DEFINING ‘REASONABLE FORCE’ IN THE MODERN SCHOOL ENVIRONMENT

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There is a perception in the wider community that there are increasing incidents of violence in the modern school environment. Baseline data on violence in Australian schools and levels of complaints against teachers relating to discipline are lacking. What is apparent, however, is that there is a real confusion among ‘frontline’ teaching staff as to their legal powers to resort to reasonable force when confronted with violence and disorder which threatens the safety of students and/or colleagues. This article argues that the state of legal confusion is a result of a tension that exists between, on one hand, the common law duty of care that teachers owe to protect students from harm, which includes a duty to intervene (and extends to using reasonable force if appropriate); and, on the other hand, a failure of school administrations in their duty of care to their teachers by informally promoting a ‘hands-off’ culture. After reviewing the modern legal environment governing the management and control of students, this article recommends reform, proposing that Australian education authorities consider implementing uniform national guidelines similar to those recently enacted in England and Wales governing the use of force to manage or control students.1

I INTRODUCTION

The modern school environment across Australia is characterised by a ‘hands off’ culture with respect to physical contact between teachers and students. This has been promoted by risk management approaches by school administrations to unlawful events (such as possible inappropriate physical and sexual contact between teachers and students) that have had the effect of discouraging, and inhibiting any use of lawful force (including minimal touching) by teachers for the safety and management of students within the school environment. This article examines both statutory and common law in regulating the use of such force by the teachers. At the outset, it should be noted this article is not advocating the use of corporal punishment in schools nor the common law right to use reasonable chastisement for the purpose of discipline by teachers. Rather, its purpose is to identify factors that inhibit the ability of teachers to safely manage and control their classrooms: a lack of policy accessibility; and a poor alignment of physical intervention policy with the legislation. In identifying these factors, it exposes the failure of school administrations in the duty of care they owe to their teachers and students to create a safe environment. This failure has led to confusion and uncertainty, which undermines the legitimate role that such force has to play, in some defined circumstances, in making schools a safer place for both students and staff.

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II INTERVENTION TO SUPPRESS SCHOOL VIOLENCE: LEGAL POWERS AND DUTIES OF CARE

Consider the following scenario: a high school teacher on playground duty is confronted with two students fist-fighting. Having exhausted de-escalation strategies, the two students continue to fight. The teacher on duty is faced with a dilemma: to intervene physically in order to prevent two students from harming each other, or to risk either possible disciplinary action for breaching a code of conduct or civil action for a negligence claim. Do teachers have the power to use force to break up a fight? Under the ordinary law, it is indisputable that a person confronted by an affray has the power to take reasonable steps (including use of reasonable force) to suppress a breach of the peace.3 Similar powers would be conferred by the law governing self-defence, which extends to the defence of others in every jurisdiction in Australia.4 It is clear that these inherent powers and general defences are not fettered by the fact that the affray occurred between minors and within a school environment. Like the sporting field, the criminal law does not stop on the perimeter of the school grounds.

Teachers have the power to intervene, but are they under a positive legal duty to intervene? In other words, is there a common law duty of care to protect students from harm? If so, what is the extent of their duty? Generally, the law is reluctant to find omissions to act as negligent: ‘there is no general duty to rescue’.5 The leading Australian authority on the question of teachers’ duty of care to act in the above scenario is Richards v Victoria.6 This decision of the Full Court of the Supreme Court of Victoria dealt with the failure of a teacher to intervene to prevent two students from fighting. The Court unanimously held that the teacher witnessing the fight was under a duty to take reasonable care, outlining the duty in the following terms:

It was essentially a matter for the jury to determine whether [the defendant teacher] even foreseeing the probability or possibility of a fight and injury major or minor as the case may be, should, in the exercise of reasonable care in all the circumstances, have taken any and what steps by way of intervention.7

The duty is not an absolute one, as one summary of the legal obligations of teachers noted:

It was a duty to take reasonable care, and not a duty to insure against any injury. It was then a matter for the jury to decide, after taking into account all the circumstances surrounding the fight, including the ages and physique of the fighting students, whether the teacher in exercising reasonable care for the safety of the students, should have intervened. The Court indicated that there was sufficient evidence for the jury to conclude that the teacher should have intervened – that is, that there was evidence to support a finding of breach of the duty of care, and a finding that this breach lead to the student’s injury.8

In the first instance, each individual teacher must exercise his or her judgment – in effect use discretion - to determine what ‘reasonable care’ demands in the particular case. From the above decision, the factors relevant to what is ‘reasonable’ in a given situation include the age and physique of the fighting students. Other relevant factors will be the relative strength, confidence, training and experience of the teacher in dealing with such cases. Reasonable care in a particular case may dictate a strategic withdrawal from the situation, summoning for assistance, including from the police. Although guidance in the above judgment is scant, for the past 40 years it has formed the basis of education department policy in various Australian jurisdictions governing the legal duty of teachers to intervene. However, more recent authority suggests that exceptions to the ‘no general duty to rescue’ can fall under special relationships such as that between teachers
and students, and through statutory powers to protect a ‘specific class’ (students) where a ‘salient features’ approach has been adopted.

III THE RISE OF A ‘HANDS-OFF’ CULTURE IN SCHOOLS

Until the late 20th century corporal punishment in schools was commonplace. Teachers, acting in loco parentis, and, later on behalf of the Crown in state systems, were authorised to use some degree of force for the purpose of ‘reasonable chastisement’. The legality of such correction, otherwise constituting an assault, was clarified in legislation in some jurisdictions. In most States and Territories, corporal punishment in State schools has been prohibited. But even in these jurisdictions, there has been a steady trend away from legitimising the use of reasonable force or restraint in the management and control of students. Young believes that the use of force as part of a teacher’s obligation to keep order is no longer the law except in cases of emergency action. The prevailing professional ‘hands off’ culture has developed to the point that, as Cumming and Mawdsley observe, ‘educators in Australia have noted for some time, the fear factor of school staff in touching students’. This fear is despite the fact that the statutory and the common law have remained largely unchanged in relation to the fundamental duty of care that teachers have to protect their students from harm and maintain order.

For many, the pendulum has now swung too far from corporal punishment towards no touching whatsoever. What is evident now in the modern school environment is a pervasive risk-averse professional culture, propagated in part by teacher unions seeking to protect members from legal or disciplinary action that advises teachers that any physical interaction with students should be avoided since it may lead to allegations of abuse. One example of this is found in the following extract from the New South Wales Teachers Federation. Under the banner ‘Protecting teachers as well as students’ it offers the following advice to teachers:

2. Avoid allegations of physical abuse
   • Try not to touch students.
   • It is unfortunate that a hug or pat aimed at encouraging or comforting a student may be misinterpreted by the student, or a staff or community member as “unwarranted or inappropriate touching”.
   • Apart from inevitable situations, such as first aid, a teacher should avoid touching children ....
   • An area of particular difficulty for teachers is how to intervene to prevent students causing physical harm to themselves, other students or to teachers. Your school should adopt a policy to be followed in these circumstances. The carrying of emergency cards or using a mobile phone to gain help while on playground duty, stating clearly and loudly in front of witnesses the action you are about to take and the use of minimal force can lessen the opportunity for your appropriate action being misconstrued.

As a result of this professional advocacy of defensive practice, teachers are now reluctant to intervene if they see students fighting, even where this poses threats to their own safety, or the safety of others. This kind of advice has led to confusion and uncertainty as to what their precise legal obligations are in such circumstances. The fear of legal action or being disciplined by school authorities produces decisional paralysis. Consequently, some students have become emboldened with the idea that they are ‘untouchable’, pushing the boundaries of acceptable behaviour and putting at risk the health and safety of themselves and others within a school environment.
A recent incident in Western Australia of an assault of a teacher by a 13-year-old female student led to a call for panic alarms to be placed in classrooms. In that case, the student allegedly threw a garbage bin at her male teacher and repeatedly punched him, while the attack was recorded on another student's mobile phone and subsequently uploaded to the internet for public consumption. This somewhat grainy footage was later played on the nightly news and showed the disturbing image of a teacher cowering against a classroom wall in the face of an unrelenting assault by a student. The passivity of the male teacher is, notwithstanding the fact, that Western Australia has expressly codified the legal powers available to teachers. Regulation 38 of the School Education Regulations 2000 (WA) states:

A member of staff of a government school may, in the performance of the person's functions, take such action, including physical contact with a student or a student's property, as is reasonable —

(a) to manage or care for a student;  
(b) to maintain or re-establish order; or  
(c) to prevent or restrain a person from —  
(i) placing at risk the safety of any person; or  
(ii) damaging any property.

Under this regulation, not only do teachers have the power to use reasonable physical contact to prevent the risk of safety of any persons, but, in addition, this extends to physical contact to manage or care for a student, or to maintain or re-establish order.

One of the problems with a prevailing 'hands-off' culture is the fact it invariably implies that teachers pose a threat to students. Sachs and Mellor caution:

[A]ny declaration of a ‘no touch’ policy presupposes a culture of complete mistrust: parents and students cannot trust school staff, school staff can no longer trust students and parents ... this is clearly not the intent of child protection legislation and policy.

Indeed, no jurisdiction in Australia, whether by statute, regulation, or government policy prohibits outright physical contact between teachers and students; yet, there is anecdotal evidence that individual schools and principals instruct their teachers not to touch students under any circumstances. Such local directives underscore the teachers’ view that it is better to adopt a ‘hands-off’ approach than risk being prosecuted criminally or sued civilly. The problem with this approach is threefold: firstly, it exacerbates a ‘hands off’ culture that inhibits teachers from properly carrying out their role; secondly, it perpetuates an environment where trust breaks down between teachers, students and parents; finally, and paradoxically, it can leave teachers and education authorities open to being sued for negligence where they were in a position to physically intervene in the circumstances, but failed to take the reasonable care required of them through the common law duty of care they owe to students. Passivity motivated by fears of being sued or disciplined, or by the ‘hands off’ professional folklore banning all physical contact provides no legal refuge for teachers.

IV ACCESSIBILITY OF POLICY

The ‘hands-off’ culture in the modern school environment, as outline above, means that the law and policy authorising the use of reasonable force in the management and control of students has limited (if any) impact on the behaviour of frontline teachers and principals. Internal departmental policy documents obtained in the course of this research ultimately recognise
that use of force by teachers is permissible (and indeed may be required by law) provided it is reasonable in the circumstances, for example, where there is a serious and imminent risk to the safety of students or school staff. A common problem nationally it seems, with the exception of Western Australia, is one of policy accessibility.23

Difficulties in accessing relevant departmental policies have made it testing to counter the culture of fear among teachers about the legal risks and potential liabilities in using force against students. A 2010 newspaper article in the Hobart Mercury reported of teachers variously being abused, punched in the face, stabbed with a pen and even strangled. The then Australian Education Union President, Leanne Wright, pointed out that teachers were reluctant to restrain students because of the lack of published guidelines. She said, ‘many teachers feared that if they laid a hand on a child they would be penalised ... it is a grey area and teachers were ill-informed and given very little information ... about what is acceptable and legal’.24

Typically, the relevant policy governing teacher use of force is spread across several documents, hampering accessibility and adding unnecessary complexity for teachers. In Queensland, for example, teachers who wish to access the policy on the use of physical restraint of students would have to review three layers of policy documentation: the Code of Conduct for the Queensland Public Service,25 which has legislative force through the Public Sector Ethics Act 1994 (Qld) and the Public Service Act 2008 (Qld) respectively; the Department of Education and Training (Qld) Student Protection policy,26 which is a policy enforced through the Code of Conduct; and the Safe, Supportive and Disciplined School Environment procedure,27 which provides guidance to the operational functions of schools.

Under ss 276-278 Education (General Provisions) Act 2006 (Qld) it is mandatory for school principals to develop and have an approved ‘behaviour plan’ (Responsible Behaviour Plan for Students)28 implemented. This plan, according to the Safe, Supportive and Disciplined School Environment procedure, must allow for the provision of the use of physical restraint29. However, a recent survey of the public websites of 40 Queensland state schools (Table 1) chosen at random indicated that a less than optimal 29 schools had a Responsible Behaviour Plan for Students that was readily available to be viewed. Of those schools, 10 did not have a procedure for physical restraint. The other 11 schools had no publicly available Responsible Behaviour Plan for Students on their websites, or were not oriented to readily access one.30

Accordingly, just over half the schools had no accessible physical restraint provision, despite it being mandated in the Safe, Supportive and Disciplined School Environment procedure.

A bureaucratic policy maze hardly addresses the concern about tackling the culture of mistrust emerging in schools as identified by Sachs and Mellor, who properly observed that ‘it is the visibility of required procedures ... that enables these policies to work towards allaying our ‘child panic’ and restoring trust in teachers and schools’.32 Indeed, policies and procedures need to be readily accessible to not only school staff, but to parents as well.

V Alignment of Physical Intervention Policy with Legislation

Again, using Queensland as an example, s 277(4) Education (General Provisions) Act (Qld) provides that ‘the [behaviour] plan must align with the department’s policies about the management of student behaviour’ (emphasis added). This has proved problematic. The following excerpt from the DET (Qld) Supportive and Disciplined School Environment procedure provides for physical restraint, and is to align with the School Behaviour Code33.
Table 1: Review of 40 Queensland schools conducted randomly over 23-24 October 2012 by accessing the public website of the listed schools and following various links to their policies and procedures.

<table>
<thead>
<tr>
<th>School Name</th>
<th>Responsible Behaviour Plan</th>
<th>Physical Restraint Provision</th>
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</thead>
<tbody>
<tr>
<td>State High School A</td>
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<td>Yes</td>
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<tr>
<td>State School A</td>
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<td>No</td>
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<tr>
<td>State High School B</td>
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<tr>
<td>State College A</td>
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<td>Yes</td>
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<tr>
<td>State School B</td>
<td>Yes</td>
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<tr>
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<td>State School D</td>
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<tr>
<td>State High School C</td>
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<tr>
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<tr>
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<td>State School R</td>
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[P]rovision for the use of Physical Restraint, involving the manual restriction of a student’s movement for reasons of safety in cases where a student is behaving in a manner that is potentially injurious to themselves or others, or to prevent serious property damage. It is used only as an immediate or emergency response or as part of student’s individual plan, including prevention of self-harming behaviours.3

In reviewing the above schools (see Table 1) there was no uniformity on the use of physical restraint found in their behaviour plans. Notwithstanding that there is a legislative requirement that the behaviour plan ‘must align with departmental policies about the management of student behaviour,’ this was found not to be the case. For instance, a significant proportion of these schools followed a physical intervention template which could not be found in any DET (Qld) policy documents. It included the following in their behaviour plans: ‘[p]hysical intervention is not to be used as a response to: property destruction’; however, the above provision on the use of physical restraint from the Supportive and Disciplined School Environment procedure clearly allows for its use ‘to prevent serious property damage’. One school (State School N) had the following in its behaviour plan on the use of physical restraint, which was the only one to align with both the policy and legislation:

Physical Intervention

The primary intention of any form of intervention is the care, welfare, safety and security of students and staff. Physical intervention may be used when all verbal and non-verbal techniques have been exhausted. Physical intervention can involve coming between students, blocking a student’s path, leading a student by the hand/arm, shepherding a student by placing a hand in the centre of their back, removing potentially dangerous objects and, in extreme situations, using more forceful restraint.

The Safe, Supportive and Disciplined School Environment procedure, when first accessed by the author in 2010 for the original conference paper this article is based on contained:

The legal basis for use of physical restraint is twofold. Firstly, it resides in the common law duty of care that teachers owe to all students to protect them from foreseeable harm. Secondly, a defence to complaints of assault in respect of physical restraint is provided in section 280 of the Criminal Code.3

Since 2010, the procedure has been amended deleting the above clarification of the dual legal basis for physical restraint. Direct reference to the legal defence under s 280 was removed, substituted with a general hyperlink to the Criminal Code (Qld) with no pinpoint citation to s 280. The procedure now reads:

use physical restraint:

• as an immediate or emergency response
• as part of student’s individual plan, including prevention of self-harming behaviours
• when other options have been considered such as allowing the student to withdraw or move away, or moving other people from the situation
• after considering welfare of student, staff and other students
• with such force as is reasonable in the circumstances [hyperlinked to Criminal Code]
• in conjunction with teaching and reinforcement of alternative appropriate behaviour.3
The omission of a precise reference to s 280 is regrettable as it is this section of the Criminal Code that expressly recognises the use of reasonable force by teachers for the ‘management or control’ of students. Interestingly, this section is cast in positive terms – ‘it is lawful’ – rather than in the negative – ‘it is a defence’. Section 280 reads:

It is lawful for a parent or a person in the place of a parent, or for a schoolteacher or master, to use, by way of correction, discipline, management or control, towards a child or pupil, under the person’s care such force as is reasonable under the circumstances (emphases added).

This formulation authorising force for student ‘management or control’ was inserted into the Criminal Code (Qld) in a 1997 amendment, which has been similarly used in the equivalent provisions in the Northern Territory and Western Australia. The purpose of this amendment to s 280 was expounded by the government of the day in the following terms:

This is an important section of the Criminal Code which has existed since ... last century. Many people today do not realise that they may, if they are in charge of a child, discipline that child using force reasonable in the circumstances. Let me state categorically that this does not—and I repeat “does not”—allow child abuse, but it does allow for parental and teacher control and discipline ... I feel strongly that discipline seems to be a quality that is fast becoming rare in our society, and I believe that our young have suffered from this and our teachers have suffered from this in the classrooms ... The section is being amended to insert the words “discipline, management or control”. I understand that the Teachers Union commented that these words help clarify the provision. (emphases added)

The need for clarity, as the Teachers Union pointed out, had stemmed from the implications of a criminal assault case in Queensland, Horan v Ferguson, where a teacher was found guilty of nine charges of common assault in 1994 upon students he taught. He subsequently appealed to the Queensland Court of Appeal. The Court of Appeal allowed the appeal, setting aside the findings of guilt, acquitting the appellant on each charge, and ordered a retrial. The central issue before the Court was whether a common assault occurs if a teacher touches a child on the buttocks or elsewhere in order to encourage the child to move in a desired direction. In determining this issue, consideration was given to s 280 of the Criminal Code (Qld) which, at that time, was expressed as ‘it is lawful for a parent or person in the place of a parent, or for a schoolteacher or master, to use, by way of correction, towards a child, pupil, or apprentice, under the person’s care such force as is reasonable under the circumstances’. (emphasis added)

Demack J with McPherson JA agreeing (Fitzgerald P gave different reasons) interpreted that sole term of ‘correction’ in s 280 at that time in broad and permissive terms:

Within a school setting, there are many circumstances in which a teacher will properly apply force to a student for the purpose of correcting that student ... Indeed, the concept of discipline within the home and at school is no longer seen as something that is dependent upon physical chastisement. Consequently, neither the heading ... nor the words of s.280 require that that section be given a restricted meaning ... The orderly movement of children within the school buildings is as much a matter where correction may be needed as is the observing of school rules about cheating. Thus the application of force to ... the body of a student to encourage movement in a desired direction is justified by s. 280, if it is reasonable in the circumstances.

The nine complaints were considered separately by Demack J, with each one being dismissed on the basis that the appellant’s actions were justified by s 280 of the Code or found not to
constitute the elements of common assault in the Code. Demack J furthered asserted that a child attending school tacitly consents to receiving from a teacher tactile expressions of encouragement. In elaborating on this statement, Demack J stated that reliance should not be placed entirely on the Criminal Code as it is part of the general law and should be read in conjunction with other relevant legislation including the education legislation. When this is done, Demack J held that ‘it is consistent with the aims of the statutory scheme for primary education to allow as justification for the appropriate, non-sexual touching of a student by a teacher, the student’s tacit consent to receiving encouragement’. 

The 1997 amendment, in effect, clarified the broad interpretation of s 280 in Horan v Ferguson, confirming that teachers in Queensland, at least, have the legal authority to use reasonable force for student management or control, other than for corporal punishment, without fear of prosecution, or, indeed, departmental discipline.

It follows that if there is any conflict between legislation and policy, legislation prevails over policy. This legal axiom is expressly signposted in some jurisdictions, for example, the New South Wales Department of Education and Communities Code of Conduct states: ‘if there is a conflict between this Code and legislation, the provision of the legislation will prevail’. It may be asked: why should there be any conflict between legislation and policy in the first place? There is a strong case for policy to be consistent with legislation, but also to act as a means of conveying the content of the substantive legislation to school staff in plain English with clear guidelines in its application in school settings.

In Queensland, by contrast with New South Wales, the primacy of legislation over policy and legislation is more hedged. The following information on the Student Protection Policy for beginning teachers on Education Queensland’s ‘The Learning Place’ website states:

Some of these responsibilities are determined by legislation (the law), and others are determined by Education Queensland Policy. If you fail to comply with Education Queensland policy, you would not necessarily be breaking the law, but non-compliance could lead to disciplinary action.

It would seem from this guideline to beginning teachers that a teacher may well be acting within the law in Queensland, yet still be open to disciplinary action if he or she fails to comply with Education Queensland policy. It needs to be clarified here that a problem will only arise where there is a conflict between policy and legislation. For example, both the common law and statute law are silent on the question of a teacher being a Facebook friend with a student; therefore, departmental policies banning teachers from being Facebook friends with students do not conflict with any legislation to the contrary. On the other hand, where there is a statute, such as s 280, that allows for the use of reasonable force for the management and control of students, then this would prevail over any policy to the contrary.

It should be emphasised at this point that no disciplinary action could lawfully be taken against a teacher in a Queensland state school who uses reasonable force for the ‘management and control’ of a student pursuant to s 280 of the Criminal Code, which is in compliance with ‘the laws of the State’ according to the Code of Conduct. However, this would depend on each school’s own policies on what entails ‘management and control’. Notwithstanding individual school policies, a teacher may act against a particular school’s ‘no touching’ policy in order to protect a student or others where there is risk of harm, and reasonable force is used to prevent that harm. This is a clear justification for breaching such a policy. One needs to look at all the circumstances before jumping to the conclusion that a teacher has simply breached a ‘no touching’
policy.\textsuperscript{51} No touching policies are rightly put in place for the welfare and safety of students to prevent gratuitous or inappropriate touching.\textsuperscript{52} Therefore, it is essential to draw a distinction between cases that are unacceptable such as unwarranted touching and any use of unreasonable force, and cases where the use of reasonable force by teachers is in compliance with a common law duty of care, or a statutory power that allows such force in circumstances that warrant its use. In Western Australia, for example, no disciplinary action would be taken if a teacher under the state system used force pursuant to regulation 38 of the \textit{School Education Regulations 2000}.\textsuperscript{53}

Indeed, Western Australia is the only state so far which has aligned its policies with legislation by giving clear guidance on the use of physical contact and restraint.\textsuperscript{54} In Queensland, there is an makeshift approach where schools are responsible for formulating their own physical restraint policies. Even so, a clear legislative basis supporting intervention as in Western Australia and to a lesser extent in Queensland still renders many teachers seemingly powerless in the face of disorderly student conduct and violence. The key propositions here are the necessity to align policy with legislation, and to formulate such policies that will accommodate, communicate, and facilitate the substantive legislation so teachers can utilise it confidently, skilfully, and professionally without fear. It would appear that in Australia, the prevailing “hands-off” culture has become so entrenched that education systems need to counter this. We now turn to the United Kingdom which has attempted to do just that.

\textbf{VI Policy Learning and Policy Transfer: The UK Experience}

The lack of accessibility of department guidelines and procedures is not the only problem with use of force policies in this field. In common with Australian criminal law, there is a significant lack of uniformity in approach to use of force policies across Australian jurisdictions. Notwithstanding the imminent introduction of a National Curriculum, the Commonwealth Parliament has no power under the Constitution to pass laws on the management and control of school students. Unless the States referred its powers to the Commonwealth to implement a national law on the topic, or, indeed, a referendum led to a change of the Constitution, it is likely that the current system of fractured regulation governing the management and control of students in schools across the nation will continue. At best, as with the Model Criminal Code project, mechanisms of intergovernmental cooperation in Australia (such as the Standing Council on Law and Justice (SCLJ), which replaced Standing Committee of Attorneys General in 2011), can be harnessed to devise model laws in the field, that could lead to reasonable approximation, if not perfect uniformity, between Australian jurisdictions.

In undertaking national law reform, it would be useful to examine the approach in the United Kingdom. In 2005, the then Secretary of State for Children, Schools and Families, The Hon Ed Balls MP, commissioned Sir Alan Steer to report on pupil behavioural issues.\textsuperscript{55} The final Steer Report was released in 2009 where the Secretary of State said in response, ‘I agree with Sir Alan Steer that it is unacceptable for a pupil to disrupt the learning and teaching of an entire class. Pupils need to know that when certain boundaries are crossed they will have to bear the consequences’.\textsuperscript{56} As a result of this report, legislation was passed in 2006, applying to all schools in England and Wales. The \textit{Education and Inspections Act 2006 (UK)} contains explicit provision authorising the use of force by teachers. Section 93 \textit{inter alia} provides:

\begin{enumerate}
\item A person to whom this section applies\textsuperscript{57} may use such force as is reasonable in the circumstances for the purpose of preventing a pupil from doing (or continuing to do) any of the following, namely –
\end{enumerate}
(a) committing any offence,
(b) causing personal injury to, or damage to the property of, any person (including
the pupil himself), or
(c) prejudicing the maintenance of good order and discipline at the school or
among any pupils receiving education at the school, whether during a teaching
session or otherwise.

The provision is reasonably clear, supported by comprehensive policy and guidelines for
school staff issued by the Department for Education that are aligned with the legislation. These include guidelines on what is reasonable force; who can use reasonable force; and when reasonable force can be used. Reasonable force is defined in the guidelines as follows:

- The term ‘reasonable force’ covers the broad range of actions used by most teachers
  at some point in their career that involve a degree of physical contact with pupils.
- Force is usually used either to control or restrain. This can range from guiding a
  pupil to safety by the arm through to more extreme circumstances such as breaking
  up a fight or where a student needs to be restrained to prevent violence or injury.
- ‘Reasonable in the circumstances’ means using no more force than is needed.
- As mentioned above, schools generally use force to control pupils and to restrain
  them. Control means either passive physical contact, such as standing between
  pupils or blocking a pupil’s path, or active physical contact such as leading a pupil
  by the arm out of a classroom.
- Restraint means to hold back physically or to bring a pupil under control. It is
  typically used in more extreme circumstances, for example when two pupils are
  fighting and refuse to separate without physical intervention.
- School staff should always try to avoid acting in a way that might cause injury, but
  in extreme cases it may not always be possible to avoid injuring the pupil.

These guidelines should leave teachers in no doubt as to what their legal responsibilities
are, when to apply them, how to apply them, and allay any fear of discipline or civil liability.
However, a recent case reported in the UK press indicates that there is still a way to go to
change the ‘hands-off’ culture even where clear legislation and guidelines are in place. The report
stated a teacher was dismissed for restraining a student after the student had thrown a milkshake
over his head. The teacher claimed self-defence fearing the student was going to throw a chair
at him, and that the school administration ignored government guidelines, which he said, ‘start
from the premise that a teacher should be supported in these circumstances’. The report further
stated that an employment tribunal turned down his appeal for unfair dismissal. Indeed, this
case would demonstrate that good policy needs not only good training for teaching staff in its
implementation, but for administrative bodies as well.

VII Conclusion

The 2006 legislation in the UK was introduced with much fanfare with the then Secretary
of State, The Hon Ed Balls MP, trumpeting: ‘[M]yths that schools should have ‘no-contact
policies’, that teachers shouldn’t be able to protect and defend themselves and others, will be
dispelled by this new guidance, which makes it clear that in some situations, teachers have the
powers and protection to use force’. By contrast, the law and policy governing use of force
by teachers in Australia is characterised by the failure of school administrations in their duty
of care to their teachers through lack of accessibility and poor alignment with the legislative position. The UK model may be viewed as a best practice standard, which should be placed on the national policy agenda at the Council of Australian Governments (COAG). The UK has taken the lead in reclaiming school authority and, above all, putting the education of all children first. Australian jurisdictions urgently need to examine the UK reform as one strategy for restoring the lost authority and confidence in the management or control of students within the modern school environment. Otherwise, as Sachs and Mellor warn: ‘perpetuating a culture of fear and mistrust in our schools can only be damaging for children, schools and education’.63

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Keywords: reasonable force; student behaviour; classroom management; duty of care; physical restraint; education policy.

ENDNOTES

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1 All of the opinions (and errors) expressed in this article are my own, and should not be attributed to DET or the Queensland government.
4 Ibid 338.
6 [1969] VR 136 (Winneke CJ delivered the judgment of the Full Court).
7 Ibid [149].
9 In Stuart [127], Crennan, Kiefel JJ noted: ‘The common law does recognise that some special relationships may require affirmative action to be taken by one party and are therefore to be excepted from the general rule [no duty to rescue]. Examples of such relationships are employer and employee, teacher and pupil, carrier and passenger, shipmaster and crew’ (footnote omitted; emphasis added) cf n 5.
11 Cleary v Booth [1893] 1 QB 465; Mansell v Griffin [1908] 1 KB 160.
12 Ramsay, above n 2.
For example, s 11 of the *Criminal Code* (NT) states: ‘A person who may justifiably apply force to a child for the purposes of discipline, management or control may delegate that power either expressly or by implication to another person who has the custody or control of the child ... where that other person is a school teacher of the child, it shall be presumed that the power has been delegated unless it is expressly withheld’. Section 280 of the *Criminal Code* (Qld) is cast in similar terms, yet with no delegation or withdrawal provision.

In the majority of states, corporal punishment in schools has been explicitly banned: *Education Act* (ACT), s 7(4); *Education Act 1990* (NSW), s 35(2A); *Education Act 1994* (Tas), *Education and Training Reform Act 2006* (Vic), 4.3.1(6)(a); s 82A; *School Education Regulations 2000* (WA), reg 40(2).


See *Smith v Mater Dei School* [2007] NSWSC 820 [31] where Young CJ held that *Murdock v Richards* [1954] 1 DLR 766 was still good law. *Murdock* involved a case of a teacher pulling a resisting female pupil by her arm out of the classroom. Young CJ [31] cautioned that it should not be assumed at law ‘that dragging a disobedient child from a classroom must be an assault’.


This WA regulation replaced the previous reg 39 in 2007, and added: ‘to manage or care for a student’; and ‘to maintain or re-establish order’.


This was gleaned from both my experience as a classroom teacher and investigator with the Ethical Standards Unit (ESU) of the Department of Education and Training (DET) in Queensland.

This WA regulation replaced the previous reg 39 in 2007, and added: ‘to manage or care for a student’; and ‘to maintain or re-establish order’.


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Sachs and Mellor, above n 21, 138.


DET (Qld), above n 27.

36 DET (Qld), above n 27.

37 Cf s 61AA Crimes Act 1900 (NSW).

38 The Code was amended by Criminal Law Amendment Act 1997 (Qld), Act of No 3, s 43.

39 Section 27(p), Criminal Code Act 1983 (NT) provides a legal justification for the use of force “… in the case of a parent or guardian of a child, or a person in the place of such parent or guardian, to discipline, manage or control such child”; see also s 257, Criminal Code (WA) and reg 38, School Education Regulations 2000 (WA).

40 Queensland, Parliamentary Debates, Legislative Assembly 18 Mar 1997, 528 (Naomi Wilson, Parliamentary Secretary to the Minister for Families, Youth and Community Care). Notwithstanding that this amendment pertains to a statutory defence, the Secretary is implying it carries a positive duty that allows teachers to use reasonable force to manage and control students. (Cf Western Australian legislation, above n 20).

41 [1995] 2 Qd R 490. For further discussion of this case and its implications, see generally Andrew West ‘What is unlawful assault?’ (1995) 16 The Queensland Lawyer 13; and D Butler and B Mathews, School and the Law (Federation Press, 2007), 67–69.


43 Ibid.

44 See Peter John Ayling v Director-General Department of Education and Training [2009] WAIRComm 413 [157] (Senior Commissioner J H Smith: ‘the terms of [a] policy cannot confine the scope of [a regulation]’).


46 This guideline was accessed by the author via the online Student Protection Training module on Education Queensland’s ‘The Learning Place’ website that beginning teachers complete by user ID and password login.

47 I am grateful to a referee for proving this example.

48 Code of Conduct (Qld) Cl 3.1(c), above n 25.

49 This is part of the implementation of a school’s behaviour plan under ss 276–278 of the Education (General Provisions) Act 2006 (Qld) (See also above nn 27–29).

50 This was the case in my time as an investigator with the Ethical Standards Unit with DET (Qld) that such matters were unsubstantiated if the use of any restraint or force by a teacher could be lawfully justified under s 280.

51 I am grateful to a referee for asking for clarification of the previous points raised in this paragraph.

52 See Doug Stewart, ‘Case Note: A school’s right to dismiss staff for non-abusive touching of students: Romolo Luigi Puccio v Catholic Education Office and Catholic Church Endowment Society (Incorporated): Industrial Relations Court of Australia – 1098/1996’ (2002) 7(2) Australia & New Zealand Journal of Law and Education, 179–183. This case involved a teacher working in the Catholic school system whose gratuitous and ‘inappropriate’ touching of students was against school policy.

53 In The State School Teachers’ Union of W.A.(Incorporated) v Director General, Department of Education and Training [2007] WAIRComm 521 a teacher was departmentally charged with using ‘physical action against ... a student in circumstances not authorised by regulation 39’ The corollary of this is that physical action authorised by this regulation would not be subject to disciplinary action (See n 20).


‘Classroom powers “not being used’” BBC (online), 13 April 2009 <http://news.bbc.co.uk/2/hi/uk_news/education/7996146.stm> (Cf n 60).

Section 93(2) of the Education and Inspections Act 2006 (UK) states such person includes “a member of the staff of any school at which education is provided for the pupil.”

Department for Education (UK), Use of reasonable force - advice for head teachers, staff and governing bodies (2012). These guidelines are prefaced with the following: “This is non-statutory advice from the Department for Education. It is intended to provide clarification on the use of force to help school staff feel more confident about using this power when they feel it is necessary and to make clear the responsibilities of head teachers and governing bodies in respect of this power.” <http://www.education.gov.uk/schools/pupilsupport/behaviour/behaviourpolicies/f0077153/use-of-reasonable-force-advice-for-school-leaders-staff-and-governing>.

Ibid.

Ibid.


Graeme Paton, ‘Teachers ’should use force to control violent pupils’ The Telegraph (online), 5 April 2010 <http://www.telegraph.co.uk/education/educationnews/7556297/Teachers-should-use-force-to-control-violent-pupils.html> (Cf n 60).

Sachs and Mellor, above n 21, 137.