

Good Motive, Bad Law

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There can be no doubt that those who promoted the recent amendment to section 59 of the Crimes Act had the best of motives for doing so. There have been far too many cases of appalling violence being used against young children in New Zealand and something had to be done. But did we do the right thing? Did the legislative amendment improve the law or make it worse? And by what yardstick can a situation of that kind be judged?

There are three reasons for concluding that the amendment was an inappropriate response to the problem. The first is that the amendment is an extremely poor piece of legal drafting in that it is calculated to create confusion rather than clarity. The second is that it criminalizes behaviour which should not be classified as a criminal offence. The third is that it fails to provide adequate protection for those whom it was designed to help.

The old version of section 59 was fairly simple. It allowed a person having parental responsibility to use reasonable force for the purpose of correction. The problem was that the boundaries were a bit vague. The new section provides that a person having parental responsibility may use force that is reasonable in the circumstances for the purpose of:

- preventing or minimising harm to the child or another person; or
- preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence; or
- preventing the child from engaging or continuing to engage in offensive or disruptive behaviour; or
- performing the normal daily tasks that are incidental to good care and parenting.

So far so good, but the section goes on to confuse the situation by saying that nothing in the initial part justifies the use of force for the purpose of correction. What this means is that, even where only the mildest force is used, the parent will have committed a criminal offence if the parent's real purpose was "correction". This translates into an absolute rule that you are never allowed to administer even a very mild smack if your purpose is to help a child to learn how to behave. Confused? So am I. And it seems obvious that a law which confuses people is not going to help much in regulating their behaviour.

It is also legitimate to ask: should the use of mild force for the purpose of behavioural correction be classified as a criminal offence? It is a serious thing to say that someone has committed a crime, irrespective of whether the person is prosecuted. Surely we should reserve that kind of condemnation for situations that really warrant the intervention of the criminal law. What kind of legal system is it that proceeds on the basis that innocuous behaviour is against the law, but it doesn't matter because the police will only prosecute in serious cases? This is the kind of muddled thinking that brings the law into disrepute and results in us saying that the law is an ass.

Some people have criticised the wording of the question posed in the forthcoming referendum on the ground that it appears to be loaded in favour of a "no" answer. I disagree. The question is a justifiable response to the problem created by the wording and legal effect of the new section. The law, as it now stands, means that the use

of mild force for the purpose of well-motivated parental correction is a criminal offence. The question posed in the referendum simply asks us to say whether that should be so.

The problem lies not in the question but in the conceptual confusion that lies at the heart of the new section and the fact that many people still don't understand what it really means. It is, of course, a shame that so much money will be spent on ascertaining our views. But is that the fault of those who have asked for the referendum or is it the fault of those who enacted such an ill-conceived provision?

The new section also fails to advance sufficiently the cause of those whom it was intended to protect. In practice, the police will prosecute the same cases as they would have done before and the results are unlikely to be much different under the new section as compared with the old one. It is said that juries were too lenient in relation to the interpretation of what was reasonable force under the old section. But the new section still refers to force that is "reasonable in the circumstances" which contains the same element of vagueness. The amendment could have been drafted in a way that achieved the intended result much more effectively than in the current version.

In short, the current section is confusing, innocuous behaviour is classified as criminal, and children at risk have been short-changed in terms of the legal protection they are entitled to receive.

Bottom line: good motive, bad law.

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