Summary of Review of section 280 of the Criminal Code
Department of Justice and Attorney-General – November 2008

Introduction

Section 280 of the Criminal Code provides that it is lawful to use such force to a child or pupil as is reasonable in the circumstances for the purposes of correction, discipline, management or control, by a parent, a person in the place of a parent or a school master or master. Whether the force used in a particular case is 'reasonable' is a question of fact to be determined by the jury (or by the Magistrate in a summary trial) and will turn on the circumstances of the particular case and be influenced by prevailing community standards.

On 15 February 2007 a public forum on children's rights was held at Parliament House. The Member for Murrumba, Mr Dean Wells MP, has publicly supported the repeal or amendment of section 280. It is argued that the existence of section 280 condones the use of violence against children.

The Department of Justice and Attorney-General (DJAG) has undertaken a review of the use of this defence in cases of parent/child assaults.

Methodology and Limitations of the Review

Information as to whether or not section 280 was relied on in a case is not recorded by the Queensland Police Service, the Courts or the Office of the Director of Public Prosecutions in the normal course of data collection. In addition, the DJAG data does not record ages of victims or relationship between offender and victims in assault cases. Accordingly, the only way to discover whether or not section 280 has been used would be to conduct a manual audit of all assault cases to identify a parent/child relationship and whether or not section 280 was raised in the case.

The Queensland Police Service (QPS) data enables the identification of police investigations into complaints of child physical abuse by a parent which resulted in charges being laid. At the request of DJAG and to narrow the scope of the manual audit, QPS provided a list of 748 names of such offenders relating to charges of common assault, assault occasioning bodily harm and grievous bodily harm - for the period 05/06, 06/07 and 07/08.

Using the names supplied by the QPS, an internal data search by DJAG identified 624 files, representing 624 charges. Due the number of matters identified, the decision was made to restrict the audit to matters commenced in 06/07. The relevant Court files for each matter were then manually located and reviewed to determine if they were relevant to the review.

Upon review of these files, a number of matters were excluded from the final review on the basis that the charges were irrelevant to the audit. Further, a number of matters were discarded on the basis that there was insufficient information pertaining to key information such as: verification of the nature of the relationship between the accused and the complainant; verification that the complainant was in fact a child; or the context of the assault. Without such information it is impossible to assert that the file is relevant to the audit and on that basis, was discarded.

The Court files accessed contained very limited information (that is, they only contain the name, charge and outcome) and do not record the facts of the case, the age of the victim, or what defences, if any, were raised. Thus this review of the Court files was

limited to establishing the outcome of the charges and what, if any, further information would be required to draw a conclusion about the relevance of domestic discipline to the case.

Finally, DJAG also sought from the QPS the Police Court briefs for each of the identified matters.

Results of the review

The audit culminated in a detailed review of 198 individual accused who were charged in the period 2006/07 with parent/child assault. Upon a review of the facts of each case, the review concluded that these assaults could be broken down into three general categories of assaults – child abuse (for example, cases of 'baby shaking' or cases involving gratuitous violence); domestic or family violence (where the assault on the child was in the context of ongoing family violence); and excessive discipline.

However, it should be acknowledged that abuse is a continuum with no clear cut-off where excessive punishment ends and abuse begins. In doubtful cases, the review has erred on the side of categorising these cases as discipline. Of the 198 prima facie relevant cases, 29 were categorised as child abuse, 35 as domestic violence, and 134 as excessive discipline. Only the cases of excessive discipline were examined further, because section 280 is not relevant to cases of child abuse or domestic violence.

Of the 134 excessive discipline matters, nine are yet to be finalised. Further, despite reviewing the material from the various sources outlined above, for five matters the final outcome is unknown. Matters that remain to be finalised or where the outcome is unknown have not been further analysed because final conclusions cannot be drawn in these cases.

Of the remaining 120 excessive discipline matters: 95 accused were convicted (through either a plea of guilty or a finding of guilt); two accused were acquitted; and 23 accused had their charges discontinued by the prosecution.

As at the final determination of the matters, the charges can be broken down as:

- Common assault - 74;
- Assault occasioning bodily harm - 115 (and of these, 30 were charged with the aggravating circumstance of being armed);
- Breach of a Domestic Violence Order - 2;
- Cruelty to Children - 1;
- Threatening violence whilst armed - 1.

As mentioned, 23 (19.2%) accused had their charges fully discontinued by the prosecution, either in the Magistrates Courts by the Police Prosecutor ('no evidence to offer' or NETO) or in the District Court by the Office of the Director of Public Prosecutions (ODPP) (No true bill[1] and Nolle Prosequi[2]). Further, two accused were convicted on a plea of guilty in full discharge of the original charges.

Of the matters that were discontinued:

- No evidence to offer – 14 ;

[1] A "no true bill" occurs where a person is committed by a magistrate to face trial in a higher court, but the prosecution (the ODPP) decides not to present an indictment, thus ending the prosecution.
[2] A "nolle prosequi" occurs when, after an indictment has been presented, the prosecution informs the court that the Crown will no longer proceed with the indictment, thus ending the prosecution.

- No true bill – three;
- Nolle prosequi – six;
- No evidence to offer on certain charge/s but proceeded on other charge/s (for example, no evidence to offer for one complainant but a matter involving another complainant proceeded) – one; and
- Nolle prosequi on certain charge/s but proceeded on others – one.

Reasons for the discontinued prosecutions:

- prosecution of the view that section 280 could not be negatived – one;
- complainant did not wish to proceed/reluctant to give evidence – four;
- public interest (eg given domestic discipline context the matter can be better addressed through parental education/ anger management/mediation) – five;
- evidentiary issues (example, credibility issues with complainant) – two;
- prosecution not ready to proceed – two; and
- reason unknown from available material - nine.

Of the 97 accused whose matters proceeded to final determination:

- 90 accused accepted the force used was unreasonable and pleaded guilty. This represents 92.7% of matters. Of these 90 accused, 74 pleaded guilty in the Magistrates Courts and 16 pleaded guilty in the District Court;
- four accused were summarily convicted but there was insufficient information to verify whether the conviction was upon a plea of guilty or a finding of guilt;
- three accused elected to contest the charges and proceeded to trial in the Magistrates Courts. This represents 3.1% of matters. Of these three contested matters, two accused were fully acquitted; and
- therefore, of the 97 relevant accused, 95 were convicted either upon a plea of guilty or following a trial. This represents 97.9% of matters.

Where a matter is resolved by a plea or finding of guilt, it can be concluded that section 280 was not relevant. By pleading guilty to the assault, the parent has acknowledged that there was no justification or excuse to use the force they did, and that even if their actions were for the purposes of discipline or correction, the force used was not reasonable in the circumstances.

In relation to the two acquittals, in one case the material reviewed included no information as the basis of the acquittal. In the other case, the material indicates the acquittal was based on credibility issues with both the complainant and prosecution witness.

Impact of section 280 on prosecutions

Where the matter was discontinued (23 cases) or resulted in an acquittal (2 cases), in only three cases did section 280 appear to have a bearing on the decision to discontinue.

In the first case, the ODPP discontinued the prosecution because there were significant credibility issues with the complainant. The reasons also note that the existence of section 280 may have been a secondary issue in the decision to discontinue. In the second case, the ODPP declined to present an indictment on a number of grounds, including that the charges (common assault) were more appropriately dealt with as a summary trial. Further, it was considered that a restorative justice approach was suitable because it was a case of parental discipline (and section 280 was therefore relevant). It was more appropriate for the parent to

receive guidance and parenting skills. In addition, the children's mother did not want the children to have to go to court. In the third case, the police offered no evidence on the grounds that section 280 was available.

However, for 10 of these cases, the review could not ascertain the reason for the discontinuance or acquittal. It is therefore not known if domestic discipline was a factor in these cases.

Nature of force used in "discipline"

The review also considered the nature of the force used in the cases of excessive discipline. In particular, the review noted the number of cases where force was applied to the head of the child, (including force to the neck and throat, slaps to the face, punches to the head and pulling by the hair); force by way of punches or kicks; and the use of implements.

Implements used varied from belts, brooms, sticks, kitchen utensils, pieces of hose and cattle prods.

The following provides a breakdown of the various types of force used. It is important to note that figures involve a degree of overlap. Where a particular assault involved, for example, blows to the head with a belt, the incident has been counted in both the 'implement' tally and the 'head' tally:-

- Implement – 80;
- Head – 85;
- Punches – 36;
- Kicks - 13

Conclusions

The review failed to reveal any evidence that section 280 is relied on to any significant degree or that it is impacting on the ability to charge or prosecute parents.

The review has revealed a disturbing trend in relation to parents choosing to discipline their children using a variety of implements. Further, 85 assaults involved force to the head (often in the form of punches to the face and slaps to the head). It is also concerning that a significant number of parents choose to discipline their children using punches and kicks.

To further explore the impact of section 280 on decisions to charge would require anecdotal evidence from police (that is, whether the police decide not to charge a parent with assault because they think section 280 will be successfully raised on the evidence). It is also important to note that other factors may bear on the decision to charge a parent with assault, regardless of the existence of the defence. For example, whether it is in the public interest to charge a parent in cases of discipline gone wrong or if the community would be better served by the parent seeking assistance.