YOUTH AFFAIRS

STERILISATION OF INTELLECTUALLY DISABLED YOUNG PEOPLE: Who decides?

The Australian High Court has split over the difficult question 'Who can consent to sterilisation of a young woman with an intellectual disability?' The real issues were whether the approach should be a 'welfare' or a 'rights' approach. Welfare arguments prevailed with the Chief Justice and the other judges in the majority.

In *Marion's* case (1992) CLR300 the High Court had decided that in the Northern Territory (where there is no equivalent to the guardianship boards of NSW and several other States) the Family Court could authorise the sterilisation of a minor as part of a general common law power based on the *parens patriae* principle (a general welfare jurisdiction over all children). In its decision in *P v P* handed down on 20 April 1994 the Court went further, holding that even where there is a guardianship board with statutory powers to authorise sterilisation, the Family Court has parallel jurisdiction and can give consent. Parents who wish to have their son or daughter sterilised can make application to the Family Court which will base its decision on the welfare of the child, or they can apply to the local guardianship board where the matter will be decided on more specific criteria outlined in the legislation.

In a dissenting judgment, Justice Brennan, started from the fundamental principle that every person's body is inviolate and any court order authorising sterilisation, when such sterilisation is not necessary to save the child's life or save the child from serious bodily harm, must offend that principle. If the Family Court has the power to authorise sterilisation of a child with an intellectual disability on a general welfare ground, it must possess a like power in relation to any child, whatever the child's age and degree of understanding. Justice Brennan challenges the notion that the state has power to authorise the invasion of a child's physical integrity except in cases where this is necessary to save life or protect from serious bodily harm. In his eyes a judgment that a child would be better off if sterilised is either 'speculative' or 'formed on the basis that the child will be left without other protection against undesirable sexual access'.

The practical result of this decision is that any Australian child could be sterilised with or without parental approval where the Family Court has held that it would be in that child's welfare to undergo the necessary surgical procedures. This position is unsatisfactory. The child is a person, not an object of concern. Sterilisation is likely to be irreversible. The longer term health effects are not fully understood. Parents may have a genuine concern about the effects of menstruation and pregnancy but these situations can be dealt with in other ways. The opinions of health and social work professionals may well be influenced by the wishes of the parents. There is a need for national legislation reflecting a rights approach to the issue.

Robert Ludbrook

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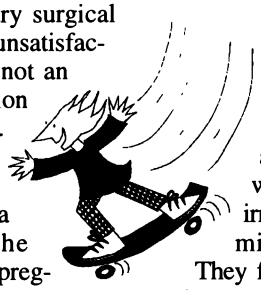
SAY GOODBYE DOLI? Age and criminal responsibility

In Australia the age of criminal responsibility is generally 10 (7 in Tasmania). There is an irrebuttable presumption that a child under this age cannot be convicted of a criminal offence. Between 10 and 14 (15 in Queensland) children are protected by the *doli incapax* rule which is a rebuttable presumption that children under this age are incapable of crime. This presumption is written into the Criminal Codes of Queensland, Tasmania, the Northern Territory and Western Australia. In other States and Territories it is part of the common law. In practice, the prosecution must call evidence to satisfy the court beyond reasonable doubt that the child knew when the offence was committed that the action was seriously wrong as opposed to being merely naughty.



The presumption of incapacity recognises that children lack the developmental maturity of adults and has long provided an important safeguard for children facing criminal charges.

On 29 March 1994 the English High Court in *C (A Minor) v Director of Public Prosecutions* Times Law Reports 30 March 1994, proclaimed the presumption was no longer part of English common law, holding that it put too great a burden on the prosecution to require it to be proved that children were morally responsible for their actions. The judges argued that it was because of the child's moral irresponsibility that the child committed the act in the first place. They further argued that the presumption could mean that children of 'good homes' were more likely to be found to have capacity than other children.

The decision may reflect the public concern that surrounded the killing last year of toddler James Bulger by two ten-year old boys. In that case the court was satisfied that the boys were aware that their actions were wrong and they were convicted of murder.

While there has been a general movement away from age-based presumptions of children's legal capacity towards an individualised assessment based on the level of understanding of the particular child, the *doli incapax* rule does provide an important safeguard for young people and it should not be swept away without careful consideration and without other protections being provided for children. The UN Convention on the Rights of the Child in its preamble stresses that children, because of their physical and mental immaturity, need special safeguards and care including appropriate legal protection, and Article 40.3 requires governments to promote laws and procedures specifically applicable to children.

If the English decision is followed by Australian courts in States and Territories where the *doli incapax* rule is not part of the criminal code, the onus would be on the defence to prove that a particular child did not have the capacity to form the necessary criminal intent.

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