

# Assessing the Chester Borrow's proposal

This briefing sheet examines the Chester Borrow's proposal using a wide ranging set of criteria. It concludes the proposal is flawed because it —

- Does not fully protect the child
- Is likely to confuse parents rather than clarify the law
- Retains a number of provisions capable of subjective interpretation in court
- Sends a public message which is inconsistent with government parenting and anti-family violence messages
- Does not prohibit misuse of section 59 by some religious schools
- Is silent on the common law defence
- Is in breach of New Zealand's international obligations
- Lacks congruence with other major legislation protecting children.

This briefing sheet has been provided by the following organisations —

- Barnardos NZ
- EPOCH NZ
- National Collective of Independent Women's Refuges
- Plunket
- Save the Children NZ
- Unicef

The Chester Borrow's proposal for amendment of Section 59 of the Crimes Act will be considered when the Crimes (Substituted Section 59) Amendment Bill is considered in Committee of the Whole, probably on Wednesday, 14 March.

The proposal legalises the use of force in parental correction of children provided the force used does not 'cause or contribute materially to harm that is more than transitory and trifling'; involve any weapon, tool or other implement; and is not 'cruel, degrading, or terrifying'.

The proposal is a serious attempt to address the dual concerns of limiting the physical punishment of children while protecting loving and conscientious parents from needless prosecution or fear of prosecution. It has therefore been studied carefully by child and family organisations.

Regrettably, we conclude that it is seriously flawed.

In undertaking an assessment of the proposal we have used the following criteria —

- Legal protection from assault
- Protection of parental restraint practices
- Legal clarity
- Message to the public
- Fit with positive parenting initiatives
- Misuse of S.59 by some religious schools
- Removal of any common law defence
- Protection of the whole child
- Protection of children of all ages
- International obligations
- Legislative congruence.

Our assessment using these criteria is set out below. It is our hope that all MPs will find this briefing sheet useful as they prepare for the next stage in the passage of the Crimes (Substituted Section 59) Amendment Bill.

## Legal protection from assault

If the Borrow's proposal became law, children would still not have the same protection from assaults as adults under the law. The current statutory defence available to parents who hit their children for correction purposes would continue — although now restricted to the most minor forms of assault that do not involve the use of weapons, tools or implements.

## Protection of parental restraint practices

There are a number of parenting practices which technically are breaches of the Crimes Act — restraining toddlers while dressing them, picking up a child and carrying them away from the situation where they are being disruptive, 'time out' practices, and so on.

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Such practices remain as technical breaches of the Crimes Act under the Borrow's proposal.

### Legal clarity.

The proposal fails this test in a number of ways.

First, while 'transitory and trifling' is a legal standard which may well be understood by lawyers, police and the courts, it is a novel concept for parents, parent educators and in contemporary parenting practice.

Far from clarifying the legal situation for parents, the proposal introduces a new confusion.

Parents will know that they can hit children legally but will have to judge whether the punishment they are inflicting will cause harm greater than transitory and trifling — unrealistic in the context of parental frustration, exasperation and anger.

Second, the proposal introduces a range of new terms which are likely to be subject to legal dispute in court — is a folded newspaper, for example, a 'weapon, tool, or other implement'? Is it 'cruel, degrading, or terrifying' to smack a 15 year old?

A similar standard set by the Supreme Court of Canada in 2004 has resulted in some significant parental assaults being judged transitory and trifling, for example, —

- A mother was acquitted for having hit her six year old daughter twice on the shoulders and then striking her on the mouth with the back of her hand (**R. c. D. P.** [2004] J.Q. No.10753, Quebec City, Sept.10/04, Judge Dionne).
- A judge acquitted a mother who slapped her 13 year old daughter in the face (**R. v. D. K.**, [2004] O. J. No. 4676, Ontario, Toronto, Sept 24/04, Judge Sutherland)

- An 8 year old's father who had 'spanked' the boy leaving bruising of the lower back and buttock region (covering an area four inches by seven inches) was also acquitted (**R. v. J. D. B.**, [2004], A. J. No. 814 Alberta, Calgary, July 8/04, Judge Wilkins).

Third, the amendment does not define 'harm'. It allows physical punishment that causes harm assessed as trifling or transitory.

Yet such punishment of a sensitive or traumatised child can cause serious emotional harm. Perhaps, such action would be illegal if it could be proved that it was 'terrifying' to the child. But that introduces another subjective concept that would need to be argued in court.

### Fit with positive parenting initiatives

There is at present multi-million dollar expenditure on SKIP (Strategies for Kids, Information for Parents) and family violence messages. These messages promote non-violent positive methods of parenting.

Clearly, a law change that legalises the light hitting of children fits poorly with these government programmes.

### Misuse of S.59 by some religious schools

Some private religious schools, committed to the use of physical punishment in school, have been getting around the law by having the parents physically punish the children for the schools.

Such a practice could continue under the Borrow's proposal.

### Common law defence

The proposal is silent on the issue of any common law defence. It is

unclear how common law would apply under the proposal.

### Protecting the child's whole body

Children can still be struck on the head and neck and other sensitive parts of their body and therefore are at risk of serious injury. Angry parents are not always able to judge what force will cause injury.

### Protecting children of all ages

Under the proposal all children can be smacked — logically, even babies, teenagers, and children with disabilities in the care of their parents — as long as the assault does not cause more than trifling and transitory harm. But the impact of such assault may not be well understood and may result in serious loss of trust and incite aggression in the child.

### International obligations

New Zealand would remain in breach of international human rights obligations under the UN Convention on the Rights of the Child and the Convention against Torture.

### Legislative congruence

The proposal is not congruent with the principles and/or provisions of the Children, Young Persons and Their Families Act 1989, the Domestic Violence Act 1995, and the Care of Children Act 2004. Currently these laws do not fully protect children from parental assault because of Section 59.