8 March 2007

Lynne Pillay
MP for Waitakere
Parliament Buildings
WELLINGTON

Dear Lynne

CRIMES (SUBSTITUTED SECTION 59) AMENDMENT BILL: OPINION OF PETER MCKENZIE QC

Thank you for your facsimile dated 5 March 2007, attaching a copy of the opinion prepared for Gordon Copeland MP by Peter McKenzie QC. On the strength of that opinion, Mr Copeland asserted in the media that our advice previously provided to and adopted by the Committee would have unexpected and undesirable effects. Our response follows.

Background
The Member's Bill of Sue Bradford MP, as originally introduced, proposed the repeal of section 59 of the Crimes Act 1961.

The Law Commission was asked by the Justice and Electoral Select Committee to provide advice. We suggested two alternative options.

Option 1 replaced section 59 with a section of quite different scope. It thus effectively repealed the section. However, in addition, it offered protection for non-disciplinary "good parenting" interventions, which may involve the use of force, and thus are technically assaults. This was to address a gap that had been identified in the current law. The current section 59 protects only discipline. Other use of force in the course of parenting children, such as cutting their hair, or snatching them out of harm's way, has no statutory protection. Option 1 was supported by a majority of the select committee. It is now replicated in the Crimes (Substituted Section 59) Amendment Bill awaiting its third reading.

Option 2 provided for the use of some force against children for correctional purposes. However, it proposed to narrow the scope of the existing section 59, by excluding examples of excessive force. Option 2 is now the subject of a Supplementary Order Paper to the Crimes (Substituted Section 59) Amendment Bill, in the name of Chester Borrows MP.

The opinion of Peter McKenzie QC
Mr McKenzie concludes that under the Crimes (Substituted Section 59) Amendment Bill as proposed by Sue Bradford, carrying a child against his or her will to "time out" or a "naughty mat" will be a criminal act that exposes parents to prosecution for assault. This is because the redrafted defence in section 59(2) provides that "nothing in subsection (1) or in any rule of common law justifies the use of force for the purpose of correction". For most parents, it is said, a corrective purpose would be the dominant or indeed the only purpose for "time out".

Comment
Committee members will recall that, in relation to option 1, the Law Commission was advised by a majority of the members that the outcome sought was a prohibition on the use of any force against children for corrective purposes. We are consequently delighted to receive Mr McKenzie's independent confirmation that this objective is achieved by our proposed draft.

However, we have a number of points to make in rebuttal of the media debate prompted by Mr Copeland. In particular, we disagree with the assertion that the effect of our draft will be to prohibit time out by exposing parents who use it to the risk of prosecution.

In the example highlighted by Mr Copeland (carrying a child to a "naughty mat" who had been throwing food at the walls), we disagree with his assertion that this is "obviously for the purpose of correction". We suggest that at least part, and probably a large part, of the parental motive in that scenario relates to "preventing the child from engaging or continuing to engage in offensive or disruptive behaviour". This is a permitted purpose under our proposed redraft of section 59.

We need to emphasise that, in any given case, the parental motive will be a question of fact that varies in the circumstances of each case. This means that it is impossible for us to provide a blanket reassurance that prosecution will never be appropriate when force has been used to achieve "time out". It will be a matter for prosecutorial discretion and, ultimately (if the discretion is taken to prosecute) the decision of a jury.

However, in this regard, there is a very important point to note. The "Solicitor-General's Prosecution Guidelines" require prosecutors, in the exercise of their discretion, to assess the likelihood of achieving a conviction. We suggest that, in the vast majority of "time out" cases, parents will be prompted by a mix of motives, which may include prohibited correctional purposes, but in all likelihood will also include other permitted purposes. It is thus questionable whether in such cases a jury could ever properly convict a parent beyond reasonable doubt, which in turn may tell against the likelihood of prosecution.

It may be that the McKenzie opinion will persuade some that the Law Commission's advice on this issue produces an unsatisfactory result. However, in our view, it would be a great deal more unsatisfactory to tinker with the proposed draft to try to achieve a more robust exception for "time out". It could open a loophole for the use of gratuitous force by parents, under a "time out" guise. As we understand the Committee's majority view, this is definitely not what was wanted.

Yours sincerely

Sir Geoffrey Palmer
President