CAB/NZP 11

10 July 2006

Chairperson
Justice and Electoral Select Committee

CRIMES (ABOLITION OF FORCE AS A JUSTIFICATION FOR CHILD DISCIPLINE) AMENDMENT BILL

Thank you for the invitation to provide advice to the Committee on likely Police prosecution practice if the Crimes (Abolition of Force as Justification for Child Discipline) Amendment Bill is passed.

Reducing violence (including family violence) is a priority outcome for Police and Police support initiatives that may help to reduce violence in society. However, Police recognise that the repeal of s59 of the Crimes Act raises complex issues that may not be easily resolved.

The purpose of the Bill is "...to abolish the use of reasonable force by parents as a justification for disciplining children" and it is noted in the Explanatory Note to the Bill that upon repeal children "...will be in the same position as everyone else so far as the use of force against children is concerned." Against this background, Police offer the following information.

CURRENT POLICE PRACTICE

The Police Family Violence Policy (introduced in July 1996) outlines the principles, policy and procedures for best practice when members of police deal with family violence within their community. The term 'family violence' includes violence which is physical, emotional, psychological and sexual abuse, and includes intimidation or threats of violence. The term 'family' includes such people as parents, children, extended family members and whanau, or any other people involved in relationships.

Paragraph 19 of the Police Family Violence Policy states:

> "Given sufficient evidence, offenders who are responsible for family violence offences shall, except in exceptional circumstances, be arrested. In the rare case where action other than arrest is contemplated, the member's supervisor must be consulted."

Force used on children that is not justified under section 59 is covered by the Family Violence Policy.

It is considered good practice that assault investigations involving children be referred to Child Abuse Investigators, and investigated in conjunction with Child, Youth and Family. However, sometimes Police Officers who witness an assault or need to deal with an incident promptly will determine whether section 59 provides a good defence and if it does not, arrest the alleged offender.

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Paragraph 9 and 10 of the Police Family Violence Policy state:

> 9. "Children and young people are often victims of family violence related assaults, or can suffer trauma from witnessing family violence".
>
> 10. "As a matter of best practice, attending police officers must ascertain whether children are involved as victims or have witnessed the incident under investigation. In the interests of child safety, it may be necessary to speak to the children directly."

IMPLICATIONS OF REPEAL

If section 59 was to be repealed in its entirety, parents would not be authorised to use reasonable force by way of correction and smacking a child in such circumstances would be an assault. This is consistent with the purpose of the Bill. However, parents would still be authorised to use reasonable force to prevent harm to their children (e.g. if a parent stopped their child from running out onto a busy road or stopped their child from climbing over a balcony on a building).

Police investigating cases where force was used against a child, as in the case with all assault investigations, would consider the amount of force used in the circumstances before making a decision about whether a prosecution is required in the public interest. An aggravating factor in any such decision may be the fact that a child is generally more vulnerable than an adult.

If section 59 were repealed, this would mean that in all cases of suspected/reported assault on children Police would continue to:

- investigate alleged assaults against children to establish whether there is sufficient admissible and reliable evidence that an offence has been committed
- where and when possible, refer appropriate cases to Police Child Abuse Investigators where they may be investigated further
- take into account whether it is in the best interest of the child/family and the public to prosecute.

SPECIFIC QUESTIONS

Outlined below are 3 specific questions which may be relevant to the Select Committee's deliberations on this issue.

1. *If section 59 was repealed, could a parent who would not have previously been prosecuted for smacking their child now be prosecuted?*

Yes.

2. *If section 59 was repealed, will Police prosecute parents who smack their children where there is sufficient admissible and reliable evidence and the parent does not otherwise have a good defence?*

Yes, however, as is the case with all instances of alleged assault, Police will take into account whether it is in the public interest to prosecute.

3. *Would Police be able to develop new guidelines, practice notes or policy in relation to prosecution practice if section 59 was to be repealed in its entirety?*

Yes, but the difficulties in undertaking this task should not be underestimated. It is recognised that there will be many issues to consider in developing such guidelines and some of the issues may be difficult to resolve. Issues that may need to be addressed may include:

- If force short of striking is used, at what level does such force become unacceptable
- The continued presence in the household of the child if one of the parents is being prosecuted for assaulting them
- Whether Police bail is appropriate and in what circumstances
- As an agency primarily concerned with law enforcement, what role, if any, should Police take in changing social attitudes towards the physical punishment of children
- Since the aim of repealing section 59 is not to prosecute parents who 'lightly' smack their children but rather to encourage parents/caregivers to use alternatives to hitting children, what can be or should be put in place to ensure that parents who 'lightly' smack their child receive the support and advice they need instead of facing prosecution?

Any guidelines would need to be consistent with the law. They would also have to be in line with the current whole of government approach towards addressing family violence including child abuse and neglect.

Also, notwithstanding any such guidelines, each case would need to be considered on its merits, and any guidelines would not provide a definitive answer to any particular set of circumstances.

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CAP/NZP/2

CROWN LAW OFFICE PROSECUTION GUIDELINES FOR CROWN SOLICITORS

1. Introduction

1.1 Almost invariably, it is the responsibility of officers and agencies of the State to investigate offences and prosecute offenders. It is the Attorney-General and Solicitor-General, as the Law Officers of the Crown, whose responsibility it is to ensure that those officers and agencies behave with propriety and in accordance with principle in carrying out their functions.

1.2 The State bears a dual responsibility in its administration of the criminal law. Behaviour classified as criminal has been deemed so harmful to society generally that the state, on behalf of all its citizens, accepts the responsibility to investigate, prosecute and punish those behaving in that way.

1.3 The State also accepts the responsibility of ensuring, through institutions and procedures it establishes, that those suspected or accused of criminal conduct are afforded the right of fair and proper process at all stages of investigation and trial.

1.4 Those dual responsibilities are often in tension. The individual subjected to the criminal justice process will rarely believe that it is working in his or her favour; the investigating and prosecuting agencies will not wish to see someone they believe guilty elude conviction.

1.5 The decision to begin a prosecution against an individual has profound consequences. The individual is no longer a suspect, but is formally and publicly accused of an offence. Even if eventually acquitted, he or she will be subjected to the stresses of public opprobrium, court appearances and, possibly, a loss of liberty while awaiting trial.

1.6 It is of great importance therefore that decisions to commence and to continue prosecutions be made on a principled and publicly known basis. The purpose of these guidelines is to indicate, in a general way, the bases on which the Law Officers expect those decisions to be made.

2. Who may Institute Prosecutions

2.1 Any person may institute a prosecution for an offence against the general criminal law, and, with some specific exceptions, for regulatory offences. Some prosecutions require the prior consent of the Attorney-General; the procedure for obtaining that consent is outlined in section 4. Every prosecution is commenced by way of an Information laid under the provisions of the Summary Proceedings Act 1957, and the person bringing the prosecution is known as the "informant". In practice, almost all prosecutions for offences against the general criminal law are brought by the Police,

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and those for regulatory offences by officers of government departments or local authorities.

2.2 In the case of prosecutions brought by Crown agencies for offences triable only on Indictment, or those on which the accused has exercised a right of electing trial by jury, the informant ceases to be the prosecutor from the point at which the accused is committed for trial. At that point the prosecution becomes a "Crown" matter, and only the Attorney-General, Solicitor-General or a Crown Solicitor may lay an Indictment. The laying of Indictments is dealt with in section 5.

2.3 The Attorney-General, as the Senior Law Officer of the Crown, has ultimate responsibility for the Crown's prosecution processes. Successive Attorneys-General, however, have taken the view that it is inappropriate for them, as Ministers in the Government of the day, to become involved in decision making about the prosecution of individuals.

2.4 In New Zealand, the Attorney-General and Solicitor-General have co-extensive original powers. With some specified exceptions, the Solicitor-General may perform any function given to the Attorney-General. In practice, the Solicitor-General exercises all of the Law Officer functions relating to the prosecution process.

2.5 The initial decision to prosecute rests with the Police in the case of the general criminal law, or an officer of some other central or local government agency charged with administering the legislation creating the offence. It is frequently the case that the Police or agency will consult a Crown Solicitor or the Solicitor-General for advice as to whether a prosecution would be well founded. It is, however, never for the Solicitor-General or the Crown Solicitor to make the initial decision to prosecute; it is their function to advise.

3. The Decision to Prosecute

In making the decision to initiate a prosecution, there are two major factors to be considered; evidential sufficiency and the public interest.

3.1 Evidential Sufficiency

The first question always to be considered under this head is whether the prosecutor is satisfied that there is admissible and reliable evidence that an offence has been committed by an identifiable person.

The second question is whether that evidence is sufficiently strong to establish a prima facie case; that is, that if that evidence is accepted as credible by a properly directed jury, it could find guilt proved beyond reasonable doubt.

3.2 The Public Interest

3.2.1 The second major consideration is whether, given that an evidential basis for the prosecution exists, the public interest requires the prosecution to proceed. Factors which can lead to a decision to prosecute, or not, will vary infinitely and from case to case. Generally, the more serious the charge and the stronger the evidence to support it, the less likely it will be that it can properly be disposed of other than by prosecution. A dominant factor is that ordinarily the public interest will not require a

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prosecution to proceed unless it is more likely than not that it will result in a conviction. This assessment will often be a difficult one to make, and in some cases it may not be possible to say with any confidence that either a conviction or an acquittal is the more likely result. In cases of such doubt, it may be appropriate to proceed with the prosecution, as, if the balance is so even, it could probably be said that the final arbiter should be a Court. It needs to be said also that the public interest may indicate that some classes of offending - for example, driving with excess breath or blood alcohol levels - may require that prosecution will almost invariably follow if the necessary evidence is available.

3.2.2 Other factors that may arise for consideration in determining whether the public interest requires a prosecution include:

a the seriousness or, conversely, the triviality of the alleged offence; that is, whether the conduct really warrants the intervention of the criminal law.

b all mitigating or aggravating circumstances.

c the youth, old age, or physical or mental health of the alleged offender.

d the staleness of the alleged offence.

e the degree of culpability of the alleged offender.

f the effect on public opinion of a decision not to prosecute.

g the obsolescence or obscurity of the law.

h whether the prosecution might be counter-productive; for example, by enabling an accused to be seen as a martyr.

i the availability of any proper alternatives to prosecution.

j the prevalence of the alleged offence and the need for deterrence.

k whether the consequences of any resulting conviction would be unduly harsh and oppressive.

l the entitlement of the Crown or any other person to compensation, reparation or forfeiture as a consequence of conviction.

m the attitude of the victim of the alleged offence to a prosecution.

n the likely length and expense of the trial.

o whether the accused is willing to co-operate in the investigation or prosecution of others, or the extent to which the accused has already done so.

p the likely sentence imposed in the event of conviction, having regard to the sentencing options available to the Court.

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3.2.3 None of these factors, or indeed any others that may arise in particular cases, will necessarily be determinative in themselves; all relevant factors must be balanced.

3.2.4 A decision whether or not to prosecute must clearly not be influenced by:

a the colour, race, ethnic or national origins, sex, marital status or religious, ethical or political beliefs of the accused.

b the prosecutor's personal views concerning the accused or the victim.

c possible political advantage or disadvantage to the Government or any political organisation.

d the possible effect on the personal or professional reputation or prospects of those responsible for the prosecution decision.

4. Consent to Prosecutions

4.1 A number of statutory provisions creating offences require that, before a prosecution is commenced, the consent of the Attorney-General is to be obtained. This is a function carried out in practice by the Solicitor-General (see section 2). The consent, if given, is signified by way of endorsement on the Information. Requests for consent should be directed to the Solicitor-General with full details of the alleged offence and the evidence available to be called.

4.2 The reasons for requiring that consent vary. In general terms, however, the consent requirement is imposed to prevent the frivolous, vengeful or 'political' use of the offence provisions.

A list of the provisions creating offences for which the Attorney-General's consent is required is given in Appendix 1.

5. Indictments

5.1 The power of the Attorney-General and Crown Solicitors to present an Indictment is recognised in section 345 of the Crimes Act 1961. Almost invariably, it is a Crown Solicitor who does so. In exercising that power, the Crown Solicitor acts entirely independently of the Police or other investigating agency and is not subject to their instructions.

5.2 A Crown Solicitor may present an Indictment "... for any charge or charges founded on the evidence disclosed in any depositions taken against such person ..." A Crown Solicitor may therefore present an Indictment containing a charge different from, or additional to, that originally contained in the Information, so long as it is founded on evidence contained in the depositions. In exercising that power, a Crown Solicitor is exercising, de novo, the discretion to prosecute. All factors affecting that discretion arise again for consideration.

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