

The Child's Right to Bodily Integrity

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The right to bodily integrity is the most personal and arguably the most important of all human rights. It is the right to make decisions about what happens to one's own body, the right to say no to unwanted touching, the right not to be physically or sexually assaulted.

This fundamental right has been stated and restated many times by the courts and judicial commentators. In 1765 Blackstone wrote:

The law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having the right to meddle with it, in any the slightest manner.¹

Two hundred and twenty years later an English appeal judge restated the principle:

The fundamental principle, plain and incontestable, is that every person's body is inviolate ... any touching of another person, however slight, may amount to a "battery".²

The High Court of Australia in *Marion's* case³ recently reinforced the importance of this principle in Australian law. Brennan J made a connection between the common law principle of bodily integrity and the right to human dignity under international human rights instruments:

Human dignity is a value common to [Australia's] municipal law and to international instruments relating to human rights. The law will protect equally the dignity of the hale and the hearty and the dignity of the weak and the lame; of the frail baby and the frail aged; of the intellectually able and the intellectually disabled.

This article considers the right of children to bodily integrity and examines whether there is justification for giving children lesser protection than is accorded to adults. It reviews three recent unreported Australian cases where the courts have considered children's rights to bodily integrity.

Lesser legal protection for children

While stressing the universal nature of the right to bodily integrity and the law's refusal to draw lines between different degrees of violence, Blackstone was willing to make an exception in relation to parental punishment of children, allowing that "a parent may lawfully correct the child, being under age, in a reasonable manner: for this is for the benefit of his education". This principle of "reasonable chastisement" has become an established part of the common law and is restated in more modern form in the current edition of Halsbury:

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1 *Commentaries* (17th edn 1830) vol 3 at 120.

2 *Collins v Wilcock* [1984] 1 WLR 1172 at 1177 (CA) per Robert Goff LJ.

3 *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR, 218, 266 (*Marion's* case).

An act is not an assault if it is done in the course of lawful correction of a child by its parent or of a pupil by its teacher, provided that the correction is reasonable and moderate considering the age and health of the child and is administered with a proper instrument.⁴

The reasonable chastisement exception to the general law of assault provides a defence to any criminal charge or civil claim for assault. It applies throughout Australia either as part of the common law or local statute law.⁵ In practical terms:

- In each Australian State and Territory parents and carers have the right to smack children. They must use only reasonable force and the purpose must be to correct the child's behaviour.
- In all Australian States and Territories teachers who strap or cane children as a punishment can successfully defend civil or criminal proceedings for assault if they have used no more than reasonable force. In South Australia, Victoria, Western Australia and Queensland corporal punishment is forbidden in government schools as a matter of educational policy,⁶ but a teacher who strapped or caned a student could still rely on the common law defence to a criminal charge or civil action for assault.
- In Western Australia and Queensland employers have the power to use corporal punishment as a means of correcting apprentices.⁷ One hopes that this has fallen into disuse but the right still remains on the statute books.

There are other situations in which the right of Australian children to bodily integrity is less recognised than that of adults:

- Parents and permanent carers seemingly have the right to lock up their children for short periods as part of the normal disciplinary powers,⁸ although it is doubtful whether teachers or part-time carers (for example, baby sitters) enjoy an equivalent right.⁹
- It is sometimes asserted that teachers have the power to forcibly search students, although the extent and even the existence of such a right is debatable.¹⁰
- Parents can force minor medical treatments on their young children, even against the child's wishes, and can give consent on behalf of an unwilling child to medical or dental treatment. This power is subject to statutory restrictions in relation to older children

4 *Laws of England* (4th edn) vol 11(1) at para 488.

5 For a comprehensive review of Australian legislation, regulations and policies, see *Legal and Social Aspects of the Physical Punishment of Children: a discussion paper* (May 1995) at 3.3 commissioned by the Commonwealth Department of Human Services and Health under the auspices of the National Child Protection Council.

6 *Id* at 3.4.4, 3.4.5.

7 Western Australia Criminal Code s257; Queensland Criminal Code s280.

8 *R v Rahman* (1985) 81 Cr App Rep 349.

9 *Fitzgerald v Northcote* (1865) 4 F & F 656; *Mansell v Griffin* (1908) 1KB 160, *Ryan v Fildes* [1938] 3 All ER 517. See also *Hunter v Johnson* (1984) 13 QBD 225.

10 This was previously believed to flow from an implied delegation of powers by parents to teachers but more recently is seen as an incident of the compulsory removal of children from their parents under education laws and the assumption by schools of obligations to ensure the care and safety of children: *Ramsey v Larsen* (1964) 111 CLR 16; see also *Regina v JMG* (1986) 58 OR (2d) 705 and discussion in Boer, B and Gleeson, V (eds), *The Law of Education* [724] and Trouc, K and Sleight, D, *Australian Teacher and the Law* at 103.

and to the *Gillick*¹¹ principle that children who have sufficient intelligence and understanding can give or refuse consent.¹²

- The courts, relying on the principle that the State has an overriding interest in the welfare of children (the *parens patriae* principle) can authorise invasive medical treatment of children if it is deemed to be in the child's best interests (as in *Marion's* case where sterilisation of a 14-year-old child was ordered).¹³
- Children can in some States and Territories be compulsorily hospitalised not for health reasons but to obtain forensic evidence of abuse.¹⁴

Community attitudes towards the bodily integrity of children

In practice, people tend to make considerably more body contact with children than they would with adults. Physical closeness and overt displays of affection by parents, family members and other adults who are part of the child's community are an important part of childrearing.

Babies and small children require assistance with many essential tasks such as feeding, bathing and dressing, and this involves handling and a degree of physical intimacy. Nurturing behaviour of this type is essential to the child's physical and emotional development and is to be encouraged.

Even adults who are complete strangers to a small child often assume a right to clasp, squeeze, hug or pick up a child. It is presumed that such actions are motivated by friendliness and that children welcome such attention. Politicians believe they can win votes by being seen holding or kissing babies. Babies are also a popular subject for advertising and media messages. There seems to be a current fad for using naked babies as photographers' accessories: putting them in flowerpots, watering cans or draping them over pumpkins. Penelope Leach has written on "bodily indignities routinely imposed on older children" such as compulsory haircuts, public weighing and measuring or mass examinations for parasites.¹⁵

Special legal protections for children against physical or sexual assault

To some extent the criminal law recognises that children require even greater protection from physical and sexual assault than adults. There are special protections for children in criminal law from physical or sexual assaults: these may be separate criminal offences or offences carrying heavier penalties if the victim is a child.¹⁶

11 *Gillick's v West Norfolk and Wisbeach Area Health Authority* [1986] 1 ACII 2 (*Gillick's* case).

12 For a detailed discussion see National Children's and Youth Law Centre, *My body, my decision: children's consent to medical treatment* (1995).

13 Above n3.

14 For example, *Community Welfare Act* 1983 (NT) ss15,16; *Child Welfare Act* 1947 (WA) s29(3a).

15 *Children First: What society must do and is not doing for children today* (1994) at 233.

16 For example, *Crimes Act* 1900 (NSW) ss42,66A,66B,66C,66D,78fH,78I,78L78O,90,91.

Justifications for denying children equal rights to bodily integrity

There are several possible justifications for denying children's right to bodily integrity:

Dependency and welfare

Children are dependent upon adult help for their survival and physical, social and emotional development. Some invasion of their bodily integrity is necessary in the child's best interests as part of childrearing. To quote Brennan J again:

the baby whose dignity is respected by being carried and cared for by his or her parents grows into a man or a woman whose dignity would be affronted by such treatment.¹⁷

This argument is a "welfare" argument based on the child's need for nurturing, protection and assistance. It would be universally accepted in respect of younger children.

Adult responsibilities

Parents and other adults who have a responsibility for children should have the powers they need to carry out their responsibilities. This argument was considered in the House of Lords in the *Gillick* case.¹⁸ Lord Fraser emphasised that

the parental rights to control a child do not exist for the benefit of the parents. They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child and towards other children in the family.¹⁹

When it comes to an invasion of the child's bodily integrity parents can rely on their parental powers only to the extent that they can show this is necessary in furtherance of parental responsibilities.

Family autonomy

The State entrusts to parents and carers the difficult task of bringing up children and the State should not intervene in such a personal and sensitive area as child rearing. The view is often expressed that the State should not interfere with parents who bring up children in the manner they think best. While it is generally accepted that many of the societal rules about physical touching are relaxed within the family environment it is not questioned that the State should have the power to intervene in interfamilial relationships where one family member is subjected to physical violence or unwanted sexual touching. In the words of Brennan J in *Marion's* case:

Limits on parental authority are imposed by the operation of the general law, by statutory limitations or by the independence which children are entitled to assert ... as they mature. Within these limits, the parents' responsibilities and powers may be exercised for what they see as the welfare of the child.²⁰

Adults know best

Children need to be firmly guided and controlled and adults entrusted with their care or their education should have the necessary powers to enforce compliance with their commands.

This is in reality a statement that parents, teachers and other authority figures acquire the right to infringe the bodily integrity of children by reason of parenthood or by virtue of

17 Above n3 at 266.

18 Above n11.

19 Id at 278.

20 Above n3 at 278.

their office. It has been described by Penelope Leach as "benevolent authoritarianism".²¹ The argument views children as possessions and not, as the Convention on the Rights of the Child declares, as "equal and inalienable members of the human family".

Children are children

Children are immature and impulsive and the normal boundaries in relation to their bodily integrity need to be relaxed.

This is an argument that children are different from adults and should be treated differently. While children do differ from adults in many ways, this should not be a justification for taking away their right to make choices about their own bodies. While it is obvious that many children like to engage in adventurous, exploratory and robust physical activities and that they may need special care and protection, this should not be a licence for adults to assume that any touching will be welcomed by the child and is acceptable.

United Nations Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child was ratified by the Australian government in November 1990 and came into effect from 1 February 1991. It sets out fundamental principles of human rights that apply to children and young people under the age of 18 years. It achieves a careful balance between the rights of children and the rights of their parents. The Convention has now been ratified by more than 170 countries worldwide and signed by eight others.²² It is estimated that nearly 99 per cent of the world's children live in countries which have made a commitment to the principles of the Convention. While the child's right to bodily integrity is not a right specifically referred to in the Convention it can be derived from a reading of the Convention as a whole:

Article 18.1 recognises that parents have responsibilities for the upbringing and development of their child and adds that "[t]he best interests of the child will be their basic concern."

Article 19.1 requires governments to "take all appropriate measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of their parents, legal guardian(s) or any other person who has the care of the child". The wording of this Article places significant restrictions on family autonomy when questions arise as to the child's need for protection.

Article 28.2 deals with punishment in schools. It requires governments to "take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human rights and dignity and in conformity with the ... Convention". Article 19 probably applies to teachers as well as parents and carers, since it is settled law that teachers owe a duty of care to their students.

Article 29.1(d) speaks of the purpose of education being to prepare children for a responsible life in a free society, in a spirit of understanding, peace and tolerance.

Article 37(a) places an obligation on governments to protect children from any "cruel, inhuman or degrading treatment or punishment".

21 Above n15.

22 As at 15 March 1995. See *International Children's Rights Monitor* vol 11 no 4 and vol 12 no 1 at 55.

The UN Committee on the Rights of the Child, which receives and comments on the Reports filed by parties to the Convention, recognises Articles 19, 29 and 37 of the Convention as granting children a right to physical integrity. The Committee has made a clear statement that any form of corporal punishment is in breach of the Convention.²³

Implications of the right given to adults to smack or hit children

The question is often asked, "What harm can a parental smack do to a child?"

The occasional light smack is not likely to cause permanent damage to a child but the questions that need to be answered are "Why is it acceptable to assault a child when it is not acceptable to assault an adult?" or "Why are children the only group in society to be denied the right to their bodily autonomy and integrity?"

There are important messages to society in the legal rules which allow the reasonable chastisement of children:

- Children can expect less protection from violence than adults.
- Adults can use force if necessary to enforce their demands on children in their care.
- Children's bodies are not "off limits" to adults.
- There are differing legal and social standards as to the protection of children under child protection laws, education law and the criminal law.
- The boundaries between physical punishment and child abuse are blurred with parents and teachers receiving discrepant messages such as, "You can hit children if they are naughty and if they are very naughty you can hit them hard but you must not hit them too hard because that is child abuse."

Corporal punishment and family law and laws restraining domestic violence

Every State and Territory now has laws which allow a family member to seek legal protection from another family member.²⁴ Most of these allow children to seek protection from adults. Proposed changes to the *Family Law Act* require judges deciding disputes about children to consider any family violence involving the child or a member of the child's family.²⁵ As Sally Castell-McGregor has pointed out:

There is something deeply hypocritical about a society which on the one hand waxes eloquent about the harmful effects of domestic violence and the need to "change attitudes" while on the other it upholds a common law right to hit one section of the community only — children.²⁶

23 *Concluding Observations on Report by Canada* CRC/C/15/Add.37 (20 June 1995) at para 25; *Concluding Observations on Report by United Kingdom* CRC/C/15/Add.34 (January 1995) at 6.

24 For a summary see Seddon, N, *Domestic Violence in Australia* (2nd edn, 1993).

25 Letter from Hon Peter Duncan, 27 September 1995.

26 Comment in relation to a father charged with hitting his son with a cricket stump who was released without penalty with the magistrate remarking that the father had gone "a little over the top". Noted in (Aug/Sept 1992) 12 *Interesting: Newsletter of the Children's Bureau*.

Reasonable chastisement and child abuse

There is conflicting opinion and research evidence on whether physical punishment is child abuse or whether it leads to child abuse. This evidence is fully discussed in a recent discussion paper *Legal and Social Aspects of the Physical Punishment of Children*.²⁷ It is necessary to heed Blackstone's warning given 260 years ago that "the law cannot draw the line between different degrees of violence." Once the laws permit physical violence, decisions have to be made as to where within the continuum of violence the limits are to be fixed. If the purpose of reasonable chastisement is to correct the child's behaviour, then it must be assumed that the intention is to cause the child physical pain. But how much pain is reasonable? And if mild chastisement does not correct the child's behaviour is the infliction of greater pain justified?

The reported cases²⁸ (and the three recent Australian unreported cases analysed below) show that there are significant differences of opinion in the community and among the judiciary about when physical punishment is appropriate and how much pain is reasonable. The law is an important symbol and if the law allows parents, carers and teachers to hit and hurt children, it is sending a message to these people and to the community generally that children are not entitled to the same right to bodily integrity as adults.

Recent Australian decisions

Because each case is seen to turn on its own particular facts, many decisions relating to physical punishment of children are not reported in official law reports even when they are taken on appeal. Three unreported cases decided during the last decade give some indications of the attitude of the Australian judiciary to physical punishment of children.

Case 1: Higgs v Booth (WA) 1986²⁹

A foster mother hit a two-year-old child with her hand. She also hit a three-year-old girl causing severe bruising to her buttocks and lower back which was clearly visible three or four days later. The magistrate held that the punishment was reasonable and proper. On appeal the judge held that physical punishment was not warranted in respect of any two-year-old and that the punishment meted out to the older girl was unreasonable.

Comment

What the magistrate found to be acceptable was seen by the judge to be unwarranted and unreasonable. Many people would consider the use of an implement causing severe bruising to a three-year-old to be child abuse. Others would, no doubt, view this as normal parental discipline. One criticism of the current state of the law is the uncertainty concerning what is reasonable chastisement and the lack of any clear boundary between reasonable punishment and physical abuse. While the test of reasonableness gives the courts a wide discretion it provides little guidance for parents and teachers. Judicial officers have to make a value judgment on an issue on which there is a lack of community consensus. Their decisions will be influenced by their own personal beliefs and experiences and outcomes will often be difficult to predict. A result of this uncertainty may be that the police

27 Above n5 at 5.5.4.

28 *Id* at 3.3.

29 Western Australia Supreme Court A315/316/86, 29 August 1986

and child protection authorities will be reluctant to take action in cases which they believe the bounds of reasonable chastisement have been exceeded.

Case 2: Ruse v Thew (NSW) 1995³⁰

A male nurse at a residential centre for disabled children was charged with assaulting or ill-treating an 11-year-old developmentally disabled and autistic child who had motor skills but no speech skills. Another worker had called out after the 11-year-old was seen shoving a female child and putting her hand inside his pants. The accused worker yanked the disabled boy's ear, yanked and pulled him aggressively by the ear seven to 10 metres across the grounds of the centre. The management plan for the child stated, "Do not attempt to physically restrain," and there was evidence that, because of his disability he did not understand appropriate social behaviour. The magistrate considered that the worker's actions were inappropriate but were not sufficiently serious to amount to ill-treatment. He viewed the incident as being "trivial, insubstantial or a mere lack of nicety". He dismissed the charges as not establishing a prima facie case against the worker. The Supreme Court Judge upheld this view. On the assault charge the Supreme Court considered that there had been a technical assault but supported the magistrate's view that the worker had not gone beyond generally acceptable standards of conduct.

Comment

Both at first instance and on appeal it has been held that to drag an 11-year-old disabled child for some considerable distance by his ear is acceptable practice and does not amount to ill-treatment. The case was dismissed not because of the reasonable chastisement defence but on the grounds that the physical dragging of the child by the ear was trivial and did not go beyond generally acceptable standards of conduct. The fact that the child suffered a disability and that the nurse had a duty of care towards the child and was breaching the centre's management guidelines and plan for the child seemed to carry little weight with the court.

Case 3: Horan v Ferguson (Qld) 1994³¹

A magistrate found a male teacher guilty of nine charges of assault on seven primary schoolgirls aged between 10 and 13. The teacher admitted patting the children on the buttocks to encourage them to move in a desired direction. There was evidence of one occasion when a girl went up to the teacher's desk in the classroom, and the teacher, intending to put his arm round the student, put his hand under her skirt. He stated that this was accidental and that he had apologised to the girl and immediately taken his hand away. Several other students said that the teacher had squeezed them on their thighs or their buttocks and another claimed that he had rubbed her shoulder. Three judges in the Supreme Court allowed an appeal and directed that the teacher be acquitted on all charges. They considered that the statutory right of teachers to use force by way of correction was wide enough to permit teachers to make bodily contact with students to guide them in a particular direction. One judge was of the view that

there is every reason to accept the concept that a child attending school tacitly consents to receiving from a teacher tactile expressions of encouragement. The traditional pat on the shoulder for a significant achievement falls within this concept. To deny this concept would

30 New South Wales Supreme Court 12822/23/94 27 July 1995.

31 Queensland Supreme Court CA 85/94, 23 September 1995.

be to insist that schools become sterile, unemotional and devoid of normal expressions of friendly human interaction.

Comment

Unlike the earlier cases, the issue here was not one of physical punishment but of a pattern of physical touching (claimed to be no more than friendly gestures) which was not welcomed by the students. The judges were willing to extend the reasonable chastisement principle to include physical touching which was not intended as a punishment. In this case, as the first case, there was a difference of opinion between the magistrate (who had seen the young women and heard them give evidence) on the one hand and the three Supreme Court judges on the other as to the extent of the students' right to bodily integrity. The appeal decision suggests that it can be implied from children's attendance at school that they consent to a certain amount of physical touching:

The simple activity of going [to school] where inevitably one may be touched is sufficient to invite a degree of unavoidable physical contact, however unwelcome it may be for some people.

This comment fails to draw a distinction between accidental touching (inevitable in a crowded playground) and deliberate touching as was alleged in this case.

Conclusion

Australian law recognises a person's right to bodily integrity as a fundamental right, and there have been significant developments recently (particularly in family law and laws dealing with domestic violence) aimed at restricting and restraining the use of physical violence within families and communities. It is anomalous that we still cling to the common law notion, developed more than 300 years ago, that physical chastisement involving the deliberate infliction of pain is acceptable if the person being punished is a child and the use of force is intended to correct the child's behaviour.

While there may be differing views about the correctness of the three recent decisions considered above several points emerge. In all three cases, the children were held to have lesser rights to bodily integrity than adults would have had in equivalent circumstances. Imagine if, in the first case, it was an adult woman who had been hit with a stick so fiercely that bruises were visible three or four days later.

If the victim in the second case had been an adult male with an intellectual disability would the court have dismissed the incident on the basis that it was within acceptable standards of conduct? And if, rather than adolescent schoolgirls, seven grown women had been touched around the buttocks by an older male (as in the third case) would the incidents have been dismissed as "tactile expressions of encouragement"?

An important point that emerges from consideration of the three cases is that it is not just in the area of "reasonable chastisement" that the courts are willing to apply lesser standards for children than would apply to adults. The second and third cases were decided under general law and the "reasonable chastisement" defence seems not to have been specifically raised. In the first case, the magistrate viewed the punishment as "reasonable and moderate" but the judge found there was "inadequate justification for physical force of any kind". In the second case, the charge against the nurse was dismissed on the basis that no prima facie case had been established and so the court did not have to consider whether or not the physical assault was "reasonable chastisement". In the third case, the touching was claimed to be benevolent, not punitive, and reasonable chastisement was not an issue.

In these three cases Australian courts have had to consider a child's right to bodily integrity. Courts must, of course, apply the law. But in two of the three cases considered there was a serious division of judicial opinion as to the interpretation of the law and the acceptability or otherwise of the alleged infringement of the children's bodily integrity. In this area of the law the personal values and beliefs of the decision-maker are likely to be influential in the ultimate decision.

If Australia is serious about the protection of children it cannot continue to operate according to double standards. Penelope Leach has made the point that "public opinion and the laws draw protective circles around punishing adults rather than around punished children."³² Current laws are unfair to parents and teachers who are being given mixed messages about hitting children and to child protection workers and the courts who have the task of fixing and enforcing the limits of acceptable violence towards children. More importantly, they are unfair to children whose right to bodily integrity is compromised.

32 Above n15 at 215.