

TASMANIA
LAW REFORM
INSTITUTE

Non-Therapeutic Male Circumcision

FINAL REPORT NO 17

AUGUST 2012

CONTENTS

Information on the Tasmania Law Reform Institute	iv
Acknowledgments	iv
Summary of recommendations	vi
Part 1: Introduction.....	1
1.1 Background to this report	1
1.2 Feedback to the Issues Paper	2
1.3 Scope and key terms	3
1.4 Outline	4
Part 2: Background.....	5
2.2 Circumcision	5
2.3 Circumcision in Tasmania	6
2.4 The costs and benefits of circumcision	8
2.5 Circumcision and the law	15
Part 3: The Current Law	17
3.2 Criminal responsibility	17
3.3 Authorisation: family law	18
3.4 Private law responsibilities of circumcisers.....	19
3.5 The use and sale of excised foreskin	20
3.6 Limitation of actions.....	21
3.7 Human rights	21
Part 4: Legislation in Foreign Jurisdictions	23
4.2 South Africa	23
4.3 Sweden	24
4.4 The United States	26
4.5 Concluding remarks.....	28
Part 5: Perspectives on Circumcision	30
5.2 Respondents' views.....	30
5.3 The Tasmania Law Reform Institute's view	50
5.4 Concluding remarks.....	54
Part 6: Perspectives on Reform	55
6.2 The desirability of law reform	55
6.3 The circumcision of adults and capable minors	61
6.4 The circumcision of incapable minors: criminal liability.....	63
6.5 The circumcision of incapable minors: civil liability	71
6.6 Mandatory court authorisation.....	75
6.7 The provision of information.....	79
6.8 Circumciser practising standards.....	83
6.9 The commercial aspects of circumcising	88
6.10 Limitation of actions law	90
6.11 Removing the fault requirements of an action for compensation.....	96
Appendix 1.....	99

Information on the Tasmania Law Reform Institute

The Tasmania Law Reform Institute (the Institute) was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000. The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself.

The Institute's Director is Professor Kate Warner of the University of Tasmania. The members of the Board of the Institute are Professor Kate Warner (Chair), Professor Margaret Otlowski (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice AM Blow OAM (appointed by the Honourable Chief Justice of Tasmania), Ms Lisa Hutton (appointed by the Attorney-General), Mr Philip Jackson (appointed by the Law Society), Ms Terese Henning (appointed by the Council of the University), Mr Craig Mackie (nominated by the Tasmanian Bar Association) and Ms Ann Hughes (community representative).

Contact information: Tasmania Law Reform Institute
Private Bag 89,
Hobart, TAS
Australia, 7001

Email: law.reform@utas.edu.au
Telephone: (03) 62262069
Fax: (03) 62267623

This report is available on the Institute's webpage at: www.law.utas.edu.au/reform

Acknowledgments

This report was prepared for the Board by Warwick Marshall.

Professor Kate Warner and George Zdenkowski provided invaluable support in the preparation of this report. The report benefited greatly from their experience and expertise. The author could not be more grateful for their assistance.

The Institute would like to thank Daniel Albert (President of the Hobart Hebrew Congregation), Rabbi John Levi, David Clarke and George Goldsteen for liaising with the Institute and providing information on the practice of circumcision in Tasmania's Jewish community.

The Institute has also benefited from exchanges with Imam Sabri Samson and Murshid Ali ElSenossi (the Almiraj Sufi & Islamic Study Centre). They each provided the author with information on the practice of circumcision in Tasmania's Muslim community.

The Institute is grateful for the assistance of Dr Gerard Gill (Northern Suburbs Medical Service), Dr Rob Jensen (urological surgeon), Dr Steve Sonneveld (obstetrician), Grant Musgrave (Director of Operations – Launceston, Calvary Health Care) and Tracy Malloy (Health Information Manager – Hobart, Calvary Health Care) for the provision of information about the practice of circumcision in Tasmania's medical community.

The Institute is also appreciative of Elise Anderson (Librarian, Government Offices Library), Claes Tollin (Unit for Legal Affairs, The National Board of Health and Welfare), Ann Clements (Senior

Registry Officer, The National Board of Health and Welfare) and Heléne Lundgren (Lagrummet.se) for the provision of information on the regulation of circumcision in Sweden.

The Institute would like to thank Bruce Newey for editing and formatting this report. It would also like to thank Professor Margaret Otlowski for her assistance in the preparation of the early drafts of this report.

Finally, the Institute would like to thank each individual who took the time to prepare a response to the Institute's *Non-Therapeutic Male Circumcision* Issues Paper.

Summary of recommendations

Recommendation 1	The Institute supports the enactment of legislation to reform the law governing circumcision.
Recommendation 2	The Institute recommends reform to provide a clear legislative basis for the legality of circumcision performed at the request of an adult or capable minor.
Recommendation 3	The Institute recommends the enactment of a new and separate offence generally prohibiting the circumcision of incapable minors in Tasmania. The new legislation ought to create an exception for the performance of some well-established religious or ethnicity motivated circumcision on incapable minors.
Recommendation 4	The Institute recommends the enactment of legislation to require joint parental authorisation for the circumcision of an incapable minor.
Recommendation 5	The Institute recommends the enactment of a law to require court authorisation for a circumcision whenever parents disagree about the desirability of performing a circumcision.
Recommendation 6	The Institute does not recommend the enactment of legislation mandating court authorisation for the circumcision of minors.
Recommendation 7	<p>The Institute recommends the enactment of a law to require that all circumcisers provide accurate information as to:</p> <ul style="list-style-type: none"> • the financial cost of the procedure; • the non-therapeutic nature of the operation; • the purpose and function of the foreskin; • the procedure itself; • the procedure's effect on the functioning of the penis; • the risks of the procedure; • the nature and significance of the evidenced prophylactic benefits of circumcision in an Australian context; • the potential for children to grow up into adults who resent their circumcision (this may include a discussion of the common rationales and prevalence of circumcision); • the availability of the procedure in adulthood; and • the legality of the procedure.
Recommendation 8	The Institute recommends that health policy, community and industry leaders use non-legislative avenues of reform to improve the dissemination of accurate information on the known and potential effects and significance of circumcision.

Recommendation 9	<p>The Institute recommends the enactment of a criminal law that sets general principles against which to judge the acceptability of a circumciser's practice. These principles should set minimum standards that all circumcisers of incapable minors must meet in the provision of their service. Parliament should give an existing health regulatory body the responsibility of formulating regulations to qualify the general standards set in statute. The Institute recommends the setting of standards as to matters such as:</p> <ul style="list-style-type: none"> • the pain relief provided; • the instruments used; • the skill of the person performing the operation; • the skill with which the procedure is performed; • the adequacy of the wound care and post-procedure monitoring. <p>The standards set by statute and in regulations ought to reflect the minimum standards the community would expect circumcisers to meet at the time of the operation in the circumstance in which they are operating. In particular, the standards should ensure that no minor be put at a needlessly high risk of pain or complication from a circumcision.</p>
Recommendation 10	The Institute recommends further investigation into whether the law governing the use and sale of human tissue would benefit from reform.
Recommendation 11	The Institute does not recommend reform to the law regulating the commercial aspects of a circumciser's service.
Recommendation 12	The Institute recommends the enactment of reform to create a uniform period in which individuals harmed by a circumcision as a minor may bring an action against their circumciser. This period should extend for an appropriate time after the harmed person has reached the age of majority. This new limitation period should be enacted in a provision in a new Circumcision Act.
Recommendation 13	The Institute recommends the enactment of legislation to require circumcisers to transmit information relevant to actions that may be brought for harm they cause to a minor to an appropriate government authority.
Recommendation 14	The Institute does not recommend the enactment of a no-fault compensation scheme for harm caused by a circumcision performed upon an incapable minor.

Part 1

Introduction

1.1 Background to this report

1.1.1 Male circumcision exists at the crossroads of religion, custom, human rights, health, commerce, harm and ethics. Its regulation is one of many divisive issues in 21st century Australia. Medical professionals have performed circumcision in Australian medical facilities since before federation;¹ some of Australia's Indigenous communities have performed circumcision from time immemorial.² Circumcision is performed in Tasmania on both adults and children, and for both therapeutic and non-therapeutic reasons. Non-therapeutic circumcision is performed for a variety of reasons, including: socio-cultural, religious, aesthetic and prophylactic reasons. The vast majority of circumcisions in Australia are performed upon newborns at the request of the newborn's parents.³ There is rarely a medical indication for the circumcision of a newborn.⁴ Over nineteen thousand Medicare claims were lodged in 2010 for circumcisions performed on boys under the age of six months.⁵ A similar number of claims were made in 2009.⁶ Australian taxpayers contributed more than \$1.7 million through Medicare to the circumcision of infants in 2010.⁷ They contributed more than \$8 million dollars to the circumcision of infants in the five years between 2006 and 2011.⁸

1.1.2 This report is concerned with the application of Tasmanian law to non-therapeutic male circumcision. It provides information on the merits of the legal framework regulating circumcision in Tasmania and proposes reform where it may be beneficial. Paul Mason, the former Tasmanian Commissioner for Children, referred the issue to the Tasmanian Law Reform Institute (the Institute) in 2008. Mr Paul Mason was a member of the Council of Obstetric and Paediatric Mortality and

¹ Robert Darby, 'A Source of Serious Mischief: The Demonisation of the Foreskin and the Rise of Preventative Circumcision in Australia' in George Denniston, Frederick Hodges and Marilyn Milos (eds), *Understanding Circumcision: A Multidisciplinary Response to a Multi-dimensional Problem* (Springer, 2001) 153, 159.

² For a discussion of Indigenous Australian genital modification procedures see: John Cawte, N Djagamara and Murray Barret, 'The Meaning of Subincision of the Urethra to Aboriginal Australians' (1966) 39 *British Journal of Medical Psychology* 245; John Morrison, 'The Origins of the Practices of Circumcision and Subincision Among the Australian Aborigines' (1967) *Medical Journal of Australia* 125.

³ In 2010 in Australia, 19,417 claims were made against Medicare for circumcisions performed upon males under 6 months of age; 7,376 claims were made for circumcisions performed upon males over 6 months. Medicare items 30653, 30656, 30659 and 30660 processed from January 2010 to December 2010: Medicare Australia, *Medicare Item Reports* (2011) <https://www.medicareaustralia.gov.au/statistics/mbs_item.shtml> at 20 October 2011.

⁴ Padraig Malone and Henrik Steinbrecher, 'Medical Aspects of Male Circumcision' (2007) 335 *British Medical Journal* 1206.

⁵ In 2010, 19,417 claims against Medicare were made for the circumcision of children under six months of age. See Medicare item 30653 processed from January 2010 to December 2010: Medicare Australia, *Medicare Item Reports* (2011) <https://www.medicareaustralia.gov.au/statistics/mbs_item.shtml> at 20 October 2011.

⁶ In 2009, 19,981 claims against Medicare were made for the circumcision of children under six months of age. See Medicare item 30653 processed from January 2009 to December 2009: Medicare Australia, *Medicare Item Reports* (2010) <https://www.medicareaustralia.gov.au/statistics/mbs_item.shtml> at 20 October 2010.

⁷ Medicare Australia contributed \$1,715,283 for circumcisions performed on boys under the age of six months from January 2010 until December 2010. See Medicare item 30653 processed from January 2010 to December 2010: Medicare Australia, *Medicare Item Reports* (2011) <https://www.medicareaustralia.gov.au/statistics/mbs_item.shtml> at 14 October 2011.

⁸ Medicare Australia contributed \$8,071,465 for circumcisions performed on boys under the age of six months from January 2006 until December 2010. See Medicare item 30653 processed from January 2006 to December 2010: Medicare Australia, *Medicare Item Reports* (2011) <https://www.medicareaustralia.gov.au/statistics/mbs_item.shtml> at 14 October 2011.

Morbidity at the time of his referral of the matter to the Institute. Another member of the council was concerned about the exposure of a paediatrician to civil and criminal liability for performing a circumcision on an infant. This member asked Mr Mason about the legality of performing a non-therapeutic circumcision on an infant in Tasmania. The Commissioner offered to investigate the issue. The Office of the Commissioner for Children released a discussion paper on the topic in 2007.⁹

1.1.3 Mr Mason is critical of the performance of non-therapeutic procedures on minors. He is concerned that some non-therapeutic procedures may ‘traverse the rights of children’.¹⁰ The Office of the Commissioner for Children suggested in its discussion paper on circumcision that the law in Tasmania lacked clarity in its application to the circumcision of males under the age of majority. Mr Mason as the Commissioner for Children invited the TLRI to investigate the legal issues relating to the circumcision of male children and to explore what actions the Tasmanian Government might consider desirable to better protect the rights of children. The TLRI accepted the project in 2008.

1.1.4 The TLRI produced an Issues Paper entitled *Non-Therapeutic Male Circumcision* in 2009.¹¹ The paper provided information to encourage public deliberation and feedback on the merits of the current legal framework for non-therapeutic male circumcision in Tasmania. The Institute released the paper after consultation with members of Tasmania’s Jewish, Muslim and health community. The paper took no position on the appropriateness of non-therapeutic male circumcision from a medical, religious or ethical viewpoint. It found that there has not been significant legal action relating to, or legislative regulation of, male circumcision in Tasmania. The Institute also found that there is a dearth of current, thorough and reliable commentary on the application of the law to circumcision in Australia. The Institute concluded that uncertainties abound in the application of Tasmanian law to circumcision.

1.2 Feedback to the Issues Paper

1.2.1 The Issues Paper asked eight questions to focus the feedback from the public. The questions covered both the form and substance of the criminal, family and other private law governing circumcision in Tasmania. They were as follows:

1. Do you think the criminal law relating to non-therapeutic circumcision requires clarification?
2. Under what circumstances do you think a non-therapeutic circumcision should be lawful (under the criminal law)?
3. Do you think the law relating to the authorisation of non-therapeutic circumcision requires clarification?
4. Under what circumstances should a parent be able to legally authorise the circumcision of their child?
5. Should the authorisation of a court, or some other form of independent body, be required to legally perform a circumcision in some, or in all, circumstances?
6. Should the law clearly establish that medically qualified and non-medically qualified circumcisers have the same legal duties in the provision of their service?
7. Should the law set specific duties for circumcisers in the provision of their service?
8. Should there be a special limitation period for civil law actions brought by an adult for a circumcision performed on them as a minor?

⁹ Office of the Commissioner for Children, *‘First Do No Harm’ the Liability of Medical Practitioners Performing Non-therapeutic Male Circumcision on Minors in Tasmania*, Discussion Paper (2007).

¹⁰ Email from Paul Mason (Commissioner for Children) to Warwick Marshall, 20 March 2009.

¹¹ Tasmania Law Reform Institute, *Non-therapeutic Male Circumcision*, Issues Paper No. 14 (2009).

1.2.2 The TLRI received submissions from one hundred and twenty-six respondents (including both individuals and organisations). Respondents did not confine themselves to addressing the questions posed in the Issues Paper. Submissions were received from respondents in Tasmania, other Australian jurisdictions, Canada, New Zealand, South Africa, the United Kingdom and the United States. They varied in length from a single short exclamation ('Stop circumcision') to dozens of typed pages in length. This report refers to these submissions. The appendix to this report provides a numbered list of the names of the individuals and organisations who responded to the Issues Paper (unless the respondent requested anonymity or opted to use a pseudonym).

1.3 Scope and key terms

1.3.1 This report is primarily concerned with the application of the law in Tasmania to non-therapeutic male circumcision. The report addresses non-therapeutic male genital modifications only. Legislation prohibiting all forms of female genital modification (also widely known as female genital mutilation or female circumcision) already operates in every state and territory of Australia.¹² References to circumcision in this report, unless otherwise indicated, refer exclusively to male circumcision.

1.3.2 The Institute defines circumcision as a permanent genital modification involving at least a partial excision of the male foreskin. The foreskin includes all the flesh covering and extending beyond the glans penis (when it is present).¹³ A reference to circumcision in the text, unless otherwise indicated, refers to a circumcision procedure that does not involve the deliberate alteration of other parts of the penis.

1.3.3 A circumciser is anyone, however qualified or trained, who performs a circumcision. The Institute adopts this expansive definition in recognition of the variety of people (including highly trained and experienced medical practitioners, traditional practitioners and laypersons) who have attempted or may attempt in future to perform a circumcision.

1.3.4 This report focuses upon the circumcision of minors. The majority of circumcisions in Tasmania and Australia more generally are performed on minors (of whom infants form by far the highest percentage),¹⁴ and most of the uncertainty in the application of the law is in this area. It is easier to understand how the law applies to minors after the application of the law to adults is considered. Accordingly, legal analysis of the circumcision of adults is included in the discussion. Care will be taken to indicate within the text whether the relevant discussion relates to adults, or to minors who can provide a competent legal consent (capable minors), or to minors who are incapable of providing a competent legal consent by virtue of their immature age (incapable minors). This report does not address the circumcision of intersexual or mentally disabled people.

1.3.5 A reference to circumcision, unless otherwise indicated, is a reference to non-therapeutic circumcision. The Institute gives the term non-therapeutic its ordinary meaning. A circumcision is non-therapeutic if it is performed for any reason other than remedying or treating an existing disease, illness or deformity of the body. A circumcision for prophylactic reasons, one which is performed for

¹² *Crimes Act 1900 (ACT)* s 74; *Crimes Act 1900 (NSW)* s 45; *Criminal Code 1983 (NT)* s 186B; *Criminal Code 1899 (QLD)* s 323A; *Criminal Law Consolidation Act 1935 (SA)* s 33A; *Criminal Code (TAS)* s 178A; *Crimes Act 1958 (Vic)* s 32; *Criminal Code Act 1913 (WA)* s 306.

¹³ The purposes of this report do not require an overly technical definition of circumcision or the foreskin. For a detailed discussion of the anatomy of the foreskin see: Steve Scott, 'The Anatomy and Physiology of the Human Prepuce' in George Denniston, Frederick Hodges and Marilyn Milos (eds), *Male and Female Circumcision: Medical Legal and Ethical Considerations in Paediatric Practice* (Springer, 1999) 9.

¹⁴ In Australia in 2010, 19,417 claims were made against Medicare for circumcisions performed upon males under 6 months of age; 7,376 claims were made for circumcisions performed upon males over 6 months of age. Medicare items 30653, 30656, 30659 and 30660 processed from January 2010 to December 2010: Medicare Australia, *Medicare Item Reports* (2011) <https://www.medicareaustralia.gov.au/statistics/mbs_item.shtml> at 20 October 2011.

the purpose of reducing the likelihood of future disease, illness or deformity of the body is a non-therapeutic circumcision.¹⁵

1.3.6 Both Commonwealth and state law regulate the practice of circumcision. Family law is largely governed by the Commonwealth's *Family Law Act 1975*.¹⁶ This report considers both state and Commonwealth law to clarify the law applicable to circumcision operating in Tasmania. The Tasmanian Parliament cannot alter Commonwealth legislation. Consideration of the reform of Commonwealth legislation is beyond the scope of the report.

1.4 Outline

1.4.1 This report has six parts and an appendix. The first Part provides the background to this report. It also provides the report's scope and key terms. Part two provides background information on circumcision, with a particular focus on the practice and regulation of circumcision in Tasmania. The third Part summarises the current law applicable to circumcision. It addresses the key question of whether the consent of the person being circumcised, or the consent of the parent or parents of an incapable minor being circumcised can provide protection from actions brought against a circumciser. It also considers some of the key legal responsibilities of circumcisers in the provision of their service, the human rights law relevant to circumcision, the law governing the commercial aspects of circumcision, and the law limiting the period in which a person may bring a private action for harm caused by a circumcision.

1.4.2 Part four describes and provides comment on the legislative regimes governing circumcision that exist in several overseas jurisdictions. Part five gives an overview of the views of respondents on the merit of circumcision. It also details both the Institute's position on the merit of circumcision and the Institute's approach to circumcision law reform. The penultimate Part discusses the respondents' views on the law governing circumcision in Tasmania. It also provides the Institute's view on the governing law, gives an overview of the various options for reform, and makes reform recommendations. An appendix listing the names (or pseudonyms) and affiliations of the respondents to the Institute is included at the end of this report.

¹⁵ The medical community recognises treatment to prevent the likely *recurrence* of a health condition a person has previously suffered as therapeutic treatment. This report is also inclined to accept treatment of this kind as therapeutic treatment.

¹⁶ *Family Law Act 1975* (Cth).

Part 2

Background

2.1.1 This Part provides background information on circumcision. The information presented contextualises the analysis of the law presented in Part 3 and informs the reforms recommended in Part 7. Information is provided on the foreskin, the procedure itself, how circumcision is practised in Tasmania, the costs and benefits of circumcision and the interrelationship between the law and circumcision. The Institute's Issues Paper, *Non-Therapeutic Male Circumcision*, provides further information on the history and origins of circumcision.¹⁷ Part 5 of this report provides more information on the views held on the significance and merit of circumcision by both respondents and the Institute (see discussion from 5.1.1).

2.2 Circumcision

The foreskin

2.2.1 Circumcision involves at least a partial excision of the foreskin. The foreskin is a large part of the natural male penis. It is a double-layered fold of flesh (with penile shaft skin on the external side of the fold and mucous membrane on the internal side of the fold).¹⁸ It contains blood vessels, nerve endings and a thin layer of muscle.¹⁹ The foreskin begins as a continuation of the skin along the penile shaft and typically extends to or beyond the glans of the flaccid penis. It attaches to the penis again at the fraenum (an area rich with nerves where the glans begins on the underside of the penis).²⁰ This attachment helps contract the foreskin over the glans after the retraction of the foreskin under the glans.²¹

2.2.2 Flesh adhesions typically attach the foreskin to the glans of the penis until adolescence.²² These adhesions ordinarily reduce over time to allow for full retraction of the foreskin by adulthood. Extremely few boys have a fully retractable foreskin and no flesh adhesions before the age of one. Over 90% of males will have a fully retractable foreskin by their late teens.²³ The majority of boys will not have a fully retractable foreskin until around the age of ten.²⁴ The foreskin of a mature adult should be able to move over the penile shaft freely so that it can be retracted below the glans of the

¹⁷ Tasmania Law Reform Institute (TLRI), *Non-therapeutic Male Circumcision*, Issues Paper No. 14 (2009).

¹⁸ Scott, above n 13, 14.

¹⁹ Ibid 12.

²⁰ Michael Schünke, Lawrence Ross, Erik Schulte, Edward Lamperti and Udo Schumacher, *Atlas of Anatomy: General Anatomy and Musculoskeletal System* (Thieme, 2006) 198.

²¹ Scott, above n 13, 14.

²² For information on foreskin flesh adhesions see: Prasanna Kumar, Mainak Deb and Kanishka Das, 'Preputial Adhesions – A Misunderstood Entity' (2009) 76 *Indian Journal of Paediatrics* 829.

²³ These approximate ages were generalised from the following studies: Abhinav Agarwal, Anup Mohta and Ritesh Anand, 'Preputial Retraction in Children' (2005) 10 *Journal of Indian Association of Pediatric Surgeons* 89; Douglas Gairdner, 'The Fate of the Foreskin: A Study of Circumcision' (1949) 2 *British Medical Journal* 1433; Jakob Oster, 'Further Fate of the Foreskin: Incidence of Preputial Adhesions, Phimosis, and Smegma among Danish Schoolboys' (1968) 43 *Archives of Disease in Childhood* 200; Hiroyuki Kayaba, Hiromi Tamura, Seiichi Kitajima, Yoshiyuki Fujiwara, Tetsuo Kato and Tetsuro Kato, 'Analysis of Shape and Retractability of the Prepuce in 603 Japanese Boys' (1996) 156 *Journal of Urology* 1813.

²⁴ It has been suggested that this slowly developing retractability of the prepuce has the evolutionary purpose of protecting the glans in childhood and discouraging sexual intercourse until later in life, see: Guy Cox, 'De Virginibus Puerisque: The Function of the Human Foreskin Considered from an Evolutionary Perspective' (1995) 45 *Medical Hypotheses* 617.

penis when the penis is erect. The circumcision of a young minor will usually involve the forcible separation of the flesh adhesions joining the glans to the foreskin.

2.2.3 The functions of the foreskin and the costs and benefits of circumcision are discussed below (see discussion beginning at 2.4).

The procedure

2.2.4 Circumcision is an umbrella term for a variety of different procedures. Medical professionals, people trained in religious circumcision rituals, people trained in traditional circumcision rites and lay people all perform circumcision in Australia. There is no uniform system of accreditation for people trained to perform circumcision in Australia. Australian circumcisers can differ significantly in their skill level, methods and practice standards. Circumcision may involve cutting, crushing or burning (or any combination of these three methods).²⁵ Individuals have performed circumcision with all manner of tools in Australia.²⁶

2.2.5 A circumcision may remove a minimal amount of foreskin or it may leave the once covered glans of the penis fully exposed even when the penis is in a flaccid state. Circumcisers do not always provide pain relief. There is no standard method of pain relief in Australia. The methods used include (sometimes in combination): nerve blocks, subcutaneous ring blocks, EMLA cream, general anaesthetic, sipped sugar water, ingested alcohol and over the counter pain medication. These methods are not equally effective.²⁷ Circumcision is not always performed within a sterile environment in Australia.²⁸

2.3 Circumcision in Tasmania

Common rationales

2.3.1 The justifications for circumcision are many and varied. There are no reliable figures on how common each reason is for the performance of circumcision in Tasmania. Common justifications for the procedure include:²⁹

²⁵ For a discussion of some of the main ways of performing circumcision see: Joel Teichman, *Common Problems in Urology* (McGraw-Hill, 2001) 42-47; Laurie Marbas and Erin Case, *Blueprints Clinical Procedures* (Lippincott Williams & Wilkins, 2004) 198-202; Thomas Zuber and Edward Mayeaux, *Atlas of Primary Care Procedures* (Lippincott Williams & Wilkins, 2003) ch 45.

²⁶ There is even an account of the performance of a circumcision with a burning stick. For a description of this practice and the use of other traditional circumcising tools, see: Herbert Basedow, 'Subincision and Kindred Rites of the Australian Aboriginal' (1927) 57 *The Journal of the Royal Anthropological Institute of Great Britain and Ireland* 123, 125-126, 141-143.

²⁷ In favour of the ring block see: Janice Lander et al, 'Comparison of Ring Block, Dorsal Penile Nerve Block, and Topical Anesthesia for Neonatal Circumcision' (1997) 278 *Journal of the American Medical Association* 2158; In favour of more than one form of anaesthetic see: Anna Taddio et al, 'Combined Analgesia and Local Anesthesia to Minimize Pain During Circumcision' (2000) 154 *Archives of Pediatrics and Adolescent Medicine* 620; For a study suggesting that paracetamol is insufficient to relieve the pain of circumcision see: Cynthia Howard, Michael Weitzman and Fred Howard, 'Acetaminophen Analgesia in Neonatal Circumcision: The Effect on Pain' (1994) 93 *Pediatrics* 641; For a review that suggests dorsal penile nerve block performs better than EMLA cream see: Janice Lander, Barbara Brady-Freyer and Natasha Wiebe, 'Pain Relief for Neonatal Circumcision' (2009) 1 *Cochrane Database of Systematic Reviews* 5; For a study that suggests a pudendal block performs better than a dorsal penile block see: Zoher Naja, Mohamad Al-Tannir, W Faysal, N Daoud, Fouad Ziade and Mariam El-Rajab, 'A Comparison of Pudendal Block vs Dorsal Penile Nerve Block for Circumcision in Children: A Randomised Controlled Trial' (2011) 66 *Journal of the Association of Anaesthetists of Great Britain and Ireland* 802.

²⁸ Most circumcisions performed in Australia are performed in hospitals. However, circumcision is also performed by medical professionals in day surgeries and in general practice offices. Circumcision is also performed outside of medical establishments. It can be performed in buildings of religious assemblies, private households and even outdoors.

²⁹ Jennifer Shark and Amber Knoche, 'Circumcision' (2007) 52 *Journal of Midwifery and Women's Health* 517.

- respect for a particular religion, mythology or way of life that values circumcision;
- concerns about the preservation of individual or public hygiene and health;
- reverence for societal or familial custom;
- a desire to alter (lessen, enhance or otherwise change) the experience of sexual pleasure (for the circumcised person or their partner); and
- aesthetics.

Studies on the importance of the various rationales for circumcision in several communities are discussed below (see discussion from 5.2.37).

Prevalence

2.3.2 The Australian College of Paediatrics estimated that only 10% of newborn children were circumcised in Australia in 1996.³⁰ Shane Peterson, who suffered harm from a negligently performed circumcision in infancy, conducted research in 2004 that suggested that the newborn circumcision rate was approximately 12.9% in Australia.³¹ In 2004, Hugh O'Donnell also concluded that approximately 12.7% of newborn children were circumcised in Australia.³² The circumcision rate of newborns in Tasmania is often cited as being significantly lower than the average elsewhere in Australia. Peterson found that approximately only 1.6% of newborns were circumcised in Tasmania in 2004.³³ O'Donnell estimated that 3.9% of newborns were circumcised in Tasmania in 2004.³⁴

2.3.3 Medicare statistics from recent years suggest that approximately only 1% of newborns (or 30-40 children) will be circumcised in Tasmania in each of the next few years.³⁵ They also suggest that approximately only 13% of newborn Australians (about 20,000 children) will be circumcised in each of the next few years.³⁶ The Medicare circumcision claim rate for newborn circumcisions in Tasmania has not exceeded 1.47% since 2004.³⁷

2.3.4 These statistics provide a relatively accurate minimum circumcision rate for minors under six months of age. They may also be close to the overall rate for minors under six months of age. However, it is important to note that the Medicare benefit is not claimed for every circumcision performed in Australia, and that some circumcisions claimed on Medicare (as is actually required by law) may have been performed for a therapeutic reason.

2.3.5 Public hospitals in Tasmania, Western Australia, Victoria, New South Wales and South Australia no longer perform non-therapeutic circumcision. Precise data relating to circumcisions not claimed on Medicare and performed outside of public hospitals are difficult to obtain. Medical professionals also perform non-therapeutic circumcision in Tasmanian private medical practices. At least twenty-four non-therapeutic circumcisions (all ages) were performed in Tasmanian Calvary

³⁰ Australian College of Paediatrics, *Position Statement: Routine Circumcision of Normal Male Infants and Boys* (1996).

³¹ Judy Skatssoon, 'Circumcision Rates Rise for Some', *Sydney Morning Herald* (Sydney) 1 July 2004 <<http://www.cirp.org/news/smh07-01-04/>> at 11 December 2011.

³² Hugh O'Donnell, *Circumcision Incidence in Australia* (2004) The Circumcision Reference Library <<http://www.cirp.org/library/statistics/Australia/>> at 28 January 2011.

³³ Skatssoon, above n 31.

³⁴ O'Donnell, above n 32.

³⁵ Comparable rates have occurred in each of the last five years. The rates are devised by comparing Medicare claim statistics for circumcision in the first six months of life against Australian Bureau of Statistics (ABS) statistics on birth-rate for the same calendar year.

³⁶ Comparable rates have occurred in each of the last five years. The rates are devised by comparing Medicare claim statistics for circumcision in the first six months of life against ABS statistics on birth-rate for the same calendar year.

³⁷ The rates are devised by comparing Medicare claim statistics for circumcision against ABS statistics on birth-rate for the 2004-2010 calendar years.

Health Care private hospitals in 2008.³⁸ Circumcision was also performed for non-therapeutic reasons in other private health care establishments by a few Tasmanian urologists, general practitioners and obstetricians during that time. Tasmanian medical practitioners in the private health care system typically exercise their own discretion as to whether they will perform a particular non-therapeutic circumcision.³⁹ Some practitioners only perform the procedure on people in a certain age range (less than six weeks of age for example). Others choose to perform circumcision for some reasons but not others (ie for a religious but not aesthetic reason).

2.3.6 The vast majority of circumcisions in Tasmania are performed by trained medical professionals in good conditions with appropriate tools. Tasmania has a local Jewish community. Because the local Jewish community is small, less than one circumcision a year is performed on average in Tasmania by a traditional Jewish circumciser (a *mohel*).⁴⁰ Tasmania does not have a resident *mohel*. When a traditional Jewish circumcision is required, a *mohel* from mainland Australia may be brought in to perform it, or the person desiring the circumcision can travel interstate to have it performed. Tasmanian Muslims typically use local medical practitioners to perform the procedure.⁴¹ However, Tasmanian Muslims have also travelled interstate on occasion to have the procedure performed.⁴²

2.4 The costs and benefits of circumcision

The known and potential costs of circumcision

2.4.1 Circumcision is painful. There is a consensus in the medical community that both adults and children (including infants) experience pain during and for a period after the procedure.⁴³ Medical literature recommends the provision of pain relief for all circumcisions to increase patient comfort and reduce the risk of surgical complications.⁴⁴ Appropriate pain relief can substantially reduce the pain experienced during and following a circumcision.

2.4.2 Circumcision significantly alters the normal functioning of the male penis. The foreskin has some accepted and several disputed beneficial functions affected by circumcision.⁴⁵ It is highly

³⁸ Letter from Tracy Malloy (Health Information Manager – Hobart, Calvary Health Care) to Warwick Marshall; Letter from Grant Musgrave (Director of Operations – Launceston, Calvary Health Care) to Warwick Marshall, 27 April 2009.

³⁹ Health professionals provided this information to the Institute during Institute consultations.

⁴⁰ Email from Daniel Albert (President of the Hobart Hebrew Congregation) to Warwick Marshall, 26 March 2009; Email from David Clark (Vice-president of the Hobart Hebrew Congregation) to Warwick Marshall, 24 March 2009.

⁴¹ This information was provided by members of Tasmania's Muslim community during the consultation held at the Almiraj Sufi and Islamic Study Centre.

⁴² This information was provided by members of Tasmania's Muslim community during the consultation held at the Almiraj Sufi and Islamic Study Centre.

⁴³ There are many articles, policy statements and reviews on the pain of circumcision, see for example: Royal Australasian College of Physicians, *Circumcision of Infant Males* (2010) 9; American Academy of Pediatrics, 'Circumcision Policy Statement' (1999) 103 *Pediatrics* 686, 688; John Goodman and Patrick McGrath, 'The Epidemiology of Pain in Children and Adolescents: A Review' (1997) 278 *Journal of the American Medical Association* 2157; Janice Lander, Barbara Brady-Freyer and Natasha Wiebe, 'Pain Relief for Neonatal Circumcision' (2009) 1 *Cochrane Database of Systematic Reviews* 5.

⁴⁴ See Janice Lander et al, 'Comparison of Ring Block, Dorsal Penile Nerve Block, and Topical Anesthesia for Neonatal Circumcision' (1997) 278 *Journal of the American Medical Association* 2158.

⁴⁵ For discussions on the possible functions of the foreskin see: Kristen O'Hara and Jeffery O'Hara, 'The Effect of Male Circumcision on the Sexual Enjoyment of the Female Partner' (1999) 83 *British Journal of Urology International* 79; George Denniston and George Hill, 'Circumcision in Adults: Effect on Sexual Function' (2004) 61 *Urology* 155; Donald Taves, 'Intromission Function of the Foreskin' (2002) 59 *Medical Hypothesis* 180; Patrick Duffy, Anthony Rickwood and David Thomas, *Essentials of Paediatric Urology* (2002) 180-182; Marilyn Milos and Donna Macris, 'Circumcision: Male - Effects Upon Human Sexuality' in Vern Bullough and Bonnie Bullough (eds), *Human Sexuality: An Encyclopedia* (Garland, 1994) 119; John Taylor, Anthony Lockwood and A Taylor, 'The Prepuce: Specialized Mucosa

innervated and may enhance sexual pleasure. It may encourage the ejaculatory reflex. The foreskin keeps the glans of the penis moist which may encourage the pleasurable sensitivity of the glans. It may help promote a gliding rather than thrusting motion during sex that could reduce dryness and trauma for both partners during vaginal intercourse. The foreskin may help facilitate intromission. It also provides protection to the glans penis and urethral opening from external trauma which can be caused by bodily excretions and other irritants which come in contact with it.

2.4.3 The foreskin can also be used for repairing genital deformities like hypospadias (an abnormally placed urethral opening); as material on which research may be performed; as a or as part of a particular commodity (skin for skin grafts,⁴⁶ treatments for wound care,⁴⁷ stem cells^{48,49}), and, for many other miscellaneous and unexpected purposes not related to health, as, for example a focus of prayer,⁵⁰ or as a source of an ingredient in some high end cosmetic face creams.⁵¹ Although it is not suggested that it is an inherently beneficial use, it is interesting to note that the foreskin has been used for concealing contraband objects.⁵²

2.4.4 A person's circumcision status and their perception of their penis can be a significant matter to them and their view of their identity. Circumcision status can potentially affect mental health in this way. Trauma from circumcision in childhood can also have a long lasting and significant effect on a person's mental health.⁵³ Several papers have suggested that circumcision in early childhood may change the way the brain processes information.⁵⁴ However, more research into circumcision's effect on mental health is required before any general effect can be stated conclusively.

2.4.5 Circumcision has inherent complications which can negatively affect health should they eventuate. There is no consensus in the medical literature on an approximate complication rate for circumcision simpliciter. Complication rates cited for circumcision performed by physicians vary

-
- of the Penis and its Loss to Circumcision' (1996) 77 *British Journal of Urology* 294; John Taylor and Chris Cold, 'The Prepuce' (1999) 83 *British Journal of Urology* 34; Gregory Boyle and Gillian Bensley, 'Adverse Sexual and Psychological Effects of Male Infant Circumcision' (2001) 88 *Psychological Reports* 1106.
- ⁴⁶ John Enderle, Joseph Bronzino and Susan Blanchard, *Introduction to Biomedical Engineering* (2005) 322-324.
- ⁴⁷ Robyn Masseth, 'Apligraf: A Promising New Wound Care Treatment for the 21st Century' (2002) *Journal of the National Association of Orthopaedic Technologists* 22, 23.
- ⁴⁸ Outi Hovatta et al, 'A Culture System Using Human Foreskin Fibroblasts as Feeder Cells Allows Production of Human Embryonic Stem Cells' (2003) 18 *European Society of Human Reproduction and Embryology* 1404.
- ⁴⁹ See Coriell Institute for Medical Research, *Tissalsoue Catalogue* (2010) <<http://ccr.coriell.org/Sections/Search/Search.aspx?PgId=165&q=foreskin>> at 20 October 2010.
- ⁵⁰ Robert Palazzo, 'The Veneration of the Sacred Foreskin(s) of Baby Jesus: A Documented Analysis' in James Helfers (ed), *Multicultural Europe and Cultural Exchange in the Middle Ages and Renaissance* (Brepols, 2005) 155.
- ⁵¹ For example, the product Vavelta reportedly uses human foreskins: Rosemary Black, 'Vavelta May be the New Wave in Anti-Aging Treatment', *New York Daily News* (online) 18 November 2008 <<http://www.nydailynews.com/life-style/vavelta-wave-anti-aging-treatment-article-1.337113>> at 20 October 2010.
- ⁵² Members of the IRA were known to hide notes under their foreskins when incarcerated: Richard English, *Armed Struggle* (Macmillan, 2004) 200-201. A drug runner in Britain used his foreskin to conceal heroin: Simon Davies, 'Dealer Hid Heroin in His Foreskin', *Wilts and Gloucestershire Standard* (online) 8 April 2008 <http://www.wiltsglosstandard.co.uk/news/2181718.dealer_hid_heroin_in_his_foreskin/> at 20 October 2010.
- ⁵³ Gregory Boyle et al, 'Male Circumcision: Pain, Trauma, and Psychosexual Sequelae' (2002) 7 *Journal of Health Psychology* 329; Ronald Goldman, *Circumcision the Hidden Trauma* (Vanguard, 1997); Ronald Goldman, 'The Psychological Impact of Circumcision' (1999) 83 *British Journal of Urology* 93; John Rhinehart, 'Neonatal Circumcision Revisited' (1999) 29 *Transactional Analysis Journal* 215; Robert Johnson, 'The Impact of Neonatal Circumcision: Implications for Doctors of Men's Experiences in Regressive Therapy' in George Denniston, Frederick Hodges and Marilyn Milos (eds) *Genital Autonomy: Protecting Personal Choice* (Springer, 2010) 149.
- ⁵⁴ See for example: Ronald Immerman and Wade Mackey, 'A Proposed Relationship Between Circumcision and Neural Reorganization' (1998) 159 *The Journal of Genetic Psychology* 367. A recent study has also suggested that childhood circumcision may alter a man's emotional development: Tiffany Leone-Vespa, *Understanding the Relationship Between Circumcision and Emotional Development in Young Boys: Measuring Aggressiveness And Emotional Expressiveness* (D Psy, Alliant International University, 2011).

from as low as 0.19% to as high as 55%.⁵⁵ A commonly cited figure for neonatal circumcision is 0.2 to 0.6%.⁵⁶ Other papers cite a significantly higher rate of between 2 and 10%.⁵⁷ Others split the divide suggesting a rate between 0.2 and 3.0%.⁵⁸ Studies suggest that a marginally higher complication rate can be expected for circumcision performed within medical facilities when it is performed outside of the neonatal period. Recent studies have suggested that significant complications are likely to occur at a rate between 1.5% and 3.6% for free hand circumcision performed on healthy adults by experienced operators in good conditions.⁵⁹ A recent systematic review of the literature on complication rates for circumcision performed upon minors suggested an average complication rate of 1.5%.⁶⁰

2.4.6 There are differences between the various methods of performing a circumcision as to both the rate of complication, and the type of complications that can occur. Evidence suggests that the likelihood of complications occurring decreases as the training, expertise, familiarity with the method utilised, and the resources of the circumciser increase.⁶¹ Studies have sometimes found substantially higher complication rates for out of hospital circumcisions performed by traditional circumcisers.⁶² There is literature which suggests Israeli *Mohelim* have a similar complication rate to trained physicians.⁶³

2.4.7 The possible complications of circumcision vary from the very rare and horrific (including death and penile amputation), to the significant but still uncommon (including unintended damage to

⁵⁵ For 55% see: Hawa Patel, 'The Problem of Routine Circumcision' (1966) 95 *Canadian Medical Association Journal* 576. For 0.19% see: Thomas Wiswell and Dietrich Geschke, 'Risks from Circumcision During the First Month of Life Compared With Those for Uncircumcised Boys' (1989) 83 *Pediatrics* 1011.

⁵⁶ For 0.2% see: William Gee and Julian Ansell, 'Neonatal Circumcision: A Ten-Year Overview: With Comparison of the Gomco Clamp and the Plastibell Device' (1976) 58 *Pediatrics* 824. For 0.3% see: Jacob Chaim et al, 'Circumcision in Israel: A One Year Multicentre Survey' (2005) 7 *Israel Medical Association Journal* 368. For 0.6% see: Kenneth Harkavy, 'The Circumcision Debate' (1987) 79 *Pediatrics* 649.

⁵⁷ Nigel Williams and Leela Kapilla, 'Complications of Circumcision' (1993) 80 *British Journal of Surgery* 1231; Ferda Senel, Mustafa Demirelli and Sehmuz Oztek, 'Minimally Invasive Circumcision with a Novel Plastic Clamp Technique: A Review of 7,500 Cases' (2010) 26 *Pediatric Surgery International* 739.

⁵⁸ Dimitri Christakis et al, 'A Trade-off Analysis of Routine Newborn Circumcision' (2000) 105 *Pediatrics* 246; Victor Palit et al, 'A Unique Service in UK Delivering Plastibell Circumcision: Review of 9-year Results' (2007) 23 *Pediatric Surgery International* 45; M Atikeler et al, 'Complications of Circumcision Performed Within and Outside the Hospital' (2005) 35 *International Urology and Nephrology* 97.

⁵⁹ Robert Bailey et al, 'Male Circumcision for HIV Prevention in Young Men in Kisumu, Kenya: A Randomised Controlled Trial' (2007) 369 *The Lancet* 643; Ronald Gray et al, 'Male Circumcision for HIV Prevention in Men in Rakai, Uganda: A Randomised Trial' (2007) 369 *The Lancet* 657; Bertran Auvert et al, 'Randomized, Controlled Intervention Trial of Male Circumcision for Reduction of HIV Infection Risk: The ANRS 1265 Trial' (2005) 2 *PloS Medicine* 1112.

⁶⁰ Helen Weiss, Natasha Larke, Daniel Halperin, Inon Schenker, 'Complications of Circumcision in Male Neonates, Infants and Children: A Systematic Review' (2010) 10 *BMC Urology* 2 <<http://www.biomedcentral.com/1471-2490/10/2>> at 20 October 2011.

⁶¹ See for example: Robert Bailey and Omar Egesah, *Assessment of Clinical and Traditional Male Circumcision Services in Bungoma District, Kenya: Complications Rates and Operational Needs* (2006); Valerian Kiggundu et al, 'The Number of Procedures Required to Achieve Optimal Competency with Male Circumcision: Findings from a Randomized Trial in Rakai, Uganda' (2009) 104 *British Journal of Urology* 529.

⁶² A study of Turkish circumcisers, for example, found that licensed physicians had a complication rate of 2.56%, whilst traditional circumcisers had an alarming complication rate of 85%: Atikeler et al, above n 58. A South African study found traditional circumcisers to have a complication rate of 35.3% compared to a complication rate of 17.7% for physicians: Robert Bailey, Omar Egesah and Stephanie Rosenberg, 'Male Circumcision for HIV Prevention: A Prospective Study of Complications in Clinical and Traditional Settings in Bungoma, Kenya' (2008) 86 *Bulletin of the World Health Organization* 669. For a discussion of several studies examining complication rates in Anglophone Africa which did not find traditional circumcision associated with a significantly higher complication rate see: Adamson Muula, et al, 'Prevalence of Complications of Male Circumcision in Anglophone Africa: A Systematic Review' (2007) 7 *BioMed Central Urology* 4 <<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1821037/>> at 20 October 2011. For a systematic review that found a higher complication rate for traditional rite of passage circumcision see: Weiss, Larke, Halperin and Schenker, above n 60.

⁶³ Yoram Mor, 'Circumcision in Israel: A One Year Multicentre Survey' (2005) 7 *Israel Medical Association Journal* 368.

the glans or the fraenum), to the more common and easily treatable (such as haemorrhaging, for the arrest of which there is a specific Medicare benefit).⁶⁴ Without wishing to settle on a particular complication rate for circumcision performed in Australia by trained individuals within safe circumstances, this report accepts that whilst devastating when they do occur, serious complications are extremely rare and that less serious but not inconsequential complications occur at a rate of at least 0.2% to 0.6%, but perhaps closer to a rate of 1.5% to 3.0%. It also accepts that circumcision performed in riskier circumstances may have a higher approximate complication rate.

The known and potential benefits of circumcision

2.4.8 Circumcision has socio-cultural significance to some individuals and communities in Australia and around the world. It is an integral part of several mainstream religious faiths. It can be an important initiatory rite. It also has significance as a community or family tradition for many individuals. A person's circumcision can be a highly valued part of their identity. More information on the socio-cultural significance of circumcision, including the views of respondents on this matter, is provided below in Part 5 (see discussion from 5.2.13).

2.4.9 Research has produced evidence to suggest that circumcision reduces the likelihood of healthy men contracting a wide array of different diseases and infections. Much of this research is subject to criticism, challenges to the significance of the prophylactic effect and conflicting research. The footnotes below reference some of this critical literature.⁶⁵ Some of the prophylactic effects claimed for circumcision are relatively well supported by scientific research. The evidence is more equivocal in other cases.

2.4.10 Research on the relative reduction in the likelihood of a circumcised man contracting a particular illness compared to an uncircumcised man is strong for human immunodeficiency virus (HIV) transmitted from a woman to a man via vaginal intercourse;⁶⁶ human papillomavirus (HPV) transmitted from a woman to a man via vaginal intercourse;⁶⁷ urinary tract infection (UTI);⁶⁸ and

⁶⁴ Medicare Australia, *Medicare Benefits Schedule Item No. 30663* (2011).

⁶⁵ For penile cancer see: Ronald Poland, 'The Question of Routine Neonatal Circumcision' (1990) 22 *The New England Journal of Medicine* 1312; American Cancer Society, *Detailed Guide: Penile Cancer* (2008). For HIV see: Lawrence Green et al, 'Male Circumcision and HIV Prevention: Insufficient Evidence and Neglected External Validity' (2010) 39 *American Journal of Preventive Medicine* 479; Gary Dowsett and Murray Couch, 'Male Circumcision and HIV Prevention: Is There Really Enough of the Right Kind of Evidence' (2007) 15 *Reproductive Health Matters* 33; Edward Mills and Nandi Siegfried, 'Cautious Optimism for New HIV/AIDS Prevention Strategies' (2006) 368 *The Lancet* 1236; John Talbott, 'Size Matters: The Number of Prostitutes and the Global HIV/AIDS Pandemic' (2007) 2 *PloS ONE* 543. For UTI's see: American Academy of Pediatrics, 'Circumcision Policy Statement' (1999) 103 *Pediatrics* 686; Jennifer Vines, 'Major Potential Confounder Not Addressed' (2006) 3 *PLoS Med* e63. For a critical response to an article promoting circumcision as a prophylactic measure against HIV in Australia by the head of the Paediatrics and Child Health Division of the Royal Australasian College of Physicians see: David Forbes, 'Letter to the Editor' (2011) 194 *Medical Journal of Australia* 97. For HPV: Bethany Weaver et al, 'Evaluation of Genital Sites and Sampling Techniques for Detection of Human Papillomavirus DNA in Men' (2004) 189 *Journal of Infectious Diseases* 677; Hai-Rim Shin et al, 'Prevalence and Determinants of Genital Infection With Papillomavirus, in Female and Male University Students in Busan, South Korea' (2004) 190 *Journal of Infectious Diseases* 468.

⁶⁶ Bailey et al, above n 59; Gray et al, above n 59; Auvert et al, above n 59.

⁶⁷ Xavier Castellsagué et al, 'Male Circumcision, Penile Human Papillomavirus Infection, and Cervical Cancer in Female Partners' (2002) 346 *New England Journal of Medicine* 1105; Bertran Auvert et al, 'Effect of Male Circumcision on the Prevalence of High-Risk Human Papillomavirus in Young Men: Results of a Randomized Controlled Trial Conducted in Orange Farm, South Africa' (2009) 199 *Journal of Infectious Diseases* 14.

⁶⁸ See for example: Davinder Singh-Grewal, Joseph Macdessi and Jonathan Craig, 'Circumcision for the Prevention of Urinary Tract Infection in Boys: A Systematic Review of Randomised Trials and Observational Studies' (2005) 90 *Archives of Disease in Childhood* 853. However, it should be noted that there is evidence in support of the proposition that undergoing a traditional Jewish circumcision significantly increases the chance of a child suffering from a UTI, see: Ori Toker et al, 'A Costly Covenant: Ritual Circumcision and Urinary Tract Infection' (2010) 12 *Israel Medical Association Journal* 262; Dario Prais, Rachel Shoov-Furman and Jacob Amir, 'Is Ritual Circumcision a Risk Factor for Neonatal Urinary Tract Infections?' (2009) 94 *Archives of Disease in Childhood* 191.

penile cancer.⁶⁹ Research also suggests that circumcision reduces the likelihood of male to female sexual transmission of HPV (which is linked to cervical cancer).⁷⁰

2.4.11 There is also some evidence that circumcision may reduce the likelihood of HIV being transmitted from a man to a woman via intercourse;⁷¹ the likelihood of HIV being transmitted from a man to a man via intercourse;⁷² the likelihood of syphilis being transmitted from a woman to a man via intercourse;⁷³ and the likelihood of herpes being transmitted from a woman to a man via intercourse.⁷⁴ However, the strength of the evidence contradicting these four purported prophylactic effects is such that a strong statement for the likelihood of a significant benefit in reduced relative risk, or even just neutrality for at least one of the purported effects,⁷⁵ cannot be made.⁷⁶

2.4.12 It is important to put circumcision's prophylactic effect into a meaningful context. The world's leading health policy organisations have cautioned against attributing too much significance to circumcision's prophylactic effect for those who reside in the developed world. They stress that circumcision only offers a relative reduction in risk and that circumcision does not offer complete protection against any disease or ailment. They also stress that circumcision's prophylactic effect is generally most established for ailments that are relatively minor and treatable (like most UTIs) or rare in Australia (like penile cancer, or female to male heterosexually transmitted HIV).

⁶⁹ Edgar Schoen et al, 'The Highly Protective Effect of Newborn Circumcision Against Invasive Penile Cancer' (2000) 105 *Pediatrics* 36; Natasha Larke, Sara Thomas, Isabel dos Santos Silva and Helen Weiss, 'Male Circumcision and Penile Cancer: A Systematic Review and Meta-Analysis' (2011) 22 *Cancer Causes and Control* 1097.

⁷⁰ Castellsagué et al, above n 67; Auvert et al, above n 67; Ronald Gray et al, 'Male Circumcision Decreases Acquisition and Increases Clearance of High-Risk Human Papillomavirus in HIV-Negative Men: A Randomized Trial in Rakai, Uganda' (2010) 201 *The Journal of Infectious Diseases* 1455.

⁷¹ For a study suggesting circumcision may have a slight, but not significant, effect of reducing the likelihood of a man passing HIV to a female sexual partner see: Jared Baeten et al, 'Male Circumcision and Risk of Male-to-Female HIV-1 Transmission: A Multinational Prospective Study in African HIV-1-Serodiscordant Couples' (2009) 24 *AIDS* 737.

⁷² The protective effect may be limited to insertive partners, for an overview of the relevant studies see: David Templeton, Gregorio Millett and Andrew Grulich, 'Male Circumcision to Reduce the Risk of HIV and Sexually Transmitted Infections Among Men Who Have Sex with Men' (2010) 23 *Current Opinion in Infectious Diseases* 45.

⁷³ See Helen Weiss et al, 'Male Circumcision and Risk of Syphilis, Chancroid, and Genital Herpes: A Systematic Review and Meta-Analysis' (2006) 82 *Sexually Transmitted Infections* 101.

⁷⁴ See for example: Aaron Tobian et al, 'Male Circumcision for the Prevention of HSV-2 and HPV Infections and Syphilis' (2009) 360 *The New England Journal of Medicine* 1298; Joelle Sobngwi-Tambekou et al, 'Effect of HSV-2 Serostatus on Acquisition of HIV by Young Men: Results of a Longitudinal Study in Orange Farm, South Africa' (2009) 199 *Journal of Infectious Diseases* 958.

⁷⁵ For a study suggesting circumcision may actually have a slight, but not significant, effect of increasing the likelihood of a man passing HIV to a female sexual partner see: Maria Wawer et al, 'Circumcision in HIV-infected Men and its Effect on HIV Transmission to Female Partners in Rakai, Uganda: A Randomized Controlled Trial' (2009) 374 *The Lancet* 229.

⁷⁶ For syphilis see: Aaron Tobian et al, above n 74. For sexual transmission of HIV from a man to a man see: David Templeton, Gregorio Millett and Andrew Grulich, above n 72; Gregorio Millett et al, 'Circumcision Status and Risk of HIV and Sexually Transmitted Infections Among Men Who Have Sex With Men: A Meta-analysis' (2008) 300 *Journal of the American Medical Association* 1674; Lisa McDaid, Helen Weiss and Graham Hart, 'Circumcision Among Men Who Have Sex With Men in Scotland: Limited Potential For HIV Prevention' (2010) 86 *Sexually Transmitted Infections* 404. For a study of man to man sexual transmission of HIV in Australia which found that circumcision did not significantly reduce the risk of HIV infection generally, but did find circumcision to be associated with a reduction in HIV incidence among men who reported a preference for the insertive role in man to man intercourse see: David Templeton et al, 'Circumcision and Risk of HIV Infection in Australian Homosexual Men' (2009) 23 *AIDS* 2347. For Herpes see: Fajie Xu et al, 'Prevalence of Circumcision and Herpes Simplex Virus Type 2 Infection in Men in the United States: The National Health and Nutrition Examination Survey (NHANES), 1999-2004' (2007) 34 *Sexually Transmitted Diseases* 479. For a meta-analysis that found the effect of circumcision to be of only borderline significance to herpes see: Helen Weiss et al, above n 73; Steven Reynolds et al, 'Male Circumcision and Risk of HIV-1 and other Sexually Transmitted Infections in India' (2004) 363 *Lancet* 1039. For several male to male sexually transmitted infections see: Damon Jameson, Connie Celum, Lisa Manhart, Timothy Menza and Matthew Golden, 'The Association Between Lack of Circumcision and HIV, HSV-2, and Other Sexually Transmitted Infections Among Men Who Have Sex With Men' (2010) 37 *Sexually Transmitted Diseases* 147.

2.4.13 The Royal Australian College of Physicians (RACP) is Australia's premier health policy making body. The RACP reviewed the evidence supporting circumcision's prophylactic effect in 2010 and concluded that 'the frequency of diseases modifiable by circumcision, the level of protection offered by circumcision and the complication rates of circumcision do not warrant routine infant circumcision in Australia and New Zealand.'⁷⁷

2.4.14 The position of Australia's health policy makers on circumcision has not changed significantly for decades.⁷⁸ No authoritative health policy maker in any jurisdiction with a frequency of relevant health conditions as low as that in Australia recommends circumcision as an individual or public health measure.⁷⁹ Some health policy makers in foreign jurisdictions with a comparable frequency of relevant conditions discourage parents from requesting circumcision for their child for prophylactic health reasons.⁸⁰ The Institute discusses the significance of routine circumcision's prophylactic effect against the sexual transmission of HIV from a female to a male below to illustrate the importance of contextualising a prophylactic effect in a particular population to portray the significance of a purported relative reduction of risk meaningfully.

2.4.15 Many respondents believed that circumcision's partial prophylactic effect against contracting HIV justified the circumcision of incapable minors as an individual or public health measure. Circumcision's claimed prophylactic effect against female to male sexual transmission of HIV is perhaps the most significant and substantiated prophylactic health benefit attributed to circumcision. In 2005, three large and widely acclaimed randomised controlled trials in Africa concluded that circumcised men had an average 42-44%, but perhaps as high as 66%, less relative risk of female to male sexual transmission of HIV (ie 1.12% of the total circumcised participants in the three trials contracted HIV, compared to 2.54% of the total uncircumcised participants in the three trials).⁸¹ This finding was welcomed in Africa, where there is an extremely high incidence of HIV acquisition from heterosexual sex.⁸² The World Health Organisation (WHO) began promoting adult

⁷⁷ Royal Australasian College of Physicians, above n 43, 5.

⁷⁸ For the last four authoritative Australian policy statements (all of which have refused to endorse or have suggested discouraging circumcision in Australia for health reasons), see *ibid*; Royal Australasian College of Physicians, *Position Statement on Circumcision* (2004); The Australian College of Paediatrics, *Position Statement* (1996); The Australian College of Paediatrics, *Official Statement on Circumcision* (1983).

⁷⁹ See in the United Kingdom for example: British Medical Association, *The Law and Ethics of Male Circumcision - Guidance for Doctors* (2006). See in Canada for example: Canadian Paediatric Society, *Circumcision: Information for Parents* (2004); Canadian Paediatric Society, *Neonatal Circumcision Revisited* (1996). See in the United States for example: American Academy of Pediatrics, above n 65. The Canadian and United States policies are under review at the time of writing. However, medical associations in Canada's provinces have passed their own policy statements in recent years, including, most recently, the College of Physicians and Surgeons of British Columbia, which support the position of the Canadian Paediatric Society. See for example: The College of Physicians and Surgeons of British Columbia, *Circumcision (Infant Male)* (2009).

⁸⁰ See for example: Royal Dutch Medical Association, *The Non-therapeutic Circumcision of Male Minors* (2010). Many surgeons and local health authorities in Sweden refuse to condone circumcision: 'Swedish Doctors Refuse to Circumcise Boys', *The Local* (online) 25 July 2009 <<http://www.thelocal.se/20900/20090725/>> at 20 October 2010. Professor Trond Markestad, the head of the Norwegian Medical Association's ethics committee, has also called for non-therapeutic circumcision to be phased out: Michael Sandelson, 'Top Norwegian Doctor Wants Circumcision Phased Out', *The Foreigner* (online) 9 August 2010 <<http://theforeigner.no/pages/news/top-norwegian-doctor-wants-circumcision-phased-out/>> at 20 October 2010.

⁸¹ Bailey et al, above n 59; Gray et al, above n 59; Auvert et al, above n 59; Cochrane HIV/AIDS Group, *Male Circumcision for Prevention of Heterosexual Acquisition of HIV in Men* (2009). Randomised controlled trials are often attributed significant merit by public health policy makers. However, some researchers have cautioned against excluding other evidence and uncritically accepting the superiority of randomised controlled trials in the formulation of public policy, see: Reidar Lie and Franklin Miller, 'What Counts as Reliable Evidence for Public Health Policy: The Case of Circumcision For Preventing HIV Infection' (2011) 11 *BMC Medical Research Methodology* 34 <<http://www.biomedcentral.com/1471-2288/11/34>> at 20 October 2011.

⁸² For a discussion of the high prevalence of HIV in Africa, particularly Southern Africa, and its possible causes see: Daniel Halperin and Helen Epstein, 'Why Is HIV Prevalence So Severe in Southern Africa? The Role of Multiple Concurrent Partnerships and Lack of Male Circumcision: Implications for AIDS Prevention' (2007) 8 *The Southern African Journal of HIV Medicine* 19; John Bongaarts et al, 'Has the HIV Epidemic Peaked?' (2008) 34 *Population and Development Review* 199.

consensual circumcision as part of a comprehensive strategy to combat the spread of HIV in Africa on the basis of this research in 2007.⁸³ Several respondents and some members of the Australian health community suggested that circumcision ought to be promoted to reduce the incidence of HIV acquisition in Australia.⁸⁴

2.4.16 No HIV/AIDS or medical policy organisation has endorsed the use of circumcision to combat the transmission of HIV in Australia. In 2009, the Australian Federation of AIDS Organisations (AFAO) concluded that the relevant scientific evidence is ‘limited, and potentially conflicting’, and ‘African data on circumcision is context-specific and cannot be extrapolated to the Australian epidemic.’⁸⁵ Many health researchers and policy makers have stressed the difference between the Australian HIV epidemic and the HIV epidemic in Africa.⁸⁶ HIV is not at all as commonly spread from women to men via vaginal sex in Australia as it is in Africa. The AFAO noted in its policy statement that the risk of an Australian born man acquiring HIV if he does not inject drugs or engage in sex with men is at an already remote likelihood of 0.02%.⁸⁷ A relative risk reduction of even 60% for female to male sexual transmission of HIV would not be nearly as significant in Australia as it would be in Africa.⁸⁸ This is because even a sizeable reduction of a remote risk is not as notable as even a small reduction of a substantial risk.

2.4.17 A significant and indiscriminate increase in circumcision in Australia would result in potentially hundreds of thousands of Australian men being circumcised even though there is only an extremely remote likelihood of them ever being exposed to HIV via heterosexual sex. Very few new HIV cases in Australia are the result of the transmission of the virus from heterosexual sex.⁸⁹ Only a small minority of new diagnoses of HIV in Australia are women.⁹⁰ A male is particularly unlikely to contract HIV in Tasmania from heterosexual sex. Tasmania has the lowest rate of HIV diagnoses in Australia.⁹¹ Approximately 17 (or less than 0.007%) of Tasmania’s more than 250,000 women have been diagnosed with HIV as of October 2010.⁹²

2.4.18 The incomplete protection offered by circumcision will also mean that the few men who are circumcised and unfortunate enough to come in contact with HIV via heterosexual sex in Australia will not necessarily avoid infection. Factors such as whether there is repeat exposure to the virus or

⁸³ World Health Organisation, *Press Release: WHO and UNAIDS Announce Recommendations from Expert Consultation on Male Circumcision for HIV Prevention* (2007).

⁸⁴ Alex Wodak and Brian Morris have been particularly vocal advocates of this position, see: Julia Medew, ‘Doctor Calls for Cut to Curb HIV’, *Sydney Morning Herald* (Sydney) 24 January 2009, 7; David Cooper, Alex Wodak and Brian Morris, ‘The Case for Boosting Infant Male Circumcision in the Face of Rising Heterosexual Transmission of HIV’ (2010) 193 *The Medical Journal of Australia* 318.

⁸⁵ Australian Federation of AIDS Organisations, *Male Circumcision and HIV* (2009) 1-2.

⁸⁶ See for example: John Murray, ‘Circumcision No Barrier to HIV’, *The Australian* (Australia) 14 March 2009, 13. For a discussion of the potential significance of circumcision as a health measure against HIV in the United States see: Patrick Sullivan et al, ‘Male Circumcision for Prevention of HIV Transmission: What the New Data Mean for HIV Prevention in the United States’ (2007) 4 *Plos Medicine* 1162.

⁸⁷ Australian Federation of AIDS Organisations, above n 85, 2.

⁸⁸ Studies have come to a similar conclusion on the significance of male circumcision as a stratagem to reduce HIV infections in the United Kingdom, see for example: Brian Rice, Valerie Delpech and Barry Evans, ‘Could Male Circumcision Reduce HIV Incidence in the UK?’ (2008) 9 *HIV Medicine* 329.

⁸⁹ ABS statistics suggest that only 13.5% of all reported diagnoses of HIV in Australia contracted the virus from heterosexual contact: Australian Bureau of Statistics, *2009-2010 Year Book Australia: No. 1301.0* (2011) 366.

⁹⁰ ABS statistics suggest that 91.3% of all reported diagnoses of HIV in Australia are men: *ibid.*

⁹¹ ABS statistics suggest that only 0.4% of all reported diagnoses in Australia occurred in Tasmania: Australian Bureau of Statistics, above n 89, 366.

⁹² The Institute gathered this approximate rate by comparing the reported incidences of HIV transmission to women with population statistics for the same period. See National Centre in HIV Epidemiology and Clinical Research, *Australian HIV Surveillance Report* (2010) 9; Australian Bureau of Statistics, *Australian Demographic Statistics: No. 3101* (2011) 15.

whether there is proper condom use when exposed will have greater significance than a man's circumcision status in whether HIV will be transmitted to those few men who do engage in sexual activities with a HIV infected female.⁹³

2.5 Circumcision and the law

2.5.1 Several respondents argued that circumcision ought not to be the law's business. These respondents doubted whether the law could have a necessary or desirable impact on the practice of circumcision in Tasmania. Law endeavours to guide and mediate how individuals interact with each other and with the world generally. Circumcision has contentious aspects. Its performance creates several opportunities for potentially undesirable interactions between people. Some of the potentially contentious aspects of circumcision include:

- The invasiveness of the procedure (involving blood loss, pain and the permanent removal of human genital tissue);
- The variety of unnecessarily harmful or risky ways it may be performed;
- The inherent risk of harmful complications;
- The potential for it to be performed upon a person who did not request the procedure;
- The potential for it to be performed upon a person unable to express an opinion on whether the procedure is in their interests;
- The potential for it to be performed upon a person when it is not in that person's interest;
- The potential for several parties with conflicting views to have an interest in a person's circumcision status;
- The possibility that it may be performed upon the basis of insufficient, inaccurate or insufficiently contextualised information.

2.5.2 These are the kinds of features that give rise to the disputes brought before Australian courts every day. This makes circumcision an appropriate matter for legal analysis.

2.5.3 However, it is important to note that circumcision has largely avoided legal scrutiny until recently. Circumcision predates Australian law and British common law by thousands of years. It has with but a few notable and infamous exceptions, largely escaped the attention of the law throughout history.⁹⁴ Circumcision did not attract critical legal consideration in Australia until after it became routinely performed in Australian hospitals.

2.5.4 There has never been significant legal action relating to, or legislative regulation of, male circumcision anywhere in Australia. There is no governing Circumcision Act. There has never been a circumcision test case. Uncertainties abound in the application of the general law to circumcision (see discussion below from 3.1.1). Australia's criminal and civil laws were not framed with male circumcision in mind. Even preliminary legal matters, such as the circumstances of a lawful authorisation, are clouded in uncertainty. Currently, those who perform, assist in, or instigate a

⁹³ For the effectiveness of Condom use see: Susan Weller and Karen Davis, *Condom Effectiveness in Reducing Heterosexual HIV Transmission: Cochrane Review* (2007).

⁹⁴ Jewish sources suggest that King Antiochus IV Epiphanes, who ruled Asia-minor, instituted a ban with severe punishments on circumcision around 175 to 165BCE. See, *Book of Maccabees* 1:46-67; 6:10. The Roman Emperor Hadrian may also have regulated circumcision around 130CE prior to the Bar Kokhba Revolt, see: Alfredo Rabello, 'The Ban on Circumcision as a Cause of the Bar Kokhba's Rebellion' (1995) 29 *Israel Law Review* 176. The ancient Roman legal text, *The Digest of Justinian* also contains a ban on circumcision in some circumstances, see: *The Digest of Justinian* 48:8:11.

circumcision or who promote or advertise their services as a circumciser do so without knowing the full extent to which they are exposed to civil and criminal liability.

2.5.5 Clarification of the law is yet to come from scholars. Overseas legal commentary has not considered the application of Australia's state and territory law to circumcision in detail. Australian legal commentary did not begin to address the application of Australia's laws to circumcision until the very end of the twentieth century. The 1993 Queensland Law Reform Commission's paper on male circumcision, the most often cited Australian legal commentary in the area, is now over eighteen years old, Queensland focused, and was never intended to be Australia's primary legal reference.⁹⁵ Les Haberfield's and David Richard's commentaries, published later in the 1990s, now themselves dated, were never intended to offer more than a cursory review of Australian law.⁹⁶

2.5.6 Some of the commentary and literature on circumcision also suffers from partiality and unsophisticated legal analysis. Many widely disseminated commentaries brush aside competing and equally open interpretations of law, significant evidential problems, key jurisdictional differences and detailed problems of law to create the appearance of certainty where it does not in fact exist. Furthermore, regulatory reform, either implicitly or explicitly, is usually the focus of legal commentary on circumcision. Very few legal commentaries are presented in a purely explanatory fashion devoid of normative argument. Most passionately argue for either a change in the current law, or, usually following some questionable interpretation of the existing law, a significant change in how the current law is enforced.⁹⁷

2.5.7 The Institute presents its analysis of the law regulating circumcision in the next Part (see discussion from 3.1.1). Proposals for reform are outlined in Part 6 (see discussion from 3.1.16.1.1).

⁹⁵ Queensland Law Reform Commission, *Circumcision of Male Infants*, Miscellaneous Paper No. 6 (1993).

⁹⁶ Les Haberfield, 'The Law and Male Circumcision in Australia: Medical, Legal and Cultural Issues' (1997) 23 *Monash University Law Review* 92; Les Haberfield, 'Informed Consent and Infant Male Circumcision' (Paper presented at the Australasian Law Teachers Association Conference, Sydney, 3 October 1997); Les Haberfield, 'Responding to Male Circumcision: Medical or Ritual' (1997) 4 *Journal of Law and Medicine* 379; David Richard, 'Male Circumcision: Medical or Ritual' (1996) 3 *Journal of Law and Medicine* 371.

⁹⁷ For an example of where both arguments are made in the alternative see: Christopher Price, *Male Circumcision: A Legal Affront* [Submission in response to the Law Commission for England and Wales Consultation Paper Number 139] (1996).

Part 3

The Current Law

3.1.1 This Part summarises the law that regulates circumcision in Tasmania. It succinctly reviews the relevant criminal, family and general private law covering the main legal responsibilities of circumcisers. It addresses the limitation of actions law that may prevent people injured by a circumcision from bringing an action after a certain period. It also considers the human rights law relevant to circumcision in Tasmania. The Institute's Issues Paper discusses the relevant law in more detail.⁹⁸ The Issues Paper also refers to matters of law not addressed below. A recently completed research thesis also discusses the law relevant to male circumcision in each of Australia's state and territories in detail.⁹⁹

3.2 Criminal responsibility

3.2.1 The Issues Paper considered the application of assault, wounding, grievous bodily harm and two child specific abuse and ill-treatment offences to the circumstances of a non-therapeutic circumcision in Tasmania (Issues Paper, Part 4).¹⁰⁰ The Issues Paper also considered the operation of the provisions in the Tasmanian *Criminal Code* that may provide protection from criminal prosecution for these offences.¹⁰¹ The Issues Paper found that:

- A circumcision performed with patient consent is almost certainly lawful in Tasmania;¹⁰² and,
- There is significant uncertainty as to whether a circumcision performed on an incapable minor with parental consent is lawful.¹⁰³

3.2.2 Circumcision is an assault and a wounding.¹⁰⁴ However, the *Tasmanian Criminal Code* presents considerable obstacles to proving an *unlawful* assault or wounding when a circumcision is performed upon an adult or capable minor who has provided their consent to the procedure.¹⁰⁵ The *Code* does not address when a parent's authorisation can make the infliction of non-therapeutic harm to a minor lawful. The *Code* does not establish a general power for parents to authorise the infliction of harm to their child. It is not clear whether the surgical operations provision in the *Code* will be interpreted to apply to any non-therapeutic circumcision performed upon a child with parental authorisation.¹⁰⁶ It is possible that a common law defence exists to allow a parent to authorise a circumcision on their incapable child in socially acceptable circumstances.¹⁰⁷ The law does not

⁹⁸ TLRI, above n 17.

⁹⁹ Warwick Marshall, *Circumcision in Australia: Reforming the Law* (LLM, University of Tasmania, 2011).

¹⁰⁰ *Criminal Code* (Tas) s 184; *Police Offences Act 1935* (Tas) s 35; *Criminal Code* (Tas) s 172; *Criminal Code* (Tas) s 178(1); *Children, Young Persons and Their Families Act 1997* (Tas) s 91.

¹⁰¹ *Criminal Code* (Tas) s 182(4); *Criminal Code* (Tas) s 51; *Criminal Code* (Tas) s 53; *Criminal Code Act 1924* (Tas) s 8.

¹⁰² TLRI, above n 17, 4.3.7-12.

¹⁰³ Ibid 4.3.13-15, 4.5.1-7.

¹⁰⁴ Ibid 4.2.

¹⁰⁵ *Criminal Code* (Tas) s 182(4), *Criminal Code* (Tas) s 53.

¹⁰⁶ *Criminal Code* (Tas) s 51; TLRI, above n 17, 4.5.1-7.

¹⁰⁷ TLRI, above n 17, 4.3.14.

provide guidelines on when a procedure is socially acceptable. It is also not clear whether reference may be made to this potential defence under the *Code*.¹⁰⁸

3.2.3 Without clarity in the application of the criminal law, those who perform, assist in or instigate a circumcision do so without knowing the extent to which they are protected from criminal liability.

3.3 Authorisation: family law

3.3.1 The Issues Paper reviewed the law governing the lawful authorisation of a circumcision in Tasmania.¹⁰⁹ It noted that a person who performs a circumcision without being properly authorised to do so may be liable in tort for battery. The Issues Paper found that:

- A child is capable of lawfully authorising their own circumcision ‘when he or she achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed’;¹¹⁰
- The consent of an adult or a capable minor is sufficient to lawfully authorise their circumcision;¹¹¹
- There is some uncertainty as to whether a parent may authorise the performance of a circumcision on their son without first acquiring court approval for the procedure;¹¹²
- It is likely that joint parental authorisation will generally be sufficient to lawfully authorise the circumcision of an incapable minor.¹¹³ However, it is also likely that court authorisation will be required for the circumcision of an incapable minor in at least some circumstances.¹¹⁴

3.3.2 Parents must seek court authorisation for the performance of ‘special medical procedures’ on their children.¹¹⁵ A procedure is a ‘special medical procedure’ if it is non-therapeutic and there is a significant risk of the parent making a wrong decision as to what is in the best interests of the child.¹¹⁶ It is not clear whether a non-therapeutic circumcision is a special medical procedure. Current practice and non-binding judicial comments suggest that joint parental agreement will ordinarily be sufficient to authorise a child’s circumcision without court authorisation.¹¹⁷ However, it is likely that court authorisation will be required when there is a heightened risk of a parent making a wrong decision as to whether a circumcision is in their child’s best interests. Relevant circumstances might include:

¹⁰⁸ The Code’s common law defence savings provision may potentially allow reference to the common law defence: *Criminal Code Act 1924* (Tas) s 8; TLRI, above n 17, 4.3.15.

¹⁰⁹ TLRI, above n 17, Part 5.

¹¹⁰ *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 237-238 (Mason CJ, Dawson, Toohey, Gaudron JJ).

¹¹¹ TLRI, above n 17, 5.1.1-2.

¹¹² *Ibid* 5.4.

¹¹³ Justice Strickland in the Family Court of Australia has previously suggested in *obiter dictum* that: ‘Circumcision is a procedure which parents are able to consent to as an aspect of their parental responsibility unlike, for example, sterilisation for non-therapeutic purposes’. See, *K v H* [2003] FamCA 1364 (Unreported, Strickland J, 19 December 2003) [25].

¹¹⁴ TLRI, above n 17, 5.4.

¹¹⁵ *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 249 (Mason CJ, Dawson, Toohey and Gaudron JJ).

¹¹⁶ *Ibid*.

¹¹⁷ *Ibid*, 297 (Deane J); *Re J* (Child’s Religious Upbringing and Circumcision) [2000] 1 FCR 307; *Re S* [2005] 1 FLR 236.

- the presence of parental disagreement;
- a greater than normal risk of complications occurring; and,
- the potential likelihood of the child being able to make their own competent decision on the matter in the future when there is no significant cost to delaying the decision.

3.3.3 Judicially mandated court authorisation for special medical procedures has also proved to be difficult to enforce. It has proved to be a problem in the context of sterilisation.¹¹⁸ This is also likely to be the case for circumcision. Parents who want their child circumcised and who are able to find a circumciser willing to perform the procedure may be willing to proceed without first seeking court authorisation. Parents and circumcisers have an incentive to avoid the process of court authorisation because circumcision is a relatively simple, cheap and quick operation that can be performed without attracting significant attention. The procedure may be able to be explained away by physicians as being therapeutic in nature. The process of acquiring court authorisation is also disproportionately costly and time consuming compared to the cost and speed of performing an unauthorised circumcision.

3.4 Private law responsibilities of circumcisers

3.4.1 The Issues Paper discusses the main obligations that a circumciser has at each stage of the provision of their service.¹¹⁹ The stages addressed are: the promotion of the service; the provision of information; the confirmation of a proper authorisation for the service; the performance of the service; and the provision of post-service care. The Issues Paper also considers several areas of law, including: the commercial law concept of ‘misleading or deceptive conduct’ in relation to the promotion of a circumciser’s service; the information that a circumciser must provide to the party who authorises a circumcision to avoid liability for battery and negligence; and negligence law as it applies during and after the performance of the procedure. The Issues Paper discusses several responsibilities circumcisers have in the provision of their service. These responsibilities are outlined below:

- Circumcisers must not engage in conduct that is misleading or deceptive when they promote their service.¹²⁰ In particular, they ought to refrain from using exaggerated, unsubstantiated or contested claims in their promotions.¹²¹
- Circumcisers only need to provide information in broad terms about the nature of the procedure proposed to the person who lawfully authorises a circumcision in order to avoid liability for battery.¹²²
- Circumcisers must warn a person authorising a circumcision of the risks of the procedure the person would be likely to attach significance to so as to avoid an action in negligence. Furthermore, although there is uncertainty in the law, circumcisers may

¹¹⁸ Only seventeen sterilisations of mentally disabled women were authorised by courts (or legislatively established tribunals) in the first five years of the special medical procedure regime. However, apparently hundreds of sterilisations, perhaps even over a thousand, most of which ought to have been authorised by a court or tribunal, were performed during this five year period. See: Susan Brady and Sonia Grover, *The Sterilisation of Girls and Young Women in Australia - A Legal, Medical and Social Context* (1997) 127. The Federal Minister for Health suggested that at least 202 sterilisations were performed in this time, see: Danny Sandor, ‘Sterilisation and Special Medical Procedures on Children and Young People - Blunt Instrument? Bad Medicine?’ in Ian Freckelton and Kerry Petersen (eds), *Controversies in Health Law* (1999) 19.

¹¹⁹ TLRI, above n 17, Part 6.

¹²⁰ *Trade Practices Act 1974* (Cth) s 52(1); *Fair Trading Act 1990* (Tas) s 14.

¹²¹ TLRI, above n 17, 6.2.

¹²² *Ibid* 6.3.1.

need to provide the person authorising the procedure with all of the information which might influence the person's decision to have the circumcision performed.¹²³

- Circumcisers have a duty to ensure that a lawful authorisation has been provided for the circumcision that they perform.¹²⁴
- Circumcisers who are 'professionals' (a term which would include medical professionals, but not necessarily any other circumciser) must perform circumcision in a manner that is widely accepted in Australia by peer professional opinion as competent professional practice.¹²⁵ All non-professional circumcisers have a legal obligation to perform the procedure with reasonable care and skill.¹²⁶
- Circumcisers have a duty to a patient after they have circumcised them, and sometimes after the patient has moved on. The full scope of the post care duty, and whether it will apply to non-medical circumcisers, is uncertain. A duty arises whenever a circumciser has a reason to believe the health of the person circumcised requires further attention after the procedure is performed.¹²⁷

3.4.2 The relevant private law largely operates to good effect. However, the current regime does not set clear standards of practice for circumcisers in many significant areas. There is no qualification or accreditation process for circumcisers in Tasmania. Circumcisers with different backgrounds, training, and accreditation may be expected to meet different standards of care.

3.4.3 Negligence law also has an unusual application to circumcision performed upon incapable minors. Parental consent is not a substitute for a person's own consent in private law. Incapable minors are in a vulnerable position. They are subject to the reasoning and choices of their parents. Parents may consider inappropriate matters in their decision making. They may subject their child to unnecessary risks. Case law has previously identified religious conviction and social influence as factors in the negligent failure to warn cases which may move people away from 'doing what a reasonable person in [their] situation might be expected to have done.'¹²⁸

3.5 The use and sale of excised foreskin

3.5.1 There is a market for excised foreskin. The Issues Paper considers the lawfulness of the use and sale of excised foreskin.¹²⁹ The Issues Paper found that:

- The law does not provide extensive guidance on the lawfulness of the use and sale of excised foreskin;¹³⁰
- It seems that excised human tissue can be legal property in at least some circumstances;
- Tasmanian law prohibits a person from entering into an arrangement to sell or supply human tissue (which would include an excised foreskin) for valuable consideration,¹³¹ unless 'the tissue has been subjected to processing or treatment and the sale or supply

¹²³ Ibid 6.3.3-6.

¹²⁴ Ibid 6.4.

¹²⁵ Ibid 6.5.2.

¹²⁶ Ibid 6.5.1.

¹²⁷ Ibid 6.6.

¹²⁸ See for example: *Smith v Barking, Havering and Brentwood Health Authority* (1994) 5 Med LR 285, 289 (Hutchison J).

¹²⁹ TLRI, above n 17, 7.4.25-26.

¹³⁰ Ibid 7.4.25-26.

¹³¹ *Human Tissues Act 1985* (Tas) s 27(1).

is made for use, in accordance with the directions of a medical practitioner, for therapeutic or scientific purposes’;¹³²

- The law does not provide authoritative guidance on whether, or when, an excised foreskin is likely to be considered property, or on the probable attribution of rights that may attach to an excised foreskin if it is property.¹³³

3.5.2 The law governing the use and sale of excised foreskin is unclear. Consequently, it is difficult to determine whether the law strikes a sufficient balance between the person circumcised benefiting from any use or sale of their foreskin; the person using the foreskin benefiting from the use or sale of the foreskin; the availability of the tissue for benevolent purposes (such as research); and a multitude of other potential ethical considerations.

3.6 Limitation of actions

3.6.1 Legislation limits the time in which an action for personal injury may be brought in Tasmania. People injured as adults may not bring an action three years after the date of discoverability (ie when the plaintiff knows or ought to have known that the injury had occurred, was attributable to the conduct of the defendant and was sufficiently significant to warrant bringing proceedings);¹³⁴ or, twelve years after the date of the act alleged to have caused the personal injury to the plaintiff.¹³⁵ The twelve-year cut off for bringing actions may be extended up to three years commencing on the date of discoverability if it is in the interests of justice to do so.¹³⁶

3.6.2 The law limiting when an action may be brought for an injury inflicted on a minor is complex. The limitation period for a personal injury inflicted on a minor is not ordinarily suspended whilst the child is in the custody of its parents. Generally, the law makes it the responsibility of the parent of the minor (or the minor themselves) to bring an action within the period applicable to adults. However, a person injured as a minor may bring an action within three years of when they attain 25 years of age if the intended defendant of the action is a parent, or the intended defendant is in a close relationship with the minor’s parents.¹³⁷ A circumciser will not necessarily be deemed to be ‘in a close relationship’ with the parents of a minor they circumcise. Consequently, this law may operate unfairly in some circumstances to limit when an adult harmed as an incapable minor may bring an action for a circumcision.

3.7 Human rights

3.7.1 The Issues Paper considers the domestic and international human rights law obligations relevant to circumcision.¹³⁸ The Issues Paper found that:

¹³² *Human Tissues Act 1985* (Tas) s 27(2).

¹³³ TLRI, above n 17, 7.4.25-26.

¹³⁴ *Limitation Act 1974* (Tas) s 5A(3)(a).

¹³⁵ *Ibid* s 5A(3)(b).

¹³⁶ *Ibid* s 5A(5).

¹³⁷ *Ibid* s 26(7). A close relationship is a relationship where: either parent may be directly or indirectly influenced by the intended defendant not to bring an action on behalf of the minor against the intended defendant; or the minor may be unwilling to disclose to the parent the conduct or events on which the action may be based. See, *Limitation Act 1974* (Tas) s 26(8).

¹³⁸ TLRI, above n 17, Part 7.

- The relevant human rights instruments do not expressly address male circumcision;
- International human rights instruments are not binding in Tasmania unless they are implemented by domestic law;¹³⁹
- The human rights obligations in force in Tasmania are too nondescript, potentially conflicting and unenforceable to meaningfully regulate an issue as complex and divisive as male circumcision;
- The limitation provisions in the various domestic and international human rights instruments seem to allow considerable scope for lawmakers to determine how the relevant rights apply to circumcision;
- The relevant human rights instruments are best regarded as one of several influences on reform as opposed to an area of law which should itself be a focus of reform.

3.7.2 It is not clear whether human rights law condones or condemns all or only some circumcisions performed on incapable minors. The relevant law does not provide clear and authoritative guidance on when or whether the practice and regulation of circumcision in Tasmania is in accordance with human rights. There is considerable dispute as to how several of the rights apply to the practice and regulation of circumcision. The relevant rights include: the right to freedom of religion; the right to take part in cultural life; the right to be free from torture and all other cruel, degrading, inhumane, or ill treatment; the right to life and health; the right to private life, family life, autonomy and development; the right to security; the right to equality and non-discrimination; and the right to be free from economic exploitation. There is even greater dispute over how the various and sometimes conflicting rights relevant to circumcision interact. However, a few guiding general principles can be drawn out from the relevant international law:

- efforts should generally be made to minimise harm and potential risk if circumcision is to be performed;¹⁴⁰
- circumcision should only be performed upon incapable minors if there are good reasons for its performance;¹⁴¹
- adults and capable minors should be left free to be circumcised if they so desire it;¹⁴² and,
- the law governing male circumcision should be enshrined in clear and accessible domestic law.¹⁴³

¹³⁹ Ibid 7.2.

¹⁴⁰ Ibid 7.4.10-13.

¹⁴¹ Ibid 7.4.7-9.

¹⁴² Ibid 7.4.14-17.

¹⁴³ Ibid 7.2.1.

Part 4

Legislation in Foreign Jurisdictions

4.1.1 This Part analyses the legislation in foreign jurisdictions that specifically addresses male circumcision. Federally, only South Africa (and three of its provinces) and Sweden have enacted detailed legislation directed to the regulation of circumcision. The following two sections focus upon the law in these jurisdictions. Consideration is then given to the legislation in several states of the United States of America that refer to circumcision. The final section compares Tasmania's experience with circumcision and its regulation with that of the jurisdictions discussed.

4.2 South Africa

4.2.1 Both federal and provincial legislation regulates circumcision in South Africa. The legislation in South Africa and three of its provinces – Eastern Cape, Limpopo and Free State – reflects the fact that male circumcision is practised in a traditional manner in South Africa. These circumcisions are usually performed in 'circumcision schools'. Initiates of these schools, typically in their mid to late teens to their early twenties, are separated from their families for a period of many days, and even weeks.¹⁴⁴ They are circumcised and led through initiatory ceremonies and lessons. The schools often operate at hygiene, pain relief, ethical, surgical and post-surgery care standards far below that which could be expected from a modern medical facility. There is a disturbingly high mortality rate for those who are circumcised in South Africa's circumcision schools.¹⁴⁵ Dozens of young men die annually because of the practices at these schools. The incidence rate of other horrific complications is also alarmingly high.¹⁴⁶

4.2.2 South Africa's legislators designed the legislation regulating circumcision to ensure a basic level of both health care and of autonomy in the decision making leading to a circumcision. Federal law in South Africa offers legal protection from circumcision to minors who are chronically ill, disabled or who are mature enough to express their wish not to be circumcised.¹⁴⁷ The relevant law makes respecting, protecting, promoting and fulfilling the best interests of the child a requirement in any decision involving a child brought before a court.¹⁴⁸ It also requires children over the age of 16 to provide their own consent to the procedure, and for the child to be given proper counselling prior to the performance of the procedure.¹⁴⁹ Federal law only allows children under the age of 16 to be circumcised for religious reasons, or on the recommendation of a medical practitioner for medical

¹⁴⁴ Initiates are not circumcised at a set age. Circumcisions may still be performed upon children under the age of 10 see: I P Crowley and K M Kesner, 'Community Perception of Traditional Circumcision in a Sub-Region of the Transkei, Eastern Cape, South Africa' (2005) 47 *BMC Public Health* 58, 58.

¹⁴⁵ For the official circumcision complication statistics of the Eastern Cape of South Africa see: Eastern Cape Department of Health, *Summary of Seasonal Statistics Since June 2001: Mutilations and Deaths From 2001 to 2006* (2006) <<http://www.ecdoh.gov.za/uploads/files/120707095947.pdf>> at 20 October 2010; Eastern Cape Department of Health, *Statistics for June: 2007* (2007) <<http://www.ecdoh.gov.za/uploads/files/281107142127.pdf>> at 20 October 2010.

¹⁴⁶ At least 70 men lost their genitals due to practices in circumcision schools between 1995 and 2005, see: Peter Apps, 'Deaths Prompt Action on Circumcision Schools', *Independent Online* (online) 28 July 2005 <http://www.iol.co.za/index.php?set_id=1&click_id=&art_id=qw1119962881870B265> at 20 October 2010. Other sources suggest that as many as 200 men lost their genitals between 2001 and 2006, see: Karl Peltzer, 'Traditional Male Circumcision Remains a Dangerous Business' (2008) 6 *Human Sciences Research Council Review* 5, 5.

¹⁴⁷ *Children's Act 2005* (RSA) ss 11(3), 12(10).

¹⁴⁸ *Ibid* ss 6(2)(a), 9.

¹⁴⁹ *Ibid* s 12(9).

reasons.¹⁵⁰ It is not entirely clear whether prophylactic reasons are medical reasons for the purpose of the Act.

4.2.3 The provinces of Eastern Cape,¹⁵¹ Limpopo¹⁵² and Free State¹⁵³ have enacted further and more detailed regulatory legislation. The relevant statutes limit who may perform circumcision; limit where circumcisions may be performed; allow the state to regulate how, and under what conditions circumcision is performed; require the people who are to be circumcised to pass a medical examination prior to their circumcision; set limits on how old a person must be before they can be circumcised; require consent of a parent or guardian for minors who are under a specific age; and allow for inspections of circumcisers' equipment, buildings, and their patients by a government official.

4.2.4 It is difficult to judge the effectiveness of the regulatory regime in South Africa. Eastern Cape officials have made many arrests, convicted illegal circumcision school practitioners, and have closed several illegal schools in each year of the law's operation.¹⁵⁴ Government monitoring of circumcision schools has seen hundreds of young men — over 500 men in 2005 alone — harmed in illegal circumcision schools receive medical treatment in hospitals.¹⁵⁵ However, statistics suggest that the law has been unable to effect significant change in Eastern Cape. Commentary has suggested that the legal regime will not be successful in reducing the mortality rate without greater support from circumcisers, parents and the initiates themselves.¹⁵⁶ Commentary has also suggested that tension between traditional leaders and the state is a primary cause of the lack of positive results from the government intervention.¹⁵⁷ There were more than 100 deaths and 200 penis amputations between 2001 and 2006 in Eastern Cape.¹⁵⁸ At least eighty circumcision school participants died (including two suicides) in 2009 in what an Eastern Cape health spokesperson described as a 'disastrous year'.¹⁵⁹ A high rate of initiate deaths, school closures and arrests also occurred in 2010.¹⁶⁰

4.3 Sweden

4.3.1 Circumcision is not a traditional practice in Sweden. Circumcision was limited almost exclusively to Sweden's small Jewish community until relatively recently. Circumcision was for centuries of little legal or political concern in Sweden. However, an influx of Muslim immigrants and

¹⁵⁰ *Children's Act 2005* (RSA) s 12(8).

¹⁵¹ *Application of Health Standards in Traditional Circumcision Act 2001* (Eastern Cape).

¹⁵² *Northern Province Circumcision Schools Act 1996* (Limpopo).

¹⁵³ *Free State Initiation School Health Act 2004* (Free State).

¹⁵⁴ Louise Vincent, 'Cutting Tradition: The Political Regulation of Traditional Circumcision Rites in South Africa's Liberal Democratic Order' (2008) 34 *Journal of Southern African Studies* 77, 81.

¹⁵⁵ Louise Vincent, *Male Circumcision Policy, Practices and Services in the Eastern Cape Province of South Africa: Case Study* (2008) 41.

¹⁵⁶ See for example: Ortrun Meissner and David Buso, 'Traditional Male Circumcision in the Eastern Cape – Scourge or Blessing?' (2007) 97 *Southern Africa Medical Journal* 371, 373.

¹⁵⁷ For a discussion see: Thembela Kepe, '"Secrets" that kill: Crisis, Custodianship and Responsibility in Ritual Male Circumcision in the Eastern Cape Province, South Africa' (2010) 70 *Social Science and Medicine* 729.

¹⁵⁸ Karl Peltzer, 'Traditional Male Circumcision Remains A Dangerous Business' (2008) 6 *Human Sciences Research Council Review* 5, 5.

¹⁵⁹ Robin McKie, 'Thousands Face Agony or Death After Zulu King's Circumcision Decree', *The Observer* (online) 17 January 2010 <<http://www.guardian.co.uk/world/2010/jan/17/circumcision-zulu-south-africa-hiv>> at 20 October 2010.

¹⁶⁰ 'South African Government Concerned about Spike in Deaths After Traditional Circumcision Rites', *Fox News* (online) 29 June 2010 <<http://www.foxnews.com/world/2010/06/29/south-african-government-concerned-spike-deaths-traditional-circumcision-rites/#ixzz1dGjDUOJ6>> at 20 October 2011; 'Eastern Cape Circumcision Death Toll Rises to 20', *Mail and Guardian Online* (South Africa) 17 June 2010 <<http://mg.co.za/article/2010-06-17-eastern-cape-circumcision-death-toll-rises-to-20>> at 20 October 2011.

a high profile death attributed to a religious circumcision led Sweden's Parliament to pass circumcision legislation.¹⁶¹ Sweden's Government, concerned about an increase in unregulated 'kitchen table' circumcisions, did not favour a proposal to ban the circumcision of minors.¹⁶² An approach which focused upon improving health and ethical standards of circumcisers and which limited when and by whom certain circumcisions can be performed was preferred.¹⁶³ Sweden's Parliament opted to enact a comprehensive legislative regulatory scheme.¹⁶⁴ The law was passed with criticism locally and internationally by religious circumcising groups.¹⁶⁵

4.3.2 The law in Sweden applies to any operation, on a boy younger than 18, that fully or partially removes the foreskin, and that is not for the purpose of the prevention, investigation or treatment of medical disease and injury.¹⁶⁶ The *Act* requires the circumciser to provide information about the procedure to the minor to be circumcised if the minor is capable of understanding it.¹⁶⁷ It also requires the circumciser to determine the minor's views about the procedure and prohibits the performance of a circumcision against the will of the minor to be circumcised.¹⁶⁸

4.3.3 A parent or guardian may request, or consent to, the performance of a circumcision on their child after they and their child have been informed of the implications of the procedure.¹⁶⁹ If custody of the boy is shared, both parents must be provided with the relevant information, and both must consent to the procedure.¹⁷⁰ Parties required to consent to the procedure are to be informed about the right of the child to refuse the procedure if they are competent to do so; how the surgery will be performed; the pain the circumcised person may experience; the risks and potential complications of the procedure; the requirements of after procedure care; and the irreversible nature of the procedure.¹⁷¹

4.3.4 The procedure itself must be performed with anaesthetic administered by a registered nurse or medical practitioner under hygienic conditions in a manner that is in the best interests of the child.¹⁷² Only registered medical practitioners may circumcise boys over two months of age.¹⁷³ A boy under the age of two months may be circumcised by either a registered medical practitioner or a person holding a special circumcision licence.¹⁷⁴ A person applying for a licence must establish that they have the knowledge and experience to perform circumcisions at a standard equivalent to a circumciser in the health service.¹⁷⁵ The practice of a licensed circumciser is subject to government monitoring, inspection and information collection. A licensed circumciser must maintain sterile and hygienic operating conditions, and must only perform the procedure when a registered health

¹⁶¹ 'Sweden Restricts Circumcisions', *BBC News* (online) 1 October 2001 <<http://news.bbc.co.uk/2/hi/europe/1572483.stm>> at 20 October 2010.

¹⁶² Socialstyrelsen, *Omskärrelse av pojkar: Rapport av ett regeringsuppdrag (S2005/7490/SK)* (2007) 12.

¹⁶³ *Ibid.*

¹⁶⁴ *Circumcision of Boys Act 2001:499* (Sweden).

¹⁶⁵ Canadian Children's Rights Council, *Jews Protest Swedish Circumcision Restriction* (2001) <http://www.canadiancrrc.com/Newspaper_Articles/Jews_Protest_Swedish_Circumcision_Restriction_07JUN01.aspx> at 20 October 2010.

¹⁶⁶ *Circumcision of Boys Act 2001:499* (Sweden) s 1; *The Health and Medical Services Act 1982:763* (Sweden) s 1.

¹⁶⁷ *Circumcision of Boys Act 2001:499* (Sweden) s 3.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ Socialstyrelsen, above n 162, 12.

¹⁷² *Circumcision of Boys Act 2001:499* (Sweden) s 4.

¹⁷³ *Ibid* s 5.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid* s 6.

professional (nurse or doctor) provides anaesthetic to the child.¹⁷⁶ A circumcision licence can be revoked immediately if a person holding a licence performs a circumcision in an incompetent or improper manner, or is otherwise unable to carry out circumcisions to the required standard.¹⁷⁷ Illegal circumcisions are punishable by a fine or by imprisonment for up to six months.¹⁷⁸

4.3.5 The National Board of Health and Welfare reviewed the regulatory law in 2007 and concluded that it had been ineffective in significantly reducing unsafe circumcision practices.¹⁷⁹ The review found that the law was proving difficult to enforce, and that circumcisers had been able to act in contravention of the law without attracting the attention of the relevant authorities. The Board suspected that as many as one to two thousand illegal circumcisions were still being performed annually since the law came into force.¹⁸⁰ The Board, whilst not criticising the aims or the requirements of the legislation generally, argued that not enough was being done to entice or encourage people to choose legal circumcision over illegal circumcision. The Board recommended that there be better dissemination of information to the public about the regulatory regime.¹⁸¹ It also recommended Sweden's Parliament and Government take measures to make legal circumcision more accessible to those who may be likely to utilise illegal circumcisers.¹⁸²

4.3.6 Only five circumcisers, four Jewish and one Muslim, were granted circumcision licences in the first six years of the law's operation.¹⁸³ However, it seems that the sole Muslim ritual circumciser has since had his licence revoked and was wanted by police investigating the performance of a series of negligent circumcisions in 2009.¹⁸⁴ None of the 16 cases of potentially illegal circumcisions investigated in the first six years of the law's operation resulted in a conviction.¹⁸⁵ Only one resulted in a warning.¹⁸⁶ Several investigations were ended prematurely because the circumciser involved could not be identified.¹⁸⁷ However, a man was successfully prosecuted in 2010 for circumcising boys without a licence.¹⁸⁸ This marks the first successful prosecution for an illegal circumcision since the enactment of the circumcision law in 2001.

4.4 The United States

4.4.1 The majority of male babies born in the United States over the last 100 years were circumcised.¹⁸⁹ Incomplete reporting makes it impossible to know the precise prevalence of circumcision in the United States. It seems likely that at least 70% of the men born in the United

¹⁷⁶ Ibid s 4.

¹⁷⁷ Ibid s 7.

¹⁷⁸ Ibid s 9.

¹⁷⁹ Socialstyrelsen, above n 162, 25.

¹⁸⁰ Ibid 16.

¹⁸¹ Ibid 26.

¹⁸² Ibid.

¹⁸³ Socialstyrelsen, above n 162, 15.

¹⁸⁴ 'Two Boys Seriously Injured After Illegal Circumcision', *The Local* (online) 19 April 2009 <<http://www.thelocal.se/18950/20090419/>> at 20 October 2010.

¹⁸⁵ Socialstyrelsen, above n 162, 23-24.

¹⁸⁶ Ibid 24.

¹⁸⁷ Ibid.

¹⁸⁸ 'Man Jailed for Illegally Circumcising Young Boys', *The Local* (online) 14 December 2010 <<http://www.thelocal.se/30836/20101214/>> at 3 May 2011.

¹⁸⁹ For a general discussion see: David Gollaher, *Circumcision: A History of the World's Most Controversial Surgery* (Basic Books, 2000).

States in the middle of the twentieth century were circumcised.¹⁹⁰ It is also likely that the United States has maintained a newborn circumcision rate of somewhere between 33 and 80% in the twenty first century.¹⁹¹ The Centre for Disease Control in the United States recently conducted research suggesting that circumcision rates declined in the last decade but probably still remained above 50%.¹⁹²

4.4.2 The United States has not enacted a comprehensive circumcision regulatory regime. However, male circumcision is specifically referred to in provisions of state legislation in Delaware, Idaho, Illinois, Minnesota, Montana, and Wisconsin. These provisions do not create positive regulatory obligations. Instead, they establish a legislative exemption for some circumcisers from a certain type of regulatory law. For example, the provisions in Montana,¹⁹³ Wisconsin,¹⁹⁴ Delaware,¹⁹⁵ and Minnesota,¹⁹⁶ establish an exemption for some circumcisers from the application of medical practice laws. The provisions in Idaho,¹⁹⁷ and Illinois,¹⁹⁸ establish an exemption for some circumcisers from the application of the law in these states which criminalises ritualised abuse.

4.4.3 It is of note that California has recently passed a bill prohibiting local governments in California from banning male circumcision. This law was passed in response to a ballot measure proposed in San Francisco to prohibit the performance of circumcision on minors in that city.¹⁹⁹

¹⁹⁰ Edward Laumann, Christopher Masi and Ezra Zuckerman, 'Circumcision in the United States: Prevalence, Prophylactic Effects, and Sexual Practice' (1997) 277 *Journal of the American Medical Association* 1052.

¹⁹¹ For studies suggesting a newborn circumcision rate of less than 70%, and as low as 33% see: Roni Rabin, 'Steep Drop Seen in Circumcisions in U.S.', *New York Times* (online) 16 August 2010 <<http://www.nytimes.com/2010/08/17/health/research/17circ.html>> at 20 October 2010; Arleen Leibowitz, Katherine Desmond and Thomas Belin, 'Determinants and Policy Implications of Male Circumcision in the United States' (2009) 99 *American Journal of Public Health* 138; Caleb Nelson et al, 'The Increasing Incidence of Newborn Circumcision: Data from the Nationwide Inpatient Sample' (2005) 173 *Journal of Urology* 978. For studies suggesting a rate of over 70% see: Diana Cheng, Lee Hurt and Isabelle Horon, 'Neonatal Circumcision in Maryland: A Comparison of Hospital Discharge and Maternal Postpartum Survey Data' (2008) 4 *Journal of Pediatric Urology* 448; Segal Quayle, Douglas Coplen and Paul Austin, 'The Effect of Health Care Coverage on Circumcision Rates Among Newborns' (2003) 170 *Journal of Urology* 1533.

¹⁹² Xinjian Zhang, Sanjyot Shinde, Peter H Kilmarx, Robert T Chen, Shanna Cox, Lee Warner, Maria Owings, Charbel El Bcheraoui, 'Trends in In-Hospital Newborn Male Circumcision — United States, 1999-2010' (2011) 60 *Morbidity and Mortality Weekly Report* 1167.

¹⁹³ *Montana Code Annotated* § 37-3-103(1)(g) (2009) (Montana) creates an exemption for 'ritual circumcisions by rabbis.'

¹⁹⁴ *Wisconsin Statute* § 448.03(2)(g) (2009) (Wisconsin) creates an exemption for: 'Ritual circumcision by a rabbi.'

¹⁹⁵ *Delaware Code* § 24-1703(10) (2009) (Delaware) creates an exemption for: 'The practice of ritual circumcision performed pursuant to the requirements or tenets of a religion; provided, however, that a person certified and registered to practice medicine in this State certifies in writing to the Board that, in the person's opinion, the circumcision practitioner has sufficient knowledge and competence to perform a ritual circumcision according to accepted medical standards.'

¹⁹⁶ *Minnesota Statute* § 147.09(10) (2009) (Minnesota) creates an exemption for: 'A person who practices ritual circumcision pursuant to the requirements or tenets of any established religion.'

¹⁹⁷ *Idaho Code* § 18-1506A(2)(b) (2009) (Idaho) creates an exemption for: 'The lawful medical practice of circumcision or any ceremony related thereto.'

¹⁹⁸ *Illinois Compiled Statutes* § 720-5/12-32(c), 720-5/12-33(b)(2) (Illinois) creates an exemption for: 'The lawful medical practice of circumcision or any ceremony related thereto'; and, in regard to the special offence of ritual mutilation: 'the practice of male circumcision or a ceremony, rite, initiation, observance, or performance related thereto'.

¹⁹⁹ Benny Evangelista, 'New Circumcision Law Blocks Local Bans', *San Francisco Chronicle* (San Francisco) 3 October 2011, C2.

4.5 Concluding remarks

4.5.1 The legislation in each jurisdiction discussed is a direct product of the particular jurisdiction's historical experience with circumcision. Dozens of boys are seriously harmed by their participation in circumcision schools every year in South Africa. South Africa's law is bound by pragmatic considerations and a respect for the traditional initiation process. It sets standards, some of which are significantly lower than those which might be expected in South Africa's health services, to raise the very low hygiene, surgical and ethical standards in the many traditional circumcision schools operating in its jurisdiction.

4.5.2 Sweden is a country largely unaccustomed to circumcision. It passed reform on the basis of concerns that new immigrants would bring an influx of unsafe circumcision practices with them to Sweden. The legislation in Sweden attempts to: monitor ritual circumcisers; ensure that ritual circumcisers operate at a standard equivalent to circumcisers in the health community; and, encourage people seeking ritual circumcisions to utilise a health service. Sweden's Government has acknowledged both problems with the law's enforcement, and the need for more effective public education on circumcision and the regulatory regime.²⁰⁰

4.5.3 Circumcision is widely accepted as a social, cultural and religious practice in the United States, and, a majority of American men are circumcised. Most circumcisions in the United States are performed by health care professionals, and the United States has relatively little experience with poorly performed ritual circumcisions. Lawmakers in the United States have not seen the need to regulate circumcision specifically. This may be because it is viewed as a common, beneficial, minor and sometimes religiously mandated procedure. This may explain why United States lawmakers have given little attention to circumcision except when exempting circumcisers from the application of other laws.

4.5.4 Tasmania's experience with circumcision differs dramatically from South Africa's experience. Tasmania does not have, like South Africa and the Northern Territory in Australia, a significant circumcising community which performs circumcisions at hygiene, surgical and ethical standards often significantly lower than the standards which could be expected from circumcisers within the health community.²⁰¹ The vast majority of circumcisions performed in Tasmania are performed in safe and pain managed circumstances. Consequently, South Africa's regulatory approach does not appear immediately relevant to Tasmania.

4.5.5 Tasmania shares some significant similarities with Sweden. Tasmania has a very low circumcision rate and very little experience with circumcisers operating at poor health standards. However, the prevalence of poorly performed circumcision is not nearly as likely to increase in Tasmania in the near future as it may in Sweden. Consequently, Tasmania does not seem to need to tailor its regulation to address an increase in poorly performed circumcisions at the current time.

4.5.6 Circumcision in Tasmania is also, as in the United States, widely perceived to be a relatively minor and safe procedure, and was once the norm for newborn babies. However, Tasmania's experience with circumcision differs from the experience of the United States. Circumcision is no longer commonly performed on newborns in Tasmania. Tasmania's public health services do not offer the procedure. Circumcision is increasingly being understood to be, and to be treated as an unnecessary and potentially harmful procedure. Tasmania has the lowest newborn circumcising rate in Australia.²⁰²

²⁰⁰ Socialstyrelsen, above n 162, 26.

²⁰¹ For an overview of Indigenous Australian circumcising practices see: Marshall, above n 99, 23.

²⁰² For a discussion of Tasmanian and Australian circumcision rates see discussion from 2.3.2.

4.5.7 None of the foreign regimes considered above is completely transplantable to Tasmania. Each was developed within a particular social and historical context. Tasmania must approach any review of its law in the light of its own social and historical experience with circumcision. It is also noteworthy that jurisdictions as different as South Africa and Sweden have each experienced enforcement problems in relation to their respective regulatory regimes. Tasmania must be careful to opt for a regime which is grounded on pragmatism and concerned with enforceability if its regulation is to be effective.

Part 5

Perspectives on Circumcision

5.1.1 This Part provides an overview of the submissions made on the merit of circumcision and identifies the principles that inform the approach to reform adopted by the Institute. Autonomy, paternalism and non-paternalistic benefit are the primary considerations that shape attitudes to circumcision. Respondents who emphasise the first of these oppose circumcision of incapable minors. Those who favour either of the latter two considerations approve of circumcising incapable minors in at least some circumstances. These three considerations are discussed at the beginning of this Part. The Part then moves on to examine the difficulties associated with reform in this area, outline the foundational premises accepted by the Institute and present the principles underlying the Institute's approach to the proposed reforms.

5.2 Respondents' views

5.2.1 Three overarching considerations appear to shape attitudes to circumcision: autonomy, paternalism, and non-paternalistic benefit. Respondents argued their position using these paradigms. The following discussion reviews the history, guiding principles and justifications for each of these considerations.

Autonomy

'I was circumcised when I was a baby, which I very much resent.' (21)²⁰³

5.2.2 Seventy-six respondents (60%) expressed their opposition to the circumcision of incapable minors. These respondents opposed circumcision because of the value they placed on autonomy. Autonomy is a philosophical concept with a long historical tradition. The term comes from the Ancient Greek *autonomia* from *autonomos* meaning self-law or self-rule. The concept is at the core of liberal democratic thinking and is, as political philosopher Joseph Raz recognises, 'the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.'²⁰⁴

5.2.3 Autonomy focuses upon the choice making of individuals.²⁰⁵ It refers to a person's freedom to both determine and live according to their conception of the good life. The concept attributes a kind of ownership and right to a person over their own body. Respondents Frank McGinness, The Secular Medical Forum, Aubrey Taylor, The Doctors Opposing Circumcision, James Chegwiddden and David Jackson used proprietary terminology when expressing their views on autonomy in their submissions opposing the circumcision of incapable minors:

No one owns another person least of all their genitals to do with as they wish. (73)

Members of the SMF [Secular Medical Forum] are of the opinion that the boy's body including his penis belongs to the boy himself and not to his parents or culture. As an adult he may make an informed decision about circumcision- before that time, the onus is on his

²⁰³ Anonymous.

²⁰⁴ Joseph Raz, *Freedom of Morality* (Oxford University Press, 1986) 369.

²⁰⁵ Wim Dekkers, 'Routine (non-religious) Neonatal Circumcision and Bodily Integrity: A Transatlantic Dialogue' (2009) 19 *Kennedy Institute of Ethics Journal* 125, 134.

guardians and medical attendants to ensure that he reaches adulthood having been protected from unnecessary harm and interventions. (77)

If a child does not have a right to his body, then the man he will become is also denied it. Remove a part of a child's body and the man he becomes will be missing that part as well, and was never given the freedom to choose. How can a man truly own his own body if he does not own it from the start? (80)

We believe that granting consent for non-therapeutic circumcision of a child, for several reasons, exceeds the natural rights of a parent, infringes upon the rights of the child as a separate person, and thus is undeserving of legal protection. (110)

Almost all Australian adults assume as a basic right their control over their body, their right to make their own decisions about it, and the law's protection against anyone attempting to act in violation of that right. So one would expect that, when it comes to children, we would make sure we preserve their rights to such an important good as well, allowing violation of that right in emergencies only. And generally, that is what we do - permitting surgical intervention on children in cases of emergency only. In one area, though, that principle is silently dropped. That area is non-therapeutic male circumcision. (1)

A body part may have different importance for some people rather than others. For instance, some people might think that a body part is just a piece of skin. While to others it is very important. For them, the foreskin may be essential or very important, if only for aesthetic reasons. Only a person can decide what value a body part has to them. Only that person who lives in the body should make decisions about amputations of medically normal body parts when they are old enough to decide for themselves. This right should be protected by law by prohibiting such body parts from being altered when they are infants or children. (37)

5.2.4 Respondents prioritising autonomy argued for measures to allow individuals to choose options 'themselves wherever possible rather than being pre-empted in their decisions...'.²⁰⁶ Doctors Opposing Circumcision argued that parental decision making ought to be directed to maximising children's developmental options:

The Late social philosopher Joel Feinberg noted that children are ethically entitled to an 'open future' that is, one in which all options for the future development of the child as an adult-soon-to-be are retained. This applies not only to affection, food, shelter, and education, but to freedom from irrevocable parental choices of which circumcision is a permanent, palpable, (and fully unnecessary), example. (110)

5.2.5 James Chegidden noted in his submission that the approach of maximising decision making opportunities accords with the suggestion in the English Court of Appeal in *Re A Minors (Conjoined Twins: Separation)* that: 'Every human being's right to life carries with it, as an intrinsic part of it, rights of bodily integrity and autonomy – the right to have one's own body whole and intact and (upon reaching an age of understanding) to take decisions about one's body.'²⁰⁷

5.2.6 The persuasive force of autonomy rests upon three concerns regarding the potential for resentment to arise within a person interfered with by another. The concerns relate to resentment arising from one or more of the denial of choice; living with the negative consequences of a procedure the person affected did not authorise; and, suffering from the insufficiently informed substitute decision making of another. Several respondents identified and discussed these concerns. Respondents opposing circumcision generally expressed more than one of the concerns and often conflated them within their submissions. Chegidden concisely identified the concerns at the heart of autonomy:

²⁰⁶ Rebecca Mussell, 'The Development of Professional Guidelines on the Law and Ethics of Male Circumcision' (2004) 30 *Journal of Medical Ethics* 254, 254.

²⁰⁷ *Re A (Minors) (Conjoined Twins: Separation)* [2000] Lloyd's Rep Med 425, 494 (Walker LJ).

It does not require deep analysis to conclude that non-therapeutic, forcible infant circumcision gravely infringes the value of bodily integrity. Forced child circumcision totally ignores the individual's right to decide what happens with his own body; it destroys bodily integrity forever; it permanently deprives the person of the ability to make his own decisions about all parts of his body and its future; it wholly overrides the right to make one's own analysis of how one's body is to be used, and the risks and benefits with which he/she is comfortable; it shows contempt for the capacity for self-determination of the human. It engraves coercion and bodily violation on the victim forever. Because of the strong connection between physical integrity and psychological integrity, that violation can, like rape, have serious psychological effects beyond the physical. (1)

5.2.7 The first concern identified by the Institute is denial of choice. This entails a desire to prevent children from maturing into adults who resent the loss of the opportunity to decide their own circumcision status. Several respondents expressed this concern:²⁰⁸

Circumcision removes and reduces choice. A male child who arrives at adulthood intact has a choice as to whether to continue in his natural state, or opt for having a circumcised penis. The circumcised child has no such choice. He cannot return to a natural state. As such he is radically without the choice that the intact male has. The decision to circumcise a child thus reduces the adult potential of the human being, not only his life as a child. The unethical nature of that deliberate restriction is highlighted in the Australasian Association of Paediatric Surgeons' position paper on circumcision, which records that "in particular, we are opposed to male children being subjected to a procedure, which had they been old enough to consider the advantages and disadvantages, may well have opted to reject the operation and retain their prepuce" [Footnote omitted]. (1)

Circumcision was a decision that was made for me—a decision made by others upon my body, before I was granted any right to an opinion in the matter. It was a violation of the right to control my own body. Had the decision been mine to make, the outcome would have been different. I know many circumcised men who feel the exact same way. (65)

Newborns cannot express a view on whether they should be circumcised. Circumcising children removes their choice for all time. (62)

Even though my parents did not know better and at that time (1992) made what they believed to be the 'right decision', I still have not truly forgiven them, or the doctor who circumcised me. How can I? Where was the protection parents are supposed to give their children? It is my body, MY FORESKIN. My parents did not have the right to decide to have my foreskin cut off, nor did the doctor have the right to remove a completely natural human structure from my penis. Where was my say in this? How come I was not consulted with the decision to cut off the most erogenous part of my penis? It is insanity! I feel robbed. I am robbed. Even till today, I experience nightmares about the experience. I have countless times, woken up in the middle of the night, perspiring, crying alone in bed. The worst part was that I did not have a say in any of this, and neither did I want to get circumcised in the first place. It was not my choice. (15)

I was circumcised in infancy, and it has been the source of lifelong injury and sexual dysfunction. I wish I had been given the choice to remain intact, as a healthy, normal human being. (51)

To circumcise in infancy completely disregards the potential future feelings of the patient (the infant, to whom the doctor owes every responsibility, not the parents) on the matter. I resent being circumcised against my will, I can't say that a single good thing has ever come from it to me, personally speaking. It has been a source of envy and shame. Not the least of the adverse psychological effects is feeling inferior to those lucky enough to have escaped this barbarism. I do not find the aesthetics attractive or particularly satisfying, I prefer the natural look, which was stripped from me without my consent at birth. I do not like seeing the brown ring circling my penis, it is a scar that serves as an embarrassing reminder of

²⁰⁸ Respondents James Chegwiddden, John Kyper, Steven Svoboda, K, Todd Downing, Bob Bob and Joseph Duncan.

what happened. Nothing more to me. I am amazed that this kind of practice persists even to this very day. (57)

If I had the choice, I would have said no!!! By restricting circumcision, you would simply be giving men a choice they are all too often denied, and unfairly, denied. (81)

5.2.8 The second concern identified in the submissions is about living with the negative consequences of a procedure the person affected did not authorise. The following comments from respondents express this concern:²⁰⁹

The infant victim has no say in the matter, and is forced to live with the adverse physical, reduced sexual, and psychological/ptsd consequences for the whole remainder of his life. (62)

I am writing to say that I think the practice of routine non-therapeutic infant male circumcision should be made illegal. I feel that the rights of an infant who cannot make an informed choice should be protected. The many arguments put forward as excuses to perpetuate the practice cannot replace the choice that should be made by the individual involved who will have to accept the consequences. (61)

I was circumcised at birth. It is not something I would have chosen for myself. It is something against the religious beliefs I have developed over the course of my life, and it has harmed me in a permanent way... I urge you to legally ban circumcision until the age of 18 for all men. No one should have to live with the problems I have had to endure in my life. (81)

The circumcision of a neo-natal baby boy takes only minutes. The pain caused by the removal of between 25-50% of his penile skin lasts days. Its effects, however, last a lifetime. Those effects cannot be reversed and the person who has to live with the effects of circumcision is the child circumcised – the one person whose consent to the operation was not sought ... As such, child circumcision is altering not just a child's life, but an adult's life – since the adult circumcised as a child cannot go back to reverse the procedure. This puts the need for consent on a much higher plane. A decision that affects a child while a child but which he can take steps to reverse later (decisions about diet, which educational path, which sports to play, where to live and so on) are still impositions on a child's freedom, but can and often are thrown off and forgotten in adulthood. The same is not true for circumcision because it binds an adult without any possibility of return to his natural state. (1)

As a 52 year old male who has suffered a lifetime of despair and depression because of the botched circumcision that I received in the first days of my life, I find that most of the concerns and points of argument today about this issue are off base... The reality is that there is a rate or percentage of undesirable outcomes with this surgery. I don't know what it is, nobody knows what it is, because there has never been a survey or study about it. One would hope that it is on the order of 1 in a million or millions. I think it is more likely that it is several in a 100, even as many as 1 in 10. Regardless of just what the ratio is, the question that needs to be asked is would I want to be that one, would I want my son to be that one? (40)

I hope that within my lifetime, we can see an end to the mutilation of those that are unable to say no. If even one man is unhappy about having his genitalia being altered without his consent, is it ethical to continue this physically and psychologically harmful practice. (48)

Thank you for the opportunity to respond to this paper in an open and truthful manner. As a victim of a routine circumcision as an infant, I feel strongly that my rights as an individual have been violated. As an adult male, circumcision is not a procedure I would have sought out as I believe that the foreskin has been designed and built to perform a role

²⁰⁹ Steven Svoboda, Paul Brandes, Joseph Duncan, James Chegwidien, Michael Syberg, Phil Hurst, Wilfred Ascott, Robert Darby, Mr Restorer, Andy Fabre, Richard Warren and Anonymous.

in the normal mechanical and sensory function of my penis. My mutilated body though carries the scar of a decision to which I could not consent. Whilst my parents, who authorised the procedure, may have thought that they were doing the right thing, were in fact violating my most private organ, my rights, my humanity and my trust in them to act in my best interest. The medical practitioner who performed the procedure, over and above violating my basic rights, also violates the basic and underlying principle of his Hippocratic Oath – “First, do NO harm”. The state has failed me in not enacting legislation that protects my body and my penis to the same extent that my sisters’ bodies are protected from genital mutilation. It is my belief that the rights of every child must be protected by law, that circumcision must be criminalised, and that any offender must be punished for their action. (49)

The operation is performed in a coercive environment, by adults on minors who have not given (and by definition cannot give) consent; there is no knowing whether, when they reach maturity, they will be resentful, indifferent or pleased about what was done to them at a time when they lacked the capacity to express an opinion or the power to resist. (79)

My father is a Muslim, hence my circumcision status. I do not share my father’s faith, and as such am somewhat aggrieved at being unnecessarily circumcised. (82)

Circumcision has had a profoundly negative effect on my life and I ask you to not allow the same to happen to any child in Tasmania. (122)

My late father had a hang up about uncircumcised penises and had his three sons (me included) circumcised WITHOUT OUR KNOWLEDGE when we were only a few days old. I would NEVER have consented to the procedure, and I have been psychologically damaged by it throughout my life. Some guys prefer to be ‘cut’ and it’s an option they can choose when they’re old enough. What I have NEVER been able to choose is to be ‘uncut’ because once it’s removed there’s no way to repair the damage, so I am stuck with a decision that was never mine and I could never have agreed to. I think it’s totally inappropriate to do this to a child. (97)

However, a long number of years of sexual frustration and embarrassment could have been prevented if I had been left alone. (54)

5.2.9 The third concern is poorly informed substitute decision making. It focuses on resentment in people who have to live with a decision that they did not make personally as a mature person in possession of all the information that may have influenced their decision. Several respondents made comments representative of this concern:²¹⁰

Some of the chief losses of circumcision can only be appreciated after the dawn of sexual awareness. A principal complaint surrounding the circumcised state concerns a lack of, or decreased, sensitivity of the penis in sexual activity as a result of being deprived of a foreskin. That is a loss which can only be realised from puberty onwards, and can thus only be personally appreciated and evaluated by persons who have reached that stage in their life. Persons circumcised before puberty will be left unable to form a view on the role and function of their foreskin. Only a person left intact until adulthood can properly weigh the advantages or disadvantages of having his foreskin cut off. (1)

The genitals do not finish developing until the end of puberty. Thus, no male can knowledgeably give informed consent for the removal of part of his genitals until he is fully mature and has had enough firsthand experience to understand their natural sensations and functions. Very few adults ever choose a non-therapeutic circumcision (paradoxically, this is often used as a reason to do it before he can consent). (26)

The infant penis is a bud of an organ. It is a sexual organ not a urinary one, (urination is a secondary function and can be accomplished without the penis) as such it is not developed in infancy and there is simply no way of determining just how much foreskin one may be able

²¹⁰ James Chegwiddden, Hugh Young, Michael Syberg and Dan Strandjord.

to comfortably live without. This is the main problem that no one seems to want to accept. (40)

The genitals do not finish developing until the end of puberty. Puberty actually lasts longer than the most commonly recognised outward signs of sexual maturity are recognisable. Thus, an “older child” cannot knowledgeably provide “informed consent” until after the genitals are fully mature and one must have enough “hands-on experience” to understand the natural sensations/functions of their genitals. Very few adults ever choose a non-therapeutic circumcision. (33)

5.2.10 Many respondents supporting autonomy were willing to acknowledge there were valid concerns in favour of circumcision. However, these respondents prioritised autonomy over these concerns:²¹¹

To suggest that “health benefits”, even if proved, are sufficient to force another person to submit to circumcision amount to denying an individual the right to make his own assessment of how his body is to be used. They subvert the true order by placing the person’s right to bodily integrity lower in priority than the circumciser’s and the parents’ perceived right to experiment – on others - with health theories. Balanced in light of the absolute and not relative value of bodily integrity, “health reasons” (or indeed any external justification), even if they were scientifically proved, are not arguments justifying forced circumcision by one person of another person. They are arguments which, at best, may be raised to suggest to an individual sovereign owner of his or her body what he or she may like to do with his or her own body should he or she so decide that. They cannot trump the absolute value of bodily integrity and permit that individual’s will to be overridden, because that would be subjecting an absolute (bodily integrity) to what the law considers only a relative good (possible but not probable avoidance of risk to health). When those two goods clash, the law favours the absolute of bodily integrity: *Airedale NHS Trust v Bland* [1993] AC 789 per Lord Keith at 857. Not to do so would tear too deeply at the individual’s sense of autonomy, self-image and rights of self-determination. (1)

Supposed medical benefits such as HIV prevention should not justify performing the operation on a child as he will not benefit until he is old enough to make an informed decision about the matter. A doctor should not be able to perform a cosmetic operation on an infant or child with only the parents’ consent. (74)

Obviously, religion does not give persons carte blanche to do whatever they wish to other human beings, including their own children. Clearly, religion cannot justify the committing of any act. We cannot justify cutting off nipples, ears, or other body parts from little boys, with religion, nor can we justify cutting off parts of a boy’s penis, with such either. We live in a democracy, not a theocracy, where the personal rights of the individual are paramount. Religion, cannot permit violent acts to be committed, and does not supersede the rights of the individual. ... Circumcision of children should not be made legal because it is religious, or not be made illegal because it is religious, but it should be made illegal because it is a violation of the rights of another human being an act of assault and mutilation of another person. Making circumcision of children illegal protects the right of the individual to decide whether or not they want circumcision, and protects the individual’s religious freedom. (37)

A non-therapeutic circumcision should only be lawful on a person who has reached the age of majority. Considerations such as parental consent, cultural or religious tradition or the safety of methods employed are all outweighed by the child’s right to sexual completeness, and their right to a choice in whether they undergo sexual modification. (76)

What health requirements would be necessary to validate non-therapeutic circumcision? None that I can think of! Health requirements are not the issue. The baby has an inherent

²¹¹ James Chegwidan, Anonymous, David Jackson, Owen Jolly, 98, Robert Darby, Michael Syberg, Aubrey Taylor and Anonymous.

right to bodily integrity, and that is the issue... A child's right to his own body trumps the personal parental preferences, cultural norms, or religious biases for circumcision. (98)

In this paper I think I make a strong case that the so-called public health arguments for routine circumcision (i.e. circumcision of normal male infants or boys at the behest of adults) are feeble and cannot override the ethical and legal arguments in favour of the autonomy of the child as an individual and citizen. (79)

No one should ever be able to consent to the mutilation of another's body for aesthetic or cultural reasons. (40)

Imagine someone cutting off the last phalange of their child's pinky finger. Not a bloody scene in the kitchen, but a sanitary surgery done by a professional. Now assume that the digit in question happened to be perfectly healthy. No cancer, no gangrene. Would it matter the parent's reason? Does the child's right to its fingers change if the reason for removing it is socially acceptable, or simply acceptable to the parent? No, of course not. Does it matter that the child *needs* the finger for function? Let's change the finger to an ear lobe; something somewhat non-functional. Now is a reason even needed? Perhaps the parent would say that the child was bad, and this was the punishment. Perhaps the parent read online that removing the earlobe would improve the child's hearing. Maybe there are even research papers that prove it to be so. Does the child's human right to its healthy earlobe disappear in the presence of a popular opinion or even some possibility of a benefit? NO. If it isn't good enough to justify removing choice from an adult, it doesn't justify removing choice from an adult when they are a child. No doctor would do it, and if someone *did* do it, they would be found guilty of assault. Why? Because nothing removes, diminishes, sets aside, or compromises the human right [to autonomy]. Not age, not sex, not other's social freedoms, not opinions, not anything. (80)

With respect to the view that criminal law against male circumcision would 'alienate' members of the community, it is first and foremost a cowardly one. The children involved are defenceless and unable to speak for themselves, and cultural practice is simply not a valid pretext for assault on a child. Secondly, it is a dangerous view; Tasmania is presently relatively culturally homogeneous, so the presence of cultures practising FGM, scarification, foot binding, and similar practices is rare. However, I think the institute should consider that providing a precedent of 'cultural exception' for male circumcision would undermine the very strong case against allowing these other cultural practices. I feel the institute should also note cases on mainland Australia where some members of Aboriginal communities have used culture as a pretext for sexually assaulting children in other ways. I also feel the institute should consider the implications of discriminatory protection; are we to be a society that protects children only if female, Atheist, Christian, Hindi or Sikh, and abandon the male Moslem or Jewish child for fear of offending someone? (34)

5.2.11 Most proponents of the autonomy paradigm left little room for compromise. Robert Darby quoted newspaper commentator Andrew Sullivan at length to express why he was willing to prioritise autonomy over the main paternalistic and non-paternalistic arguments for the circumcision of incapable minors. The quotation is largely representative of the views of strong proponents of autonomy:²¹²

The argument against the circumcision of infants is not that it might not conceivably have some future health-benefits. The argument against infant male genital mutilation is that it is the permanent, irreversible disfigurement of a person's body *without his consent*. Unless such a move is necessary to protect a child's life or essential health, it seems to me that it is a grotesque violation of a person's right to control his own body. It matters not a jot why it is done. It simply should not be done - until the boy or man is able to give his informed consent. And to perform such an operation to protect the health of others is an even more

²¹² Citing: Andrew Sullivan, 'The Mutilation of Children', *The Daily Dish* (online) 12 April 2002 at <http://sullivanarchives.theatlantic.com/index.php.dish_inc-archives.2002_04_01_dish_archive.html> at 20 October 2011.

unthinkable violation. It's treating an individual entirely as a means rather than as an end. I'm at a loss why a culture such as ours that goes to great lengths to protect the dignity and safety of children (and rightly so) should look so blithely on this barbaric relic. Yes, I know there are religious justifications for it. But even so, religions should not be given ethical *carte blanche* over the bodies of children. Would we condone a religious ceremony that, say, permanently mutilated a child's ear? Or tongue? Or scarred their body irreversibly? Of course not. So why do we barely object when people mutilate a child's sexual organ? (79)

5.2.12 The following discussion outlines the perspective of people who prioritise the paternalistic paradigm.

Paternalism

It would be absurd for the law to intervene to prevent a parent from doing the very best for their child ... (6).²¹³

5.2.13 Thirty-nine respondents (31%) argued in support of circumcising at least some incapable minors. Each of these respondents at least partially justified their position by arguing that childhood circumcision can be in a person's best interests. Each respondent argued that one or more of the potential benefits of circumcision justified the performance of the procedure on at least some incapable children. Proponents of paternalistic circumcision can differ on two fronts. First, proponents can differ on how they assess a child's best interests. Some argue that circumcision is justified whenever there is a persuasive argument for the belief that a man would appreciate their childhood circumcision once they mature.²¹⁴ Others argue that childhood circumcision can be justified as an exercise of a parent's responsibility or right to shape their child's interests, beliefs and development in a way that the parents consider beneficial to the child. Respondents including Brian Morris, James Menzies, Vikki Bullock, Roger and Anne Brewer, Terry Russell, William Power, Mike Haywood, John Dodson and Bruce Wilkinson referred to these justifications in their submissions:

It would be absurd for the law to intervene to prevent a parent from doing the very best for their child, especially when the legal argument contravenes the overwhelming medical and public health evidence. (6)

I respect his [the Commissioner for Children Paul Mason] view but there must also be respect for those with an opposing view. The many of us who have chosen to circumcise our sons have done so firmly believing that this will benefit them throughout their life. This is our informed view. (67)

Parents are not harming their child, they are making informed decisions for the long term wellbeing of their sons. (35)

Parents have a right to choose on behalf of their child for personal, hygiene, cultural or religious reasons, that's what parents do! The child is their responsibility! (10)

Such an action [banning circumcision] would violate the rights of parents to make decisions for the benefit of their children. (44)

It's time to give parents and doctors the opportunity to make their own informed decision as we should have in a free and democratic society. (108)

²¹³ Brian Morris.

²¹⁴ Gerald Dworkin, 'Paternalism' in Rolf Sartorius (ed), *Paternalism* (University of Minnesota Press, 1984) 19, 28. The philosopher Gerald Dworkin terms this approach the 'future orientated consent' approach. Dworkin described the approach as a wager. A wager that the child in question will eventually come to recognise the wisdom of the decision made on their behalf.

Parents should therefore have no difficulty explaining to their offspring later in life why they requested the operation. In retrospect I felt that I was a victim of neglect in not having been circumcised as an infant. Please do not let the law get in the way of a good thing. (78)

The public benefits are manifest. Although I understand your concerns with consent, they must not be the only driver for giving boys a better life generally. Parental education and choice should be paramount. (22)

I have known men in my life who have sincerely regretted that they were not circumcised as a child. I have never met a man who had any regrets that the procedure had been done ... Infants cannot speak for themselves. If they could, this debate would be unnecessary, and I believe circumcision would be uniform. (105)

5.2.14 Proponents of paternalistic circumcision also differed on the benefits they considered as sufficient to justify circumcising incapable children. The following discussion outlines the four most commonly utilised justifications for the circumcision of incapable minors: religion, secular social tradition, rite of passage tradition and prophylactic health.

Religion

The Muslim community in Australia regards the practice of male circumcision as an integral part of the free exercise and practice of the Islamic faith. (46)²¹⁵

5.2.15 Circumcision is significant in Judaism, Christianity and Islam (the Abrahamic faiths). Religion was the primary motivator behind approximately two thirds of the circumcisions performed on men alive today.²¹⁶ Eighteen respondents (14%) expressly stated their support for legal protection for religiously motivated circumcision. The precise number of people in Australia who support religiously motivated circumcision is unknown. The 2006 census identified 88,826 Jews, 340,390 Muslims, 19,928 Coptic Orthodox Christians and 1,705 Ethiopian Orthodox Christians in Australia.²¹⁷ The same census identified 236 Jews, 1,050 Muslims, 27 Coptic Orthodox Christians and 37 Ethiopian Orthodox Christians in Tasmania.²¹⁸ These four faiths have a history of followers commending, mandating, or at least tacitly supporting circumcision for religious reasons. Accordingly, at least 450,849 Australians (more than 2.2% of the population at the time) identified themselves with a circumcising religious faith in 2006.²¹⁹ At least 1,350 Tasmanians (more than 0.28% of Tasmania's population at the time) identified themselves with a religious faith associated with circumcision in 2006.²²⁰

Table 1: People associated with a major circumcising religious faith in the 2006 census

Jurisdiction	No. of People	Percentage of Total Population
Tasmania	1,350	0.28%
Australia	450,849	2.27%

5.2.16 The number of people in Tasmania or Australia generally who are not associated with a circumcising faith who see merit in religiously motivated circumcision is unknown. Several respondents who did not express a belief in a religious circumcising faith, some of whom expressed opposition to circumcision in principle, indicated their support for affording legal protection to

²¹⁵ The Australian Federation of Islamic Councils.

²¹⁶ Ibid.

²¹⁷ Australian Bureau of Statistics, *2006 Census Table: 20680-Religious Affiliation (full classification list) by Sex – Australia* (2007).

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid.

religious circumcision. Some held this belief as a matter of pragmatism. These respondents feared that restrictive laws might drive circumcision underground. Others supported affording legal protection to circumcision because of the value they attributed to religious tolerance. Bernd Wechner represents the views of these respondents:

It seems to me that as abhorrent as I might personally find the idea of circumcision it is to some cultures at least an integral or potent historical component offering a sense of belonging and identity, and I am not aware of any newly discovered heinous consequence of a procedure that is so culturally widespread and historically mature. (16)

5.2.17 Judaism, Christianity and Islam have a long historical relationship with circumcision. Circumcision has been a defining mark of belief for members of the Jewish faith for millennia, the Christian bible contains an account of Jesus' circumcision,²²¹ and Muslims have long been humanity's single largest circumcising religious faith.²²² The association of these faiths with circumcision begins in theology with the circumcision of the patriarch of these three faiths – Abraham.

5.2.18 Judaism is the oldest circumcising Abrahamic faith in existence today. According to the *Torah*, the most important of the Jewish holy books, Abraham circumcised himself as part of a covenant with God.²²³ God promised Abraham that he would be exceedingly fruitful, that he would possess the land of Canaan,²²⁴ and become a father of a multitude of nations and a line of kings for fulfilling the covenant.²²⁵ Abraham's side of the covenant is contained within the book of Genesis:

And ye shall be circumcised in the flesh of your foreskin; and it shall be a token of a covenant betwixt Me and you; And he that is eight days old shall be circumcised among you, every male throughout your generations, he that is born in the house, or bought with money of any foreigner, that is not of thy seed; he that is born in thy house, and he that is bought with thy money, must needs be circumcised; and My covenant shall be in your flesh for an everlasting covenant.²²⁶

5.2.19 This text is the basis of the continuing Jewish tradition of circumcising infant boys on the eighth day of their life.²²⁷ Most Jews consider circumcision to be a direct commandment from God and a requirement of full participation in the Jewish faith.²²⁸ Eliana Freydel Miller and George Goldsteen express this belief:

The circumcision of all Jewish boys at the age of eight (8) days is a commandment given to the Jewish people by G-d Al-mighty, a commandment which we the Jewish people have followed for thousands of years from our forefather Abraham... [C]ircumcision is among the laws from Heaven which we observe... It is our hope that you will legislate all your laws according to G-d's will, and that you will allow Jewish people to continue the important practice of circumcision which is a commandment from G-d al-mighty to the Jewish people and that you allow circumcision to be available also to any male person and child if the child's parents or parent requests circumcision. (115)

²²¹ Luke 2:21.

²²² World Health Organization, *Male Circumcision: Global Trends and Determinants of Prevalence, Safety and Acceptability* (2007) 1.

²²³ Genesis 17:1-27.

²²⁴ The Land of Canaan is an area that includes all, or parts of, modern day Israel (including the Palestinian territories), Lebanon, Jordan, Egypt and Syria.

²²⁵ Genesis 17:4-8.

²²⁶ Genesis 17:11-13.

²²⁷ See also: Leviticus 12:3.

²²⁸ It is worth noting that there are people and groups who identify themselves as Jewish that do not practise circumcision, see for example: Jews Against Circumcision, *Jews Against Circumcision Home Page* (2009) <<http://www.jewsagainstcircumcision.org>> at 20 October 2010; Jewish Resource Center, *Jewish Resource Center Home Page* (2009) <<http://www.jewishcircumcision.org>> at 20 October 2010.

In Genesis G-d commands Abraham, aged 99, to circumcise himself and his male descendants forever on the 8th day after birth as a sign of His Covenant with the Jews. If a child is not well enough on day 8 it may be postponed. An uncircumcised man cannot fully participate in religious life. (83)

5.2.20 Christianity is the second oldest Abrahamic faith with an historical link to religiously motivated circumcision. Christianity's main religious text, the *New Testament*, makes explicit reference to the infant circumcision of the Christian's messiah Jesus. Jesus was born sometime before 1CE.²²⁹ His parents had him circumcised in accordance with Jewish law.²³⁰ Most early Christians followed the Jewish law on circumcision. However, there is little evidence that Jesus ever explicitly endorsed circumcision, and most sects of Christianity do not promote circumcision for religious reasons. Christianity's split with circumcision began when Christian apostles and community leaders met in Jerusalem around 50CE to discuss whether converting gentiles ought to be required to undergo ritual circumcision. The participating Christians concluded that circumcision was not a requirement of faith for new converts to the religion.²³¹ The apostle Paul in particular, himself circumcised as a Jew, vehemently opposed the suggestion that converting gentiles ought to be circumcised. In one version of the *New Testament* Paul is said to have written: 'As for those agitators [who supported the circumcision of gentiles converting to Christianity], I wish they would go the whole way and emasculate themselves!'²³²

5.2.21 Christian sects today with few exceptions (that include some particular Coptic, and African orthodox churches) do not mandate or even tacitly support the practice of circumcision for religious reasons.²³³ Fewer still explicitly denounce circumcision. Most Christian sects are neutral or non-committal in their stance on circumcision.²³⁴ The Institute did not receive a submission commenting on circumcision as a Christian practice.

5.2.22 Islam incorporates circumcision through two avenues: references of reverence to the life and practices of Abraham in Islamic holy texts, and the *Hadith* (the oral traditions of the words and deeds of Islam's final and most important prophet Muhammad).²³⁵ The Islamic holy book the *Koran* (*Qur'an*) does not mention circumcision. Muhammad was born in 570CE.²³⁶ There are conflicting reports as to when, and if, Muhammad was circumcised, and what his precise views as to male

²²⁹ For a discussion of the probable birth date of Jesus, placing his birth between 7-5BCE, see: Robert Stein, *Jesus the Messiah* (1996) 52-56.

²³⁰ Luke 2:21.

²³¹ Acts 15:1-41.

²³² Galatians 5:12 (*New International Bible*).

²³³ See Margo DeMello, *Encyclopedia of Body Adornment* (Greenwood, 2007) 66; Christine Mattson et al, 'Acceptability of Male Circumcision and Predictors of Circumcision Preference Among Men and Women in Nyanza Province, Kenya' (2005) 17 *AIDS Care* 182, 185. It is worth noting that circumcising infants is not, or at least did not necessarily begin as, a strictly religious practice for Coptic Christians, and, was not, and is still not, universally accepted as desirable for religious reasons under that faith see: Edward Lane, *Manners and Customs of the Modern Egyptians* (John Murray, 1860) 535-536; Adrian Fortescue, *Lesser Eastern Churches* (reprint: Gorgias Press, 2001) 279; Sami Abu-Sahlieh, 'Male Circumcision/Female Circumcision: Is There Any Difference' in Chantal Zabus (ed), *Fearful Symmetries: Essays and Testimonies Around Excision and Circumcision* (Rodopi, 2009) 2, 14.

²³⁴ Reathe Rain-taljaard et al, 'Potential for an Intervention Based on Male Circumcision in a South African Town with High Levels of HIV Infection' (2003) 15 *AIDS Care* 315, 323. The Catholic Church has condemned circumcising: Pope Eugenius IV, *Bull of Union with the Copts* (1442). However, the Catholic Church's position is less forcefully stated and clear now see: Petrina Fadel, 'Respect for Bodily Integrity: A Catholic Perspective on Circumcision in Catholic Hospitals' (2003) 3 *American Journal of Bioethics* 1f. See also Catholic Church, *Catechism of the Catholic Church* (2002) [2297].

²³⁵ Gollaher, above n 189, 44-52. For several possible interpretations of Islamic law on male circumcision see: Sami Abu-Sahlieh, 'Jehovah, His Cousin Allah, and Sexual Mutilations' in George Denniston and Marilyn Milos (eds), *Sexual Mutilations: A Human Tragedy* (Springer, 1997) 41.

²³⁶ David Gollaher, above n 189, 44.

circumcision were.²³⁷ Circumcision is widely considered by Muslims today to be a part of obtaining (or perhaps more technically reverting to) *fitra*. *Fitra* may be characterised as a preferred state of being. Ayisha El-Shamandi from the Islamic Association Launceston succinctly states circumcision's significance in Islam:

Circumcision is not prescribed by the Holy Quran and is not a commandment in Islam. However, before Islam, it was practised by the people of Arabia, starting from our Prophet Ibrahim (Abraham); and being a good practice and a useful hygienic measure, it was allowed by Prophet Muhammad (peace be upon him) to be kept up by the Muslims. Since then it has retained its traditional significance in Islam. Male circumcision is among the rites of Islam and is part of the (in Arabic): *Fitrah*. *Fitrah* is the innate disposition and natural character and instinct of the human creation. If these characteristics are followed by a man, he would be described as a man of *Fitrah*, which Allah (God) has gifted his servants with, and encouraged them to follow, so that they attain a high degree of respectability and dignity. (84)

5.2.23 Most but not all Muslims undergo a circumcision in their lifetime. Muslims usually undergo circumcision prior to reaching adulthood, and typically before the full onset of puberty. Most Muslim scholars regard circumcision as a highly commendable but not obligatory act. However, some Islamic scholars consider circumcision to be an obligation to meet prior to full participation in the Muslim faith.²³⁸ Ayisha El-Shamandi from the Islamic Association Launceston expressed his understanding of the importance of circumcision in Islam:

As Muslims we follow what is called the Shari'ah Law (Islamic Law), Islam is a way of life based on the commandments of Allah (God), and this Law is contained in the Holy Quran, and also in the Hadith and Sunnah of Muhammad (peace be upon him) our Prophet. We are required to live our whole life in accordance with the order of the Quran, Hadith and Sunnah (Doi 1984). To live a life based on the Shari'ah is something which all faithful Muslims strive to do, the circumcising of males is just one of them. It is also necessary for a man to be circumcised to lawfully make the hajj (pilgrimage) to Mecca, one of the five pillars of Islamic belief. (84)

5.2.24 Respondents supported their belief in circumcision on religious grounds with several arguments.²³⁹ Some respondents, including Simon Lipert, suggested that religious circumcision can assist in the creation and maintenance of a beneficial sense of belonging, enfranchisement and identity:

As an orthodox Jew, I believe that performance of circumcision upon my sons (should I be so blessed) is an integral part of my religious beliefs and obligations; that the outlawing of 'non-therapeutic male circumcision' will disenfranchise many in the community who perform this procedure for religious and rite of passage purposes including but not limited to the Jewish Community, the Muslim community, the Aboriginal Community and many in the wider Christian Community. (31)

5.2.25 Respondents also argued that Tasmania ought to accommodate religious circumcision as an exercise of religious tolerance. Roger and Anne Brewer and the Australian Federation of Islamic Councils Inc. stressed this point:

In these days of tolerance of all religions and cultures you must consider groups for whom this is a religious or cultural preference and not enforce the views of a nanny state. (10)

²³⁷ Sami Abu-Salieh, 'Muslim's Genitalia in the Hands of the Clergy: Religious Arguments about Male and Female Circumcision' in George Denniston, Frederick Hodges and Marilyn Milos (eds), *Male and Female Circumcision: Medical Legal and Ethical Considerations in Paediatric Practice* (Springer, 1999) 131.

²³⁸ For a general discussion on circumcision in Islam, see: Clifford Bosworth et al (eds), *The Encyclopaedia of Islam* (Brill Archive, 1976) 20-22; Syed Ali Anwar Naqvi et al, 'Religious Circumcision: A Muslim View' (1999) 83 *British Journal of Urology International* 13.

²³⁹ Respondents regularly phrased such arguments in human rights terms.

The act of banning non-therapeutic circumcision male circumcision would be internationally regarded as an attack on the practice of the Islamic Faith in Tasmania. This would damage Australia's reputation as a tolerant country which accepts and welcomes all religious faiths. (46)

5.2.26 The Australian Federation of Islamic Councils Inc. and George Goldsteen suggested that restrictions on religious circumcision could create a crisis of conscience and even civil disobedience in people of circumcising faiths:

It [a ban on circumcision] would also create a crisis of conscience in the Muslim community. Most Imams constantly stress in their sermons the importance of obeying the laws of Australia. A ban or restriction would force Muslims to choose between acting in accordance with their conscience or obeying the law. Many Muslims would not be able to obey an unjust law and legal changes would have the effect of criminalising their behaviour. (46)

If Tasmania were to outlaw non-therapeutic circumcision on Jewish boys we would have to violate a man-made law in order not to violate a G-d given law. Such a law would be seen as interfering with our freedom of religion. (83)

5.2.27 The Australian Federation of Islamic Councils identified several other potential consequences of enacting a law restricting religious circumcision, including harm to Tasmania's standing in business and politics overseas. The Council also argued that:

It would adversely affect the national security of Australia. The Muslim community has a problem with the tiny fringe element who have engaged in acts of a terrorist nature. These people do not have a valid grievance as there is complete freedom of religious belief and practice in Australia. A ban would give them credibility and would undermine the credibility of moderate organisations like AFIC that have always condemned extremist activity. (46)

5.2.28 The Rabbinical Council of Victoria suggests that Tasmania has an interest in protecting religious circumcision to promote diversity:

The state should not lightly interfere with the private religious practices of its citizens unless there are compelling reasons for such interference. To the contrary, the state has an interest in ensuring that the cultural and religious diversity of the community is maintained. (2)

5.2.29 Proponents of paternalistic religious circumcision are passionate about their cause. Respondents expressly prioritised religion over other considerations. George Goldsteen's comment reflects this view:

Clearly G-d is not concerned about the lack of consent by the baby. As far as pain and suffering goes, any pain is only momentary (if felt at all) and babies do not really suffer. (83)

5.2.30 The Rabbinical Council of Victoria is critical of the various opposing considerations raised by respondents who favour autonomy:

The RCV does not accept that the removal of the foreskin is a "loss" in the way outlined in the Issues Paper. To the contrary, its removal confers an incomparable benefit, namely entry into the covenant of our forefathers. Any interference with this sacred rite would inflict far more serious loss on those intended to be the beneficiaries of intervention by reason of their exclusion from the faith community. The RCV considers that the psychological and social implications of a ban on infant circumcision would far outweigh any perceived gain in the free exercise of the "right" to bodily integrity by those concerned. (2)

Rite of passage tradition

5.2.31 Circumcision continues to be a significant part of the social and cultural identity of some members of both Indigenous and immigrant communities in Australia. A man's circumcision status can significantly influence their social standing within a circumcising community. It can affect a man's eligibility for marriage, employment and friendship in some communities. It can determine the standing of a man within his family. It can also affect their right to participate in social and business matters. Circumcision has a role in the initiation of boys into the rights and responsibilities of manhood in some communities.²⁴⁰ Circumcision can also be a part of a larger ritual. For example, community elders sometimes teach sacred lessons, stories, songs, and dances to boys undergoing a rite of passage circumcision ritual.²⁴¹ Some communities regard ritual circumcisers as the makers of men.²⁴² Anthropologist Mervyn Meggitt, commenting in the mid-twentieth century on the importance of circumcision to the Walbiri (Warlpiri) people, an Indigenous Australian circumcising community in the Northern Territory, noted that:

Circumcision, with its accompanying ceremonies, firmly and unequivocally establishes a youth's status in Walbiri society. Should he fail to pass through these rites, he may not enter his father's lodge, he may not participate in religious ceremonies, he cannot acquire a marriage line, he cannot legitimately obtain a wife; in short, he cannot become a social person.²⁴³

5.2.32 The Institute did not receive any submissions detailing the significance of rite of passage circumcision. Tasmania does not have a large traditional rite of passage circumcising community. No respondent identified themselves as a member of a rite of passage circumcising community. Only three respondents expressly indicated their support for rite of passage circumcision. It is extremely difficult to provide an accurate approximation of the number of people who identify with a rite of passage circumcising community in Tasmania or Australia. Thousands of migrants living in Australia are from African countries that have an extremely high prevalence of rite of passage circumcision. Many other people living in Australia are originally from other countries, such as South Korea, Papua New Guinea and the Solomon Islands, where communities practise circumcision for cultural rite of passage reasons. It is also known that at least some of the almost half a million Indigenous Australians (16,767 of which were Tasmanian) counted in the 2006 census identify with an Indigenous circumcising community.²⁴⁴ Many people in wider society also recognise merit in protecting a sphere of freedom for traditional rite of passage practices. However, modern Indigenous Australians in Tasmania do not have a strong circumcising tradition, and Tasmania does not have a large circumcising immigrant population.

5.2.33 Proponents of rite of passage circumcision argue that traditional practices can help foster a strong and beneficial sense of cultural identity, and that this sense of identity can be essential to maintaining a close and functioning community. Bernd Wechner expressed this viewpoint in his submission.

²⁴⁰ For an illustrative discussion of the importance of traditional circumcision in the Xhosa community in South Africa see: Vincent, above n 154, 79-80.

²⁴¹ Cameron Forbes, 'Australia: Secrets of Dreamtime' (1984) 138 *The New Internationalist* 14; Ronald Berndt, *Australian Aboriginal Religion: The North-Eastern Region and North Australia* (1974) vol 2, 11-23.

²⁴² 'Circumciser Story: Making Boys Men', *BBC News* (online) 1 August 2008 <<http://news.bbc.co.uk/2/hi/africa/7536892.stm>> at 20 October 2010.

²⁴³ Mervyn Meggitt, *Desert People: A Study of the Walbiri Aborigines of Central Australia* (Angus and Robertson, 1962) 309.

²⁴⁴ 455,031 people identified themselves as Indigenous in the 2006 census. This was 2.3% of Australia's total population at the time: Australian Bureau of Statistics, *2006 Census QuickStats: Australia* (2007).

Secular social tradition

5.2.34 Social and cultural influences developed in the twentieth century motivated the majority of circumcisions performed in Australia. Rowena Hitchcock, a paediatric surgeon, once described the culture of circumcising babies in much of the English-speaking world in the twentieth century, including Australia, as ‘a social ritual with a grain of medical origin’.²⁴⁵ Australia’s circumcising social tradition has waxed and waned since the beginning of the twentieth century. Circumcision was largely unheard of as a secular practice in Australia until the turn of the Twentieth century. Newborn circumcision became common in Australia by the middle of the twentieth century.²⁴⁶ The percentage of newborns circumcised in Australia has dropped dramatically since then. Most of Australia’s public hospitals now refuse to offer the procedure. Australia’s medical associations have not endorsed circumcision as a routine procedure for several decades. Only approximately 13% of newborn babies born in Australia (about 20,000 children in total) will be circumcised in 2011. This remains a high circumcision rate considering Non-Indigenous Australia’s relatively short experience with circumcision.

5.2.35 Medicare statistics suggest that Australia is a country divided by different approaches to neonatal circumcision. Five of Australia’s largest states and territories had a Medicare claim infant circumcision rate of lower than 8% in 2008, whilst three others have rates exceeding 14%. In 2009 Tasmania, the Northern Territory, the Australian Capital Territory, Western Australia and Victoria continued to have a circumcision rate of less than 8%, whilst South Australia, Queensland and New South Wales continued to have a rate of 14% or higher. In 2008 the percentages were as follows: Tasmania (1%), Northern Territory (3%), Australian Capital Territory, Western Australia and Victoria (6-7%), South Australia (15%), and Queensland and New South Wales (17-18%).²⁴⁷ These figures were similar in 2009: Tasmania and the Northern Territory (1-2%), Australian Capital Territory, Western Australia and Victoria (7-8%), South Australia (15%), and New South Wales (16%) and Queensland (18%).²⁴⁸ These statistics suggest that Tasmania’s experience with circumcision is very different from that in most of Australia’s other state and territories. Tasmania has the lowest circumcising rate of any jurisdiction in Australia.

5.2.36 As noted above, there is rarely a medical indication for circumcision in the newborn.²⁴⁹ It is difficult to discern the reasons for the performance of most newborn circumcisions. Parents are not generally required to disclose their reasons for circumcising. Ordinarily one or more of the following factors will influence parental decision making (leaving aside religious or rite of passage reasons considered earlier):

²⁴⁵ Rowena Hitchcock, ‘Commentary’ (1997) 77 *Archives of Disease in Childhood* 260.

²⁴⁶ For a good discussion of the growth of circumcision in Australia see: Darby, above n 1, 153.

²⁴⁷ These approximate minimum circumcision rates for children under the age of six months in each jurisdiction in Australia were gathered by comparing the birth rate of male babies in each jurisdiction to the number of circumcisions claimed on Medicare for children less than six months of age in each jurisdiction in 2008. See: Medicare item 30653 processed from January 2008 to December 2008. Medicare Australia, *Medicare Item Reports* (2010) <https://www.medicareaustralia.gov.au/statistics/mbs_item.shtml> at 20 October 2010. See: Australian Bureau of Statistics, *3301.0 - Births, Australia, 2008* (2009).

²⁴⁸ These approximate minimum circumcision rates for children under the age of six months in each jurisdiction in Australia were gathered by comparing the birth rate of male babies in each jurisdiction to the number of circumcisions claimed on Medicare for children less than six months of age in each jurisdiction in 2009. The numbers were rounded to the nearest whole number. Jurisdictions were grouped together if there was less than a percentage point between them before they were rounded. See: Medicare item 30653 processed from January 2009 to December 2009. Medicare Australia, *Medicare Item Reports* (2011) <https://www.medicareaustralia.gov.au/statistics/mbs_item.shtml> at 20 July 2011. See: Australian Bureau of Statistics, *3301.0 - Births, Australia, 2009* (2009).

²⁴⁹ See Malone and Steinbrecher, above n 4.

- familiarity;
- convenience;
- aesthetics;
- family tradition;
- conformity; and,
- a perception that circumcision has health or hygiene benefits.

5.2.37 A study conducted in Victoria of 136 parents who had their child circumcised found ‘hygiene’ and ‘family tradition’ to be the most often cited reasons for having the procedure performed.²⁵⁰ A study in the United States suggested that concerns about the attitudes of peers and their sons’ self-conception in the future were strong influences upon whether a parent will circumcise or not.²⁵¹ The same study also suggested that the father’s circumcision status was a key indicator of their son’s circumcision status.²⁵² A recently completed study found ‘mother’s choice’ and ‘health reasons’ to be the most commonly cited motivations behind the decision to circumcise in a sample of 78 relatives of circumcised children from the southeast of the United States.²⁵³ ‘Health reasons’, ‘father’s choice’ and ‘mother’s choice’ were the three reasons for circumcising most commonly chosen as the most important consideration by the participants.²⁵⁴

5.2.38 The view that the procedure may be beneficial to health and hygiene is a strong driving force behind the secular social circumcising tradition in Australia. Medical evidence at least partly informs this belief. However, strong and longstanding social and cultural pressures significantly drive it. These pressures can strongly affect how a person perceives circumcision. Belief in the merit of a circumcising norm is known to, as scholar Sarah Waldeck, suggests, ‘color every aspect of decision making, thereby encouraging an individual to either exaggerate or diminish the significance of other factors in the behavioural calculus.’²⁵⁵

5.2.39 Waldeck found that parents ‘were made visibly uncomfortable’, ‘expressed resentment’ and ‘tried to distance themselves’ when they were confronted by a qualified physician with accurate health information which conflicted with their beliefs about the potential benefits of circumcision.²⁵⁶ She also found that parents who favoured circumcision ‘demonstrated a clear desire to discount, or perhaps entirely ignore, the costs that would lead them to opt against circumcision.’²⁵⁷ A 1987 study in the United States reported that the presentation of accurate and unbiased medical evidence had little effect on a parent’s decision to circumcise their child, but increased the dissatisfaction of the parents with their doctor.²⁵⁸ A 2002 study in the United States involving 190 mothers of boys came to a similar conclusion.²⁵⁹ A further study in the United States found that ‘parents continue to have pre-

²⁵⁰ Bo Xu and Hershel Goldman, ‘Newborn Circumcision in Victoria, Australia: Reasons and Parental Attitudes’ (2008) 78 *Australian and New Zealand Journal of Surgery* 1019.

²⁵¹ Mark Brown and Cheryl Brown, ‘Circumcision Decision: Prominence of Social Concerns’ (1987) 80 *Pediatrics* 215.

²⁵² *Ibid.*

²⁵³ Brenda Dyal, *A Study of Factors That Influence the Parental Decision to Circumcise Male Infants* (M Sci, The Florida State University College of Nursing, 2006) 31.

²⁵⁴ *Ibid.*

²⁵⁵ Sarah Waldeck, ‘Using Male Circumcision to Understand Social Norms as Multipliers’ (2003) 72 *University of Cincinnati Law Review* 455, 455.

²⁵⁶ Sarah Waldeck, ‘Social Norm Theory and Male Circumcision: Why Parents Circumcise’ (2003) 3(2) *The American Journal of Bioethics* 56, 56.

²⁵⁷ *Ibid.*

²⁵⁸ Jay Christensen-Szalanski et al, ‘Circumcision and Informed Consent: Is More Information Always Better?’ (1987) 25 *Medical Care* 856.

²⁵⁹ Sharon Binner et al, ‘Effect of Parental Education on Decision-Making About Neonatal Circumcision’ (2002) 95 *Southern Medical Journal* 457.

formed decisions regarding circumcision based primarily on non-medical concerns, which are unlikely to be changed by attempting neutral discussion of the relative risks and benefits'.²⁶⁰ The same study found that 80% of the participating mothers made the decision to circumcise their son before discussing the procedure with a physician.²⁶¹ These studies suggest that physician advice and careful consideration of the relevant medical evidence may only have a small role in the formation of most people's views on circumcision.

5.2.40 Some respondents shared anecdotes reflecting these findings. Vikki Bullock related her experience with a doctor who did not share her opinion on the merit of circumcision:

Whilst pregnant with [name excluded], we again requested our baby be circumcised. I now had a different gynaecologist and she did not perform this operation and indicated we would need to make our own arrangements. I eventually organised for this procedure to be performed prior to our release from hospital. My son [name excluded] also did not suffer. The surgeon ([name excluded]) visited me in hospital and really was not happy to perform this procedure, he tried to change my mind, I was not impressed that this operation may not have occurred if I had not been so assertive. It was very distressing to find that whilst I was pregnant I needed to plead my case on what should be a simple request. I assumed that if you consented to circumcision on your baby boy, then there would be no reason for a doctor to not perform it as soon as practicable following birth. (35)

5.2.41 The significance of circumcision to those who support circumcision for secular social reasons is not entirely clear. Loosely entrenched social and cultural influences support the tradition. Much of the support within Australia seems to be relatively passive and weakly invested. The differences in circumcision rates between otherwise similar jurisdictions and the speed with which some jurisdictions, particularly Tasmania, have abandoned newborn circumcision suggest a weak embedding of the tradition.

5.2.42 Few respondents referred to distinctly secular social and cultural influences expressly. Most, who might be characterised as supporting secular social circumcision phrased their support for circumcision on health and hygiene based arguments. However, some respondents suggested that the circumcised penis was more aesthetically pleasing. John Glazebrook suggested that circumcision might be, or might become, a permanent mark of higher economic social status in places where publicly funded circumcision is not readily available.²⁶² Brian Morris was one of the few respondents who argued in support of circumcising incapable minors who directly acknowledged Australia's secular tradition of circumcising. He made this acknowledgement whilst making his case for preferring circumcision in childhood over circumcision in adulthood should the procedure be encouraged as a public health measure:

CIRCUMCISION LATER (say, when the male can give informed consent) IS NOT A PART OF MAJORITY AUSTRALIAN TRADITION OR CULTURE as can be the case in some other parts of the world. THE TRADITION IN AUSTRALIA IS CIRCUMCISION AT BIRTH. There is no reason to attempt to change our culture. In fact, as discussed above at birth is, for every reason medically, the very best time for circumcision to be carried out. (6) (Emphasis in the original).

5.2.43 The following discussion refers to the significance attributed by some to prophylactic health.

Prophylactic health

5.2.44 Thirty-three respondents (26%) expressly stated their belief that circumcision's prophylactic benefits justify the circumcision of all, or at least some, incapable minors. Respondents attributed

²⁶⁰ Jeffrey Tiemstra, 'Factors Effecting the Circumcision Decision' (1999) 12 *Journal of the American Board of Family Practitioners* 16, 20.

²⁶¹ *Ibid* 17.

²⁶² 25.

several prophylactic effects to circumcision. Several respondents characterised circumcision as a ‘surgical vaccine’, a term that was popularised in circumcision literature by respondent Brian Morris. Respondents from this perspective argued that a good parent would aim to maximise their child’s lifelong health. They argued that the performance of circumcision in early childhood would maximise the child’s chance of lifelong good health. The following responses are representative.²⁶³

I am writing to emphasise that circumcision, especially when performed in the newborn period, is a valuable lifetime preventative health procedure which can be life-saving in protecting against lethal diseases. These include prevention of HIV/AIDS, other serious sexually transmitted infections, penile and cervical cancer and severe infant kidney infections, as well as local foreskin infections and foreskin retraction problems. (104)

In this day of Aids, banning circumcision for any reason is totally wrong... let each person decide whether they want their male child to stand a greater risk of getting AIDS. (89)

I am a man born in 1942, I was circumcised as an infant, as was my father and my sons. I am very grateful that this basic simple and essential procedure was carried out. I believe it has offered me considerable protection throughout my life. None of the men in my family has ever had any complaint about the fact that this procedure was done. They would probably ridicule the proposition that it should not have been done... The debate about infant male circumcision seems to have been brought about by concern for the rights of children. Given due consideration to all of the matters above, one might reasonably ask who has the right to deny these children access to circumcision and therefore protection against all the possible medical risks associated with not having this procedure done. Every male child, and every future partner of these male children, has the right to this protection. It could easily be said that to deny this procedure, with the knowledge of the possible consequences, could be interpreted as neglect of the child. (105)

It would be absurd for the law to intervene to prevent a parent from doing the very best for their child, especially when the legal argument contravenes the overwhelming medical and public health evidence. ... Since circumcision is in the best interests of the child in every way as far as health is concerned, then support by the law should be given to the parental decision that is in favour of circumcision. The non-consenting parent should be expected to provide an extremely good reason for opposing their son’s circumcision for a juridical system to disallow it. (6)

Families should have that ability to ensure circumcision on a male infant before 6 weeks. My belief is based on health and prevention attitudes. It is a tough love decision. After that I would leave it to be an adolescent decision. (71)

The low rate of circumcision is not because of the decisions of parents NOT to circumcise, but the refusal of the medical association in Tasmania to ALLOW parents the choice to circumcise. Now ourselves, our boys, and again numerous other parents I talk to, are paying the price for that decision being taken from us with numerous infections. Will you also take the choice away from parents to immunise their children? By the time our child is considered old enough to be able to consent to his own circumcision, how many infections will he have had to painfully battle with? (87)

No informed person would wish to prevent access to these prophylactic procedures which have such obvious benefits and little downside. (11)

It is imperative that given the new medical evidence, that both newborn and adult male circumcision be freely available to parents of male children and adult males in Tasmania. Any effort to undermine the basic human right to preventative health care, like access to vaccination, would be immoral and unethical. (111)

²⁶³ Respondents Edgar Shoen, Richard DeArmond, Bruce Wilkinson, Brian Morris, Geoff Dickson, Alison and Andrew Scott, Collin Sutton and Jeffrey Klausner.

5.2.45 Some respondents argued that circumcision could benefit their child's sexual functioning in adulthood. Respondent Robin Willcourt stated that:

Every recent published paper has shown that the removal of the foreskin in adults does not decrease sexual pleasure though it did prolong the act of intercourse- hardly a detriment!!! (93)

5.2.46 Many respondents cautioned against letting other considerations cloud or trump the significance of circumcision's prophylactic health benefits.²⁶⁴

I am aware that there are some parents who for cultural, religious or philosophical reasons do not wish their sons to be circumcised. I respect their view but I have greater respect for the argument that every child deserves the best health outcomes ... It [the pain of circumcision] is a short term insult that results in a long term benefit for the child and later as an adult. (11)

Presumptions underlying any legal change should not be entertained without heeding the information which science provides. (66)

I understand that anti-circumcision activists in Tasmania are engaged in a campaign to have newborn circumcision banned. I urge that you reject this ill-conceived movement which is detrimental to the future health of infants. (104)

But for circumcision the health benefits are extensive and greatly exceed by orders of magnitude any adverse aspects. (6)

The public health benefits are manifest. Although I understand your concerns with consent, they must not be the only driver for giving boys a better life generally. Parental education and choice should be paramount. (22)

Non-paternalistic benefit

Please do everything you can to promote public health by making circumcision free for all male infants and also any adult male who wants to be circumcised.²⁶⁵ (7)

5.2.47 Some respondents found merit in the circumcision of incapable minors because of the procedure's ability to provide a benefit to a third party (a person or people other than the person circumcised). For example, it was argued that the reduced susceptibility of circumcised men to particular infections would lead to a reduction in the transmission of infections to women, and a reduction within the population overall. Respondent Brian Morris stressed this point in his submissions to the Institute:

It should be clear that any legal move to halt circumcision would lead to an increase in morbidity and mortality in the community from diseases and conditions that circumcision prevents.

... if the intent of the issues paper is to change the law so as to make the circumcision of infants or children illegal then that would be a grave travesty, being an affront to everything the medical research represents, extending in particular to its application in terms of public health and preventative medicine. The TLRI should see through this transparent ideologically driven poppycock and move to direct legislation if needed to supporting those who are doing good for the benefit of children and the rest of the population when that child grows up. (6)

5.2.48 Morris listed several infections that an increase in male circumcision might reduce among women including: '...HPV, cervical cancer, HSV-2, Chlamydia and bacterial vaginosis'. Several

²⁶⁴ Collin Sutton, Michael Bates, Edgar Schoen, Brian Morris, John Dodson.

²⁶⁵ John Travis.

respondents concurred with Morris that public health would benefit from the promotion of circumcision. For example, respondents John Glazebrook and Collin Sutton commented:

The full spectrum of preventive health measures needs to be implemented in order to control the rapid spread of sexually transmitted diseases throughout the Australian community. To date, Federal and State authorities have failed to recognise the value of male circumcision in this regard, despite the publication of many papers in International peer reviewed journals. (25)

If actions of the Tasmanian Law Reform Institute, in clarifying the legal position of clinicians that perform circumcisions, have the effect of reducing parent's access to circumcision, then it will have done an enormous disservice to public health in general and the long term interest of the child. (11)

5.2.49 Several respondents also argued in favour of routine circumcision because of its potential to reduce cervical cancer rates within Australia (on the basis that circumcision reduces the susceptibility of men to HPV, a sexually transmittable virus linked to cervical cancer in women).²⁶⁶

Recent randomised trials have demonstrated beyond doubt the clinical efficacy of circumcision in preventing the spread of HIV (and possibly HPV). Continued access to this therapeutic option is a basic human right and an important community health requirement. It is also an important factor in safeguarding women's health. (11)

We understand that if a man is circumcised he cannot pass on to his partner the virus that causes cervical cancer – that is a good enough reason for circumcision. (10).

As a nurse in the 1970's, I held many babies for the procedure, and learnt in my training that Jewish women rarely have cancer of the Cervix because their husbands were circumcised. If this belief is held, parents should have the liberty to request the practice, and the circumciser not be held responsible for illegal practice. (60)

I urge you to consider the fate of the 300,000 women who have contracted HPV.... When you are looking at the legality, consider a woman suing an uncircumcised man for being responsible for transmitting the papilloma virus into her vagina and inflicting her with cervical cancer. (96)

5.2.50 Health benefits were not the only non-paternalistic benefits identified by respondents. Respondents also identified the potential for religious and cultural benefits to accrue to some people involved in the circumcision of an incapable minor or the social development of a circumcised minor. Members of religious and ethnic communities sometimes have pressures and influences acting upon them to circumcise children born within their community. For example, respondent Rabbi Dr Shimon Cowen stated a belief that Jewish parents were under a religious obligation to circumcise boys born to them:

Just as the parents bear a child, who becomes Jewish by virtue of a Jewish mother (at least), a fact which no secular court can alter or modify, so also the father (and in his absence the Jewish community) is bidden to circumcise that child at eight days (health permitting) as part of the child's integral Jewishness. The notion of the "autonomy" of the child – such as to require a "moratorium" on all religious obligations (including circumcision) until the child comes of an age of autonomous decision-making – can also shade into an interference with the religious parental obligation to educate the child in an integral religious worldview. Both are concepts of formation – whether physical or moral and character building – and the argument that one is reversible and the other is not, have nothing to do from the standpoint of the Divine mandate upon a Jewish parent both to form the child physically and spiritually. Indeed the power of formation of a child through an early religious education could be argued to have a much deeper and pervasive effect than the physical formation of circumcision. If the law is "uncertain" about the right of a parent to circumcise his or her infant son, then the law should make it certain. (59)

²⁶⁶ Collin Sutton, Roger and Anne Brewer, 60 and Robert William.

5.2.51 Parents raising children in other faiths and traditions may have similar social, religious or cultural inducements to circumcise.

5.3 The Tasmania Law Reform Institute's view

The difficulty of conflicting viewpoints

5.3.1 Seventy-six respondents clearly expressed their opposition to the circumcision of any incapable minor. Thirty-nine respondents clearly expressed support for the circumcision of at least some incapable minors. The debate on circumcision is characterised by conflicts between claims that are equally absolute, and between ends that are equally ultimate.²⁶⁷ The submissions presented a choice between several potentially beneficial but conflicting ends. The law cannot completely please both a circumcision abolitionist and an Orthodox Jewish *Mohel*. Nor can it promote every potential way of circumcising whilst also maximising the health and ethical standards of every circumciser.

5.3.2 The Institute has opted to adopt an approach to analysing the law that is pluralistic, deeply concerned with legal, political and evidential reality and that is committed to supporting an operation of the law that most Tasmanians can be persuaded with rational argument to accept. The Institute adopts this approach to aid it in only devising reform capable of attracting broad appeal. It outlines its approach to aid others in their critical evaluation of the reforms proposed in this report.

The Institute's perspective on circumcision

5.3.3 The Institute accepts the following factual premises. The Institute acknowledges that the foreskin is a natural and healthy part of the male body. Circumcision is not a necessary procedure for either good health or a fulfilling life for the vast majority of Australians. Circumcision has inherent known and potential costs, including a negative impact on several aspects of a circumcised person's health and the risk of complications ranging from greater than expected bleeding to death (see discussion from 2.4.5). Most circumcisions involve a financial cost. The circumcision of an incapable minor also necessarily involves an encroachment on one or more aspects of the child's autonomy (see discussion from 5.2.2).

5.3.4 Circumcision is a convenient umbrella term for a range of practices performed with a plethora of rationales. The Institute takes the position that a circumcision should generally only be legal to perform when it is likely to be broadly accepted in society. The Institute adopts this position because:

- circumcision is not a necessity for good health;
- circumcision is not necessary for most Australians to live a fulfilling life;
- circumcision has known and potential costs; and
- circumcision is performed in a variety of ways and for a variety of reasons.

5.3.5 The interest of the person undergoing the circumcision is a major consideration in whether society will regard a particular circumcision as acceptable. The Institute generally agrees with the British Medical Association's approach to the ethics of circumcising a minor:

²⁶⁷ Isaiah Berlin in his seminal essay *Two Concepts of Liberty* recognised that: 'The world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate, and claims equally absolute, the realization of some of which must inevitably involve the sacrifice of others.' See, Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press, 1969) 168.

Doctors must act in the best interests of the patient.

Even where they do not decide for themselves, the views that children express are important in determining what is in their best interests.

The BMA does not believe that parental preference alone constitutes sufficient grounds for performing a surgical procedure on a child unable to express his own view. Parental preference must be weighed in terms of the child's interests.

The courts have confirmed that the child's lifestyle and likely upbringing are relevant factors to take into account. The particular situation of the case needs to be considered.

Parents must explain and justify requests for circumcision, in terms of the child's interests.

5.3.6 The following discussion outlines the Institute's position on the merit of each of the main rationales for circumcising both adults (and capable minors) and of incapable minors.

Personal preference (adults and capable minors)

5.3.7 The Institute is of the view that autonomy of the individual should generally prevail. The Institute acknowledges that it may be appropriate to set minimum health and safety standards to discourage particularly abhorrent or unnecessarily risky practices for moral, paternalistic, or public cost reasons. However, the Institute is of the view that uncircumcised adults and capable minors should generally have the right to determine both their own circumcision status and the circumstances of the performance of their own circumcision.

Religious and traditional circumcision

5.3.8 There is significant and well entrenched support for religious and ethnically associated circumcision (particularly as many Indigenous Australians, Muslims, Jews, and some African Christian sects practise it). Many proponents of religious and ethnically associated circumcision are ardent in their support. Some regard circumcising incapable children as an unbreakable commandment from either their God or their community.²⁶⁸ These features of religious and traditional circumcision make the legal proscription of its most widely accepted aspects unlikely, potentially ineffectual and arguably undesirable. Consequently, the Institute is of the view that the law ought to accommodate established religious and ethnic circumcising traditions at the current time.

5.3.9 However, the Institute would support measures to encourage Tasmanians to move away from particularly contentious or loosely entrenched practices. The law ought to, at least to the extent that it can do so efficaciously, encourage the modification of traditions to take account of better health and ethical standards.²⁶⁹ The law should prohibit traditional practices that are weakly entrenched or poorly regarded within a tradition or society generally (such as the use of unsterile tools or dangerous methods).

²⁶⁸ Jewish circumcision has been banned or heavily discouraged on several occasions throughout history. Jewish sources suggest that King Antiochus IV Epiphanes who ruled Asia-minor instituted a ban, with severe punishments, on circumcision around 175 to 165BCE. For a brief discussion see: Gollaher, above n 189, 15-16. For an earlier source see: Book of Maccabees 1:46-67; 6:10. The Roman Emperor Hadrian may also have regulated circumcision around 130CE prior to the Bar Kokhba Revolt, see: Rabello, above n 94. The ancient Roman legal text, *The Digest of Justinian*, also bans circumcision in some circumstances, see: *The Digest of Justinian* 48:8:11. The Soviet Union prohibited Jewish circumcision at times. For an interesting discussion of circumcision in one part of the Soviet Union see: Elissa Bemporad, 'Behavior Unbecoming a Communist: Jewish Religious Practice in Soviet Minsk' (2008) 14 *Jewish Social Studies: History, Culture, Society* 1.

²⁶⁹ This point has been made in work considering the regulation of traditional circumcision practices in South Africa, see: Louise Vincent, above n 154, 86.

Secular social tradition circumcision

5.3.10 Tasmania no longer has a strong secular social circumcising tradition. Tasmanian parents have left approximately 98% of the boys born in Tasmania in recent years uncircumcised (see discussion from 2.3.2). It seems that fewer and fewer Tasmanian parents are willing to consider matters such as aesthetics, family tradition, familiarity and conformity with common practice as reasons that might motivate them to circumcise their incapable child.

5.3.11 The Institute regards the secular social reasons for circumcising as weakly established, increasingly contentious and only tenuously linked to any benefit. It opposes the performance of circumcision for secular social reasons.

Prophylactic health

5.3.12 There is evidence that circumcision has a prophylactic effect against several health conditions. The Institute discusses this evidence in detail in Part 2 (see discussion from 2.4.9). A minority express the view that the benefits of circumcision's evidenced prophylactic effect justify the adoption of routine circumcision in Australia.²⁷⁰ However, Australia's leading public health policy makers do not support measures to encourage the routine performance of circumcision. The Royal Australasian College of Physicians (RACP) concluded last year that there is no warrant for routine infant male circumcision in Australia.²⁷¹ The Institute, accepting mainstream health policy opinion, considers the routine performance of circumcision on incapable minors unwarranted. It also doubts whether routine circumcision could confer a significant or a cost effective improvement to public health in Australia or Tasmania. Accordingly, the Institute would oppose the enactment of any measure aimed at encouraging the routine performance of circumcision on incapable minors for reasons of individual or public health in Tasmania.

5.3.13 Many Australians believe that parents ought to be left free to weigh the costs and benefits of circumcision themselves and make a decision on the matter for their incapable child. This position is widely supported in mainstream literature on the ethics of circumcising. For example, the RACP states that:

In the absence of evidence of risk of substantial harm, informed parental choice should be respected. Informed parental consent should include the possibility that the ethical principle of autonomy may be better fulfilled by deferring the circumcision to adolescence.²⁷²

5.3.14 The Institute notes that the RACP formulated this position with regard to both health and 'psychosocial' considerations.²⁷³ The position taken by bioethicists Benatar and Benatar is similar to the position taken by the RACP:

Our conclusion is that circumcision is neither a compelling prophylactic measure nor a form of child abuse. For this reason, nontherapeutic circumcision of infant boys is a suitable matter for parental discretion.²⁷⁴

5.3.15 The 'permissible but not objectively preferable' position, whilst definitely opposed by some, probably reflects a common opinion in Australia. Proponents of this position argue that parents should have the option of circumcising their incapable children because there is evidence that their sons may

²⁷⁰ See for example: Cooper, Wodak and Morris, above n 84.

²⁷¹ Royal Australasian College of Physicians, above n 43, 5.

²⁷² Ibid 16.

²⁷³ Ibid 15.

²⁷⁴ Michael Benatar and David Benatar, 'Between Prophylaxis and Child Abuse: The Ethics of Neonatal Male Circumcision' (2003) 3 *The American Journal of Bioethics* 35, 45.

benefit from circumcision's prophylactic effect and will not suffer from substantial harm in the vast majority of cases. It is an understandable position. Particularly when presented in those terms. However, the Institute cannot support permitting the circumcision of incapable minors for prophylactic health reasons alone.

5.3.16 The decision to circumcise an incapable minor for health associated reasons requires the weighing of the benefit of an only prophylactic effect (that is likely to be of little if any significance to the typical Australian) against the likelihood of certain limited but potentially significant costs, as well as the possibility of other costs that range from the negligible to the truly dire. Individual Tasmanians differ on how to balance these considerations. This may be a persuasive reason to leave the decision to be circumcised for prophylactic reasons open to adults and capable minors willing to bear the known and potential costs of circumcision. However, the presence of indications against circumcising for prophylactic health reasons that are of similar or of greater significance than the indications for circumcising for prophylactic health reasons would seem to support the argument that the decision to circumcise for prophylactic reasons ought to be made only by the person who has to live with the consequences of the decision.

5.3.17 The availability of circumcision on request to capable minors and adults further reduces the desirability of permitting the circumcision of incapable minors for prophylactic health reasons. Some respondents argued that there are advantages to circumcising a person when they are a child rather than an adult.²⁷⁵ These potential advantages include financial cost, the potential for greater health benefits, better post-operative recovery, and less intrusiveness of the surgery into daily life. However, the possibility of a benefit accruing from performing a prophylactic circumcision earlier rather than later in life is of little significance in the context of the overall merit of circumcising for prophylactic health reasons in an Australian context. Furthermore, the potential benefits of circumcising a child whilst they are young must also be set against the weighty considerations of autonomy.

5.3.18 The Institute is also not persuaded by the argument that circumcising incapable minors ought to be permitted to allow health policy makers to use the circumcision of incapable minors as a public health tool should it become desirable to do so. There is little, if any, indication that circumstances will change significantly in Australia to make an increase in circumcision rate a public health priority. Policy makers will still be free to enact measures to encourage adults and capable minors to undergo circumcision. Studies conducted in Africa suggest that serious public health concerns (most notably high rates of HIV transmission) can motivate adult men to request circumcision. This suggests that Australia could bring about a significant increase in overall circumcision prevalence without circumcising incapable minors. Furthermore, selected circumcising of particular high-risk demographics may be the most cost efficient and otherwise desirable way of utilising circumcision as a public health tool.²⁷⁶

5.3.19 Many Tasmanians would be likely to accept the arguments against permitting the circumcision of incapable minors for prophylactic reasons as persuasive. Few Tasmanian parents currently opt to circumcise their newborn sons (see discussion from 2.3.2). However, it is worth noting that there are several pragmatic considerations weighing against the adoption of a position opposing the circumcision of incapable minors for prophylactic reasons.

5.3.20 Adopting a stance that is opposed to permitting prophylactic circumcision at the current time could potentially be counterproductive. Many Tasmanians presently support permitting parents to circumcise their incapable son for prophylactic reasons. The interrelationship between circumcision and health is complex. There are significant misconceptions, and strong, not yet well-identified or articulated cultural biases affecting how people consider circumcision. However, evidence indicates that fewer Tasmanian parents may be circumcising their sons in recent times than at any time since

²⁷⁵ See Brian Morris's submission (6) for example.

²⁷⁶ See for example: Gregory Londish and John Murray, 'Significant Reduction in HIV Prevalence According to Male Circumcision Intervention in Sub-Saharan Africa' (2008) 37 *International Journal of Epidemiology* 1246.

the beginning of the twentieth century. It may be unnecessary to use the law to discourage the performance of prophylactic circumcision. Circumcising for prophylactic reasons seems to have fallen out of favour in Tasmania. Tasmanian public hospitals do not offer the procedure and few private practitioners perform it. Health policy makers have been able to affect a significant shift in practice. It may be counterproductive to utilise the blunt instrument of the law when more subtle means are already effecting change to discourage the performance of circumcision on incapable minors in Tasmania for prophylactic health reasons.

5.3.21 The Institute sees little merit in circumcising incapable minors for prophylactic reasons. It would oppose any measure designed to encourage parents to circumcise their incapable sons for prophylactic reasons. The Institute acknowledges several pragmatic concerns weighing against adopting a position condemning the performance of prophylactic circumcision on incapable minors in Tasmania. However, the Institute does not find these concerns compelling. It would oppose any measure designed to permit parents to circumcise their incapable sons for prophylactic reasons.

5.4 Concluding remarks

5.4.1 There is a significant divergence of views in the community on the merit of circumcising incapable minors. The submissions to the Institute illustrate this division. Seventy-six respondents (60%) clearly expressed their opposition to the circumcision of any incapable minor. Thirty-nine respondents (31% of all respondents) clearly expressed support for the circumcision of at least some incapable minors.

5.4.2 The Institute adopts an approach to reform that is pluralistic, deeply concerned with legal, political and evidential reality, and that is committed to formulating recommendations that most Tasmanians can be persuaded with rational argument to accept. The Institute is of the opinion that circumcision should only be legal to perform when there are widely and well-received reasons for its performance. In particular, the Institute is of the view that:

- Uncircumcised adults and capable minors should have the right to determine their own circumcision status, and, generally, the right to determine the circumstances in which their own circumcision is performed.
- The law ought to accommodate established religious and ethnic circumcising traditions. It should also support measures to encourage individuals associated with these traditions to move away from loosely entrenched and particularly contentious practices.
- The law ought to condemn the waning tradition of circumcising incapable boys for secular non-ethnicity related social reasons.
- The law ought not to permit the circumcising of incapable minors in Tasmania for prophylactic reasons.

5.4.3 The next Part discusses the respondents' views on the law's regulation of circumcision. It also proposes reform to improve the law governing circumcision in Tasmania.

Part 6

Perspectives on Reform

6.1.1 Respondents made submissions on various aspects of the law, including the law governing the authorisation of circumcision, the formalities of a lawful authorisation, the provision of information by a circumciser to a person authorising a circumcision, circumciser practising standards, the limitation period in which an action in tort may be brought for a harmful circumcision, and the commercial aspects of circumcision. Respondents also proposed the establishment of a no-fault compensation scheme to compensate those harmed by complications from a circumcision performed upon them as an incapable minor. This Part presents the views of both the respondents and the Institute on these aspects of law and its reform. It begins by discussing the views on the desirability of law reform.

6.2 The desirability of law reform

So then, should Tasmanian law as it concerns circumcision be reformed? The answer to this question is of course a total no-brainer. Not only should it be reformed, it should have been reformed a century ago. (101).²⁷⁷

The Australian Federation of Islamic Councils (AFIC) strongly supports Issues Paper 9.2 Option 1: leaving the law unchanged. ... At present there is not a problem with the way that circumcision is practised in Australia. (46)²⁷⁸

6.2.1 Each respondent's interpretation of the law and their view on the merit of circumcision shaped their perspective on the desirability of reform. However, many respondents failed to communicate how they interpreted the law and what their position was on the desirability of reform. These respondents focused on presenting their case on the merit of circumcision. The discussion below groups respondents who addressed the issue of the desirability of law reform according to their views on both the merit of circumcision and their position on the desirability of reform.

Respondents opposed to the circumcision of incapable minors who supported reform

6.2.2 James Chegwiddden was one of several respondents who opposed the circumcision of incapable minors and made the argument that ambiguities in the law make reform desirable:

This response agrees with the Issues Paper (IP 5.1.1) that the law on authorisation is unclear with respect to children being subjected to non-therapeutic procedures without their consent, but also in respect of those minors who do personally consent. That ought to be remedied, because it is in the non-therapeutic category that the most unnecessary wrong decisions can be made, and the most long-lasting wrongs occur, since it is a child, and not the decision-maker, who is left to bear the effects of such decision; and not for a few years only, but for his or her entire life ...

This [the option of not reforming the law] is, as the Issues Paper suggests (IP 9.2.2), not desirable, as it perpetuates unclearness in the law and also leaves open large gaps in the protection being offered to Tasmanian citizens. ... A new law brings about a new awareness, removes any underlying ambiguities and avoids the need to rely on provisions not drafted with the current issue in mind. The issue becomes legally clear and compliance becomes potentially more effective. In the past, where a subject is controversial, the only

²⁷⁷ Robert Inder.

²⁷⁸ The Australian Federation of Islamic Councils.

effective mechanism for change has been new legislation. That is what was done, to great effect, to bring about reform in the areas of marital rape,²⁷⁹ of anti-discrimination action,²⁸⁰ and of female genital mutilation.²⁸¹ That is also what should be done in the area of non-therapeutic circumcision ...

This Response takes the view that it is time to renew our analysis of circumcision. The anomalous position of non-therapeutic circumcision in Tasmania should be changed. The current position is incompatible with the fundamental rights and freedoms embraced by modern Australian law and society. It contradicts the already-existing legal order, which ordinarily extends criminal and civil protection to each citizen from unwanted intervention to his or her person. Further, it generates significant unfairness to those children on whom the practice is inflicted; and moreover, is productive of citizens who feel abused by the medical system and abandoned by the very law whose primary role was to protect them at a time when they could not protect themselves. (1)

6.2.3 The following comments were also made by respondents who opposed the circumcision of incapable minors and argued for reform to overcome ambiguities in the law:²⁸²

In our view it would be valuable to avail of Tasmania's power to enact legislation to clarify whether and how circumcision may be legally authorised. (3)

The law requires clarification and should be very clear about protecting non-consenting minors from genital surgery. Circumcision is sexual assault, wounding and grievous bodily harm. (39)

[In response to a question asking whether the criminal law requires reform] Absolutely, the current criminal law and responsibility are vague and too open to interpretation. (49)

[In response to a question asking whether the criminal law requires reform] Yes, as under the current law it is unclear whether or not parental consent is sufficient to authorise non-therapeutic circumcision. The law should be clarified to change this, ideally to confirm that parental consent is not sufficient to authorise this procedure. (72)

6.2.4 The Doctors Opposing Circumcision argued that the law regulating circumcision required reform because it was incongruent with general common law principles:

The power of consent for surgery granted by the Criminal Code is much too broad and requires amendment. The case of surrogate consent is a special case. The code should be amended to provide that surrogates must act only in the best interests of the patient. Surrogate consent surgery should only be allowed when disease or deformity exists and the proposed operation is recommended by a medical doctor to treat existing disease or deformity. Consent for non-therapeutic circumcision should not be allowed. ... The Criminal Code should be amended to provide that non-therapeutic circumcision is an assault. The same civil and criminal penalties should apply as for other assaults. (110)

Respondents opposed to both the circumcision of incapable minors and law reform

6.2.5 Some respondents who considered the law ambiguous and opposed the circumcision of incapable minors suggested that there might be some value in leaving the law ambiguous. This argument was raised by respondents Steven Svoboda and Robert Darby:

Law reform is typically poor where the desired change is not so much in the letter of the law but in public perception of, and judicial application of, the law. Even with FGC

²⁷⁹ *Crimes Act 1900* (ACT) s 69; *Crimes Act 1900* (NSW) s 61T(a); *Criminal Law Consolidation Act 1935* (SA) s 73(3); *Crimes Act 1958* (Vic) s 62(2).

²⁸⁰ *Sex Discrimination Act 1984* (Cth) s 5.

²⁸¹ *Criminal Code* (Tas) s 178A.

²⁸² Marie Fox and Michael Thomson, James Loewen, Wilfred Ascott and Anonymous.

[Female Genital Cutting], it is far from clear that the numerous laws prohibiting it have had a positive effect on efforts to eliminate the practice, as resentment has grown in many communities over the double standard. The public is probably not yet educated to the point where outlawing circumcision would be acceptable, and thus courts would be reluctant to apply the statute. It probably makes more sense to maintain the status quo. Courts will thereby be able to interpret the law so as to be consistent with current public benefits. Over time, awareness will grow, and doctors will become increasingly reluctant to perform or promote circumcision based on possible adverse legal consequences. (62)

There is a certain value in leaving the law ambiguous in this area, as it allows the courts to apply the law in a manner consistent with the evolving sentiment and attitudes of the community, and it may also discourage parents and medical practitioners from demanding or performing circumcision procedures out of fear that it might possibly land them in legal trouble. It would be a pity to remove this fear, as its effect is to give boys some protection. (79)

6.2.6 Some respondents opposed to the circumcision of incapable minors also opposed reform because they interpreted the law as already criminalising the circumcision of incapable minors.²⁸³

The criminal law should apply as it stands to anyone cutting into the healthy genitals of healthy minors. (91)

As discussed above, existing law, if properly interpreted, adequately addresses the subject. (62)

No, the law relating to non-therapeutic circumcision does not require clarification. A clarification allowing circumcision would be a further injustice to boys; however, a change criminalising circumcision, in addition to being politically untenable, would be redundant. If circumcision is examined without the baggage of cultural familiarity, it is clear that non-therapeutic circumcision, without direct consent, is already a battery. (56)

6.2.7 Robert Van Howe argued that it might be counterproductive to legislate new laws criminalising circumcision if circumcision is already illegal under the current law:

To make it explicitly illegal will have the opposite of the intended effect. In Kurt Vonnegut's *Cat's Cradle* he points out that if you want people to do something make it illegal, it will add an element of excitement. (121)

6.2.8 Some respondents opposing the circumcision of incapable minors accepted that the current law allowed parents to have their incapable child circumcised; many others did not expressly indicate how they interpreted the current law. These respondents typically desired reform to change what they perceived to be the legal status quo in Tasmania to discourage or prohibit circumcision. However, respondents who were opposed to the circumcision of incapable minors and who interpreted the current law as criminalising circumcision did not adopt a uniform position on reform. James Chegwiddden considered the possibility that only reform to enforcement of the law was needed, but he ultimately opted to support law reform over the option of leaving the law unchanged.²⁸⁴ Robert Van Howe and Robert Darby both saw merit in non-legislative reform to discourage circumcision:

My view would be that circumcision of minors, unless necessary to cure an injury, deformity or disease that cannot be treated in any other way, is already (technically) illegal under both the common law and numerous specific provisions covering assault, injury, mistreatment etc; but that since social custom (as the QLRC observed in 1993) tolerates and to some extent approves of the practice we do not see prosecutions being launched, and very few civil suits. That being the case it is difficult to imagine that the govt would ever contemplate legislation even half as strong as the sections of the criminal code

²⁸³ Respondents James Wright, Steven Svoboda, Joe.

²⁸⁴ Chegwiddden.

prohibiting FGM, or at least not until MGM is generally regarded with the same degree of revulsion. This implies that the best course of action is not legislative, but much stricter regulation by the medical professional and regulatory bodies and public education to counteract the scaremongering of certain publicity hungry professors and opportunistic GPs. (121)

I am not in favour of legal restrictions on circumcision, since they are likely to upset significant ethnic/religious minorities, and are not likely to be passed by any parliament. I think it is preferable for the medical regulatory bodies (professional colleges, medical boards etc) to impose strict criteria for the performing of circumcisions on minors. These should be along the lines of the guidelines already issued by the British Medical Association ... (79)

Respondents supportive of the circumcision of incapable minors and opposed to reform

6.2.9 Several respondents were nonplussed about why reform was being considered.²⁸⁵ Many respondents in favour of permitting parents the option of circumcising their incapable boys interpreted the law as already permitting the circumcision of incapable minors and consequently expressed the view that the law was perfectly adequate. For example, William Power asserted:

I sincerely believe the status quo should be maintained with parents and doctors free to act in the best interests of the child, without fear of legal repercussions. (109)

6.2.10 Some respondents supportive of giving parents the option of circumcising their child acknowledged a degree of ambiguity in the law. Several respondents expressed this belief but opposed reform. The Rabbinical Council of Victoria (RCV) questioned the significance of the ambiguities in the law:

To the extent that there is some identified uncertainty in the law as to what might happen should such a prosecution be launched, the RCV does not believe that it warrants anticipatory legislative or regulatory intervention. There is little if any precedent for such action and the RCV's view is that it has not been demonstrated that the framework provided by the criminal code and the common law is inadequate to cope with the countless medical or quasi medical decisions that have been made by parents on behalf of their children... The RCV does not accept that any compelling case has been made out for legislative or regulatory intervention in circumcision and opposes any recommendation by the TLRI in favour of such an outcome. (2)

6.2.11 Other respondents in favour of parentally authorised circumcision were concerned that reform of any kind might eventually lead to an unwanted move in the law toward restricting the circumcision of incapable minors. Rabbi Dr Shimon Cowen expressed this concern:

The correct course of action in regard to the final Options set out in the Issues Paper on Non-therapeutic Male Circumcision is Option 1 "leaving the law unchanged". Option 2 clearly endangers age-old Jewish practice. Option 3 could be formulated in such a way as to achieve that very same danger to the Jewish practice of circumcising a newborn male child by its parent, as would Option 4. Even Option 5 opens the possibility of a significant interference in the way, prescribed by religious law, that Jewish children have been circumcised for thousands of years. In short an attempt to legislate "more" could very rapidly become a "less", an attack (whether intended or not) on Jewish (and Muslim) practice. (59)

6.2.12 Michael Bates also thought reform to the criminal law to be unnecessary:

Nor is amendment of Criminal Law required for any other purpose. I concur with the author of the paper that adding a criminalising provision in the Criminal Code would perhaps not be the most desirable vehicle for any law reform. This is so for the reasons

²⁸⁵ Roger and Anne Brewer (10).

provided there and the problematic issue of criminalising a beneficial form of preventative medicine. Likewise any legal compulsion to force parents to circumcise their children involving any Criminal sanctions would be undesirable. It would unnecessarily undermine the parent's authority to make decisions for their minor children's welfare based on their caring relationship. (66)

Respondents supportive of both the circumcision of incapable minors and reform

6.2.13 A few respondents were in favour of allowing parents the option of circumcising their incapable sons and argued that the law might benefit from reform. These respondents were concerned that the law offered insufficient or at least insufficiently clear protection to circumcisers. George Goldsteen concluded:

If Tasmania were to outlaw non-therapeutic circumcision on Jewish boys we would have to violate a man-made law in order not to violate a G-d given law. Such a law would be seen as interfering with our freedom of religion. ... If the Attorney-general considers changing the law, and I agree there is a need for it, he/she must consult with the Jewish experts on circumcision in Melbourne and ask Jewish mothers to submit their experience (When it comes to older boys and men, Muslims should also be consulted). (83)

Respondents who did not communicate their position on the merit of circumcision but held a position on reform

6.2.14 Three respondents held a position on the desirability of reform without expressing their viewpoint on circumcision's merit. Allan Carmichael made an argument against reform without firmly stating his position on the merit of circumcision:

There are a number of points raised in the paper to suggest that leaving the law unchanged may be the best option. First, evidence cited in the paper indicates that circumcision is rarely performed in Tasmania. Second, no substantial legal issues have arisen in Australia with regard to circumcision. Third, reform in relation to practice such as circumstances in which a circumcision may be performed (by whom, where and with what caveats) can be achieved through education and practice changes. Finally, I observe that while the issue of "non-therapeutic" circumcision is not insignificant, there are arguably more important and pressing matters relating to the rights and protection of children which deserve higher priority for the time resources and energy that would be expended in taking this particular issue further. (106)

6.2.15 Some respondents made an argument for reform without commenting on circumcision's merit. Respondent 100 stated:

The Issues Paper recently published by the Tasmanian Law Reform Institute has highlighted that the law surrounding circumcision in Tasmania is currently unclear. Regardless of my personal view as to whether non-therapeutic circumcision should be legal in Tasmania, I think the law should be clear. It would appear that reform of the current law in Tasmania is essential in informing parents, doctors and traditional circumcisers of their legal position regarding non-therapeutic circumcision in the future. (100)

6.2.16 The Department of Health and Human Services agreed with the need for clarification:

The Department shares the view that there is uncertainty among sections of the medical profession and the community about the legality of performing non-therapeutic male circumcision. It is the Department's preliminary view that express statutory provisions would be appropriate to avoid any uncertainty in the law – however it is premature to identify the exact mechanism of regulation as that is dependent upon the scope of the reform sought. (116)

The Tasmania Law Reform Institute's view

6.2.17 There are several arguments against the desirability of reform. Circumcision is yet to attract significant critical attention in Australia. Tasmanian circumcisers generally meet high health and ethical standards. There is presently little impetus for reform in the community. Very few interstate or overseas jurisdictions have laws specifically regulating circumcision. Significant circumcision related actions have not been brought in Tasmanian courts. The emotiveness of the issue will also make reform controversial and difficult to implement. Furthermore, Tasmania could potentially improve circumcision practices without altering the law. Leaders and policy makers in government, the community, and religious and health organisations can all influence how circumcision is practised. The vast majority of Tasmanian parents do not circumcise their children. It may be better for Parliament to focus attention on other perhaps more deserving areas of law.

6.2.18 However, there are also strong arguments for reform. The Institute received scores of submissions concerned about the law regulating circumcision in Tasmania. There are identifiable problems with the application of the general law to circumcision. The law suffers from inaccessibility. Tasmanian legislation does not expressly refer to male circumcision. Case law does not directly address circumcision. Lawmakers did not develop the relevant governing law with its application to circumcision in mind. The governing law is a complicated mix of both federal and state law, and of statutory and common law. This makes identifying the relevant law an unnecessarily time consuming and difficult task for parents, medical professionals and non-medically trained circumcisers alike.

6.2.19 The law is also less than certain, coherent and comprehensive. These issues are pervasive. Fundamental matters remain unclear. Uncertainty makes it difficult for parents and circumcisers to discern the legality of their conduct. It is liable to lead to both the condoning of questionable practices and to the challenging of commendable practices.²⁸⁶ Uncertainty also invites costly and time consuming legal action. Overseas jurisdictions have experienced problems with uncertain regulatory law. Finland's criminal courts have recently heard four years of appeals at taxpayer expense to resolve whether a mother was guilty of assault for authorising the complication free and pain managed circumcision of her four-year-old son.²⁸⁷ Most of the imprecision and uncertainty in the law that drove the appeals heard in the Finnish courts also exist in Tasmanian law.

6.2.20 Causes embedded in both the law and the circumstances of some circumcisions also make enforcing the law difficult. Most people circumcised in Australia are too young to make a complaint or bring an action on their own in a timely manner. Conflicts of interest may discourage some parents from bringing an action on their child's behalf. The law itself sometimes provides little incentive for a person to bring an action on behalf of a child. This is certainly the case for the law governing the authorisation of non-therapeutic procedures on incapable minors (see discussion from 3.3.3). Tasmanian limitations law may also have the unfortunate operation of precluding some adults from bringing potentially legitimate and just actions for harm they suffered as a minor (see discussion at 3.6.1).

6.2.21 The inaccessibility, uncertainty and unenforceability of the law will remain until there is reform or authoritative judicial interpretation. Reform through case law may never come. If it does come it will be piecemeal. There is also no guarantee that legal action in the courts will bring about desirable reform. The Institute supports legislative reform to establish greater accessibility, certainty and enforceability in the law for these reasons.

6.2.22 It may also be desirable to introduce reform to ensure that the law reflects the legitimate bases for non-therapeutic circumcision. The law might also benefit from reform to set higher health

²⁸⁶ Lord Diplock has also suggested that the 'absence of clarity is destructive of the rule of law; it is unfair to those who wish to preserve the rule of law; it encourages those who wish to undermine it.' See: *Merkur Island Shipping Corp v Laughton* [1983] 2 AC 570, 612.

²⁸⁷ KKO:2008:93 (Finland).

and ethical practising standards for circumcisers or to better address the interests of individuals harmed by a circumcision as an incapable minor. The following sections directly address these potential rationales for reform. However, the Institute is of the opinion that the benefits from resolving problems with the uncertainty of the law make reform desirable regardless of any other benefit that reform might bring.

Recommendation 1

The Institute supports the enactment of legislation to reform the law governing circumcision.

6.3 The circumcision of adults and capable minors

If as an adult a guy wants to be circumcised then cool, let him do it, after all it's HIS body, and although he will not need his penis much when he's young, he definitely uses it A LOT later on. (90)

6.3.1 Respondents were in favour of permitting circumcision performed on an adult or capable minor with their consent. Respondents agreed on this point regardless of the position they took on the merit of circumcising an incapable minor. Several respondents vehemently opposed the circumcision of incapable minors whilst stressing their support for circumcision performed at the request of an adult or capable minor.²⁸⁸

Non-therapeutic circumcision is a valid elective procedure for adults, like many forms of non-necessary cosmetic surgery. However, the non-therapeutic, forcible circumcision of children is a mistaken and discreditable practice of a bygone era. (1)

Moreover, on our analysis competent minors and adults should be free to elect circumcision for non-therapeutic reasons. (3)

There should be no gender discrimination. If non-therapeutic circumcision/mutilation of a little girl is illegal, then circumcision/mutilation of a little boy must also be illegal. Adults can make up their own minds about their own bodies. I find it absurd and insulting to suggest that it is "mutilation" for one gender and "circumcision" for the other. The child who is being cut is unable to understand the motives and intentions of the person cutting their body. The adult that the child becomes must be able to make their own value judgements about their own body. (33)

Non-therapeutic circumcision of an adult should be lawful if the adult has given informed consent in writing. (90)

6.3.2 However, respondents did not reach consensus on how old, mature, rational or informed a minor ought to be before they ought to be allowed to authorise the procedure themselves. Several respondents argued for the establishment of legislated age ranges to guide consideration of when a minor ought to be adjudged as capable of making their own decision on circumcision. Steven Svoboda proposed that:

Non-therapeutic circumcision of a minor should not be lawful, due to the human rights considerations discussed above, including the overview of religious arguments. If the child is ten years of age or older, he should provide his own properly informed consent to the procedure. Between six and nine years of age, he should be provided the opportunity to consent depending on his capacity. (62)

²⁸⁸ James Chegwidan, Marie Fox and Michael Thomson, Dan Strandjord and Paul Harwood.

6.3.3 Robert Darby asserted that:

If the minor is aged ten years or above his own informed consent should also be required. (79)

6.3.4 Some respondents argued for delaying a person's decision to circumcise until they have reached the age of majority:

Regarding older children say from about the ages of 8 to about 14 informed consent is contentious. The default is they are not giving consent (i.e. if they say nothing) so if they clearly state they do not wish to be circumcised that needs to be respected. I don't think it is reasonable to expect all young boys to be able to stand up to their parents. As parents are their primary care givers young boys may feel they are betraying their parents. There are a myriad of ways in which a parent (or parents) could manipulate a young boy into agreeing to circumcision. I don't think it's reasonable for prepubescent boys to understand the consequences of circumcision. For these and other reasons consent by young boys for a non-therapeutic circumcision is invalid. As for boys close to the age of 18 (who may be independent of their parents), it's a moot point whether their consent is valid. If they haven't the maturity to wait till they are 18, they haven't the maturity to undertake such a thing. (69)

6.3.5 Others went further and argued that some individuals may be unable to make a considered decision about circumcision even when they reach the age of 18.²⁸⁹

Since circumcision affects sexual function, the person should have had a significant sexual experience before the operation is performed, to make an informed decision about how much his foreskin matters to him. For that reason, ideally, the age should be 21, but it will probably not be practicable to make the age of consent greater than the age of marriage. (26)

Non-therapeutic circumcision should never happen except at an age of majority preferably at 26 years or older as this is when the mind is physiologically mature and so free from outside forces of coercion from peers, parents and society and so choosing the circumcision by the owner of the penis. (73)

6.3.6 Steven Svoboda asserted the law should prohibit people from circumcising older minors who voice their opposition to the procedure:

Even with court authorisation, a minor ten years of age or older should not be circumcised if he refuses to give properly informed consent. (62)

The Tasmania Law Reform Institute's view

6.3.7 As explained in Part 5 (see discussion from page 5.3.7), it is the view of the Institute that uncircumcised adults and capable minors should have the right to determine their own circumcision status, and, generally, the right to determine the circumstances of the performance of their own circumcision.

6.3.8 The law governing the circumcision of adults and capable minors already provides a significant sphere of legality for circumcision performed at the request of an adult or capable minor (see discussion from Part 3). The governing law is not ideal; it is not circumcision specific and is provided by a complicated mix of legislation and common law. Reform to clarify the basis of the legality of circumcision performed at an adult's or capable minor's request may be beneficial. However, the law is relatively clear in its operation and there is no pressing need for reform. The relevant private law provides that a minor is 'capable of giving informed consent when he or she achieves a sufficient understanding and intelligence to enable him or her to understand fully what is

²⁸⁹ Hugh Young, Respondent Frank McGinness.

proposed'.²⁹⁰ The law does not set a specific age range. However, courts take several matters including age into account when determining a child's capacity.²⁹¹ The Institute considers the current law on the matter of determining a minor's capacity sufficient. The law requires courts to consider and balance all relevant matters. This determination is difficult and people will disagree on how it ought to be done. The Institute is of the view that the courts do this difficult task sufficiently well.

6.3.9 The Institute does not see merit in limiting the right to request a circumcision to adults only, or to just adults or minors of a pre-determined age. The Institute acknowledges that minors may not have the same experience, maturity or comprehension as some adults, and that this may affect their decision making. However, the Institute is of the opinion that at least some minors have maturity, experience and comprehension analogous to that of an adult allowed by law to provide their consent to a circumcision. The law also allows mature minors to make decisions of potentially greater significance than the decision to be circumcised (or to be left uncircumcised) before they reach the age of majority. Some people may also benefit more from a circumcision performed in their minority than from a circumcision performed later in their life. A blanket age prohibition would on occasion unduly prohibit some minors from exercising their autonomy. The Institute is of the view that the capacity of each minor to authorise their own circumcision should be determined on the merits of the particular case. This is already required under present law.

Reform options

1. Leaving the law unchanged:

6.3.10 The law governing the circumcision of adults and capable minors is quite well established. It requires courts to take all relevant matters into account. On the whole courts perform their function of determining a minor's capacity well. There is not likely to be a significant practical benefit from reforming the relevant governing law.

2. Expressly legalising circumcision performed at the request of adults and capable minors:

6.3.11 This option would involve the enactment of a provision to provide expressly for the legality of consensual adult and capable minor circumcision in legislation. The present law is sufficiently clear in its operation. This option would serve only to establish clearly the basis of the legality of circumcision performed at the request of an adult or capable minor. The option may be desirable to prevent uncertainty about the performance of circumcision at the request of an adult or capable minor arising in the future. It may also serve to establish clearly the availability of circumcision to adults and capable minors. This reform, although not strictly necessary, would be uncontroversial and would clearly establish the operation of the relevant law.

Recommendation 2

The Institute recommends reform to provide a clear legislative basis for the legality of circumcision performed at the request of an adult or capable minor.

6.4 The circumcision of incapable minors: criminal liability

6.4.1 Respondents expressed several distinct viewpoints on the desirability of a law permitting the circumcision of incapable minors. The viewpoints ranged from support for a new and explicit criminalising provision to support for mandating the circumcision of healthy newborn children. The

²⁹⁰ *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 237 (Mason CJ, Dawson, Toohey, and Gaudron JJ).

²⁹¹ TLRI, above n 17, Part 5.2.

discussion below presents the viewpoints of people opposed to the circumcision of incapable minors followed by the viewpoints of people supportive of at least some circumcisions performed upon incapable minors.

The views of respondents opposed to circumcision

6.4.2 Sixty-five respondents (52% of all respondents) clearly expressed a desire to prohibit the circumcision of incapable minors. Most of these respondents held the autonomy viewpoint on the merit of circumcision. Owen Jolly succinctly described this position:

A non-therapeutic circumcision should only be lawful on a person who has reached the age of majority. Considerations such as parental consent, cultural or religious tradition or the safety of methods employed are all outweighed by the child's right to sexual completeness, and their right to a choice in whether they undergo sexual modification. (76)

6.4.3 Dozens of other respondents also supported prohibiting the circumcision of young children. The following comments by respondents are representative:²⁹²

I urge passage of laws which protect boys from circumcision of medically normal body parts where there is no serious or life threatening medical condition which is present and current, which cannot be treated with lesser invasive means, similar to proposals by the MGM bill project at: <http://www.mgmbill.org>. (37)

Male circumcision should be treated the same way as female circumcision and totally outlawed. (85)

I am writing to say that I think the practice of routine non-therapeutic infant male circumcision should be made illegal... I would appreciate your consideration in this matter as I feel that things have to change. (60)

Out of the proposals for law reform, Option 2 – inserting a criminalising provision into the Tasmanian Criminal Code similar to that on FGM – seems like the most sensible option. (72)

Circumcision may only be performed where a defined list of medical reasons exist, and only after all other forms of conservative treatment have failed. The only valid reasons for circumcision in a minor are gangrene or surgically irreparable trauma. Should a therapeutic circumcision be required, an application must be made to the relevant court who shall rule on the matter. (49)

The patient must be at least 18 years old before they can decide to get circumcised. This ensures they can make a rational decision. There must be no exceptions, even for religion. A child must have the sole rights over his body. (15)

Non-therapeutic genital surgery should only be available for those aged 18 or over, and subject to the same public funding and legal constraints as any other cosmetic surgery. (34)

6.4.4 A few respondents argued for a regime that would classify the circumcision of an incapable minor as either a criminal assault or civil battery (or both). Robert Van Howe, Stephen Saunders and Robert Darby all argued that the circumciser and the person authorising the circumcision ought to remain liable in tort law throughout the circumcised person's life.²⁹³

It needs to be emphasised to parents, both in the standardised form and in other ways, that they are at a real risk of being sued by their child if for any reason the child is unhappy with being circumcised. They need to realise that by circumcising their child they are acting outside of the limits of normal, ethical parenting. (121)

²⁹² David Jackson, Anonymous, 60, Anonymous, Wilfred Ascott, K and Anonymous

²⁹³ Robert Van Howe, Stephen Saunders and Robert Darby.

Neither the circumciser nor the parents may extinguish the child's legal right to later seek redress for what is evidently a radical assault with no consent. (24)

As discussed above, the requirement to prove negligence raises the bar too high for men who have been harmed by circumcision procedures that have been performed competently. But even where there is no negligence on the part of the operator in the actual operation, which is usually performed within the normal parameters of acceptable damage, a male can still suffer both physical and psychological harm. The latter may take the form of resentment, shame, anger, loss of self-esteem, poor body image, mental anguish and a variety of psychiatric conditions requiring treatment or counselling. The former may take the form of reduced sexual sensation, performance and functionality, such as difficulty achieving a satisfactory erection or orgasm, as well as degraded anatomical appearance, compared with how his penis would have functioned and looked had it been left alone and its foreskin left in place. (79)

6.4.5 Robert Darby argued that logically there should be no opposition by those confident of circumcision being in the best interests of the child to reform that would significantly reduce the obstacles for those circumcised as a minor to overcome before they can succeed in a criminal or tort action for the harm they suffered from being circumcised:

Advocates of circumcision, whether for religious, customary or prophylactic reasons, can have no valid objections to this reform, since it does not infringe their right to circumcise boys. If they have the courage of their convictions and are truly confident that the boy will be grateful for his parents' actions in initiating him into their culture or giving him protection from dread diseases, they will have no fears that he will resent or object to their decision when he reaches maturity. If they do object to such a reform it suggests that they believe, deep down, that most boys would really prefer not to have been circumcised, or at least to have been allowed to make the decision for themselves when they were old enough to consider the issues and form their own judgement. (79)

6.4.6 Wilfred Ascott supported criminalising the circumcision of incapable minors and argued for several other supporting laws:

Non-therapeutic circumcision of a child should be made a criminal offence, punishable under the law. Provision needs to be made that parents may not take the child out of the country to have the procedure performed to bypass the legislation, nor may they request or bring a medical practitioner (or other circumciser) who is not subject to Tasmanian law in to the country to perform the procedure...

The possession, manufacture, importation, distribution, sale, purchase or ownership of any medical instrument designed for the performance of circumcision (Tara Clamps, Circumstraints, Mogen clamp, AccuCirc, Gomco clamp, PlatiBell, etc) must also be outlawed. It should be a criminal offence to own a medical instrument used in the performance of a circumcision. (49)

6.4.7 Bob Carveth briefly considered recommending the passing of measures to discourage circumcision without banning it:

In my suggestions to bring circumcisions to an end (both male and female) I was torn between suggesting that a law should be passed to stop any person carrying out a circumcision charging for that service. As most doctors are only motivated by money I could see circumcisions stopping overnight. (102)

6.4.8 However, he ultimately recommended measures to discourage the performance of circumcision on incapable minors, including removing government funding for the procedure, increasing the cost of the procedure and passing a law to only allow surgeons to perform it.

6.4.9 Several respondents argued on pragmatic grounds for a defined sphere of legality for at least some circumcisions performed upon incapable minors. Bernadette McSherry, Marie Fox and Michael Thomson argued that complete prohibition would be ineffective and perhaps even counterproductive:

Personally, I tend to think that regulation rather than prohibition is appropriate because the latter can be counterproductive, resulting in less rather than more control. For that reason I tend to think the Swedish model is the most appropriate. (120)

Although we adopt the position that on ordinary criminal law principles it must be extremely questionable whether the performance of non-therapeutic genital surgery on a child who lacks the capacity to consent is lawful, we nevertheless consider that it would be a mistake to enact criminal legislation to prohibit circumcision. Advocating such a measure would ignore the ineffective history of colonial attempts to stamp out circumcision in other jurisdictions, which almost inevitably generates 'reactance' that serves only to mobilise support for the procedure amongst those communities which support the practice. It is true that criminal prohibitions on female genital cutting in the UK and Australia convey a powerful message about the unacceptability of the practice and serve to highlight the harm which such practices inflict. However, the lack of prosecutions under such legislation raises questions about the enforceability and effectiveness of such provisions. In our view, therefore, the criminal law is both too blunt and too punitive to effectively regulate the practice of male circumcision, and utilising criminal law is likely to be counterproductive. (3)

6.4.10 Several respondents stated their belief that an entrenched deference to individuals and groups that practise or benefit from circumcision make the continuance of at least a limited sphere of legal protection for the circumcision of incapable minors a *fait accompli*. Robert Inder expressed this belief:

Alas, I fear the chances of the Tasmanian parliament legislating along the above lines are slender and that even the chances of the institute recommending such legislation are not particularly high. Too many people are too deferential to vested commercial interests, to medicos who tout cruel quackery and to divines of various stripes. (101)

6.4.11 Other respondents argued that targeted prohibition could be an effective tool in changing attitudes and reducing the rates of incapable circumcision in Tasmania. Ranipal Narulla expressed her opposition to the circumcision of incapable minors in principle whilst recognising pitfalls in complete prohibition. She made the following suggestion:

I propose that there may be scope for the criminalisation of non-therapeutic non-religious circumcision, whilst continuing to allow non-therapeutic religious circumcision with appropriate safeguards. I encourage you to consider this possibility in your final analysis. (95)

6.4.12 Robert Darby and respondent 69 argued that the law should only allow circumcisions to be performed for particular reasons in certain circumstances:

Non-therapeutic circumcision of a minor should be lawful if he is under ten years of age and it is performed at the request of parents who are committed, sincere and practising adherents of a religion that requires parents to circumcise their children as a condition of adherence to that faith; or if the parents are members of a viable indigenous Aboriginal tribal group that traditionally practises circumcision as an initiation rite. (79)

Religious ritualistic circumcision is a challenge. Some people say that boys whose parents are members of religions that practise circumcision (i.e. Judaism and Islam) deserve the same protection as other boys. Religious circumcision would need approved anaesthetic etc. and follow the same rules as a therapeutic circumcision. If ritualistic circumcision is permitted then it needs to be clear that parents are members of such a religion. The religions need to be approved (i.e. Judaism and Islam only). This is to pre-empt the possibility of people creating their sects in order to have circumcision allowed. (69)

6.4.13 Other respondents opposing the circumcision of incapable minors believed that reform to discourage the circumcision of incapable minors should be pursued through less coercive means. They often held this view for pragmatic reasons. This view was held by Marie Fox and Michael Thomson and Joe:

We would contend that a more productive way forward would be to work with health professionals to promote awareness of the risk and costs of the practice, and with religious communities to explore alternative ways of satisfying religious requirements which would not entail permanent surgical alteration. (3)

In conclusion, I lamentably suspect that direct legislative action to fully protect boys is still in our more distant future. It is said that bad habits are hard to break, bad cultural habits are clearly even harder to break. It would be a tortuous path to attempt to eliminate all circumcision at this point, resulting in at best a Pyrrhic victory. Therefore, as opposed to a direct legislative change, perhaps the best course of action for Australia at this point is to further reduce the financial incentive for circumcision. Non-therapeutic circumcision is no longer performed in most public hospitals, it is time to take the next step by removing the federal subsidy provided through Medicare. Such a move should then be followed up by a campaign by the Royal Australasian College of Physicians to reduce the number of later circumcisions caused by misdiagnoses of conditions such as Phimosis and Balanitis. Such a change could be coupled with reforms along the lines seen in Sweden. Make it a goal to end the secular practice of non-therapeutic circumcision: a goal that is not too far off from being realised in Australia. (56)

6.4.14 Robert Darby also argued for greater public education to discourage circumcision. He gave two justifications for his suggestion:

First, because Australia has a past history of widespread circumcision, many parents are unfamiliar with the development of the normal penis and uncertain as to its proper care. Secondly, and partly as a consequence of this, circumcision promoters exploit these fears, intensify them with news from Africa about the extra disease risk supposedly posed by the foreskin, and insist that the only way to avoid inevitable and recurrent “foreskin problems” is by an early and thorough circumcision. There is a great deal of misinformation about the foreskin currently circulating, which must be countered with accurate advice. (79)

6.4.15 Darby argued for the need for an authoritative guide to be published and disseminated to inform the public about circumcision and foreskin care:

In order to avoid such problems and to reassure parents that the uncircumcised penis is normal and easy to care for, and that most problems can be fixed without the need for foreskin surgery, medical authorities should issue a simple, easy-to-read guide to its care and maintenance, including advice on simple remedies for minor problems and what to do in rare but genuine emergencies such as severe paraphimosis.

The guide should also warn parents not to be alarmed or misled by the extreme claims of circumcision promoters. These fall into two classes: true believers in the necessity for circumcision, who act out of conviction rather than the desire for gain; and opportunistic medical practitioners who exploit parental fears in the interests of attracting surgical patients and making money. Both categories may be accused of irresponsible medical scaremongering, and the conduct of the latter is reminiscent of the fairground quack who quickly found that nearly everybody who consulted him was suffering from precisely the illness that his snake oil was guaranteed to cure.

The guide should warn parents to be sceptical of such claims and not to be misled by sensational media reports or gossip on talk-back radio, but to trust their paediatrician and other reliable medical authorities. Above all, the leaflet should offer simple, practical advice as to penis care and not get bogged down in a fruitless debate about the “pros and cons” of circumcision. (79)

6.4.16 Gary Burlingame also argued for public education to be used as a tool to discourage people from circumcising incapable minors:

There needs to be better education in relation to the anatomy for children so when they become adults they don't request this abuse on their children. (5)

The views of respondents supportive of at least some circumcisions performed upon incapable minors

6.4.17 Proponents of either the paternalistic or non-paternalistic benefit viewpoints on the merit of circumcision supported permitting the circumcision of incapable minors in at least some circumstances. Some of these respondents argued for the legal protection of only certain kinds of circumcision. Others argued for broader permissibility for circumcisions performed upon incapable minors. The Rabbinical Council of Victoria (RCV) was primarily concerned about protecting the tradition of Jewish parents circumcising their child on the eighth day of its life:

The RCV is opposed to any legislative or regulatory intervention in the private religious lives of adherents to Judaism that would in any way interfere with or obstruct the free practice of one of the central tenets of the Jewish faith, namely the fulfilment of the Abrahamic covenant to circumcise male infants at the age of 8 days. (2)

6.4.18 Respondents who saw merit in at least some circumcisions performed upon incapable minors typically supported permitting circumcision for a broad range of reasons. Some respondents argued that all or at least most children would benefit from circumcision. Several respondents had trouble comprehending support for the criminalisation of the circumcision of incapable minors. Brian Morris, a keen advocate of the potential benefits to public health of routine circumcision, expressed his disbelief to the Institute:

The arguments here [addressing some issues that might arise if the circumcision of incapable minors is criminalised] seem to support in simple terms the possibility that if circumcision were to be made a crime then the law would be seen as a joke! (6)

6.4.19 Several respondents earnestly supported the enactment of measures to allow and perhaps even encourage the circumcision of incapable minors. Brian Morris argued this:

In response, the TLRI should do everything within its power to address any legal obstacles so as to facilitate and streamline the implementation by governments to access by parents of better means to have their male infants and children circumcised ...

The Tasmanian government has a responsibility, possibly legal, to inform parents of health and medical benefits of circumcision as a preventive health measure ...

The TLRI needs to send a clear message to the Tasmanian government to do so. The government should do more to promote circumcision services and access to those ...

Since circumcision is in the best interests of the child in every way as far as health is concerned, then support by the law should be given to the parental decision that is in favour of circumcision. The non-consenting parent should be expected to provide an extremely good reason for opposing their son's circumcision for a juridical system to disallow it. (6)

6.4.20 Morris, without making the argument himself, suggested that an argument could be made for government mandated circumcision of incapable minors:

Just as extremists may argue that infant male circumcision be banned, there are more logical, evidence-based medical arguments that circumcision should be mandated. In fact a reasonable finding by the TLRI is that circumcision should be promoted and the previous win by the anti-circ movement in having elective circumcisions banned in the public

hospital system (which Governments were happy to accede to in the false belief that it would save them money) should be overturned. (6)

6.4.21 Other respondents also argued for the enactment of measures to actively encourage parents to have their sons circumcised. Jean Harris and John Glazebrook held this view:

Please continue allowing male circumcision in Tasmania. Indeed, please fund free circumcision for all baby boys whose parents request it. (7)

Government funded circumcision clinics should be established in Launceston and Hobart, and operate with the highest professional standards. It would be appropriate for this to occur in the proposed GP super clinics. Circumcisions should also be allowed in private clinics practising the same high standards. (25)

6.4.22 The Australian Federation of Islamic Councils (AFIC) opposed both legal and non-legal efforts to discourage the performance of circumcision:

AFIC opposes a special regulatory regime for non-therapeutic male circumcision. The purpose behind such a scheme would be to put barriers in the way of non-therapeutic circumcision. It would have the goal of trying to “educate” people to abandon the practice. This would be insulting to Muslim, Jewish and Aboriginal Australians who are not interested in abandoning the requirements of their faiths. (46)

6.4.23 However, most respondents who saw merit in the circumcision of incapable minors merely argued that the law ought to permit parents to have their incapable son circumcised at their request:²⁹⁴

I see no reason for practitioners to take on board legal risks for performing the wishes of the parents, and I see no reason why anyone but the parents should have a say in this matter. (16)

The parents have the right to choose circumcision for their son for religious or medical reasons, without the circumciser being held liable, unless there was pressure or coercion. (60)

The Tasmania Law Reform Institute’s view

6.4.24 Respondents differed on whether they thought the law ought to ban, discourage, permit, promote or mandate the circumcision of incapable minors. The Institute detailed its position on the merit of the main rationales for circumcising incapable minors in the previous Part (see discussion from 5.3.6). The Institute is of the view that circumcision should only be legal to perform when there is broad ranging support for its performance. There is no persuasive reason to enact measures to encourage or mandate the circumcision of incapable minors (for the Institute’s view on this matter see the discussion from 5.3.6). Furthermore, it considers the various rationales for circumcision as unequal in merit. The Institute is of the opinion that:

- The law ought to accommodate established religious and ethnic circumcising traditions in Tasmania. It should also support measures to encourage individuals associated with these traditions to move away from loosely entrenched and particularly contentious practices.
- The law ought to condemn the waning tradition of circumcising incapable boys in Tasmania for secular non-ethnicity related social reasons.
- The law ought to prohibit the circumcision of incapable minors in Tasmania for prophylactic reasons.

²⁹⁴ Bernd Wechner and 60.

6.4.25 It is not clear how the criminal law distinguishes between the various rationales and potential circumstances for the performance of a circumcision upon an incapable minor. Ethically contentious and sometimes abhorrent circumcision practices occur in Australia.²⁹⁵ Legal action in relation to circumcision could arise in Tasmania. There is no guarantee that legal action will establish a desirable interpretation of the law. The Institute is of the opinion that these features make legislative reform desirable.

Reform options

1. Amending the surgical operation section in the criminal code:

6.4.26 The Surgical Operation section in the *Code* (s 51) lawfully excuses behaviour that may otherwise be unlawful in certain circumstances. The section provides:

- (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 too young to exercise a reasonable discretion in such a matter, 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.

6.4.27 The Institute's *Non-Therapeutic Male Circumcision Issues Paper* discusses this section in detail.²⁹⁶ The analysis in the Issues Paper concluded that it is uncertain whether the section has an application to circumcision or any other non-therapeutic procedure.

6.4.28 This option would amend the Surgical Operation section in the *Code* to give it an express application to non-therapeutic procedures performed for some religious or ethnicity related procedures performed upon incapable minors.²⁹⁷ Alternatively, a religious and ethnicity related circumcision specific sub-section could be included in the section. Either reform could clarify the operation of the law.

6.4.29 It may be inappropriate to amend the section to give it an application to some religious and ethnic circumcisions or even any non-therapeutic procedure. It is debateable whether the section ought to have an application to any non-therapeutic procedure. It may be difficult to reconcile non-therapeutic circumcision with the section's focus on therapeutic procedures. Altering the operation of the section to accommodate some non-therapeutic procedures may change the section's operation in an undesirable way. It may skew and complicate the operation of the section.

6.4.30 This reform would also fail to clarify how the law applies to non-religious and ethnically related circumcision. An attempt to address these circumcisions by including a circumcision criminalising provision into the Surgical Operation provision would only serve to complicate the section further.

2. Amending the female genital mutilation section in the Criminal Code

6.4.31 This option would amend the Female Genital Mutilation (FGM) section in the *Code* (s 178A) to make the prohibition in the section gender neutral and its exceptions broad enough to accommodate the desirable forms of circumcision. This option would clarify the operation of the law.

²⁹⁵ Marshall, above n 99, 23.

²⁹⁶ TLRI, above n 17, 27.

²⁹⁷ Ibid 4.5; *Criminal Code* (Tas) s 51.

6.4.32 However, it may be undesirable to clarify the law in this way. The FGM section condemns non-therapeutic female genital procedures. It provides a general prohibition on the performance of any non-therapeutic procedure on a female's genitals. The provision even prohibits adult women from requesting someone to perform a circumcision upon them.²⁹⁸ The section intends to stigmatise the performance of all non-therapeutic female genital procedures as criminal. This aim is incongruent with the Institute's recommended approach to regulating circumcision.

6.4.33 The Institute recommends a more nuanced approach to regulating circumcision than that which has been taken in regard to FGM. It is of the opinion that some circumcisions ought to be permitted. The Institute does not wish to stigmatise every kind of circumcision as criminal. It considers circumcision to be too complex to be treated as closely analogous to any other single non-therapeutic procedure at the current time (including FGM).

3. Enacting provisions to detail permissible rationales for circumcising an incapable minor

6.4.34 A circumcision specific provision could be included in either the *Criminal Code* or a new Act. Such provisions could establish a prohibition on performing circumcision on incapable minors whilst also providing an exception for the performance of well-established religious or ethnicity related circumcision on incapable minors. This approach could clarify the application of the law to the various rationales for circumcision. It could set specific penalties for undesirable circumcision practices. This reform might also encourage Tasmanians to adopt an accurate characterisation of circumcision as a non-therapeutic procedure with known and potential costs that ought only to be performed for a good reason.

6.4.35 This option would clearly distinguish between undesirable and illegal rationales for circumcision, and desirable and legal rationales for circumcision.

Recommendation 3

The Institute recommends the enactment of a new and separate offence generally prohibiting the circumcision of incapable minors in Tasmania. The new legislation ought to create an exception for the performance of some well-established religious or ethnicity motivated circumcision on incapable minors.

6.5 The circumcision of incapable minors: civil liability

6.5.1 Regardless of the issue of criminal liability for non-therapeutic circumcision of an incapable minor, a further issue arises as to potential civil liability. The current law governing civil liability was discussed above (see discussion from 3.318). Much turns on the authorisation of the procedure and the extent to which the consent of one or both parents may be sufficient for the lawful authorisation of a minor. Many respondents were concerned about the potential for unethical conduct at the authorisation stage of circumcising an incapable minor. Several respondents argued that the law ought to clearly mandate minimum requirements for a lawful authorisation. Respondents criticised the failure of the law to state clearly whether one parent alone could lawfully authorise a circumcision. This section discusses the viewpoints on this matter.

6.5.2 The submission from Peter Brown was particularly pertinent. Brown's partner made a unilateral decision to circumcise their child. Brown did not want his child circumcised. He explained the circumstances of his son's circumcision in his submission:

²⁹⁸ *Criminal Code* (Tas) s 178A.

We [Brown and his partner] had discussed the issue of circumcision. My partner was in favour of the surgery but I was vehemently opposed. I viewed the surgery as unnecessary, ill-advised and barbaric. Most importantly, I view circumcision of an infant as a direct violation of his rights. If he, for whatever reason, elects to undergo circumcision at a later date (however unlikely that may be), I see that decision as his and his alone.

I was heartened to learn that circumcision is no longer performed in any public hospital in NSW. It did not occur to me FOR ONE SECOND that my partner would be able to find a zealous doctor who would eagerly perform such irrevocable surgery without my consent. I was of the absolute belief that, in the absence of my explicit consent, the default position regarding circumcising my son would be to do nothing. Consequently, it did not occur to me that the only way to protect the rights of my son and I was to send letters to every medical practitioner in Australia, one by one, explicitly telling them NOT to circumcise my son. How naive of me. I had cause to be out of the country for much of July. When I returned home on the 2nd of August I discovered that my son had been circumcised on the 27th of July, a few days prior to my arrival home...I remain completely dumbfounded that [name omitted] could (apparently) be afforded the latitude to perform non-medically indicated surgery on my son without my consent. (126)

6.5.3 The circumstances of the circumcision of Peter Brown's child are not unique. The Issues Paper identified another high profile case of a single parent authorised circumcision in Bundaberg in 2002.²⁹⁹ Robert Darby had been in contact with Brown and argued that both Brown's case and the Bundaberg case illustrated the need for reform:

What the case underlines yet again is the extreme casualness with which circumcision of a minor is regarded (no more serious than scratching off a wart), the ease with which it can be procured, and the need for much tighter regulation. As the law and regulatory practice stand, it would be quite easy for some pervert to kidnap a baby or young boy, take him to a compliant doctor, and have him circumcised without needing to produce any ID or proof of responsibility, and no questions asked, while he watches - which is not so different to what happened in that dreadful Bundaberg scandal. Peter [Brown] puts it very well, in an email to me, when he writes that he does not blame his misinformed and deluded partner nearly as much as the doctor who should have known better and warned her against proceeding; as he writes:

[name of his wife omitted] error of judgement is partially attributable to being a layperson. Assuming for one second that the surgery is justifiable on any non-medically indicated level, the doctor and the legal system, as experts, should have provided the circuit-breaker to ensure that the decision was utterly considered and meticulously measured. (In stark contrast, they both allowed action that was almost unholy in its haste). (79)

6.5.4 Several respondents argued for joint parental consent as a requirement for a circumcision on an incapable minor:³⁰⁰

I am sure however that I would not wish my sons to be circumcised. I am equally sure that if they were circumcised without my permission I would perceive this as a breach of human rights and a physical abuse of my child's person. I would be horrified. ... I can only suggest that any legal reform should: 1) make it clear that the consent of both parents is required 2) protect the person performing the circumcision in the case that the consent of both parents is unambiguously provided. I see no reason for practitioners to take on board legal risks for performing the wishes of the parents, and I see no reason why anyone but the parents should have a say in this matter. (16)

²⁹⁹ TLRI, above n 17, 23.

³⁰⁰ Bernd Wechner, Michael Glass, 69 and Robert Darby.

I think the following changes should be added to the law so that circumcision cannot be used as a weapon in a war between parents. It should be illegal to circumcise a boy without the permission of both parents. ... In addition to this, the forced circumcision of an adult or a child against the wishes of his parents should be prosecuted as a sexual assault. (29)

Requiring both parents to give written consent is much better than only having one. ... People are not always rational, one parent may have a boy circumcised just to spite the other. Having consent of both parents required could avoid some of these potential problems. Another advantage is that parents might be encouraged to discuss and explore the issue before committing to circumcision. Having said that, I don't believe parents have the right. (69)

Written consent of both parents or guardians required; where custodial parent has remarried, consent of both original parents, plus the new partner. ... Parents/guardians to present documentary proof that they are the people responsible for the child (e.g. birth certificate); normal POI process to apply. (79)

6.5.5 Michael Glass argued that a child should not be circumcised when their parents cannot agree on the desirability of the procedure:

If parents disagree then the circumcision should be postponed until the boy is an adult and can make his own decision on the matter. (29)

6.5.6 Several respondents argued that there ought to be recourse to the courts when parents disagreed about the merit of circumcising their son.³⁰¹

Authorisation by the Tasmanian Supreme Court or the Family Court should be required if the parents disagree regarding the circumcision of a child under ten years of age. (62)

Where parents disagree, circ not to be performed unless ordered by Family Court. (79)

I would like to comment on the issue of parental consent when there is a dispute between parents on the issue of religious circumcision. The Australian Federation of Islamic Councils would support the following:

- (a) If a child has not reached the age where he can give informed consent then the issue should be decided by the relevant court.
- (b) If a child has reached the age where he can give informed consent then the wishes of the child must be supported by the courts. This means that a child must not be forced to wait until he was 18 years old before the procedure could be performed. (46)

6.5.7 Robert Darby argued similarly that the performance of a circumcision on an incapable minor ought to be conditional on whether:

the request [for the circumcision] is by both parents of the child and is given in writing; and, court approval has been obtained if there is disagreement among the parents ... (79)

6.5.8 Michael Bates supported court involvement in settling disputes between parents but argued against legislative heavy handedness in how such disputes ought to be settled:

it would be a proper function of the court to consider the endless permutations and combinations of factual circumstances and apply the legislatively mandated test of the child's best interests. There is no need to overcomplicate legislation to address this remote possibility. (66)

³⁰¹ Steven Svoboda, Robert Darby and the Australian Federation of Islamic Councils.

6.5.9 Not every respondent provided support completely free of caveats for the judicial settling of disputes between parents over the circumcision of their child. Gershon Goldsteen expressed his concerns:

The British decision of *Re J* [in which the court gave great weight to the secular nature of a child's likely upbringing in its decision not to permit a child to be circumcised for religious reasons against the wishes of his mother] would create a problem in Judaism. ... Outside of Israel and New York even today most Jews live in a primarily Gentile community. Who is going to decide [whether a circumcision ought to be permitted] when a Jew lives in a non-secular non-jewish community ...

I can agree in a case where one parent is non-jewish and is against the mila that the court may have to resolve it. However there are problems with this. If the mother is Jewish the child is Jewish and she has a divine obligation to have him circumcised. The court is virtually obliged to decide in favour of mila in her case. If the father is Jewish, but the mother is not, then the child is not and there is no religious obligation. In that case it is appropriate that the court decides. This opens a can of worms however, because in many so called Reform/Progressive Jewish communities if the father is Jewish the child is considered Jewish even if the mother is not ...

Only if there is a dispute between the parents or in the case of an older child that is not willing to undergo a mila should the decision of a court or other independent body be sought (and where applicable seek the advice of a Beth Din). In all other cases the court should keep its nose out of circumcision. (55)

6.5.10 John Glazebrook suggested that court involvement ought to be avoided whenever possible:

A dispute may occur from time to time between parents. It is here that the weight of available evidence should be employed in order to achieve the best possible outcome for the child. Consultation with public health officials followed by mediation. No court action!! (25)

The Tasmania Law Reform Institute's views

6.5.11 Tasmanian circumcisers do not routinely seek joint parental authorisation prior to performing a circumcision on an incapable minor. Neither the criminal law nor the private law clearly establishes whether joint parental consent is an ordinary requirement of a lawfully authorised circumcision of an incapable minor. Case law suggests that joint parental consent may be required under private law.³⁰² Legislation does not clearly express this requirement.

6.5.12 Incapable minors are vulnerable to actions taken by their parents. Parents can use their children as instruments in their disputes. Circumcisers have circumcised children against the wishes of one of the child's parents on more than one occasion in Australia (see discussion above from 6.5.2). Joint parental consent does not guarantee decision making that is in a child's best interest. However, a legislated requirement of joint parental consent would operate to prevent the use of circumcision as an instrument in disputes between parents. Joint parental consent should serve to protect an incapable minor's interests in some instances in this way.

6.5.13 Private law already allows parents who disagree about whether their incapable child ought to be circumcised to bring an action before the courts to determine the matter.³⁰³ Case law also suggests that a circumcision may not be performed without the authorisation of a court when parents disagree about whether their incapable child ought to be circumcised.³⁰⁴ The Institute is of the opinion

³⁰² See discussion above from 3.3.

³⁰³ An action of this kind has previously been brought in Australia, see: *K v H* [2003] FamCA 1364 (Unreported, Strickland J, 19 December 2003).

³⁰⁴ *Re J* (Child's Religious Upbringing and Circumcision) [2000] 1 FCR 307, [21] (Thorpe LJ), [30] (Butler-Sloss P).

that disputing parents ought to go before the courts to settle their dispute. The Institute supports the operation of the current law in this respect. The Institute also sees merit in enacting reform to clearly establish the necessity of seeking court authorisation before performing a circumcision on an incapable minor when parents may disagree on whether the procedure ought to be performed. Both the authorising parent and the circumciser ought to be liable for battery under private law for performing a circumcision on an incapable minor without joint parental consent or court authorisation.

Recommendation 4

The Institute recommends the enactment of legislation to require joint parental authorisation for the circumcision of an incapable minor.

Recommendation 5

The Institute recommends the enactment of a law to require court authorisation for a circumcision whenever parents disagree about the desirability of performing a circumcision.

6.6 Mandatory court authorisation

6.6.1 The current law allows for referrals to a court to determine if a circumcision is in the best interests of a child.³⁰⁵ The law also mandates the referral of circumcisions where there is a significant risk of a parent making a decision not in the child's best interests.³⁰⁶ However, the circumstances that may enliven mandated court authorisation are unclear. Several respondents criticised the current system and argued for mandatory court authorisation for all circumcisions performed on minors. James Chegwiddden identified several problems with the current law:

The Court is lamentably impotent at present, since referral to the court is voluntary only. It can only determine the issue when a case is referred to it. In infant circumcision, that is unlikely to happen because (a) the child is too young to refer itself; (b) the parents asking for the operation obviously want it and thus are unlikely to refer the issue to a court that may deny their wishes; (c) many circumcisers have a financial interest, indeed whole businesses, based on circumcision and are unlikely to refer; (d) often other interested parties will not find out until after the event and thus will not be able to refer; (e) the independent children's lawyer that the court can provide is appointed only *after* the referral itself. As such, it is no surprise that no referral has yet occurred. Thus has the unsatisfactory status of infant circumcision once again dodged the scrutiny of the courts. (1) [Footnotes omitted].

6.6.2 Several respondents argued that the mandated authorisation of an independent tribunal or court would be desirable for the circumcision of every incapable minor. Chegwiddden argued for this reform:

The consent regime can be improved by a simple requirement inserted into legislation that in all cases where circumcision of a minor is proposed, a Medical Procedure Application must be made to the Family Court (or, by virtue of cross-vesting, the Supreme Court of Tasmania). The Court can then determine the question of the child's best interests, weighing the positives and negatives in each individual case, with the aid of an Independent Children's Lawyer to speak in the child's interests. That provision would harmonise with the criminal law reform proposed, which would make it illegal to circumcise a male minor without obtaining the above court order. The benefit of requiring court authorisation for all circumcisions of minors offers many benefits. (1)

³⁰⁵ See discussion from 3.3.

³⁰⁶ *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

6.6.3 Chegwiddden stressed that a court authorisation system may be required for both therapeutic and non-therapeutic circumcisions to ensure that circumcisions are not falsely classified as therapeutic to avoid the proper scrutiny:

The proposed regime would only work properly if referral is compulsory for all circumcisions of minors, not just non-therapeutic circumcisions. That is in part out of necessity and in part out of caution. Out of necessity, because the question of whether a therapeutic indication is present belongs so closely to the whole issue of whether to circumcise that it is part of the decision itself – and thus, as a ‘special medical procedure’, is not one the parent can validly make. Out of caution, because it is the sad experience of the court, as the High Court observed in *Re Marion*, that not all medical practitioners, nor all parents, can be relied upon to do the ethical thing in all cases. Sad case histories exist in other countries, for example in the United Kingdom, where children have been classed as having spurious illnesses simply to provide a pseudo-medical indication for an operation that is in fact wholly non-therapeutic (for example, “congenital phimosis”, which is undiagnosable in infants as the foreskin does not retract at that age even in healthy babies). Compulsory referral removes the risk that some children will be wrongly classed as having a “therapeutic circumcision” simply to avoid the need for court consideration of the child’s best interests. Where there is a medical indication, a Court order would be extremely easy to obtain. (1)

6.6.4 Chegwiddden also argued that mandatory court authorisation should be widely supported because it provides the best means through which to ensure that the procedure is only performed when in the best interests of a particular child:

The best way of proceeding is therefore by a new provision. The new provision would be part of the Code. It would be simple. It would not ban infant circumcision outright, but would make it conditional upon fulfilling a requirement of seeking a Court order. Circumcision on male minors (whether therapeutic or not) would be legal only where a Court Order is first obtained from the Supreme or Family Court. The Court would need to be satisfied of an objective need and that the operation is in the “best interests of the child”. If such an order were obtained, the procedure may go ahead. If not, its performer/s are exposed to criminal prosecution. This would fulfil the underlying protective purpose of the current criminal law, ... remove doubts as to its application, and make the enforcement of the new system easy, clear and effective. It would also marry well with civil proceedings, where the same court approval system would apply (see Chapter 4). Those performing circumcisions have no legitimate objection to this slight increase in regulation, since it would have the effect of legitimising those circumcisions that are justified and removing them from the bounds of reasonable criticism. It is also a step in the right direction for medical professional standards. To object to this would show a desire to keep the “best interests” question out of the scrutiny of the law, and to refuse to adopt best practice in an area where it is acknowledged fundamental rights are engaged. (1)

6.6.5 Wilfred Ascott also supported the establishment of mandatory court authorisation. He also argued for new legislation to detail when a circumcision is in a child’s best interests:

The authorisation of any circumcision (irrespective of the reason thereof) must be authorised by a competent court that has jurisdiction over such matters. In addition to this, specific legislation must be enacted to provide guidance to and support for the court ruling. (49)

6.6.6 Several respondents envisaged an authorisation system where parents wanting to circumcise their child would have to apply to an independent arbiter for an exemption from a law generally prohibiting circumcision. Marie Fox and Michael Thomson, Stephen Saunders and Owen Jolly expressed this view.³⁰⁷

³⁰⁷ Owen Jolly, Marie Fox and Michael Thomson, Stephen Saunders.

If the law were to explicitly permit non-therapeutic circumcision under certain circumstances, then court authorisation should be required in all cases to establish whether those circumstances apply. (76)

In order to engage with communities that may feel marginalised by any change in the law, we recognise that it may be advisable to establish a tribunal to hear those cases where parents are adamant that a child should not wait until he attains competence. We recognise that such a proposal may have significant resource implications, but argue that it would have the advantage of requiring parents to reflect on their reasons for electing circumcision, and that such a tribunal should, following the English Court of Appeal decision in *Re S*, aim to carefully distinguish what the child *needs*, from the wishes and interests of the parents. (3)

Outside of very rare and genuine medical cases, have the procedure outlawed, and let the birth parents or guardians be the ones who have to apply for special exemptions, at all times first requiring that (a) the circumciser is appropriately and medically skilled (b) the circumciser has appropriate insurances (c) both the circumciser and the parents must lay down in writing for the child their justifications for what they have done (d) neither the circumciser nor the parents may extinguish the child's legal right to later seek redress for what is evidently a radical assault with no consent. (24)

6.6.7 Several respondents opposed mandatory court authorisation.³⁰⁸

I reject outright the suggestion on p 89 Q5 that authorisation might be needed from a Court to perform a circumcision. This is a typical anti-circumcision ploy and is part of an intimidation tactic to scare parents and doctors, mess them around and in the end stop circumcision from being done. (6)

I don't see a need for authorisation of a court or tribunal in a scenario where consent of both parents is required or preferably parents do not have that right. (69)

[Commenting upon the merit of mandatory court authorisation] Probably too extreme. (27)

Where it concerns a Jewish ritual mila asking for a formal authorisation is like a police officer having to seek authorisation from a motorist to give him a traffic infringement ticket. Jewish mila is legally required. (55)

6.6.8 Several respondents noted the burden mandatory court authorisation might create on parents. Vikki Bullock related her distress at the difficulty she already had in having the circumcision of her son performed in Tasmania under the present law:

Finally, it is extremely distressing for parents to source a surgeon willing to perform circumcision. There are such surgeons in Tasmania or otherwise mainland states. Parents should be able to request a circumcision, a consent form is signed and the operation is performed shortly following birth. (35)

The Tasmania Law Reform Institute's view

6.6.9 It is not clear whether the law already requires court authorisation to circumcise an incapable minor.³⁰⁹ Case law suggests that court authorisation is required when parents disagree. It also suggests that authorisation will not generally be required when joint parental consent is present. This interpretation of the law is not well enforced. Respondents made a persuasive argument for mandatory court or independent tribunal authorisation for all circumcisions to be performed upon incapable minors. James Chegwidan provided a thorough list of potential benefits:

³⁰⁸ Brian Morris, 69, John Travis and Gershon Goldsteen.

³⁰⁹ See discussion from 3.3.

- a) *It makes the law and procedure clear.* At present the law is not clear. Should authorisation be explicitly needed, parents, doctors, care agencies and welfare bodies know what the requirement is and can go about obtaining or opposing authorisation. It removes all guesswork as to what is needed for consent.
- b) *It harmonises the criminal and civil regimes.* No more would interested parties have to consider the criminal and civil obligations involved in circumcision. The requirement for court approval would make the civil route clear and also remove any ambiguity on criminal liability. Because it would depend on whether a Court order existed or not, the legitimacy or criminality of the process would be crystal clear.
- c) *It allows for proper consultation and participation.* At present there is a significant risk that not all those who ought to be consulted on a circumcision proposal are so consulted. Court authorisation allows any concerned party to be involved in the determination by making submissions, and thus there is no danger that decisions will be made without proper consultation.
- d) *It gives the child a voice in the circumcision decision.* Currently an infant has no role whatever in the circumcision decision. If court authorisation were required, an Independent Children's Lawyer can be appointed to make representations to the Court on the child's best interests.
- e) *It is more objective.* The court, being further removed either than the parents or the medical professional proposing to circumcise the child, is more likely to make a determination that is reliable and takes into account all relevant considerations within a formalised and transparent structure. That is not guaranteed in decisions by parents alone.
- f) *It provides objectively assessable criteria and precedents.* Upon making decisions courts can give reasons which then clarify the law for others who may face the same decision in the future. This aids clarity and consistency to the law. That is not provided when parents and doctors decide in private what is an appropriate case for circumcision, and what not.
- g) *It allows for easier resolution of intra-family disputes.* Where parents disagree about the circumcision decision, the requirement for court authorisation defuses the situation by putting the decision into the hands of an objective third party.
- h) *It is more human-rights compliant.* The giving to the child of a voice, the provision of an objective decision-maker, the better consultation and access available, and the dispassionate consideration of the best interests of the child in each case makes the circumcision application procedure much more compliant with human rights norms.
- i) *It correlates well, simply and effectively with criminalising provisions.* Should the recommendations this Response makes be put into effect, the criminal regulation of circumcision (illegal subject to exceptions) work well with the civil sphere, as a chief exception to the criminal prohibition would be court authorisation.
- j) *It provides certainty about liability.* A parent who complies with established court authorisation procedures will know that his/her consent cannot be called into question at a later date by the bringing of criminal or civil charges. The authorisation procedure would put consent beyond the reach of later actions (subject to negligence).
- k) *It is simple and requires no other change.* The benefit of requiring court authorisation is that no other change need be made. The Court itself will, when referred to adjudge the best interests of the child, take into account all the relevant factors highlighted at Appendix, and is already required to do so by Commonwealth legislation. Court authorisation ought to be required for all circumcision of minors. (1)

6.6.10 Notwithstanding the strength of the above arguments, there are several reasons why mandatory court authorisation may not be desirable. The law would be costly to enforce. The process

would be time consuming, stressful and burdensome on parents and circumcisers alike. It may also not operate efficiently enough to accommodate traditions that circumcise a child early in life. Mandatory court authorisation may also be difficult to enforce. Circumcisers may be able to perform circumcisions without court authorisation without attracting the attention of the law. The Institute does not recommend mandated court approval for these reasons.

Recommendation 6

The Institute does not recommend the enactment of legislation mandating court authorisation for the circumcision of minors.

6.7 The provision of information

6.7.1 Several respondents argued for measures to ensure that circumcisers would meet the highest standards in the provision of information to those authorising a circumcision. James Chegwidden made the argument for reform from the perspective of a person opposed to the circumcision of incapable minors:

The current situation on consent, as highlighted by the Issues Paper, is woeful. Most provision of information is inadequate, some even misleading. Even the current [the 2004 statement] information brochure produced by the Royal Australasian College of Physicians provides far too limited information to the patient (or, as usual, his parents) to allow him or them to “fully understand” the risks. As medical professionals and academics alike have observed, all too often consent is regarded by certain medical practitioners as a formality to comply with, done by fulfilling a minimum standard of “basics”. That is especially unacceptable when it is not even the person being operated on who is giving the consent. To accord with the law set down in *Rogers*, doctors need to provide much more information when proposing to perform infant circumcision. They need to provide detailed information as to:

- the non-necessity of the operation in a healthy male;
- the purpose and function of the foreskin in the adult male;
- the process of circumcision (the procedure itself);
- the effect of the procedure (the final result);
- the risks of the procedure;
- the inconclusive nature of the supposed “benefits” and their non-accrual in any event until adulthood; and
- the advice of relevant health bodies who have advised on circumcision.

Something needs to be said about the last two components. Stating explicitly that the alleged benefits are unproved is important for two reasons. First, competent paediatric organisations recommend it as an important point of honesty in advising patients, because this is often a spurious ground thought important by some parents due to media exposure of supposed health benefit surveys. Secondly, Australians live in a culture in which, previously and due to the prevalence of circumcision, *many* rumours and unproved assumptions circulated about the practice that have been shown to be entirely baseless (that the foreskin was like an umbilical cord, that the child feels no pain, that the circumcised penis is “cleaner”, that the natural penis is hard to maintain, and even that it will be better for the boy’s penis to look like his father’s etc). It is thus incumbent upon any ethical medical professional to ensure that such rumours are swept away and form no part of the decision-making process. This advice might not be necessary in a country where circumcision and belief in its appropriateness were never part of the country’s social fabric. In Australia, however, it was. (1)

6.7.2 Several other respondents expressed concern about the accuracy and completeness of the information provided on the risks, benefits and potential significance of the procedure.³¹⁰

Parents seeking to have a boy circumcised must be given current advice from professional medical bodies and advised that the procedure is not recommended as a health precaution and that it may have adverse effects on the boy's sexuality. (79)

All information should be comprehensive to provide all things, not just the most common aspects, about circumcision, types, styles, methods, outcomes, results, in terms of Numbers To Treat NTT, list of what is lost to circumcision, film record of all circumcision procedures for the patient use and for patient file, not be done by OGBYN who have not studied male genitalia, show a close up of circumcising operation, include Taylor's penile function of the penis and foreskin, Sorrell's Adult Penile Touch Sensitivity Test results, O'Hara's Sex as Nature Intended, and include results of Tinari's brain visualisation: www.stopinfantcircumcision.org/BrainVisualizationArticle.htm (another example of doctors protecting their peer group from litigation by suppressing facts that show negative effects of circumcision under the guise of bad ethics). (73)

Before every circumcision request, the patient/parents must understand the procedure and what is lost in the process of circumcision. They should watch videos on how a circumcision is performed so they know the anguish that they/their child will go through. (15)

6.7.3 Respondents commonly suggested that there should be greater uniformity and higher standards across the board in the provision of information. Several suggested that this could be partially achieved through an authoritative uniform information and consent form.³¹¹

That a standardised consent form be developed that includes all of the complications that have ever been reported from circumcision. I developed such a form a couple years ago, but since I do not perform the procedure, it may need to be updated. I have attached a copy. This form would need to be signed by both parents. (121)

A detailed government publication could be approved. ... (It is inadequate and inappropriate for the prospective patient to rely on the circumciser's information). (69)

Both the child's parents should be informed of the benefits and risks of the procedure as indicated by the latest evidence medicine from peer reviewed, international journals. It is imperative that this information be provided by Federal and State Health authorities who will also have a legal obligation and responsibility to do so (reviewed annually so as to keep up to date). (25)

6.7.4 Several respondents were keen to stress their views on the insufficiency of providing information via brochures and forms alone. Respondent Dan Strandjord commented:

Since circumcision is irreversible, physicians who perform circumcisions must keep current with the medical/legal/psychological/sexual aspects of circumcision. Each penis is unique, the physician must make sure that the person who gives the consent actually understands these issues. It is not sufficient to simply offer a brochure and/or other literature. The physician must discuss the specific details for the patient in question and verify that the person giving consent actually understands the issues. (33)

6.7.5 Frank McGuinness and respondent 69 suggested that people should participate in some kind of counselling and perhaps even capacity testing to ensure that they understand both the information provided to them and the significance of the decision to circumcise:

³¹⁰ Robert Darby, Frank McGuinness, K.

³¹¹ Robert Van Howe, 69, John Glazebrook.

Written testing of the one to be circumcised should be done and submitted with the consent form along with showing the type of circumcision by film or best by live observance. (73)

I think it's appropriate for an adult to get counselling (though unclear as to what form it should take, though obviously not from the circumciser). A person may wish to get circumcised as a result of low self esteem, poor body image or self destructive impulses etc. ... The idea of counselling brings to mind of a waiting period to prevent immature persons from rushing into getting circumcised then regretting it later. (69)

6.7.6 James Chegwiddden suggested that a circumciser's post-operative duty may extend to informing children circumcised whilst incapable of making their own decision on the matter of the certain and potential effects of the procedure performed upon them once they are old enough to understand it:

As such, a post-operative duty arises of informing and advising the child who was (usually) not informed and not advised at the time of the operation. The child should have explained, either by their GP or the circumciser, the following:

- the effects of circumcision and their circumcision status;
- problems that may arise in future with the altered penis they now have; and
- the function of an ordinary natural penis, so that the child is enabled to understand the normal function of a penis and can seek advice should they perceive a deficit between the function of their penis and that of an unaltered penis. (1)

The Tasmania Law Reform Institute's view

6.7.7 Respondents argued that Tasmanian parents were liable to receive inaccurate or insufficient information under the current regime. These respondents proposed reform to improve the depth and quality of the information provided to people who might wish to authorise a circumcision.

6.7.8 The law requires medically trained circumcisers to provide people who are to authorise a circumcision with all of the information material to their decision on whether to have a circumcision performed.³¹² The same requirement may exist for non-medically trained circumcisers.³¹³ The full extent of the information to be required depends upon the circumstances of the particular procedure. It will ordinarily include the provision of information on all the health costs and benefits and any possible complications of significance. It may also require the provision of non-health information relevant to the decision.³¹⁴

6.7.9 The law already seems to require the provision of suitable and accurate information to people who wish to authorise a circumcision. However, the Institute sees some merit in introducing legislation to establish uniform provision of information requirements for all circumcisers. Reform may also be desirable to specify the information circumcisers must provide.

Reform options

1. Non-legislative reform

6.7.10 This option would be in the form of public education and improvement in the self-regulation of circumcisers. It would involve the provision of information to circumcisers on their responsibilities. It ought also to involve the provision of information to people interested in authorising a circumcision on the duties owed to them.

³¹² See discussion above from 3.4.

³¹³ Ibid.

³¹⁴ Ibid.

6.7.11 Non-legislative reform of this kind may be sufficient to bring about a significant improvement in the information provided to people interested in authorising a circumcision.

2. Enacting a law to clarify what is required of circumcisers

6.7.12 This option would see the enactment of a law that would either specify or provide guidelines as to the information circumcisers ought to provide to people who wish to authorise the performance of a circumcision. A new law might specify the need to provide accurate information on:

- the financial cost of the procedure;
- the non-therapeutic nature of the operation;
- the purpose and function of the foreskin;
- the steps involved in performing the procedure itself;
- the procedure's effect on the functioning of the penis;
- the risks of the procedure;
- the nature and significance of the evidenced prophylactic benefits of circumcision in an Australian context;
- the potential for children to grow up into adults who resent their circumcision (this may include a discussion of the rationales and prevalence of circumcision);
- the availability of the procedure in adulthood; and
- the law governing the procedure.

6.7.13 The law could also detail or provide guidelines on how a circumciser ought to provide this information. For example, it could suggest or require the provision of up to date statements from leading Australian health policy makers. It might also suggest or require that circumcisers provide time for questions face to face, and that the circumciser and the person or people authorising a circumcision keep a written record of the information provided. Such a law would clarify a circumciser's provision of information responsibilities. It could also have the effect of significantly improving the accuracy and adequacy of the information provided by circumcisers.

Recommendation 7

The Institute recommends the enactment of a law to require that all circumcisers provide accurate information as to:

- the financial cost of the procedure;
- the non-therapeutic nature of the operation;
- the purpose and function of the foreskin;
- the procedure itself;
- the procedure's effect on the functioning of the penis;
- the risks of the procedure;
- the nature and significance of the evidenced prophylactic benefits of circumcision in an Australian context;
- the potential for children to grow up into adults who resent their circumcision (this may include a discussion of the common rationales and prevalence of circumcision);
- the availability of the procedure in adulthood; and
- the legality of the procedure.

Recommendation 8

The Institute recommends that health policy, community and industry leaders use non-legislative avenues of reform to improve the dissemination of accurate information on the known and potential effects and significance of circumcision.

6.8 Circumciser practising standards

6.8.1 Respondents recommended several reforms to improve perceived deficiencies in the practising standards of circumcisers. Many respondents suggested that circumcisers ought to be made to undergo formal training. They also recommended the establishment of a formal qualification, accreditation or licence for people who have undergone sufficient training. Brian Morris commented that:

Training is important so that operators are skilled in this simple procedure ... I also agree that circumcisers should be qualified (and this should include doctors having received appropriate training in the technique), the use of analgesia and proper surgical methods so as to minimise pain (which can be nil using the Russel method) ... minimise risks and maximise the cosmetic outcome, aseptic conditions to minimise infection risk. (6)

6.8.2 James Chegwiddden argued that it would be particularly unjust and unethical for the law to allow a poorly qualified or lowly skilled person to perform a circumcision on an incapable child. He makes this argument on the basis of the vulnerability of incapable children to poor decision making of others:

The common law rightly assumes that a person cannot hold another person to a higher standard than that which that person held himself out to have when they entered into an agreement. ... Infant circumcision is *entirely* different. The new-born is not offered a range of different circumcisers from which he chooses the one who suits him most. The choice is made for him – he has no say. As such, because he did not choose a lower grade of practitioner, he should not be made to accept a lower standard of care. Further, the “best interests of the child” includes the child’s right to the best possible medical care [footnote omitted] and the preservation of its full legal rights. As such the child has the right to expect the *highest* standard of care. It would be unjust to impose a lower standard of care for an operation whose performer the child did not choose. (1)

6.8.3 Hugh Young argued for clearer and higher standards because of his concern that the procedure might be treated as trivial by some:

The practice of assigning circumcision to unassisted house surgeons as part of their training is a deplorable example of the trivialisation of the operation that has resulted in many botches. Supervision should be required for some minimum number of operations. (26)

6.8.4 Several respondents argued for clear and uniform practising standards for all circumcisers operating in Tasmania. Respondents were particularly concerned about the possibility of circumcisers without medical training being held to a lower standard of care than medically trained circumcisers.³¹⁵

The law should clearly establish that medically qualified and medically unqualified circumcisers have the same legal duties in the provision of their services. A lower standard would be a direct breach of the obligation to promote the best interests of the child, which include its legal interests. (1)

Thus, in answer to Q6, since clear evidence exists that rates of serious complications are significantly higher where circumcisions are performed in a non-clinical setting, we argue

³¹⁵ James Chegwiddden, Marie Fox and Michael Thomson, Robert Darby, John Glazebrook and Joe.

that there is a need for the law to stipulate minimum standards and impose duties of care upon circumcisers that are akin to those applicable to health professionals. This would require adequate provision for follow-up care. (3)

As stated above, the right to perform circumcision procedures should be confined to fully qualified paediatric surgeons; general surgeons who have passed a specific test to establish their competence; and similarly qualified religious practitioners (Mohels in the case of Jewish families, and an appropriately qualified and licensed equivalent in the case of Muslim families). All licensed operators should be subject to the same legal regime. (79)

The law should allow for both medically and non-medically qualified (religious) persons to perform circumcisions in Tasmania. However, the need for the procedure to be surgically clean and for a local anaesthetic to be used (for pain relief) remains. Non medically qualified circumcisers should not be exempt from providing a high quality service. (25)

Non-medically qualified people should be prohibited from performing circumcision. If the State continues to allow non-medically qualified individuals to perform circumcision then they clearly should have the same obligations as a medical practitioner. These obligations should be aggressively enforced. A licence, for example, should be difficult to obtain and easy to lose. (56)

6.8.5 Wilfred Ascott and Robert Van Howe suggested that circumcision should only be performed by registered medical practitioners with specialised training in performing circumcision:

Circumcisions should be performed by specifically trained, qualified and registered urogenital surgeons. ... The law should clearly establish and formalise a recognised procedure for the training and appointment of state sanctioned, licensed and qualified medical practitioners that are, under the authority of and with the permission of the court, legally allowed to perform circumcisions. A State Circumciser(s) if you wish. The law should further establish that any other person performing a circumcision on a minor is guilty of an offence and punishable under the law. Should the offender be a medical practitioner, that his medical licence be permanently and irrevocably revoked. Should the offender be any other person, a jail term and or a fine must be imposed. (49)

I agree whole-heartedly, that circumcision should only be performed on infants by those with special training (such as pediatric urologists and pediatric surgeons). Such special training should not be available through a weekend accreditation course. (In the United States you can go to a 3-day course on how to become an allergist.) There should be stiff penalties for those performing a circumcision on a person under the age of five who do not have special training. For those physicians who are not allowed to circumcise, a pamphlet should be titled, "Why We Don't Circumcise Children Anymore" or a title to that effect. This would allow an opportunity for education. (121)

6.8.6 Brian Morris saw merit in a licensing system for circumcisers. He also suggested that religious circumcising communities might be able to adapt to a requirement that circumcisions only be performed by medically qualified people:

A licensing system is reasonable. This would help ensure competence. Here non-medically qualified circumcisers seem to be the subject. Religious circumcisions do not require such. Islamic for example. Mohelim in Judaism can be medical practitioners who have obtained this additional religious qualification. I am not religious nor have any background in these circumcising religions so can offer little here. (6)

6.8.7 However, George Goldsteen saw significant benefits in utilising specialised ritual circumcisers and suggested that medically trained circumcisers might require greater training to meet the standards of highly skilled ritual circumcisers:

This requires the circumciser to be trained and benefit from our 4,000 years of experience. This training and experience is generally lacking in Gentile doctors, who are rarely called upon for this. Indeed I once saw a Gentile doctor on TV using an appallingly inefficient

and crude method ... As I state elsewhere I believe non-Jewish *mohelim* do not use proper techniques and/or instruments. (83)

6.8.8 Michael Bates did not see the need for the law to address non-medical circumcisers in Tasmania:

With respect, the discussion paper advises that there is no resident *Mohel* in Tasmania and the Muslim children are circumcised by medical practitioners. In the above premises any law reform would have no relevance to real life. I am of the view that that is sufficient reason to refrain from analysing the issue in relation to law reform. (66)

6.8.9 Daniel Albert of the Hobart Hebrew Congregation endorsed a uniform qualification, accreditation or licensing regime so long as it accommodated the requirements of a religiously valid Jewish circumcision:

We fully support the requirement that only suitably qualified people be allowed to perform circumcision provided the process for proving such necessary qualifications is both fair and reasonable. Numerous options for dealing with circumcision were identified in the discussion and others may be suggested. The Hobart Hebrew Congregation does not have a preferred option, as long as the option chosen does not impinge on our right to religious freedom by restricting circumcision on male infants in accordance with Jewish law. (119)

6.8.10 Not all respondents supported the establishment of a qualification, accreditation or licensing regime. Marie Fox, Michael Thomson and Marilyn Milos opposed the circumcision of incapable children and were concerned that a formal regime might legitimise the practice:

establishing a comprehensive licensing and regulatory regime as outlined in part 9.6 does run the risk of legitimising the practice of circumcision. (3)

I do not believe that we should legitimise non-therapeutic circumcision by medicalising it. This will only allow surgical mishaps and deaths to occur in the hospital as well as in back-street alleys. Doctors should not be allowed to perform non-therapeutic surgeries on infants and children. Children need to be protected from harmful traditional practices. Perhaps, the first step needs to be a moratorium on medicalised, non-therapeutic routine infant circumcision. (23)

6.8.11 Gershon Goldsteen expressed concern that some potential requirements on circumcisers may be inconsistent with religiously mandated circumcision requirements:

No anaesthetic is applied for Jewish ritual mila. As far as I know it is not permitted in Jewish law. I recommend you consult a mohel or orthodox Rabbi on this. (55)

6.8.12 Michael Bates argued that the current law already establishes adequate practising standards for circumcisers:

The law already requires reasonable skill and care. This is adequate. (66)

Tasmanian Law Reform Institute's view

6.8.13 Incapable minors are unable to select the circumstances of their circumcision. They are unable to demand high practice standards from their circumciser. The vulnerability of incapable minors makes protective law desirable.

6.8.14 Both criminal and private law place practice requirements on circumcisers. The relevant criminal law is obscure.³¹⁶ The relevant private law is stated clearly but is uncertain in its operation.³¹⁷

³¹⁶ See discussion above from 3.4.

³¹⁷ Ibid.

Private law sets different standards for ‘professional’ circumcisers and for non-professional circumcisers.³¹⁸ ‘Professional’ circumcisers must perform circumcision in a manner that is widely accepted in Australia by peer professional opinion as competent professional practice. Non-professional circumcisers have a legal obligation to perform the procedure with reasonable care and skill. It is not clear whether some circumcisers will be categorised as professional or not (eg well trained religious circumcisers who are paid for their services) or which circumcisers will be regarded as the peer of another circumciser. The courts are yet to provide guidance on the practices and standards expected of laypersons and non-medically trained circumcisers. The law does not establish precise practice requirements. For example, it is not entirely clear whether all circumcisers have a duty to use anaesthetic.

6.8.15 The law may also fail to provide sufficient protection from risky decision making to every incapable minor circumcised as a child. The Institute would support reform to ensure that all circumcisions performed upon incapable minors are pain managed, performed with sterile and proper instruments, performed by an adequately skilled person in a skilled way, and followed up with adequate wound care and post-procedure monitoring.

Reform options

1. The establishment of a licensing regime

6.8.16 Several respondents recommended the enactment of a licensing regime. The Issues Paper discussed this option. Sweden and three of South Africa’s provinces have implemented licensing regimes. These regimes were discussed in detail in Part 4.

6.8.17 A licensing regime would require the establishment of a circumcision regulatory, monitoring and licensing body. It would require an Act to set the requirements a circumciser must meet to hold and keep a licence. The performance of a circumcision without a licence or outside the terms and conditions of holding a licence would be punishable by criminal sanction or the loss or suspension of the circumciser’s licence. The regulatory body would be empowered to grant licences and monitor the compliance of circumcisers with the conditions of holding a licence. The body could also be responsible for setting some of the practice requirements circumcisers have to meet, and for monitoring or administering various services related to the performance of circumcision.

6.8.18 A licensing regime could clarify the applicable law. A dedicated enforcement body would provide the best means through which to regulate and raise circumcision practice standards. It could also improve the collection and dissemination of information pertaining to circumcision practices. The low incidence of circumcision in Tasmania may even make a relatively small regulatory body perhaps created within an existing government department feasible.

6.8.19 However, an effective licensing regime depends on a suitable means of enforcement. Even a small regulatory body will require funding and infrastructure to operate successfully. The low incidence of circumcision may also suggest that a comprehensive regulatory and monitoring regime may not be entirely necessary. It is also of note that overseas licensing regimes, whilst operating in substantially different circumstances, have proven difficult to enforce and have been unable to effect significant changes to unsafe circumcision practices. Tasmania does not have a significant problem with unsafe circumcision practices. A potentially costly and ineffective licensing regime may not be desirable.

2. Require all circumcisers to meet professional medical standards

6.8.20 This option would involve enacting a law requiring all circumcisers to meet the standards required of qualified medical professionals. The option would operate to set the same minimum standards for all circumcisers of incapable minors. This would be a higher standard than that which is

³¹⁸ Ibid.

currently met by some circumcisers in Australia. The option would serve to clarify the operation of the private law to circumcision. However, the option could conceivably result in some communities having to sacrifice some circumcising methods of cultural significance. The Institute sees some merit in this option. However, it would be reluctant to recommend a measure that might impinge on culturally significant practices that meet arguably adequate standards but fall short of the standards set for the health community. The Institute also recognises that the standard set for circumcisers in the health community may itself potentially fall short of good practice.

3. Requiring all circumcisers to Meet Certain Minimal Standards

6.8.21 This option could involve the enactment of a criminal law that sets minimum requirements for all circumcisers. The option could be implemented in three ways: by detailing particular requirements; by providing general guidelines left to be determined in light of current evidence and community standards; or by a mix of general requirements in legislation and of specific explanatory requirements in regulation.

6.8.22 A law listing every particular requirement of a circumciser of an incapable minor would clarify some of the standards and practices expected of all circumcisers by the law. However, it would be a cumbersome way of effecting this result. Legislated specific requirements may prove too inflexible to accommodate both the wide range of potentially acceptable practices and changes in evidence and community perception.

6.8.23 A law that provides general guidelines alone may fail to create sufficiently clear requirements for circumcisers. Guidelines that are too broad may also result in inconsistent applications of the law. However, sufficiently qualified general standards could serve to clarify some minimum standards expected of circumcisers. They could also be devised to be responsive to changing evidence and community standards.

6.8.24 The third approach of a mix of general requirements in legislation and of specific explanatory requirements in regulation could provide a mix of certainty and flexibility. Parliament could give the responsibility of formulating appropriate qualifying regulations to an existing health regulatory body. This body would need to work closely with circumcision stakeholders in the community. This approach could clarify minimum standards for all circumcisers who circumcise incapable minors. It would also clarify the criminal law and serve to set clear guiding minimum standards for all circumcisers separate from those that might operate at private law. This would ensure that children receive at least a minimum level of protection.

Recommendation 9

The Institute recommends the enactment of a criminal law that sets general principles against which to judge the acceptability of a circumciser's practice. These principles should set minimum standards that all circumcisers of incapable minors must meet in the provision of their service. Parliament should give an existing health regulatory body the responsibility of formulating regulations to qualify the general standards set in statute. The Institute recommends the setting of standards as to matters such as:

- the pain relief provided;
- the instruments used;
- the skill of the person performing the operation;
- the skill with which the procedure is performed;
- the adequacy of the wound care and post-procedure monitoring.

The standards set by statute and in regulations ought to reflect the minimum standards the community would expect circumcisers to meet at the time of the operation in the circumstance in which they are operating. In particular, the standards should ensure that no minor be put at a needlessly high risk of pain or complication from a circumcision.

6.9 The commercial aspects of circumcising

6.9.1 Several respondents commented upon the law regulating the commercial aspects of circumcising. James Chegwiddden was concerned with the potential of circumcision advertising to mislead consumers. He took issue with the enforcement of current advertising law:

Any promotion of circumcision services must be in accordance with the *Trade Practices Act 1974* (Cth) and the *Fair Trading Act 1990* (Tas). To avoid being misleading and deceptive, all such promotion of services must observe at least these minimum requirements:

- a) Honest description of the service provided (descriptions of “pain-free” procedures would require objective justification and do not appear to be supported by the medical evidence);
- b) The avoidance of all “puffery”. The purpose of this advertising is to encourage a person to submit his body to be operated on and a (usually) healthy part of it excised forever. It is wholly inappropriate in the context of such serious procedures to be permitting exaggerations and “advertising talk-up”. The ACCC has rightly stipulated that puffery is unacceptable in advertising medical services.³¹⁹ The Issues Paper quite rightly insists that advertising of circumcision must refrain from any exaggerated, unsubstantiated or contested claims (disputed health benefits and STI reduction being among them) and must restrict their advertising to facts that may be objectively verified.
- c) Warnings of the potential for physical and psychological damage, and the potential need for court authorisation. Without such warnings, the advertising is deceptive because it fails to alert the consumer to a material feature, or pre-condition, of the product being advertised to which the consumer would reasonably expect to be alerted. (1)

6.9.2 Chegwiddden argued for the promotion of clear trade practices compliant guidelines for promoting circumcision to encourage people to meet the standards required by law.

6.9.3 Robert Darby argued for health warnings to be included in all advertising of circumcision:

Doctors who advertise circumcision services must include health warnings on advertisements, that circumcision is not a recommended procedure and may have harmful effects, etc (along lines of health warnings on packets of cigarettes). (79)

6.9.4 Several respondents argued for the promotion of circumcision to be made illegal.³²⁰

No person should be allowed to promote, entice, require, suggest or recommend a non-therapeutic circumcision. (49)

There should be no advertising of circumcision services. (73)

Ban on all forms of advertising including Australian websites promoting children’s circumcisions. (99)

³¹⁹ ACCC, *Fair Treatment Guide to the Trade Practices Act for the Advertising and Promotion of Medical and Health Services* (2000) 10.

³²⁰ Wilfred Ascott, Frank McGinness, Noel Clark, Isabel Snow and Karl Snow, James Loewen, James Wright, 98, Noel Clark.

Since non medical circumcision is harmful, it should be restricted similarly to cigarettes, with absolutely no advertising, and the law requiring practitioners to offer information about the risks. (28)

Circumcisers should not be allowed to advertise performing illegal sexual surgeries on children. (39)

The promotion and provision of non-therapeutic circumcision services for minors should not be allowed and would not be allowed if the law relating to genital cutting was applied equally to males and females. It is clear that some individuals have developed lucrative businesses based around the non-therapeutic circumcision of male children. These businesses heavily promote their services online and in other forms of traditional media. Try to imagine any other unnecessary, cosmetic surgery for children being promoted as in the photo above [shows an image of an Australian clinic advertising circumcision for ‘all ages – all reasons’] and how legally, ethically and culturally unacceptable it would be. “All ages – All reasons” All reasons? Is it acceptable to remove healthy sexual tissue from a child in order to prevent a slim chance of disease at some stage later in life? Is it acceptable for a doctor to perform cosmetic surgery on a boy’s penis because the parents simply don’t like the look of it? Is it acceptable for a doctor to comply with a parental request for a tight circumcision to punish their son and try to prevent him from masturbating? (91)

Circumcisers should never be allowed to promote their service. (98)

There needs to be immediate legislation for ... a ban on all forms of advertising including Australian websites promoting children’s circumcisions. (99)

6.9.5 John Glazebrook asserted that circumcisers ought not to be too encumbered by law in the advertisement of their services:

Circumcisers should be able to freely advertise their services if accredited by state health authorities. (25)

6.9.6 Brian Morris considered reform to the commercial aspects of circumcision unnecessary:

[Quoting the Issues Paper] ‘circumcision can be a business’, this is ridiculous. Many medical, dental and other health care services are advertised to the general public and most of this should be encouraged, since they have far greater validity than the advertising of junk food and the plethora of products and services that have either no or negative effects on health. As for the sale of foreskins, this comes under aspects of law concerning the use of human tissues, and should not form any part of the current considerations, being covered already by law. (6)

6.9.7 Marie Fox and Michael Thomson argued that reform to the law governing the commercial aspects of circumcision, particularly to the use and sale of excised foreskin, may be better considered in a broader context:

As regards the commercial aspects of male circumcision, and in particular the growing recognition of the commercial value of excised foreskins, we would suggest that this matter (while important) is peripheral to the fundamental questions raised by the Issues Paper and needs to be addressed as part of a fundamental reconsideration of the way in which law regulates human body parts and products under the *Human Tissues Act 1985*. (3)

Tasmania Law Reform Institute’s view

6.9.8 The Issues Paper gave relatively little attention to the regulation of the commercial aspect of circumcision services. Respondents focused upon two matters: the regulation of the use and sale of excised foreskin and the regulation of the advertisement of circumcision services.

6.9.9 It may be desirable to implement specific regulations limiting when and how people may use and profit from excised foreskin. The relevant law is uncertain.³²¹ It is not clear whether the law provides an appropriate balance between the relevant conflicting interests. This is an indication for the desirability of reform. However, the Institute is of the opinion that significant community and industry consultation will have to occur before the proper balance is found between the person circumcised benefiting from any use or sale of their foreskin, the person who makes use of the foreskin benefiting from their use, the availability of the tissue for benevolent purposes (such as research) and a multitude of other potential ethical considerations. The Institute also acknowledges that the problems with the law governing the use and sale of excised foreskin are not specific or limited to foreskin. There is uncertainty in the law in regard to excised human tissue generally. The Institute is of the opinion that it would be better for reform to address the matter of the use and sale of excised human tissue generally rather than in regard to circumcision in particular.

6.9.10 The Institute is of the opinion that lawful circumcisers ought to be allowed to advertise their services. The current law regulating the advertisement of circumcision services provides an appropriate balance between consumers and circumcision providers. Several respondents were concerned about the enforcement of the relevant law. They were particularly concerned with the potential for the exaggeration of circumcision's prophylactic health benefits and with the underplaying of circumcision's known and potential costs in advertisements for circumcision providers. This is an understandable concern. However, the Institute is of the opinion that potential problems with enforcement of the law in this area may be overcome without law reform. Concerned individuals may bring an action under the relevant legislation. For these reasons the Institute does not consider this area of law in need of reform.

Recommendation 10

The Institute recommends further investigation into whether the law governing the use and sale of human tissue would benefit from reform.

Recommendation 11

The Institute does not recommend reform to the law regulating the commercial aspects of a circumciser's service.

6.10 Limitation of actions law

6.10.1 The Issues Paper asked the public to consider the merit of the law limiting when a civil action may be brought by an individual for harm caused by a circumcision. Several respondents were concerned about the justice of the limitation law operating in Tasmania. James Chegwiddden expressed his concern:

From the above [a discussion of the relevant law] it ought to be obvious that limitations legislation imposes massive obstacles on children who were circumcised in operations or rituals to which their parents consented but about which the child concerned wishes to sue. First, although the Tasmanian law offers a longer limitation period when suing parents and those in a "close relationship" to the parent, this is not particularly helpful. Few children statistically seek to sue their own family, for understandable reasons of emotional and social cohesion. The other category (those in a "close relationship" to the parent) also offers little consolation, because although that definition *could* include doctors treating the pregnant mother and child, there is absolutely no guarantee of this, and in fact any such suggestion is certain to be disputed by the potential defendant circumciser. As a result, the longer limitation period is of almost no use to the genitally cut infant. Secondly, the theory behind the "custody" criterion (i.e. that injuries to the child occurring in the parent's

³²¹ See discussion from 3.5.

presence are to be treated differently because such wrongs are bound to be acted upon by the parent in the child's name) is simply wrong. It is factually disproved (child sexual abuse cases offer ample evidence that parents do not always prosecute their child's attackers); it is especially untrue when applied to cases of surgery on a baby *to which a child's parents themselves have consented*. The fact that the parents elected the unnecessary surgery means that, far from being sure to sue, they are (provided the operation itself is medically "successful") extremely *unlikely* to commence legal action against the circumciser. The evidence that actions by parents against circumcisers are almost non-existent proves the point. Aside from the factual anomaly, the custody criterion produces two different (though, in either case, low) levels of protection on an utterly irrational basis: if the circumcision takes place in a hospital (thus, almost invariably, away from the parent's immediate physical custody), the child has till he is 21 to sue; if circumcision takes place in a religious ritual (usually performed in the presence of the parents), the child will be given no limitation period protection at all, being treated as if he were an adult plaintiff from the moment of the circumcision. This is hardly just, since the child circumcised had no say in whether the parents were present or not - or indeed whether the operation occurred at all. It is true that the date of discoverability doctrine offers genitally cut children some hope, particularly when it is psychological injury that is alleged, since such injuries are usually recognised only in early adulthood, not as children. But the onus will still be on the child to prove that he was not (and could not reasonably have been) aware of the injury, nor aware that such injury was attributable to the circumciser nor that the injury was sufficiently serious to bring proceedings. And if the date of realisation is more than 12 years after the act of injury (which in infant circumcision cases it almost always will be), the claim will be subject to the *additional* hurdle of showing that the justice of the case merits an extension, involving a consideration of the detriment to the defendant given the length of time that has passed. Such a test requires complex legal argument that is within the grasp of very few citizens other than the most specialised of lawyers. As such, it is an exceedingly harsh burden to place on an 18 year-old youth. It is not surprising that so few undertake that burden. (1) [Footnotes omitted, emphasis in original].

6.10.2 Chegwiddden proposed a longer limitation period to overcome the deficiencies he identified in the law:

The limitations law currently extinguishes too early to be fair for children injured as a child through circumcision. The limitations period should be extended. In the author's submission, it should be extended to the age of 30. This is to allow a proper opportunity to the child to:

- a) participate in sexual experience;
- b) consider the effect of circumcision on him *as an adult*;
- c) take into account complications/dysfunctions that may have become apparent in late adolescence or adulthood;
- d) acquaint himself with the facts as to the childhood surgery he was subjected to (which is unlikely to have been made available to him as a minor);
- e) secure the financial independence sufficient to launch an action.

The law should retain its standard extension of limitation dependent on the date of discoverability, namely to three years from that date, as the only possible extension of the limitation period to those over 30. Such an extension would function in the same way it now does, and no change is required. (1)

6.10.3 Robert Darby also supported an extension of the limitation period. He provided three reasons for his position:

The adverse effects of circumcision on sexual experience and functioning may not become apparent until a male becomes sexually active, and possibly not until he marries or

otherwise finds a partner. A male may not realise that he is missing something significant until he has had sufficient experience of the world and the chance to compare his penis with those of his uncircumcised contemporaries, whether in person or by means of images, correspondence, discussion etc. A male is unlikely to have the independence, financial resources, confidence or knowledge of affairs necessary to mount a case until he is in his twenties and probably earning an income, particularly if his parents (who probably authorised the procedure) are not supportive. (79)

6.10.4 Several other respondents argued for an extension of the current period:³²²

This is why the limits on bringing civil action need to be very long, a young man who is not experienced with sexual activity may take some time to realise that whatever problem he might be having is indeed a problem in the first place and that it is a consequence of his circumcision. (40)

Adults who find they have been harmed by their infant circumcision procedures should have a special extended time limit within which to bring civil action, since the harm may not be fully understood even after the victim's first few sexual encounters. Just off the cuff, I'd say letting a man sue about infant circumcision until he is 40 years old seems fair. (30)

Males, circumcised as a child, should be allowed a generous time by the statute of limitations in which to bring a suit for injuries suffered during minority after reaching the age of majority. (110)

If any [limitation period] it should be very generous, because it may take considerable time for problems due to circumcision to come to light. (26)

6.10.5 Steven Svoboda and Robert Darby argued that the limitation period for harm caused to a minor by a person in a close relationship to the minor ought to be extended to apply to any action brought against an individual involved in circumcising a minor:

Under the current state of the law, a more or less unique hardship is visited on potential circumcision litigants, who will never be able to bring their case. We recommend that the doctor who performs the circumcision should be treated as constructively placing himself or herself within the ambit of the "close relationship rule" thereby allowing a male to begin a legal action until he reaches 28 years of age. Other defendants in a circumcision case should be subject to the same limitations period. With these changes, in some circumstances, there will be time for negative effects of circumcision to start to become apparent, and there is a chance the plaintiff will have the resources to bring an action. At the same time, it should be noted that many men do not realise their sexual loss until they are in their thirties or forties, so in many cases even this extended time limit is not sufficient to offer realistic relief for men harmed by circumcision. (62)

According to the Issues Paper (6.9.1.), Tasmanian law requires an action for damages to be launched within twelve years of the event, unless the intended defendant is a parent or a person in a close relationship with a parent, in which case the plaintiff has until age 28 to initiate proceedings. If the twelve-year rule applied there would clearly be no possibility of any actions for wrongful circumcision being mounted, since no twelve or thirteen year old could have the independence, knowledge or resources needed to initiate an action. If the doctor who performed the circumcision could be regarded as a person in a close relationship with the parent, the "close relationship" rule in the legislation might be regarded as permitting a man to commence an action up until he reached the age of 28. This is a reasonable provision, but since it might also require him to sue his parents, something very few men would be willing to do, it seems better to amend the law to allow an aggrieved man to sue the operator, hospital or other direct agent of the operation separately up until the same age. (79)

³²² Michael Syberg, Ron Low, The Doctor Opposing Circumcision and Hugh Young.

6.10.6 Several respondents argued that there should be no limitation on actions for harm caused by a circumcision performed upon an incapable minor.³²³

There should be no limitation for filing civil and/or legal actions for a circumcision performed on a minor. The physical and sexual harm of circumcision is ongoing and cumulative. There is no given age (25, or even 56, for example) where a person should be able to know/understand all the damage on an individual level. (33)

Adults who recognize the harm done to them by forced circumcision when they were children and seek justice should have no limits to civil law actions. (39)

Yes; there should be no limit at all. The individual who has a non-therapeutic circumcision performed on them without their consent may take a long time to realize what has been done to them and understand just what the damage is. They should be able to take legal action no matter how long this takes. It would also serve as deterrent to anyone performing the surgery in the first place if they know that for the rest of their lives they may be held culpable for the damage that they might do. (40)

No, no limitation of the rights or time period of the individual may be imposed. It is the right of any victim of a circumcision to seek civil and or criminal justice for the violation of their rights by the circumciser, or any person that reasonably failed to prevent such circumcision. (49)

No, I don't feel there should be a limitation period. Some adults claim to only notice the negative effects of their circumcision well into adulthood. Additionally, if the procedure was restricted so that it was only performed for legitimate medical reasons, there would be no basis for an action against a doctor in the first place. (72)

All circumcised males should be expressly allowed to sue those that forced their circumcision and those that did and helped in the cutting. There should be no time limit to sue because losing one's foreskin is for life ... (73)

There should be no statute of limitation on civil action against someone who circumcises a non-consenting individual and there should be no privilege of immunity. (56)

Given that complications arising from circumcision can take many years - half a lifetime or more - to emerge, liability for an illegally performed procedure should not be limited by time. Psychological complications, though present from childhood, may only be noticed and acted on in later adulthood. Sexual dysfunction resulting from the permanently exposed, and therefore desensitised, glans will often onset in the 30's or 40's or later. Even physical deformities, such as adhesions caused by childhood circumcision may go unnoticed and un-acted on for many years. All three examples given here are in fact applicable to me personally. I accepted as normal the many shortcomings caused by an unwanted circumcision for around 30 years before taking action personally to repair the damage as far as possible, and I may yet pursue legal action against the Queensland practitioner who recommended my circumcision for "medical" reasons. (76)

I feel that there should be no time limit on being able to bring legal action against anyone who performs such an act against someone else, as the act and effect of mutilating someone's genitals has no time limit either. (85)

Circumcision has a lifelong effect. A time limit would mean that the time limit has expired, but the man still has no foreskin. Also minor complications of circumcision may not be discovered till many years into adulthood. I have a hole through the side of the penis (as a result of a neo-natal circumcision) which I didn't discover until a few years ago. In addition there may be problems that were known of but not attributed to the circumcision

³²³ Dan Strandjord, James Loewen, Michael Syberg, Wilfred Ascott, 69, Anonymous, Frank McGinness, Owen Jolly and James Wright.

until many years into adulthood. Men subjected to neonatal circumcision frequently have a lot of ignorance about what they have lost. (69)

Any person who is suffering with the results of unnecessary genital surgery should be able to initiate civil proceedings against their circumciser at any time. Adverse results from non-therapeutic circumcision can arise at different times and for different reasons. Reasons may include teasing from peers as a pre-teen, painful erections at puberty, impaired sexual functioning upon sexual maturity to loss of sensitivity once a man reaches his 30's or 40's as well as a range of other physical and psychological issues. Doctors performing unnecessary surgery on unconsenting minors entirely for their own financial gain must be legally liable for their actions. (91)

6.10.7 However, Vikki Bullock and Gershon Goldsteen asserted that there should be a limitation period for actions for harm caused by a circumcision:

I agree that there should be a limitation period for actions brought against the circumciser. (35)

If a mila is "botched" I imagine this would become apparent within a short time and so a limit must be set to prevent frivolous cases going to court. If it is a psychological problem that arises, then this may not become apparent until adulthood. However, such problems should not be a ground for a lawsuit against a mohel, because he performed a legal procedure, which was done professionally and successfully. (55)

6.10.8 Isabel Snow and Karl Snow and Michael Bates did not see a need for a special limitation law applicable only to actions for harm caused by a circumcision. Bates commented that:

I cannot conceive any justification for adding such a complication to the law and thus would not support this curious exception. (66)

The Tasmania Law Reform Institute's view

6.10.9 Many respondents expressed concern about the law limiting when an action may be brought by an individual who was harmed by a circumcision as a child. The relevant law is complex. It may also operate unjustly in some circumstances. Generally, the law makes it the responsibility of the parent of the minor (or the minor themselves) to bring an action within three years of when they knew or ought to have known that the injury had occurred, was attributable to the conduct of the defendant and was significantly sufficient to warrant bringing proceedings,³²⁴ or within twelve years after the date of the child's harmful circumcision.³²⁵ This twelve-year cut off for bringing actions may be extended up to three years commencing on the date of discoverability if it is in the interests of justice to do so.³²⁶ This law will ordinarily operate to require most actions for harm caused by a circumcision performed on a baby to be brought before the harmed child even reaches puberty. This may operate unfairly whenever the child's parents are motivated by matters not in their child's interests not to bring an action on behalf of their child.

6.10.10 The law also allows a person injured as a minor to bring an action within three years of when they attain 25 years of age if the intended defendant of the action is a parent or if the intended defendant is in a close relationship with the minor's parents. This law will give most individuals harmed by a circumcision as a minor until they are 28 to bring an action against their parents for their circumcision. This ought to be a sufficient period in most instances. However, the law will probably

³²⁴ *Limitation Act 1974* (Tas) s 5A(3)(a).

³²⁵ *Ibid* s 5A(3)(b).

³²⁶ *Ibid* s 5A(5). The date of discoverability is when the plaintiff knows or ought to have known that the injury had occurred, was attributable to the conduct of the defendant and was significantly sufficient to warrant bringing proceedings).

not operate in most circumstances to allow an individual harmed by a circumcision as a minor to bring an action against their circumciser outside of the ordinary twelve-year cut off period.

6.10.11 The continuation of the limitation period for a person harmed by a circumcision as a minor (except when the intended defendant is a parent of the minor, or a person in a close relationship to one of the minor's parents) may operate unfairly to limit when an adult harmed as an incapable minor may bring an action for a circumcision. The extension that may be made in the interests of justice of three years from the date of discoverability may not provide just relief when the three-year period elapses during the time in which the harmed minor is reliant on their parents to bring an action on their behalf. The Institute is of the opinion that the law should extend the period in which individuals harmed by a circumcision as a minor may bring an action against their circumciser, at least when the circumciser is not in a 'close relationship' to the minor's parents.

Reform options

1. Create a special limitation period for people harmed by a circumcision as a minor

6.10.12 This option would involve the enactment of a special limitation period for all actions brought by individuals harmed by a circumcision as a minor. This reform could be included as a section in either the *Limitation Act* or in a new Circumcision Act.³²⁷ It could establish a period in which all individuals harmed by a circumcision as a minor may bring an action sometime after they have reached the age of majority. This reform would overcome potential unjust operations of the current law. The option would add certainty to the law. It would also simplify it.

2. Extend the definition of the category of those in a 'close relationship' to the parents of a harmed minor to include a circumciser engaged by the parents

6.10.13 This option could involve changing the law to refer to circumcisers directly. It could also be enacted by widening the definition of 'close relationship' to operate to include circumcisers (perhaps by extending the definition to people authorised by a parent to perform a non-therapeutic procedure on their child). This reform would have the effect of extending the limitation period to within three years of when the harmed person turns 25. It ought to provide sufficient time for most individuals harmed by a circumcision as a minor to bring an action. It would also simplify the law, reduce its complexity and significantly reduce its potential to operate unjustly in regard to actions brought for harm caused to incapable minors by a circumcision. The widening of the definition of 'close relationship' to include other non-therapeutic procedures performed on minors may also help overcome potential unjust operations of the law in those circumstances.

3. Improve the collection of information relevant to an action in tort

6.10.14 This option could be enacted as a complementary measure to reform to the limitation period for actions brought by those harmed by a circumcision as an incapable minor. It would involve the enactment of a law requiring the maintenance of information relating to all circumcisions performed upon a minor. This record should be transmitted to an appropriate government authority. This reform should reduce some of the evidential obstacles met by people harmed as incapable minors who would like to bring an action as an adult. The enactment of this option by itself would not lessen the legal burdens that have to be met for a person to receive compensation. Compensation will continue only to be available after the attribution of legal liability for an action in tort via a court to a person for the harm suffered. Individuals would still have to bring an action within the designated limitation period. However, it should operate to reduce the hardship in assembling relevant information after considerable delay for those who were harmed as an incapable minor, who did not have an action brought on their behalf, who were unable to bring an action themselves in a timely manner and who can still bring an action.

³²⁷ *Limitation Act 1974* (Tas).

Recommendation 12

The Institute recommends the enactment of reform to create a uniform period in which individuals harmed by a circumcision as a minor may bring an action against their circumciser. This period should extend for an appropriate time after the harmed person has reached the age of majority. This new limitation period should be enacted in a provision in a new Circumcision Act.

Recommendation 13

The Institute recommends the enactment of legislation to require circumcisers to transmit information relevant to actions that may be brought for harm they cause to a minor to an appropriate government authority.

6.11 Removing the fault requirements of an action for compensation

6.11.1 Some respondents argued for the removal of the requirement to prove fault before a person injured by a circumcision as an incapable minor may succeed in an action for compensation. For example, Steven Svoboda argued that the negligence standard should not need to be proved in an action for compensation for harm caused to an incapable minor by a circumcision:

Normal requirements to prove negligence work as a hardship on plaintiffs and are unjust in that proof of the harm is all that can reasonably be expected to be produced when these cases finally make it to court decades after the triggering event. As one example, in Shane Peterson's case, even with a flayed penis, given existing social views of Male Genital Cutting as benign, he experienced great difficulty convincing the court he had undergone anything out of the ordinary. Accordingly, the negligence standard should be relaxed to a *res ipsa loquitur* standard, whereby proof that the defendant(s) proximately caused the plaintiff's harm, combined with a modest showing of the harm caused, is sufficient to demonstrate liability. (62) [References excluded].

6.11.2 James Chegwiddden proposed the establishment of a no-fault compensation scheme for individuals harmed by a circumcision as an incapable minor. He based this proposal on the no-fault scheme for vaccinations operating in the United Kingdom. He described this scheme and his proposal in his submission:

To assist them [children harmed by vaccination], a special scheme was established to provide lump sum payments to these children where the law could not. In the United Kingdom, the *Vaccine Damage Payments Act 1979* (UK) was passed by Parliament. A copy of it is attached to this Response at Appendix C. It provided (in summary) for:

- a) lump-sum payments capped (currently) at £120,000;
- b) no need to show negligence/fault/battery/best interests;
- c) eligibility for the scheme established by showing causation on the balance of probabilities;
- d) payment calculated on degree of damage done to the child (level of life impairment as a percentage);
- e) limitation period of *six* years from vaccination or the age of 21, whichever is later.

The scheme was an excellent way of bringing some measure of recompense to vaccination-damaged children. One negative was that the system only applied to vaccinations performed under the auspices of the National Health Service (NHS), not private vaccinations, since the State was not considered responsible for private clinics. However, the Act was a huge step in the right direction and won much public support, especially

among victims' groups and those caring for infants suffering from vaccination-related injuries. A similar scheme ought to be created for Tasmanian children who were circumcised and who have suffered damage. It could operate precisely as the United Kingdom's *Vaccine Damage Payments Act 1979*. Such children should be able to make a claim which is determined by a Social Security tribunal or compensation court. Such a scheme would require funds. This Response suggests that the scheme operate in tandem with a proposed licensing system for circumcisers. Licences to circumcise would be consequent upon membership of the compensation scheme (much like lawyers and doctors cannot practise without professional indemnity insurance). Those who wished to circumcise children would have to accept a liability, under the scheme, to make contributions to it if a circumcision they performed were the subject of a claim. This scheme would, as well as being more just, be of immense benefit to the community. Those damaged by circumcision would have an action available to them, thus restoring the balance in their rights that was distorted in their childhood by their subordination to others' wishes. The risk of complications of circumcision would be transferred partly to the circumciser, who would have to bear the financial consequences of such damage if it were proved before a tribunal. In that way, the claim by circumcisers that "children generally are happy with their services" could be put to the test, as it would be the circumciser himself exposed to financial risk were something to go wrong in the circumcised child as a result of the circumcision. That, in my submission, is the right place for the risk to be placed. If not prepared to take this risk themselves, one could legitimately question why such persons feel it acceptable to be taking those same risks with other people's bodies. (1) [Footnotes omitted].

6.11.3 Chegwiddden proposed that:

The non-fault scheme established by the United Kingdom government to assist children who suffered damage by being forcibly vaccinated is a model for the scheme that should operate for circumcision victims. The moral position of the two categories of children is identical. The system is ideal in that it provides those who have suffered loss with an adapted and appropriate system to redress that, without the need to show elements which in fact are not relevant to their loss (negligence, for example) because, in their particular circumstances, any injury flowing from their circumcision is something they should not have been forced to bear. It also recalibrates the risk correctly, placing it on those who perform non-therapeutic circumcisions rather than on the child the object of the treatment. (1)

The Tasmania Law Reform Institute's view

6.11.4 This option was not introduced in the Issues Paper. It was first proposed by respondents to the Institute.

6.11.5 Circumcision has inherent risks. Some individuals who are circumcised as incapable minors will suffer from complications that are not the result of the negligence of their circumciser. These individuals bear the harmful consequences of a medically unnecessary procedure that they did not request and that they were too young to fully understand. They may not succeed in an action for compensation in the courts which relies on establishing intentional harm or negligence. The harm they suffer is an injustice that cannot be prevented whilst circumcision continues to be performed upon incapable minors. The respondents who argued for a no-fault compensation scheme wished to alleviate some of the burden of this harm. They proposed to do this by moving some of the burden of the harm to those responsible for the performance of circumcision on incapable minors. There is merit in their proposal. If minors are to be subjected to the inherent risks of a non-therapeutic procedure like circumcision efforts ought to be made to lessen and compensate harm when it eventuates.

Reform options

1. Modify negligence law to facilitate claims by incapable minors for compensation for harm caused by circumcision

6.11.6 One possible way of assisting incapable minors in bringing claims for damages for harm sustained by them through circumcision would be to dilute the current test applicable in relation to the duty of care owed by the circumciser, and to the breach of such duty by failing to comply with appropriate standards with resulting harm. This could involve the attribution of responsibility to circumcisers for unforeseeable harm. The Institute is of the opinion that this would be unjust and inappropriate. The existing law of negligence is satisfactory.

2. Enact a no fault scheme

6.11.7 No fault compensation schemes are based upon a desire to ensure that parties who suffer harm from the eventuation of an inherent risk of participating in a beneficial activity are compensated. Such schemes are designed to lessen the injustice on those who suffer 'fault free' harm and to reduce the need for recourse to costly and at times unpredictable litigation to compensate for harm. A no fault scheme would see individuals harmed by a circumcision compensated for the harm they suffered without needing to attribute the particular harm to the fault or negligence of the circumciser. This option would operate to alleviate some of the burden of the harm on an individual harmed as an incapable minor by a circumcision.

6.11.8 Such a scheme could be funded by a levy on those authorising the circumcision, by a levy on circumcisers, by general tax revenue, or by a combination of these three funding options. The funds for a no-fault scheme could primarily be raised from those involved in the authorisation and performance of the procedure on incapable minors. Consequently, a levy placed on circumcisers of incapable minors (the cost of which they could pass onto the person or people authorising the circumcision they are to perform) would be the best way to fund a no fault scheme. This funding method would not inconvenience those who do not support the circumcision of incapable minors. It would also move some of the burden of the harm on an individual caused by a circumcision performed on them as an incapable minor onto the people involved in the authorisation and performance of circumcision on incapable minors.

6.11.9 The Institute is of the view that individuals ought to receive compensation for any harm that flows from them undergoing a circumcision as an incapable minor. The reform proposed in this option would guarantee this result. It would achieve this by spreading some of the burden of the harm onto the people involved in the authorisation and performance of circumcision on incapable minors in Tasmania. This funding arrangement would provide an appropriate distribution of the harm and cost of harmful circumcisions performed upon incapable minors. Every circumcised minor is subjected to the inherent risks involved in the performance of a circumcision. The Institute sees merit in holding the people who subject minors to these risks collectively responsible for any harm that might eventuate.

6.11.10 However, Tasmania is a relatively small jurisdiction. Very few Tasmanian parents have their sons circumcised. Few circumcised children in Tasmania suffer harm from a complication related to their circumcision. Tasmania does not have a large community of circumcisers who perform circumcisions in unnecessarily risky circumstances. A no fault compensation scheme may be costly and complicated to operate. Its potential benefits may not outweigh its costs. The enactment of a law prohibiting the circumcision of incapable minors in Tasmania (subject to a few exceptions) would further reduce the benefit likely to accrue from the establishment of a no-fault scheme.

Recommendation 14

The Institute does not recommend the enactment of a no-fault compensation scheme for harm caused by a circumcision performed upon an incapable minor.

Appendix 1

1. James Chegwiddden (Barrister)
2. The Rabbinical Council of Victoria
3. Prof. Marie Fox and Prof. Michael Thomson
4. John Aldous
5. Gary Burlingame
6. Prof. Brian Morris (www.circinfo.net)
7. Jean Harris (PhD)
8. Assoc. Prof. Guy Cox
9. Sean Leaver
10. Roger and Anne Brewer
11. Collin Sutton (PhD)
12. Howard Stang (Doctor)
13. Michael Lisitsa
14. Bill Jordon
15. “K”
16. Bernd Wechner
17. Bob Carveth
18. L.R. Watson
19. Randy Rose
20. Jean Bailey
21. Anonymous
22. John Dodson
23. Marilyn Milos (Executive Director of the National Organisation of Circumcision Information Resource Centres)
24. Stephen Saunders
25. John Glazebrook (PhD)
26. Hugh Young
27. John Travis (Doctor)
28. Isabel Snow and Karl Snow
29. Michael Glass
30. Ron Low (proprietor of the TLCTugger)
31. Simon Lipert
32. David Wilton (www.circumcisionandhiv.com)
33. Dan Strandjord
34. Anonymous
35. Vikki Bullock
36. Matthew Drobnich
37. David Jackson
38. Anonymous (Doctor)
39. James Loewen
40. Michael Syberg
41. Patricia Robinett
42. Matthew Hess (President, www.MGMbill.org)
43. David Smith (General Manager of the National Organisation of Restoring Men, United Kingdom)
44. Terry Russell (Doctor)
45. Anonymous

46. The Australian Federation of Islamic Councils (Harun Abdullah, Secretary)
47. Charles Pique
48. Phil Hurst
49. Wilfred Ascott
50. Katie Orlor
51. Todd Downing
52. Joel Smart
53. Stephen Brouchs (Chairman of the Tasmanian Section of the Urological Society of Australia and New Zealand)
54. Anonymous
55. Gershon Goldsteen
56. "Joe"
57. Anonymous
58. The Office of the Tasmanian Commissioner for Children
59. Rabbi Shimon Cowen (Director of the Institute for Judaism and Civilisation, PhD)
60. "Doreen" - Illegible Last Name
61. Paul Brandes
62. Steven Svoboda (Executive Director of the Attorneys for the Rights of the Child)
63. Daniel England
64. John Geisheker (Executive Director of the Doctors Opposing Circumcision, Lawyer)
65. John Kyper
66. Michael Bates
67. James Menzies
68. Anonymous
69. Name Not Provided
70. Cecily Lawrance-Harmey (Midwife)
71. Geoff Dickson
72. Anonymous
73. Frank McGinness
74. Anonymous
75. Bruce Martin
76. Owen Jolly
77. The Secular Medical Forum
78. Mike Haywood
79. Robert Darby (<http://www.historyofcircumcision.net>)
80. Aubrey Taylor
81. Joseph Duncan
82. "Mr Restore"
83. George Goldsteen
84. Ayisha El-Shamandi (Islamic Association Launceston)
85. Anonymous
86. A. Bramich
87. Alison and Andrew Scott
88. Sten Bjerking
89. Richard DeArmond
90. Paul Harwood
91. James Wright
92. "JT"
93. Robin Willcourt (Doctor)
94. Alex Wodak (Doctor)

95. Ranipal Narulla
96. Robert E William
97. Richard Warren
98. Name Not Provided
99. Noel Clark (Nurse)
100. Anonymous
101. Robert Inder
102. Robert Carveth
103. The National Organization of Circumcision Information Resource Centres
104. Edgar Shoen (Doctor)
105. Bruce Wilkinson
106. Prof. Allan Carmichael
107. W.D. Stuart
108. Illegible Name
109. William Power
110. The Doctors Opposing Circumcision
111. Jeffrey Klausner (Doctor)
112. Tim Ellis (The Tasmanian Director of Public Prosecutions)
113. Gregory Boyle (PhD)
114. Anonymous (Nurse)
115. Eliana Freydel Miller (Doctor)
116. The Department of Health and Human Services
117. Betty Jones
118. Beverly Rush (Nurse)
119. Daniel Albert (President of the Hobart Hebrew Congregation)
120. Prof. Bernadette McSherry
121. Robert Van Howe (Doctor)
122. Andy Fabre (National Organization of Circumcision Information Resource Centres, South Africa)
123. Damien Williams
124. Ronald Goldman (Executive Director of the Circumcision Resource Centre, PhD)
125. Paul Turkeltaub (Doctor)
126. Peter Brown