

PRÉCIS

Criminal Responsibility for Domestic Discipline: The Repeal or Amendment of Crimes Act 1961 section 59

It appears that proponents of the repeal of s.59 perceive some acquittals of parents for assaulting their child to be so inappropriate that the only answer is to repeal the section, apparently on the basis that the mere idea of legal recognition of a parental right to touch a child for corrective purposes produces the unintended impression that very aggressive correction is permitted by the law. The Committee accepts that there must be limits to the justification for the forceful correction of a child. These limits can be traced by drafting the statutory justification with a view to defining what is allowed. For the purposes of broader discussion we have provided a suggested new section 59.

October 2005

Spokesperson:

David R James

Telephone: 09 407 0000 (business)
09 407 6256 (residential)
025 271 4545 (mobile)

**Criminal Responsibility for Domestic Discipline:
The Repeal or Amendment of Crimes Act 1961 section 59**

Parliament is considering a private members bill seeking the repeal of section 59 of the Crimes Act 1961. Section 59 permits a parent or someone acting in the place of a parent to use reasonable force by way of correction towards a child. Without this provision, any touching of a child by a parent could constitute an assault leading to a criminal charge.

It appears that proponents of the repeal of s.59 perceive some acquittals of parents for assaulting their child to be so inappropriate that the only answer is to repeal the section, apparently on the basis that the mere idea of legal recognition of a parental right to touch a child for corrective purposes produces the unintended impression that very aggressive correction is permitted by the law. The Committee accepts that there must be limits to the justification for the forceful correction of a child. These limits can be traced by drafting the statutory justification with a view to defining what is allowed. For the purposes of broader discussion we have provided a suggested new section 59.

The current legislation provides:

59. *Domestic discipline—*

- (1) *Every parent of a child and, subject to subsection (3) of this section, every person in the place of the parent of a child is justified in using force by way of correction towards the child, if the force used is reasonable in the circumstances.*
- (2) *The reasonableness of the force used is a question of fact.*
- (3) *Nothing in subsection (1) of this section justifies the use of force towards a child in contravention of section 139A of the Education Act 1989.*

Repeal of this section produces 2 uncertainties:

- (a) is the consequence of repeal that parents risk criminal sanction for any disciplinary application of force on their children (?); or,
- (b) is there a common law privilege to apply discipline which would survive repeal, such as:
 - (i) the *patria potestas* (all powerful protector) principle traced to roman law (cf indigenous rights, a sort of liberalised *pater familias* [clan chief] power to punish); or,
 - (ii) the doctrine of *necessity* (the force used is less evil than the wrong behaviour the force is intended to correct); or,

- (iii) the judicial discretion available by way of the doctrine of *de minimis non curat lex* [a matter too trifling for the law to be concerned about] (?).

The major concern of advocates for repeal is to prevent the perceived mischief of unacceptable forms of parental application of force to children being countenanced in the criminal court. An answer which avoids the uncertainties, but protects against the mischief, may be amendment of the section.

A strong theme in the rationale for those urging repeal, is the failure of the criminal justice system to respond in an expected way to some prosecutions for child physical abuse. Our interest is to express confidence in the jury system and the judges' leadership of the jury on matters of law; and the capacity of parliamentary draftspersons to draft legislation adapted and adaptable for the purpose of present and future protection of the vulnerable. There is room to better define the ambit of acceptable corrective touching, while giving due respect to the decision making wisdom of the family.

A draft of an amendment for this purpose follows:

59. Domestic discipline

- (1) **Every parent of a child and, subject to sub section (5), every person standing in the place of a parent, is protected from criminal responsibility when using force for the sole purpose of correction towards that child, if the force used is no more than is reasonably justified in the circumstances.**
- (2) **Whether the force applied can be found to be reasonably justified by a properly instructed jury, is a matter of law. Whether the force applied is reasonably justified, is a matter of fact.**
- (3) **Without departing from the generality of the phrase, "no more than is reasonably justified", used in this section, examples of conduct that cannot be reasonably justified include:**
 - (a) **force that materially contributes to actual bodily harm, whether that result was intended or not;**
 - (b) **any striking above the shoulder;**
 - (c) **any conduct that but for this section would be an offence more serious than assault.**
- (4) **For the purpose of this section, child is defined as a person over the age of 2 years, and under the age of 13 years.**

- (5) **Nothing in subsection (1) of this section justifies the use of force towards a child in contravention of section 139A of the Education Act 1989.**
- (6) **Any conduct not protected by this section, is not protected by any defence related to parental rights or privileges.**

We proceed with an explanation of the underlined word changes and how this might achieve the purpose of:

- (a) providing a tighter, more clearly defined threshold for criminal conviction; while,
- (b) preserving a zone for intra familial discipline practices which will not be intruded into by the state.

A. *justified* vs **protected from criminal responsibility**

As defined in section 2 of the Crimes Act 1961, 'justified', means protected from civil or criminal sanction. This has produced some uncertainty in the exercise of the civilian Domestic Violence Act jurisdiction.

By affording a protection against criminal sanction only, it leaves the civil law system its full scope to develop the civilian appreciation of what conduct is violence, and what conduct is a civil wrong, and what common law rights (if any), privileges, and responsibilities, touching on force applied to children, reside with those with the legal care of children. It also avoids the collision of the criminal system, where a forceful touching of a child may be found short of being criminal, with the Family Court, which may deem the same conduct to be violence.

The phrase *protected from criminal responsibility* is defined at section 2 of the Act, and it is used for example in the Crimes Act 1961, section 61 in relation to surgical operations.

B. Force **reasonably justified**: the role of the judge and the role for the jury

The current sub s.59(2) directs that, what is reasonable, is a question of fact. This is a strong signal to the trial judge that the finder of fact, the jury, has a wide power for determining whether particular disciplinary conduct is unreasonable. New Zealand case law, fairly allows past and surrounding circumstances to be considered in that assessment. But the role of the Judge is curtailed: where it is possible that right minded citizens could accept the alleged force to be within the scope of a parental

authority in disciplinary circumstances, the Judge must allow the jury to control that deliberation.

Under the proposed sub ss.59(2) & (3) the Judge is concerned to determine whether the conduct alleged falls within a more narrowly defined compass of tolerable conduct. By defining that concern as a question of law, the proposed amendment requires the Court to direct a conviction if no reasonably instructed jury could find the alleged conduct to be 'reasonably justified'.

What is 'reasonably justified' is defined at proposed sub section 59(3). Where, for example, bodily harm is caused, the finder of fact will not, in law, be entitled to acquit. The Judge would direct a conviction. Similarly, under proposed sub section 59(4), if the child fell outside the age of exposure to corrective physical discipline (between the proposed ages of 2 years and 13 years) the defence of domestic discipline would not be available.

Proposed sub section 59(1) also adds the phrase **sole purpose**. If a material or contributing purpose of hitting a child is found to be something other than corrective discipline, say fury or sexual gratification, the jury would be cautioned to convict, although that would be a jury question.

C. Force **reasonably justified**: the narrower scope for corrective touching

Proposed sub section 59(3) sets out a baseline of conduct below which, a Judge must direct that the force is not reasonably justified. Proposed sub section 59(3)(a) provides that if bodily harm is caused, no reasonable justification, no defence, is available. Bodily harm is accepted in New Zealand law to be a hurt or injury that is more than merely trifling or transitory: *R v Waters*, [1971] 1 NZLR 375 (CA).

We intend this to be a pure question of causation, so that whether the result of bodily harm was intended or not, the mere effect of bodily harm removes the corrective discipline defence. Where bodily harm is the result, those who choose to apply physical domestic discipline will be at risk of criminal conviction for a mistake or over reaction. Intent to cause that harm is irrelevant; just as it is irrelevant to a charge of 'careless driving causing injury' (see, Land Transport Act 1998, ss.8 & 38). It is enough that force was intentionally applied and bodily harm resulted. In that sense we revert to the ordinary law of assault.

D. The **child** under 2 years and over 13 years of age; and **striking to the head**

The Appellant in, *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, [2004] 1 SCR 76, argued that our section 59's counterpart in the Criminal Code RSC 1985, c. C-46, s.43, should be struck down by application of the Canadian Charter of Rights and Freedoms, ss 7 [deprivation of life liberty and security of the person contrary to a principle of fundamental justice], 12 [cruel and unusual punishment], and 15(1) [equality under the law]. Additional questions arose as to: the independent rights of children; that 'the best interests of the child' principle falls within the notion of a *principle of fundamental justice*; and, Canada's duties in its domestic law flowing from the United Nations *Convention on the Rights of the Child*, Articles 5 [respect for the rights of [parents to provide appropriate directions and guidance to children], and 19(1) [protect the child from all forms physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents and others].

McLachlin CJC, speaking for the majority of 6 of the 9 Justices, found for Canada when she determined that, the "reasonable under the circumstances" test for, "force by way of correction", does not infringe the rights of children under the Charter. She found that corrective touching of children infringes only children's equality rights [Charter s.15], and except for teachers [included under the s 43 Criminal Code defence], such infringement is, under the Charter s.1 saving provision, a *reasonable limit prescribed by law in a free and democratic society*.

In this third tier consideration of the law and evidence on the question of child physical discipline, she detects under present standards that, the section itself provides reasonable limits on corrective touching because:

- (a) it is limited to educative or corrective purposes (para 24), which requires the sober and reasoned use of force to restrain, to control or to express symbolic disapproval;
- (b) the child must be capable of benefiting from the correction, and this would prohibit touching a child under 2 years, because on the evidence adduced, they are incapable of understanding why they are hit (para 25);
- (c) corporal punishment of teenagers is harmful because it can induce aggressive or anti social behaviour (para 37);
- (d) discipline by the use of objects or blows or slaps to the head, is unreasonable;
- (e) section 43 only exempts from criminal sanction, minor corrective force of "a transitory and trifling" nature (para 40);

- (f) to the extent that trial decisions produce inconsistent results, it is for the appellate courts to fix the standard (para 39).

In that leading superior court so many restraints and limits were read into the broad terms of the Canadian provision very like our present 59. The proposed s.59 covers these restraints and limits.

Our Committee also considered the question of a weapons prohibition. A weapon, in law, is really any instrument which is deliberately used for a criminal purpose. A pen could be a dagger. However, we refrain from adding such a prohibition for fear it will invite fine and unnecessary distinctions. If bodily harm is caused the defence is gone. If an instrument for corrective discipline is used in the right spirit (proposed s.59 (1) *sole purpose of reasonable corrective discipline*), whether it is a tap with a ruler or with a bare hand, should not affect criminality.

E. Corrective discipline conduct falling outside the proposed section

Out of an abundance of caution, proposed sub s.59(6) is added to clarify that the purpose of section 59 is to stand in the place of any vestigial common law defence which might otherwise be thought to survive the specific terms of the section; for example corrective discipline of a child over the age of 13. This cautionary sub section is believed to be useful in light of Crimes Act 1961, s.20 which preserves all common law rights of justification or excuse not inconsistent with specific provisions of the Act.

David R James, Committee Member

October 2005