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Dear Professor Warner

***NON-THERAPEUTIC MALE CIRCUMCISION: ISSUES PAPER NO 14 JUNE 2009***

Thank you for the opportunity to respond to the above Issues Paper and for accepting this late submission.

**INTRODUCTION**

This submission is informed by my view that if surgery on the genitals of a pre-pubescent child is not therapeutically necessary for the preservation of life or the treatment or prevention of serious illness, then the decision whether or not to operate, and what surgery should be undertaken, should be deferred until the child is old enough to express an informed opinion about the options and if still then a minor should be made in a forum that addresses conflicts of interest. That age will depend on the intervention that is proposed.

This in turn is based on the child's fundamental common law right to bodily integrity<sup>1</sup>, which underpins the criminalisation of unlawful assaults and has been endorsed by the High Court and Family Court in the context of consideration of the appropriateness or otherwise of "non-therapeutic sterilisation" and other "special medical procedure" cases under the *Family Law Act 1975*.

This submission assumes that the Tasmania Law Reform Institute has been provided with a wealth of information about the physiology of male circumcision, and has been unable to locate any common law determination of the issue in point, so proceeds directly to options for legislative clarification.

## PARENT'S RIGHTS OF RELIGIOUS FREEDOM

Performing unnecessary circumcision on another person is sometimes justified as an expression of the parents' right of religious freedom of expression guaranteed in the *Universal Declaration of Human Rights (UDHR)*, the *International Covenant on Civil and Political Rights (ICCPR)* and other rights instruments.

However, Article 18.3 of the ICCPR curtails all person's right to freedom of religious expression where it is necessary to do so to protect the health or fundamental rights and freedoms of others, and Article 18.2 provides that no person shall be coerced so as to impair his freedom to adopt a religion of his choice. Unnecessary circumcision infringes a boy's fundamental right to bodily integrity and the right to freedom from all forms of physical or mental violence, injury or abuse and maltreatment: Article 19 *Convention on the Rights of the Child (UNCROC)*.

A boy's right to freedom of religious expression under Article 14.1 UNCROC is also infringed if unnecessary surgery is performed to bring him into conformity with a religious or cultural requirement of his parent. Article 14.2 recognises only a parent's countervailing rights to "provide direction to the child in the exercise of his or her right".

It is submitted that to amputate any part of a child's body for cultural, religious or social custom falls outside the expression "to provide direction".

Modern pluralist parliamentary democracy is secular and non-discriminatory. Some genital surgery of female children is performed in the exercise of the parent's religious belief <sup>2</sup>

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<sup>1</sup> For a useful discussion of this refer to the judgement of Brennan J in *Secretary of the Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 15 FamLR 392 at 421-423.

<sup>2</sup> Some scholars of the Shafi-i School of Sunni Islam prevalent mainly in Kurdistan, accept that removing the clitoral prepuce is *wajib* [obligatory] following a *hadith* of the Prophet recorded by Abu al-Malih, others that it is desirable, optional or not harmful: Wikipedia, *Religious Views of FG Cutting*, 25.9.09.

Tasmania legislated a decade ago to prohibit all genital surgery on girls regardless whether the operation is "part of a cultural, religious or social custom".

## **IS THE LAW IN TASMANIA SUFFICIENT TO PROTECT A BABY BOY OR MALE CHILD FROM MEDICALLY UNNECESSARY CIRCUMCISION?**

The statute and common law in relation to performance of a medically unnecessary circumcision on a minor in Tasmania is unclear.

If non-therapeutic male circumcision is a "surgical operation", s.51 of the *Criminal Code Act 1924* (Tas) applies, at least in relation to the person performing the procedure, the consequence being that a medical practitioner or other person performing the procedure can lawfully carry out a non-therapeutic circumcision so long as:

- The operation is performed in good faith and with reasonable care and skill;
- The operation is performed with the consent **and for the benefit of, the patient.** Where the patient is a child who is too young to exercise a reasonable discretion consent may be given by the child's parent or by any person having the care of the child;
- The performance of the operation is reasonable **having regard to all the circumstances.**

Whether or not non-therapeutic male circumcision was "for the benefit of the child" and was reasonable in all the circumstances would need to be assessed on a case-by-case basis in relation to the presenting medical needs of the patient. It is submitted that this cannot include the spiritual or cultural needs or beliefs of one or more of his relatives or "carer" as presently provided.

It appears that there has been no reasoned decision in the English-derived common law about the validity of parental consent to medically unnecessary circumcision.

It is submitted that the United Nations *Convention on the Rights of the Child* (UNCROC) and other international human rights instruments identified in the TLRI Issues Paper categorise infants and children as human beings with certain inalienable "protective" or unqualified individual human rights that are at face value inconsistent with the physical power of their parents - with or without professional or lay operators - to conduct this form of irreversible and medically unnecessary surgery on children without their consent and even contrary to their wishes.

It is therefore submitted that the present state of the law fails to protect the human rights of children.

## DISCUSSION

*Marion's Case*<sup>3</sup> is binding authority in Tasmania on the limits to the capacity of a parent to give legally valid consent on behalf of a child to surgery that conflicts with the child's "fundamental right to personal inviolability existing in the common law, a right which underscores the principles of assault, both criminal and civil".<sup>4</sup> The decision did not adopt the narrower submission specific to "Marion's" own case (that of sterilisation) that the human right at issue was "a fundamental right to reproduce which is independent of the right of personal inviolability".<sup>5</sup>

It does not appear to be in contention that if surgery is medically necessary to protect life, prevent the imminent onset of disease or cure an existing disease, to repair an injury or congenital deformity, the existing law protects an operator in the event of such emergency or medical necessity (*Marion's Case per curiam*).

Also not in contention however is that the capacity of the parent to give valid consent to any medical or surgical procedure is limited to procedures that confer such a "benefit" on the child.

This was expressed by the majority in *Marion's Case* as follows and the minority Justices did not significantly disagree on this point:

Where their child is incapable of giving valid consent to medical treatment, parents, as guardians, may in a wide range of circumstances consent to medical treatment of their child who is a minor. This is clear in the common law and, by implication, in the Emergency Medical Operations Act which creates an exception to the need for parental consent in the case of emergency treatment. It is also implicit in the duty to provide the necessaries of life imposed by ss 149 and 183 of the Code. Where this parental power exists, two principles are involved. First, the subjective consent of a parent, in the sense of a parent speaking for the child, is, ordinarily, indispensable. That authority emanates from a caring relationship. Secondly, the overriding criterion to be applied in the exercise of parental authority on behalf of a child is the welfare of the child objectively assessed. That these two principles become, for all practical purposes, one is a recognition that ordinarily a parent of a child who is not capable of giving informed consent is in the best position to act in the best interests of the child. Implicit in parental consent is understood to be the determination of what is best for the welfare of the child

...the overriding criterion of the child's best interests is itself a limit on parental power...[in the case of sterilisation], the question whether it is in the best interests of the child and, thus, should be authorised is not susceptible of easy answer as in the case of an amputation on other than medical grounds. And the circumstances in which it arises may result from or involve an imperfect understanding of the issues or an incorrect assessment of the situation.<sup>6</sup>

This reasoning recognises the sometimes overlooked fact that the interests of the parent may conflict with the interests of the child.

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<sup>3</sup> *Secretary of the Department of Health and Community Services v JWB and SMB* (*Marion's Case*) (1992) 15 FamLR 392.

<sup>4</sup> *Secretary of the Department of Health and Community Services v JWB and SMB* (*Marion's Case*) (1992) 15 FamLR 392 at 412.

<sup>5</sup> *Secretary of the Department of Health and Community Services v JWB and SMB* (*Marion's Case*) (1992) 15 FamLR 392 at 412.

<sup>6</sup> *Secretary of the Department of Health and Community Services v JWB and SMB* (*Marion's Case*) (1992) 15 FamLR 392 at 402 (Mason CJ, Dawson, Toohey and Gaudron JJ).

However the majority <sup>7</sup> also ruled that parental consent to surgery without independent input via the court or a tribunal reaches its limits where "invasive, irreversible and major" surgery entails:

the significant risk of making the wrong decision, either as to a child's present or future capacity to consent or about what are the best interests of a child who cannot consent and secondly, because the consequences of a wrong decision are particularly grave.

One further important limitation identified by the High Court in *Marion's Case* is that in each case of any surgery on a child, surgery should be the last resort where less invasive therapeutic modalities were available to achieve the desired medical outcome.

In applying the *ratio* of the majority in *Marion's Case*, to medically unnecessary circumcision, it is clear that the certainty to the individual child of any measurable medical or prophylactic benefit is contentious.

It is clear that whether the adverse short and long term physiological and psychological effects of the amputation of the foreskin are "grave" is also contentious. Likewise, it is conceded that whether or not the amputation of that tissue is "major" is also contentious.

These issues have simply not been determined.

## PROPOSALS FOR REFORM

I recommend amendment of the *Criminal Code* so that it would provide as follows (proposed amendments underlined):

### **51. Surgical operations**

(1) It is lawful for a person to perform in good faith and with reasonable care and skill a surgical operation upon another person, with his consent and for his benefit, if the performance of such operation is reasonable, having regard to all the circumstances.

(2) In the case of a child not capable by reason of age, disability or other characteristic to give informed consent to that surgical procedure, then subject to s.51A such consent as aforesaid may be given by his parent or by any person having the care of such child.

(3) In the case of a person in such a condition as to be incapable of giving such consent as aforesaid, such operation may be performed without such consent if performed for a genuine therapeutic purpose.

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<sup>7</sup> *Secretary of the Department of Health and Community Services v JWB and SMB* (Marion's Case) (1992) 15 FamLR 392 at 410.

## **51A Consent by parent or any person having the care of a child**

(1) For the purposes of s51(2) the consent of a parent of a child or of any person having the care of such child to a surgical operation on the child is of no effect unless that surgical operation-

- a) is performed for a genuine therapeutic purpose; or
- b) a court or other tribunal of competent jurisdiction has authorised or consented to the performance of that surgical operation.

(2) For the purposes of this section, the fact that a surgical operation is performed as, or as part of, a cultural, religious or other social custom or its performance is not medically necessary to save the life of the child or for the immediate treatment or prevention of disease or deformity is not, of itself, a genuine therapeutic purpose.

(3) Removal of child from State

- a) Any person who takes a child who is by reason of age, disability or other characteristic incapable of giving informed consent to that surgical operation, or arranges for such a child to be taken, out of the State with the intention of having a surgical operation performed on that child for a purpose that is not a genuine therapeutic purpose and without prior authorisation or consent of a court or tribunal of competent jurisdiction is guilty of a crime.
- b) If it is proved that a person took the child, or arranged for the child to be taken, out of the State and that a surgical operation was performed on the child outside the State for a purpose that was not a genuine therapeutic purpose without the prior consent or authorisation of a court or tribunal of competent jurisdiction, it is a presumption, in absence of proof to the contrary, that the person took the child, or arranged for the child to be taken, out of the State with the intention of having a surgical operation performed on the child for a purpose that was not a genuine therapeutic purpose without prior authorisation or consent of a court or tribunal of competent jurisdiction.

ALTERNATIVELY if any proposed amendment is to be limited to medically unnecessary circumcision on boys, PROPOSED s.51A can be tailored specifically to that procedure, substituting for "surgical operation" the words "complete or partial removal of the prepuce of the penis of a child" OR " complete or partial amputation of the foreskin of a child".

## **EXPLANATORY NOTES**

### **Proposed amendment to s.51(2) – child’s consent to surgery generally**

In relation to s.51(2) the Commissioner for Children submits that the criterion for determining whether a child (that is any person under 18 years of age) is competent to give informed consent to surgery or to “exercise a reasonable discretion in the matter” is by the terms of the sub-section solely age-related. This overlooks the more significant criteria of understanding, maturity, and development to understand the specific

procedure contemplated on the one hand, and intellectual or cognitive incapacity to form a valid consent on the other.

If capacity is intended by the Statute, then the Statute should refer to capacity, not age.

It is hoped that this proposed amendment might be accepted by the Government to put to Parliament independently of consideration of the outcomes of the Tasmania Law Reform Institute reference. Such an approach would more properly reflect the law<sup>8</sup> regarding the competency of children and young people to give or withhold consent to medical treatment including surgery.

### **Proposed amendment to s.51(3) – genuine therapeutic purpose generally**

It was thought by the Commissioner for Children on close examination that s.51(3) in its current form is too broad as it does not provide guidance or limit the type or circumstances in which a surgical operation could be performed on any other person who is by reason of age, disability or any other characteristic incapable of giving or withholding consent.

The Commissioner for Children is concerned that without some limitation the existing subsection authorises any person to perform medically unnecessary surgery on a child merely at the request of a parent and for any perceived "benefit" in the subjective perception of the operator and/or the adult giving vicarious consent on behalf of the child.

An example instanced in argument in the High Court in *Marion's Case* was amputation of the hand of a beggar child to improve their commercial prospects. It is submitted that the concept of "genuine therapeutic purpose" introduces a greater degree of objectivity, and a more consistently justiciable issue of fact.

### **Proposed amendment - s.51A – expression "court or tribunal of competent jurisdiction"**

The phrase "court or tribunal of competent jurisdiction" is employed because on the one hand it may be that the Family Court of Australia has jurisdiction only in respect of "children of a marriage" and to resolve disputes between parents, while on the other hand the Supreme Court of the State in any event reserves its *parens patriae* jurisdiction to make any protective order over children not "of a marriage".<sup>9</sup>

The Parliament may see fit to confer this aspect of State *parens patriae* jurisdiction on the Guardianship and Administration Board, in order to provide an expeditious and cheap but independent means of assessing the

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<sup>8</sup> Refer to *Secretary of the Department of Health and Community Services v JWB and SMB* (Marion's Case) (1992) 15 FamLR 392 at 400.

<sup>9</sup> Refer *P v P* [1994] HCA 20; *Commonwealth Powers (Family Law) Act 1987* (Tas); see also s67ZC *Family Law Act 1975*.

benefit to the child in each case of surgery proposed for a purpose other than a genuine therapeutic purpose.

## CONCLUSION

In the course of researching this short submission it became clear to the Commissioner for Children that the removal of a boy's foreskin for no medical necessity or for mere parental preference is but a single instance of a wider class of procedures where the rights of children require more accountability and independent community supervision of the activities of medical practitioners, lay operators and the consent of parents.

Accordingly the legislative proposal in this submission is directed to the broader issue rather than the narrower one. An alternative drafting is included if the policy outcome is to be strictly limited to circumcision on boys, which would seem an unnecessary restriction.

I congratulate the Tasmania Law Reform Institute for its decision to undertake this reference into an issue that is capable of causing strong and emotive responses often devoid of rational and considered argument and debate.

I look forward to the Institute's Report and recommendations to Government.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Paul Mason', with a stylized flourish at the end.

Paul Mason  
Commissioner

## APPENDIX – PROPOSED LEGISLATIVE AMENDMENTS

### CRIMINAL CODE ACT (Tas.) 1924

#### **51. Surgical operations**

(1) It is lawful for a person to perform in good faith and with reasonable care and skill a surgical operation upon another person, with his consent and for his benefit, if the performance of such operation is reasonable, having regard to all the circumstances.

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(3) In the case of a person in such a condition as to be incapable of giving such consent as aforesaid, such operation may be performed without such consent if performed for a genuine therapeutic purpose.

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a) is performed for a genuine therapeutic purpose; or

b) a court or other tribunal of competent jurisdiction has authorised or consented to the performance of that surgical operation.

(2) For the purposes of this section, the fact that a surgical operation is performed as, or as part of, a cultural, religious or other social custom or its performance is not medically necessary to save the life of the child or for the immediate treatment or prevention of disease or deformity is not, of itself, a genuine therapeutic purpose.

(3) Removal of child from State

a) Any person who takes a child who is by reason of age, disability or other characteristic incapable of giving informed consent to that surgical operation, or arranges for such a child to be taken, out of the State with the intention of having a surgical operation performed on that child for a purpose that is not a genuine therapeutic purpose and without prior authorisation or consent of a court or tribunal of competent jurisdiction is guilty of a crime.

b) If it is proved that a person took the child, or arranged for the child to be taken, out of the State and that a surgical operation was performed on the child outside the State for a purpose that was not a genuine therapeutic purpose without the prior consent or authorisation of a court or tribunal of competent jurisdiction, it is a presumption, in absence of proof to the contrary, that the person took the child, or arranged for the child to be taken, out of the State with the intention of having a surgical operation performed on the child for a purpose that was not a genuine therapeutic purpose without prior authorisation or consent of a court or tribunal of competent jurisdiction.