overwhelmingly Reject The Anti-Smacking Law

In the most recent independent poll of 1,000 New Zealanders in 2014¹⁰⁵, 72% of respondents backed a law change, with only 22% supporting the current law, and 6% unsure. In 2013, the support for a law change was 77%¹⁰⁶ and in 2012 it was 63%¹⁰⁷. Slightly more men than women support a law change, and the highest support for a law change was in rural areas and was lowest in metropolitan areas.



Only 9% of parents said they would report another parent whom they saw smacking a child on their backside or hand.

In the 2012 polling, half the parents said the law change had caused a decline in discipline. A further 12% were unsure. In addition, only 9% of parents said they would report another parent whom they saw smacking a child on their backside or hand.¹⁰⁸

105 <https://www.familyfirst.org.nz/wp-content/uploads/2014/05/Anti-Smacking-Poll.pdf>

106 <https://familyfirst.org.nz/wp-content/uploads/2013/03/ANTI-SMACKING-LAW-2013-POLL.pdf>

107 <https://www.familyfirst.org.nz/wp-content/uploads/2011/03/Smacking-Poll-March-2012-FULL-REPORT.doc>

108 Ibid.

The 'Borrows' Solution

"I'm not arguing people like the law, nor am I arguing we would've got to that point if we had been the government of the day, we would've gone to the Chester Borrows' amendment, I'm not arguing about that actually. What I am saying is the law is on the books now, so if we want to change the law, don't underestimate that there won't be such a ferocious debate coming back the other way... So my view is if the law doesn't work, I'll change it. There - I think there will be a strong no vote and if there is a strong no vote it should give parliament and future parliaments if the law still works and then one day doesn't, the backbone to actually do something about it."

John Key – TVNZ Breakfast 3 Aug 2009 (before the Referendum)

If there is a strong no vote it should give parliament the backbone to actually do something about it.

During the debate on Sue Bradford's bill, virtually all of the National MPs supported a sensible and practical amendment by National MP Chester Borrows.¹⁰⁹ The amendment was considered and worded by Sir Geoffrey Palmer and Dr Warren Young of the Law Commission.

Smacking would be deemed an offence and 'unreasonable' if:

- it causes or contributes materially to injury that is more than transitory and trifling; or
- any weapon, tool, or other implement is used; or
- it is inflicted by any means that is cruel, degrading or terrifying.

The phrase "*transitory and trifling*" is currently in our common law and refers to a sting or redness from a smack which disappears after a few minutes, but nothing more serious than that.¹¹⁰ Mr Borrows, in asking for other MPs to support his amendment, said; "*Any protection for parents must be written into the law, and re-drafting section 59 is law making not social policy writing. I believe that we should make laws that work and not abrogate our responsibility as parliamentarians and hand law making over to social agencies. That is not why we were elected to parliament.*"

The amendment was defeated.¹¹¹

SUPPORT 58:

New Zealand National 48; New Zealand First 5 (Brown, Mark, Paraone, Peters, Stewart); United Future 2 (Copeland, Turner); ACT New Zealand 2; Independent: Field

OPPOSE 63:

New Zealand Labour 49; New Zealand First 2 (Donnelly, Woolerton); Green Party 6; Māori Party 4; United Future 1 (Dunne); Progressive 1

We should make laws that work and not abrogate our responsibility as parliamentarians and hand law making over to social agencies.

Just two months later, National MPs were 'whipped' by John Key to support the anti-smacking law. Some of those MPs had been helping groups such as Family First NZ raise the necessary signatures to force a Referendum on the issue.

¹⁰⁹ http://www.parliament.nz/resource/en-nz/48DBHOH_SOP987_1/2b0e51bc12c30d-d5e33e16266cfb2356bd8d24a0

¹¹⁰ <https://www.familyfirst.org.nz/wp-content/uploads/2015/12/Chester-Borrows-Background-paper.pdf>

¹¹¹ http://www.parliament.nz/en-nz/pb/debates/debates/48HansD_20070328_00001170/crimes-substituted-section-59-amendment-bill—in-committee

Didn't 87% Reject the Law in a Referendum?



Yes they did, but incredibly John Key's government ignored the Referendum result.

To add insult to injury, just a week after the result of the Referendum was announced, a private member's bill by ex-ACT MP John Boscawen, which

would have met the demands of New Zealanders, was drawn from the ballot.¹¹²

It was virtually identical to the sensible amendment proposed by National MP Chester Borrows during the 2007 anti-smacking law debate¹¹³ which was being supported by virtually all of the National MPs.

As John Boscawen said in Parliament, "My bill was drawn out of the ballot just 3 days after the results of the referendum were announced. It was drawn out of the ballot at 12.00 on a Wednesday, and by 4.30 that afternoon, 4½ hours later, National had called a press conference and said it would not be supporting my bill. National members said they would not give effect to those 1.4 million people, the 87 percent of New Zealanders, who voted in the referendum for a change in the law."¹¹⁴

John Key's government rejected the private members bill – despite having heavily campaigned for a similar amendment previously, and having been told by 87% of voters that they wanted this amendment.

International Experience

Case Study: Sweden

In 1979, Sweden became the first country to outlaw smacking. New research has revealed a dramatic rise in cases of criminal assaults on minors since the smacking ban. Based on official Swedish figures, the study, published in the peer-reviewed *International Journal of Criminology and Sociology*¹¹⁵, shows that, compared with 1981, criminal statistics in 2010 included:

- 22 times as many cases of physical child abuse (up 55% in the first eight years after the ban);
- 24 times as many assaults by minors against minors (up 114% in the first eight years); and
- 73 times as many rapes of minors under the age of 15 (up 92% in the first eight years).

Compared to the increases in criminal assaults against children in Sweden for the first seven or eight years after it banned smacking, New Zealand is follow-

"4½ hours later, National had called a press conference and said it would not be supporting my bill."

**ACT MP
John Boscawen**

John Key's government rejected the private members bill – despite having heavily campaigned for a similar amendment previously.

Will NZ continue to mimic these Swedish trends?

112 http://www.parliament.nz/en-nz/pb/debates/debates/49HansD_20100908_00001226/crimes-reasonable-parental-control-and-correction-amendment

113 http://www.parliament.nz/resource/en-nz/48DBHOH_SOP987_1/2b0e51bc12c30d-d5e33e16266cfb2356bd8d24a0

114 <http://www.johnboscawen.org.nz/parliamentary-debates/crimes-reasonable-parental-control-and-correction-amendment-bill-first-reading>

115 <http://www.lifescienceglobal.com/pms/index.php/ijcs/article/view/1080>

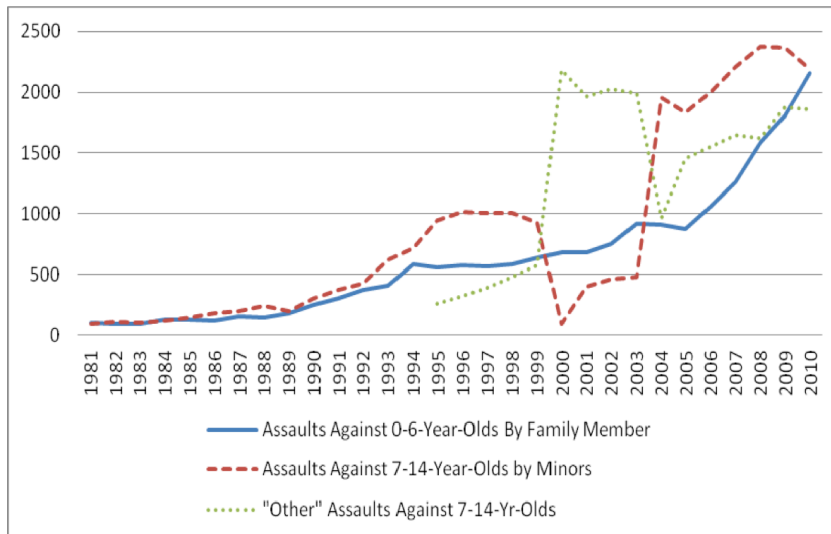
ing a similar pattern, according to police records (increase of 136% for physical abuse and 43% for sexual offences against children). Will NZ continue to mimic these Swedish trends?

Although the researchers from three American universities recognise that changes in reporting practices may account for the increases to some extent, the magnitude and consistency of the figures suggest that there has been a real increase in criminal assaults on minors in Sweden over the course of the past three decades.

Parental discipline undermined

The study concludes that Sweden's ban on smacking may have contributed to an increase in criminal assaults rather than achieving its intended outcome of decreasing the incidence of violence. The authors suggest that, despite the best of intentions, **the prohibition of all forms of physical correction may inadvertently undermine appropriate parental discipline, with the result that a small but increasing percentage of boys may grow up with a dangerous combination of disrespect for their mothers and a lack of self-control:**

"Without appropriate parental discipline, such boys learn to get whatever they want when they want it regardless of their mothers' disapproval... For some boys, this disregard for others' disapproval may generalise to other females, who are then at risk of becoming their rape victims. We are not claiming that this is the only possible explanation of the increase in rapes of minors, but it is a plausible explanation for part of the increase."



Reported criminal assaults against children in Sweden, 1981-2010

Permissive parenting

The researchers suggest that bans on smacking may undermine appropriate parental discipline if physical chastisement is not replaced with alternative disciplinary tactics that are effective for defiant children as well as easily managed children. Yet, at the same time, they note that neither supporters nor critics of anti-smacking laws have been able to identify alternative methods of discipline that are as effective in reducing child behaviour problems.¹¹⁶

A small but increasing percentage of boys may grow up with a dangerous combination of disrespect for their mothers and a lack of self-control.

Only 31% of 10- to 12-year-olds thought that Swedish parents had the right to use even 'grounding'.

Many countries listed as outlawing smacking do not enforce laws against mild smacking.

116 Robert E. Larzelere, Taren Swindle, Byron R. Johnson, 'Swedish Trends in Criminal Assaults against Minors since Banning Spanking, 1981-2010', International Journal of Criminology and Sociology, 2013, 2, 2, pp129-137.

The ability of parents to enforce appropriate discipline continued to erode until, in 2000, only 31% of 10- to 12-year-olds thought that Swedish parents had the right to use even 'grounding'. The perceived right for parents to threaten to forbid something decreased from almost 39% to under 4% in the same study.¹¹⁷

Banning only Severe Physical Punishment Works Better

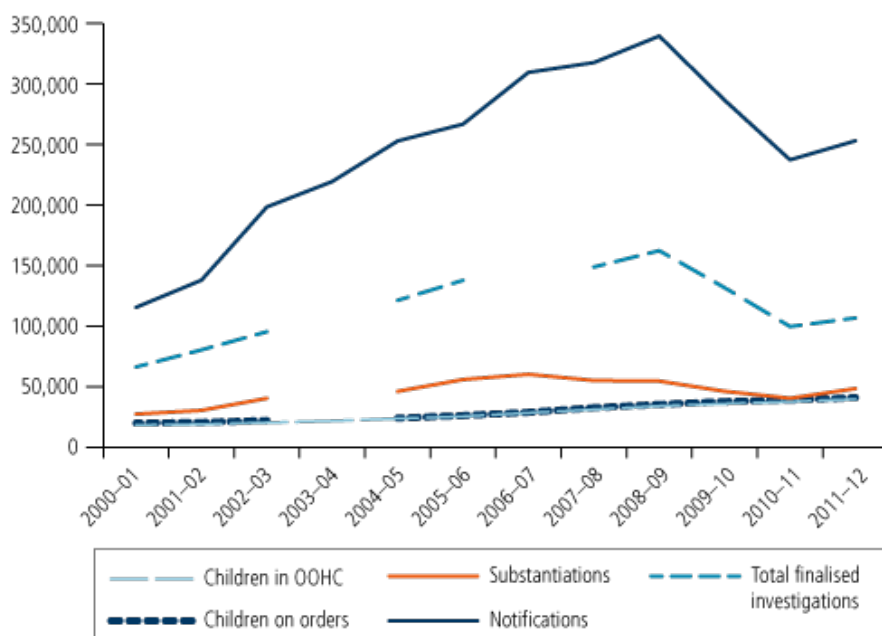
Many countries listed as outlawing smacking do not enforce laws against *mild* smacking. For example, in 2007 fewer than a third of parents thought that mild smacking had been banned in Austria and in Germany even though smacking-ban advocates claim that smacking has been outlawed there since 1989 and 2000 respectively.¹¹⁸

Further, the survey of five European nations found that **mild smacking led to decreases in severe physical punishment in the next generation** when comparing families who were similar in their endorsement of severe physical punishment.

This supports a conclusion in Larzelere & Johnson's (1999) review of available evidence on the effects of Sweden's smacking ban that its primary effect, which was to reduce mild smacking, might account for the apparent increase in physical child abuse cases from 1981 to 1994 in that country. Mild smacking may provide a means to enforce compliance and thereby stop the escalation of frustration in parents when young children are especially persistent in their defiance. Without mild smacking, their frustration may continue escalating in such disciplinary situations, thereby increasing the risk of exploding with overly severe physical abuse.

The survey of five European nations found that mild smacking led to decreases in severe physical punishment in the next generation.

Child Abuse Rates in Australia



Substantiations of abuse dropped with no equivalent law banning smacking.

Total number of notifications, investigations and substantiations across Australia from 2000/01 to 2011/12. SOURCE Australian Institute of Health and Welfare 2013¹¹⁹

117 Janson, Staffan. 2001. Barn och Misshandel: En Rapport om Kroppslig Bestraffning och Annan Misshandel i Sverige vid Slutet av 1900-Talet [Children and Physical Abuse: A Report about Corporal Punishment and Other Physical Abuse in Sweden at the End of the 20th Century] (SOU 2001: 18). Stockholm: Statens Offentliga Utredningar. p58

118 Bussmann, K. D., Erthal, C., & Schroth, A. (2011). Effects of banning corporal punishment in Europe: A five-nation comparison. In J. E. Durrant & A. B. Smith (Eds.), *Global pathways to abolish physical punishment: Realizing children's rights* (pp. 299-322). New York: Routledge.

119 Australian Institute of Family Studies - May 2013 <http://bundlr.com/clips/52934528f-d57513ad0000c8>

According to government statistics, as with New Zealand, Australia had an increase in notifications through to 2008/09, a significant drop to 2010/11, and has started to increase again. Most noticeably, substantiations of abuse dropped during the four year period 2006/2007–2010/2011, with no equivalent law banning smacking.¹²⁰

This is backed up by professionals working in the field of child abuse.

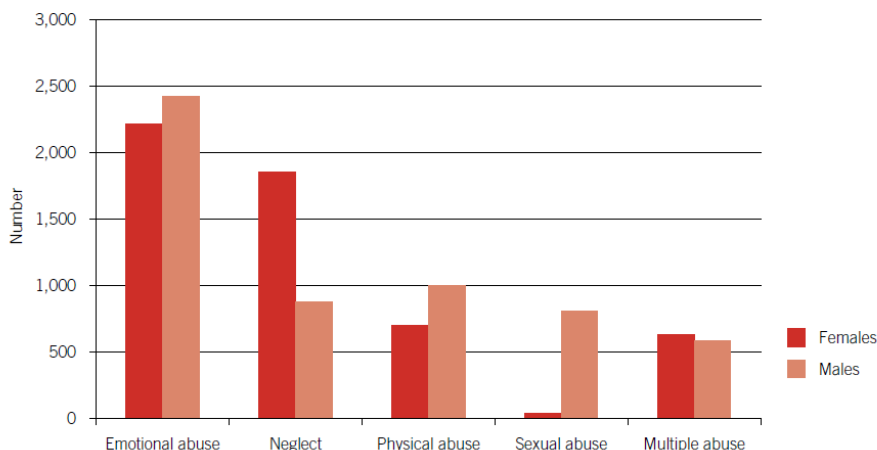
Australia, with five-times the population of NZ, has just over double the incidence of child abuse – without a smacking ban.

Child Abuse Is Not a Gender Issue

It is generally assumed in the media that children (and women) are the victims of abuse by males. It is significant to note however that a 2009 report on family violence by the Families Commission identified that 48% of abuse and neglect in 2006 was committed by women – (one of the few reports we could find that analysed this gender breakdown.)¹²¹ This is backed up by professionals working in the field of child abuse.¹²²

Before the causes of child abuse and its solutions can be properly addressed, this factor must therefore be acknowledged i.e. child abuse is not a gender issue.

FIGURE 7: NUMBER OF FEMALE AND MALE ABUSERS OF SPECIFIC TYPES OF ABUSE AND NEGLECT, 2006



From CYF Appendix Table 8.

Note that abusers found to have committed more than one type of abuse are shown in the 'multiple abuse' category as well as in the individual abuse types.

Family Violence Statistics Report - Families Commission 2009

"(I)n very young infants the mother can often be the offender, particularly if there are issues like postnatal depression."

Starship hospital child protection team leader Dr Patrick Kelly¹²³

120 <https://aifs.gov.au/cfca/publications/child-abuse-and-neglect-statistics>

121 <http://www.superu.govt.nz/sites/default/files/family-violence-statistics-report.pdf>

122 Starship doctor says head injuries most common 'by far' in 130 admissions of abused children last year. NZ Herald 13 Jan 2015 http://www.nzherald.co.nz/child-youth-and-family/news/article.cfm?o_id=256&objectid=11385415

123 Ibid.

Let's Deal With the Real Causes of Child Abuse

The people of New Zealand have been quite clear on this point - they are sick of hearing case after case of innocent children being beaten and killed.

UNICEF reports in 2003¹²⁴ and 2007¹²⁵, a CYF report in 2006¹²⁶, and a Children's Commissioner report in 2009¹²⁷ listed factors most commonly associated with the maltreatment of children as including;

- drug and alcohol abuse
- family breakdown
- children not living with biological parents
- single parenthood / weak family ties
- poverty and stress
- low maternal age at birth

These reports suggest, by implication, that strategies to address the prevalence of child abuse in New Zealand should include:

- **Working with families where children are at obvious risk of physical and emotional abuse and neglect, and improving parenting skills.** Families which have shown a propensity for drug and alcohol abuse, family violence, and where there are a number of agencies who are concerned with the welfare of children should be red-flagged and monitored closely until the issues are resolved. This is where the resources of CYF should be targeted. In 2004, most of the notifications made to CYF were for children not previously known to the agency. In 2014, six out of ten notifications were for children the agency already knew about. Many of these children had extensive history with the agency - on average, these children had engaged with CYF on three previous occasions.¹²⁸
- **Tackling significant contributing factors** such as family breakdown and declining marriage rates, drug and alcohol abuse, poverty, mental illness and teenage pregnancy.
- **Introducing policies which strengthen marriages, families and parental responsibility.**
- **Immediate increase of support and resourcing of grass-root community organisations** who are educating and working with at-risk families - for example Barnardos, Salvation Army, Crosspower Ministries in Otago, Homes of Hope in Tauranga, Te Whare Ruruhau O Meri in South Auckland, Amokura in Northland, Family Help Trust in Christchurch, and the many other charitable groups around the country working in their local communities and acting as the 'ambulance at the top of the cliff'.

In 2014, six out of ten notifications were for children the agency already knew about.

Families which have shown a propensity for drug and alcohol abuse, family violence, and where there are a number of agencies who are concerned with the welfare of children should be red-flagged and monitored closely until the issues are resolved.

124 A league table of child maltreatment deaths in rich nations – UNICEF 2003

<http://www.unicef-irc.org/publications/pdf/repcard5e.pdf>

125 An overview of child well-being in rich countries – UNICEF 2007

http://www.unicef-irc.org/publications/pdf/rc7_eng.pdf

126 Children at increased risk of death from maltreatment and strategies for prevention – MSD

2006 <http://www.msd.govt.nz/documents/about-msd-and-our-work/newsroom/media-releases/news/2006/pr-2006-07-27-2-child-death-from-maltreatment.pdf>

127 Death and serious injury from assault of children aged under 5 years in Aotearoa New Zealand: A review of international literature and recent findings – Children's Commissioner June 2009

<http://www.occ.org.nz/assets/Uploads/Reports/Child-abuse-and-neglect/Death-and-serious-injury.pdf>

128 Modernising Child, Youth and Family Expert Panel: Interim Report – Sep 2015 <http://www.msd.govt.nz/documents/about-msd-and-our-work/work-programmes/cyf-modernisation/cabinet-paper-modernising-cyf-expert-panel-interim-report.pdf>

- **Increased investment and availability of parenting programmes** such as The Parenting Place, Triple P and other early childhood home-based programmes e.g. HIPPO run by Great Potentials, Early Start, Parents as First Teachers, Plunket Helpline etc.
- **Media-based anti-child abuse and positive parenting campaigns.** This would follow the model of the road safety 'shock' campaigns and would encourage 'positive' parenting and the identifying of abuse.
- **Sentencing for those who abuse and kill our children to be substantially toughened** to provide both a deterrent and a clear message of our community's disgust with the actions of people who abuse children.

Tackle significant contributing factors such as family breakdown and declining marriage rates.



Billboard used during Referendum 2009

Sentencing for those who abuse and kill our children to be substantially toughened.

CONCLUSION

There is not a single social indicator relating to child abuse and wellbeing that has shown significant and/or consistent improvement in the seven years since the passing of the anti-smacking law. Overall, they've continued to get worse; in some cases, a lot worse.

In addition, the data would appear to suggest that CYF has reached the point of 'saturation' and can no longer handle the level of notifications it receives, which in turn has led to the inability to investigate and find actual cases of child abuse.

New Zealanders predicted this before the law was passed, but their concerns were ignored. Politicians and anti-smacking lobby groups linked good parents who smacked their children with child abusers – a notion strongly rejected by Kiwis. John Key was right – linking light smacking with child abuse is "*bloody insulting*".

The fact that so many social indicators continue to get worse indicates that New Zealand is simply not tackling the real causes of child abuse. These negative trends also prove that the law has been completely ineffective in terms of tackling the problem it was supposed to resolve.

There is evidence that the new law is doing more harm than good.

It is clear to many that supporters of smacking bans were driven by political ideology rather than common sense, good science and sound policy-making.

The issue of child abuse can be solved, but in order to achieve this, the real issues must be identified, agreed upon, and confronted.

Criminalising good parents who simply want to raise law-abiding and responsible citizens is bad law-making.

What matters most is that the voice of New Zealanders is heard and respected!

Overall, they've continued to get worse.

The law has been completely ineffective in terms of tackling the problem it was supposed to resolve.

The real issues must be identified, agreed upon, and confronted.

What matters most is that the voice of New Zealanders is heard and respected!

About Family First NZ

Family First NZ is a charitable organisation formed in 2006, and registered as a charity with the Charities Commission. Its purposes and aims are:

- to promote and advance research and policy regarding family and marriage
- to participate in social analysis and debate surrounding issues relating to and affecting the family
- to produce and publish relevant and stimulating material in newspapers, magazines, and other media relating to issues affecting families
- to be a voice for the family in the media speaking up about issues relating to families that are in the public domain



For more information, go to www.familyfirst.nz

tel: 09 261 2426

fax: 09 261 2520

email: admin@familyfirst.org.nz

web: www.familyfirst.nz

post: PO Box 276-133, Manukau City 2241, New Zealand





CONFIDENTIAL AND LEGALLY PRIVILEGED

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**

Instruction	1
Summary	2
Part 1: Parliamentary Intention	3
Background – Legislative history	3
Repeal and replacement of section 59.....	4
Interpreting Parliament’s intention – a definitional issue	8
Part 2: Legal Analysis of The New Section 59 and the Case Law	10
Criminalisation of the use of force for the purposes of correction.....	11
Subsection (1)	13
Subsections (2) and (3).....	15
Subsection (4)	17
Conclusion: Consistency of Law with Parliamentary Intention	19

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:

Provided by Family First

- (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.



Mai Chen
Managing Partner

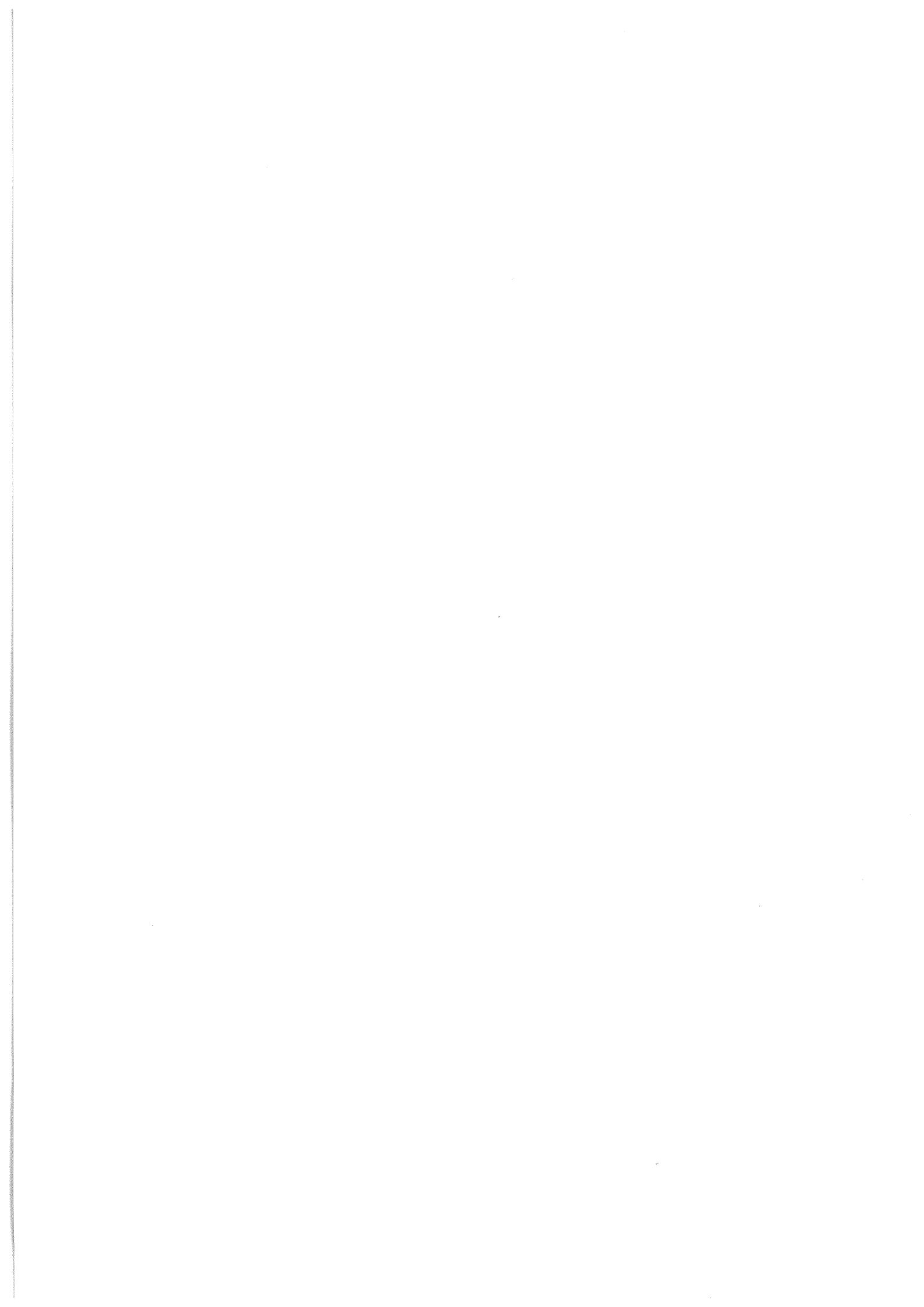
DDI: +64 9 557 0350
Email: mai.chen@chenpalmer.com



Carol Anderson
Senior Associate

DDI: +64 9 917 0362
Email: carol.anderson@chenpalmer.com

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.



Family First New Zealand
By email

4 April 2019

Dear Colleague,

Children (Abolition Of Defence Of Reasonable Punishment) (Wales) Bill

You will be aware that the Welsh Government has recently introduced a Bill to abolish the defence of reasonable punishment in Wales.

The National Assembly for Wales's cross-party [Children, Young People and Education Committee](#) is undertaking an inquiry into the general principles of the [Children \(Abolition of Defence of Reasonable Punishment\) \(Wales\) Bill](#) ('the Bill'). More information about the Bill and the Committee's work on it is attached as an Annex to this letter.

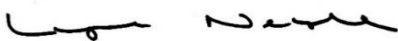
Given the New Zealand Parliament's passing of the [Crimes \(Substituted Section 59\) Amendment Act 2007](#), the country's experience is cited in a number of places in the Welsh Bill's accompanying [Explanatory Memorandum](#). The Committee also notes that Family First New Zealand responded to the [Welsh Government's consultation](#) on this proposed legislation in 2018. As such, the Committee is keen to hear from you.

The Committee would be grateful to know **your views on this legislative proposal, particularly in the context of the Explanatory Memorandum referring to New Zealand's experience**. Members would also welcome any other comments you may wish to share via the Committee's [online consultation](#). The closing date for comments is **Tuesday 14 May 2019**.

Any insight into the proposed legislation and its implementation would be very gratefully received. The Clerk of the Committee, Llinos Madeley, would be happy to discuss any questions you have. She can be contacted on seneddcype@assembly.wales.

You can find further details about how we will use your information at www.assembly.wales/InquiryPrivacy. Please ensure that you have considered these details carefully before submitting information to the Committee.

Yours sincerely,



Lynne Neagle AC / AM
Cadeirydd / Chair



The Children (Abolition of Defence of Reasonable Punishment) (Wales) Bill

The purpose of the Bill is to abolish the common law defence of reasonable punishment so it is no longer available in Wales to parents or those acting in loco parentis as a defence to assault or battery against a child.

The defence currently applies in respect of both the criminal and civil law. Under the criminal law, it applies in respect of the common law offences of assault and battery; and under civil law, in respect of the tort of trespass against the person.

The Bill is intended to support children's rights by prohibiting the use of physical punishment, through removal of this defence.

The intended effect of the Bill, together with an awareness-raising campaign and support for parents, is to bring about a further reduction in the use and tolerance of the physical punishment of children in Wales.

A [Summary of the Bill](#) is available.

The Committee's work

The [Children, Young People and Education Committee](#) is a cross-party committee of the National Assembly for Wales comprised of 8 Assembly Members. It is responsible for scrutinising the Welsh Government's policy, legislation and finances as they relate to children, young people and education in Wales.

From March to July 2019, the Committee will be scrutinising the general principles of the [Children \(Abolition of Defence of Reasonable Punishment\) \(Wales\) Bill](#). You can read more about [how legislation is scrutinised](#) on the Assembly's website. To help inform the report the Committee will produce, Members would like to hear the views of organisations and individuals about the Bill, particularly on the following **terms of reference**:

- the general principles of the Children (Abolition of Defence of Reasonable Punishment) (Wales) Bill and whether there is a need for legislation to deliver the Bill's stated policy objectives;
- any potential barriers to the implementation of the provisions and whether the Bill takes account of them;
- whether there are any unintended consequences arising from the Bill;



- the financial implications of the Bill (as set out in Part 2 of the Explanatory Memorandum);
- the appropriateness of the power in the Bill for Welsh Ministers to make subordinate legislation (as set out in Part 1: Chapter 5 of the Explanatory Memorandum).

