

Here are the questions that must be authoritatively answered.

Following the questions are two items for your ease of reference:

- 1) a copy of the new Section 59 and
- 2) a copy of the Police Guidelines to the interpretation and enforcement of the new Section 59 (Circular 2007/03).

Craig Smith, craig@hef.org.nz, www.FamilyIntegrity.org.nz, www.hef.org.nz

August 2007

Number One: What Is Meant by “Correction”?

A. Is it possible to make an arrest or prosecute or secure a guilty verdict against a parent for using force with his/her child for the purpose of correction even though the term “correction” is not defined?

B. Does Parliament need to define “correction” before Police will know how to recognize it or identify it? Apparently “correction” used to include all the purposes listed in the present Section 59(1)(a-d). If the meaning of “correction” no longer includes those things, then what does it mean? Could it mean the same as “discipline”, “training”, “punishment” or “guidance”?

C. Are the Police going to arrest parents for “correcting” their children using a Police working definition of “correction”? If so, what is that working definition? Will Police then modify their working definition of “correction” once a body of case law is built up and precedents established?

D. What if a parent is thoroughly, earnestly and honestly convinced that “correction” of a child is more than just “incidental to good care and parenting” (Section 59(1)(d)), but is an essential part of “good care and parenting”? Are the parent’s beliefs and/or convictions about this protected in law?

E. Is “correction” now not to be considered part of “good care and parenting” (Section 59(1)(d)), unless it can be accomplished without the use of any force at all?

F. On page 2 of the recently issued Police Guidelines to the interpretation and enforcement of the new Section 59 (Circular 2007/03), under the heading “Preventing” it says, “force cannot be used after the event to **punish or discipline** the child.” Are parents now to understand that neither “discipline” nor “punishment” can be considered part of “good care and parenting” unless they can be accomplished without the use of any force?

Number Two: What Is Meant By Reasonable Force?

A. Does the term “Force” as it is used in Section 59 of the Crimes Act refer to only physical force or does it also refer to non-physical force such as gestures, intimidation, verbal warnings, threats, insinuations, emotional manipulation, appeals to religion or culture or tradition or concepts of right and wrong?

B. On page 2 of the recently issued Police Guidelines to the interpretation and enforcement of the new Section 59 (Circular 2007/03), under the heading “Preventing” it says, “force cannot be used **after the event** to punish or discipline the child.” What if the

parent uses force after the event for the purpose of “preventing the child from engaging or continuing to engage” **at any time in the future** “in conduct that amounts to a criminal offence” or “in offensive or disruptive behaviour” as per Section 59(1)(b) & (c)? Could force used for this purpose be legally justified under the new Section 59?

C. On page 3 of the Police Circular, under the heading “Inconsequential offences where there is not public interest in prosecuting”, it says, “The use of objects/weapons to smack a child...would not be inconsequential”. This is obviously in reference to Section 59(4). Do Section 59(4) and this comment from the Circular apply equally to Section 59(1)(a-d) as well as to Section 59(2), or do they apply only to Section 59(2)?

D. Does the "reasonable force in the circumstances" of Section 59(1)(a)-(d) mean parents can legally employ implements and/or smacking to accomplish the purposes listed, as long as the force used is reasonable in the circumstances?

Number Three: If There Is Reasonable Doubt, Are Parents Therefore Automatically Guilty?

A. Section 59(3) says Sub-Section 2 must prevail over Sub-Section 1. Does this mean that if it is unclear to a Police Officer contemplating making an arrest of a parent who has used force with a child or if it is unclear to a jury trying to decide if the force used by a parent with a child was legally justifiable, if there is a doubt as to whether the use of force was for the purpose of preventing (for example) offensive behaviour or for the purpose of correction, that the interpretation of correction must prevail?

B. Does this mean that, contrary to normal understandings of justice wherein one is only guilty when it is proven **beyond** reasonable doubt, juries and Police Officers in these cases will be required to return a guilty verdict when **there is** reasonable doubt about the purpose?

Crimes Act 1964

Section 59: Parental control

(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
- (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.

(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).

(4) To avoid doubt, it is affirmed that the Police have the discretion not to prosecute complaints against a parent of a child or person in the place of a parent of a child in relation to an offence involving the use of force against a child, where the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution."

Police Analysis and Guide

2007/03 - Crimes (substituted section 59) Amendment Act 2007

Group: Policy

Owner: National Manager: Policy, Police National Headquarters

Publish Date: 12/06/2007

Expiry Date: 12/06/2009

Introduction

The Crimes (Substituted Section 59) Amendment Act ("Amendment Act") comes into force on 22 June 2007 and amends section 59 of the Crimes Act.

Section 59 of the Crimes Act provided a statutory defense for every parent of a child and every person in place of the parent of a child to use force by way of correction towards the child, if the force used was reasonable in the circumstances. The purpose of the Amendment Act is to amend the Crimes 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.

The purpose of this practice guide is to advise staff about the new section and to give guidance on the application of it. Until case law develops on the section, it is not known how it will be interpreted and applied by the Courts.

If staff require any advice about the application of section 59 to any particular circumstances, they should consult Prosecution Services, a Child Abuse Investigator, a Family Violence Coordinator or Legal Services.

New Section 59

Section 59 states:

(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
- (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.

(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).

(4) To avoid doubt, it is affirmed that the Police have the discretion not to prosecute complaints against a parent of a child or person in the place of a parent of a child in relation to an offence involving the use of force against a child, where the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution.

Analysis of the New Section

Child

“Child” is not defined for the purpose of section 59. Because “child” is not defined, it is not clear whether it includes those persons 17 years of age and under (as it is defined in the Care of Children Act 2004), or perhaps, under 14 years of age (as it is defined in the Children, Young Persons, and Their Families Act 1989). As children get older, the use of reasonable force for the purposes listed in section 59 will become less justifiable. Factors that will need to be considered in determining whether the force used is justified under section 59 include:

- age of the child
- maturity of the child
- ability of the child to reason
- characteristics of the child, such as physical development, sex and state of health, and
- the circumstances that led to the use of force.

Person in the Place of a Parent

“Person in the place of a parent” is also not defined, but includes step parents and foster parents, and other persons who take on parental responsibility in the absence of a parent.

Force Used Is Reasonable in the Circumstances

No definitions are offered about what constitutes reasonable force. In using force parents must act in good faith and have a reasonable belief in a state of facts which will justify the use of force. The use of force must be both subjectively and objectively reasonable.

Any force used must not be for the purposes of correction or punishment; it may only be for the

purposes of restraint (s 59(1)(a) to (c)) or, by way of example, to ensure compliance (s 59(1)(d)).

Preventing

To “prevent” is to hinder or stop something from occurring. From this it is implicit that reasonable force can only be used at the time that the intervention by the parent is required, i.e. force cannot be used after the event to punish or discipline the child. This distinction is made clear in the new subsections (2) and (3) — nothing in s 59(1) will justify the use of force for the purposes of correction.

Preventing or Minimising Harm to the Child or Another Person

This subsection allows reasonable force to be used to prevent or minimise harm to the child or another person. For example, to stop a child from:

- running across a busy road
- touching a hot stove
- inserting a metal object into a power point
- striking another child or person with an object.

Preventing the Child from Engaging or Continuing to Engage in Conduct that Amounts to a Criminal Offence

This subsection authorises the use of reasonable force to prevent children from committing offences. Although a child under 10 cannot be convicted of an offence (section 21 Crimes Act 1961), and a child aged 10 to 13 can only be charged with murder or manslaughter (section 272 Children, Young Persons and Their Families Act 1989), a child of any age can commit an offence e.g. theft, wilful damage or assault. Therefore, a parent of a child and every person in the place of a parent of the child can use reasonable force to prevent their child, by way of example, from damaging or stealing property, or assaulting other people or themselves (Note: the defence of self defence could equally apply in such cases).

Preventing the Child from Engaging or Continuing to Engage in Offensive or Disruptive Behaviour

Offensive or disruptive behaviour is not defined in the Crimes Act and it is not known where the boundaries lie in the context of this subsection. While current case law can offer some insight, the analysis provided by the Courts is more particularly targeted at types of behaviour that warrant the interference of the criminal law.

In *Ceramalus v Police* (1991) 7 CRNZ 678 Tomkins J adopted the following as a helpful description of “offensive behaviour”:

[The behaviour] must be such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person.

The *Shorter Oxford English Dictionary* defines “offensive” as:

1. *Pertaining or tending to attack; aggressive; ...*
2. *Hurtful, injurious ...*
3. *Giving, or of a nature to give, offence; displeasing; annoying; insulting ...*

The *Shorter Oxford English Dictionary* defines “disruptive” as:

1. *Causing or tending to disruption ...*

Examples of behaviour that may amount to offensive or disruptive behaviour, depending upon the specific circumstances, could include, by way of example, yelling and screaming or throwing objects or food.

Performing the Normal Daily Tasks that Are Incidental to Good Care and Parenting

Many everyday tasks require parents to use force when interacting with their children. For example, when changing nappies, dressing or securing a child in a car seat, or applying sunscreen. The use of reasonable force in performing such tasks is permitted under this subsection.

Also, a parent may send or take their child to, by way of example, their room against the child’s will at the time the intervention is required. Force may be required to perform such a task and the use of reasonable force in such circumstances may be justified under this subsection, i.e. to prevent the child from continuing to engage in the behaviour (s 59(1)(b) or (c)) or to restore calm. However, if the child is detained for a period or in a manner that is unreasonable in the circumstances, this subsection will not provide a defence to such action.

Inconsequential Offences Where There Is No Public Interest in Prosecuting

Parliament has expressly affirmed that for minor cases of assault against children, Police have discretion not to prosecute where the offence is considered to be so inconsequential that there is no public interest in a prosecution. The Crown Law Office Prosecution Guidelines for Crown Solicitors also states that a factor that may arise for consideration in determining whether the public interest requires a prosecution includes:

the seriousness or, conversely, the triviality of the alleged offence; that is, whether the conduct really warrants the intervention of the criminal law.

The *Shorter Oxford English Dictionary* defines the word “inconsequent” as:

Of no consequence

And the *Concise Oxford Dictionary* defines the word “inconsequential” as:

Unimportant

The use of objects/weapons to smack a child, strikes around the head area or kicking would not be inconsequential assaults. While all mitigating and aggravating circumstances would need to be considered, such assaults will generally require a prosecution in the public interest.

In addition, while smacking may, in some circumstances, be considered inconsequential, a prosecution may be warranted if such actions are repetitive or frequent, and other interventions or warnings to the offender have not stopped such actions.

Application of the Police Family Violence Policy (1996/2)

The Police Family Violence Policy outlines the principles, policy and procedures for best practice when members of Police deal with family violence within their community. The term 'family violence' includes violence which is physical, emotional, psychological and sexual abuse, and includes intimidation or threats of violence. The term 'family' includes such people as parents, children, extended family members and whanau, or other people involved in relationships.

Paragraph 19 of the Police Family Violence Policy states:

Given sufficient evidence, offenders who are responsible for family violence offences shall, except in exceptional circumstances, be arrested. In rare cases where action other than arrest is contemplated, the member's supervisor must be consulted.

Force used on children that is not permissible under section 59 is covered by the Family Violence Policy.

It is considered good practice that assault investigations involving children be referred to Child Abuse Investigators, and investigated in conjunction with Child, Youth and Family. Where an assault on a child is witnessed by Police or where a report of an assault needs to be dealt with promptly, Police Officers will need to determine whether section 59 provides a good defence and if it does not, arrest the alleged offender unless there are exceptional circumstances.

Police investigating cases where force is used against a child, as is the case with all assault investigations, must consider the amount of force used in the circumstances, among other things, before making a decision about whether a prosecution is required in the public interest. In such cases Police need to:

- establish whether there is sufficient admissible and reliable evidence that an offence has been committed
- where and when possible, refer appropriate cases to Child Abuse Investigators where they may be investigated further

- depending upon the amount of force used, take into account whether it is in the best interests of the child/family and the public to prosecute, i.e. “exceptional circumstances” will justify a departure from the requirements of paragraph 19 of the Police Family Violence Policy. Staff must apply their common-sense.

In *Attorney-General v Hewitt* [2000] NZAR 148 a full bench of the High Court held that adopting a policy to automatically arrest a suspect without allowing for exceptional circumstances was not lawful. The High Court also held that a failure to consider the discretion to arrest was unlawful and arbitrary under section 22 of the New Zealand Bill of Rights Act. Discretion must be used by staff.

Referrals and Documentation

In cases where the force used is found to be minor, trivial or inconsequential, it will be appropriate to record the event on a POL400 and forward the file to the Family Violence Coordinator. The expected outcome for such events will be one using common sense and of offering guidance and support, dependent on the context following discussion by the Family Violence Co-ordinator.

In repeat events (where other interventions or warnings have been unsuccessful) involving the same family or more serious cases the matter should be recorded on a POL400 and consideration given as to whether prosecution may be appropriate. A Notification to Child Youth and Family must be made by faxing the POL400 to the Child Youth and Family Call Centre. The matter will also be forwarded in the usual way to the Family Violence Co-ordinator.

For clear events of abuse or neglect, the event will be recorded on a POL400 and dealt with in terms of the CAT/SAT Protocol as a Care and Protection issue. A Notification to Child Youth and Family must be made by faxing the POL400 to the CYF Call Centre. The matter will also be forwarded in the usual way to the Family Violence Co-ordinator.

Appropriate Charging

If a parent of a child or a person in the place of a parent of a child uses force that is not justified under section 59, and there are no exceptional circumstances and it is in the public interest to prosecute (refer to the above guidance and commentary), the appropriate charge would be assault pursuant to section 9 of the Summary Offences Act 1981 where the offence is not overly serious. For more serious cases, the offence against section 194(a) of the Crimes Act (assault on a child under 14 years of age) would be more appropriate.

Howard Broad
Commissioner