

The Law and Male Circumcision in Australia: Medical, Legal and Cultural Issues.

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I INTRODUCTION

Female circumcision has been the focus of an enormous amount of health and legal literature in the Western world in the last two decades. It has been generally condemned as female genital mutilation,¹ and law and policy makers have looked at ways to eradicate this practice both in the West and in the Third World (particularly Africa)² where the practice is most prevalent.

In the last few years, the print and electronic media have shifted its focus somewhat to examining male circumcision. Some journalists have suggested that the reason for our acceptance of male circumcision while showing moral outrage for female circumcision is that the former practice has been prevalent in our society whereas the latter has not.³ It is because 'male circumcision belongs . . . to this Judeo-Christian ideology which is the melting pot of our culture and this ideology does not know [female] excision and never did.'⁴

To link the two practices however is problematic. Although both may loosely be referred to as traditional or cultural practices with associated health risks, the cultural context of the practices and the medical risks and consequences particular to each practice are quite different. Accordingly, the legality of each procedure may differ and must be assessed separately.

We live in a multicultural society which endeavours to show some tolerance to minority cultural practices.⁵ It is clear however that some traditional practices or customs are not acceptable to our community; whether or not this stems from our own ethnocentric value judgments or the application of universal human rights.⁶

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¹ Queensland Law Reform Commission *Female Genital Mutilation* Report No 47 (September 1994) 8, which argues that the term 'female genital mutilation' has attained international acceptance as being descriptive of female circumcision.

² Id 11-17.

³ P Bone 'Male Circumcision is a feminist issue too' *The Age* 14 March 1994.

⁴ S A Aldeeb Abu-Sahlieh *To Mutilate in the Name of Jehovah or Allah: Legitimization of Male and Female Circumcision* 5, citing G Guidicelli-Delage 'Excision et droit penal' *Droit et Culture* (1990) Vol 20, 203. It should be noted that this statement is historically flawed. Female circumcision was popularly practised in some Western countries late last century. See *infra*, fn 24.

⁵ Australian Law Reform Commission *Multiculturalism and the Law* Report No 57, paras 1.15-1.18.

⁶ Traditional foot-binding of infant girls, polygamy, suttee (the practice of burning the widows of deceased men), refusals to transfuse blood to infant Jehovah's Witnesses, child labour (to name a few) are all practices repugnant to our society. On the other hand, our society appears to accept cosmetic surgery such as breast-reduction, ear-piercing, tattooing of adults, sex-reassignment operations, all of which might be called 'mutilation'. For example G Greer 'Suffering is secondary in our bid to carve out new images' *The Age* 10 July 1991.

It has become clear that female circumcision is not acceptable in Australia. Following a great deal of media attention and reports prepared by the Family Law Council of Australia,⁷ the Federal Government and various State Attorneys-General have made announcements indicating that the practice of female genital mutilation is already illegal under current State legislation and common law principles, or that special legislation will be formed to specifically bring attention to the illegality of such practices.⁸ In this regard, New South Wales has recently amended its Crimes Act to unequivocally outlaw female genital mutilation.⁹

It is too simplistic to link all cultural practices, or indeed even practices involving alteration of the human body, in examining their acceptability. For example, although both cosmetic breast reduction surgery¹⁰ and female circumcision involve altering the sexual apparatus of a woman, our society appears to sanction one and not the other. Ultimately such comparisons are useful in understanding the nature of our society and in testing whether our society is consistent in its quest for justice. Before such comparisons can be effectively made however, it is important to understand what underlies the cultural institutions earmarked for comparison.

In the case of male circumcision, although the electronic and print media have produced a number of sensational articles in recent years¹¹ (and although there is some medical literature on the topic), there is remarkably little legal literature to be found in textbooks, law reports or scholarly law journals discussing the efficacy and legality of the procedure. A recent research paper by the Queensland Law Reform Commission¹² is perhaps the first attempt in Australia to canvass some of the legal and ethical issues involved in male circumcision. Although the Queensland Law Reform Commission paper is a significant contribution to the study of male circumcision in so far as it addresses the question of the legality of the procedure in relation to children, it fails to draw out the competing cultural factors as to the validity of circumcision.

Male circumcision is a medical procedure predominantly performed on infants. A fundamental legal value in our society has become the paramountcy of the 'best interests of the child'.¹³ Although the above-mentioned paper discusses the medical best interests of children, no account is taken of

⁷ Family Law Council *Female Genital Mutilation: Discussion Paper* (1994); Family Law Council *Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Council* (1994).

⁸ For example P Daley 'Lavarch to outlaw genital mutilation' *The Age* 26 June 1994; D Wilson 'State to ban female genital mutilation' *Herald-Sun* 29 October 1995; P Daley & M Forbes 'Wade resists move for law on mutilation' *The Age* 7 August 1994, etc.

⁹ *Crimes (Female Genital Mutilation) Amendment Act 1994* (NSW).

¹⁰ Legal difficulties might arise in connection with this procedure being performed on a minor if not in the 'best interests of the child'. See under 'The Legal Issues' *infra*.

¹¹ For example S Dow 'Circumcised men may sue parents, doctors' *The Age* 12 February 1996.

¹² Queensland Law Reform Commission *Circumcision of Male Infants: Research Paper* (December 1993).

¹³ This has been enshrined in our law by the *Family Law Act 1975* (Cth) and the ratification by Australia of the United Nations Convention on the Rights of the Child. See discussion *infra*.

social and cultural factors. In other words, male circumcision might be justified as being culturally in the best interests of a child. Furthermore, the paper makes no contribution to balancing the medical advantages and disadvantages of male circumcision with the rights of minorities to practise their own cultural institutions in Australia and the general right to autonomy in a liberal society. The paper further fails to recognise a most likely legal consequence of circumcision in the community; although the procedure itself is probably legal, doctors are at risk of being sued for damages in negligence for failing to get informed consent to the procedure should something go wrong.

This article will explore the legal, medical and cultural issues which determine the legality of male circumcision in our community. Only when these issues are understood are we in a position to examine whether the law requires modification. Male circumcision cannot be simply linked to other cultural practices; at least as a starting point it requires some analysis in its own right.

II THE PRACTICE OF MALE CIRCUMCISION

Male circumcision is found in three main forms:¹⁴

- (1) Simple circumcision which involves the removal of the foreskin or prepuce. This is the form most practised today in Western cultures;
- (2) Subincision (also known as ariltha) found among some Australian Aboriginals in certain areas. This might typically involve longitudinally slicing open a youth's penis from the meatus to a point about an inch along the urethra, stretching the foreskin and slicing it off with two or three quick slices, giving the penis a flat appearance;¹⁵ and
- (3) Superincision, used in Polynesia, which involves longitudinally cutting the preputium from the upper surface and extending the cut to the pubic region.

Infant male circumcision dates back thousands of years and was widely practised in ancient Egypt at least as far back as 2400 BC.¹⁶ Male circumcision is mandatory for both Jews and Muslims in accordance with Abraham's covenant with God. This covenant is specifically mentioned in Genesis 17 of the Old Testament. Jewish boys are required to be circumcised at eight days of age. So important is the ritual for Orthodox Jews, that if the eighth day falls on the Sabbath, circumcision must still be observed. Jewish law even requires an infant who dies before the eighth day to be circumcised at the grave.¹⁷

In Islam, circumcision is regarded as a tradition of the prophet Mohammed

¹⁴ W E Brigman 'Circumcision As Child Abuse: The Legal and Constitutional Issues' (1984-85) 23 *Journal of Family Law* 337, 338.

¹⁵ Although abandoned today by many Aboriginal peoples, an example of this procedure was its prevalence among the Waibiri men of Central Australia who were circumcised in this way at age 17 years; Queensland Law Reform Commission, op cit (fn 12) 8-10.

¹⁶ W E Brigman, op cit (fn 14) 338.

¹⁷ Id. 353.

and accordingly is an important ritual. It is recommended that it be performed on the newborn, but in some communities may be done just prior to puberty.¹⁸

Other religions in Australia have generally taken a benign view of routine male circumcision, neither promoting nor condoning it.¹⁹

From a non-religious perspective, anthropologists and psychologists have offered a variety of explanations for the existence of the practice: enhanced or decreased sexual performance, sacrifice to fertility gods, tests of endurance and a rite of passage, societal prestige, re-incarnation,²⁰ a punitive measure, absolution against the toxic influences of vaginal blood, a mark of slavery, as a war trophy, to affirm the male sex of a boy by removing the 'feminine' prepuce, cosmetic reasons and reasons of hygiene.²¹

While the practice of male circumcision for non-religious reasons failed to gain much popularity in most of Europe, in a number of Western countries such as England, the United States of America, Canada and Australia, its practice became prevalent by the beginning of this century.

In the countries practising non-religious routine male circumcision, the customary justification for the practice has been hygiene. The practice itself, however, seems to have become popular as a result of the anti-masturbation hysteria of the late 1800's.²² It was widely believed by the medical profession and others that masturbation was responsible for a number of illnesses including epilepsy, madness and a range of other illnesses. It was feared that a boy with a foreskin (which is pulled back while cleaning) would learn to masturbate and was at risk of contracting a number of such illnesses.²³ It was not until the 1930's that the dangers of masturbation were exposed as a myth,²⁴ by which time circumcision was well entrenched in the United States and those other Western countries that took up its practice.

During both World War I and World War II, male troops were encouraged to be circumcised for hygienic reasons (particularly if fighting in hot climates overseas) and for the prevention of venereal diseases. In the 1930's it was believed circumcision prevented cancer of the penis, and in the 1950's it was

¹⁸ Queensland Law Reform Commission, op cit (fn 12) 4.

¹⁹ *Australian Family Physician* (Vol 15, 1986) Numbers 3, 4, 6, 8 for a brief view of other religions' views of routine infant male circumcision.

²⁰ These reasons are proffered in W E Brigman, op cit (fn 14) 339.

²¹ Queensland Law Reform Commission, op cit (fn 12) 5-6. (In connection with the affirmation of the sex of the child, it is interesting to note that this reason has been mentioned among the reasons for female circumcision ie excising the 'penis-like' clitoris from the female body. See for example A T Slack 'Female Circumcision: A Critical Appraisal' (1988) 10 *Human Rights Quarterly* 437, 447).

²² W E Brigman, op cit (fn 14), 339; Queensland Law Reform Commission, op cit (fn 12) 7.

²³ Ibid.

²⁴ Queensland Law Reform Commission, op cit (fn 1) 16. It is interesting to note that female circumcision also became popular in a number of Western countries late last century and was only abandoned in Australia, England and the United States when the 'masturbation' myth was laid to rest.

claimed that cervical cancer was more likely to occur in women whose sexual partners were not circumcised.²⁵

By the 1960's the majority of Australian male infants and virtually all male infants born in the United States and Canada were routinely circumcised.²⁶ In Britain, circumcision rates dropped to less than six per cent following reports in the *British Medical Journal* in 1949 which informed physicians that it is perfectly normal for an infant's foreskin to remain unretractable in the first years of life and that nonretractability of the foreskin no longer remained a justification for circumcision.²⁷

The views of the Western medical world regarding the value of routine male circumcision have not been static this century and appear to vary a great deal from country to country. It is estimated that while circumcision is practically unknown in Scandinavia,²⁸ the rate of circumcision among infant males in the United States remains at 50 to 75 per cent.²⁹ In Australia today, the circumcision rate is estimated at 25 per cent, in Canada 25 per cent, but in New Zealand only two per cent of infant males are circumcised.³⁰

In all it has been estimated that between 75 per cent and 85 per cent of the world's male population are not and will not be circumcised.

III HEALTH AND MEDICAL QUESTIONS

In order to examine the legality of male circumcision some assessment of the medical benefits and risks of the procedure is necessary. This is so since an effective parental consent to a medical procedure on a child requires that the procedure be in the best interests of that child. Further, there are some 'harms' for which even an adult cannot legally give consent.³¹

It is clear from the previous section of this article that although a significant number of male infants in Australia are still circumcised, the popularity of the practice has waned dramatically in the course of one generation.

The decrease in the prevalence of the procedure reflects a change in attitude by the medical profession to circumcision. The previous generation of male infants were by and large routinely circumcised.

In a survey of general practitioners in Adelaide in 1984, it was evident that the popularity of circumcision had diminished somewhat since the 1960's. Of 101 general practitioners surveyed, 33 per cent favoured routine infant male circumcision, 39 per cent did not favour the procedure but agreed that they would perform the operation if pressed by the parents, and the remaining 28

²⁵ Queensland Law Reform Commission, *op cit* (fn 12) 7. The medical benefits (or otherwise) of male circumcision are discussed below.

²⁶ *Id* 7-8.

²⁷ W E Brigman, *op cit* (fn 14) 340-1.

²⁸ *Id* 341.

²⁹ G L Williams 'Newborn Circumcision: An Enigma of Health' Presentation paper delivered to the Second International Childbirth Conference, University of Sydney, 7 October 1992, 3.

³⁰ *Ibid*.

³¹ These issues are discussed under 'The Legal Issues' *infra*.

per cent were indifferent as to whether the procedure should be performed.³² Ninety-four per cent of those surveyed believed that circumcision, if to be done, should be performed at birth or by the six week post-natal period.³³

Of some significance in the survey results is the fact that there was widespread 'ignorance about normal care of the uncircumcised infant';³⁴ a number of doctors were unclear as to the age by which the foreskin should retract spontaneously. While there is some disagreement among paediatric surgeons in relation to foreskin management of an uncircumcised infant, all agree that the foreskin should not be manipulated until it retracts spontaneously. This was misunderstood by the majority of doctors surveyed.³⁵

By the 1990's however, the medical profession in Australia generally discouraged the practice of newborn infant male circumcision. The Australian Medical Association has supported the policy position adopted by the Australian College of Paediatrics.³⁶ Its Position Statement of 1991 reads that '[t]he Australian College of Paediatrics should continue to discourage the practice of circumcision as in the newborn male infant'.³⁷ The 1991 policy statement further suggested that if the procedure is to be performed (after parents consider the medical, social, religious and family factors and still opt for the procedure), the recommendation of the doctor should be that it was 'performed at an age and under medical conditions that reduce the hazards to a minimum'.³⁸

In August 1995, a four-member working party from the Australian College of Paediatrics produced a discussion paper that recommended softening the college's anti-circumcision position. This followed the publication of new medical literature suggesting that the failure to circumcise led to more urinary tract infections in infants. The working party suggested that the college could no longer be 'dogmatic' about risks and benefits.³⁹

As a consequence of statements attributed to the four-member working party, the Australian College of Paediatrics received some criticism and 'closed ranks'. The Australian College of Paediatrics withdrew from circulation its previous Position Statement and refused to release the draft of the 1995 Working Party's Position Statement until the final draft was reviewed by Council in May 1996. The final draft of the College's Position Statement, however, re-iterated that the procedure had both risks and benefits, and that 'it is not possible to be dogmatic on the exact risk/benefit ratio'.⁴⁰

In short, the Australian College of Paediatrics recognises the controversial nature of circumcision and has reconsidered its former position of discouragement of the practice of infant male circumcision (except perhaps where it

³² N Broadhurst & B Davey 'Circumcision: A review of the literature and survey of current practice' *Australian Family Physician* (Vol 13, 1984) No 10, 731, 731-2.

³³ *Id* 732.

³⁴ *Id* 733.

³⁵ *Id* 732.

³⁶ Queensland Law Reform Commission, *op cit* (fn 12) 18.

³⁷ *Ibid*.

³⁸ *Ibid*.

³⁹ S Dow, *op cit* (fn 11).

⁴⁰ Australian College of Paediatrics *Position Statement: Routine Circumcision of Normal Male Infants and Boys* 27 May 1996.

is clearly indicated for a medical condition such as phimosis).⁴¹ It would appear that the College now neither recommends nor discourages circumcision. It suggests that it is a matter of family choice.

In the last twenty-five years then, medical opinion has shifted on the question of the advisability of infant male circumcision. This does not unequivocally answer the question of whether circumcision might be construed as against the medical best interests of a child and hence illegal. A closer examination of the medical risks and benefits of the procedure is warranted before the procedure is declared illegitimate. For unlike female circumcision (where it has been argued consistently by the Western world that there 'are no known medical advantages'⁴² but a number of serious risks of physical and psychological short-term and long-term damage to a woman, and that such a procedure is genital mutilation),⁴³ some medical benefits of routine prophylactic infant male circumcision may still be argued, and that further, infant male circumcision is sometimes medically indicated.

The medical risks and benefits of the procedure are comprehensively set out by the Queensland Law Reform Commission Research Paper on the circumcision of male infants.⁴⁴ They are summarised as follows.

Medical Justifications for the Procedure

Where the procedure is medically indicated.

There are a number of medical conditions which justify a need for circumcision in older children or men. These are as follows.

Phimosis is a medical condition in which the prepuce does not pull back over the glans of the penis because the 'opening' is too tight. When erections occur the preputial opening may split, and healing may cause linear contraction and further narrowing of the circular orifice. In some cases infection may follow which would be an indication for circumcision.⁴⁵

Another medically-indicated condition for circumcision is paraphimosis,⁴⁶ which is an uncommon condition resulting in the inability of the phimosed prepuce to be pulled forward again. The condition is more common in older men and rare in children.

A non-retractable prepuce may be an indication for circumcision in few cases. By the age of three or four years the prepuce is usually fully retractable, and by 16 years of age only about one per cent of boys still have a non-retractable prepuce. The medical evidence suggests that conservative

⁴¹ This is discussed below.

⁴² Queensland Law Reform Commission, *op cit* (fn 1) 22.

⁴³ *Id.* These risks are spelt out by the Report at 22-27. The Report also lists in its appendices a number of samples of legislation from around the world proscribing circumcision as mutilation.

⁴⁴ Queensland Law Reform Commission, *op cit* (fn 12). The medical and contextual aspects of circumcision are usefully dealt with by this Research Paper. For criticisms of the paper, see under 'Introduction' *supra*.

⁴⁵ *Id.* 20.

⁴⁶ *Ibid.* In one study this condition was shown to be usually caused by forcibly retracting the foreskin of a young child's penis on the misguided advice of a doctor.

treatment will break down the adhesions between the prepuce and the glans if this does not occur naturally. Although infection might sometimes occur, this may be treated conservatively by local anaesthetic cream and saline baths. Only recurring infections appear to be an indication for circumcision.⁴⁷

Circumcision has also been recommended generally in the case of recurrent balanitis (usually inflammation of the glans penis where phimosis is present) and where there are complications from a previous inadequate neo-natal circumcision.⁴⁸

Prophylactic reasons for removal of the prepuce.

A number of benefits have been claimed by those who promote routine male circumcision on the basis of preventative health. Possibly the most often argued reason for routine circumcision is hygiene. Failure to clean beneath the prepuce may lead to infections, and circumcision reduces the need for males to practise genital hygiene. Such an argument has strong appeal if men live in dry, arid conditions where facilities for personal hygiene are not optimal.⁴⁹

Although a rare phenomenon, there is some evidence that circumcision may reduce the risk of cancer of the penis. For example, in a study of 156 patients with penile cancer treated at the University of Michigan Medical Centre — all were uncircumcised.⁵⁰ However in Denmark and Japan, for example, where circumcision is not routinely performed, the rates of penile cancer are similar to those found in the United States (where the majority of males have been circumcised).⁵¹ This has led some to conclude that it is good hygiene and not the presence or absence of the foreskin that matters in this context.

Others have argued that the low risk of penile cancer does not justify routine male circumcision. In one study,⁵² it was estimated that the rate of carcinoma of the penis is 0.2 to 0.9 per 100,000 uncircumcised males. Using this data it was argued that between 110,000 and 500,000 circumcisions were required to be performed to prevent one case of penile cancer. It must also be noted that there is some risk of death from circumcision. Thus the procedure is not justified.

In a separate study in Australia⁵³ however, it was shown that between 1960 and 1966 there were 78 deaths from carcinoma of the penis, while in the same period there were only two deaths from circumcision.

It was previously argued by some that a low incidence of carcinoma of the cervix in Jewish women is due to the fact that their Jewish male partners are

⁴⁷ Id 21.

⁴⁸ Ibid.

⁴⁹ Id 22–23.

⁵⁰ Id 25, citing R Dagher, M L Selzer & J Lapidus 'Carcinoma of the Penis and the Anti-Circumcision Crusade' (1973) 110 *Journal of Urology* 79.

⁵¹ Id 23–24.

⁵² Id 24, citing V F Marshall 'Should circumcision of infant males be routine?' (1954) 48 *Medical Record Annals* 790.

⁵³ Id 26, citing I O W Leitch 'Circumcision — A Continuing Enigma' (1970) 6 *Australian Paediatric Journal* 59.

circumcised. This theory has been shown by a number of studies to have no scientific basis.⁵⁴ It would appear that intercourse at an early age, multiple sexual partners, sexual hygiene, whether a woman has borne children, method of contraception and frequency of sexual intercourse are the most likely predisposing factors in cervical cancer.⁵⁵

Urinary tract infections are said to be more common in uncircumcised male babies, although it has also been said that the 'evidence for this is scientifically suspect as it all comes from hospital-based retrospective studies'.⁵⁶ It should also be added that such infections may be more efficiently treated by conservative means (such as antibiotics) than by surgical circumcision and its associated risks.

There has been some media discussion and research into the relationship between circumcision and sexually transmitted diseases in recent years. For example, in a 1983 Western Australian study of men attending a sexual diseases clinic, it was estimated that uncircumcised men were twice as likely as circumcised men to contract gonorrhoea or genital herpes, and five times as likely to contract candidiasis or syphilis.⁵⁷ No attempt, however, was made to examine the socio-economic status of the subjects.⁵⁸

In relation to HIV infection, recent available research indicates that for men involved in a high-risk lifestyle, circumcision may offer some protection. However not all studies reveal such a link⁵⁹ and such conclusions are hotly debated. Certainly there are those who argue that the answer to the prevention of sexually transmitted disease lies in better hygiene⁶⁰ and safer sexual practices.

Some have tried to justify circumcision on the basis of protecting a child from the discomfort and embarrassment of looking different from his father and other children.⁶¹ Given that the majority of children in Australia are now uncircumcised, this argument probably lacks merit.

In short then, some argument may be given for prophylactic circumcision of infant males. The counter-view, however, seems to suggest that a less intrusive way to achieve the same results is to place more emphasis on better hygiene and safer sex practices. Those against routine prophylactic circumcision point to a large number of disadvantages or risks associated with the procedure.

⁵⁴ Id 26.

⁵⁵ Ibid.

⁵⁶ Id 27.

⁵⁷ Id 28, citing S W Parker, A J Stewart, M N Wren, M M Gollow and J A Y Straton, 'Circumcision and Sexually Transmitted Disease' (1983) 2 *Medical Journal of Australia* 288.

⁵⁸ Ibid.

⁵⁹ Id 29. Appendix 3 of the Queensland Law Reform Commission Research Paper summarises recent research findings on the link between failure to circumcise and HIV/AIDS infections.

⁶⁰ Ibid.

⁶¹ Id 30.

Medical Risk and Disadvantages

Those against routine neonatal circumcision argue that the prepuce has a function; it serves to protect the glans and meatus (urinary opening of the penis) from the effects of 'nappy rash' and other irritations.⁶²

The prepuce is one of the most sensitive parts of the penis and is said to enhance sexual sensation and pleasure during intercourse.⁶³ This argument has been advanced on the basis that the skin of the circumcised penis has ten times the thickness of an uncircumcised penis. However, little research has been done on the differences in sexual pleasure between a circumcised and uncircumcised penis.⁶⁴

A major argument against neonatal circumcision is that because anaesthesia given to a newborn may lead to complications, the procedure has generally been performed without anaesthetics and may cause a newborn considerable pain.⁶⁵ Some new anaesthetic creams are considered to be potentially appropriate for a new-born infant.⁶⁶

A number of serious medical complications are associated with circumcision. It has been suggested by some that complications will arise in approximately 15 per cent of cases.⁶⁷ Although considered rare, there have been a number of reports of death caused by circumcision. The Queensland Law Reform Commission paper points to several deaths in Australia; one from cardiac arrest⁶⁸ from an overdose of anaesthetic and two cases of death by bacterial meningitis from infected circumcision sites.⁶⁹ In a recent New York study, however, 500,000 circumcisions were completed without a death.⁷⁰ Although death is not a likely result of circumcision, it should be remembered that it is a surgical procedure and that all surgery carries risks.

Other risks⁷¹ of a circumcision procedure include damage to the shaft by excessive skin removal⁷² from the penile shaft, damage to the urethra if caught

⁶² Id 17.

⁶³ Ibid.

⁶⁴ Masters and Johnson in one study found no difference in sensitivity between circumcised and intact men. See B Arndt 'On the cutting edge' *The Australian* 11 February 1995; W E Brigman, op cit (fn 14) 342.

⁶⁵ See for examples G L Williams, op cit (fn 29) 4–5; W E Brigman, op cit (fn 14) 341. In ritual Jewish circumcision the infant is given alcohol during the procedure, cries little, and almost immediately sleeps. Brigman argues that sleep itself is a response to pain and that non-REM sleep patterns of infants following circumcision are congruent with severe stress.

⁶⁶ Although there have been developments in infant anaesthesia including the use of dorsal penile nerve blocks and local anaesthetic creams, there is still some element of risk for a newborn child; B Arndt, op cit (fn 64).

⁶⁷ Queensland Law Reform Commission, op cit (fn 12) 32.

⁶⁸ In the United States (in Texas), a recent newspaper article details a five year old boy suffering heart failure and eventual death after a circumcision went wrong; L Lum & R Sorelle 'Boy's autopsy results expected' *Houston Chronicle* 28 July 1995, 28A.

⁶⁹ Queensland Law Reform Commission, op cit (fn 12) 33.

⁷⁰ Ibid, citing L R King, 'Neonatal Circumcision in the United States in 1982' (1982) 128 *Journal of Urology*.

⁷¹ Queensland Law Reform Commission, op cit (fn 12) 33–36.

⁷² In a reported English case, a five year old boy had half of his penis cut off (including the glans) in a negligently-performed circumcision procedure; *Ibrahim (a minor) v Muhammad; Ibrahim and anor v Muhammad* Queen's Bench Division (Transcript: Marten Walsh Cherer), 21 May 1984.

in a circumcision clamp, unsightly appearance, urethral fistulas, haemorrhage (which may even cause death), phimosis as a direct result of inadequate circumcision, infection in the meatus⁷³ and even amputation of the penis.⁷⁴

In short, from the above it can be seen that while there may be some benefits to routine prophylactic circumcision, there are also a number of serious risks of this procedure. Because of this, the medical profession in Australia does not generally encourage the procedure, preferring to encourage hygiene (and perhaps safe sex practices) and treating a urinary tract infection by antibiotics or other means should such an infection occur. By no means, however, is the medical profession universally opposed to circumcision. It still has its proponents and the debate over the procedure is far from settled.

IV THE LEGAL ISSUES

Clearly if circumcision is performed without due care and skill, doctors run the risk of being sued for negligence (as is the case with all medical procedures). There is also case authority for the parents of a child having a negligently-performed circumcision being able to recover damages for 'nervous shock', since their resultant depression was a direct and reasonably foreseeable consequence of the severing of their child's penis.⁷⁵

Apart from the failure of a doctor to perform a circumcision with the requisite care however, there are a number of legal issues which require special attention. They include the issue of the legality of the procedure itself, the question of who (if anyone) may consent to the circumcision of a child, the potential criminal and tortious liability of doctors and parents if the procedure is 'illegal', and the ramifications of the concept of informed consent.

Consenting Adults and the Legality of Circumcision

The principle of self-determination as to what procedures may be imposed on our bodies is one which the law certainly recognises.⁷⁶ This principle has to some extent been enshrined in legislation. In Victoria, for example, the *Medical Treatment Act 1988* (Vic) allows a competent adult to refuse medical

⁷³ For example, one Australian paediatrician describes a personal series of five proven cases of septicaemia in a six year period. Three other cases of septicaemia in which the circumcision site was probably the portal entry of the bacterium were also reported as being treated during the period; Queensland Law Reform Commission, *op cit* (fn 12) 36.

⁷⁴ In one reported incident, one of two seven month old twins had his penis literally cooked and severed by an excessive surge of heat from an electric cauterising needle. At the age of twenty-one months the injured child was given sex reassignment surgery because of the loss of the penis; G L Williams, *op cit* (fn 29) 4.

⁷⁵ *Ibrahim (a minor) v Muhammad; Ibrahim and anor v Muhammad* Queen's Bench Division (Transcript: Marten Walsh Cherer) 21 May 1984.

⁷⁶ For example K Hayter 'Female Circumcision — Is There a Legal Solution?' [1984] *Journal of Social Welfare Law* 323, 327.

treatment generally (or a particular kind of treatment) for a current condition.⁷⁷

Nonetheless, the right to refuse medical treatment does not mean that one may lawfully consent to serious harms being visited upon one's body. It has long been the common law position that consent to a maim (originally making a man less able to fight in his defence or the defence of his country) could not be regarded as of legal validity.⁷⁸ This might be redefined today to include any injury substantially and permanently impairing bodily function.⁷⁹

Lawful consent is generally recognised as a defence to what would otherwise be assault or other serious offence under the criminal law. In the medical field generally, failure by a doctor to obtain a patient's consent (except where an emergency situation exists) is regarded as an assault and actionable in the civil law⁸⁰ as well. Similarly in the field of sport, a participant consents to run the risk of being injured within the fair play and rules of a sporting contest.

However there exists a number of precedents that suggest that one cannot lawfully consent to any injury. Such cases have extended the concept of 'maim' above to a number of areas of behaviour involving risk of serious injury. In *Attorney-General's Reference (No 6 of 1980)*,⁸¹ the English Court of Appeal held that where two people had agreed to 'settle their differences' by way of a fist-fight, consent could be no defence to an assault charge. The court found it irrelevant whether the act occurs in public or private; it is not in the public interest that people should cause each other bodily injury for no good reason.⁸²

In another example of a court emphasising the public interest in finding that a consent was unlawful, an English court found a Nigerian woman who incised the cheeks of her two sons, aged nine and fourteen years, with a razor blade guilty of a serious statutory assault.⁸³ This was so despite the fact that her children willingly took part in what was described as a tribal custom of the Yoruba tribe.

In a colourful and recent example of the principle that a person's consent affords no defence to a serious criminal assault, the House of Lords dismissed the appeal of a number of convicted defendants in *R v Brown*.⁸⁴ In that case the appellants were a group of sado-masochists who willingly and enthusiastically participated in the commission of acts of violence (including genital torture and branding of the skin with a hot poker) against each other for the sexual pleasure it engendered in the giving and receiving of pain.

⁷⁷ Section 5 *Medical Treatment Act 1988* (Vic).

⁷⁸ R D McKay 'Is Female Circumcision Unlawful?' [1983] *Criminal Law Reform* 717, 718.

⁷⁹ *Ibid.*

⁸⁰ For example see S Selman 'Jury finds hospital guilty of negligence' *Montgomery Advertiser* 21 July 1995, where civil proceedings were brought against a hospital for performing a 'routine' neonatal circumcision without the consent of the child's parents.

⁸¹ [1981] QB 715.

⁸² *Id* 719.

⁸³ This case is known as *Adesanya*; R D McKay, *op cit* (fn 78) 720-1, citing *The Times* July 16 and 17, 1974. The mother was found guilty of breaching s 47 *Offences against the Person Act 1861* (UK).

⁸⁴ [1994] 1 AC 212.

A number of legal scholars have used these examples to argue that since there is no sound medical reason for female circumcision, and that the harms which may result from the procedure are of a very serious kind, the public interest demands that consent to female circumcision cannot be lawful, and accordingly female circumcision is a criminal assault.⁸⁵

Whether such logic may be applied to the circumcision of a consenting male in Australia is doubtful. While the previous part of this article indicated some medical risk involved in medical circumcision as well as an associated discouragement of the practice by the medical profession in Australia, some prophylactic benefits of the removal of the foreskin are evident, and the medical debate is far from settled on these issues. In the case of female circumcision, the degree and risk of injury and complications are generally higher and there are no medical justifications for the procedure.⁸⁶

While the cases above indicate some willingness of the courts, in the name of public policy, to invalidate the consent of a person to an act not for his or her medical best interests, clearly there are exceptions to this. For instance, cosmetic surgery (such as face-lifts, breast enlargement or reduction surgery, cosmetic changes to one's nose etc) is permitted if performed by a qualified medical practitioner, even though no therapeutic benefit is obvious.⁸⁷ So too does ear-piercing,⁸⁸ and perhaps 'reasonable' physical chastisement appear to be acceptable in our community.⁸⁹

Even where serious bodily harms are a foreseeable consequence of these cosmetic procedures, consent will be a good defence to a criminal prosecution because of the lawfulness per se of the activities. This was the view of Lord

⁸⁵ For example R D McKay op cit (fn 78) 721; K Hayter, op cit (fn 76) 327; Queensland Law Reform Commission, op cit (fn 1) 27-33. This might be the case even without specific legislation outlawing the practice as in New South Wales; see *Crimes (Female Genital Mutilation) Amendment Act 1994* (NSW).

⁸⁶ For example K Hayter, op cit (fn 76), 326 where a distinction is drawn between the two practices on the basis of degree of injury.

In its most severe form, infibulation, female circumcision may involve quite a degree of violence. The female subject may be held down while her clitoris, labia minora and parts of her labia majora are excised by a woman with no medical training using glass or razors or unsterilised instruments and without anaesthetic. The two sides of the vulva are then sewn together with catgut or acacia thorns leaving a tiny opening for the passage of urine and menstrual blood. In many African tribes the tiny opening is widened by a dagger on her wedding night.

A glance at the literature shows the high risk of a number of serious complications of a short-term and long-term nature. The practice often results in death. Its 'lesser' implications include infertility, keloid formation, menstrual blockages, severe pain during intercourse and periods, obstructed childbirth, haemorrhaging, tetanus, septicemia from unsterile instruments, shock, infection etc. For example Queensland Law Reform Commission, op cit (fn 1) 7-9 & 22-26; A T Slack, op cit (fn 21) 440-2 & 450-55; A Funder 'De Minimis Non Curat Lex: The Clitoris, Culture and the Law' (1993) 3 *Transnational Law & Contemporary Problems* 417, 433-7.

⁸⁷ For example L Bibbings & P Alldridge 'Sexual Expression, Body Alteration and the Defence of Consent' (1993) 20 *Journal of Law and Society* 356, 361.

⁸⁸ Tattooing of infants is generally illegal under Australian State legislation. For example see s42 Summary Offences Act 1966 (Vic).

⁸⁹ New Law Journal (Editorial) 'Change and Consent' (1994) 144 *New Law Journal* 309.

Templeman in *R v Brown* (discussed above) and his Lordship specifically included ritual male circumcision as such a lawful activity.⁹⁰

Lord Templeman suggests that what is regarded as lawful may change over time. In so doing, he refers to the historical custom of duelling.⁹¹ Such a practice, though lawful in the past, would today clearly not excuse the participants of criminal charges of assault, though their participation was willing. It may be the case that male circumcision may be so discredited medically in the future that its practice may not be regarded as lawful and any resultant consent invalidated.

The above suggests that for those patients capable of giving a valid consent, a doctor performing a male circumcision is unlikely to be guilty of a criminal offence. This will also protect a medical practitioner in a civil action for assault.⁹²

An interesting question arises if the criminal law were to regard a competent person's consent to a circumcision procedure as invalid as against public policy. In such a scenario, would the law also regard the consent of the patient as invalid for the purpose of a civil assault action?

There is surprisingly little authority on this point. John Fleming⁹³ suggests that the public interest considerations in the criminal sphere do not necessarily apply to civil cases. For example in *Murphy v Culhane*,⁹⁴ the English Court of Appeal held that a consenting participant in an unlawful fight had no action in trespass notwithstanding that consent could be no defence to a criminal charge involving the intentional infliction of bodily harm arising from the same facts. Similarly, Fleming suggests in the case of statutes fixing the age of consent to sexual intercourse, the female victim, if allowed to succeed in an action for assault while actively participating in such illegal sexual conduct, is being offered a reward for 'abandoning her virtue'.⁹⁵

In general, the criminal law involves public, and not just personal, interests⁹⁶ These interests are not always an appropriate rationale in the context of civil cases. In our scenario, injustice might occur if a patient requests a circumcision and is then able to claim monetary compensation for the very act he demanded.

⁹⁰ [1994] 1 AC 212, 231. Not only is there some potential prophylactic medical benefit to circumcision, the procedure is often performed in compliance with religious custom. While Lord Templeman formed part of the majority in the case itself, his judgment contains the only reference to male circumcision and these remarks are properly regarded as obiter dicta.

⁹¹ *Ibid.*

⁹² Consent, of course, will not protect a practitioner for a tortious action for a negligently-performed circumcision.

⁹³ J G Fleming *The Law of Torts* (8th ed, 1992) 82.

⁹⁴ [1977] 1 QB 94. Cf *Lane v Holloway* [1968] 1 QB 379 where the conduct of the injured man was trivial. See also *Fontin v Katapodis* (1962) 108 CLR 177.

⁹⁵ J G Fleming, *op cit* (fn 93) 82. Cf *M v K* (1989) 61 DLR (4th) 392 where a 15 year old girl consenting to, and initiating, sexual intercourse with her foster father was successful in the subsequent civil action.

⁹⁶ *Marion's Case* (1992) 175 CLR 218, 233 (per Mason CJ, Dawson, Toohey and Gaudron JJ).

Children

Parental Consent and the Best Interests of a Child.

It was suggested in the discussion above that an adult can probably give an effective consent to a circumcision procedure on himself; it is unlikely that circumcision is illegal per se.

It is also likely that an older child might be able to give an effective consent to such a procedure. It was recognised by the Australian High Court in *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)*,⁹⁷ that as a child's capacities and maturity grow, the parental power to consent to medical treatment for that child diminishes, and that when a child has reached a sufficient understanding and intelligence to enable him or her to fully understand what is proposed, the minor is capable of giving an informed consent.

However, the vast majority of circumcisions of males in Australia takes place within the first few days of life.⁹⁸ Accordingly the question of a child consenting to the procedure is not usually at issue. It is the child's parent(s) who consent on his behalf in the normal course of events. This raises some particular issues.

While parents are recognised at common law as the natural custodians and guardians of their children with various related duties, powers and responsibilities in relation to a child, including the power to consent to medical treatment on behalf of the child, the common law does not confer upon parents rights over their children.⁹⁹ That is, parents are not free to arbitrarily make medical decisions on behalf of their children; the basis for the parental power to consent to medical treatment has been identified as the child's right of advancement.¹⁰⁰ A parent is given the power to consent to medical treatment on behalf of a child because he or she is in the best position to act in the 'best interests of the child'.¹⁰¹

Under Australian law, the best interests of the child is the basis on which any decision or order about a child is to be made, and under the *Family Law Act* 1975 (Cth) the welfare of the child is the paramount consideration.¹⁰² This certainly reflects the United Nations Convention on the Rights of the Child which Australia signed and ratified in 1990. Article 3 of that Convention provides that '[i]n all actions concerning children, whether undertaken by private or public social welfare institutions, courts of law, administrative

⁹⁷ (1992) 175 CLR 218. This decision approved the House of Lords decision in *Gillick v West Norfolk A H A* [1986] AC 112 on this point.

⁹⁸ Queensland Law Reform Commission, op cit (fn 12) 13. See also Appendix 1 of the Queensland Law Reform Commission paper for a statistical breakdown on the number of circumcisions performed annually and their monetary cost.

⁹⁹ Queensland Law Reform Commission *Consent to Medical Treatment of Young People: Discussion Paper* (WP44) May 1995, 27.

¹⁰⁰ Id 28 (citing Justice McHugh in *Marion's Case* (1992) 175 CLR 218, 312).

¹⁰¹ Ibid. Note that there are limits on the power of a parent to consent to medical treatment of a child. These are spelt out in *Marion's Case* (1992) 175 CLR 218 and are alluded to below.

¹⁰² See s 64 (and the Act generally).

authorities or legislative bodies, the best interests of the child should be a primary consideration.'

While it may be possible for a legally competent adult to consent to treatment not in their best interests,¹⁰³ a parent has no such authority in respect of his or her child. If a parent purports to consent to treatment not in the best interests of a child, the consent is of no effect and any person acting on such a consent may be guilty of assault if any physical interference is involved.¹⁰⁴

However while the 'best interests' objective is conceptually certain, the relevant children and family law legislation in Australia fails to specifically define what is in the best interests of a child. The term 'welfare' has been given a wide meaning by the courts, and may include all aspects of well-being, including physical, financial, intellectual, emotional, moral and spiritual well-being.¹⁰⁵ The courts have consistently declined to lay down rigid rules or principles about how the welfare of a child should be determined. The courts are given a wide discretion to make a decision having regard to contemporary social standards.¹⁰⁶

This article has indicated that the medical profession in Australia does voice some opposition to routine infant male circumcision.¹⁰⁷ Nonetheless, it was also suggested that some justification can be put forward to circumcise a child for prophylactic purposes, and that some of the medical evidence on this topic is incomplete in establishing the usefulness or otherwise of circumcision to, for example, reduce the risk of sexually transmitted diseases. Given the very broad nature of the concept of 'best interests' of a child, it is difficult to determine when behaviour falls outside what is required. It may well be that given the current state of knowledge, it is both reasonable and rational to choose to have a child circumcised or choose not to have a child circumcised.

Some have argued that the decision should be deferred until the patient is old enough to understand what is intended¹⁰⁸ (and perhaps be allowed some involvement in the decision process). This has various difficulties associated with it. In the first place, it is generally considered that circumcision beyond early infancy is an extremely painful and probably traumatic procedure. Another objection to this idea is that for Jewish ritual circumcision, in particular, religious law dictates that the procedure is to be performed on the eighth day of life.

This raises another important issue. It may be that the best interests of a child in relation to circumcision is different for a Jewish or Muslim boy than a child receiving a non-religious circumcision. It has already been noted that

¹⁰³ This article mentions cosmetic surgery such as breast enlargement or a face-lift which, although perhaps psychologically beneficial to a patient, may not be in the patient's therapeutic medical best interests; see *supra* under 'Consenting Adults and the Legality of Circumcision'.

¹⁰⁴ McHugh J in *Marion's Case* (1992) 175 CLR 218, 316.

¹⁰⁵ Australian Law Reform Commission, *op cit* (fn 5) para 6.21.

¹⁰⁶ *Ibid.*

¹⁰⁷ See 'Health and Medical Questions', *supra*.

¹⁰⁸ N Turner 'Circumcised boys may sue' (February 23, 1996) 1(4) *The Health Law Update* 1, 2.

the best interests of a child include his spiritual well-being (and not just physical well-being). As was discussed in Part II of this article, ritual male circumcision is of special importance in Judaism and Islam. A child who is not circumcised may feel psychologically and spiritually cut off from his religion and culture.

Opponents of circumcision may point to Article 24(3) of the United Nations Convention on the Rights of the Child which requires that ratifying member States take all effective and appropriate measures to abolish traditional practices prejudicial to the health of children.¹⁰⁹ We have already seen that the debate concerning the medical benefits and costs of circumcision is not conclusively settled. It is perhaps presumptuous to assume that circumcision is 'prejudicial'.

On the other hand, the preamble to the above United Nations instrument refers to "the importance of the traditions and cultural values of each people for the protection and harmonious development of the child."¹¹⁰ Further international authority to justify ritual male circumcision is afforded by the International Covenant on Economic, Social and Cultural Rights which provides that '[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their social, economic and cultural development'.¹¹¹ Clearly a practice seen as integral to Judaism and Islam can be characterised as a credible cultural value in this context.

Although not specifically focusing on the issue of male circumcision, the Australian Law Reform Commission in a paper entitled 'Multiculturalism and the Law' argued that the law should be amended to explicitly take into account 'the effect of a decision on a child's cultural identity'¹¹² when a court is faced with the issue of determining the best interests of a child. It would seem that in balancing the best interests of a child, if circumcision is not permissible for children generally, there is some legal basis for arguing that ritual circumcision should be allowed.

Is the consent of a court required for a circumcision procedure?

Following the High Court decision in *Marion's Case*,¹¹³ it is now clear that there are circumstances where neither a parent nor a child can appropriately consent to surgical interference. In such circumstances a court is invested with the necessary authority to make an appropriate decision.

¹⁰⁹ For example see Id 1.

¹¹⁰ Issues of cultural autonomy and relativism are elaborated upon in Part V of this article below.

¹¹¹ Article 1 (1) (1967). See also R C Smith 'Female Circumcision: Bringing Women's Perspectives into The International Debate' (1992) 65 *Southern California Law Review* 2449, 2489-2503 for a discussion of a number of potentially relevant human rights instruments.

¹¹² Australian Law Reform Commission, op cit (fn 5) para 6.35. The Commission pointed out in Chapter 8 of its report, however, that a cultural practice which is illegal in Australia cannot be excused on the grounds of respecting another's culture. On this point the Commission specifically mentioned female genital mutilation; see para 8.3 (Note 4), 169.

¹¹³ (1992) 175 CLR 218.

The Supreme Court of each state is invested with an inherent jurisdiction known as *parens patriae*. This doctrine authorises the state to intervene in family matters to protect the health, welfare and safety of children. While this jurisdiction has been likened to a parental role, a court acting in this jurisdiction has wider powers than those of a natural parent. The jurisdiction springs from the direct responsibility of the Crown for those who cannot look after themselves; it includes infants and those of unsound mind.¹¹⁴

It is also recognised that the Family Court of Australia has a similar jurisdiction to the *parens patriae* power of a state Supreme Court. Application can be made to the Family Court of Australia¹¹⁵ to authorise particular medical treatment which may be beyond the scope of a parent's power.¹¹⁶ This jurisdiction can also be used to resolve disputes in relation to the medical treatment of infants.¹¹⁷

In *Marion's Case*,¹¹⁸ the parents of a fourteen year old girl with intellectual and physical disabilities applied to the Family Court for authority to have her sterilised by undergoing a hysterectomy and ovariectomy. The question of the right of parents to consent to the procedure reached the High Court. In remitting the case back to the Family Court for decision, the High Court held that parents cannot consent, without court approval,¹¹⁹ to non-therapeutic sterilisation procedures for their children.

While the majority of the High Court did not specifically state which other medical procedures would require prior court approval, the court did lay down some criteria for its required involvement in such decision-making.

The decision in *Marion's Case*¹²⁰ is relevant to all non-therapeutic medical procedures involving invasive, irreversible and major surgery. Court authorisation is required because of the significant risk of making the wrong decision, either as to a child's present or future capacity to consent or about what are the best interests of a child who cannot consent, as well as the particularly grave consequences of a wrong decision.¹²¹

The majority mentioned a number of factors contributing to the significant risk of a wrong decision being made in the case of non-therapeutic sterilisation. These included¹²² the complexity of the question of consent; the central role played by the medical profession in deciding both about the sterilisation and the procedure itself; the clash of potentially conflicting interests of a child, parents, carers and other family members; the gravity of the

¹¹⁴ Id 258–259, per Mason CJ, Dawson, Toohey and Gaudron JJ.

¹¹⁵ Pursuant to s 63C *Family Law Act* 1975 (Cth).

¹¹⁶ *Marion's Case* (1992) 175 CLR 218, 253 per Mason CJ, Dawson, Toohey and Gaudron JJ.

¹¹⁷ It is worth noting that where a conflict arises in relation to orders made by a State Supreme Court and the Family Court under this jurisdiction, orders made by the Family Court will prevail (not least because of the workings of s 109 of our Constitution to break such deadlocks); *P v P* (1994) 181 CLR 583, 604–5.

¹¹⁸ (1992) 175 CLR 218.

¹¹⁹ In this case approval was necessary by the Family Court pursuant to its powers in s 63C. In some States, notably New South Wales and South Australia, approval by a State Guardianship Board may also be legitimately given to such a procedure.

¹²⁰ (1992) 175 CLR 218.

¹²¹ Id 250, per Mason CJ, Dawson, Toohey and Gaudron JJ.

¹²² Id 250–53.

consequences of a wrong decision; and the fact that sterilisation interferes with a fundamental right to personal inviolability at common law.

While the majority of the High Court did not specifically state which other procedures require court consent, they are likely to include¹²³ the turning off of life-support, transplantation of organs for the benefit of a sibling, applications for major surgery (such as cardiac surgery) where a parent refuses to consent and gender reassignment.¹²⁴

Some have employed the decision of the High Court to argue that routine male circumcision might be beyond the authority of a parent and might also require judicial consent.¹²⁵ The stated factors relevant to the need for judicial intervention may have some relevance to infant male circumcision. One can possibly see the potential for a clash of wills of the interested parties and the gravity of a wrong decision being made.

However while circumcision is invasive and possibly irreversible,¹²⁶ it is far from 'major' surgery. Although, as in all surgical procedures, there are some risks attached, infant male circumcision is a procedure which takes only a few minutes, need not be performed in a hospital, and is still performed on many thousands of children in Australia each year.¹²⁷ It seems far-fetched to argue that a superior court is required to approve each of these procedures.

It is noteworthy that while the majority of the High Court did not mention routine infant male circumcision in *Marion's Case*,¹²⁸ Deane J specifically named it as a procedure within the normal authority of parents.¹²⁹ He regarded parental consent to circumcision as appropriate, in this context, for both religious and hygienic reasons.¹³⁰

Infant male circumcision: criminal and civil liability

In the preceding sections some argument was advanced to show that a parent cannot consent to an infant male circumcision either because it is not in the child's best interests, or because the decision itself is beyond the scope of

¹²³ For a discussion of such procedures see Queensland Law Reform Commission, op cit (fn 99) 59.

¹²⁴ For example, in *In Re A* [1993] Fam LR 715, the Family Court gave its approval for a fourteen year old child to undergo gender reassignment by the construction of male sexual organs. At birth the child was diagnosed with ambiguous genitalia and underwent genital reconstruction to give her a feminine appearance but received inadequate hormone replacement treatment. Recurrent masculinisation of the child's physical structures had occurred with a change in mental behaviour and attitude. While the child wanted to undergo the procedure, Family Court approval was necessary since the procedure would require invasive, irreversible and major surgery.

¹²⁵ For example N Turner, op cit (fn 108) 2.

¹²⁶ There have been a number of accounts in the media of a technique known as 'foreskin restoration' which through stretching of skin in the area replaces the lost foreskin. The technique has received some recognition by its publication in two medical journals in the United States. See C Hicks 'They took my foreskin, and I want it back' *The Age* 25 August 1993.

¹²⁷ For example in 1992–1993 over 20,000 circumcisions (over 14,000 of children less than six months of age) were performed in Australia; Queensland Law Reform Commission, op cit (fn 12) Appendix 1.

¹²⁸ (1992) 175 CLR 218.

¹²⁹ *Id* 297.

¹³⁰ *Ibid*.

authority of a parent and must be made by a court. Whilst such a conclusion is not whole-heartedly embraced, it is worth considering the potential criminal and civil liability of doctors and parents should such a conclusion be correct.

Where parental consent to a medical procedure is invalid (as described above), there is some authority for the proposition that the procedure itself would be an assault. While this view is implicit in the reasoning of the majority in *Marion's Case*,¹³¹ McHugh J was prepared to explicitly state that '[a] person who acts on such a "consent" is guilty of assaulting the child if the treatment involves any physical interference with the child'.¹³²

On this construction, both parents and doctors run the risk of a number of criminal charges being brought against them for an unlawful circumcision. In Victoria, for example, charges may be brought under Division 1(4) of the *Crimes Act 1958* (Vic) dealing with offences against the person. Potential offences include causing injury intentionally or recklessly,¹³³ causing serious injury intentionally or recklessly,¹³⁴ conduct endangering life¹³⁵ or negligently causing serious injury.¹³⁶ In this context a parent or doctor may also be guilty of common assault.¹³⁷

While it is questionable whether an adult may bring civil proceedings for a procedure to which he consented¹³⁸ which caused him injury, a child's ability to sue may be available by the absence of 'real consent'.¹³⁹ If this is the case children may be able to sue their parents and/or doctors for battery.

Certain procedural difficulties are evident here for it is unlikely that parents will instigate tortious legal action against themselves. It may be possible for a 'next-friend' to bring an action on behalf of a child. Alternatively, for the purposes of the relevant limitation of actions period in tort, time may not begin to run until the child reaches majority.¹⁴⁰ Accordingly, a child would be able to bring a civil action against his parents after turning eighteen years of age.

While historically there has been some dispute as to whether a child may sue its parents for a cause of action for personal injuries negligently inflicted by its parents, it is probably the case today that the doctrine of parent-child

¹³¹ (1992) 175 CLR 218.

¹³² Id 316, per McHugh J.

¹³³ Section 18 *Crimes Act 1958* (Vic). It is noteworthy that s 15 includes 'pain' in the definition of injury. This of course is one of the criticisms of the procedure. See supra under 'Health and Medical Questions'.

¹³⁴ Sections 16 and 17 *Crimes Act 1958* (Vic).

¹³⁵ Section 22 *Crimes Act 1958* (Vic).

¹³⁶ Section 24 *Crimes Act 1958* (Vic).

¹³⁷ Section 23 *Summary Offences Act 1966* (Vic).

¹³⁸ See discussion under 'Consenting Adults and the Legality of Circumcision', supra.

¹³⁹ This is so in our hypothetical since the parents either wrongfully consented or had no authority to consent; Queensland Law Reform Commission, op cit (fn 12) 40.

¹⁴⁰ For example, in Victoria, s 5 *Limitations of Actions Act 1958* (Vic) provides that an action in tort must be brought within six years of the time the action accrued. However s 23 of this legislation extends the period to six years from the time a person under a 'disability' (which includes a minor by virtue of s 3(2)) ceased to be under such disability. Hence an adult male might theoretically still be able to sue within six years of attaining majority.

immunity in tort¹⁴¹ has no place in Australian law. In a negligence action, children may sue parents not because of a general duty arising out of a blood relationship, but because of the factual circumstances involved.¹⁴² Parents however are more likely to be at risk of an action in trespass against the person (battery) than a negligence action being brought against them. In the case of intentional torts, it has long been recognised that a child is capable of suing its parents.¹⁴³

In the case of doctors performing surgical procedures upon children with parental consent, some have argued that doctors should be afforded some latitude here. Patrick Parkinson,¹⁴⁴ for example, argues that doctors should not be liable for performing a procedure which is retrospectively deemed by the courts not to be in a child's best interests. He argues that, in this context, the well-known test laid down in the English case of *Bolam v Friern Hospital Management Committee*¹⁴⁵ should be applied. This test provides that as long as a doctor acts in accordance with a practice accepted at the time by a responsible body of medical opinion skilled in the form of the particular treatment in question, the doctor should not be regarded as negligent.

While this test has now been rejected in Australia in respect of the issue of negligence by a practitioner for failing to give sufficient information to enable a patient to give an informed consent to an operation,¹⁴⁶ Parkinson argues¹⁴⁷ that there is no reason that the test should not be used in assessing a doctor's liability in trespass (both criminal and civil).¹⁴⁸ If a stricter test than the *Bolam* test was applied, doctors would be reluctant to perform a number of procedures on children which are commonly performed on legally consenting adults, since adults need not necessarily act in their 'best interests'. Parkinson argues that the best interests of children cannot be said to be completely objective and hence some flexibility should be given in its application.¹⁴⁹

If a *Bolam* test was applied to infant male circumcision in Australia, it is unlikely that doctors would be criminally or civilly liable for performing the

¹⁴¹ This doctrine was widely recognised in the United States until early this century; see for example N Hansbrough 'Surrogate Motherhood and Tort Liability: Will the new reproductive technologies give rise to a new breed of prenatal tort?' (1986) 34 *Cleveland State Law Review* 311, 320-1.

¹⁴² *Rogers v Rawlings* [1969] Qd R 262, 274 (per Lucas J) and 276-7 (per Douglas J). This view has the authority of Barwick CJ in the High Court decision of *Hahn v Conley* (1971) 126 CLR 276 at 283-4. See also *Tidman v Griffiths* (1989) 155 LSJS 95. While the law has held parents liable for positive acts which endanger their children, the courts have been less willing to impose a duty of care upon parents for omissions in protecting their children; for example *Robertson v Swincer* (1989) 52 SASR 356 and *Towart v Adler* (1989) 52 SASR 373.

¹⁴³ *Ash v Ash* [1696] Comb 357.

¹⁴⁴ P Parkinson 'Children's Rights and Doctors' Immunities: The Implications of the High Court's Decision in *Re Marion*' (1992) 6 *Australian Journal of Family Law* 101.

¹⁴⁵ [1957] 1 WLR 582.

¹⁴⁶ *Rogers v Whitaker* (1992) 175 CLR 479. The question of informed consent in relation to a circumcision procedure is discussed under the heading 'Informed Consent: the Real Risk', *infra*.

¹⁴⁷ P Parkinson, *op cit* (fn 144) 122-3.

¹⁴⁸ Such a view is evident in the obiter dicta of Lord Bridge in the House of Lords decision in *Re F* [1990] 2 AC 1, 52. His judgment forms part of the majority position in that case.

¹⁴⁹ P Parkinson, *op cit* (fn 144) 120-5.

procedure. While there has been some resistance by the medical fraternity to routine infant male circumcision, there remain some claimed prophylactic medical benefits,¹⁵⁰ and a substantial number of children in Australia are still willingly circumcised by a number of doctors. That is, there is still a reasonable body of medical opinion that supports the practice albeit a minority.

Informed Consent: the Real Risk.

The previous section of this article focused on the theoretical potential criminal and civil liability of doctors and parents for the performance of a routine infant male circumcision. While such a scenario has been foreshadowed by the media and some writers,¹⁵¹ it appears an unlikely scenario at present. It was suggested above that circumcision is not likely to be the type of procedure requiring court approval as in *Marion's Case*,¹⁵² and that good argument may be made against those who claim that the procedure cannot receive parental consent in the best interests of a child.

In the little available legal literature on the topic, a glaring omission is the failure of writers to consider the issue of informed consent. It is submitted that the greatest risk to doctors of civil liability in this area is the failure to obtain the informed consent of the patient or his custodial parents (in the case of newborn infant male circumcision) leaving the doctor potentially liable in negligence.

Since the High Court decision in *Rogers v Whitaker*,¹⁵³ it is clearly the law in Australia that a doctor has a duty to warn a patient of a material risk inherent in a proposed procedure or treatment. A risk is material if, in the circumstances of a particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it. A risk is also material if the medical practitioner is, or should have been from the circumstances, aware that the particular patient would have attached significance to the risk.¹⁵⁴

It is also clear, from the case, that doctors must in general answer the questions put to them by their patients honestly and directly.¹⁵⁵ In the case itself, although the patient did not specifically ask about the possibility of sympathetic ophthalmia when considering an operation on her right eye for therapeutic and cosmetic purposes, her persistent questioning of the doctor about possible complications and accidental interference to her left eye should have been sufficient indication to her consulting doctor that she be warned of the

¹⁵⁰ See under the heading 'Health and Medical Questions', supra.

¹⁵¹ For example see Queensland Law Reform Commission, op cit (fn 12) 13–16 & 38–9; N Turner, op cit (fn 108) 1–2.

¹⁵² (1992) 175 CLR 218.

¹⁵³ (1992) 175 CLR 479.

¹⁵⁴ Id 490. This is subject to the possible defence of therapeutic privilege. The defence applies where there is a particular danger that the provision of all relevant information will harm an unusually nervous, disturbed or volatile patient.

¹⁵⁵ Id 487.

risk of sympathetic ophthalmia, however small.¹⁵⁶ Given the patient's particular concerns, the doctor was held to have breached the required standard of care of advice owed to his patient and hence was liable in negligence.¹⁵⁷

In the context of circumcision, there are a number of risks of serious consequences connected with the procedure. These were alluded to in Part III of this article above. Where a doctor neglects to provide information to an adult patient or the parents of an infant patient as to these risks, the doctor runs the risk of a negligence action should something go wrong. Should the parents raise any concerns regarding the complications of circumcision, the doctor may be even more obliged to present relevant information enabling an informed consent to the procedure.

In the case of ritual circumcision, particularly where the family involved lives a lifestyle very observant to Judaism or Islam, doctors may be able to argue that the risks of circumcision are not material in that the infant's parents may feel obliged to consent to the procedure for religious reasons, irrespective of any risk factors. Whether someone religious in these circumstances may attach significance to a risk, however, might vary from person to person and case to case.

The 1996 policy statement of the Australian College of Paediatrics¹⁵⁸ to some extent addresses the need for informed consent by stating that 'informed discussion with parents regarding the possible health benefits of routine male circumcision and the risks associated with the operation is essential. Up-to-date, unbiased written material summarising the evidence in plain English should be widely available to parents'.¹⁵⁹ It warns however that 'the medical attendant should avoid exaggeration of either risks or benefits'¹⁶⁰ of the procedure. There is no guarantee that published educational material and informed discussion will exempt a practitioner from liability; it is a question of the contents of such material and the substance and level of communications between the doctor and parents on a case by case basis that the courts are likely to examine. Published educational material, however, is a step in the right direction.

V THE RIGHT TO AUTONOMY AND MULTICULTURALISM

What underlies informed consent, and is implicit in the judgment of *Rogers v Whitaker*,¹⁶¹ is the notion of self-determination and autonomy in the decision-making process. Autonomy is valued in a liberal society because the

¹⁵⁶ Id 491. It was accepted at the trial that the complication occurred on average only one in fourteen thousand such procedures. The patient's right eye was not improved greatly by the procedure, and with the effects of sympathetic ophthalmia on her left eye, the plaintiff was left in almost total blindness; id 482.

¹⁵⁷ It is worth noting that the negligence of the surgeon in this case was his failure to disclose information enabling the patient to give an informed consent, whether or not he performed the actual surgery with due care and skill.

¹⁵⁸ See fn 40, supra.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ (1992) 175 CLR 479.

liberal ideal emphasises that one acts morally by being responsible for one's actions; one may only be responsible by choosing to act in a particular manner.¹⁶² In a liberal society autonomy is valued in itself.¹⁶³

Personal liberty is stressed in a liberal society by allowing people, to the greatest degree possible, to be free to make their own choices. A corollary of this is that the law should, as far as possible, not enter the realm of personal morality.¹⁶⁴ Accordingly, a *prima facie* position is that people should be free to choose whether or not to be circumcised. This is particularly so in the case of ritual circumcision which is connected to a complete value system embodied in an established religion, whether it be Judaism or Islam. This is not to suggest that non-ritual routine circumcision does not involve a choice or the application of one's autonomy.

The liberal ideal in our society however is constrained by the limitation that legal intervention is justified to protect persons from what is offensive or injurious, particularly where those persons are vulnerable or physically or mentally disadvantaged in some way.¹⁶⁵ Clearly most candidates for male circumcision are young infants who are obviously very vulnerable.

Yet in a liberal society, the onus is on the state to show justification before intervening in the autonomous decision-making of its citizens;¹⁶⁶ without such justification one need not agree with but should tolerate the actions of others.

Obviously the state does intervene and set limits to our conduct in many areas of human behaviour. Sometimes however it may be charged that these rules lack consistency.¹⁶⁷ In the case of infant male circumcision, a number of consequentialist or utilitarian arguments have been put forward by some to argue that this practice should be prohibited. These arguments generally point to the medical risks and consequences of circumcision discussed in Part III above. This paper has argued that while there certainly are risks involved in this medical procedure, some prophylactic benefits may be available as well.¹⁶⁸ While the net benefits or costs of this long-established practice are still in dispute, and while the onus rests on the State to show compelling reasons to intervene in the autonomy of its citizens, it is argued that it is inappropriate to prohibit infant male circumcision.¹⁶⁹

In addition, the imposition of such a prohibition seems further inappropriate in a multicultural society espousing tolerance for diverse cultural

¹⁶² M Charlesworth *Bioethics in a Liberal Society* (1993) 10–13.

¹⁶³ *Id* 13–15.

¹⁶⁴ *Id* 15–16.

¹⁶⁵ K Hayter, *op cit* (fn 76) 326.

¹⁶⁶ M Charlesworth, *op cit* (fn 162) 17.

¹⁶⁷ For example, while adults may legally consume cigarettes and alcohol, both of which may be severely injurious to one's health, a range of other intoxicating substances (perhaps less harmful or no more harmful) are prohibited. See also fn 6, *supra*.

¹⁶⁸ The counter-argument is that better hygiene and safer sexual practices are a less intrusive way of achieving the same result. See under the heading 'Health and Medical Questions', *supra*.

¹⁶⁹ Some have argued that female circumcision (as contrasted with male circumcision) should be prohibited on the basis of the degree of injury involved in that practice; see for example K Hayter, *op cit* (fn 76) 326 and fn 86, *supra*.

practices. Ritual circumcision, at least, is a cultural practice mandated by Judaism and Islam.

Multiculturalism however cannot be seen as a blanket approval for all diverse cultural practices. Female circumcision, for example, has been a traditional cultural practice among many African peoples¹⁷⁰ (although not mandated by religion).¹⁷¹ Nonetheless, it has been overwhelmingly condemned by the Western world as a repugnant practice and outlawed by legislation in a number of jurisdictions around the world.¹⁷² While diverse cultural practices are to be *prima facie* tolerated, multiculturalism is said to have limits. Multiculturalism has been defined as including 'the right of all Australians, within carefully defined limits, to express and share their individual cultural heritage, including their language and religion.'¹⁷³ As the liberal ideal is subject to the protection of the vulnerable, so too does the concept of multiculturalism have 'carefully defined limits'.

A likely limitation of multiculturalism in Australia is the principles of international law. In its report entitled 'Multiculturalism and the Law', the Australian Law Reform Commission stated that 'one source of principles to guide the Commission in dealing with competing values are the international human rights instruments to which Australia is a party'¹⁷⁴ and that these 'international covenants and other instruments declare fundamental rights and values which transcend cultural, political and economic differences'.¹⁷⁵

These instruments of international law were discussed above in this article.¹⁷⁶ While opponents of infant male circumcision may point to the fact that the United Nations Convention on the Rights of the Child requires states to take effective action to abolish traditional practices prejudicial to the health of children,¹⁷⁷ a case must first be made out that male circumcision is such a practice. Additionally, potentially conflicting human rights

¹⁷⁰ Some have drawn a distinction between peoples whose practice of female circumcision may be justified on anthropological grounds, such as maintaining tribal group identity, with societies where analysis reveals that the practice is entrenched without anthropological justification; see the case studies discussed by R C Smith, *op cit* (fn 111).

¹⁷¹ It appears that Islamic scholars characterise female circumcision in a number of different ways. While not specifically mentioned in the Koran, it is often characterised as 'sunnah' and hence advisable according to the tradition of Mohammed; S A Aldeeb Abu-Sahlieh, *op cit* (fn 4). Accordingly, given its different interpretations, it is not practised consistently in all Muslim countries.

¹⁷² See Queensland Law Reform commission, *op cit* (fn 1), Appendices 2-8.

¹⁷³ Australian Law Reform Commission, *op cit* (fn 5) para 1.15 (quoting Department of the Prime Minister and Cabinet Office of Multicultural Affairs *National Agenda for a Multicultural Australia: Sharing our Future* (1989) vii.)

¹⁷⁴ *Id* Para 1.25.

¹⁷⁵ *Id* Para 1.26.

¹⁷⁶ See discussion under the heading 'Parental Consent and the Best Interests of a Child', *supra*.

¹⁷⁷ Article 24(3).

instruments were shown to demonstrate the rights of people to self-determination in cultural matters.¹⁷⁸

Additionally it needs to be said that the system of international universal human rights, increasingly being employed by legal scholars, has its share of critics. The doctrine of cultural relativism has been widely debated as a challenge to the concept of universal human rights.¹⁷⁹ While Garkawe indicates there may be a number of conceptual variations of cultural relativism, he suggests that the concept has two key points:¹⁸⁰

- (1) As there is infinite cultural variety, it is not possible to make moral judgments about a particular culture because such judgments are relative to the cultural influences of the person making such moral judgments.
- (2) Modern international human rights law is based upon Western moral concepts and should not be imposed upon other types of societies, in particular Third World countries.

A danger and criticism of the doctrine of cultural relativism is that it may be manipulated by oppressive political regimes to justify repressive practices.¹⁸¹ Garkawe counters this by arguing that this does not challenge the validity of cultural relativism; it calls into question the bona fides of those making a cultural relativist claim.¹⁸²

In the case of female circumcision, many African women have been offended by the accusations of child abuse and other violations of human rights in connection with this practice. It is clear from the available literature that women who circumcise their daughters do not view themselves as guilty of crimes, and are simply perpetuating their own cultural traditions.¹⁸³

In an illuminating article on cultural relativism and female circumcision, Brennan demonstrates that the notion of cultural relativism has been the reason for the reluctance and caution of the United Nations to draft instruments condemning this practice until quite recently.¹⁸⁴

Garkawe presents cogent evidence to show that the doctrine of cultural

¹⁷⁸ For example Article 1(1) *International Covenant on Economic Social and Cultural Rights* discussed under the heading 'Parental Consent and the Best Interests of a Child', supra. Another example is Article 27 of the *International Covenant on Civil and Political Rights* acceded to by Australia in 1991 which provides for the rights of minorities to enjoy their own culture.

¹⁷⁹ For example S Garkawe 'The Impact of the Doctrine of Cultural Relativism on the Australian Legal System' (1995) 2 *E Law-Murdoch University Electronic Journal of Law* 29, which draws out the competing tensions between universal human rights and cultural relativism (and multiculturalism).

¹⁸⁰ Id 34.

¹⁸¹ For example Garkawe points to the now defunct apartheid regime in South Africa. Ibid.

¹⁸² Id 35.

¹⁸³ K Engle 'Female Subjects of Public International Law: Human Rights and the Exotic Other Female' (1992) 26 *New England Law Review* 1509. She notes (at 1511) that Western women ought not be so shocked by the practice of female circumcision given our own forms of body mutilation such as plastic surgery, incessant dieting and wearing shoes that are too small. See also M Ierodiaconou "'Listen to Us!' Female Genital Mutilation, Feminism and the Law in Australia' (1995) 20 *MULR* 562.

¹⁸⁴ K Brennan 'The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study' (1989) 7 *Law and Inequality* 367.

relativism has some validity.¹⁸⁵ He suggests, however, that in a multicultural society such as Australia, legislators have the ultimate right to prohibit practices repugnant to the mainstream community.¹⁸⁶ This is so, according to Garkawe, by the doctrine of implied consent or the notion of a social contract. Either by being born into our type of society or by choosing to immigrate to Australia, we are taken to accept Western concepts of human rights incorporated into our legal system. On this basis, Garkawe affirms the ultimate right of Australian law to prevail over the imported immigrant cultural practice of female circumcision in Australia.¹⁸⁷

From this reasoning Garkawe states a most interesting proposition. Because Aboriginal presence pre-dates European culture (and hence Western concepts of human rights) in Australia, a social contract/implied consent notion cannot be applied to traditional Aboriginal customs. Accordingly the doctrine of cultural relativism might be used to justify Aboriginal cultural practices, particularly so where such practices do not impinge upon the rights of those from other cultural backgrounds. On this basis, Garkawe is able to make out a case of spearing convicted Aboriginal defendants (instead of incarceration) in some instances, within the parameters of Aboriginal law.¹⁸⁸

In Part II of this article, mention was made of the traditional 'ariltha' (subincision). On the basis of the cultural relativist arguments above, strong reasons might be necessary to justify state intervention into Aboriginal traditional circumcision.

Unlike the United States, the Australian Constitution did not incorporate a Bill of Rights to guarantee the liberties of the individual. As Australia has acceded to a growing number of international legal instruments, some have argued that a de facto Bill of Rights is gradually being incorporated into the Australian legal system.¹⁸⁹ In the case of male circumcision (and in particular ritual circumcision) it was suggested that the relevant international instruments add little to resolving the legal issues involved.

In the United States context, the liberties of an individual are enshrined in their Constitutional amendments. In connection with infant male circumcision, the right to privacy and freedom of religion¹⁹⁰ are the most relevant of such constitutional protections.

As far as the right to privacy is concerned however, it may be argued that the right belongs to the individual and not one's family.¹⁹¹ Accordingly privacy

¹⁸⁵ S Garkawe, op cit (fn 179) 34–8.

¹⁸⁶ Id 38–40.

¹⁸⁷ Id 40. In connection with Jewish male circumcision, on the other hand, he suggests (at 40–41) that the benefits to Jewish culture and religion outweigh the long-term effects of the procedure.

¹⁸⁸ Id 42–48. In the recent case of *Wilson Jagamara Walker* in the Supreme Court of the Northern Territory (Unreported 10 February 1994, SCC No 46 of 1993), Chief Justice Martin became the first judge to incorporate the traditional customary punishment of spearing into the court's sentence. The Aboriginal defendant had been convicted of the manslaughter of another Aboriginal in that case (Id 48).

¹⁸⁹ Id 31.

¹⁹⁰ Cf s 116 of the Australian Constitution dealing with freedom of religion.

¹⁹¹ *Eisenstadt v Barid* 405 US 438, 453 (1972).

rights do not prevent state interference with a parent's decision to consent to a circumcision procedure being performed on a child (if the state should seek to intervene).¹⁹²

Freedom of religion, as part of the first amendment of the United States Constitution, has been the basis of a number of decisions granting religious groups exemptions under the law. For example in *Wisconsin v Yoder*,¹⁹³ the Supreme Court was prepared to allow members of the Amish religion the right to remove their children from the public school system into a religious community separate from the outside world. Although compulsory education was characterised as of major importance, the Court was not prepared to subordinate all other interests to this concept.¹⁹⁴ It is suggested that even should the government of the day prohibit infant male circumcision, freedom of religion may represent an exception for practising Jews and Muslims. However Brigman argues that in such a scenario the State may argue that the *Yoder* case was concerned with a situation involving no conflict between the rights of the parent and the rights of the child; where circumcision is deemed generally to be an assault, he argues that the parental request for a circumcision would represent such a conflict of interest.¹⁹⁵

It would seem then that while the right to autonomy of action appears to be constitutionally entrenched in the United States, counter-arguments may be readily found that leave issues no more resolved in that jurisdiction.

In the Australian sphere, freedom of religion is one of the few guarantees of liberty enshrined in our constitution. While few cases have reached the High Court concerning the application of this section of the Constitution, it is envisaged that any attempt to prohibit infant male circumcision would be met by a constitutional challenge from religious groups who practise this ritual. In one of the few cases concerning this section,¹⁹⁶ the High Court held that it is a question for the court to determine whether a particular law is an infringement of religious freedom.

VI REGULATING THE PRACTICE OF MALE CIRCUMCISION

The question of whether to proceed with the circumcision of a young male infant is currently left to the choice of parents in consultation with a medical practitioner.¹⁹⁷

While this article has generally argued that parents should continue to be

¹⁹² W E Brigman, op cit (fn 14) 355. Clearly the State does not seek to prevent infant male circumcision in the United States. It was noted under the heading 'The Practice of Male Circumcision', supra, that the rate of circumcision in the United States is between 50 — 75 per cent of new-born infants.

¹⁹³ 406 US 205 (1972).

¹⁹⁴ Id 215.

¹⁹⁵ W E Brigman, op cit (fn 14) 354.

¹⁹⁶ *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 131 concerning s116 *Commonwealth of Australia Constitutional Act 1900* (Imp).

¹⁹⁷ In Jewish ritual circumcision in Australia today, most babies are circumcised by doctors using the same procedures for non-ritual circumcision. A religious ceremony normally occurs at the same time; Queensland Law Reform Commission, op cit (fn 12) 12.

able to make such decisions, it has been acknowledged that the practice of male circumcision has been challenged on the basis of consequentialist arguments. Opponents of male circumcision argue that the medical and human rights aspects of the procedure discussed above require its prohibition.

Even if one is persuaded by the case against circumcision, it is argued that criminal prohibition of the procedure is not the way to proceed. This is so particularly where the procedure is performed for cultural or religious reasons as in ritual circumcision. Carolyn Bowra contends that 'the effectiveness of prohibitory laws is questioned when the people do not believe that certain cultural traditions are violations of human rights.'¹⁹⁸

The issue of female circumcision is quite instructive on this point. During this century a number of governments in African countries have legislated to criminalise the practice of female circumcision. For example, legislation in the Sudan in 1946 which prohibited some types of female circumcision had little effect on changing the practice of infibulation in that country.¹⁹⁹ Similarly, legislative responses in Kenya early this century had little success at changing the cultural traditions of female circumcision.²⁰⁰ Ogamien suggests that where there is effectively mutual consent among participants, issues cannot be resolved through private law because there are no litigants.²⁰¹

In the sphere of criminal law, legal penalties may simply drive a practice underground where the participants do not accept the validity of the law.²⁰² In Britain, for example, specific legislation was passed prohibiting female circumcision in 1985.²⁰³ While it is estimated that there were about ten thousand female children circumcised in Britain in 1991,²⁰⁴ there has not been a single prosecution under the provisions of the 1985 legislation.²⁰⁵

In the case of ritual male circumcision in particular, it is likely that any attempt to prohibit the practice will see it performed illegally.²⁰⁶ If circumcision is generally banned with an exception made for ritual circumcision, claims of discrimination may surface and those keen on the practice for medical reasons may still pursue the procedure illegally.

It is argued that education is likely to be a more effective and less invasive remedy if the state seeks to discourage circumcision.²⁰⁷ To some extent an

¹⁹⁸ C Bowra 'The Debate on Clitoridectomy: "Act of Love" or Act of Oppression?' (1994) 15 *Australian Year Book of International Law* 183, 190.

¹⁹⁹ K Brennan, op cit (fn 184) 375-6.

²⁰⁰ T B E Ogamien 'A Legal Framework to Eradicate Female Circumcision' (1988) 28(2) *Med Sci Law* 115, 115-6.

²⁰¹ Id 117.

²⁰² For example D Fraser 'Heart of Darkness: The Criminalisation of Female Genital Mutilation' (1994) 6 *Current Issues in Criminal Justice* 148, in connection with female circumcision.

²⁰³ *Prohibition of Female Circumcision Act 1985* (UK).

²⁰⁴ J S Seddon 'Possible or Impossible?: A Tale of Two Worlds in One Country' (1993) 5 *Yale Journal of Law and Feminism* 265, 266.

²⁰⁵ D Fraser, op cit (fn 202) 151.

²⁰⁶ There have been periods in Jewish history where ritual male circumcision was made illegal by the state. For example Soviet Russia banned the practice earlier this century but the practice continued unabated (Discussion held with Rabbi C Gutnik, Elwood Synagogue, Melbourne).

²⁰⁷ This point has been made by a number of writers in connection with female circumcision: for example D Fraser, op cit (fn 202); C Bowra, op cit (fn 198) 184-8.

education campaign is already in place to discourage routine male circumcision. As was noted in Part II of this article above, the rate of circumcision in Australia has fallen markedly since the 1960's. This, of course, reflects a change in the attitude of the medical profession to circumcision. It was noted in Part III of this article that the 1991 policy of the Australian College of Paediatrics included the discouragement of routine infant male circumcision as well as the dissemination of educational literature to parents, both before the birth of their baby and in hospital at the time of such birth.²⁰⁸

If the medical community resolves over time that circumcision has no prophylactic value, the continued dissemination of educational material is likely to see the eradication of infant male circumcision except for religious reasons.

CONCLUSION

The practice of male circumcision in Australia raises a number of serious medical, legal, ethical, cultural and human rights issues. While these issues have been tackled by the media in recent years, there is little scholarly legal literature available on the subject. This article has attempted to canvass the issues of this important topic.

Opponents of male circumcision tend to focus on consequentialist arguments relating to medical risks to children. Yet while these risks are certainly present, some prophylactic benefits can be claimed for the practice of circumcision. It has been argued that while the medical world is not unequivocal about the net detrimental effects of circumcision, it is unlikely to be regarded as an illegal practice. Additionally, ritual circumcision in Australia is integral to both Judaism and Islam, which further dissuades one from seeking its prohibition.

Accordingly, the State is probably not justified in seeking to override the autonomy of the individual in choosing to consent to have his or her baby boy circumcised. While the 'best interests of a child' has become a guiding principle to lawmakers in our society, it is likely that the concept is wide enough to accommodate the practices of routine and ritual infant male circumcision.

For the medical profession who perform infant male circumcision, the practice is unlikely to render them liable in the civil law provided that they perform the procedure with due care and skill, and obtain the informed consent of the infant's parents. In this regard, it is imperative that all material risks are explained before performing a circumcision.

It has been contended that the practice of circumcision is acceptable in Australia at the present time. However, it should be noted that society does not remain fixed in either its technological processes or prevalent value systems. History demonstrates the dynamic nature of human society.

²⁰⁸ See also discussion of informed consent under the heading 'Informed Consent: The Real Risk' (fn 159 supra).

In the future, medical technology may provide a simpler, safer and painless method to perform an infant male circumcision. This would render the current criticism of the practice inconsequential. On the other hand, the values and fabric of society may alter to such an extent that infant male circumcision may become unacceptable as a violation of our children's physical integrity.

A glance at history is instructive in relation to our values concerning children. The Spartans believed in the exposure of children, American slave owners believed that their treatment of children was beneficial to society (and perhaps to the children themselves), and in the nineteenth century, Western countries accepted the practice of children of eight years of age working in factories for long hours each day. The maltreatment of children is as old as recorded history.²⁰⁹

Infant male circumcision is acceptable today; the future may present a revision of the validity of this idea.

²⁰⁹ W E Brigman, *op cit* (fn 14) 337.