WHOSE RIGHTS?
Children, parents and discipline

BRONWYN NAYLOR and BERNADETTE SAUNDERS

This article outlines the current state of the law on the physical discipline of children and argues the case for legal change in Australia. It also identifies the politics of the ongoing debate and its potent symbolism — claims that physical parental punishment amounts to child abuse and state-sanctioned violence, pitted against claims that parental rights and the privacy of the home will be violated by state regulation of physical punishment.

Perceptions of children’s rights to be raised without physical violence, and of parents’ rights to physically correct their children, are clearly in conflict here. Many would challenge the claim of either of these positions to be ‘rights’, but the ‘interests’ of parents largely subordinate those of children in this area. The interests of children are increasingly being recognized as legitimate rights with clear international status, but the role of parents in physically disciplining their children continues to be socially endorsed in a specific criminal law defence to a charge of assault.

The criminal law of assault penalises the application of physical force to anyone without lawful excuse. The general ‘lawful excuses’ which provide a defence to a charge of assault are consent to the usual force involved in playing a contact sport, in travelling in crowded trains and such like, legal entitlement (for example, reasonable force in arrest), self-defence, and necessity (for example, pushing someone out of the way of an oncoming train).

There is no separate ‘lawful excuse’ for hitting an adult partner, or an employee, or an apprentice, although physical discipline of these categories of people was accepted in earlier centuries. There is, however, a lawful excuse where the victim of the hitting is the hitter’s child, and the hitting is for the purpose of ‘discipline’. This is the defence of ‘reasonable chastisement’ or ‘lawful correction’. The defence exists in various forms in all Australian states. For example, the Code states provide for a defence of reasonable force for ‘correction’ (s 257 Criminal Code WA) or for ‘correction, discipline, management or control’ (s 280 Criminal Code Qld).

In Victoria this defence is framed in a 1955 judgment which states:

... there are strict limits to the right of a parent to inflict reasonable and moderate corporal punishment on his or her child for the purpose of correcting the child in wrong behaviour. In the first place, the punishment must be moderate and reasonable. In the second place, it must have a proper relation to the age, physique and mentality of the child, and in the third place, it must be carried out with a reasonable means or instrument. (R v Terry [1955] VLR 114, 116)

Since this judgment there have been moves to limit, but not prohibit, parental physical punishment. Recognition since the 1960s of the widespread and hidden nature of child abuse, physical and sexual, has spurred change, but parental claims to the right to control their children...
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have overridden the claims of children to be raised without physical violence.

In 2002, NSW adopted legislation to circumscribe the parental right to chastisement. It limits the defence of 'lawful correction' to 'reasonable' force and provides that force will be unreasonable if it is applied to the head or neck of the child, or if it could harm the child 'for more than a short period' (Crimes Act 1900 (NSW) s 61AA (2) (b)). 'Short' is not defined in the legislation.

In the UK the Children Act 2004 restricts the use of the defence of 'reasonable punishment' to minor assaults (s 58). It is no longer available in relation to any more serious injuries, for example, where the punishment caused 'grazes, scratches, abrasions, minor bruising, swelling, superficial cuts or a black eye'.

Competing discourses

It would generally be accepted that children need discipline:

...to set reasonable, consistent limits while permitting choices among acceptable alternatives. Discipline teaches moral and social standards, and it should protect children from harm by teaching what is safe while guiding them to respect the rights and property of others.

The issue here is the role of physical discipline in parenting. A difficulty in examining the role of the criminal law and parental discipline is that participants in the debate are often addressing quite different issues. None argue that 'child abusers' should be protected from criminal prosecution, but they differ on the meanings of 'abuse' and 'discipline', and also more broadly on the effectiveness of physical discipline.

At least three lines of argument can be discerned. The first two disagree on the relationship between discipline and abuse. One argument is that the debate is in fact about child abuse: that physical discipline inevitably and dangerously blurs the distinction between the aim of 'correction' and less acceptable motivations for aggression, such as anger and retribution. Opposed to this is the argument that there is such a thing as loving correction of children, and that this can be distinguished from abusive violence. A third line of argument dismisses the previous debate and claims that even if the physical discipline is 'loving correction', it is morally wrong, as well as being harmful to the child, or at the very least is ineffective in achieving behavioural change.

The importance of this debate in Australia now

There are at least five reasons for challenging the traditional claim that parents have a fundamental right to physically discipline their children.

1. Children have rights. Children are now seen to have rights to be treated with respect and accorded equal protection to that accorded adults. In addition to the CRC, international and domestic charters of rights recognise rights of children, in both the general prohibition on torture and on 'cruel, inhuman or degrading' punishment (Vic-Charter s 10; Human Rights Act 2004 (ACT) s 10; International Covenant on Civil and Political Rights art 7), and the specific provision that 'Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.' (Charter s 17(2); see also HRA ACT s 11(2); ICCPR art 24(1)).

It can of course be argued that other rights may appear to conflict with the rights claimed for children, such as rights of the family, and protection of privacy and family from unlawful or arbitrary interference. It is submitted here that a carefully drawn legal response to the issue (such as that of jurisdictions discussed further below) would not contravene such rights.

2. Children are entitled to equal protection. The only situation where physical force is now allowed as discipline is for people who are young, where the perpetrator is the child's parent or carer. Similar behaviour would be a criminal offence in any other situation. The ICCPR, ACT Human Rights Act 2004 and Victorian Charter specifically provide for the equal application and protection of the law:

Every person is equal before the law and is entitled to the equal protection of the law without discrimination.

Indeed, when given the opportunity to comment, children have questioned parental physical punishment and highlighted injustice given their perception that children and adults:

...should be treated equally the same, like one shouldn't get more than the other in ways of better treatment ... (age 10)

Just because they're small and they can't fight back, [adults] shouldn't take advantage of [children] for that reason... they have rights too... (age 12),

3. Physical discipline can be harmful. Physical punishment is often reactive rather than controlled. One of the

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Physical force may be ultimately ineffective as discipline. Research in areas ranging from education to laboratory psychology to medicine suggests that physical punishment is both futile and harmful. It is unlikely to encourage the development of a strong moral sense as it does not teach children why they should behave in a socially acceptable manner, nor does it explain the impact of children's behaviours on others, and it may teach avoidance of getting caught rather than a desire to act responsibly. Frequent and harsh physical punishment may encourage rather than curb anti-social behaviour. It may teach children that violence is an acceptable means to resolve conflicts. It may never convince them with violence. The response of Swedish MP Sixten Pettersson has become the recognised wisdom on the ban: In a free democracy like our own, we use words as arguments, not blows. We talk to people and do not beat them. If we can’t convince our children with words, we shall never convince them with violence.

The Swedish reform did not criminalise corporal punishment as such. Recognising that the law of assault already applied to any substantial act of violence to a child, the legislature added a provision specifying that children were entitled to be treated with respect, and that they were not to be subjected to corporal punishment. The provision appears in the civil...
With the exception of the NSW amendments, no legal reform has ultimately occurred [since Australia’s ratification of the CRC in 1990], and governments are clearly avoiding provoking parental backlash.

Children and Parents Code and does not carry a separate sanction. The Ministry of Justice confirmed in its public information materials that the criminal law already allowed punishment, as assault, of physical chastisement that caused ‘bodily injury or pain …more than of very temporary duration’, and that the new law made no change to this. Further, it continues to be the case that ‘trivial offences will remain unpunished, either because they cannot be classified as assault, or because an action is not brought.’ The rights of children were recognized and protected, without removing any right of parents to discipline their children within accepted limits.

The emphasis of the reform was on cultural change: the changed balance of rights of parents to use force to prevent harm to the child. There were, however, claims that parents were now unable to correct or discipline their children, and that children were threatening to report parents to the police. The Director of Family First New Zealand reportedly claimed, ‘We are creating a “paranoid parenting” environment. Kiwi parents’ worst nightmare.’

A major impact of the legislation would seem to have been cultural — the changed balance of rights between children and parents. There was no rush to prosecution, as had been feared, nor evidence of a significant increase in notifications to welfare agencies. It was reported that ‘[t]he main feedback … is that people are more willing to report violence against children in public places.’

The New Zealand Police conducts ongoing reviews of the legislation. Initial findings were that there had been little impact on police activity. In the first three months after enactment of the legislation, police attended 111 child assault events. Three involved smacking and 12 involved minor acts of ‘physical discipline’, all were considered ‘inconsequential and not in the public interest to prosecute’.

The most recent six-monthly review, in December 2008, reported:

Police attended a total of 258 child assault events during the third review period. A total of 58 events involved either smacking (nine) or minor acts of physical discipline (49).
There has been a decline in the total number of child assault events attended by Police during this review period. Of the 58 child assault events involving smacking or minor acts of physical discipline, 40 were referred to either the Ministry of Social Development (Child Youth and Family) or an inter-agency Case Management meeting. 36

The police reported that they had prosecuted one of the nine child assault events involving smacking during this review period, but had withdrawn the prosecution when the primary witness refused to give evidence. They also prosecuted four of 49 assaults involving minor acts of physical discipline; three cases resulted in convictions and community supervision orders, and one was not decided at the time of reporting.37

After one year’s operation, an independent survey of 750 adults over 18 years of age found that whilst many respondents were aware of the law reform (91 per cent), fewer understood its implications (18 per cent knew ‘a lot’ about the law, 54 per cent ‘a fair amount’). Some 43 per cent of respondents supported the law, 28 per cent opposed it, and 26 per cent were neutral (3 per cent were unsure). There was a high level of support for the idea that children deserved equal protection from assault as adults (89 per cent). There was a high level of support for the idea that children deserved equal protection from assault as adults (89 per cent). Just over one third of respondents were firmly opposed to the use of physical discipline, and support for the practice appeared to be in decline. However, 58 per cent thought physical punishment of children was acceptable in some situations.38 Whilst at odds with the finding of support for equal protection, this figure was a significant reduction on the 87 per cent response to this question in 1993.

The educational goal of the reform could therefore tentatively be said to have achieved some success, in raising the profile of children’s rights, without evidence that the reform has significantly increased state intervention in appropriate parental practices.

New Zealand democracy: the referendum process

Under the Citizens Initiated Referenda Act 1993, NZ citizens can initiate a referendum if they can show the support of 10 per cent of registered voters. Such a referendum is to be held in August 2009 on the ‘anti-smacking’ legislation.

Proponents are the Kiwi Party and leader Larry Baldock. The proponents presented their petition in February 2008, but a number of the signatures were found to be invalid, and the 10 per cent hurdle was not met until June 2008, when the petition was resubmitted with 310 000 valid signatures.

The referendum question, as settled by the Clerk of the House of Representatives following the statutory consultation process, is phrased in value-laden terms: ‘Should a smack as part of good parental correction be a criminal offence in New Zealand?’ An editorial in the NZ Herald commented acerbically on the question:

‘If the wording had been ‘should parents be allowed to get away with beating their kids so badly they require...'
A major impact of the [New Zealand] legislation would seem to have been cultural — the changed balance of rights between children and parents.

The ongoing debate in Australia

Since Australia’s ratification of the CRC in 1990, debate about the need for physical discipline law reform has erupted regularly, often following reports of cases of particularly violent child abuse. Media reporting of child physical abuse and murder often draws public attention to the issue, as does reporting of cases where parents’ excessive use of physical discipline leads to protective intervention. With the exception of the NSW amendments, no legal reform has ultimately occurred, and governments are clearly avoiding provoking parental backlash.

We have seen the release of at least four discussion papers at state and federal level since 1995.40 State Commissioners for Children have called for legislative change,41 and Australia has received strong rebukes from the UN Committee on the Rights of the Child in 1996 and 2005. The Committee in its 2005 Report note[d] with concern that corporal punishment in the home is lawful throughout Australia under the label "reasonable chastisement" - and recommended appropriate action to prohibit corporal punishment at home.42

In 2007 the federal government funded a $2.5 million positive parenting education program, Every Child is Important, run by the Australian Childhood Foundation to promote positive discipline without resorting to physical punishment. Guidelines were prepared in 16 languages, over 1 million free booklets were distributed to parents, and over 10 000 parents attended parenting seminars.

In the context of this federal government campaign, South Australia’s Family First MP, Dennis Hood, introduced the Criminal Law Consolidation (Reasonable Chastisement of Children) Amendment Bill 2007 into the South Australian parliament in an attempt to codify parents’ right to smack their children. The amendment would have provided that ‘conduct that lies within limits of what would be generally accepted in the community as reasonable chastisement or correction of a child … cannot amount to an assault’. The legislation was not pursued as the government would not support it. In the same year, a Queensland Labor Government MP, Dean Wells, supported by the group ‘Concerned Psychologists’, sought, without success, to amend s 280 of that state’s Criminal Code to restrict the defence of reasonable chastisement to a charge of common assault.43

In 2008, retired Chief Justice of the Family Court, Alistair Nicholson, called on state governments to follow New Zealand’s move to abolish the defence of reasonable chastisement,44 and attracted broadly supportive media attention with discussion of positive parenting options.45 The phone-in by readers was less enthusiastic. A forum at the Australian Institute of Family Studies on corporal punishment in the same year attracted considerable media attention which again provoked polarised community views on the issue.46

In January 2009, the Medical Journal of Australia published a study of child homicides in NSW which concluded that ‘lives could be saved by measures that reduce the incidence of child abuse, including the prohibition of corporal punishment of children’.47 This was reported in the main Australian newspapers, in supportive terms.48 The ‘popular’ press in Victoria reported the MJA research and conclusion, and invited readers to vote online on the question ‘should smacking be banned’. The result? The overwhelming majority of readers who took the time to respond voted no to any ban: 93.8 per cent.49

Calls for full prohibition, particularly following legal reform in New Zealand in 2007, do not appear to have been given serious consideration in Australia despite moves towards a federal Bill of Rights and the recent enactment of rights legislation in the ACT and Victoria. Taking seriously children’s rights to protection from physical violence remains a political challenge. Governments must, however, address the issue of physical discipline as children are bearers of rights, including rights to physical and emotional integrity, and protection from harm. This is an issue that will not go away until children’s rights are fully respected.

BRONWYN NAYLOR teaches law at Monash University.

BERNADETTE SAUNDERS is a Senior Research Fellow at Child Abuse Prevention Research Australia and lectures in Social Work at Monash University.

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email: Bronwyn.Naylor@law.monash.edu.au
email: Bernadette.Saunders@law.monash.edu.au

45. ‘Call for ban on hitting children’ Medical Journal of Australia 1, 7 (2009).
47. ‘Ask an obvious question and you get a meaningless answer’, New Zealand Herald (Auckland), 5 October 2008.