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## 1- CONSENT TO HARM

- Issue whether a person can be said to consent to the harm intentionally inflicted upon them
- Uncertainty as to circumstances under which consent may legitimate an assault
- **Brown (1994) →**
  - There are exceptions to the principle that a person cannot consent to harm—such as in sports, surgery, rough horseplay, prostitution etc.
  - However, **consent is immaterial in unlawful situations which the degree of harm is very severe**
- **Wilson (1997) →**
  - **Facts:** Husband branded (with a hot knife) his initials on his wife's buttocks (with her consent). The doctor reported it and the husband was convicted of assault.
  - **Held:** *Brown* is not authority for the proposition that consent is no defence to a situation where actual bodily harm is deliberately inflicted - **that judgement pertained only to sadomasochistic encounters.**
  - **Ratio:** "Consensual activity between husband and wife, in the privacy of the matrimonial home, is not, in our judgement, normally a proper matter for criminal investigation, let alone criminal prosecution...". **The conviction was quashed.**

### Consent to medical treatment:

- Medical treatment only lawful where procedure has been consented to by the patient (or another person authorised to provide such consent such as parent or guardian), or where circumstances make the procurement of consent impractical (such as in an emergency)
- Difficulty of informed consent → Patients consent must be freely given after an explanation of the basic nature and risks of the procedure.
- **Marion's case →**
  - The rationale for exceptions to unlawful violence "appears to rest in the idea that some harms involve public, not just personal interests."
- The relationship between consent under the criminal and the doctrine of informed consent was considered in **Richardson:**
  - **Facts:** a dentist continued to treat patients after being suspended from practicing, and was convicted for assault because the 'fraud' vitiated the informed consent of the patients.
  - **Held:** "only a mistake as to the nature of the act or the identity of the person doing it vitiates consent". In any case, this was an issue for civil and not criminal law, so the conviction was quashed.
- Concern about the introduction of the practice of female circumcision by some cultural groups in Australia prompted the enactment of the **Crimes (Female Genital Mutilation) Amendment Act 1994.**
  - **Consent to such procedures is expressly not a defence.**
  - Surgical operations (including gender reassignment) which are necessary for "medical welfare" of the person are exempt when performed by medical practitioner's or "authorised professionals".

### Acceptable Violence:

- **Corporal punishment/ chastisement of children:**
  - Physical violence in the form of corporal punishment of children has a long history as a recognised exception to the criminal law on assault
  - Teachers and parents could assault children with relative impunity, as long as the violence was for the purpose of discipline or 'correction'.
  - Historically, use of force regarded as an acceptable method for managing the behaviour of children and disciplining transgressions

- This view changed in 20<sup>th</sup> century- led to national campaign to ban corporal punishment on children
- **W & DL (2014):**
  - Parents have lawful right to inflict reasonable and moderate corporal punishment on his/her child for the purpose of correcting the child in wrong behaviour
  - Strict limits on this right:
    - Must be reasonable and moderate
    - Must take into consideration age, physique and mentality of child
    - Must be carried out with reasonable means
- **"Fair Discipline Code"**
  - Corporal punishment (including beatings) reintroduced into NSW State schools in 1989 whereby State schools had the option of adopting or rejecting use of corporal punishment and parents could veto the use in respect of their children by notifying the school principal each year.
- The banning of corporal punishment was recommended in 1997 in a report jointly prepared by the ALRC and the Human Rights and Equal Opportunities Commission, noting that *"corporal punishment has negative long term impacts on children, teaches some that problems are best resolved by violence and does not lead to improved discipline compared with alternative methods."*
- In the year 2000, s 61AA was inserted into the *Crimes Act*, codifying the defence of lawful correction introducing the requirement of **reasonableness but confines the level of force to exclude force applied to the head or neck or to any part of the body if it lasts for more than a short period.**
- **A v United Kingdom** → **Held:** the beating by a father to his 9 year old son reached the level of severity to fall within the scope of the convention and recommended that English law be amended, noting that *"children and other vulnerable individuals, in particular, are entitled to state protection, in the form of effective deterrence, against such serious breaches of personal integrity."*

#### Violence in Sport:

- Generally said that participants consent to the rough and tumble and risk of injury within the rules of the game
- Rare for on field violence to be the subject of crim or civil charges → law remains silent when it comes to sporting violence
- Even where violence is in breach of rules- often regarded as accepted risk and therefore not criminal in nature
  - **Billinghamhurst:**
    - Rugby is a game of physical contact necessarily involving the use of force and that players are deemed to consent to force of "a kind which could reasonably be expected to happen during the game". However, "there must obviously be cases which cross the line."
  - **Re Jewell:**
    - **Facts:** victim wanted compensation for brain damage after head injury
    - **Held:** Dismissed; "players of Australian Rules contemplate that the game will be played in circumstances where there will be numerous breaches of the rules and accept within *reasonable limits this fact*." The test applied should be one of **reasonableness**; the court allowed that he may have been entitled to compensation if he had been deliberately punched
  - **Stanley:**
    - **Facts:** Intentional striking of an opposing player.
    - **Held:** rugby player does not consent to being injured during the course of the game by an act which is not done in the legitimate pursuit of the objectives of the game."

## 2. ASSAULT

- **Hogg and Brown** → Three broad types of violent interaction which accounts for majority of violent crimes in aust society →
  - 1) **Violence between males** (typically of young and marginal socioeconomic status);
    - Excessive alcohol use is typically evident
    - Vast majority unreported Victimization rates highest for age groups 15-19 and 20-24.
  - 2) **Between family members and other intimates** - spouses, de facto partners, parents and children etc. Most likely location for women to be assaulted is in the home, and for men, at a place of entertainment or recreation.
  - 3) **Aboriginal communities suffer high levels of violence**
    - Due to other problems e.g. overcrowded housing, horrific health standards, high alcoholism rates, less education, poverty → leading to feelings of hopelessness and alienation and thus high levels of intra-community violence, alcohol abuse.
    - NSW 1968-1986 → ab homicide rate seven times higher than general population, and 3 times that of the high risk group constituted by young adult men
    - Prosecution and incarceration does not mitigate the problem → can lead to added stress and larger unemployment

### Social context and prevalence

- Changing social perceptions of some forms of violence - increasingly accepted and now regarded as a 'private' affair not warranting intervention
- 2013- almost 65,000 recorded incidents of assault in nsw (mostly domestic violence and police assaults)
  - **Domestic violence:** victim and perp in a domestic relationship (e.g. intimate partners ex partners, de facto).
- Alcohol plays large role in violent crimes (increases aggression, clusters of people in one area etc) i.e. Thomas Kelly case in 2012

### COMMON ASSAULT (s61 CA):

- **Section 61 of the Crimes Act 1900 provides:**
  - *Whosoever assaults any person, although not occasioning actual bodily harm, shall be liable to imprisonment for two years*
- Routinely dealt with summarily in local court (Table 2 offence under *Criminal Procedure Act 1986*)
  - 2<sup>nd</sup> most charged offence in the local court after drink driving
- **Darby v DPP:** Distinction exists between assault and battery
  1. **ASSAULT** → act by which a person intentionally or perhaps recklessly causes another person to apprehend the immediate infliction of unlawful force upon him; *R v Burstow; R v Ireland*.
  2. **BATTERY** → actual infliction of unlawful force
    - Even without consent, ok if exigencies of life (i.e. bumping into someone on a bus, ejecting someone from property)
- **Edwards v Police (1988):**
  - Elements of assault where there is **no actual physical contact** (assault)
    - **AR** - act of D raising in the mind of the victim, the fear of immediate violence to him/her (i.e. fear of unlawful physical contact)