CHAPTER FOUR

THE CORPORAL PUNISHMENT OF CHILDREN
IN NEW ZEALAND: THE POWER OF PARENTAL
RIGHTS IN NEW ZEALAND

1. Introduction

The (im)balance between the rights of children and the rights of parents, and the role of the State in maintaining this (im)balance by virtue of the exercise of its legislative and judicial functions, is further exemplified, in the context of New Zealand, by s 59 of the Crimes Act 1961. According to s 59, the corporal punishment of children by their parents may be justified under the defence of domestic discipline, which permits the use of force in the correction of a child if the force used is reasonable in the circumstances. This defence of domestic discipline highlights the conflict inherent in New Zealand legislation between the comparatively recently-recognised concept of children’s rights and the much older concept of parental rights. In many respects, modern New Zealand legislation and recent case law pertaining to children have sought to prioritise the rights of the child over those of parents by incorporating the standard of the best interests of the child into the decision-making process. However, the results of such attempts have been inconsistent in relation to corporal punishment in terms of the level of protection against violence that has been accorded to children. Section 59, both in substance and interpretation, presents more difficulties than it resolves. The courts not only have to grapple with the definition of what is “reasonable in the circumstances”, they must also try to reconcile the lower level of protection arising out of s 59 with other legislation which is aimed at providing for and protecting children both generally and more specifically from domestic violence in order to avoid claims of discrimination as between children and adults. At the international level, New Zealand has also grappled with the inconsistency of its domestic laws with its obligations under international human rights law, an inconsistency that has been commented upon by both the UN Committee on the Rights of the Child and the UN Committee Against Torture.

The corporal punishment of children encompasses age discrimination in terms of the extent that it allows discriminatory treatment as between children and adults. Corporal punishment also encompasses the notion of age-based limitations, as the courts have made determinations as to the excessiveness of the force used in relation to the age of the child in question. It is argued in this
chapter that the defence of reasonable chastisement embodied in s 59 is discriminatory as there exists no clear justification for the difference in the level of protection against assault as between adults and children that results from the provisions of that section. To that end, Part 2 constitutes an overview of some of the historical and philosophical background to corporal punishment. This backdrop not only attempts to demonstrate the strong overlap between some of the historical attitudes towards children alluded to in Chapter 1 and corporal punishment but it also seeks to provide a backdrop to the current debate concerning corporal punishment and the rights of children and parents. Part 3 consists of a critique of some of the recent academic debate regarding the corporal punishment of children. Although the focus of this section is New Zealand academic debate, such debate mirrors much of the debate regarding corporal punishment taking place in other jurisdictions. Part 4 provides an overview of human rights treaty provisions that may be, and have been, interpreted as prohibiting corporal punishment. Part 5 returns to New Zealand and provides an international and comparative analysis of New Zealand’s stance on the defence of domestic discipline in terms of comments made by the Committee on the Rights of the Child. This part will also focus upon the consideration (or lack of) by the New Zealand courts of the notion of children’s rights in cases where s 59 of the Crimes Act is used to allow parental rights to override those of the child.

2. The Corporal Punishment of Children: A Historical and Philosophical Framework

The infliction of corporal punishment upon children has been debated for centuries. For example, in drawing a distinction between the differing modes of child discipline, Seneca asserted that corporal punishment was appropriate for those incapable of reason, including young children. Older children were to be guided by the grant or withdrawal of praise or rewards thereby setting the distinction between the discipline of children and the coercion of “honourless slaves”.1 Plutarch noted that philosophy taught men proper conduct, such as “to be affectionate with children”.2 He advised against the corporal punishment of children, although, admittedly, he did draw a distinction between those that were freeborn and those that were slaves, stating that:

Children ought to be led to honourable practices by means of encouragement and reasoning, and most certainly not blows nor by ill treatment; for it is surely

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1 R Saller, Patriarchy, Property and Death in the Roman Family, Cambridge, CUP, 1994, 143.
2 Plutarch, De liberis educandis (at 10), quoted in Saller, ibid, at 143.