LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

8 November 2006

JUSTICE AND ELECTORAL COMMITTEE

SECTION 59 CRIMES ACT 1961 AMENDMENT: OPTIONS FOR CONSIDERATION

Background

1. In a letter to the Law Commission dated 12 October 2006, the Chairperson of the Justice and Electoral Committee invited the Commission to advise the Committee on the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill.

2. Written background material was provided to the Law Commission, and Commission representatives attended the Committee on Thursday 19 October for a dialogue about the issues.

3. In the course of its work, the Commission was authorised to consult with Sue Bradford MP, Chester Borrows MP, Professor Bill Atkin, the Office of the Clerk, and Parliamentary Counsel Office.

4. This briefing summarises the results of the Commission's work, for the consideration of the Committee.

5. The Commission has discussed the application of the Standing Orders relating to scope with the Office of the Clerk of the House. It is not appropriate for the Commission to provide advice on these matters. This is the province of Parliamentary officials.

Purpose of this briefing

6. This briefing offers our advice to the Committee on legally effective options for the reform of section 59 of the Crimes Act 1961. Our discussions with the Committee suggested to us that the straight repeal of section 59 of the Crimes Act 1961, as proposed in the Member's Bill of Sue Bradford MP, was not acceptable to the Committee. But that remains an available option. What we have done in this briefing is to propose two further options addressing the different policy perspectives described to us.

Executive summary of the options

7. Option 1 does not contemplate the use of parental force against children for the purposes of correction. Force may be used for certain other listed purposes, such as protecting the child from harm, or providing normal daily care.

8. Option 2 has some aspects in common with option 1. It, too, provides for non-disciplinary interventions by parents. Everybody to whom we spoke agreed that this was a gap in the law that ought to be addressed. This is because, on the wording of section 59, the application of force from any motivation other than correction **is an offence currently**.

9. However, option 2 has an additional facet: it justifies correctional force, but there is at the same time a wish to narrow the scope of section 59, so that it cannot be used as a shield for unreasonable parental violence. Option 2 limits the scope of the defence, by giving non-exhaustive examples of force that is unreasonable. The intention is to provide parents with a defence for minor smacking as a disciplinary tool.

Option 1: section 59 amendment based upon Atkin and Wright

10. Under option 1, the use of force by parents against their children is only justified for specified non-disciplinary purposes. The essence of this option is to offer protection for "good parenting" interventions, short of correction.

Option 1: proposed draft provision (as reviewed by Parliamentary Counsel)

4 New section 59 substituted

(1) Section 59 is repealed, and the following section substituted:

"**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)."

Option 1: discussion

11. **Language of "force".** The proposed draft section 59(1) refers to the use of reasonable force by parents. We consider this legally necessary, to link the defence back to the definition of assault in section 2 of the Crimes Act 1961 (the principal offence for which this defence is likely to be used). Furthermore, alternative language that was suggested to us, such as "restraint", would not necessarily be apt for some of the parental interventions in issue (e.g. knocking a child's hand away from a boiling pot on the stove, pushing or pulling a child out of the path of an oncoming car, carrying a child out of the supermarket or to his or her bedroom).

12. **Aids to statutory interpretation: section heading and subsection (3).** The section is headed "Parental control" (instead of the current language of "Domestic discipline"). As a matter of statutory interpretation, the section heading may be used as an aid to the interpretation of the body of the section. The revised heading

will be an extra cue to signal the change in scope of this provision, and assist in the event of any ambiguity. Subsection (3) has been included for the same reason. In the event of a potentially ambiguous situation such as "time out", where there may be a mix of motives, subsection (3) seeks to ensure that parents cannot rely upon a corrective purpose for their actions.

13. **Exclusion of the common law.** Subsection (2) excludes common law defences that might be relied upon to justify the use of force for the purpose of correction.

14. **Derivation from Atkin/Wright.** The scope of this draft provision is quite similar to the amendment originally proposed to the Committee by Professor Bill Atkin and Fran Wright. One key difference is that the specific examples offered in that amendment have been reframed more generically; however, the provision covers similar ground. The other difference is that this draft is proposed as a section 59 amendment (rather than an amendment to the Crimes Act definition of assault). The various reasons why the latter approach was inappropriate and unworkable have been canvassed with the Committee. We have consulted with Professor Atkin, and understand that he supports this revised approach.

15. **Consequential amendments.** Minor consequential amendments to section 139A of the Education Act 1989 will be necessary. These will be provided to the Committee by Parliamentary Counsel, and have not been reproduced above.

16. **A further possible safeguard on the scope of option 1.** See para 22 below, for a suggestion that the Committee may wish to consider, regarding the incorporation in option 1 of subsections (2) and (3) from option 2.

Option 2: revised "Borrows" amendment

17. The key difference between options 1 and 2 is that option 2 envisages a continuation of the present position under section 59 (i.e. that the use of some force against children may be reasonable for correctional purposes). But there is a need to narrow the scope of the section, so that it cannot be used as a shield for unreasonable parental violence.

18. The amendment originally proposed by Mr Borrows to achieve this purpose defined "reasonable force" by reference to the common law phrase "transitory and

trifling discomfort". Our reasons for advising against that approach are outlined in Appendix 1.

19. We are proposing an alternative approach, whereby a non-exhaustive list of examples is given of conduct that is unreasonable.

20. This is the approach that has been taken in like-minded overseas jurisdictions that have amended their equivalents to section 59 (England and Wales, Scotland, Northern Ireland, and New South Wales): see further Appendix 2.[1]

Option 2: proposed draft provision (as reviewed by Parliamentary Counsel)[2]

4 New section 59 substituted

(1) Section 59 is repealed and the following section substituted:

"**59 Parental control and correction**

"(1) Every parent of a child and, subject to subsection (4), 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; or

"(e) correction.

"(2) The use of force for a purpose specified in any of paragraphs (a) to (e) of subsection (1) is unreasonable if—

"(a) it involves conduct prohibited by an enactment creating a criminal offence, other than an offence under—

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1 In addition to New South Wales, the same approach has also been recommended in Australia by the Tasmania Law Reform Institute, and the Model Criminal Code Officers' Committee of the Standing Committee of Attorney's General.

2 The provisions in black replicate those from subsection (1) of Option 1. The provisions in blue are additional, and designed to achieve the additional option 2 objectives as set out in para 17 above.

"(i) section 194 (assault on a child or by a male on a female); or
"(ii) section 196 (common assault); or
"(iii) section 9 of the Summary Offences Act 1981 (common assault); or

"(b) it causes or contributes materially to injury that is more than transitory and trifling; or

"(c) any weapon, tool, or other implement is used; or

"(d) it is inflicted by any means that is cruel, degrading, or terrifying.

"(3) Subsection (2) does not limit the circumstances in which force used for a purpose specified in any of paragraphs (a) to (e) of subsection (1) might be found to be unreasonable.

"(4) Nothing in this section justifies the use of force towards a child in contravention of section 139A of the Education Act 1989."

Option 2: discussion

21. **Dual objectives.** In addition to providing legislative guidance about what constitutes unreasonable force, option 2 provides for the same non-disciplinary interventions by parents envisaged by option 1. This is because everybody to whom we spoke agreed that this was a gap in the law that ought to be addressed. On the wording of the current section 59, the application of force from any motivation other than correction is technically an offence.

22. **Potential relevance of proposed subsections (2) and (3) to option 1.** Subsections (2) and (3) were primarily intended to offer guidance as to what is unreasonable force **for correctional purposes**. However, as drafted, their application is broader: they will operate as a safeguard on all of the purposes listed in subsection (1), including the purposes derived from option 1. As such, the Committee may wish to consider their incorporation in option 1 as subsections (4) and (5). If this approach was taken, the core difference of opinion between Committee members would turn on the inclusion, or not, of paragraph (e) of option 2.[3]

23. **Non-exhaustive description of unreasonableness.** The approach that has been taken to limiting the scope of this provision is to provide a non-exhaustive

[3] And minor associated consequentials.

description of unreasonableness in subsections (2) and (3). There are significant and obvious risks in attempting to address these issues exhaustively.

24. **Generic as opposed to specific approach.** We have also taken a more generic approach than some that are to be found in the United States. Illustrative examples from Arkansas and Washington, which are not dissimilar to a number of other United States' examples, are provided in Appendix 2. There are at least two legal reasons why a highly prescriptive approach is undesirable. First, the more detailed the list, the more likely it is to be considered significant that something has been omitted, with the inference being drawn that this was a deliberate decision by the legislature. Secondly, highly prescriptive lists, by their nature, tend to focus on the examples of violence that everybody agrees are extreme, whereas it arguably may be violent acts "at the margins" that are really in issue (ones on which a jury might go either way). If most items on a statutory list are very serious, then by inference it could have the perverse effect of raising rather than lowering the unreasonableness threshold (because, for example, hitting with a belt or a stick is perceived as being in a quite different class from burning or cutting or urinating on a child).

25. **Defence confined to "common assault" offences.** Option 2 proposes that the availability of the defence should be confined to the offences of common assault and assault on a child. This is to ensure that those whom the police have seen fit to charge with the more serious offences against the person (of which there are many) cannot rely on this defence. This approach is similar to that taken in both England and Northern Ireland. It also addresses the circumstance where a significant assault, judged worthy of a criminal charge, fortuitously fails to produce injury (which would be covered by subsection (2)(b)).

26. **Injury that is more than "transitory and trifling".** Subsection (2)(b) provides that an assault of any kind is unreasonable if it produces injury that is more than "transitory and trifling". Common law authority indicates that injuries such as bruises, cuts, welts, grazes, scratches or anything greater than a temporary reddening of the skin constitute actual bodily harm rather than transitory and trifling discomfort.[4] This therefore sets quite a low threshold.[5]

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[4] *R v Donavan* [1934] 2 KB 498, 509; *R v McArthur* [1975] 1 NZLR 486, 487; *R v Waters* [1979] 1 NZLR 375, 380; *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* 2004 SCC 4.

27. **Assault using any weapon, tool or other implement.** This will have the effect of excluding the use by parents of implements that might commonly be regarded as minor, such as a wooden spoon or ruler. Although this might be considered extreme by some, in our view it is impossible to formulate a provision that would facilitate the wooden spoon and the ruler but exclude (for example) the fencepost. We note a comment on this approach made by the Tasmania Law Reform Institute – that if a parent is confined to the use of their hands, they will have a better gauge of the amount of force being exerted, which will tend to calibrate and mitigate the force.[6]

28. **Other possible approaches.** We have considered and rejected some other approaches seen overseas, such as excluding the use of force by parents under or over a certain age (e.g. under the age of 2 years and over the age of 13 years); or force that is applied to a particular location (e.g. anywhere other than the buttocks or the hand, or striking above the shoulder); or force that exceeds a maximum duration (e.g. more than a matter of minutes). It seems to us that these are not bright-line tests that can be conclusively ruled unreasonable in any circumstance. However, there is nothing to prevent them from being put into the mix of factors in each case that a jury will consider when making its assessment of reasonableness.[7]

Further advice and information

29. The Commission is available to provide further advice or support on these matters, at the Committee's request.

30. For the information of the Committee, we have been made aware of the recent publication of the following text: Susan H Bitensky *Corporal Punishment of Children: A Human Rights Violation* (Transnational Publishers, Ardsley, New York, 2006). We have obtained and briefly reviewed this book, to the extent that

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5 It is also encapsulates formulations seen in equivalent provisions or draft provisions in some Australian jurisdictions (e.g. "harm … that lasts for more than a short period" in NSW, "does not cause pain for more than a matter of minutes … does not leave a mark on the skin for more than a matter of minutes" proposed by the Tasmania Law Reform Institute).

6 Tasmania Law Reform Institute *Physical Punishment of Children* (Final Report No 4, October 2003), p 43.

7 See New South Wales, Scottish, Arkansas and Washington examples in Appendix 2, for an illustration of the approach that we recommend to factors of this kind. The only difference is that, in those jurisdictions, particular factors are explicitly listed for the consideration of the jury.

time allowed. It describes the reasons why corporal punishment of children is now considered to breach international human rights instruments. It also provides a useful overview and analysis of the domestic laws of fifteen nations that absolutely prohibit all corporal punishment of children (Sweden, Finland, Norway, Cyprus, Austria, Denmark, Germany, Iceland, Bulgaria, Croatia, Latvia, Hungary, Romania, Ukraine, and Israel), and examples of domestic laws from jurisdictions in the United States and Canada that still permit some corporal punishment of children.[8]

Sir Geoffrey Palmer
President

[8] See, in particular, Chs II, III and V.

APPENDIX 1: ADVICE ON AMENDMENT ORIGINALLY PROPOSED BY CHESTER BORROWS MP

Chester Borrows MP provided us with a copy of the following draft provision (as slightly amended by Parliamentary Counsel), that had been proposed by him:

> **4 Domestic discipline**
>
> (1) Section 59 is amended by inserting the following subsection after subsection (1):
>
> "(1A) For the purposes of this section, reasonable force is force that inflicts no more than transitory and trifling discomfort."
>
> (2) Section 59 is amended by inserting the following subsection after subsection (2):
>
> "(2A) In any proceeding, the question of whether the evidence is capable of putting the matter of justification under this section in issue is a question of law."

The amendment proposed by Mr Borrows utilised the phrase "transitory and trifling discomfort", which we have also adopted in our proposed draft option 2 (subsection (2)(b)).

Problems with "transitory and trifling" as a definition of reasonable force

Mr Borrows' proposed approach would have had the effect of shifting the focus of the provision from the nature of the disciplinary conduct to its outcome. This, in our opinion, would have been highly undesirable. It would have offered no certainty for parents or guidance to juries, and may have invited innovative disciplinary techniques, such as electric shock or submersion in water, that might well have transitory and (arguably) trifling physical effects but in other respects are akin to torture.

Furthermore, "reasonableness" in the criminal law simply imports a community standard – no more and no less. That is, it is an issue for the jury to decide what is acceptable, and what is not. If the legislature wished to provide guidance for the jury, by reference to "transitory and trifling" or any other form of words, it would not have been appropriate to offer that as a definition of reasonableness. Rather than inserting the proposed subsection (1A), it would have been preferable to remove the reference to "force that is reasonable in the circumstances" in section 59(1) and refer directly instead to "force that inflicts no more than transitory and trifling discomfort".

Questions of law and fact

Two concepts are wrapped up in a question of law. The first is identifying the legal meaning of the provision, if it contains what might be described as "terms of art", and the second is a judicial assessment of whether the evidential burden has been discharged (i.e. whether there is evidence, if not rebutted, on which a properly directed jury could reasonably convict). Both of those matters having been disposed of, the remaining assessment of the weight and effect of the evidence is a question of fact for the jury.

In our view, this is the only effect of legislative provisions that purport to delineate questions of law and fact (such as the current section 59, and section 169 of the Crimes Act 1961). Consequently, they are redundant. We consider it more damaging to include them in draft legislation piecemeal, than to leave them out entirely. They are not used consistently in the Crimes Act.

For this reason, the current section 59(2) has been omitted from both of our proposed drafts.

APPENDIX 2: OVERSEAS MODELS OF "UNREASONABLENESS" DEFINITIONS (AND SIMILAR APPROACHES PROPOSED BY OTHERS IN NEW ZEALAND)

New South Wales: section 61AA of the Crimes Act 1900

61AA Defence of lawful correction

(1) In criminal proceedings brought against a person arising out of the application of physical force to a child, it is a defence that the force was applied for the purpose of the punishment of the child, but only if:
   (a) the physical force was applied by the parent of the child or by a person acting for a parent of the child, and
   (b) the application of that physical force was reasonable having regard to the age, health, maturity or other characteristics of the child, the nature of the alleged misbehaviour or other circumstances.

(2) The application of physical force, unless that force could reasonably be considered trivial or negligible in all the circumstances, is not reasonable if the force is applied:
   (a) to any part of the head or neck of the child, or
   (b) to any other part of the body of the child in such a way as to be likely to cause harm to the child that lasts for more than a short period.

(3) Subsection (2) does not limit the circumstances in which the application of physical force is not reasonable.

(4) This section does not derogate from or affect any defence at common law (other than to modify the defence of lawful correction).

(5) Nothing in this section alters the common law concerning the management, control or restraint of a child by means of physical contact or force for purposes other than punishment.

Tasmania Law Reform Institute proposal

In 2003, the Tasmania Law Reform Institute recommended the abolition of the defence of reasonable correction in Tasmania. However, in the alternative (in the event that Parliament disagreed), it recommended that section 50 of the Criminal Code should be amended, to make it clear that it is lawful to smack a child for the purposes of punishment or correction. It proposed that "smack" should be defined in the section to mean:

the reasonable application of force with an open hand to a part of the body not including the head neck or torso of the child and:

(a) which does not cause and is not likely to cause harm or injury such as cuts, welts or bruising;
(b) which does not cause pain for more than a matter of minutes;
(c) which does not leave a mark on the skin for more than a matter of minutes;
(d) which is not applied in a manner that is cruel, degrading, humiliating or terrifying; and
(e) which is reasonable having regard to the child's physical and mental condition.

Model Criminal Code Officers' Committee of the Standing Committee of Attorneys-General

The Model Criminal Code Officers' Committee of the Standing Committee of Attorneys-General (MCCOC) is a body that has been working for some years now, to develop a generic Model Criminal Code for Australian jurisdictions. New Zealand is to some extent linked into this process, by virtue of its participation as a member of the Standing Committee of Attorneys-General. The following provision has been proposed by MCCOC in *Chapter 5: Non Fatal Offences Against the Person*:

5.1.41 Correction of children

…

(3) Conduct can amount to reasonable correction of a child only if it is reasonable in the circumstances for the purposes of the discipline, management or control of the child. The following conduct does not amount to reasonable correction of a child:
   (a) causing or threatening to cause harm to a child that lasts for more than a short period; or
   (b) causing harm to a child by use of a stick, belt or other object (other than an open hand).

Scotland: section 51 of the Criminal Justice (Scotland) Act 2003

51 Physical punishment of children

(1) Where a person claims that something done to a child was a physical punishment carried out in exercise of a parental right or of a right derived from having charge or care of the child, then in determining any question as to whether what was done was, by virtue of being in such exercise, a justifiable assault a court must have regard to the following factors—

(a) the nature of what was done, the reason for it and the circumstances in which it took place;

(b) its duration and frequency;

(c) any effect (whether physical or mental) which it has been shown to have had on the child;

(d) the child's age; and

(e) the child's personal characteristics (including, without prejudice to the generality of this paragraph, sex and state of health) at the time the thing was done.

(2) The court may also have regard to such other factors as it considers appropriate in the circumstances of the case.

(3) If what was done included or consisted of—

(a) a blow to the head;

(b) shaking; or

(c) the use of an implement,

the court must determine that it was not something which, by virtue of being in exercise of a parental right or of a right derived as is mentioned in subsection (1), was a justifiable assault; but this subsection is without prejudice to the power of the court so to determine on whatever other grounds it thinks fit.

(4) In subsection (1), "child" means a person who had not, at the time the thing was done, attained the age of sixteen years.

England and Wales: section 58 of the Children Act 2004

58 Reasonable punishment

(1) In relation to any offence specified in subsection (2), battery of a child cannot be justified on the ground that it constituted reasonable punishment.

(2) The offences referred to in subsection (1) are—

(a) an offence under section 18 or 20 of the Offences against the Person Act 1861 (c. 100) (wounding and causing grievous bodily harm);

(b) an offence under section 47 of that Act (assault occasioning actual bodily harm);

(c) an offence under section 1 of the Children and Young Persons Act 1933 (c. 12) (cruelty to persons under 16).

(3) Battery of a child causing actual bodily harm to the child cannot be justified in any civil proceedings on the ground that it constituted reasonable punishment.

(4) For the purposes of subsection (3) "actual bodily harm" has the same meaning as it has for the purposes of section 47 of the Offences against the Person Act 1861.

Northern Ireland: article 2 of the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2006

2 Physical punishment of children

(1) In relation to any offence specified in paragraph (2), battery of a child cannot be justified on the ground that it constituted reasonable punishment.

(2) The offences referred to in paragraph (1) are—

(a) an offence under section 18 of the Offences against the Person Act 1861(c. 100) (wounding, or causing grievous bodily harm, with intent);

(b) an offence under section 20 of that Act (malicious wounding or grievous bodily harm);

(c) an offence under section 43 of that Act (aggravated assault);

(d) an offence under section 47 of that Act (assault occasioning actual bodily harm and common assault); and

(e) an offence under section 20(1) of the Children and Young Persons Act (Northern Ireland) 1968 (c.34) (cruelty to persons under 16). (3) Battery of a child causing actual bodily harm to the child cannot be justified in any civil proceedings on the ground that it constituted reasonable punishment.

(4) For the purposes of paragraph (3), "actual bodily harm" has the same meaning as it has for the purposes of section 47 of the Offences against the Person Act 1861.

Arkansas Code 9–27–303(3)

(3)(A) "Abuse" means any of the following acts or omissions by a parent, guardian, custodian, foster parent, person eighteen (18) years of age or older living in the home with a child, whether related or unrelated to the child, or any person who is entrusted with the juvenile's care by a parent, guardian, custodian, or foster parent, including, but not limited to, an agent or employee of a public or private residential home, child care facility, public or private school, or any person legally responsible for the juvenile's welfare:

…

(vi) Any of the following intentional or knowing acts, with physical injury and without justifiable cause:
- (a) Throwing, kicking, burning, biting, or cutting a child;
- (b) Striking a child with a closed fist;
- (c) Shaking a child; or
- (d) Striking a child on the face; or

(vii) Any of the following intentional or knowing acts, with or without physical injury:
- (a) Striking a child six (6) years of age or younger on the face or head;
- (b) Shaking a child three (3) years of age or younger;
- (c) Interfering with a child's breathing;
- (d) Urinating or defecating on a child;
- (e) Pinching, biting, or striking a child in the genital area;
- (f) Tying a child to a fixed or heavy object or binding or tying a child's limbs together;

…

(B)(i) The list in subdivision (3)(A) of this section is illustrative of unreasonable action and is not intended to be exclusive.

…

(C) "Abuse" shall not include:

(i) Physical discipline of a child when it is reasonable and moderate and is inflicted by a parent or guardian for purposes of restraining or correcting the child; or

…

Washington Criminal Code 9A.16.100

Any use of force on a child by any other person is unlawful unless it is reasonable and moderate and is authorized in advance by the child's parent or guardian for purposes of restraining or correcting the child.

The following actions are presumed unreasonable when used to correct or restrain a child: (1) Throwing, kicking, burning, or cutting a child; (2) striking a child with a closed fist; (3) shaking a child under age three; (4) interfering with a child's breathing; (5) threatening a child with a deadly weapon; or (6) doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks. The age, size, and condition of the child and the location of the injury shall be considered when determining whether the bodily harm is reasonable or moderate. This list is illustrative of unreasonable actions and is not intended to be exclusive.

Draft proposed to the Committee by Associate Professor Jeremy Finn (University of Canterbury Faculty of Law)

4 Domestic discipline

Section 59 is amended by inserting the following subsections after subsection (1):

"(1A) Force used by way of correction is not reasonable if it—

"(a) results in the infliction of actual bodily harm; or

"(b) is applied using any implement or tool; or

"(c) involves striking the child anywhere on the body except the buttocks or the hand.

"(1B) Nothing in subsection (1A) limits the circumstances in which force used by way of correction is not reasonable."

Draft suggested by the Auckland District Law Society in "Criminal Responsibility for Domestic Discipline: The Repeal or Amendment of Crimes Act 1961 section 59" (unpublished paper)

Without departing from the generality of the phrase "no more than is reasonably justified", 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.