"Light smacking" and discretion

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finds the Government position incoherent and unlawful

In May 2007, Parliament enacted the Crimes (Substituted Section 59) Amendment Act 2007. The Act repealed s 59 of the Crimes Act 1961, which had provided that a parent was justified in using reasonable force to correct a child. The Act introduced a new s 59, which justified a parent in using reasonable force towards a child for certain purposes, but not for correction. The new section also included 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 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.

This subsection was central to the political compromise that secured the Bill's passage. The present government has asserted that what Parliament intended in enacting this subsection was to ensure that good parents were not criminalised for light smacking. While I take no view here on whether Parliament should have criminalised light smacking, I argue that this understanding of what Parliament intended is false. I argue further that notwithstanding the government's assertions, it may well be unlawful for the Police to presume that parents who lightly smack their children should not be prosecuted. The proposed s 59(4) may have been central to the compromise that secured the Bill's passage, but it is incapable of bearing the weight that has been placed on it.

THE GOVERNMENT'S POSITION

In August 2009, a postal referendum was held on the question: "Should a smack as part of good parental correction be a criminal offence in New Zealand?" The turnout was 56 per cent, of whom 87 per cent answered "No". Cabinet responded by announcing a review of "Police and Child, Youth & Family policies and procedures … to identify any changes that are necessary or desirable to ensure good parents are treated as Parliament intended" (Press release, John Key, "Referendum: safeguards to give parents comfort", 24 August 2009).

The Terms of Reference state that:

> The government does not want to see good parents criminalised for a light smack and does not believe that the Crimes (Substituted Section 59) Amendment Act 2007 intends for this to occur. It wants safeguards put in place to give parents comfort that this will not happen.

The specific Terms of Reference are to review Police and CYF policies and procedures:

> … to identify any changes that are necessary or desirable in the interest of ensuring that:
>
> 1. good parents are treated as Parliament intended under the [2007 amendment];
> 2. provisions of the law (both criminal and under the Children, Young Persons, and Their Families Act 1989) are applied to those who abuse children.
>
> To consider any other matters which, in the reviewers' opinion, will assist in ensuring that parents are treated as Parliament intended under the Crimes (Substituted Section 59) Amendment Act 2007.

It is clear that the government is concerned to ensure that "good parents are treated as Parliament intended" in enacting the 2007 Act, which the government understands to mean that good parents are not "criminalised for a light smack". The Terms of Reference clearly imply that a good parent who lightly smacks a child is not a person who abuses his or her child and therefore is not someone to whom the (criminal) law should be applied.

WHAT "CRIMINALISED" MEANS

At first glance, the government's position is absurd. The 2007 Act clearly makes it the case, as the Prime Minister and his legal advisers must know, that parents who lightly smack their children for a corrective purpose commit a criminal act. Any use of force to correct a child, which might otherwise have been reasonable under the old law, now breaches at least s 194 (assault on a child) or s 196 (common assault) of the Crimes Act 1961. This undoubtedly includes a parent lightly smacking a child, just as an adult who lightly smacks another adult commits an assault: per s 2(1):

> **assault** means the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly …

A parent may use reasonable force for any of the four purposes specified in s 59(1), but, per s 59(2): notwithstanding subsection (1) is not justified in using force for the purpose of correction. And if there was any doubt, s 59(3), somewhat redundantly, states that subsection (2) prevails over subs (1).

It seems that the government's position must rest exclusively on s 59(4), which, on the government's understanding, was intended to protect good parents and to give them comfort that light smacking had not been, or would not be, criminalised. I deny that this was what Parliament intended to accomplish; Parliament plainly did not intend, by enacting this subsection, to change parents' legal obligations in respect of their children. Section 59(4) does not provide a justification or excuse for a parent who lightly smacks his or her child, even if, in the words of the subsection, "the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution." Indeed, the language and structure of the subsection make this abundantly clear: its premise is that an offence has been committed.

Several leading Members of Parliament appear to have thought that the subsection provided a defence. The Hon Bill English asserted ((2007) 638 NZPD 8857) that "we have ended up with a s 59 and the defence has changed from 'reasonableness' to 'inconsequential'". He went on to say that because of s 59(4) "parents will have protection. They will not be liable to prosecution for the inconsequential use of force for the purposes of correction." Likewise, Chester Borrows asserted ((2007) 639 NZPD 9287) that "it provides a defence to parents who use reasonable force for the purpose of correction in the same way as s 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".

These statements are false. The subsection does not justify or excuse inconsequential uses of force to correct a child: any such use of force is a criminal offence. John Key, now Prime Minister, did not, to my knowledge, make this mistake. His position, and that of the government's, appears to be that parents who lightly smack their children for corrective purposes are not "criminalised" if they are not likely to be prosecuted and convicted. Hence, s 59(4) was intended, on this understanding, to make clear that the newly widened scope of the criminal law did not entail that parents whose violation of the law is inconsequential must be prosecuted.

It is hardly surprising that this affirmation of prosecutorial discretion has not persuaded the public that good parents are not criminalised for light smacking. Reasonable persons aim to obey the law because they understand this to be their duty, not because they fear sanctions. It is no comfort, to use the government's term, for reasonable persons to be told that the criminal law is unlikely to be applied against them, with the implication that they may go ahead and breach the law safe in the knowledge that no sanction will be forthcoming.

Oliver Wendell Holmes famously argued that one should understand the law from the perspective of a bad man seeking to avoid punishment, and John Austin argued that law is merely a set of commands backed up by sanctions. They were wrong: no reasonable person understands the law in this way. Reasonable persons accept a duty to obey the law and hence are concerned that the law be reasonable. What this means is that in the focal sense of "criminalised", the 2007 Act plainly criminalises parents who lightly smack their children to correct them, because the Act makes it a criminal offence for any person to act in this way. The prospect of being accused, convicted, and punished, while not unimportant, is of secondary interest.

Liability to prosecution

Assume for the moment that the government is right to focus on effective liability to prosecution and conviction and to ignore legal obligation and duty. Section 59(4), as I have stated, is no defence if one is prosecuted; that is, it cannot bar conviction. The subsection affirms that Police have discretion not to prosecute, which entails that they may choose to prosecute. The subsection does not place police under a legal duty not to prosecute "inconsequential" offences. Further, Police guidelines on point (Police Commissioner's Circular: 2007/03), now the subject of review, entail that many "good parents" are liable to prosecution, because the guidelines explicitly imply that "repeat offending", or offending after a warning or other intervention, will warrant prosecution. ("The mere flouting of the law is in itself an injury to the public": *Attorney-General v Harris* [1961] 1 QB 74, 78.) Therefore, a parent who lightly smacks a child on more than one occasion, or who smacks more than one child should, per the guidelines, be prosecuted. There is no de facto immunity from prosecution and conviction here. Further, not all prosecutions are initiated by police. Private prosecutions are possible, and if police are reluctant to prosecute "good parents" other parties may fill the gap.

The government's focus has been, mostly, on liability to criminal conviction. However, removing the justification for correction has other legal consequences. A threat to lightly smack one's child now constitutes civil assault (as well as criminal assault), and an actual smack, being a criminal offence, is presumptively an abuse of a child in one's care, which will doubtless be argued to be relevant to Family Court proceedings concerning custody arrangements or taking children into care. This also means that "good parents" fall within the ambit of the Domestic Violence Act 1995. Affirming Police have discretion not to prosecute does not address the consequences that follow from rendering an act (light smacking) criminal.

THE SCOPE OF THE S 59(4) DISCRETION

Section 59(4) is not necessary for police to have discretion not to prosecute. Police enjoy that discretion in any event. Indeed, s 59(4) does not purport to create this discretion, but instead affirms it. That is, Parliament seems to disclaim any intention to change the content of the law by enacting s 59(4), and has acted to remove any doubt that might otherwise have arisen about police discretion to prosecute. Specifically, it removes the doubt by affirming the existing discretion. Of course, Parliament may say it affirms and yet adopt a proposition that would not exist apart from that apparent "affirmation". Arguably, it is significant that Parliament specifies a criterion for exercising the discretion not to prosecute, namely that the offence is so inconsequential that there is no public interest in prosecuting. However, the public interest and the sufficiency of evidence have always been the two main criteria on which prosecuting authorities reflect. So in truth, the subsection does not change the legal position: the subsection is redundant.

The courts are likely to hold that the meaning of "inconsequential" is a question of law (contrast "reasonableness", which per the previous s 59(2) was explicitly deemed a question of fact). Its application in any particular case would up to police discretion, but the courts would be willing to state what the test involves. The enactment of this formulation demonstrates an assumption that some offences might be inconsequential. However, Parliament has not stipulated what makes a case inconsequential. Police could conclude that this is a class with few, if any, members. And it would be open to the courts on an application for judicial review to consider the legality of any policy that the Police adopt to settle what is inconsequential.

However, there is little reason to apply for judicial review in any particular case. It is open to any person who objects to police failure to prosecute to initiate a private prosecution. The courts would be reluctant to allow collateral challenge to a decision to prosecute, instead just testing the charge or striking out an abuse of process later (if the prosecution is motivated by bad faith, for example). A parent who lightly smacks a child will not be able to mount a tacit defence to a charge of assault by way of judicial review of the decision to prosecute. Police do not breach s 59(4) or otherwise act unlawfully when they decide to prosecute an assault that the

court reasonably judges to be inconsequential. The subsection affirms "the discretion not to prosecute"; Police cannot breach the subsection by deciding to prosecute.

POLICE GUIDELINES

The Police guidelines for the new s 59 demonstrate a tension between the presumption that light smacking of a child is inconsequential – effectively the government's position – and the Police Family Violence Policy. The guidelines state that acts which are not justified under the new s 59 (that is, light smacking for correction) fall under the Family Violence Policy. Absent exceptional circumstances, this means that if Police witness an assault or if a report of an assault needs to be dealt with promptly, offenders – including the "good parents" whom the government is concerned to protect – should be arrested. The guidelines seem to imply a similar presumption in favour of prosecution but this implication is beaten back by the earlier account of what is "inconsequential". Still, the tension is clear. Once the justification for correction is removed, a parent's light smack of his or her child is criminal violence within the family and there is no clear reason why such an assault should be presumed not to warrant prosecution.

The guidelines also assert, quite reasonably, that aggravating and mitigating circumstances are relevant to any assessment of an offence's seriousness. Police may in time be directed by the courts to follow the lead set out in the Sentencing Act 2002. The aggravating factors set out in s 9(1) of that Act are relevant, especially:

(f) that the offender was abusing a position of trust or authority in relation to the victim;

(g) that the victim was particularly vulnerable because of his or her age or health or because of any other factor known to the offender.

These two aggravating features would seem to be present in every act of light smacking for correction, for each such act is now in law an assault on a vulnerable person who is one's care. On conviction then, the courts may be obliged to treat assaults by parents on children as more serious than otherwise analogous assaults by other adults on children or adults on adults.

The legality of the Police policy

The Police policy may well be challenged in the courts. The policy is effectively to proceed less vigorously against assaults by parents on children (whether or not the parent intends to correct the child; the guidelines do not draw a distinction on this basis) than against analogous assaults by adults on adults or children. This policy is arguably unlawful for it adopts an unreasonable premise, namely that an offence is presumptively less consequential if the offender is a parent and the victim the child of the parent. The policy thus denies the vigorous protection of the law to a class of person – children – the members of which are weaker and more vulnerable than other persons. The rule of law demands equal protection for all persons, which may require aggressive legal action for the weak against the strong. This concern to protect the weak is seen in the general policy of the law – in the Police Family Violence Policy, the Domestic Violence Act, the Crimes Act and the Sentencing Act – and is inconsistent with any presumption that parental violence is less serious than other criminal acts.

Clearly, police cannot lawfully abdicate their duty to enforce the law or adopt a policy not to prosecute a certain class of offences: *R v Commissioner of Police of the Metropolis, ex p Blackburn* [1968] 2 QB 118, 136, 138-9, 148-9. The courts may well conclude that police discretion to prosecute offences by parents against children must be exercised consistently with the importance of equality before the law and the protection of the weak from the strong; hence the guidelines must be recast. Imagine if the Police was now to adopt a policy not to prosecute relatively minor assaults by men against their domestic partners. The policy would be vulnerable to review because the premise would be likely to be held inconsistent with equal protection of the law.

One might argue that the distinction here is rational and not a violation of the rule of law. That is, there is good reason why parental assaults on children, if modest, should often not be prosecuted. The distinction might be sound in respect of light smacking for correction – unlike light smacking for cruelty or anger – but the whole point of amending s 59 was to remove this basis for argument. Parliament has acted, by amending s 59, to make it the case that light smacking is a criminal assault by a person in a position of authority against a vulnerable person in his care. The assumption that some cases will be inconsequential does not support the Police policy because it does not mark out light smacking for correction as an inconsequential class of assault.

It would not flout Parliament's will for judges to conclude that the Police policy is unlawful. The relevant subsection affirms an existing discretion and specifies one criterion relevant to its use, but does not establish any presumption that a parent's assault on a child (for the purpose of correction) is less serious than any other assault. Indeed, as I have said, the general policy of the law suggests otherwise. The subsection is a gloss and when pushed its apparent protection collapses. Further, even if one were to conclude that Parliament had somehow introduced the distinction on which the Police policy relies, it is quite possible that in years to come judges will be invited to conclude that had Parliament intended to institute what counsel will doubtless describe as a discriminatory, unconscionable rider on the criminal law it would have spoken more clearly.

CONCLUSION

Some MPs may have hoped that they were protecting "good parents" when they voted to enact s 59(4). The government may continue to assert that the subsection directs Police not to prosecute light smacking. If it presses this assertion then at some point it risks unlawfully interfering with Police in operational matters and/or unlawfully purporting to suspend an Act of Parliament. However, what Parliament intended when it enacted s 59 – the proposal for action that was open to reasonable legislators at the time of enactment – was to remove any justification for the use of force for the purpose of correction and to affirm that police need not prosecute inconsequential assaults. What this means is that Parliament intended precisely to criminalise parents for light smacking. The amended section neither bars police from prosecuting any particular case, nor limits private prosecutions. Arguably, any Police policy not to prosecute light smacking is unlawful. If the government wishes to protect "good parents" from the criminal law then it cannot rely on s 59(4) but must instead invite Parliament to enact legislation specifying when and how reasonable force – a light smack – for the purpose of correction is justified. ❐