

Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill

Member's Bill

As reported from the Justice and Electoral Committee

Commentary

Recommendation

The Justice and Electoral Committee has examined the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill and recommends by majority that it be passed with the amendments shown.

Introduction

Section 59 of the Crimes Act 1961 provides a statutory defence for parents and every person in the place of a parent who use force against their children for the purpose of correction. The bill as introduced repeals this provision. In the absence of section 59 parents and every person in the place of a parent would be in the same position as any other person. If charged with any offence that involves the use of force against a child, correction would no longer be a defence.

The first part of this commentary sets out the amendments to the bill the majority recommends. We would like to emphasise that we made every endeavour to reach consensus on the bill. We are disappointed that, despite our best intentions, agreement was not reached. The remainder of the commentary details some of the issues we considered as a result of submissions on the bill.

Amendments

Title

We recommend that the title of the bill be amended, as it does not adequately reflect the effect of the bill as amended, and suggest the bill be renamed the Crimes (Substituted Section 59) Amendment Bill.

Purpose

We recommend that clause 3, which states that purpose of the bill, be amended to better reflect the intention of the bill. The purpose of this bill is to amend the principal Act to make better provision for children to live in a safe and secure environment free from violence by abolishing the use of parental force for the purpose of correction.

Parental control

We recommend that section 59 of the Crimes Act be repealed and replaced by a new section 59. This new section will effectively remove the defence of using “reasonable force” against a child for the purpose of correction. The new section 59 clarifies that reasonable force may be used for other purposes such as protecting a child from harm, providing normal daily care, and preventing the child doing harm to others. We consider that this amendment provides for interventions that are not for the purpose of correction by parents and every person in the place of a parent. Additionally it will address a gap in the law, as under the current wording of section 59 the application of force from any motivation other than correction may amount to an offence.

This amendment will require a consequential amendment to sections 139A(1) and (2) of the Education Act 1989.

Committee consideration

Summary of submissions

The committee received 1,718 submissions on the bill. The majority (1,471) came from individuals. Of these, 385 submitters identified themselves as parents or caregivers, and 76 as children or young people. We received 247 submissions from organisations.

Opposition to the bill

The majority of submitters who opposed the bill commented on child discipline and associated matters generally, rather than on specific provisions of the bill. Opponents of the bill raised a number of concerns, including the following:

- that repeal of section 59 would lead to the prosecution of parents and the removal of children from their homes as a result of minor acts of physical discipline
- that the rights of parents to discipline their children or simply to raise them as they see fit would be eroded by a form of statutory control
- that the use of physical discipline, which they argued is an effective tool for raising children, would be prohibited
- that the repeal of section 59 would lead to children being raised poorly with no conception of discipline or boundaries
- that the repeal of section 59 would remove the right to discipline children according to specific belief systems.

A number of submitters predicted various detrimental effects on parents, children, and society if section 59 were repealed.

Support for the bill

Submitters who supported the bill raised the following arguments:

- that physical discipline on children is ineffective compared with other forms of discipline
- that there is a connection between the physical disciplining of children and child abuse
- that section 59 provides less protection against assault for children than adults
- that physical discipline is linked with longer-term psychological and developmental problems
- that it was not the intention of the bill to criminalise parents and that fears of prosecution for trivial use of physical discipline are unfounded
- that repealing section 59 would send a strong anti-violence message to society and encourage behavioural change.

A number of supporters of the bill argued that, while repealing section 59 would send a positive message, it would need to be reinforced with Government support and ongoing public education.

Proposed amendments

A number of submitters suggested specific amendments to the bill, most of them defining “reasonable” and “unreasonable” force. They were often illustrated with examples of acceptable and unacceptable forms of, and reasons for, physical discipline.

Other submitters illustrated the difficulties of defining “reasonable” and “unreasonable” force, and the possible consequences. They noted the following issues in particular:

- It would be very difficult to draft a definition that captured the desired behaviour with sufficient certainty and provided adequate protection to children (since, for example, a lack of visible injury may not necessarily mean no harm has been done).
- Difficulties are likely to arise in applying any definition in individual cases, particularly if terms such as “minor”, “trivial”, and “harm” are used, which are relative or open to interpretation and argument.
- “Reasonable force” is not defined anywhere in statute, so it would be out of line with the rest of statute law to define it here.
- Health professionals are averse to providing guidelines on the use of physical force against children.
- Such amendment could be seen as sanctioning or legitimising the use of force against children.

We were advised that most of the amendments proposed by submitters were fraught with difficulties both in practice and in principle, and would prove unworkable in terms of legal interpretation.

Public education

We recommend that if the bill is enacted the appropriate agencies should conduct public awareness and education campaigns about the effect of the recommended changes to section 59 and alternatives to physical discipline. We received positive feedback about the Strategies with Kids—Information for Parents (SKIP) programme. This

programme has been adopted by thousands of parents, community groups, and educational groups throughout the country. We consider that the extension of the SKIP programme and similar parental educational programmes would be most beneficial in conjunction with the recommended changes to section 59.

Prosecution practice under the new section 59

We were advised that any impact on the rate of prosecution of parents and every person in the place of a parent for the use of force against their children will depend on police practice in such cases, as well as the public response to the law change (regarding, for example, the reporting of incidents to the police). As with any other offence, the prosecution of parents and every person in the place of a parent for the use of force against children for the purpose of correction will be a matter for police discretion, although private prosecutions remain a possibility.

We were advised that all prosecution decisions are guided by the Solicitor-General's Prosecution Guidelines. The guidelines state that police must decide whether a prosecution is required in the public interest. They also state that ordinarily a prosecution will not be in the public interest unless it is more likely than not that it will result in a conviction. The likely success of section 59 as a defence in a particular case is therefore a relevant factor in a decision whether to prosecute. Therefore, the recommended changes to section 59 would remove the "correction" justification, which was one obstacle to prosecutions of assaults against children. Factors, unrelated to section 59, such as failures to detect or report assaults, would continue to limit prosecutions following repeal.

We were advised that the police will not actively solicit reports of the use of force against children. The police are obliged to investigate any reports they receive, but such reports may not require significant investigation, other than, for example, follow-up with the adult concerned and witnesses. While police may investigate (or make inquiries about) reports of alleged assault, not all such cases will require prosecution or other action.

There are safeguards in the criminal justice system to minimise the likelihood of parents and every person in the place of a parent being prosecuted for minor acts of physical punishment. Various options other than formal prosecution are available to police, including warnings and cautions. Under the Solicitor-General's Prosecution

Guidelines, a prosecution should proceed only where it is in the public interest and there is sufficient evidence.

Judges have an inherent power to control proceedings that are an abuse of the court's processes. Vexatious or trifling matters are an abuse of the court's processes. We would not expect prosecutors to bring trifling matters before the court.

The police advised us that the discretion to lay charges lies with the investigating officer, after considering any advice that they may receive from a supervisor or other person such as Police Prosecution Services or Legal Services.

Advice from the Department of Child, Youth and Family Services

The Department of Child, Youth and Family Services told us that it has various policies for dealing with situations that endanger children. It told us that it would expect the thresholds at which it removes children to remain the same if section 59 were repealed. If section 59 were repealed, Child, Youth and Family told us that it would expect a greater volume of reports, but that the legislative principle that intervention in family life should be the minimum necessary to ensure a child's or young person's safety would remain. Child, Youth and Family is concerned with child abuse and neglect but will consider removing children only if they are at serious risk. It told us that if section 59 were repealed it would look at developing operational guidelines in conjunction with all affected agencies, especially the police.

We acknowledge that the police and Child, Youth and Family need to maintain their professional discretion when dealing with complaints regarding physical force used against children. We expect the police and Child, Youth and Family to develop effective operational guidelines and protocols and to maintain a close working relationship.

Conclusion

While considering this bill we noted the high level of public interest stimulated by the possible repeal of section 59 of the Crimes Act. The submissions we received demonstrated a range of views about the use of physical discipline in New Zealand. Submissions were

received from a wide variety of individuals and organisations, and often expressed strong views on the matter.

We consider that there is widespread misunderstanding about the purpose and possible results of the bill as introduced. We do not consider that the repeal of section 59 will lead to the prosecution of large numbers of parents and persons in the place of parents in New Zealand. Nevertheless, for the sake of clarity, we have recommended amendments to the bill to clarify that parents may use reasonable force in some circumstances, but not for the purpose of correction. We note that there are several potential offences directly related to the care of children that are rarely prosecuted. Such an example is if a caregiver sends a child to its room against its will, this technically constitutes kidnapping under section 209 of the Crimes Act. However, the police are not regularly prosecuting parents for this. We consider that logic dictates the police will adopt a similar approach to parents who use minor physical discipline following the changes to section 59.

We do not believe that the changes we have proposed to section 59 of the Act will lead to a large increase in convictions or the removal of children from their families for the use of minor physical discipline.

2005/25 Petition of Barry Thomas and 20,750 others

We considered the issues raised by this petition, which supports the bill. We have no matters to bring to the attention of the House in respect of the petition.

New Zealand National minority view

In the best interests of children, the New Zealand National members of the committee believe it is imperative to lower the usage of section 59 of the Crimes Act 1961 as it is being used as a shield to conviction by some parents and guardians who have obviously abused their children.

Some high-profile recent cases involving severe beatings with implements are seen as obvious examples of child abuse, yet no convictions have resulted when the accused have successfully used the “reasonable correction” justification offered by section 59 in jury trials.

There is less concern about interpretation of the language of section 59 by Judges.

Alongside the need for lowering the threshold of violence against children in this country is the often-confirmed position that 80% of New Zealanders believe, and the New Zealand National members agree that parents should not be rendered liable to prosecution (criminalised) for smacking their children.

Firm statistics as to the use of corporal punishment in New Zealand are not readily available. There is a blurring of the lines as many researchers place child abuse on a continuum from the least application of force by way of “smacking”, through to child homicide. The New Zealand National members agree with most New Zealanders who do not place “smacking” in the same category as “child abuse”. The difficulty also remains that “smacking” itself is ill defined and has various meanings to various people. What may seem an acceptable “smack” to one parent is not to another and can be described as “the bash” by the child, and “abuse” by others.

In the course of hearing submitters, those in favour of repeal were told that a win all/lose all scenario would occur if there was no suggested amendment. Submitters were also asked to discuss and suggest compromise positions that could be included in an amendment, which would operate as a “fall-back” position to offer better protection for children while not achieving their first choice of full repeal. The National Party members were disappointed that few submitters would consider any other option than full repeal.

The New Zealand National members believe that this “all or nothing” approach fails to accurately reflect current thinking of the vast majority of New Zealand parents.

The New Zealand National members of the committee believe that the fundamental rules of law are certainty and clarity. The repeal of section 59 but retention of some protection for parents by way of guidelines for practise or commentary on this bill are insufficiently precise for parents to have confidence that they live within the law.

The New Zealand National members of the committee intend offering amendments to the bill to ensure the three common objectives of both sides of the debate (a) to send a message that child abuse is wrong; (b) to prevent child abusers from hiding behind section 59; (c) to prevent good parents from being criminalised; are achieved.

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Justification for Child
Discipline) Amendment**

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The New Zealand National members of the committee believe that there needs to be a common-sense approach to the issues around child assaults in New Zealand and that Parliament should only enact laws that work.

Appendix

Committee process

The Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill was referred to the Justice and Electoral Committee on 27 July 2005. The closing date for submissions was 28 February 2006. We received and considered 1,718 submissions from interested groups and individuals. We heard 207 submissions and held hearings in Wellington, Auckland, Hamilton, and Christchurch. We received advice from the Ministry of Justice, the Ministry of Social Development, the New Zealand Police, and the Department of Child, Youth and Family Services. We sought additional advice from the Law Commission.

Committee membership

Lynne Pillay (Chairperson)

Christopher Finlayson (Deputy Chairperson)

Russell Fairbrother

Ann Hartley

Nándor Tánzos

Nicky Wagner

Dr Richard Worth

Chester Borrows and Sue Bradford were replacement members for this item of business.

The committee appointed a subcommittee for the consideration of this bill.

Subcommittee membership

Lynne Pillay (Chairperson)

Chester Borrows replacing Christopher Finlayson

Ann Hartley

Sue Bradford replacing Nándor Tánzos

Nicky Wagner

**Crimes (Abolition of Force as a
Justification for
Child Discipline) Amendment**

Key to symbols used in reprinted bill

As reported from a select committee

Struck out (majority)

Subject to this Act,

Text struck out by a majority

Struck out (unanimous)

Subject to this Act,

Text struck out unanimously

New (majority)

Subject to this Act,

Text inserted by a majority

~~<Subject to this Act,>~~

Words struck out by a majority

~~(Subject to this Act,)~~

Words struck out unanimously

<u>Subject to this Act,>

Words inserted by a majority

Subject to this Act,

Words inserted unanimously

Sue Bradford

**Crimes (*Abolition of Force as a Justification
for Child Discipline*) Substituted Section 59)
Amendment Bill**

Member's Bill

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The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the Crimes (*Abolition of Force as a Justification for Child Discipline*) Substituted Section 59) Amendment Act 2005.
- 2 Commencement** 5
This Act comes into force on the day after the date on which it receives the Royal assent.
- 2A Principal Act amended**
This Act amends the Crimes Act 1961.
- 3 Purpose** 10
The purpose of this Act is to amend the principal Act to <abolish the use of reasonable force by parents as a justification for disciplining children> <make better provision for children to live in a safe and secure environment free from violence by abolishing the use of parental force for the purpose of correction>. 15

**Crimes (Abolition of Force as a
Justification for Child
Discipline) Substituted Section
59) Amendment**

cl 4

Struck out (unanimous)

- 4 Domestic discipline**
Section 59 is repealed.

New (majority)

- 4 New section 59 substituted**
Section 59 is repealed and the following section substituted:
- “59 Parental control”** 5
- “(1) Every parent of a child and every person in the place of a parent of the child is justified in using force if the force used is reasonable in the circumstances and is for the purpose of—
- “(a) preventing or minimising harm to the child or another person; or” 10
- “(b) preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence; or
- “(c) preventing the child from engaging or continuing to engage in offensive or disruptive behaviour; or
- “(d) performing the normal daily tasks that are incidental to good care and parenting.” 15
- “(2) Nothing in **subsection (1)** or in any rule of common law justifies the use of force for the purpose of correction.
- “(3) **Subsection (2)** prevails over **subsection (1)**.”

- 5 <Consequential> Amendments to Education Act 1989** 20

New (majority)

(1AA) This section amends the Education Act 1989.

- (1) Section 139A(1) <and (2)> of the Education Act 1989 <is> <are> amended by omitting <the words> “, unless that person is a guardian of the student or child”.

**Crimes (*Abolition of Force as a
Justification for Child
Discipline*) Substituted Section
59) Amendment**

cl 5

Struck out (majority)

- (2) Section 139A(2) of the Education Act 1989 is amended by omitting the words “, unless that person is a guardian of the student or child”.

Legislative history

9 June 2005
27 July 2005

Introduction (271–1)
First reading and referral to Justice and Electoral
Committee