

Where rights, medicine and law collide

LESLIE CANNOLD

June 7, 2009

LAST YEAR an Australian woman undertook a medical procedure. This week she and her boyfriend will face court because of it, charged with a crime. If found guilty, the 19-year-old and her 21-year-old boyfriend could get 10 years' jail.

The names of the couple don't matter. They could be any one of us. The prosecution is taking place in Australia for the crime of abortion.

That in 2009 an Australian citizen can be found guilty of undertaking a medical procedure and face jail is a scandal. A scandal that neither politicians in Queensland (where this week's prosecution will take place) or in NSW (where a doctor was convicted of the crime of unlawful abortion in 2006) intend to do anything about. Not unless they are forced to take action by a resolute medical profession and ordinary folk like you and me.

Abortion is in the Crimes Act in both NSW and Queensland. The statutes are roughly similar, making it a crime for a woman to seek an abortion and for anyone else to help her procure one.

This is not the case elsewhere. In 2002 the ACT removed abortion from the Crimes Act and last year Victoria did the same. Politicians in NSW and Queensland have been ignoring advice that they clarify, modernise and liberalise abortion law for years. This includes recommendations made in a report by the Standing Committee of Attorneys-General and in a Queensland report on women and the criminal code.

Some doctors have had enough. Respected Cairns gynaecologist Dr Caroline de Costa and her colleagues are now refusing to provide safe medical abortions to women for fear they, or their patients, will wind up in jail. If other providers in Queensland, and across the border in NSW, are smart, they will follow suit. Because, as this week's court case proves, whispered assurances by craven politicians that doctors have nothing to fear from antiquated, conservative and unclear laws are mistaken.

For their own peace of mind and the long-term best interest of their patients, health-care workers must insist that politicians reform the law.

Determined and resolute doctors can compel reluctant politicians to act. They have done it before. In 1998 in Western Australia abortion was in the criminal code and two doctors were charged. Political leaders insisted - in the face of obvious evidence to the contrary - that the law didn't need reform. But when providers at Perth's main hospital downed tools, refusing to provide terminations in all but emergency situations, and two women wound up in casualty from botched attempts to self-abort less than 48 hours later, the government was forced to act.

Doctors can't be expected to agitate on their own. Striking doctors in Western Australia had a multitude standing behind them. Supporters included courageous Labor, Liberal and minor party politicians, the AMA, family planning and legal advocacy organisations, progressive

Christian groups, a well-organised and dedicated group of grassroots activists and the people of Western Australia, 82 per cent of whom told pollsters they thought abortion should be legal.

Such coalitions are only starting to form in NSW and Queensland. Only time will tell if they will be successful.

If not, the other chance for law reform will be if the NSW Government looks to history and makes a magnanimous gesture. If the Premier referred the issue to the NSW Law Reform Commission, then acted on its recommendations before the next election, women choosing abortion in NSW might finally lose the "criminal" tag.

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Source: <http://www.smh.com.au/opinion/where-rights-medicine-and-law-collide-20090607-bzc7.html>

Key issues of concern:

- People who are having abortions are being prosecuted as in NSW it is a crime and can face jail.
- The laws are not uniform around the country, some states have decriminalised it , others have not.
- Issues have not been raised with the NSW LRC
- Doctors fear that they will end up in jail for performing a medical procedure

Suggested Changes:

- Decriminalisation of abortion around the country (standardise the laws)
- Refer the issue to the NSW Law Reform Commission

Review into male circumcision legality

PAUL CARTER

August 20, 2009

Laws protect girls from genital surgery but parents wanting to circumcise boys can "go around willy-nilly chopping up bits of their sons", a state children's commissioner says.

Tasmania's commissioner for children Paul Mason and the Tasmanian Law Reform Institute have embarked on what they say is the largest review into the legalities of male circumcision in Australia's history.

Mr Mason said a critical issue for any non-therapeutic circumcision is whether parental consent is sufficient to protect a surgeon from legal action if the child's genital autonomy is thought to have been infringed.

"The only thing that protects a doctor from an action for assault or a civil prosecution is the valid consent of the patient," he said.

"The law is getting pretty hazy about whether a parent can give a valid consent for a child's non-medical procedure."

Mr Mason said about 90 per cent of Australian male babies were circumcised in the 1970s, dropping to about two per cent these days.

Its infrequency nowadays only heightens the chance of a circumcised boy feeling aggrieved as an adult that his rights were ignored as a child, he said.

But High Court rulings and United Nations conventions on the rights of parents and children and legal consent in terms of bodily integrity argue against parental-consent circumcision, he said.

"To me they suggest parents are not entitled to cut or wound their children unless it is for a medical purpose," he said.

Mr Mason said another grey legal area was that many jurisdictions outlaw female genital alteration, not just the most severe form, because it infringed on girls' rights.

"But we have a situation where girls have legal protection from any surgery on their genitals but parents can go around willy-nilly chopping up bits of their boys.

"That is a discrimination any way you look at it," he said.

University of Tasmania circumcision-law researcher Warwick Marshall is working closely with Mr Mason and the Tasmanian Law Reform Institute review.

Mr Marshall says criminal and civil laws fail to provide adequate certainty for parents and doctors.

"The crux of the uncertainty is whether the consent of the parent of the child being circumcised provides the circumciser with protection from criminal and civil actions which may be brought against them for performing a circumcision," Mr Marshall said.

Public submissions to law reform review close on August 28.

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Source: <http://news.smh.com.au/breaking-news-national/review-into-male-circumcision-legality-20090820-er35.html>

Key issues of concern:

- Reviewing if male circumcision is legal (Tasmanian Law Reform Institute)
- Is parental consent enough to protect doctors from criminal prosecution?
- An adult may feel as if their rights were ignored as a child
- UN and High court suggest that parental consent is not enough for non-medical procedures
- Conflict between female and male circumcision laws
- Criminal and civil laws fail to provide adequate certainty for parents and doctors

Suggested Changes:

- Review changes to the laws through normal agencies of reform
- Consider public submissions (social values)

Experts give smacking the wooden spoon

- Stephen Lunn, Social affairs writer
- From: *The Australian*
- October 24, 2009 12:00AM

"I GIVE her three warnings and then it is spoon time." Melbourne mother Claire Davidson's unapologetic use of a wooden spoon to discipline her nine-year-old daughter, and her shock at being warned by police her actions may be grounds for an assault charge, has sparked a new debate about the acceptability of corporal punishment for children and alleged nanny-state interference in the family living room.

Davidson says she and daughter Anna were interviewed by police last week after a school support worker notified authorities when Anna described being smacked during a class discussion session about bullying.

"We only use the wooden spoon and this is only when she is being naughty, and we give her a fair chance to rectify the situation and we talk her through it," Davidson says. "I give her three warnings and then it is spoon time."

Davidson wasn't charged, but her case set the hares running. Overwhelmingly public opinion fell on her side, the prevailing view in the letters pages, blogs and on talkback radio being that it remains within the bounds of acceptable parent behaviour to use some level of physical force to punish their child without being considered a criminal.

But how much? Is a smack OK but a whack child abuse? What about using something more than a hand?

What is the law surrounding the criminal culpability of parents for hitting their children, and is it too harsh or too lenient? Beyond the law, is there any long-term effect on children subjected to corporal punishment?

If the impact on children is the overriding consideration in the smacking debate, this last question should be considered first.

Australian Family Association spokesman John Morrissey says his organisation "defends the right of a reasonable parent to smack their child as part of a range of strategies to discipline them".

"The fact that parents and teachers no longer smack children as much as in previous generations hasn't created a more peaceful society," Morrissey says. "(It) hasn't resulted in more pacified children or a gentler society. Look at Saturday nights in any capital city and the violence that young people are perpetrating."

But new US research concludes corporal punishment does have a long-term negative effect on children's brain development. A study by University of New Hampshire researcher Murray Straus, published in the *Journal of Aggression, Maltreatment & Trauma* in July, finds a link between children being hit and their later cognitive ability.

Using tracking data from 800 children aged between two and four, and 700 children aged five to nine, including their cognitive ability and the number of times they were hit, and then testing them four years later, it finds IQs were significantly lower for those who experienced corporal punishment.

Children in the younger group who were subjected to corporal punishment averaged five points lower on an IQ test than others the same age. With the five to nine-year-old group, it was 2.8 points lower, even taking account of parental education, income and other socioeconomic factors.

Straus finds the more frequent the spanking, the bigger the IQ gap, though even small amounts of smacking made a difference. He says children are stressed and frightened by hitting, which may make it harder for them to focus and learn.

Dorothy Scott, director of the Australian Centre for Child Protection, says the method authorities use to determine whether a parent has stepped over the line into criminality in their physical treatment of a child puts children at risk. "Breaking the skin or actual bruising is often the measure, but this is too crude a way to work out the damage to a child. Ultimately the impact on a child psychologically should be an important consideration too," Scott says.

Judy Cashmore, a developmental psychologist who specialises in children's issues at Sydney Law School, says another negative effect on children subjected to corporal punishment is that they often carry a level of emotional damage into their behaviour as older children or adults.

"The research is consistent in showing that hitting children is not an effective means of teaching children right from wrong. It does get an instant reaction, so perhaps it can in some circumstances be useful if a child is in danger and if it's an instinctive thing," Cashmore says.

"But it's not an effective way of dealing with children in the long term. Indeed it's quite harmful, particularly when paired with ongoing denigration. For children who grow up in an environment where this is the norm, there are indications it is the precursor for later domestic violence, either as the victim or as the perpetrator," she says.

Given the potential for damage to the child, particularly if the hitting is persistent (most, though not all, psychologists and experts in the field consider the odd slight smack on the bottom won't have a lasting effect), the question becomes whether the present law adequately protects them. Under Australian law, parents of children can face criminal charges for assaulting their children, though there is a defence of "reasonable chastisement" or "lawful correction".

Bernadette Saunders, a senior research fellow at Child Abuse Prevention Australia, part of Monash University, says the fact children are the only group in society who can legally be assaulted is unacceptable. "Given their particular vulnerability, they deserve special protection from the law, not less," Saunders says.

Cashmore agrees, pointing out that in the past Australia had so-called lawful excuses available for people hitting wives and employees, defences that seem ludicrous by today's standards. She says the law should be changed to remove these defences in relation to hitting children, just as has happened in the Scandinavian countries.

"The aim is not to criminalise parents for the occasional smack. It's more an educational message that there are more effective and less harmful ways to discipline children," she says.

Saunders says: "Most people don't think twice about wearing seatbelts or bicycle helmets these days, but there was resistance before those laws were introduced. Law reform in relation to physical punishment of children is not meant to criminalise parents unless they assault their children; and this is the case now.

"Many parents hit children because they were physically punished as children, and also just because they can. They don't have to think about better alternatives."

There has been some movement on the legal front. Queensland and South Australia have attempted to introduce legislation that puts limits on the right of parents to hit children. In 2002, NSW moved to limit the parameters of its lawful correction defence, saying any force to the head or neck, or any force that hurt a child for "more than a short period", was beyond reasonable.

But what is considered reasonable discipline by a parent can vary widely depending on the views of the jurists involved. While some judges argue corporal punishment of children is barbaric generally and no longer acceptable at all against very young children, another recent case in Western Australia saw a "no conviction recorded" for a father who beat his child with a garden hose for 40 minutes.

"This variation in what's considered reasonable often reflects people's own experiences as children. It's where that 'I was hit as a child and it didn't seem to do me any harm' attitude tends to surface," Cashmore says.

But Scott argues there is a clear need for judicial discretion in these decisions. "A one-off lapse in impulse control is different from a sustained course of cruelty and scapegoating of a child. A judiciary needs to assess things like that," she says.

Scott also believes Australians are not yet ready for legal changes that reach further into their living rooms. And she worries any change could clog up an already overcrowded court system, leaving children in jeopardy from damaging abuse further from legal protection.

"I think it's premature. Community attitudes and norms have definitely moved in the direction of less physical discipline of children over recent generations and we want to maintain that momentum," Scott says. "The law can be a powerful symbolic stimulus to continue this evolution, but it can have unintended consequences if it moves too far ahead of community norms and if it draws a large number of families into an already overloaded statutory child protection system."

Source: <http://www.theaustralian.com.au/news/opinion/experts-give-smacking-the-wooden-spoon/story-e6frg6zo-1225790591971>

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Key issues of concern:

- Smacking children as a punishment may be considered as corporal punishment and chargeable as assault.
- Social standards unclear. No demarcation between child abuse and acceptable parenting behaviour.
- Impacts of corporal punishment on children unknown with some studies showing detrimental effects on intelligence and brain development
- Australian parents can be charged with assault if the punishment is severe enough although there are defences of "reasonable chastisement" and "lawful correction"
- Social differences in what is "reasonable" when punishing children.
- Changes to laws could congest the courts as Australia is not ready for such reforms.

Suggested Changes:

- Children should be protected under the law from such punishments as they are particularly vulnerable
- Law should be changed in regards to hitting children (as it was in regards to hitting wives and employees)
- Do not criminalise parents, instead educate them in other methods of discipline.

Finding the right balance after 9/11

- COMMENT: Patrick Walters
- From: *The Australian*
- August 13, 2009 12:00AM

ROBERT McClelland has produced a necessary and broad-ranging set of amendments to Australia's counter-terrorism legislation.

Almost eight years after September 11, 2001 and seven years after the Bali bombings, the Rudd government has produced a mix of reforms that endeavour to balance genuine civil liberties concerns with the hard-won experience of our law enforcement and intelligence agencies.

The 440-page discussion paper released by the Attorney-General yesterday embodies the government's response to four key parliamentary, judicial and legal reviews undertaken in recent years, including John Clarke QC's review of the case of Mohamed Haneef, and the Australian Law Reform Commission's review of sedition laws.

As Mr McClelland explained yesterday, it is time to put counter-terrorism laws on a long-term footing with new review mechanisms, including a national security legislation monitor and a new, long-overdue parliamentary oversight of the Australian Federal Police.

The discussion paper proposes a number of key changes that would bolster anti-terror laws, including an expansion of the definition of a terrorist act to include psychological as well as physical harm.

Police will also be given new emergency powers to enter and search premises without a warrant where it is suspected that there is material relevant to a terrorism offence.

Significantly, the government proposes establishing a maximum nine-day limit on the amount of time a terrorism suspect can be held without being charged. Dr Haneef was held for 13 days.

The Howard government moved rapidly to introduce a barrage of new counter-terrorism laws in the wake of the October 2002 Bali bombings.

Now, as Mr McClelland points out, it is time to accept that soundly based counter-terrorism laws are here to stay.

But they must be underpinned by safeguards and sound review mechanisms such as the national security legislation monitor, which will review terror laws on an annual basis.

Source: http://www.theaustralian.com.au/news/finding-the-right-balance-after-911/story-e6frg8yx-1225760808675?from=public_rss

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ROBERT McClelland has produced a necessary and broad-ranging set of amendments to Australia's counter-terrorism legislation.

Key issues of concern:

- Amendments to the counter-terrorism laws may conflict with civil liberties
- Counter terrorism laws must be accompanied with safeguards and review mechanisms (law reform, effectiveness) to review laws on an annual basis

Suggested Changes:

- Place anti terrorism laws, security legislation monitor and parliamentary oversight of the AFP under new review mechanisms.
- Expand the definition of a terrorist act to not only physical but mental harm.
- Police given new emergency powers to enter and search premises without a warrant if they suspect there is terrorism related material.
- Nine day limit that a terror suspect can be held without charge

NSW unveils new ID theft laws

- Karen Dearne
- From: *Australian IT*
- November 11, 2009 2:00PM

THE NSW government plans to create three new identity offences - trafficking in identity data, possession with intent to commit a crime, and possession of equipment for the purpose of identity theft - in an overhaul of the state's Crimes Act.

The new laws will apply to offences committed offline and online.

The most serious offence, trafficking - the sale or use of personal identification information - will carry a penalty up to 10 years in jail, while the penalties for possession of information and possession of equipment are seven and three years' jail, respectively.

Attorney-General John Hatzistergos said the legal changes will allow police to target criminals trading in personal data for the purpose of fraud; at the same time, the penalty for serious fraud will double from five to 10 years' in prison.

"Under the new laws, it will be an offence to use everyday devices such as scanners, printers and laminators to produce fake identity documents," Mr Hatzistergos said.

"These laws (also) specifically target the use of devices that skim personal details from credit or debit cards, sometimes attached to ATMs or eftpos units."

The Crimes Amendment (Fraud, Identity and Forgery Offences) Bill, due to be introduced into NSW Parliament today, is broadly based on the Model Criminal Code agreed by the nation's standing committee of attorneys-general and is part of a move towards more harmonised laws across federal and state jurisdictions.

NSW Premier Nathan Rees said the laws were aimed at fighting the "billion-dollar identity theft syndicates ripping off families through card fraud and internet scams", labelling offenders as "thieves using sophisticated technology".

"We are responding to the growth in cyber-criminals using stolen identities to engage in money laundering, drug trafficking and illegal immigration," Mr Rees said. "There are increasing reports of personal details like credit card and PINs being stolen and sold on the global black market.

"These laws send an important message to this new breed of criminal - we will find you and send you to jail."

Source: <http://www.theaustralian.com.au/australian-it/nsw-unveils-new-id-theft-laws/story-e6frgakx-1225796477366>

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Key issues of concern:

- The increased occurrence of identity theft such as identity data trafficking, possession of theft equipment and intent to commit.
- An example of law reform due to changes in technology
- Laws around the nation are not standardised
- Average families are being scammed out of hard earned money

Suggested Changes:

- Trafficking of personal information will now carry a 10 year jail term
- Possession of equipment or information will carry 3 and 7 years respectively
- Will make using scanners, printers, laminators to produce fake identity document illegal
- Target devices that "skim" details from credit/debit cards
- These laws act as a deterrent (general)

NSW outlines new bikie laws

- From: *AAP*
- March 29, 2009 3:37PM

PROPOSED laws in NSW will put the power to ban bikie gangs in the hands of a Supreme Court judge, Attorney-General John Hatzistergos says.

Mr. Hatzistergos and NSW Premier Nathan Rees on Sunday outlined tough new legislation calling for jail terms of two to five years for bikie gang members caught associating with one another after the gang is banned.

Mr. Hatzistergos said a NSW Supreme Court judge would decide whether a bikie group should be banned after an application from the police commissioner.

"The judge will be the one who will make the orders, and those orders will be both in relation to the group and the individuals," he told reporters.

Mr. Hatzistergos said the NSW approach would differ in several ways from the strategy adopted in South Australia's anti-bikie legislation.

"In South Australia the orders are different - the order is only made in relation to the group by the attorney-general, but individuals who then constitute the offence have to be the subject of an order by a magistrate."

Bikies who continued to associate with each other would be given no warning before charges were laid, he said.

"We're not proposing to have a system of warning like they have in South Australia," he said.

Australian Federal Police Commissioner Mick Keelty said the proposed laws were "very appropriate", noting that NSW had a particular problem with bikie gangs because half of the nation's 40 outlawed groups reside in the state.

NSW Opposition Leader Barry O'Farrell welcomed the laws, saying it was time to stop "pussyfooting around".

He said the move could finally give the police the tough powers needed to smash outlaw motorcycle gangs and put an end to them.

"With parliament about to take a break until May, it's important it deal with any legislation this week so that police have the powers needed to shut down the criminal bikie gangs and their activities," he said.

"We have to stop pussyfooting around.

"The violent and criminal activities of these outlaw motorcycle gangs requires a strong response which is what the Liberal/Nationals have been urging for weeks."

The new laws have been proposed following last Sunday's fatal brawl between the Hells Angels and rival gang the Comancheros at Sydney Airport.

Police on Friday officially launched Strike Force Raptor, aimed at eliminating bikie warfare and related criminal activity.

On Saturday night, officers searched 25 people and four cars as part of the operation. Police arrested and charged two people and issued eight move-on notices after carrying out searches and patrolling 11 bars in Kings Cross and Parramatta.

AAP

Source: <http://www.theaustralian.com.au/news/nation/nsw-outlines-new-bikie-laws/story-e6frg6nf-1225692814363>

Key issues of concern:

- Bikies will not be given a warning after the ban is put in place
- Possible breach of human rights – freedom of association
- NSW has high rates of bikie criminal activity as half of the nations 40 outlawed gangs reside in NSW

Suggested Changes:

- Legislation allows jail terms of two to five years for bikie gang members caught associating with one another after the gang is banned
- NSW Supreme Court judge will decide whether a bikie group should be banned after an application from the police commissioner.
- Intended to act as a harsh general deterrent due to social pressures on the political parties in power.