

TASMANIA
LAW REFORM
INSTITUTE

Non-Therapeutic Male Circumcision

ISSUES PAPER NO 14

JUNE 2009

CONTENTS

About this Issues Paper	3
How to respond.....	3
Information on the Tasmania Law Reform Institute	3
Acknowledgments	4
Introduction	5
Background.....	5
Outline.5	
Scope and key terms	6
Medical Background	8
Key medical information	8
Circumcision may be ‘non-therapeutic’	8
Circumcision is a painful and invasive procedure.....	10
Circumcision results in a loss	11
Circumcision is relatively safe but not complication free	11
Non-Medical Background	13
The origin of circumcision.....	13
A brief history of circumcision.....	14
Oldest recorded instances	14
Judaism, Christianity and Islam.....	14
Historical periods of significance for circumcision and the foreskin	16
The prevalence of non-therapeutic circumcision.....	18
Rationales of circumcision	19
Criminal Responsibility.....	20
Assault, wounding and grievous bodily harm	20
Conclusion.....	21
Consent and unlawful assault and wounding.....	22
Consent: infants and young children	22
Consent: older children and adults	22
Consent as a lawful justification for circumcision.....	23
Parental authorisation: children too young to provide consent.....	25
Conclusion on consent as a justification for circumcision	25
Abuse and ill-treatment of the child	25
Ill-treatment	26
Child abuse	26
Surgical operation.....	27
Young children and parental consent	28
Conclusion on section 51: surgical operations	28
The common law	29
Criminal liability of accessories	29
Authorisation: Family Law.....	31
The consent of a minor	32
Parental consent.....	32
Is court authorisation required for a minor’s circumcision?.....	35
Non-therapeutic	36
Invasive, irreversible and major surgery	36
The significant risk of making the wrong decision.....	37
The consequences of a wrong decision are particularly grave	38
Conclusion on authorisation for minors	38
Who may challenge whether a circumcision is in the child’s best interests?	38
Legal Responsibilities of Circumcisers	40
Promotion of the service.....	40
Who may bring an action for misleading or deceptive conduct and what remedies are available?	41
The provision of information.....	41

Basic information	41
Who may bring an action in battery and what remedies are available?.....	41
Material information.....	42
Proper authorisation.....	43
The effect of consent/authorisation forms	43
Duties in performance	43
Duty to inform of problems and to follow up	44
Reasonable care and skill: actions in negligence.....	44
Breach of duty	45
Injury	45
Causation	45
Who may bring an action in negligence and the remedy for a successful claim	45
Limitation issues.....	46
Illegality defence	46
Human Rights Law.....	48
Effect of Australia's international law obligations	48
Subsidiary effects of Australia's international obligations.....	49
The interpretation of international law	49
The applicable human rights.....	49
Freedom of religion	50
Torture and cruel, degrading, inhuman and abusive treatment.....	51
Right to life and health	52
Private life, autonomy and development	52
The right to security.....	53
Equality and non-discrimination	54
Economic exploitation.....	54
Regulation in Foreign Jurisdictions	56
South Africa.....	56
Sweden.....	56
Options for Reform.....	58
Option 1: leaving the law unchanged	58
Option 2: a criminalising provision in the Criminal Code.....	58
Option 3: a defence provision in the Criminal Code	59
Option 4: broad reform through new provisions in existing Acts	60
Option 5: establishing a comprehensive licensing and regulatory regime	60
Substantive law reform.....	61
When should performing a non-therapeutic circumcision be a punishable offence?	61
When should a person be liable under civil law for performing a non-therapeutic circumcision?.....	62
Do the commercial aspects of male circumcision require greater regulation?	63
List of Questions	64
Criminal responsibility	64
Authorisation: family law	64
Legal responsibilities of circumcisers	65

About this Issues Paper

This Issues Paper discusses the medical background, history and legal framework of non-therapeutic male circumcision in Tasmania. It also provides questions to encourage discussion and feedback about possible reform in the law. The topic for this Issues Paper was suggested by the Tasmanian Commissioner for Children in January 2008. The Board of the Tasmania Law Reform Institute (TLRI) approved the project on the 7th April 2008. This Issues Paper was prepared for the Board by Warwick Marshall.

How to respond

The TLRI invites responses to the issues discussed in this Issues Paper. This Issues Paper does not express the final views of the TLRI. Options for action are set out in Part 9. A list of questions is set out in Part 10 of this Issues Paper. The questions are intended as a guide only – you may choose to answer all, some or none of them. When responding to this Issues Paper please explain the reasons for your views as fully as possible. It is intended that responses will be published on our website, and may be referred to or quoted from in a final report. If you do not wish your response to be published, or you wish it to be anonymous, simply say so, and the Institute will respect that wish. After considering all responses, it is intended that a final report, containing recommendations, will be published.

Responses should be made in writing by the 28th August 2009. If possible, responses should be sent by email to: law.reform@utas.edu.au

Alternatively, responses may be sent to the Institute by mail or fax:

Address: TLRI
Private Bag 89
Hobart TAS
7001
Fax: (03) 62267623

If you are unable to respond in writing, please contact the Institute to make other arrangements. Inquiries should be directed to Rebecca Bradfield, on the above contacts, or by telephoning (03) 62262069.

This Issues Paper is also available on the Institute's web page at:

www.law.utas.edu.au/reform or can be sent to you by mail or email.

Information on the Tasmania Law Reform Institute

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

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

Acknowledgments

This Issues Paper was prepared for the Board by Warwick Marshall.

Considerable assistance in the preparation of this Issues Paper was provided by Professor Kate Warner, George Zdenkowski and Professor Margaret Otlowski. They reviewed many manifestations of this Issues Paper, corrected the author's haphazard practice of using practice and practise largely interchangeably and provided more support during the preparation of the Issues Paper than could have been reasonably asked for.

Heartfelt appreciation is also extended to Paul Mason (Commissioner for Children) and Annie McLean (Research Officer for the Commissioner for Children) who graciously shared their research and resources with the Tasmanian Law Reform Institute from the very beginning of the project.

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

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

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

The Institute is also appreciative of Elise Anderson (Librarian, Government Offices Library), Claes Tollin (Unit for Legal Affairs, The National Board of Health and Welfare), Ann Clements (Senior Registry Officer, The National Board of Health and Welfare) and Heléne Lundgren (Lagrummet.se) for the provision of information on the regulation of circumcision in Sweden.

Finally, but not least, the Institute would like to thank Bruce Newey for editing and formatting the Issues Paper, Rebecca Bradfield for assisting with the preparation of the Paper for publishing and Michelle Fernando for reviewing the Family Law Part on very short notice.

Part 1

Introduction

1.1 Background

1.1.1 Male circumcision has been practised in Australian medical facilities since before federation,¹ and has been performed in Australia for time immemorial by some of its Indigenous communities.² There has not been significant legal action relating to, or legislative regulation of, male circumcision in Australia. The Queensland Law Reform Commission's research paper on circumcision, the most often cited Australian authority in the area, is over fifteen years old at the time of writing, and was never intended to be the primary reference for the law relating to non-therapeutic male circumcision in Australia.³ This project provides the opportunity to examine the law relating to circumcision in Tasmania, and to propose reform if needed.

1.1.2 The focus of the Issues Paper is the law relating to non-therapeutic male circumcision in Tasmania. Its purpose is to provide, with a view to possible reform, information to encourage public deliberation, and feedback, on the merits of the current legal framework for non-therapeutic male circumcision in Tasmania. This Issues Paper takes no position on the appropriateness of non-therapeutic male circumcision from a medical, religious or ethical viewpoint. Public feedback to this Issues Paper will be incorporated into a detailed final report that discusses the merits of the current law and the possible options for law reform if it is considered necessary.

1.1.3 The issue of male circumcision was referred to the TLRI by the Tasmanian Commissioner for Children. The Commissioner is a member of the Council of Obstetric and Paediatric Mortality and Morbidity. During an informal discussion, a member of the council, concerned about the exposure of a paediatrician to civil and criminal liability, asked whether it was legal to perform a non-therapeutic circumcision in Tasmania. The Commissioner offered to research the issue for the council. The Commissioner has since released a discussion paper, and presented a paper at an international symposium on genital integrity at Keele University, in Staffordshire England, on the topic.

1.1.4 The Commissioner is critical of the performance of non-therapeutic procedures on minors. In particular he is concerned that some procedures, when performed without medical indication and without the competent consent of the child, may 'traverse the rights of children'.⁴ The Commissioner suggested that the law in Tasmania lacked clarity in its application to the circumcision of males under the age of majority. He invited the TLRI to investigate the legal issues relating to the circumcision of male children, and to explore what administrative and legislative actions Government might consider desirable to protect the rights of children.

1.2 Outline

1.2.1 The purpose of this Issues Paper is to encourage public deliberation, and feedback, on the merits of the current legal framework for circumcision. Circumcision has not previously been the subject of thorough

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

² Most anthropological articles on genital alteration in Indigenous Communities focus on the practice of subincision rather than circumcision simpliciter, see for example: John Cawte, N Djagamara, and Murray Barret, 'The Meaning of Subincision of the Urethra to Aboriginal Australians' (1966) 39(3) *British Journal Of Medical Psychology* 245; John Morrison, 'The Origins of the Practices of Circumcision and Subincision Among the Australian Aborigines' (1967) 1(3) *Medical Journal of Australia* 125.

³ Queensland Law Reform Commission (QLRC), *Circumcision of Male Infants*, Miscellaneous Paper No 6 (1993).

⁴ Email from Paul Mason (Commissioner for Children) to Warwick Marshall, 20 March 2009.

legal analysis in Australia and consequently the apparent lack of clarity in the application of the law to circumcision was the primary problem to examine. The crux of the uncertainty was whether the consent of the person being circumcised, or the consent of the parent of an infant being circumcised, could provide protection from criminal and civil actions brought against a person for performing a circumcision.

1.2.2 The conclusion of this Issues Paper is that adults, and children capable of fully understanding what is being proposed, can almost certainly provide consent for the procedure so that a circumciser can legally perform the procedure (subject to other duties the circumciser will have in the provision of their service). However, this Issues Paper also concludes that there is uncertainty as to whether the consent of a parent for the circumcision of their child is sufficient to allow a circumciser to legally perform the procedure.

1.2.3 This Issues Paper has ten Parts. This Part of the paper provides the background, scope and key terms used in this Issues Paper. A brief review of the medical (Part 2) and non-medical background (Part 3) of male circumcision is then provided to give context to the legal discussion that follows. The Paper then reviews the current legal situation in relation to criminal responsibility (Part 4) and family law (Part 5). Parts 4 and 5 address the key question of whether the consent of the person being circumcised, or the consent of the parent of a baby being circumcised, could provide protection from criminal and civil actions brought against a person for performing a circumcision. The Paper then considers some of the key legal responsibilities of circumcisers in the provision of their service (Part 6) and the relevant human rights law (Part 7). The Issues Paper concludes by describing the legislative regimes for circumcision that exist in some overseas jurisdictions (Part 8), briefly outlining some options for reform action (Part 9) and providing a list of questions to direct discussion on the particulars of the reform (Part 10).

1.3 Scope and key terms

1.3.1 This Issues Paper addresses male circumcision. Legislation prohibiting all forms of female circumcision, widely known as female genital mutilation (FGM), has been passed in Tasmania.⁵ References to circumcision, unless otherwise indicated, refer exclusively to male circumcision.

1.3.2 Circumcision is defined as an alteration, involving at least a partial excision, of the foreskin. The foreskin includes all the flesh covering and (when present) extending beyond the glans penis at birth.⁶

1.3.3 A circumciser is anyone, however qualified or trained, who performs a circumcision. This expansive definition is used in recognition of the variety of people (from highly trained and experienced medical practitioners to laypersons) who have attempted, or may attempt in future, to perform circumcisions in this State. Distinctions between those who perform circumcisions will be made within the text when the need arises.

1.3.4 Much of the discussion in this Issues Paper focuses upon the circumcision of minors. The majority of circumcisions in Australia are performed on minors (of which infants form the highest percentage),⁷ and much of the uncertainty in the law is in that area. However, this Issues Paper does not limit itself to discussion of the circumcision of minors, as it is difficult to examine how the law applies to children before the application of the law to adults is considered. Accordingly, a legal analysis of the circumcision of adults is included as it increases the comprehensiveness of the Issues Paper without adding to its complexity. Care will be taken to indicate within the text whether the relevant discussion relates to adults, competent minors or

⁵ *Criminal Code Act 1924* (Tas) sch 1 s 178A.

⁶ The purposes of this Paper do not require an overly technical definition of circumcision or the foreskin. For a detailed discussion of the anatomy of the foreskin see: Steve Scott, 'The Anatomy and Physiology of the Human Prepuce' in George C Denniston, Frederick Hodges and Marilyn Milos (eds) *Male and Female Circumcision: Medical Legal and Ethical Considerations in Paediatric Practice* (1999) 9.

⁷ Claims for the circumcision of children less than six months of age constituted 18,756 out of 25,903 total circumcisions claimed on Medicare in Australia in 2007. In 2008, 19,656 claims out of 26,826 total claims for circumcision were for the circumcision of children under six months of age. See: Medicare items 30653, 30656, 30659, 30660 processed from January 2007 to December 2007 and January 2008 to December 2008. Medicare, *Medicare Item Reports* (2009) Medicare Australia <https://www.medicareaustralia.gov.au/statistics/mbs_item.shtml> at 20 February 2009.

incompetent minors. This Issues Paper will not address the issue of circumcision of the mentally ill or disabled.

1.3.5 Reference to circumcision, unless otherwise indicated, is a reference to non-therapeutic circumcision. For the purposes of this Issues Paper a circumcision is non-therapeutic if it is performed for any reason other than remedying or treating an existing disease, illness or deformity of the body. This Issues Paper recognises a distinction between therapeutic treatment and prophylactic treatment. A circumcision performed for the purpose of preventing or reducing the likelihood of possible future disease, illness or deformity of the body (a prophylactic circumcision) is a non-therapeutic circumcision for the purpose of this Paper.⁸

1.3.6 The practice of circumcision is regulated by both Commonwealth and State law. Family law in particular, largely governed by the Commonwealth's *Family Law Act 1975*, is an area where Tasmanian law has little influence. To clarify the law applicable to circumcision in Tasmania, the Issues Paper considers both State and Commonwealth law. The Tasmanian Parliament cannot alter Commonwealth legislation. Consequently consideration of the reform of Commonwealth legislation is beyond the scope of the TLRI.

⁸ The medical community recognises the prevention of the likely recurrence of a pre-existing condition as therapeutic treatment. This Issues Paper accepts that prophylactic treatment in those circumstances may be properly regarded as therapeutic treatment.

Part 2

Medical Background

2.1.1 It is impossible to broach the medical side of circumcision without raising controversy. Very few facts in the remarkably expansive field of medical knowledge on circumcision are truly undisputed. For example, in 2004 a jointly issued policy statement on circumcision by the Royal Australasian College of Physicians, the Australian Association of Paediatric Surgeons, the New Zealand Society of Paediatric Surgeons, the Urological Society of Australasia, the Royal Australasian College of Surgeons, and the Paediatric Society of New Zealand concluded definitively that, ‘there is no medical indication for routine neonatal circumcision.’⁹

2.1.2 A subsequent review of that authoritative joint statement, co-authored by Xavier Castellsagué, one of the leading experts in the field of cervical cancer and the human papillomavirus (HPV), concluded that the statement was ‘misleading, inaccurate and, in places, incorrect...’ and that it amounted to ‘thinly disguised propaganda.’¹⁰

2.1.3 That review, including its strong accusations, has in turn been peer reviewed and criticised.¹¹ The purpose of this Part of the Issues Paper, acknowledging that most medical facts about male circumcision are disputed to a degree, is to briefly provide the medical information accepted by, and that has shaped the content of, this Paper. This should ensure transparency and help guarantee that the conclusions reached throughout this Paper are logically consistent with the information and assumptions that they are based upon.

2.2 Key medical information

Circumcision may be ‘non-therapeutic’

2.2.1 There is consensus in the medical community that circumcision is a valuable option to have available for the treatment of many conditions, including: paraphimosis; recurring balanitis; pathological phimosis (usually caused by Balanitis Xerotica Obliterans) and even natural phimosis if it causes considerable discomfort or difficulty to a person. Research, much of which is seemingly very thorough, has produced results that also suggest circumcision may have a role in reducing the likelihood of healthy men contracting:¹² human immunodeficiency virus (HIV) from vaginal intercourse;¹³ human papillomavirus

⁹ Spencer Beasley, Brian Darlow, Jonathan Craig, Des Mulcahy and Grahame Smith, *Position Statement on Circumcision*, Royal Australasian College of Physicians (2004).

¹⁰ Brian Morris, Stefan Bailis, Xavier Castellsagué, Thomas Wisewell and Daniel Halperin, ‘RACP’s Policy Statement on Infant Male Circumcision is Ill-Conceived’ (2006) 30 *Australian and New Zealand Journal of Public Health* 16, 20.

¹¹ Juliet Richters, ‘Critical Commentary on RACP Policy Statement on Infant Male Circumcision: A Response’ (2006) 30 *Australian and New Zealand Journal of Public Health* 22.

¹² The evidence of a protective effect is strongest for those conditions cited in the text. There are studies that suggest circumcision may also have a protective effect against other conditions. For a recent study that supports the presence of a protective effect against herpes and HPV, but not syphilis, see: Aaron Tobian, David Serwadda, Thomas Quinn, Godfrey Kigozi, Patti Gravitt, Oliver Laeyendecker, Blake Charvat, Victor Ssempijja, Melissa Riedesel, Amy Oliver, Rebecca Nowak, Lawrence Moulton, Michael Chen, Steven Reynolds, Maria Wawer and Ronald Gray, ‘Male Circumcision for the Prevention of HSV-2 and HPV Infections and Syphilis’ (2009) 360 *The New England Journal of Medicine* 1298.

¹³ Robert Bailey, Stephen Moses, Corette Parker, Kawango Agot, Ian Maclean, John N Krieger, Carolyn Williams, Richard Campbell and Jeckoniah Ndinya-Achola, ‘Male Circumcision for HIV Prevention in Young Men in Kisumu, Kenya: A Randomised Controlled Trial’ (2007) 369 *The Lancet* 643; Ronald Gray, Maria Wawer, David Serwadda, Godfrey Kigozi, Frederick Makumbi, Stephen Watya, Fred Nalugoda, Noah Kiwanuka, Lawrence Moulton, Mohammed Chaudhary, Fred Wabwire-Mangen, Melanie Bacon, Carolyn Williams, Pius Opendi, Steven Reynolds, Oliver Laeyendecker and Thomas Quinn, ‘Male Circumcision for HIV Prevention in Men in Rakai, Uganda: A Randomised Trial’ (2007) 369 *The Lancet* 657; Bertran Auvert, Dirk Taljaard, Emmanuel Lagarde, Joëlle Sobngwi-Tambekou, Rémi Sitta and Adrian Puren, ‘Randomized, Controlled

(HPV) from vaginal intercourse;¹⁴ urinary tract infections;¹⁵ and penile cancer.¹⁶ Research has also suggested that circumcision may reduce the likelihood of male to female HPV transmission (a cause of cervical cancer).¹⁷ That research, like most research in the field, has been subject to criticism of varying strengths.¹⁸ Other research and meta-analysis have suggested that existing positive results are not as strong as commonly suggested.¹⁹ Most of the research has not been conducted in Australia and some of its applicability in Australia, and to the typical Australian male, has been disputed.²⁰

2.2.2 The decision to label some circumcisions as non-therapeutic, and the definition of ‘non-therapeutic’ given to the term in Part 1 of this Issues Paper, recognises a distinction between therapeutic (curative) circumcision and prophylactic circumcision. Therapeutic circumcision is performed on the ill, where it is specifically indicated by their condition, for the probable benefit of the procedure to their health. Non-therapeutic circumcision is typically performed on healthy males and only has a possible prophylactic effect.

2.2.3 The distinction made between therapeutic and non-therapeutic circumcision is also in part intended as a reflection of the fact that there is considerable dispute as to whether circumcision provides a net health benefit for the individual themselves, or across a community, when it is performed on a healthy male of any age. As noted earlier, Australia’s major medical associations favour the view that there is no medical indication for routine male circumcision.²¹

2.2.4 Some opponents of routine circumcision argue that the evidence supporting a benefit for circumcision for otherwise healthy males is either weak or unsubstantiated.²² For others, the costs, risks and possible complications of circumcision outweigh the possibility that benefits might accrue from the procedure.²³ Other critics of routine circumcisions maintain a position against the circumcision of healthy

Intervention Trial of Male Circumcision for Reduction of HIV Infection Risk: The ANRS 1265 Trial’ (2005) 2(11) *PloS Medicine* 1112.

¹⁴ Xavier Castellsagué, Xavier Bosch, Nubia Muñoz, Chris Meijer, Keerti Shah, Silvia De Sanjosé, José Eluf-Neto, Corazon Ngelangel, Saibua Chichareon, Jennifer Smith, Rolando Herrero, Victor Moreno and Silvia Franceschi, ‘Male Circumcision, Penile Human Papillomavirus Infection, and Cervical Cancer in Female Partners’ (2002) 346 *New England Journal of Medicine* 1105; Bertran Auvvert, Joëlle Sobngwi-Tambekou, Rémi Sitta, Adrian Puren, Ewalde Cutler, Marthi Nieuwoudt, Pascale Lissouba and Dirk Taljaard, ‘Effect of Male Circumcision on the Prevalence of High-Risk Human Papillomavirus in Young Men: Results of a Randomized Controlled Trial Conducted in Orange Farm, South Africa’ (2009) 199(1) *Journal of Infectious Diseases* 14.

¹⁵ Davinder Singh-Grewal, Joseph Maccessi and Jonathan Craig, ‘Circumcision For the Prevention of Urinary Tract Infection in Boys: A Systematic Review of Randomised Trials and Observational Studies’ (2005) 90(8) *Archives of Disease in Childhood* 853.

¹⁶ Edgar Schoen, Michael Oehrli, Christopher Colby and Geoffrey Machin, ‘The Highly Protective Effect of Newborn Circumcision Against Invasive Penile Cancer’ (2000) 105(3) *Pediatrics* 36.

¹⁷ Xavier Castellsagué, *et al*, above n 14.

¹⁸ For penile cancer see: Ronald Poland, ‘The Question of Routine Neonatal Circumcision’ (1990) 22 (18) *The New England Journal of Medicine* 1312; American Cancer Society, *Detailed Guide: Penile Cancer* (2008) Cancer Society Homepage <http://www.cancer.org/docroot/CRI/content/CRI_2_4_2X_Can_penile_cancer_be_prevented_35.asp> at 27 January 2008. For HIV see for example: Gary Dowsett and Murray Couch, ‘Male Circumcision and HIV Prevention: Is There Really Enough of the Right Kind of Evidence’ (2007) 15(29) *Reproductive Health Matters* 33; Edward Mills and Nandi Siegfried ‘Cautious Optimism for New HIV/Aids Prevention Strategies’ (2006) 368 *The Lancet* 1236; John Talbott, ‘Size Matters: The Number of Prostitutes and the Global HIV/Aids Pandemic’ (2007) 2(6) *PloS ONE* 543. For UTI’s see for example: American Academy of Pediatrics Task Force on Circumcision, ‘Circumcision Policy Statement’ (1999) 103(3) *Pediatrics* 686.

¹⁹ For HIV see for example: Lot de Witte, Alexey Nabatov, Marjorie Pion, Donna Fluitsma, Marein de Jong, Tanja de Gruijl, Vincent Piguet, Yvette van Kooyk and Teunis Geijtenbeek, ‘Langerin is a Natural Barrier to HIV-1 Transmission by Langerhans Cells’ (2007) 13 *Nature Medicine* 367; Edward Mills, Curtis Cooper, Gordon Guyatt and Aranka Anema, ‘Male Circumcision for the Prevention of Heterosexually Acquired HIV Infection: A Meta-Analysis of Randomized Trials Involving 11050 Men’ (2008) 9(6) *HIV Medicine* 332; Michel Garenne, ‘Long-Term Population Effect of Male Circumcision in Generalised HIV Epidemics in Sub-Saharan Africa’ (2008) 7 *African Journal of AIDS Research* 1.

²⁰ For HIV/Aids see for example: Australian Federation of AIDS Organisations Inc., *Male Circumcision Has no Role in the Australian Aids Epidemic* (2007) Australian Federation of Aids Organisations <http://www.afao.org.au/library_docs/policy/Circumcision07.pdf> at 4 January 2009.

²¹ See: Spencer Beasley, *et al*, above n 9.

²² George Hill, ‘The Case Against Circumcision’ (2007) 4(3) *Journal of Men’s Health and Gender* 318.

²³ Robert Van Howe, ‘A Cost-Utility Analysis of Neonatal Circumcision’ (2004) 24 *Medical Decision Making* 584.

males for health reasons even if the possible benefits were as great, or even greater, than claimed because of the value they attribute to their foreskin or to bodily integrity.²⁴

2.2.5 Because of a belief in the lack of a medical indication, it is against hospital policy to perform non-therapeutic male circumcision in public hospitals in Tasmania, New South Wales, Victoria, South Australia and Western Australia.²⁵ Most of the leading medical associations across Australia, and the world, have concluded that the available evidence is currently insufficient to warrant the routine circumcision of healthy males of any age for health reasons.²⁶

Circumcision is a painful and invasive procedure

2.2.6 Circumcision, however it is performed, is painful. There is a consensus in the medical community that both adults and children, including infants, experience pain during the procedure.²⁷ Modern medical literature now recognises that pain relief must be employed for all circumcisions, both for the patient's comfort, and to reduce the risk of complications.²⁸ Not all methods used to reduce pain are equally effective.²⁹ There is no set standard method of pain relief or method for the circumcision procedure itself across Australia or in Tasmania.

2.2.7 Naturally occurring flesh of the penis is removed by non-therapeutic circumcision. No matter what method, or combination of methods, is employed (cutting, crushing or laser burning) part of the natural and healthy human body is excised by the procedure. Methods that primarily rely on slow crushing to excise the relevant part of the genitalia, like the Plastibell clamp or the Tara KLamp, are still painful. Crushing methods are often performed only after the widening of the prepuce opening by means of a longitudinal cut through the foreskin.³⁰ Most circumcision methods require forcible separation of normal flesh adhesions, which prevent full retractability of the foreskin, between the glans and the foreskin when they exist.³¹ Extremely few boys have a fully retractable foreskin, and no adhesions, before the age of 1. The majority of boys will not have a fully retractable foreskin until around the age of ten. Over 90% of males have a fully retractable foreskin by their late teens.³² It has been suggested that the slowly developing retractability of the prepuce has the evolutionary purpose of protecting the glans in childhood and discouraging sex until later in life.³³

²⁴ Catholics Against Circumcision, *Catholics Against Circumcision*, (2009) Catholics Against Circumcision <<http://www.catholicsagainstcircumcision.org/>> at 22 January 2009.

²⁵ It should be noted that there is currently no formal written circumcision policy directive in Tasmania.

²⁶ See for example: Spencer Beasley, *et al*, above n 9; Fetus and Newborn Committee of the Canadian Paediatric Society, 'Neonatal Circumcision Revisited' (1996) 154(6) *Canadian Medical Association Journal* 769; Finland's Central Union for Child Welfare, *Position Statement on the Circumcision of Boys* (2003); British Medical Association, 'The Law and Ethics of Male Circumcision: Guidance for Doctors' (2004) 30 *Journal of Medical Ethics* 259; American Medical Association, *Neonatal Circumcision* (1999).

²⁷ There are many articles, policy statements and reviews on the pain of circumcision, see for example: The Royal Australasian College of Physicians (Paediatrics & Child Health Division), *Policy Statement on Circumcision* (2004) 6; American Academy Of Pediatrics (Task Force On Circumcision), 'Circumcision Policy Statement' (1999) 103 *Pediatrics* 686, 688; John Goodman, Patrick McGrath, 'The Epidemiology of Pain in Children and Adolescents: A Review' (1997) 278 *Journal of the American Medical Association* 2157.

²⁸ See: Janice Lander, Barbara Brady-Freyer, James Metcalfe, Shemin Nazarali and Sarah Muttitt, 'Comparison of Ring Block, Dorsal Penile Nerve Block, and Topical Anesthesia for Neonatal Circumcision' (1997) 278 *Journal of The American Medical Association* 2158.

²⁹ In favour of the ring block see: *ibid*. In favour of more than one anaesthetic see: Anna Taddio, Neil Pollock, Cheryl Gilbert-MacLeod, Kristina Ohlsson and Gideon Koren, 'Combined Analgesia and Local Anesthesia to Minimize Pain During Circumcision' (2000) 154(6) *Archives of Pediatrics and Adolescent Medicine* 620. Suggesting Acetaminophen (paracetamol) is insufficient to relieve the pain of circumcision see: Cynthia Howard, Michael Weitzman and Fred Howard, 'Acetaminophen Analgesia in Neonatal Circumcision: The Effect on Pain' (1994) 93 *Pediatrics* 641. For a review that suggests dorsal penile nerve block performs better than EMLA cream see: Janice Lander, Barbara Brady-Freyer and Natasha Wiebe, 'Pain Relief for Neonatal Circumcision' (2009) 1 *Cochrane Database of Systematic Reviews* 5.

³⁰ See: Joel Teichman, *Common Problems in Urology* (2001) 42-47; Laurie Marbas and Erin Case, *Blueprints Clinical Procedures* (2004) 198-202. For a detailed description of a Gomco Clamp procedure see: Thomas Zuber and Edward Mayeaux, *Atlas of Primary Care Procedures* (2003) ch 45.

³¹ *Ibid*.

³² The approximate ages used in this paper were generalised from the following studies: Abhinav Agarwal, Anup Mohta and Ritesh K Anand, 'Preputial Retraction in Children' (2005) 10(2) *Journal of Indian Association of Pediatric Surgeons* 89; Douglas Gairdner, 'The Fate of the Foreskin: A Study of Circumcision' (1949) 2 *British Medical Journal* 1433; Jakob Oster, 'Further Fate of the Foreskin: Incidence of Preputial Adhesions, Phimosis, and Smegma among Danish Schoolboys' (1968) 43 *Archives of*

Circumcision results in a loss

2.2.8 An unaltered foreskin has some accepted, and several disputed, beneficial functions: it is highly innervated and enhances sexual pleasure; it may encourage the ejaculatory reflex; it keeps the glans of the penis moist, which may encourage the pleasurable sensitivity of the glans; it may help promote a gliding rather than thrusting motion during sex that reduces dryness and trauma for both partners during vaginal intercourse; it may help facilitate, and may help reduce trauma to the vagina during, intromission; and it provides protection to the glans penis from external trauma (particularly in infancy) which can be caused by bodily excretions and other irritants which come in contact with it.³⁴

2.2.9 The foreskin, beyond those natural functions cited above, may also be important or useful: for repairing genital deformities like hypospadias (an abnormally placed urethral opening); as material on which research may be performed; as a, or as part of a particular, commodity (skin for skin grafts,³⁵ treatments for wound care,³⁶ stem cells³⁷ and some cosmetic face creams utilise foreskins in their production³⁸),³⁹ and for many other miscellaneous and unexpected purposes (for example, as a focus of prayer,⁴⁰ and for concealing objects⁴¹).

2.2.10 Not all losses are tangible. A person's circumcision status can be a significant matter to them and their own view of their identity. That is true for both uncircumcised and circumcised men.

Circumcision is relatively safe but not complication free

2.2.11 There is no true consensus in the medical literature on an approximate complication rate for circumcision simpliciter. Complication rates cited vary from as low as 0.19% to as unrealistically high as 55%.⁴² A commonly cited figure in studies that tend to favour the practice of circumcision is 0.2 to 0.6%.⁴³

Disease in Childhood 200; Hiroyuki Kayaba, Hiromi Tamura, Seiichi Kitajima, Yoshiyuki Fujiwara, Tetsuo Kato and Tetsuro Kato, 'Analysis of Shape and Retractability of the Prepuce in 603 Japanese Boys' (1996) 156(5) *Journal of Urology* 1813.

³³ Guy Cox, 'De Virginibus Puerisque: The Function of the Human Foreskin Considered from an Evolutionary Perspective' (1995) 45(6) *Medical Hypotheses* 617.

³⁴ For discussions on the possible functions of the foreskin see: Kristen O'Hara and Jeffery O'Hara, 'The Effect of Male Circumcision on the Sexual Enjoyment of the Female Partner' (1999) 83 *British Journal of Urology International* 79; George Denniston and George Hill, 'Circumcision in Adults: Effect on Sexual Function' (2004) 61(1) *Urology* 155; Donald Taves, 'Intromission Function of the Foreskin' (2002) 59 (2) *Medical Hypothesis* 180; Patrick Duffy, Anthony Rickwood and David Thomas, *Essentials of Paediatric Urology* (2002) 180-182; Marilyn Milos and Donna Macris, 'Circumcision: Male - Effects Upon Human Sexuality' in Vern Bullough and Bonnie Bullough (eds) *Human Sexuality: An Encyclopedia* (1994) 119; John Taylor, Anthony Lockwood and A Taylor, 'The Prepuce: Specialized Mucosa of the Penis and its Loss to Circumcision' (1996) 77 *British Journal of Urology* 294; John Taylor and Chris Cold, 'The Prepuce' (1999) 83 *British Journal of Urology* 34; Gregory Boyle and Gillian Bensley, 'Adverse Sexual and Psychological Effects of Male Infant Circumcision' (2001) 88 *Psychological Reports* 1106.

³⁵ John Enderle, Joseph Bronzino and Susan Blanchard, *Introduction to Biomedical Engineering* (2005) 322-324.

³⁶ Robyn Masseth, 'Apligraf: A Promising New Wound Care Treatment for the 21st Century' (2002) *Journal of the National Association of Orthopaedic Technologists* 22, 23.

³⁷ Outi Hovatta, Milla Mikkola, Karin Gertow, Anne-Marie Strömberg, José Inzunza, Julius Hreinsson, Björn Rozell, Elisabeth Blennow, Michael Andäng and Lars Åhrlund-Richter, 'A Culture System Using Human Foreskin Fibroblasts as Feeder Cells Allows Production of Human Embryonic Stem Cells' (2003) 18(7) *European Society of Human Reproduction and Embryology* 1404.

³⁸ For example, the product Vavelta reportedly uses human foreskins: Rosemary Black, *Vavelta May be the New Wave in Anti-Aging Treatment* (2008) New York Daily News <http://www.nydailynews.com/lifestyle/2008/11/18/2008-11-18_vavelta_may_be_the_new_wave_in_antiaging.html> at 4 January 2009.

³⁹ See: Coriell Institute for Medical Research, *Tissue Catalogue* (2008) <<http://ccr.coriell.org/Sections/Search/Search.aspx?PgId=165&q=foreskin>> at 15 January 2009.

⁴⁰ Robert Palazzo, 'The Veneration of the Sacred Foreskin(s) of Baby Jesus: A Documented Analysis' in James Helfers (ed) *Multicultural Europe and Cultural Exchange in the Middle Ages and Renaissance* (2005).

⁴¹ Members of the IRA were known to hide notes under their foreskins when incarcerated: Richard English, *Armed Struggle* (2004) 200-201. A drug runner in the Britain used their foreskin to conceal heroin: Simon Davies, *Dealer Hid Heroin in His Foreskin* (2008) Wilts and Gloucestershire Standard <http://www.wiltsglosstandard.co.uk/search/2181718.Dealer_hid_heroin_in_his_foreskin/> at 20 January 2009.

⁴² For 55% see: Hawa Patel, 'The Problem of Routine Circumcision' (1966) 95 *Canadian Medical Association Journal* 576. For 0.19 see: Thomas Wiswell and Dietrich Geschke, 'Risks From Circumcision During the First Month of Life Compared With Those for Uncircumcised Boys' (1989) 83 *Pediatrics* 1011.

Equally cited in other papers is a significantly higher rate between 2 and 10%.⁴⁴ Others split the divide suggesting a rate between 0.2 and 3.0%.⁴⁵ Recent studies have suggested that significant complications are likely to occur at a rate between 1.5% and 3.6% for free hand circumcisions performed on healthy adults by experienced operators in good conditions.⁴⁶

2.2.12 There are differences between the various methods of performing a circumcision as to the rate of complication and the type of complications that can occur. The likelihood of complications occurring decrease as the skill, expertise, familiarity with the method utilised and the resources of the circumciser increase.⁴⁷ The possible complications of circumcision vary from the rare and horrific, including death and penile amputation, to the more common and relatively mundane, such as haemorrhaging for the arrest of which there is a specific Medicare benefit.⁴⁸

2.2.13 Without wishing to settle on a particular complication rate for 'circumcision', this Issues Paper accepts that, whilst devastating when they do occur, serious complications are extremely rare, and that less serious, but not inconsequential, complications occur at a rate of at least 0.2% to 0.6% but perhaps closer to a rate of 3.0%.

⁴³ For 0.2% see: William Gee and Julian Ansell, 'Neonatal Circumcision: A Ten-Year Overview: With Comparison of the Gomco Clamp and the Plastibell Device' (1976) 58 *Pediatrics* 824. For 0.6% see: Kenneth Harkavy, 'The Circumcision Debate' (1987) 79 *Pediatrics* 649.

⁴⁴ Nigel Williams and Leela Kapilla, 'Complications of Circumcision' (1993) 80 *British Journal of Surgery* 1231.

⁴⁵ Dimitri Christakis, Eric Harvey, Danielle Zerr, Chris Feudtner, Jeffrey Wright and Frederick Connell, 'A Trade-off Analysis of Routine Newborn Circumcision' (2000) 105(1) *Pediatrics* 246; Victor Palit, David Menebhi, Ian Taylor, Margret Young, Yasser Elmasry and Tariq Shah, 'A Unique Service in UK Delivering Plastibell Circumcision: Review of 9-year Results' (2007) 23 *Pediatric Surgery International* 45.

⁴⁶ See: Robert Bailey, *et al.*, above n 13; Ronald Gray, *et al.*, above n 13; Bertran Auvert, *et al.*, above n 13.

⁴⁷ See for example: Robert Bailey and Omar Egesah, *Assessment of Clinical and Traditional Male Circumcision Services in Bungoma District, Kenya: Complications Rates and Operational Needs* (2006).

⁴⁸ Medicare Australia, *Medicare Benefits Schedule* (2009) Item 30663.

Part 3

Non-Medical Background

3.1.1 This section gives brief answers to common circumcision questions that are not related to the fields of law or medicine. It is included to provide the non-medical background information required for informed consideration of the issues raised by the possible regulation of male circumcision. The questions answered include: what initiated circumcision; what is the history of circumcision; what are the common rationales for the practice; and how prevalent is the practice of non-therapeutic circumcision in Tasmania today?

3.2 The origin of circumcision

3.2.1 Foreskin alteration has been practised by humans since time immemorial. Many Indigenous Australian communities were practising circumcision long before the British colonisation of Australia.⁴⁹ Many disparate communities have practised, and do practise, circumcision today. Western explorers discovered that some Native North Americans, tribesmen in the remotest parts of Africa, Polynesians and South American Indians had surgically altered foreskins.⁵⁰ It is possible that there may be many separate sources of, and motivations for, 'the first' circumcision in any particular culture.

3.2.2 Anthropologists, looking beyond the possibility that the first surgical genital alteration was a response to a divine command, have offered possible explanations which include:

- that the practice began as a reproduction of a naturally occurring genital appearance (perhaps a short or permanently retracted foreskin, or hypospadias);
- that the wound was intended to reproduce the look of an animal's genitals, or emulate the shedding of a snake's skin;
- that the procedure was intended to 'feminise' (by exposing the mucous membrane of the glans and producing blood from the genitals) or 'masculinise' (by exposing the glans which would ordinarily only show during an erection) the penis;
- that the wound began as a punishment, marking or forced sacrifice (and may later have become a positive part of the subjected people's identity);
- that the alteration provided relief from something (possibly pain, an illness, or an unwanted degree of sexual pleasure);
- ancient peoples may have believed that the genital alteration either aided fertility or produced a contraceptive result.

Each explanation is mere speculation and it is likely that it will never be known with certainty what the reason was for the 'first circumcision'.⁵¹

⁴⁹ David Gollaher, *Circumcision: A History of the World's Most Controversial Surgery* (2000) 59-63.

⁵⁰ Citations that refer to the practice of circumcision in North America prior to European colonisation usually refer back to Gairdner's seminal medical article that makes a passing comment about the practice: Douglas Gairdner, above n 32.

⁵¹ For discussion on the origins of circumcision see: W Dunsmuir and E Gordon, 'The History of Circumcision' (1999) 83 *British Journal of Urology International* 1; C Daly, 'The Psychobiological Origins of Circumcision' (1952) 21 *Psychoanalytic Quarterly* 437; Robert Darby, 'The Riddle of The Sands: Circumcision, History, and Myth' (2005) 118 *Journal of the New Zealand Medical Association* U1564; David Gollaher, above n 49, ch 3; Spencer Beasley, 'Circumcision: Certain Controversy Over Uncertain Origins' (2005) 118 *Journal of the New Zealand Medical Association* U1555; John Cawte, *et al*, above n 2; J Morrison, above n 2; Robert Darby, 'Medical History and Medical Practice: Persistent Myths About the Foreskin' (2003) 178(4) *Medical Journal of Australia* 178; Felix Bryk, *Circumcision in Man and Woman* (2001) 92-122.

3.3 A brief history of circumcision

3.3.1 It is impossible, without excluding much of significance, to summarise the history of a practice that spans each populated continent, and thousands of years, into an easily manageable form. References to texts which provide a more detailed history of circumcision are provided below.⁵² This section of the Issues Paper will include: information on the oldest recorded incidents of foreskin alteration; a highly condensed background to the current views towards circumcision of Jews, Christians and Muslims (the three large religions that exist in Australia today that have a long historical relationship with circumcision); and concludes with a table that recognises some of the various periods of significance for circumcision and the male foreskin.

Oldest recorded instances



3.3.2 The oldest representations of foreskin alteration date back over 5000 years. Palettes (Image to the right),⁵³ and sculptures, dating around 3100BCE show men with surgically altered foreskins.⁵⁴ Humanity's oldest recorded image of a surgical procedure (Image to the left),⁵⁵ an Egyptian bas-relief dated to 2400BCE, is of a surgical alteration of the penis.⁵⁶ At least seven ancient texts evidence the practice of circumcision in Egypt before 700BCE.⁵⁷



Judaism, Christianity and Islam

3.3.3 Circumcision has been considered a part of Judaism since the moment that Abraham, the patriarch of Judaism, Christianity and Islam, circumcised himself. Abraham is said to have circumcised himself as part of a covenant with God.⁵⁸ For fulfilling the covenant, Abraham was promised that he would be exceedingly fruitful, be given possession of the land of Canaan,⁵⁹ be made a father of a multitude of nations and a line of kings.⁶⁰ Abraham's side of the covenant is contained within the book of Genesis:

And ye shall be circumcised in the flesh of your foreskin; and it shall be a token of a covenant betwixt Me and you; And he that is eight days old shall be circumcised among you, every male throughout your generations, he that is born in the house, or bought with money of any foreigner, that is not of thy seed; He that is born in thy house, and he that is bought with thy money, must needs be circumcised; and My covenant shall be in your flesh for an everlasting covenant.⁶¹

⁵² See for example: David Gollaher, above n 49; Eric Silverman, *From Abraham to America: A History of Jewish Circumcision* (2006); Robert Darby, *A Surgical Temptation: The Demonization of the Foreskin and the Rise of Circumcision in Britain* (2005).

⁵³ The original image was provided by the British Museum. The image may not be copied, distributed or displayed for commercial purposes (without the permission of the copyright holder). This image is © the British Museum, but has been altered into a Derivative Work by Warwick Marshall by using an excerpt of the original image.

⁵⁴ Jack Sasson, 'Circumcision in the Ancient Near East' (1966) 85 *Journal of Biblical Literature* 473, 473, 475-7.

⁵⁵ The original image was provided by the Wellcome Library London. The image may not be copied, distributed or displayed for commercial purposes (without the permission of the copyright holder). This image is © Wellcome Images, but has been altered into a Derivative Work by Warwick Marshall by using an excerpt of the original image.

⁵⁶ The English interpretations of the hieroglyphs that accompany the image differ from source to source. Most sources suggest that a surgical alteration of the foreskin, possibly a dorsal slit, is shown and being spoken about. See for example: David Gollaher, above n 49, 1-2; Ahmed Shokeir and Mohammed Hussein, 'The Urology of Pharaonic Egypt' (1999) 84 *British Journal of Urology International* 755, 760.

⁵⁷ Jack Sasson, above n 54, 473.

⁵⁸ Genesis 17:1-27.

⁵⁹ The Land of Canaan is an area that includes all, or parts of, modern day Israel, Lebanon, Palestine, Jordan, Egypt and Syria.

⁶⁰ Genesis 17:4-8.

⁶¹ Jewish Publication Society, *The Hebrew Bible in English* (1912) Jewish Publication Society, Genesis 17:11-13 <<http://www.mechon-mamre.org/e/et/et0117.htm>> at 25 January 2009.

That biblical text is the basis of the continuing Jewish tradition of circumcising boys on the eighth day of their life. Most practising Jews, including Jews in Australia, consider non-therapeutic circumcision a requirement of their faith that is commanded by God.⁶²

3.3.4 Some time, probably a few years before 1CE,⁶³ the Christian messiah Jesus was born and circumcised according to Jewish law.⁶⁴ Around 50CE The Christian apostles and Christian community leaders met in Jerusalem to discuss whether converting gentiles ought to be required to undergo ritual circumcision. The council concluded that circumcision ought not to be a requirement for new converts to the religion.⁶⁵ Paul the apostle in particular, himself circumcised as a Jew, vehemently opposed the suggestion that converting gentiles ought to be circumcised. In the New Testament, at least in some versions, Paul is even said to have written: ‘As for those agitators [who supported ritual circumcision for Christians], I wish they would go the whole way and emasculate themselves!’⁶⁶ Christian sects today, with few exceptions (that include some Coptic, and African orthodox Christian churches),⁶⁷ do not mandate, or even support, the practice of circumcision for religious reasons.

3.3.5 Muslims are the largest identifiable group who practise circumcision today. Circumcision is incorporated into Islam primarily through two avenues; references of reverence to the life and practices in Islamic holy texts to Abraham (who they believe practised circumcision), and the *Hadith* (the oral traditions of the words and deeds of the prophet Muhammad).⁶⁸ Circumcision is not mentioned in the *Koran*. Muhammad was born in 570AD.⁶⁹ There are conflicting reports as to when, and if, he was circumcised and what his precise views as to male circumcision were.⁷⁰ Not all Muslims are circumcised during their life. Muslim sects differ on the proper age for a person to be circumcised in the Muslim faith. Most Muslim sects believe circumcision is mandated by their faith, for others it is regarded as commendable but not obligatory.⁷¹

⁶² It should be noted that there are people, and some groups, who identify themselves as Jewish that do not practice circumcision, see for example: Jews Against Circumcision, *Jews Against Circumcision Home Page* (2009) <<http://www.jewsgainstcircumcision.org>> at 12 January 2009; Jewish Resource Center, *Jewish Resource Center Home Page* (2009) <<http://www.jewishcircumcision.org>> at 16 January 2009.

⁶³ For a discussion of the possible true birth date of Jesus, placing his birth between 7-5BCE, see: Robert Stein, *Jesus the Messiah* (1996) 52-56.

⁶⁴ Luke 2:21.

⁶⁵ Acts 15:1-41.

⁶⁶ Bible Gateway, *New International Bible*, Galatians 5:12

<<http://www.biblegateway.com/passage/?search=Galatians%205:%2012;&version=31;>> at 25 January 2009.

⁶⁷ Margo DeMello, *Encyclopedia of Body Adornment* (2007) 66.

⁶⁸ David Gollaher, above n 49, 44-52. For the various possible interpretations of Islamic law on male circumcision see: Sami Abu-Sahlieh, ‘Jehovah, His Cousin Allah, and Sexual Mutilations’ in George Denniston and Marilyn Milos (eds), *Sexual Mutilations: A Human Tragedy* (1997) 41.

⁶⁹ David Gollaher, above n 49, 44.

⁷⁰ Sami Abu-Sahlieh, ‘Muslims Genitalia In the Hands of the Clergy: Religious Arguments About Male and Female Circumcision’ in George Denniston, Frederick Hodges, Marilyn Milos (eds) *Male and Female Circumcision* (1999) 131.

⁷¹ *Ibid.*

Historical periods of significance for circumcision and the foreskin

Period of Significance	Important Events
Circumcision is adopted by early Jewish communities (date uncertain – estimated 1713BCE). ⁷²	Circumcision is first accepted as a divine command by a major monotheistic religion.
A long period of Greek and then Roman influence follows Alexander the Great's conquests (from 323BCE).	There is renewed reverence for a long and tapered foreskin. ⁷³ Circumcision is regulated in some jurisdictions. ⁷⁴ The regulation of circumcision results in the stigmatisation of those with an uncovered glans penis. That stigmatisation encourages the practice of <i>epispasm</i> (un-circumcision). ⁷⁵ The <i>Periah</i> (the type of circumcision still performed by Jews today) is established to make it more difficult for Jews to practice <i>epispasm</i> . ⁷⁶
Islam spreads through the Middle East, North Africa, and then Asia (7 th -12 th centuries CE).	Circumcision is accepted by a second major monotheistic religion.
The renaissance period ushers in a period of reverence for classical beliefs and knowledge (14 th - 17 th centuries CE).	Veneration of the foreskin re-emerges in the Christian world. ⁷⁷
There is an expansion in European exploration (15 th - 18 th centuries CE).	The explorers discover that people in the 'new world', including some Indigenous Australians, ⁷⁸ alter their foreskins.
There is a period in Britain where social attitudes shift between religious Puritanism and urges towards greater sexual freedom (17 th and 18 th centuries CE).	Manuals, some venerating the foreskin and its role in sexual pleasure, others condemning it, are made publicly available. ⁷⁹
Colonisation, business and war bring many men with European origins to hot climates (from the 17 th century CE).	Circumcision is introduced into communities with no tradition of circumcision as a result of fears over the maintenance of health in hot climates. ⁸⁰
Victorian social attitudes begin to pervade western medicine (late 18 th - 19 th centuries CE).	The medical community begin to believe masturbation (thought to be encouraged by the foreskin), 'congenital phimosis' and ordinary bodily functions, may cause significant illness and debilitation. ⁸¹

⁷² Harold Speert, *Obstetrics and Gynecology: A History and Iconography* (2005) 324.

⁷³ For discussion on the 'ideal' prepuce in ancient Greece see: Frederick Hodges, 'The Ideal Prepuce in Ancient Greece and Rome: Male Genital Aesthetics and Their Relation to Lipodermos, Circumcision, Foreskin Restoration, and the Kynodesme' (2001) 75 *The Bulletin Of The History Of Medicine* 375.

⁷⁴ Jewish sources suggest that King Antiochus IV Epiphanes, who ruled Asia-minor, instituted a ban, with severe punishments, on circumcision around 175 to 165BCE. See: Book of Maccabees 1:46-67; 6:10. The Roman Emperor Hadrian may also have regulated circumcision around 130BCE prior to the Bar Kokhba Revolt. See: Alfredo Rabello, 'The Ban on Circumcision as a Cause of the Bar Kokhba's Rebellion' (1995) 29 *Israel Law Review* 176. The ancient Roman legal text, *The Digest of Justinian* also contains a ban on circumcision in some circumstances, see: *The Digest of Justinian* 48:8:11.

⁷⁵ *Epispasm*, or uncircumcision, is a historical term used for any procedure, using surgery or traction, which restores a layer of skin that covers the glans penis.

⁷⁶ The *periah* involves the excision of the entire foreskin covering the glans of the penis. That style of circumcision makes it difficult to perform *epispasm*. See: Dirk Schultheiss, 'The History of Foreskin Restoration' in George Denniston, Frederick Hodges, Marilyn Milos (eds), *Male and Female Circumcision* (1999) 285, 286.

⁷⁷ Robert Darby, above n 51.

⁷⁸ Margo DeMello, above n 66, 20-21.

⁷⁹ See: Robert Darby, above n 52, 3-72.

⁸⁰ See generally: *Ibid*; David Gollaher, above n 49. For the remarkable acceptance of circumcision in South Korea following the Korean war see: DaiSik Kim and Myung-Geol Pang, 'Extraordinarily High Rates of Male Circumcision in South Korea: History and Underlying Causes' (2002) 89 *British Journal of Urology International* 48.

⁸¹ Robert Darby, above n 52; David Gollaher, above n 49.

Public and private health care funding make hospitalisation for birth, and circumcision by a surgeon, more affordable (from the early 20 th century CE).	Circumcision becomes easily and widely available. ⁸²
There is a re-emergence of circumcision as a feature of systematic ethnic persecution from the start of the twentieth century.	Forced circumcisions occur in the Ottoman empire, ⁸³ Indonesia, ⁸⁴ and Kenya. ⁸⁵ Circumcision status is used by the Nazi state to identify Jews. ⁸⁶
Medical journals and medical associations publish papers that question routine infant circumcision (from 1949CE).	Congenital phimosis becomes widely refuted. ⁸⁷ Some national health care services refuse to fund circumcision. ⁸⁸ The practice of routine circumcision begins to wane in Britain after the 1940's, and then gradually throughout the Commonwealth in the decades that follow. ⁸⁹
Organised anti-circumcision groups form between the mid 1980's and the early 1990's CE. ⁹⁰	Circumcision begins to be treated as a human rights issue.
New research suggests that circumcision has possible prophylactic benefits (from 2000CE in particular).	The debate over circumcision intensifies in the medical community; the United Nations and the World Health Organisation suggest that circumcision should be considered as a part of a comprehensive plan to reduce female to male HIV transmission in high-risk areas of infection. ⁹¹
High profile cases of death attributed to circumcision encourage some jurisdictions to regulate circumcision (from 2000CE)	South Africa (and some of its provinces) and Sweden pass laws to regulate non-therapeutic male circumcision. ⁹²
In response to research, and decades of medical association policy statements, most public hospitals in Australia now refuse to perform non-therapeutic circumcisions. (from 2006CE)	Non-therapeutic circumcisions are no longer performed in public hospitals in New South Wales, Victoria, South Australia, Western Australia and Tasmania.

⁸² Robert Darby, above n 1.

⁸³ For a personal account of a forced circumcision during the Armenian genocide see: Vahan Hamamdjian, *Vahan's Triumph: Autobiography of an Adolescent Survivor of the Armenian Genocide* (2004) 78-83.

⁸⁴ Richard Paddock, 'Purified' in the Name of Allah (2001) Los Angeles Times <<http://articles.latimes.com/2001/mar/13/news/mn-36955>> at 14 January 2009; *Maluku Refugees Allege Forced Circumcision* (2001) BBC News <<http://news.bbc.co.uk/2/hi/asia-pacific/1146224.stm>> at 16 January 2009.

⁸⁵ Robyn Dixon, *Forced Circumcision Reported in Kenya* (2008) Los Angeles Times <<http://articles.latimes.com/2008/jan/09/world/fg-circumcision9>> at 22 December 2008; 'Forced circumcision': The Latest Weapon in Kenya's Ethnic Strife (2008) AFP <<http://afp.google.com/article/ALeqM5gkiZSdchTFFey7rFhYWAK4z6Zc8Q>> at 11 December 2008.

⁸⁶ For a brief discussion of 'un-circumcision' or *epispasm* during periods of Jewish persecution see: Dirk Schultheiss, above n 75, 290.

⁸⁷ Douglas Gairdner, above n 32.

⁸⁸ The circumcision of newborns was briefly dropped from the Medicare health benefits scheme in 1985.

⁸⁹ Robert Darby, above n 1.

⁹⁰ National Organization of Circumcision Information Resource Centers (NOCIRC) was founded in 1986. See: National Organization of Circumcision Information Resource Centers, *Website of the National Organization of Circumcision Information Resource Centers*, 1989, National Organization of Circumcision Information Resource Centers <<http://www.nocirc.org/>> at 28 January 2008. The National Organization of Restoring Men (NORM) was founded in 1989. See: The National Organization of Restoring Men, *The National Organization of Restoring Men Site* (2001), The National Organization of Restoring Men <<http://www.norm.org/>> at 28 January 2008.

⁹¹ Joint United Nations Programme On HIV/AIDS, 'WHO and UNAIDS Announce Recommendations from Expert Meeting on Male Circumcision For HIV Prevention' (Press Release, 28 March 2007).

⁹² *Children's Act 2005* (RSA); *Application of Health Standards in Traditional Circumcision Act 2001* (South Eastern Cape); *Northern Province Circumcision Schools Act 1996* (Limpopo Province); *Initiation School Health Act 2004* (Free State); *Circumcision of Boys Act 2001* (Sweden).

3.4 The prevalence of non-therapeutic circumcision

3.4.1 Non-therapeutic circumcisions are no longer performed in public hospitals in Tasmania, Western Australia, Victoria, New South Wales and South Australia. The Australian College of Paediatrics estimated that only 10% of newborn children were circumcised in 1996.⁹³ Shane Peterson, who was subject to a negligent circumcision in infancy, conducted research in 2004 that suggested that the newborn circumcision rate was approximately 12.9% in Australia.⁹⁴ In 2004, Hugh O'Donnell also concluded that approximately 12.7% of newborn children were circumcised in Australia.⁹⁵ The circumcision rate of newborns in Tasmania is often cited as being significantly lower than the average elsewhere in Australia. In Peterson's study only 1.6% of children, and only 3.9% in the O'Donnell study, were circumcised in Tasmania in 2004.

3.4.2 An approximate minimum circumcision rate for children under the age of six months in 2007, gathered by working out the percentage of newborn males who claimed the Medicare benefit for the procedure, is 12.8% in Australia and 1.18% (40 instances) in Tasmania.⁹⁶ Those figures, whilst a useful guide, may not be a completely accurate reflection of the current practice of non-therapeutic circumcision. The limitations of those figures include:

- that the Medicare benefit is not claimed for every circumcision performed;
- some of the procedures, as is required by Medicare, may have been for a therapeutic reason; and
- older children and adults who undergo non-therapeutic circumcision are not included in the figure.

The figures, as with those cited above, do reliably suggest that newborn circumcision is not the norm in Tasmania.

3.4.3 Precise data relating to circumcisions not claimed on Medicare and outside of public hospitals is difficult to obtain. Non-therapeutic circumcisions are being performed in private medical practices in Tasmania. At least twenty-four non-therapeutic circumcisions (all ages) were performed by Calvary Health Care private hospitals in 2008.⁹⁷ Circumcisions have recently been performed for non-therapeutic reasons by a few Tasmanian urologists, general practitioners and obstetricians. Tasmanian medical practitioners exercise their own discretion as to whether they will perform a particular non-therapeutic circumcision. Some practitioners only perform the procedure on people in a certain age range (less than six weeks of age for example). Others chose to perform circumcisions for religious but not aesthetic (or other non-therapeutic) reasons.

3.4.4 Reliable anecdotal evidence suggests that, because the local Jewish community is small, less than one circumcision per year is performed in Tasmania by a traditional Jewish circumciser (a *mohel*).⁹⁸ Tasmania does not have a resident *mohel*. When a traditional Jewish circumcision is required a trained practitioner from mainland Australia may be brought in to perform it, or the person desiring the circumcision can travel interstate to have it performed.

3.4.5 Anecdotal evidence suggests that Tasmanian Muslim's typically use a local medical practitioner to perform the procedure. However, perhaps because of the difficulty with finding a local medical practitioner willing to perform the procedure, Tasmanian Muslim's travel to mainland Australia on occasion to have the procedure performed.

⁹³ Australian College of Paediatrics, *Position Statement: Routine Circumcision of Normal Male Infants and Boys*. Australian College of Paediatrics (1996).

⁹⁴ Judy Skatssoon, *Circumcision Rates Rise for Some* (2004) Morning Herald (Sydney) <<http://www.cirp.org/news/smh07-01-04/>> at 11 December 2008.

⁹⁵ Hugh O'Donnell, *Circumcision Incidence in Australia* (2004) The Circumcision Reference Library <<http://www.cirp.org/library/statistics/Australia/>> at 28 January 2009.

⁹⁶ Only 34 claims were made on Medicare for circumcisions on children less than 6 months of age in 2008.

⁹⁷ Letter from Tracy Malloy (Health Information Manager – Hobart, Calvary Health Care); Letter from Grant Musgrave (Director of Operations – Launceston, Calvary Health Care) to Warwick Marshall, 27 April 2009.

⁹⁸ Email from Daniel Albert (President of the Hobart Hebrew Congregation) to Warwick Marshall, 26 March 2009; Email from David Clark (Vice-president of the Hobart Hebrew Congregation) to Warwick Marshall, 24 March 2009.

3.5 Rationales of circumcision

3.5.1 The non-therapeutic reasons people give for circumcisions are many and varied. Those reasons include:

- respect for a particular religion, mythology or initiation ritual the person identifies with;
- concerns about the preservation of hygiene and health;
- tradition;
- belief that it will control, lessen or enhance sexual pleasure; and
- aesthetics.⁹⁹

No study has been performed in Tasmania or Australia that has produced reliable figures on how common each reason is for the performance of circumcision.

⁹⁹ Jennifer Shark and Amber Knoche, 'Circumcision' (2007) 52(5) *Journal of Midwifery & Women's Health* 517.

Part 4

Criminal Responsibility

4.1.1 The legality of non-therapeutic circumcision in Tasmania is not immediately clear. Without clarity in the application of the criminal law, those who perform, assist in or instigate a circumcision do so without knowing the extent to which they are protected from criminal liability. This Part provides an overview of the criminal offences relevant to the circumstances of a non-therapeutic circumcision in Tasmania. In Tasmania the most relevant offences include: assault; wounding; grievous bodily harm (GBH); and ill-treatment/abuse of a child. The provisions in the Tasmanian *Criminal Code* that provide protection from criminal prosecution in some circumstances for those who perform surgical operations will also be considered.

4.1.2 The analysis suggests that adults, and children capable of giving it, can almost certainly provide consent for the procedure so that a circumciser can legally perform the procedure (subject to other duties the circumciser will have in the provision of their service). It also suggests that there is uncertainty as to whether the consent of a parent for the circumcision of their child is sufficient to allow a circumciser to legally perform the procedure (subject to other duties the circumciser will have in the provision of their service). The lack of clarity in the law is primarily a result of the failure of the *Criminal Code* to address when, if ever, (outside of the context of ‘surgical operations’) a parent’s consent can make an otherwise unlawful assault or wounding lawful; the dearth of guidance on when a non-therapeutic circumcision may be ‘injurious to the public’; and uncertainty over the application of the surgical operation provision in the *Criminal Code*.

4.2 Assault, wounding and grievous bodily harm

4.2.1 Assault is considered the least serious in a spectrum of offences criminalising the non-lethal application of force. Assault may be charged as either an indictable or a summary offence in Tasmania.¹⁰⁰ A heavier maximum penalty for the summary offence applies if the victim is a child.¹⁰¹ Assault requires proof of the following elements: the direct or indirect application of force to the person of another and the requirement that it is done intentionally (or recklessly).¹⁰² Each of those elements could easily be established by the prosecution in any circumcision, whatever method or instrument is chosen for its performance, because each and every circumcision involves some sort of direct contact, intended by the circumciser.

4.2.2 In Tasmania the offences of wounding and grievous bodily harm, are contained in s 172 of the *Criminal Code*: ‘[a]ny person who unlawfully wounds or causes grievous bodily harm to any person by any means whatever is guilty of a crime.’¹⁰³

4.2.3 ‘Wound’ has a technical definition at law. The leading case in Tasmania on the definition of wound is *Devine*,¹⁰⁴ where Justice Cosgrove held that for a wound,

[t]he penetration to some degree of the true skin or cutis vera is required. As the true skin contains the blood vessels, any rupture of it will cause bleeding that will evidence its invasion... If the Crown proves a laceration and free bleeding that is sufficient.¹⁰⁵

¹⁰⁰ *Criminal Code Act 1924* (Tas) sch 1 s184; *Police Offences Act 1935* (Tas) s 35.

¹⁰¹ *Police Offences Act 1935* (Tas) sch 1 35(2).

¹⁰² *Criminal Code Act 1924* (Tas) sch 1 s 182.

¹⁰³ *Criminal Code Act 1924* (Tas) sch 1 s 172.

¹⁰⁴ [1982] 8 A Crim R 45

¹⁰⁵ *Ibid*, 55.

Circumcision necessarily involves a wound. Circumcision requires a deep incision, usually excising a significant portion of flesh, into the foreskin.¹⁰⁶ Every circumcision method, even those considered ‘bloodless’, require the penetration of the *cutis vera* to excise the foreskin from the penis. Circumcision satisfies the legal definition of both wounding and assault.

4.2.4 The phrase ‘grievous bodily harm’ is defined within s 1 of the Tasmanian *Criminal Code* as: ‘any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause or be likely to cause serious injury to health’.¹⁰⁷

4.2.5 The word ‘likely’ in the definition of grievous bodily harm is given its ordinary meaning in law as a substantial or real chance, which is distinct from a mere possibility or a remote chance.¹⁰⁸ Although death is a possible complication of circumcision, courts will almost certainly not classify the possibility of death occurring from the circumcision of a healthy male, of any age, as ‘likely’ in the sense of there being a substantial chance of it occurring.¹⁰⁹

4.2.6 Whether circumcision causes, or is likely to cause, serious injury to health is uncertain. The meaning of ‘health’, in the context of the definition of grievous bodily harm, was considered by the Supreme Court of Queensland in *Tranby v R*.¹¹⁰ In *Tranby*, Justice De Jersey held,

that the concept of health, as ordinarily understood, covers the functioning of the body, and in relation to that, freedom from disease or ailment, and that it does not extend to the presence within the body of organs or parts which perform no function, the absence of which causes no disease or ailment.¹¹¹

The entire Court in the Queensland decision stressed, providing the loss of part of the outer ear as an example, that ‘it is very doubtful that the removal of a part of the body that performs no useful function would be described as an injury to health.’¹¹² A jury considering whether a circumcision is an injury to health would have to consider whether the loss of the foreskin results in the loss of a useful function in a male’s body. The precise function(s) of the foreskin, and whether its existence is beneficial to health, has long been a significant area of debate. The foreskin’s function was considered in Part 2 of this Issues Paper. Whether a Tasmanian jury will accept that the foreskin has a particular beneficial function is difficult to predict. Even if a beneficial function can be attributed to the foreskin, the Tasmanian *Criminal Code* requires a ‘serious’, rather than mere injury to health.¹¹³ The prosecution may find it difficult to establish that the loss of a foreskin is a ‘serious’ injury to health, or that the procedure is ‘likely’ to result in such an injury, as it is required to do in Tasmania.

Conclusion

4.2.7 A Tasmanian court could hold that a circumcision is both an assault and wounding. It is unlikely to hold that a circumcision constitutes grievous bodily harm. An assault or wounding must be unlawful to

¹⁰⁶ There is an old English case which suggests a laceration to the urethra is a ‘wound’, see: *R v Waltham* (1849) 3 Cox CC 442.

¹⁰⁷ *Criminal Code Act 1924* (Tas) sch 1 s 1, ‘Grievous Bodily Harm’.

¹⁰⁸ *Boughey v R* (1986) 161 CLR 10, 21.

¹⁰⁹ Little research has been conducted on the likelihood of death as a complication of circumcision. One study reported that no deaths occurred during 500,000 circumcisions, see: Lowell King, ‘Neonatal Circumcision in the United States in 1982’ (1982) 128 *Journal of Urology* 1135. However, deaths are a known complication. See for example, Jacqueline Scurlock and Patrick Pemberton, ‘Neonatal Meningitis and Circumcision’ (1977) 1(10) *Medical Journal Of Australia* 332; Paediatric Death Review Committee: Office of the Chief Coroner of Ontario, *Circumcision: A Minor Procedure?* (2007) 12(4) *Paediatric Child Health* 311.

¹¹⁰ *Tranby v R* [1992] 1 Qd R 432.

¹¹¹ *Tranby v R* [1992] 1 Qd R 432, 422.

¹¹² *Tranby v R* [1992] 1 Qd R 432, 438 (Derrington J). Cf *Wayne v Boldiston* (1992) 85 NTR 8. That case is precedent from the Northern Territory for the proposition that a cosmetic deformity may still be an injury to health when it causes an immediate, albeit temporary injury to health (in that case injuries temporarily affected the bodily functions of chewing, speaking and seeing of the victim).

¹¹³ *Criminal Code Act 1924* (Tas) sch 1 s 1 ‘Grievous Bodily Harm’.

actually constitute a crime. The next part of the Issues Paper will consider the circumstances in which an assault and a wounding may be lawful.

4.3 Consent and unlawful assault and wounding

4.3.1 Consent of the person assaulted may provide a lawful justification for assault and for wounding in certain circumstances in Tasmania. The *Criminal Code* defines consent in s 2A(1) as ‘free agreement’.¹¹⁴ Section 2A(2) of the *Code*, without limiting what is free agreement, provides a non-exhaustive list of circumstances where free agreement is not present:

- (2) Without limiting the meaning of “free agreement”, and without limiting what may constitute “free agreement” or “not free agreement”, a person does not freely agree to an act if the person –
- (a) does not say or do anything to communicate consent; or
 - (b) agrees or submits because of force, or a reasonable fear of force, to him or her or to another person; or
 - (c) agrees or submits because of a threat of any kind against him or her or against another person; or
 - (d) agrees or submits because he or she or another person is unlawfully detained; or
 - (e) agrees or submits because he or she is overborne by the nature or position of another person; or
 - (f) agrees or submits because of the fraud of the accused; or
 - (g) is reasonably mistaken about the nature or purpose of the act or the identity of the accused; or
 - (h) is asleep, unconscious or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required; or
 - (i) is unable to understand the nature of the act.¹¹⁵

Consent: infants and young children

4.3.2 In Tasmania, a person, including a minor under the age of majority (18yrs old), does not freely agree for the purposes of consent if they do not say or do anything to communicate consent,¹¹⁶ or if they are unable to understand the nature of the act.¹¹⁷ Young children, infants in particular, may be unable to communicate consent and would almost certainly not be able to understand the nature of a circumcision procedure. Thus infants, and most young children, will not be able to provide consent that might make a circumcision lawful.

Consent: older children and adults

4.3.3 Circumcisions are performed in a variety of circumstances, by and for people with a variety of motivations. Consent may be vitiated where the person circumcised did not freely agree to the procedure. Some circumstances will be more contentious than others. The following discussion will provide some examples of when a court may hold that a person’s agreement is not free.

¹¹⁴ *Criminal Code Act 1924* (Tas) sch 1 s 2A(1).

¹¹⁵ *Criminal Code Act 1924* (Tas) sch 1 s 2A(2).

¹¹⁶ *Criminal Code Act 1924* (Tas) sch 1 s 2A(2)(a).

¹¹⁷ *Criminal Code Act 1924* (Tas) sch 1 s 2A(2)(i).

4.3.4 Sections 2A(2)(b) and (c) of the Tasmanian *Criminal Code* prohibit a finding of free agreement for the purposes of consent where the complainant acquiesces due to actual force, or threats of force.¹¹⁸ Free agreement may also be an issue when a circumcision is performed on a person with their agreement although its performance is largely at the behest of a person who is, or has been, in a position of authority over them. Children may be particularly susceptible to external pressures that influence their agreement. Section 2A(2)(e) of the Tasmanian *Code* provides that there is no free agreement when a person: ‘agrees or submits because he or she is overborne by the nature or position of another person.’¹¹⁹

4.3.5 In 2002, it was reported in the media that a man in Bundaberg Queensland had his two boys, aged five and nine, circumcised against the express wishes of their mother while he had them during a brief access period.¹²⁰ Media reports suggested the boys felt misled by their father leading up to the procedure and upset following it.¹²¹ There was no indication in the reports as to whether the boys expressed a desire to undergo the procedure at the time. It was suggested by the boys’ mother that the children grew up accepting ill treatment by their father as if they were ‘objects or property for him to do with as he pleased’.¹²² The influence of an aggressive or controlling parent is an example of a factor that may affect a child’s free agreement.

4.3.6 Deception or misleading conduct as to the nature or purpose of a circumcision may in some circumstances also provide an avenue to challenge whether free agreement was given in the particular circumstances.¹²³ For example, misleading a person, whether it be an adult or a child, into thinking the procedure is medically necessary, when that is not indicated, may persuade a court to find that there was no lawful consent.

Consent as a lawful justification for circumcision

4.3.7 Only two judgments have addressed the question of when consent will not be a lawful justification for an assault in Tasmania. Those cases are *R v Holmes*,¹²⁴ decided in 1993 and *Emmett v Arnold*,¹²⁵ decided in 2006. Those decisions suggest that: ‘there can be no valid consent to force which is intended or likely to cause bodily harm, and which does cause bodily harm.’¹²⁶

4.3.8 In *Holmes*, Justice Wright suggested that the relevant law in Tasmania coincides with English common law.¹²⁷ He cited in particular *Attorney General’s Reference (No 6 of 1980)*¹²⁸ which held that a person may not consent to the infliction of actual bodily harm for no good reason. The social acceptability of the particular reason seems to be the determining factor in whether the reason is ‘good’ or not.¹²⁹ Bodily harm has its usual meaning and includes any hurt or injury which interferes with the health or comfort of the complainant.¹³⁰ A circumcision would constitute bodily harm.

¹¹⁸ *Criminal Code Act 1924* (Tas) sch 1 s 2A(2)(b)-(c).

¹¹⁹ *Criminal Code Act 1924* (Tas) sch 1 s 2A(2)(e).

¹²⁰ Elissa Lawrence, ‘Mother’s Fury as Boys Circumcised’, *The Sunday Mail* (Brisbane), 11 August 2002; Tanya Moore, ‘Cutting Anger’, *The News-Mail* (Bundaberg), 10 August 2002. For electronic copies of a collection of related articles see: *Case study: Forced Circumcision of Australian boys: Special Report From Bundaberg* (2002) Circumcision Information Australia <<http://www.circinfo.org/ethics.html#bundacasestudy>> at 5 January 2009.

¹²¹ Rowland Croucher, ‘Charges Dropped For Father Who Forced Circumcision On Sons’ (2002) John Mark Ministries <<http://jmm.absalom.biz/2003/01/1380/>> at 27 January 2009.

¹²² *Case Study: Forced Circumcision of Australian Boys: Special Report from Bundaberg* (2002) Circumcision Information Australia <<http://www.circinfo.org/ethics.html#bundacasestudy>> at 5 January 2009.

¹²³ *Criminal Code Act 1924* (Tas) sch 1 s 2A(2)(g), 2A(2)(f).

¹²⁴ *R v Holmes* [1993] TASSC 5.

¹²⁵ *Emmett v Arnold* [2006] TASSC 5.

¹²⁶ *R v Holmes* [1993] TASSC 5, [7].

¹²⁷ *R v Holmes* [1993] TASSC 5, [3], [4].

¹²⁸ *Attorney-General’s Reference* (No. 6 of 1980) [1981] QB 715, 719.

¹²⁹ See for example: *R v Brown* [1994] 1 AC 212, 256-275 (Lord Mustill).

¹³⁰ *R v Holmes* [1993] TASSC 5, [5]; *Criminal Code Act 1924* (Tas) sch 1 s 1 ‘Bodily Harm’.

4.3.9 In *Holmes*, Justice Wright added that the assault must also constitute a breach of the peace to lose the protection from criminal responsibility that consent provides.¹³¹ He relied on s 182(4) of the *Code* which provides:

Except in cases in which it is specially provided that consent cannot be given, or shall not be a defence, an assault is not unlawful if committed with the consent of the person assaulted unless the act is otherwise unlawful, and the injury is of such a nature, or is done under such circumstances, as to be injurious to the public, as well as to the person assaulted, and to involve a breach of the peace.¹³²

4.3.10 On its natural reading, the sub-section creates five separate requirements all of which must be satisfied to preclude reliance on consent: that consent is not expressly excluded as a defence; that the assault is otherwise unlawful; as well as injurious to the public; and injurious to the person assaulted; and that the assault is also a breach of the peace. Such an interpretation would provide considerable, if not insurmountable, obstacles to a successful prosecution for assault of a consensual circumcision in Tasmania. Even on Wright J's interpretation of the *Code* in *Holmes* a circumcision will only be unlawful where there is consent if it were 'injurious to the public' (it inflicts actual bodily harm for no good reason) and a breach of the peace.

4.3.11 The *Criminal Code* does not expressly state whether consent of the person wounded affects the criminal liability of the person that wounded them for a charge of wounding. However, there is Tasmanian authority for the proposition that a wounding will not be unlawful if the victim consents so long as s 53 of the *Criminal Code* does not apply.¹³³ Section 53 provides:

No person has a right to consent to the infliction –

(a) of death upon himself;

(b) except as provided in section 51, of an injury likely to cause death; or

(c) of a maim for any purpose injurious to the public –

and any consent given in contravention hereof shall have no effect as regards criminal responsibility.¹³⁴

As discussed above, the injury caused by a circumcision is not 'likely' to cause death. Circumcision is also not a maim. 'Maim' has a long established technical meaning at law which focuses on the effect of the injury on the person's ability to perform in a battle:

A maim is bodily harm whereby a man is deprived of the use of any member of his body or of any sense which he can use in fighting, or by the loss of which he is generally and permanently weakened, but a bodily injury is not a maim merely because it is a disfigurement.¹³⁵

A man is not generally weakened or permanently less able to fight due to a circumcision. Should the technical definition of maim be accepted in Tasmania today, as it was previously in 1964,¹³⁶ circumcision would not constitute a maim.

4.3.12 In summary, there are considerable obstacles to proving an unlawful assault or wounding in cases of consensual circumcision.

¹³¹ *R v Holmes* [1993] TASSC 5, [11]. *Criminal Code Act 1924* (Tas) sch 1 s 182(4).

¹³² *Criminal Code Act 1924* (Tas) sch 1 s 182(4).

¹³³ *Criminal Code Act 1924* (Tas) sch 1 s 53; *McCallum* [1969] Tas SR 73, 82-3.

¹³⁴ *Criminal Code Act 1924* (Tas) sch 1 s 53.

¹³⁵ James Stephen, *A Digest of the Criminal Law* (1883) Art 227.

¹³⁶ *Arthur v Arthur* [1964] ALR 1021.

Parental authorisation: children too young to provide consent

4.3.13 The Tasmanian *Criminal Code* allows parents to consent on behalf of their children to surgical operations.¹³⁷ The common law also provides parents with the power to consent to therapeutic surgery for their child. The Tasmanian surgical provision and the common law therapeutic surgery exception will be discussed shortly. No legislation in Tasmania provides a general power for parents to make legal, through their consent or authorisation, what would otherwise be an offence to their children.

4.3.14 Common law cases contain non-binding statements suggesting that a person who circumcises a child is not criminally responsible for the act if the child's parents consented to, or authorised, the procedure.¹³⁸ The basis for this proposition is uncertain.¹³⁹ The common law in this area is unsettled. Case law generally cites neonatal circumcision as one of many anomalous exceptions, like emergency medical treatment, to the general rule that both the consent of the person harmed and a good reason for the act that causes the harm, is required to excuse an assault causing bodily harm.¹⁴⁰

4.3.15 In Tasmania the text of the *Criminal Code* generally makes the consent of the person harmed a necessary, but not sufficient, condition for a lawful assault or wounding. However, there is the possibility that, despite the absence of consent, the common law may be relied upon to provide a defence in cases where a parent provides their consent for the performance of the procedure on their child. Whether the common law can be referred to under the *Criminal Code* on this matter is uncertain. A Tasmanian court may rely upon the common law defence saving provision to import the common law in this area.¹⁴¹ No binding decision exists upon whether the defence saving provision can import the relevant common law.

Conclusion on consent as a justification for circumcision

4.3.16 The free agreement (consent) of the person undergoing the circumcision will almost certainly provide protection from criminal prosecution for wounding and assault in Tasmania.¹⁴²

4.3.17 Under the common law, although the matter has never been directly decided, it seems that circumcisions on boys too young to consent to the procedure themselves may be performed when the performance of the procedure is considered acceptable by society. Whether the position, by reason of section 8 of the *Criminal Code Act*, is the same in Tasmania under the *Criminal Code* is unclear. It cannot be said with certainty whether a parent's consent for the performance of a non-therapeutic circumcision on their child will relieve a circumciser of criminal liability in Tasmania.

4.3.18 The application of the independent surgical operation provision in the *Criminal Code* that may also apply to the circumcision of children is discussed further below.

4.4 Abuse and ill-treatment of the child

4.4.1 There are two specific child ill-treatment/abuse provisions in Tasmania. It is quite possible, to ensure consistency in the application of the law, that the common law justifications of consent, and parental authorisation, that cover the traditional non-fatal offences against the person (like assault and wounding), will be held in a Tasmanian Court to extend to those child specific offences.

¹³⁷ *Criminal Code Act 1924* (Tas) sch 1 s 51.

¹³⁸ *R v Brown* [1994] 1 AC 212, 231 (Lord Templeton); *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 297 (Deane J).

¹³⁹ Lord Mustill's comment in *R v Brown* [1994] 1 AC 212, 265 on the lack of a clear justification for the legality of professional boxing may be apposite to circumcision: 'It is in my judgment best to regard this as another special situation which for the time being stands outside the ordinary law of violence because society chooses to tolerate it.'

¹⁴⁰ Other exceptions include: the spanking of children, brushing past people in crowded spaces and some instances of rough horseplay.

¹⁴¹ *Criminal Code Act 1924* (Tas) s 8.

¹⁴² Assuming that the particular consensual circumcision is not held to be injurious to the public.

Ill-treatment

4.4.2 The Tasmanian *Criminal Code* contains a provision which criminalises the ill-treatment of children. Section 178(1) of the *Criminal Code* provides:

Any person over the age of 14 years who, having the custody, care, or control of a child under the age of 14 years, wilfully ill-treats, neglects, abandons, or exposes such child, or causes such child to be ill-treated, neglected, abandoned, or exposed in a manner likely to cause such child unnecessary suffering or injury to health, is guilty of a crime.¹⁴³

The words ‘custody’, ‘care’ and ‘control’ allow for the application of the provision to a circumcised child’s parents.¹⁴⁴ There is less certainty as to whether the actual circumciser is in care or control over the child for the purposes of the Act. The terms used (custody, care and control) are usually associated with parental powers.

4.4.3 English decisions have interpreted similar provisions with the word ‘ill-treatment’ as having its ordinary meaning.¹⁴⁵ A Queensland lower court decision suggested that under Queensland’s similarly worded legislation the prosecution must prove the accused acted with a bad intent, malice or unkindness.¹⁴⁶ So that any course of conduct, including corporal punishment, performed with the child’s interests, betterment or well being in mind could not be considered ill-treatment.¹⁴⁷ The provision is open to some unusual interpretations.¹⁴⁸ It is unlikely that an Australian court would choose an interpretation of ‘ill-treatment’ that would subject a parent or a surgeon, who acts essentially with goodwill and with a spirit of benevolence, to the condemnation of this aspect of the criminal law whilst the procedure is currently accepted in society.

Child abuse

4.4.4 In Tasmania, the *Children, Young Persons and Their Families Act (CYPTFA)*, s 91 states:

(1) A person who has a duty of care in respect of a child must not intentionally take, or fail to take, action that could reasonably be expected to result in –

- (a) the child suffering significant harm as a result of physical injury or sexual abuse; or
- (b) the child suffering emotional or psychological harm of such a kind that the child’s emotional or intellectual development is, or is likely to be, significantly damaged; or
- (c) the child’s physical development or health being significantly harmed.¹⁴⁹

4.4.5 Section 91(2) of the *CYPTFA* states that proceedings may only be brought after consultation with the Secretary of the Department.¹⁵⁰ Section 17 of the *CYPTFA* allows for the Secretary to choose not to take or initiate any action if:

proper arrangements exist for the care and protection of the child and the matter of the apparent abuse or neglect or the likelihood of the child being killed or abused or neglected has been or is being adequately dealt with.¹⁵¹

¹⁴³ *Criminal Code Act 1924* (Tas) sch 1 s 178(1).

¹⁴⁴ Allowing harm to be caused by a third party does not prevent parents from being criminally liable for harm to their child, see: *R v Conner* (1908) 2 KB 26.

¹⁴⁵ *R v Newington* (1990) 91 Cr App R 247.

¹⁴⁶ *H v M* (Unreported, Ipswich Magistrates Court, Magistrate Gordon, 24 July 1998). For a discussion of the case see: Andrew West, ‘Ill treatment of Children’ (1999) 20 *Queensland Lawyer* 38, 39.

¹⁴⁷ Andrew West, above n 144, 39.

¹⁴⁸ The operation of the term ‘unnecessary’ for example is somewhat unclear.

¹⁴⁹ *Children, Young Persons and Their Families Act 1997* (Tas) s 91.

¹⁵⁰ *Children, Young Persons and Their Families Act 1997* (Tas) s 91.2.

¹⁵¹ *Children, Young Persons and Their Families Act 1997* (Tas) s 17.

In exercising their power, the Secretary is required to give serious consideration to '(v) preserving and enhancing the child's sense of ethnic, religious or cultural identity, and making decisions and orders that are consistent with ethnic traditions or religious or cultural values.'¹⁵²

4.4.6 The broad definition of the offence and the lack of expressed exceptions leave the provision open to some unusual possible applications if given a literal interpretation. As with the previous abuse provision it is unlikely that a court, having regard to the mischief that the Act was intended to remedy, and the terms 'significant' and 'harm', would hold that most circumcisions could be prosecuted successfully under the provision.

4.4.7 The Act provides that proceedings for an offence against this Act may be commenced within two years after the occurrence of the act that constitutes the subject of the offence.¹⁵³

4.5 Surgical operation

4.5.1 Section 51 of the Tasmanian *Criminal Code* contains a provision which describes the circumstances under which a surgical operation, otherwise constituting an offence, is lawful.¹⁵⁴ The section provides protection from criminal liability for a person who performs an act that is covered by the section. There has been no judicial consideration of this section by Tasmanian courts. Its likely scope, operation and application to circumcision can only be speculated upon. Section 51 provides:

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

(2) In the case of a child too young to exercise a reasonable discretion in such a matter, such consent as aforesaid may be given by his parent or by any person having the care of such child.

(3) In the case of a person in such a condition as to be incapable of giving such consent as aforesaid, such operation may be performed without such consent.¹⁵⁵

4.5.2 There are two possible interpretations of the section. The first is a restrictive interpretation that limits the application of the protection afforded by the section to procedures that are intended to have a therapeutic benefit. Such an interpretation requires one, or both, of the words 'surgical' and/or 'benefit' to be construed as requiring the presence of a beneficial therapeutic purpose to the operation. This interpretation has been previously accepted in legal commentary.¹⁵⁶ It also reflects the dictionary definition of the terms 'surgical' and 'surgical operation'.¹⁵⁷

4.5.3 The second possible interpretation involves construing the terms 'surgical' and 'benefit' broadly so that the application of the section is not limited to procedures that have a therapeutic benefit. This interpretation might accept the term 'surgical' as including all acts typically regarded by the public as

¹⁵² *Children, Young Persons and Their Families Act 1997* (Tas) s 8(2)(b)(v).

¹⁵³ *Children, Young Persons and Their Families Act 1997* (Tas) s 109.

¹⁵⁴ *Criminal Code Act 1924* (Tas) sch 1 s 51.

¹⁵⁵ *Criminal Code Act 1924* (Tas) sch 1 s 51.

¹⁵⁶ Margaret Somerville, 'Medical Interventions and the Criminal Law: Lawful or Excusable Wounding?' (1980) 26 *McGill Law Journal* 82.

¹⁵⁷ See Arthur Delbridge, John Bernard, David Blair, Susan Butler, Pam Peters and Colin Yallop (eds) *Macquarie Dictionary: Australia's National Dictionary* (3rd ed, 2001) 'surgical' relating to or involving surgery, 'surgery' the art, practice, or work of treating diseases, injuries, or deformities by manual operation or instrumental appliances, 'operation surgery' a process or method of operating on the body of the patient, as with instruments, to remedy injury.

surgery,¹⁵⁸ including non-therapeutic circumcision, and would not limit the consideration of ‘benefit’ to medical benefits.¹⁵⁹

4.5.4 Section 51 requires the operation to be reasonable in all the circumstances. The legislation provides no criteria for the assessment of ‘reasonableness’. The methods used, the reasons for, and the context of the procedure, may be relevant to the court’s consideration of reasonableness. Not all circumcisions will be equally reasonable. For example, a court may find a circumcision on a consenting adult by a qualified surgeon in a fully equipped hospital a more reasonable operation than a circumcision performed on a whim by a lay person upon an ill baby without proper efforts to manage risk.

4.5.5 It is clear that the section may apply to anyone who performs ‘a surgical operation’.¹⁶⁰ It does not apply only to qualified surgeons, medical practitioners or other qualified persons. It is also clear that the surgical operation has to be for the benefit of the person undergoing the operation. The phrase ‘for his benefit’ requires examination of the reasons for the operation rather than the consequence of the operation.¹⁶¹ As noted above, no guidance is given within the legislation as to the interpretation of ‘benefit’.

4.5.6 The section only applies to people who perform surgical operations with reasonable care and skill and in good faith. The criminal standard of reasonable care and skill (negligence) will most likely apply. So that:

in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.¹⁶²

A ‘surgical operation’ not provided in good faith, that intends to cause, or is reckless as to causing, significant harm and pain or that disregards known dangers, will breach the minimal standard of care required to receive protection from the criminal law.¹⁶³

Young children and parental consent

4.5.7 Parents may consent to a surgical operation on behalf of their children if the child is too young to exercise a reasonable discretion on the matter.¹⁶⁴ No guidance is given as to how to interpret the term ‘reasonable discretion’. The requirements of the provision for adults and children old enough to exercise a reasonable discretion, other than the consent of the person operated upon, namely benefit and reasonableness, still need to be established when surgery is performed on a child.

Conclusion on section 51: surgical operations

4.5.8 There will continue to be uncertainty about the surgical operation provision until the section is judicially interpreted. Commenting on the uncertain meaning of ‘benefit’ in Canada’s similar surgical operation provision, Chief Justice Deschênes said:

¹⁵⁸ The exact wording of such an inclusive definition of surgical operation is difficult to predict.

¹⁵⁹ Age, economic and social factors, amongst other considerations, have all been considered as relevant factors by Canadian courts under the ‘terms reasonable in all the circumstances’. Those decisions have not seen fit to limit the term benefit to ‘therapeutic benefit’. See for example, *Cataford v Moreau* (1978) C.S. 933.

¹⁶⁰ Robin O’Regan, ‘Surgery and Criminal Responsibility Under the Queensland Criminal Code’ (1990) 14 *Criminal Law Journal* 73.

¹⁶¹ Law Reform Commission of Canada, *Medical Treatment and Criminal Law*, Working Paper 26 (1980) 40; *Cataford v Moreau* (1978) C.S. 933.

¹⁶² *R v Bateman* [1925] 19 Crim App 8, 48.

¹⁶³ See also: *Criminal Code Act 1924* (Tas) sch 1 s 149. That section makes it a duty of a person doing ‘...a lawful act of a dangerous character which requires special knowledge, skill, attention, or caution, to employ in so doing a reasonable amount of such knowledge, skill, attention, and caution.’

¹⁶⁴ *Criminal Code Act 1924* (Tas) sch 1 s 51(2).

This imprecision raises the question of determining whether the “benefit of the patient” arises from a medical judgment or a moral judgment. The Canadian courts have not yet had the occasion to deal with this question, the importance of which will no doubt arise in respect of esthetic surgery, transsexuality or in voluntary sterilization. The fact that these practices have for some time become customary doubtless explains the absence of the jurisprudence. It may therefore be thought that the courts would only intervene in cases of extreme gravity. The result is that criminal law holds a sword of Damocles suspended above the operating table.¹⁶⁵

If a therapeutic purpose for the procedure is required by the section, it will not provide protection from criminal liability for the act of performing a non-therapeutic circumcision. If a therapeutic purpose is not required by the section a non-therapeutic circumcision must still be ‘for the benefit’ of the person operated upon, reasonable in the circumstances, and performed with reasonable care and skill in good faith to attract the protection the section affords from criminal liability.

4.5.9 In conclusion, s 51 of the *Criminal Code* may only ever provide a defence to a parent or a circumciser charged after the performance of a circumcision if ‘surgery’ includes non-therapeutic circumcision and ‘benefit’ includes non-therapeutic (perhaps social, spiritual, prophylactic or other) benefits.

The common law

4.5.10 The common law recognises surgery can be provided in circumstances where consent is unable to be given at the time, if the treatment is necessary to save the patient’s life, or, perhaps, necessary to prevent serious injury to health.¹⁶⁶ Such operations must be medically necessary and not merely convenient.¹⁶⁷ Non-therapeutic circumcision is not a medically necessary surgery. The common law also recognises that a parent can authorise therapeutic surgery to be performed on their child.¹⁶⁸

4.5.11 There is no express provision in the Tasmanian *Criminal Code* that allows for reference to a common law surgical operation exception. The presence of the surgical operation exception in the Tasmanian *Criminal Code* (section 51), suggests that reference should not, and need not, be made to any common law surgical operation exception.¹⁶⁹

4.6 Criminal liability of accessories

4.6.1 If a person is criminally liable for the performance of a circumcision, a parent, or any other person, who does any act, or makes any omission, for the purpose of enabling or aiding that person to perform the circumcision, abets (encourages) a person in the performance of that circumcision,¹⁷⁰ or instigates (counsels, procures or commands) the performance of that circumcision,¹⁷¹ may be charged.¹⁷² So, those who assist in the performance of an illegal circumcision, who ask another to perform an illegal circumcision, or who are present and encourage (abet) the performance of an illegal circumcision, at least when they intend to provide that assistance, instigation or encouragement, will be criminally liable.¹⁷³

¹⁶⁵ *Cataford v Moreau* (1978) C.S. 933, 936 (Deschênes CJ).

¹⁶⁶ *Marshall v Curry* [1933] 3 DLR 261, 274-5.

¹⁶⁷ *Murray v McMurchy* [1949] 2 DLR 442.

¹⁶⁸ *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 297.

¹⁶⁹ *Criminal Code Act 1924* (Tas) sch 1 s 51.

¹⁷⁰ *Giorgianni* (1985) 59 ALJR 461.

¹⁷¹ *Criminal Code Act 1924* (Tas) sch 1 s 1 ‘instigates’.

¹⁷² An accessory may be charged with actually committing the crime the circumciser is liable for, or with aiding, enabling, abetting or instigating that crime: *Criminal Code Act 1924* (Tas) sch 1 s 3(1).

¹⁷³ In Tasmania a person must in fact assist, enable, abet or instigate the commission of the crime, and intend their actions, or their omission to act, to assist, enable, abet or instigate the crime, see: *Arnol* [1980] Tas R 220, 228 (Everett J); *Giorgianni* (1985) 59 ALJR 461.

4.6.2 A person under the age of ten cannot be an accessory to a crime. This is because under the *Criminal Code* ‘no act or omission done or made by a person under ten years of age is an offence.’¹⁷⁴ No act or omission done or made by a person between ten and fourteen years of age is an offence ‘unless it be proved that he had sufficient capacity to know that the act or omission was one which he ought not to do or make.’¹⁷⁵

Questions

1. Do you think the current criminal law relating to non-therapeutic circumcision requires clarification?
2. Under what circumstances do you think a non-therapeutic circumcision should be lawful (please see Part 10 for a detailed list of factors that might be used to influence lawfulness).

¹⁷⁴ *Criminal Code 1924* sch 1 s 18(1).

¹⁷⁵ *Criminal Code 1924* sch 1 s 18(2).

Part 5

Authorisation: Family Law

5.1.1 A person who performs a circumcision without being properly authorised to do so may be liable in civil law for battery. There has been no detailed judicial consideration of the authorisation of circumcision in Australia. However, there have been non-binding comments made by Australian judges on the question of who may authorise a circumcision.¹⁷⁶ The lack of reasoned justification for those comments and the plethora of circumstances under which a circumcision may be performed, result in the law being unclear. If circumcision does not contravene the criminal law, the courts must establish when and how the procedure may be authorised and by whom. A circumciser cannot be certain that they are protected from an action in battery until the requirements of a proper legal authorisation are settled. An adult will ordinarily be able to authorise a non-therapeutic procedure on themselves without court intervention so long as the procedure is legal.¹⁷⁷ Some non-therapeutic procedures on children require the approval of a court before they may be legally performed. This Part will focus upon when, and whether, a child, or their parents may legally authorise a non-therapeutic circumcision in Tasmania or whether the approval of a court is required.

5.1.2 The analysis of the law suggests that adults, and children capable of fully understanding what is being proposed, can almost certainly provide consent to legally authorise a circumciser to perform the procedure on themselves. The analysis also suggests that there is uncertainty as to whether the consent of a parent for the circumcision of their child is sufficient to legally authorise a circumciser to perform the procedure, or whether a court must approve the performance of the procedure on a child in some, or in all, circumstances.

5.1.3 This Part focuses on the efficacy of the consent of a minor, and of parental consent, to relieve a circumciser from civil liability for performing a circumcision; and the power to authorise non-therapeutic circumcision vested in two courts: the Family Court of Australia and the Supreme Court of Tasmania. The Commonwealth *Family Law Act 1975 (FLA)* cannot be altered by a Tasmanian Act of Parliament. Accordingly, reform to the *FLA* is beyond the scope of the Tasmanian Parliament and the TLRI will not consider altering the Act in its reform proposals.

5.1.4 However, it seems that Tasmania can enact legislation clarifying how a circumcision may be legally authorised.¹⁷⁸ Such legislation would need to operate concurrently with the *FLA*. Following the High Court of Australia's decision in *P v P* it seems that where specific state legislation exists, authorisation may be given according to the provisions of that legislation, provided that the Family Court has not made an inconsistent order about the particular procedure.¹⁷⁹ However, the full interrelationship between the welfare power of the *FLA* and a state law that purports to clarify when a procedure may be legally performed is an area of law yet to be conclusively settled.¹⁸⁰

¹⁷⁶ *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 297.

¹⁷⁷ *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

¹⁷⁸ Legislation of a similar nature clarifying when a child may be sterilised has been enacted in both New South Wales and South Australia. See, *Children and Young Persons (Care and Protection) Act 1998* (NSW); *Guardianship Act 1987* (NSW); *South Australian Guardianship and Administration Act 1993* (SA).

¹⁷⁹ *P v P* (1994) 181 CLR 583.

¹⁸⁰ *P v P* (1994) 181 CLR 583 was decided by a five to two majority. Justice Brennan's dissenting decision noted that 'Part VII [of the *FLA*] contains no indication that the Parliament intended the welfare jurisdiction to be exercised in disregard of the applicable laws of a State.' See, *P v P* (1994) 181 CLR 583, 621 (Brennan J). Brennan J's argument is that the welfare power cannot be used to authorise an act that is illegal under state law. See, *P v P* (1994) 181 CLR 583, 618-626 (Brennan J). Following Brennan J's argument, the *FLA*'s welfare power could not, for example, be used to authorise a female genital mutilation procedure (which is illegal by virtue of Tasmania's *Criminal Code*) even if the procedure is in the best interests of the child in the particular circumstances.

5.2 The consent of a minor

5.2.1 The Australian High Court held that a minor (a person under 18 in Tasmania) is ‘capable of giving informed consent when he or she achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed.’¹⁸¹

5.2.2 There is no detailed guidance on what should be considered in determining whether a minor has the required capacity. Most cases on the competency of minors have involved very serious, and typically life and death, decisions.¹⁸² Consequently, the reasoning in the cases may not be completely applicable to the typical instance of circumcision in Tasmania. The child’s chronological, mental and emotional age may be considered by the court. So might the child’s understanding of, and support for, the reason for the circumcision. Whether the child understands the nature of the procedure and comprehends the potential physical and psychological consequences may also be part of the court’s determination of the child’s capacity. Understanding the wider ramifications of their decision, such as its effect on others, and the relevant moral or ethical issues, might also be considered by the court.

5.3 Parental consent

5.3.1 The parental power to authorise non-therapeutic procedures is limited.¹⁸³ A parent will only have the capacity to make a decision for their child when they are acting in the child’s best interests. A parent’s view of what is in the child’s best interests may be challenged in court. If the matter is one of parental responsibility, which is discussed later, as an aspect of the care, welfare or development of the child an *FLA* parenting order may be applied for.¹⁸⁴ The Supreme Court of Tasmania has the power to make orders and give directions to protect the welfare of children within its jurisdiction through its *parens patriae* power.¹⁸⁵ The Family Court of Australia has a similar power granted to it by Part VII of the *FLA*.¹⁸⁶ Under the *FLA* a party may not institute other proceedings if such proceedings can be initiated under Part VII of the *FLA*.¹⁸⁷ The welfare jurisdiction over children contained in the *FLA* is couched in broadly inclusive terms. Section 67ZC(1) reads: ‘In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.’¹⁸⁸

5.3.2 The scope of the *FLA* is limited by the *Constitution*.¹⁸⁹ Judicial precedent suggests that the marriage power and the matrimonial causes power in the *Constitution* limit the application of the *FLA* welfare power to children of marriage only.¹⁹⁰ Precedent also suggests that Tasmania’s referral of powers over children to the Commonwealth in the *Commonwealth Powers (Family Law) Act 1987* does not provide the Commonwealth with the power to legislate for the welfare of children who are not children of marriage.¹⁹¹ In

¹⁸¹ *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 237-238 (Mason CJ, Dawson, Toohey, Gaudron JJ); *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 188-189 (Lord Scarman).

¹⁸² *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386; *Re L (A Minor)* [1998] 2 FLR 810; *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1992] 3 WLR 758; *Re R (A Minor: Wardship Consent to Treatment)* [1991] 3 WLR 592.

¹⁸³ *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

¹⁸⁴ *Family Law Act 1975* (Cth) pt VII.

¹⁸⁵ The source of the Tasmanian Supreme Court’s *parens patriae* power, although the power is accepted as existing, is unclear. Typically the *Australian Courts Act 1828* (UK) s 11, along with the second *Charter of Justice 1831* (UK), is referenced as the source of this power, see: *Coghlan v Law* [1982] 8 Fam LR 566, 569 (Everett J). For a discussion see, Wendy Lacey, ‘Inherent Jurisdiction, Judicial Power and Implied Guarantees Under Chapter III of the Constitution’ [2003] *Federal Law Review* 2.

¹⁸⁶ *Family Law Act 1975* (Cth) pt VII.

¹⁸⁷ *Family Law Act 1975* (Cth) s 69B.

¹⁸⁸ *Family Law Act 1975* (Cth) s 67ZC(1).

¹⁸⁹ *Australian Constitution* s 51(xx)-(xxii).

¹⁹⁰ See, *AMS v AIF* (1999) 199 CLR 160, 243-244 (Callinan J).

¹⁹¹ That is because the referring legislation does not make reference to the referral of the power to legislate on the ‘welfare’ of children. See, *AMS v AIF* (1999) 199 CLR 160, [256]-[265] (Callinan J).

2007 alone, over 86,000 children were born in Australia out of marriage.¹⁹² The result of the limitations set by the *Constitution* and the failure to include the ‘welfare’ of children in Tasmania’s referral of power to the Commonwealth is that the *parens patriae* jurisdiction of the State Supreme Courts will probably still apply to a child who is not a child of marriage.¹⁹³ There are recent examples of State Supreme Courts exercising their inherent *parens patriae* jurisdiction in cases that involve an ex-nuptial child.¹⁹⁴

5.3.3 The issue of whether the *parens patriae* jurisdiction was left unaffected by the referral of powers to the Commonwealth is typically avoided by the State Supreme Courts. That is because, by virtue of the Commonwealth’s *Jurisdiction of Courts (Cross-Vesting) Act*,¹⁹⁵ the State Supreme Courts now enjoy all the jurisdiction of the Family Court of Australia, including its powers in relation to the welfare of children.¹⁹⁶ Although, the High Court has overturned the cross vesting legislation as it applies to Commonwealth courts the vesting of Commonwealth power in state courts remains valid.¹⁹⁷ The result of the cross-vesting legislation is that each State Supreme Court may make orders in connection with the welfare of children (whether or not they are a child of marriage).¹⁹⁸ This is so even though the precise basis of such an order (whether the basis is the *Family Law Act* or the *parens patriae* power) in regard to ex-nuptial children is unclear.

5.3.4 The fundamental principle governing the exercise of the *FLA* welfare power, *FLA* parenting orders and the Supreme Court’s *parens patriae* power is that the best interests of the child is to be the paramount consideration.¹⁹⁹ The Supreme Court’s *parens patriae* and the *FLA* welfare power may be used as a check on the authorisation of the circumcision of minors, whether that authorisation is provided by the minor themselves or the minor’s parents.

5.3.5 In determining what is in a child’s best interests judicial decisions have shown a willingness to put the long term interests of a child above any short term loss or discomfort.²⁰⁰ The courts have also been mindful to prevent harm to children where possible.²⁰¹ If a procedure is proposed which will cause harm or result in loss, the benefit that justifies the harm will need to be likely to accrue and be more significant than the harm caused. Courts also consider the different treatments reasonably available and appropriate to achieve the purpose of the procedure proposed in order to ensure that the least invasive treatment is selected should some form of intervention be required.

5.3.6 Under the *FLA*, the primary considerations as to what is in the child’s best interest are that the child has a meaningful relationship with both of their parents and that the child is protected from abuse and family violence.²⁰² The Act also provides additional considerations including, among other matters:

- the views of the child;
- the relationship of the child to their family;
- the capacity of their family to provide for the needs (including emotional needs) of the child; and
- the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child’s parents.²⁰³

¹⁹² Australian Bureau of Statistics, *Table 1 Births, Nuptiality and Age of Mother* (2008) Australian Bureau of Statistics <[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/1B23C8E60948A2B8CA2574EF0013F3C3/\\$File/33010do005_2007.xls](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/1B23C8E60948A2B8CA2574EF0013F3C3/$File/33010do005_2007.xls)> at February 2009.

¹⁹³ *Department of Community Services v Y* [1999] NSWSC 644, [91]-[97] (Austin J).

¹⁹⁴ See for example, *State of Queensland v B* [2008] QSC 231.

¹⁹⁵ *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth).

¹⁹⁶ See for example, *Director-General, Department of Community Services; Re Jules* [2008] NSWSC 1193.

¹⁹⁷ See, *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511.

¹⁹⁸ For an example of this reasoning see, *Director-General, Department of Community Services; Re Jules* [2008] NSWSC 1193.

¹⁹⁹ *Family Law Act 1975* (Cth) s 67ZC(2).

²⁰⁰ *Llyod v Lloyd* [1980] FLC 90816.

²⁰¹ *Re Baby A* [1999] NSWSC 787 [18]-[20] (Justice Young). Citing with approval, *Wellesley v Beaufort* (1827) 38 ER 236, 242 (Lord Eldon).

²⁰² *Family Law Act 1975* (Cth) s 60CC(2).

²⁰³ *Family Law Act 1975* (Cth) s 60CC(3).

The decision to circumcise a child may have an important impact on the development of the child. His relationship with his parents, his family, and the community he is raised in, may be affected by his circumcision status. Courts may also consider the impact that circumcision may have on a child's physical, psychological and even spiritual development.

5.3.7 The British decision of *Re J* considered whether the performance of a circumcision was in the best interests of the child in that case.²⁰⁴ The child in question lived with his non-practising Christian mother and was to be raised in a largely secular community. His father, a Muslim, sought the circumcision of his son. It was argued that the circumcision would see the child 'firmly identified with his father, and confirmed in the eyes of Islam as a Muslim.'²⁰⁵ Ultimately, the court decided not to authorise the circumcision. This was because the child would not:

grow up in an environment in which circumcision is a part of family life; or in which circumcision will be in conformity with the religion practised by his primary carer; or in which his peers have all been circumcised and for him not to be so would render him either unusual or an outsider.²⁰⁶

Justice Wall characterised circumcision as an 'effectively irreversible surgical intervention which has no medical basis in J's case'.²⁰⁷ The potential benefits of the circumcision were largely negated, in his Lordship's view, by the child's secular upbringing.²⁰⁸ Justice Wall also suggested that:

The disadvantages are that despite the father's passionate defence of the procedure, J may be traumatised by it; he will, moreover, be living in the household of his mother, who disagrees with the procedure, and will find great difficulty in presenting it to J in a positive light.²⁰⁹

5.3.8 The decision in *Re J* cannot be viewed as authority for the proposition that a religious circumcision will never be authorised by a court when the child's primary care giver intends to raise them in a secular community. The court will ultimately weigh all the relevant factors in the circumstances to determine what is in each child's best interests.²¹⁰ However, the upbringing of the child may often be a significant consideration in determining the best interests of the child. The authorisation of a circumcision was also considered in the English case of *Re S*.²¹¹ Justice Baron determined that circumcision was not in the child's best interests in that case because the procedure was irreversible, the child was ambivalent about his religion, he would be subject to the teachings of the different religions of his parents (Jainism and Islam respectively), and the proposed circumcision of the child could be postponed without any detriment until he was old enough to decide the matter himself.²¹²

5.3.9 Whether circumcision is classified as a 'special medical procedure' or not, (which is discussed below), the factors codified as relevant for such procedures in rule 4.09 of the Family Law Rules 2004, may help guide a court's consideration of whether a circumcision is in a child's best interests. Rule 4.09(2) refers to the matters that are relevant:

- (a) the exact nature and purpose of the proposed medical procedure;
- (b) the particular condition of the child for which the procedure is required;
- (c) the likely long-term physical, social and psychological effects on the child:
 - if the procedure is not carried out; and
 - if the procedure is carried out;

²⁰⁴ First instance: *Re J* (Specific Issue Orders: Muslim Upbringing and Circumcision) [1999] 2 FCR 345. On appeal: *Re J* (Child's Religious Upbringing and Circumcision) [2000] 1 FCR 307.

²⁰⁵ *Re J* (Specific Issue Orders: Muslim Upbringing and Circumcision) [1999] 2 FCR 345, 365 (Wall J).

²⁰⁶ *Re J* (Specific Issue Orders: Muslim Upbringing and Circumcision) [1999] 2 FCR 345, 367 (Wall J).

²⁰⁷ *Re J* (Specific Issue Orders: Muslim Upbringing and Circumcision) [1999] 2 FCR 345, 367 (Wall J).

²⁰⁸ *Re J* (Specific Issue Orders: Muslim Upbringing and Circumcision) [1999] 2 FCR 345, 367 (Wall J).

²⁰⁹ *Re J* (Specific Issue Orders: Muslim Upbringing and Circumcision) [1999] 2 FCR 345, 365 (Wall J).

²¹⁰ *Family Law Act 1975* (Cth) s 60CC(3)(m).

²¹¹ *Re S* [2005] 1 FLR 236.

²¹² *Re S* [2005] 1 FLR 236, [83].

- (d) the nature and degree of any risk to the child from the procedure;
- (e) if alternative and less invasive treatment is available – the reason the procedure is recommended instead of the alternative treatments;
- (f) that the procedure is necessary for the welfare of the child;
- (g) if the child is capable of making an informed decision about the procedure – whether the child agrees to the procedure;
- (h) if the child is incapable of making an informed decision about the procedure – that the child:
 - is currently incapable of making an informed decision; and
 - is unlikely to develop sufficiently to be able to make an informed decision within the time in which the procedure should be carried out, or within the foreseeable future;
- (i) whether the child’s parents or carer agree to the procedure.²¹³

The rules indicate that the future capacity of the child to decide himself, and a lack of necessity to perform the procedure before the child has that capacity, as recognised in *Re S*,²¹⁴ will be important considerations in deciding whether or not to authorise a circumcision.

5.3.10 In determining whether the particular procedure is in the child’s best interests, the precise nature of the procedure; the reason for the circumcision; the child’s views; the method used, including the pain relief available, the capacity to minimise and cope with complications; and the skill of the circumciser, may all be considered. The least invasive and least dangerous option available that fulfils the beneficial purpose of the procedure will be taken. A court, for example, might authorise the child to undergo an alternative less invasive act or ritual in lieu of full circumcision if that would fulfil the same purpose as the proposed circumcision.

5.4 Is court authorisation required for a minor’s circumcision?

5.4.1 Parents must seek court authorisation for ‘special medical procedures’. A procedure is a ‘special medical procedure’ if the procedure is non-therapeutic and there is a significant risk of the parent making a wrong decision as to what is in the best interests of the child.²¹⁵ In the leading Australian case of *Secretary of the Department of Health and Community Services v JWB and SMB (Re Marion)*, which dealt with the sterilisation of a mentally disabled female minor, the High Court found that the procedure’s non-therapeutic purpose, its irreversible, major and invasive nature, and most importantly, the significant risk of making a wrong decision and the grave consequences of a wrong decision, required that court authorisation be sought for the procedure.²¹⁶

5.4.2 The ‘special medical procedures’ for minors that currently require court authorisation include, gender reassignment surgery;²¹⁷ gender reassignment treatment;²¹⁸ the removal of a healthy organ; and perhaps the removal of regenerative tissue,²¹⁹ at least when these procedures are not being performed for an undisputed therapeutic benefit to the patient.²²⁰ Those procedures do not fall within the ordinary scope of parental power to consent to medical treatment. A Justice of the Australian High Court, in non-binding

²¹³ *Family Law Rules 2004* (Cth) r 4.09(2).

²¹⁴ *Re S* [2005] 1 FLR 236.

²¹⁵ *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

²¹⁶ *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 249.

²¹⁷ *Re A* (1993) 16 FamLR 715.

²¹⁸ *Re Alex* [2004] FamCA 297.

²¹⁹ *Re GWW and CMW* (1997) 21 FamLR 612. Contra: *Re Inaya* (Special Medical Procedure) [2007] FamCA 658.

²²⁰ *Re GWW and CMW* (1997) 21 FamLR 612. Contra: *Re Inaya* (Special Medical Procedure) [2007] FamCA 658.

comments, has recognised the power of parents to authorise a circumcision.²²¹ Similar comments have also been made in the Family Court of Australia.²²² The issue has not received substantial judicial consideration.

Non-therapeutic

5.4.3 *Marion's* case suggested that therapeutic surgery is surgery performed to treat a malfunction or disease.²²³ Justice Brennan offered a similar yet more thorough definition of 'therapeutic' and 'non-therapeutic' treatment:

I would define treatment (including surgery) as therapeutic when it is administered for the chief purpose of preventing, removing or ameliorating a cosmetic deformity, a pathological condition or a psychiatric disorder, provided the treatment is appropriate for and proportionate to the purpose for which it is administered. "Non-therapeutic" medical treatment is descriptive of treatment which is inappropriate or disproportionate having regard to the cosmetic deformity, pathological condition or psychiatric disorder for which the treatment is administered and of treatment which is administered chiefly for other purposes.²²⁴

...

Therapeutic medical treatment is calculated to enhance or maintain as far as practicable the physical or mental attributes which the patient naturally possesses; it is not calculated to impair or destroy those attributes and the capacities they afford.²²⁵

5.4.4 Justice Brennan's definition recognises that a procedure will only be therapeutic if it is appropriate and not disproportionate to fulfilling the purpose of the procedure. Circumcisions performed for solely religious or aesthetic reasons are undoubtedly non-therapeutic. It is not immediately clear whether procedures with distant possible prophylactic benefits, particularly benefits that are disputed as uncertain, are therapeutic under Brennan J's detailed definition, or the definition in the majority judgment, in *Re Marion*. Chief Justice Nicholson in *Re Alex* suggested that therapeutic would be limited to mean the treatment of:

disease in or malfunctioning of organs. In the context of sterilisation for example, they would seem to have had in mind a malignant cancer of the reproductive system which required an intervention that was medically indicated for directly referable health reasons.²²⁶

5.4.5 In *Re Marion*, the court refused to characterise sterilisation, with its possible psychological, menstrual hygiene and management benefits, as therapeutic. The High Court has seemed reluctant to attribute a therapeutic purpose unless there is clear evidence of the procedure being primarily for the correction, curing and treatment of an existing disease, deformity or malfunction.

Invasive, irreversible and major surgery

5.4.6 In *Re Marion* the High Court of Australia suggested that the invasive, irreversible and major nature of a sterilisation procedure makes it a special procedure which requires court authorisation. Circumcision is invasive, in that it requires incisions into the flesh, and is practically irreversible.²²⁷ However, the procedure might not be characterised as major. Serious and major complications of circumcision are rare. The procedure is minor and routine compared to female surgical sterilisation. Circumcision is unusual because the ethics of the procedure are being questioned long after the procedure has garnered wide acceptance. Procedures like sterilisation, gender reassignment and tissue harvesting have been regarded as controversial

²²¹ *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 295 (Deane J).

²²² See, *Re Inaya* (Special Medical Procedure) [2007] FamCA 658, [60]; *Re Jane* (1988) 85 ALR 409, 440.

²²³ *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 250 (Mason CJ, Deane, Toohey, Gaudron JJ).

²²⁴ *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 269 (Brennan J).

²²⁵ *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 274 (Brennan J).

²²⁶ *Re Alex: Hormonal Treatment for Gender Identity Dysphoria* [2004] FamCA 297, [195].

²²⁷ An unaltered foreskin has special qualities that cannot be reproduced once it is excised. See: Steve Scott, above n 6.

ever since they were first proposed. It may be that the greater the controversy associated with the procedure the greater the chance of it being categorised as major.

5.4.7 Even if circumcision cannot be categorised as major surgery, the decisions following *Re Marion* have not required the presence of all three of the *Re Marion* surgery indicators (invasive, irreversible and major) for court authorisation to be required.²²⁸ If circumcision is characterised by a court as ‘minor’ it will be a factor that points against the need for court authorisation. However, of more importance in each case is the significant risk of making a wrong decision and the grave consequences should a wrong decision be made.

The significant risk of making the wrong decision

5.4.8 Three matters in particular may weigh upon a court’s consideration of whether there is a significant risk of making a wrong decision to authorise the circumcision of a minor. The first is that most healthy children will acquire the capacity and maturity to authorise the procedure themselves later in life. Accurately predicting whether the best interests of a young child truly warrant a permanent non-medically necessary alteration of their body before they have developed their own views on the procedure is a difficult task.

5.4.9 Secondly, the ethical, medical, psychological and legal issues involved in any decision to circumcise might make it desirable to shift the question of authorisation from the medical (or religious) profession to the courts. The sensitive and ethically contentious nature of infant circumcision in particular suggests that a decision as to the best interests of the child might be better ensured if a court is made the final arbiter.²²⁹

5.4.10 Finally, court involvement may be appropriate and necessary to ensure both that all the views of the interested parties’ concerned (parents, family and others)²³⁰ are properly considered and that ultimately the child’s interests prevail. Disagreement between parents will almost certainly require court intervention to determine whether the procedure is in the child’s best interests. In a case involving parental disagreement Justice Wall in *Re J* agreed with the proposition that:

where more than one person shares parental responsibility, no one holder of parental responsibility should be able to have an incompetent child circumcised against the wishes of any of the others. Thus where there is a disagreement between holders of parental responsibility about the circumcision of a male child, circumcision should not be carried out without the leave of the court.²³¹

That conclusion was affirmed by the Court of Appeal.²³² Former Chief Justice Nicholson of the Family Court of Australia has also suggested that wherever there is a dispute between guardians over any significant procedure (invasive and non-therapeutic) court authorisation ought to be sought.²³³ It cannot be said with complete certainty whether the risk of making a wrong decision, particularly in cases where there is parental agreement, would be deemed to be sufficiently significant to require court authorisation for the procedure.

²²⁸ Different conclusions have been reached previously upon whether a bone marrow transplant (which is invasive but not irreversible) is a special medical procedure. See: *Re GWW and CMW* (1997) 21 FamLR 612. Contra: *Re Inaya* (Special Medical Procedure) [2007] FamCA 658.

²²⁹ A similar argument was accepted in *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 250-251.

²³⁰ This was accepted as a factor in *Re Marion*, see, *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 250-251.

²³¹ *Re J* (Specific Issue Orders: Muslim Upbringing and Circumcision) [1999] 2 FCR 345, 369 (Wall J).

²³² *Re J* (Child’s Religious Upbringing and Circumcision) [2000] 1 FCR 307, [21], [30].

²³³ Alastair Nicholson, Victorian Legal Aid, *A Question of Right Treatment: The Family Court and Special Medical Procedures for Children an Introductory Guide for use in Victoria* (1998) viii.

The consequences of a wrong decision are particularly grave

5.4.11 Some of the negative consequences of circumcision are discussed in Part 2 of this Issues Paper. Circumcision has graver consequences than many regenerative tissue and cell donation procedures. Even if a court considers the physical loss following circumcision negligible, the social and psychological effects of a wrong decision can be devastating. The significance of the impact of feeling acted upon against your wishes, or best interests, is particularly important in the context of infant circumcision. In jurisdictions like Tasmania, where the circumcision rate is low, this pain has been exacerbated for some men who have experienced ridicule and even social awkwardness because their penis differs notably from their peers.²³⁴ The high profile cases of attempted suicide, and suicide, around the world, including in Australia,²³⁵ of men forced to live with lasting complications of a circumcision performed on them as a child are an extreme illustration of the possible devastating consequences of circumcising infants.

5.4.12 For other men, their circumcision status is an important part of their identity. Circumcision can be a mark that identifies them with something important in their life (their father, or their faith, for example). A failure to be circumcised can have significant consequences for the relationships in some men's lives. The traditional penalty for not circumcising a male child on the eighth day of life in the Jewish faith, for example, is *Karet*, or excision from the religious community.²³⁶ Consequences for either decision, to circumcise or not to circumcise, may be particularly grave for the child concerned. Whether a court will consider the chance of such grave consequences occurring sufficient to require court authorisation for all non-therapeutic circumcisions is uncertain.

Conclusion on authorisation for minors

5.4.13 Boys with sufficient understanding and intelligence to enable them to understand fully what is proposed with their circumcision will, like adults, be able to authorise their own non-therapeutic circumcision.

5.4.14 It cannot be said with certainty whether non-therapeutic circumcision of an incapable minor will always require court authorisation in law or not. Current practice and non-binding judicial comments suggest that joint parental agreement is sufficient to authorise a child's circumcision without there being court intervention. However, it is quite possible, and perhaps even likely, that court authorisation will be a requirement whenever there is parental disagreement over the non-therapeutic circumcision of a child.

5.5 Who may challenge whether a circumcision is in the child's best interests?

5.5.1 Where parents share joint parental responsibility under the *FLA*, decisions that involve major long-term issues, which include issues about the care, welfare and development of the child including their health and religious and cultural upbringing, must be made jointly.²³⁷ Parents must also consult each other about such decisions and attempt to reach a joint decision.²³⁸ The decision to circumcise a child is almost certainly a decision regarding a major long-term issue.

5.5.2 The decision to circumcise, as a potential issue in the exercise of parental responsibility and as an aspect of the care, welfare and development of the child, may possibly be the subject of an *FLA* parenting

²³⁴ Private communication with an anonymous twenty one year old Tasmanian circumcised as an infant, 11 June 2008.

²³⁵ For an Australian example see: Shane Peterson, *Assaulted and Mutilated: Shane Peterson's Account of Circumcision Trauma* (2006) Circumcision Information Australia <<http://www.circinfo.org/account.html>> at 27 January 2009. For David Reimer's harrowing life story after his botched circumcision, see: John Colapinto, *As Nature Made Him: The Boy Who Was Raised as a Girl* (2000).

²³⁶ Genesis 17:14.

²³⁷ *Family Law Act 1975* (Cth) s 4(1).

²³⁸ *Family Law Act 1975* (Cth) s 65DAC(3).

order. A parenting order provides direction to a parent to act in what the court considers the best interests of the child.²³⁹ A parenting order may be applied for by the child's parents, the child himself (the *FLA* provides that an Independent Children's Lawyer may be appointed by a party, or on the court's initiative, if it is in the child's best interests),²⁴⁰ a grandparent of the child, or any other person concerned with the care, welfare or development of the child.²⁴¹ If a parenting order is breached, the court may make an order requiring the defaulting party to attend an approved parenting program.²⁴² The court may also order that the innocent party be compensated for having to bring an action for the breach of the parenting order.²⁴³ More serious penalties, which include fines and imprisonment, can be ordered by the court for serious or repeated breaches of parenting orders.²⁴⁴

5.5.3 If, in the particular instance, the decision to circumcise does not come within the ordinary scope of parental power, (see discussion above at [5.4]) it is necessary for the person seeking the circumcision to apply for court authorisation. A parent, a grandparent, the child himself or any other person concerned with the care, welfare or development of the child may bring an action under the court's welfare power to challenge whether a proposed circumcision is in the best interests of the child.²⁴⁵

Questions

3. Do you think the law relating to the authorisation of non-therapeutic circumcision requires clarification?
4. Under what circumstances should a parent be able to authorise the circumcision of their child? (Please see Part 10 for a detailed list of factors which might influence when a parent may authorise a circumcision).
5. Should the authorisation of a court, or some other form of independent body, be required to legally perform a circumcision in some, or in all, circumstances?

²³⁹ *Family Law Act 1975* (Cth) s 60CA.

²⁴⁰ *Family Law Act 1975* (Cth) s 68L(2).

²⁴¹ *Family Law Act 1975* (Cth) s 65C.

²⁴² *Family Law Act 1975* (Cth) s 70NEB.

²⁴³ *Family Law Act 1975* (Cth) s 70NEB.

²⁴⁴ *Family Law Act 1975* (Cth) s 70NFB.

²⁴⁵ *Family Law Act 1975* (Cth) s 69C. As discussed above (see [5.3.2]-[5.3.4]), orders for the welfare of ex-nuptial children may still have to be made under the Supreme Courts inherent *parens patriae* jurisdiction.

Part 6

Legal Responsibilities of Circumcisers

6.1.1 This Part will discuss the main obligations that a circumciser has at each stage of the provision of their services. The following discussion is not comprehensive.²⁴⁶ Those stages are the:

- promotion of the service;
- provision of information;
- confirmation of a proper authorisation for the service;
- the performance of the service; and
- provision of post-service care.

6.1.2 The application of the law discussed in this Part to circumcision is relatively clear. This Part considers the commercial law concept of ‘misleading or deceptive conduct’ in relation to the promotion of a circumciser’s service, the information that a circumciser must provide to the party who authorises a circumcision to avoid liability for battery and negligence, and negligence law as it applies during and after the performance of the procedure. This Part concludes by discussing the time period in which a civil law action must be commenced by a plaintiff in Tasmania, and the issue of whether a civil claim can be brought by a person injured during a circumcision for which they themselves are criminally liable.

6.2 Promotion of the service

6.2.1 Consumer regulation legislation will apply to any circumcision provided as part of a contractual agreement. The Commonwealth’s *Trade Practices Act 1974 (TPA)*,²⁴⁷ Tasmania’s *Fair Trading Act 1990 (FTA)*²⁴⁸ and the common law regulate how a circumciser, when there is a contract, may promote and provide their service. The *TPA* is a Commonwealth Act and cannot be altered by the Tasmanian Parliament. Accordingly, the TLRI will not consider reform to that Act.

6.2.2 The circumciser’s primary obligation under both the *TPA* and the *FTA*, when promoting their service is to not engage in conduct that is ‘misleading or deceptive or is likely to mislead or deceive’.²⁴⁹ Courts consider all the circumstances of a particular case, including a person’s silence, in determining whether their conduct was likely to mislead or deceive.²⁵⁰ They do this by gleaning the overall impression of the representation from the perspective of a reasonable person in the promotion’s target audience.²⁵¹ The law allows for limited ‘puffery’ – the use of promotional language (usually involving subjective claims and the use of superlatives that no reasonable person would take literally). In the context of surgical procedures, like circumcision, the courts may not be as willing to allow as much leeway for puffery.²⁵² Circumcisers ought to refrain from exaggeration, unsubstantiated or contested claims when they promote their service. Claims of that nature should not be made without clear qualifications.

²⁴⁶ To keep this Issues Paper at a manageable length, some relevant actions, like an action in unconscionability, have not been discussed.

²⁴⁷ *Trade Practices Act 1974* (Cth).

²⁴⁸ *Fair Trading Act 1990* (Tas).

²⁴⁹ *Trade Practices Act 1974* (Cth) s 52(1); *Fair Trading Act 1990* (Tas) s 14.

²⁵⁰ *Demagogue Pty Ltd v Ramensky* (1992) 110 ALR 608.

²⁵¹ *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191.

²⁵² Australian Competition and Consumer Commission, *Fair Treatment Guide to the Trade Practices Act for the Advertising or Promotion of Medical and Health Services* (2000) 10.

Who may bring an action for misleading or deceptive conduct and what remedies are available?

6.2.3 Both the Australian Competition and Consumer Commission (ACCC) and private individuals can take action under the *TPA*. An individual who suffers loss can apply for damages,²⁵³ an injunction,²⁵⁴ or other orders.²⁵⁵ The ACCC can apply for an injunction,²⁵⁶ or other orders on behalf of victims.²⁵⁷ The ACCC can also bring an action for pecuniary penalties.²⁵⁸

6.2.4 The *FTA* also allows for the imposition of penalties,²⁵⁹ and allows individuals to apply for injunctions,²⁶⁰ damages,²⁶¹ and other orders.²⁶²

6.3 The provision of information

Basic information

6.3.1 A circumciser must provide information in broad terms about the nature of the procedure proposed in order to avoid liability for battery.²⁶³ Very little information, beyond explaining that the operation will be likely to result in pain and an excision of some of the foreskin will be required to successfully defend an action in battery. An action in battery is most likely to arise when the procedure is performed without there being prior consultation between the circumciser and the person who authorises the circumcision. At the beginning of 2008, fifty-year-old Karl Spandl was rushed to his local hospital in Germany after a painful abscess developed on his penis.²⁶⁴ During the operation to treat the abscess the operating surgeon chose to perform a circumcision because he believed it might minimise future complications. Spandl was quoted as saying: '[w]hen I woke up I almost passed out again with shock. I never said they could take that. And now I have almost no feeling in the tip – my sex life has been totally ruined.'²⁶⁵

He has since begun an action against his doctor for the circumcision.²⁶⁶ Actions in battery have also been successfully brought in the United States when babies were circumcised before parents had requested the procedure to be performed.²⁶⁷

Who may bring an action in battery and what remedies are available?

6.3.2 Adults and minors are capable of suing and being sued in battery. A child must be represented by an adult with full legal capacity. Monetary compensation is the traditional remedy for a successful action in battery.

²⁵³ *Trade Practices Act 1974* (Cth) s 82.

²⁵⁴ *Trade Practices Act 1974* (Cth) s 80.

²⁵⁵ *Trade Practices Act 1974* (Cth) s 87.

²⁵⁶ *Trade Practices Act 1974* (Cth) s 80.

²⁵⁷ *Trade Practices Act 1974* (Cth) s 87.

²⁵⁸ *Trade Practices Act 1974* (Cth) s 76(1), 77.

²⁵⁹ *Fair Trading Act 1990* (Tas) s 14.

²⁶⁰ *Fair Trading Act 1990* (Tas) s 34.

²⁶¹ *Fair Trading Act 1990* (Tas) s 37.

²⁶² *Fair Trading Act 1990* (Tas) s 41.

²⁶³ *Rogers v Whitaker* (1992) 175 CLR 479, 490.

²⁶⁴ 'Man Sues Doctor for New Foreskin' (2006) Metro News

<http://www.metro.co.uk/weird/article.html?in_article_id=27769&in_page_id=2> at 3 December 2009.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

²⁶⁷ See: David Llewellyn, 'Legal Remedies for Penile Torts' (1995) 40 *The Complete Mother* 16.

Material information

6.3.3 Dealing with the question of a doctor's proper disclosure of risks at common law, the majority of the High Court in a joint judgment in *Rogers v Whitaker* held that:

The law should recognise that a doctor has a duty to warn a patient of a material risk inherent in the proposed treatment; a risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it.²⁶⁸

6.3.4 Information a person is 'likely to attach significance to' has been, generally,²⁶⁹ treated by the courts as being information 'relevant to' or that 'might influence' their decision to undergo the particular treatment.²⁷⁰ The general principle supporting the decision in *Rogers*, that a person ought to know all the information that may influence their decision to undergo a procedure, suggests a much wider duty than the mere provision of information about risks by a doctor. This has since been affirmed in non-binding comments in the High Court decision of *Rosenberg v Percival*.²⁷¹ Although there is uncertainty in the law, the duty of those who perform the operation may extend to the provision of all the information which might influence their particular patient's decision to undergo the particular procedure.

6.3.5 The common law requirement that a medical practitioner is to provide information of risks has been included in the *Civil Liability Act 2002* (Tas) by s 21 of that Act:

(1) A registered medical practitioner does not breach a duty owed to a patient to warn of risk, before the patient undergoes any medical treatment (or at the time of the patient being given medical advice) that will involve or give rise to a risk of personal injury to the patient, unless the registered medical practitioner at that time fails to give or arrange to be given to the patient the following information about the risk (whether or not the patient asks for the information):

(a) information that a reasonable person in the patient's position would, in the circumstances, require to enable the person to make a reasonably informed decision about whether to undergo the treatment or follow the advice;

(b) information that the registered medical practitioner knows or ought reasonably to know the patient wants to be given before making the decision about whether to undergo the treatment or follow the advice.²⁷²

6.3.6 The High Court in *Rogers v Whitaker* approved the comments made by the Court in the South Australian decision of *F v R* that in determining what information was material at common law, a medical professional must take into account factors including:

the nature of the matter to be disclosed; the nature of the treatment; the desire of the patient for information; the temperament and health of the patient; and the general surrounding circumstances.²⁷³

In practice, the unlikelihood of the risk occurring is effectively never regarded by the courts as a particularly significant factor by itself.²⁷⁴ Australian courts have previously found a duty to warn of risks that were as rare as a 1 in 14,000 and 1 in 10,000,²⁷⁵ and which had only been discussed and described in medical theory as 'very rare'.²⁷⁶ So, although some possible risks of circumcision, including the loss of the penis and death, are

²⁶⁸ *Rogers v Whitaker* (1992) 175 CLR 479, 490.

²⁶⁹ Justice Gummow has suggested that it may mean 'would have been likely seriously to consider and weigh up the risk': *Rosenberg v Percival* (2001) 205 CLR 434, [80].

²⁷⁰ *F v R* (1983) 33 SASR 189, 192; *Rogers v Whitaker* (1992) 175 CLR 479, 494.

²⁷¹ (2001) 205 CLR 434, 478; See also *Haughianl v Paine* (1987) 37 DLR (4th) 624, 625.

²⁷² *Civil Liability Act 2002* (Tas) s 21.

²⁷³ *F v R* (1983) 33 SASR 189, 192; *Rogers v Whitaker* (1992) 175 CLR 479, 488.

²⁷⁴ Thomas Addison, 'Negligent Failure to Inform' (2003) 11 *Torts Law Journal* 165, 172.

²⁷⁵ *Shead v Hooley* [2000] NSWCA 362.

²⁷⁶ *Chappel v Hart* (1998) 195 CLR 232.

very rare, occurring perhaps only once in tens of thousands of cases, circumcisers would be wise not to ignore them entirely when informing their patient about the risks of the procedure. That may be particularly true for patients who are very wary about risks or who are not strongly motivated to have the procedure performed.

6.4 Proper authorisation

6.4.1 The circumciser has a duty to ensure that legal authorisation has been provided for the circumcision that they perform. What constitutes proper authorisation was discussed in more detail in Part 3. Without lawful authorisation, the person circumcised will be entitled to claim for battery. A procedure cannot be legally authorised after it has been performed.

The effect of consent/authorisation forms

6.4.2 A well-drafted and patient signed authorisation form will strongly support a doctor's claim they sufficiently informed a patient. A well-drafted form will acknowledge the nature of the procedure proposed, the risks of the procedure, the concerns of the particular patient and how they have been addressed. However, a signed authorisation form or the provision of an information brochure to a patient is not conclusive evidence that adequate information has been provided. Documents may not be read by the patient properly, may be lacking in key information, may not be patient or procedure specific enough, or may use technical or convoluted language that ought to be explained to the patient in person.²⁷⁷ Although documents are a valuable informative tool they cannot replace the provision of person to person consultation time designed to ensure a patient understands the appropriate information.

6.5 Duties in performance

6.5.1 Circumcisers have a legal obligation to perform circumcisions with reasonable care and skill. This obligation exists as part of the law of negligence and as an implied contractual provision where the circumcision is performed on a contractual basis.²⁷⁸ The following discussion will consider an action in negligence. The Australian common law standard of care was clearly established by the High Court in *Rogers v Whitaker*.²⁷⁹ The majority of the High Court held that:

In Australia, it has been accepted that the standard of care to be observed by a person with some special skill or competence is that of the ordinary skilled person exercising and professing to have that special skill. But, that standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade.²⁸⁰

6.5.2 If a circumciser is found to have met the common law standard of care, no liability will attach to their behaviour. A statutory exception for professionals may apply if their behaviour does not meet the common law standard:

A person practising a profession ("a professional") does not breach a duty arising from the provision of a professional service if it is established that the professional acted in a manner that

²⁷⁷ *Shaw v Langley* [1993] DC QLD 485/91 (Unreported, Pratt DCJ, 24 November 1993) cited in Thomas Addison, 'Negligent Failure to Inform' (2003) 11 *Torts Law Journal* 165.

²⁷⁸ The law of negligence applies irrespective of whether there is a contractual arrangement.

²⁷⁹ *Rogers v Whitaker* (1992) 175 CLR 479.

²⁸⁰ *Ibid*, 631.

(at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.²⁸¹

The exception will apply to medical professionals who perform circumcisions. It is unlikely that the exception for professionals will apply to a layperson who performs a circumcison. It is uncertain whether ritual circumcisers will be considered ‘professionals’ for the purpose of the Act. A breach of duty can still be found when a professional meets the standard that is widely accepted by peer professional practice in their field, ‘if the court considers that the opinion is irrational.’²⁸²

To avoid liability circumcisers should generally perform the procedure in a manner that is widely accepted by the people in their field, but they, particularly in regard to non-medical professionals, need to keep abreast with modern medical opinions to ensure that the peer professional practice they conform with is not irrational or unreasonable.

6.5.3 The duty of a circumciser to perform the operation with reasonable care and skill is a settled area of law. In 1987, a nineteen year old Australian man was awarded \$275,000 for a circumcison that was negligently performed upon him as a child.²⁸³

6.6 Duty to inform of problems and to follow up

6.6.1 A medical professional may continue to have a duty to a patient after they have provided them with treatment and the patient has moved on. A post care duty has been established in the following circumstances: when a doctor ought to have known that a patient should have been provided with more information after a procedure;²⁸⁴ in instances where a doctor knew, or ought to have known, that a review consultation was important for the health of their patient;²⁸⁵ and when a patient is discharged with instructions or advice that their good health requires to be followed.²⁸⁶ There may well be little, if any, content to the post care duty when a circumcison is successfully performed. The precise scope of the post care duty, and whether it will apply to non-medical circumcisers, is uncertain. One academic commentator reviewed the existing case law and suggested that a post care duty may arise when:

- a procedure was unsuccessful or created a further complication;
- there is a long-standing relationship between doctor and patient;
- if the patient is seriously ill and their health is in need of continued medical attention; and
- the diagnosis is provisional or treatment is incomplete.²⁸⁷

Although the law in this area is still taking shape, circumcisers would be wise to err on the side of caution by ensuring that their patient knows and understands all the information and advice, and its importance, relevant to their health, if they find themselves in one of those situations described above.

6.7 Reasonable care and skill: actions in negligence

6.7.1 To succeed in an action in negligence it must be proved the circumciser breached their duty to the patient, that the patient suffered an injury, and that the circumciser caused the injury suffered. This is a settled area of law. The following paragraphs will briefly explain what a plaintiff must prove to successfully

²⁸¹ *Civil Liability Act 2002* (Tas) s 22.

²⁸² *Civil Liability Act 2002* (Tas) s 22(2).

²⁸³ *St Margaret's Hospital for Women (Sydney) v McKibbin* (1987) Aust Torts Rep 59009.

²⁸⁴ *Wighton v Arnot* [2005] NSWSC 637.

²⁸⁵ *Brett v Kloss* [2006] VCC 193.

²⁸⁶ *Kite v Malycha* (1998) SASR 321.

²⁸⁷ Matthew Ellis, ‘Patient Follow-up: The Scope of the Duty, the Impact of Tort Law Reform and Practical Suggestions to Comply with Legal Requirements’ (2007) 15 *Journal of Law and Medicine* 408, 418.

bring an action in negligence against a circumciser once they have established that the circumciser had a duty to them.

Breach of duty

6.7.2 A circumciser will not breach a duty of reasonable care unless: the circumciser did, or ought to have, foreseen the risk of harm to the patient; and the foreseeable risk was not insignificant; and in the circumstances, a reasonable person in the position of the circumciser would have taken precautions to avoid the risk.²⁸⁸ In determining whether a reasonable person would have taken precautions against a risk, legislation directs Tasmanian courts to consider, amongst others things they deem relevant: the probability that the harm would occur if care were not taken; the likely seriousness of the harm; the burden of taking precautions to avoid the risk of harm; and the potential net benefit of the activity that exposes others to the risk of harm.²⁸⁹

Injury

6.7.3 To establish a claim of negligence the plaintiff must prove that they suffered an injury or loss. For a claim of a negligent failure to warn the injury is the eventuation of the risk the plaintiff was not informed about. A plaintiff will only be able to claim for mental harm that is not a consequence of a personal injury if they have a recognisable psychiatric illness.²⁹⁰ Mental or emotional distress like grief, anger or anxiety is not sufficient. Damages for the eventuation of mental illness in parents who witnessed the botched circumcision of their child have previously been awarded in Britain.²⁹¹

Causation

6.7.4 Section 13 of the Tasmanian *Civil Liability Act* establishes the factors relevant to determining causation. Causation of the injury is established by proving that the particular harm would not have occurred but for (or was ‘a necessary element of’ under the *Civil Liability Act*) the defendant’s negligence; and following a consideration of normative issues, that it is ‘appropriate’ for the scope of the liability of the person in breach to extend to the harm so caused.²⁹²

6.8 Who may bring an action in negligence and the remedy for a successful claim

6.8.1 If the plaintiff can prove to the court, on the balance of probabilities, (assuming no defences apply) that the circumciser’s negligence caused injuries to them the court will order monetary compensation to be paid by the circumciser to the plaintiff. The purpose of the plaintiff receiving compensation is to put him in the same position as if he had not sustained the injuries.²⁹³ Damages are typically a one off payment, requiring an assessment of past losses suffered as well as speculation about the plaintiff’s future losses. The courts are unconcerned with how the money is used. The burden is on the plaintiff to establish the losses they are seeking damages for.

6.8.2 Punitive damages (exemplary damages) may be awarded to punish the defendant and deter others from engaging in similar conduct. At common law, punitive damages may only be awarded for ‘a conscious

²⁸⁸ *Civil Liability Act 2002* (Tas) s 11(1).

²⁸⁹ *Civil Liability Act 2002* (Tas) s 11(2).

²⁹⁰ *Civil Liability Act 2002* (Tas) s 33.

²⁹¹ *Ibrahim (a minor) v Muhammed* (Unreported, Queens Bench Division, Taylor J, 21 May 1984).

²⁹² *Ruddock v Taylor* (2003) 58 NSWLR 269, [87]-[88].

²⁹³ *Todorovic v Waller* (1981) 150 CLR 402, 402.

and contumelious disregard for the plaintiff's rights'.²⁹⁴ Aggravated damages, i.e. damages provided to compensate for the plaintiff's hurt feelings caused by a defendant's behaviour that goes beyond 'ordinary wrongdoing, of a kind consistent with ordinary human fallibility', may also be awarded.²⁹⁵ Aggravated and punitive damages are only awarded in practice in exceptional circumstances.

6.9 Limitation issues

6.9.1 Tasmanian legislation requires an action for compensation for personal injuries to be commenced within three years of the cause of action arising.²⁹⁶ Tasmania also makes provision to allow the time to run from the date of discoverability, when the plaintiff knows, or ought to have known, the injury had occurred, was attributable to the conduct of the defendant and was significantly sufficient to warrant bringing proceedings, rather than from when the cause of action accrued.²⁹⁷ However, an action may not be brought in Tasmania after 12 years from the date of the act alleged to have caused the personal injury in the plaintiff.²⁹⁸ Tasmania allows for the commencement of an action within three years of when the plaintiff attains 25 years of age if the intended defendant of the action is a parent, or if their parents are in a close relationship to the intended defendant.²⁹⁹

6.10 Illegality defence

6.10.1 Australian law recognises that a remedy may not always be available to a person who is harmed whilst committing a criminal offence. As discussed previously (**see [4.6]**) a person undergoing an illegal circumcision may themselves, in some circumstances (where they aid, assist, abet or instigate an illegal circumcision), be criminally liable as an accessory to the illegal circumcision. Section 6 of the *Civil Liability Act 2002* prohibits the award of damages for personal injury or death when a court is satisfied that at the time of the incident that caused the injury the person harmed was engaged in conduct that constitutes an offence punishable by imprisonment for greater than six months and that the conduct contributed materially to the injury suffered.³⁰⁰ Assault, wounding and both child abuse/ill-treatment offences are punishable by imprisonment for greater than six months. It is irrelevant whether the person harmed has been, will be or is capable of being proceeded against or convicted for the offence.³⁰¹ For the purposes of the provision, the court need only be satisfied on the balance of the probabilities that the injured person was engaged in conduct that constitutes the offence.³⁰²

6.10.2 In summary, a court will not provide a remedy in tort to a person who is injured during a circumcision that constitutes an offence punishable by imprisonment for greater than six months if the person injured is also criminally liable as an accessory to the offence (**for when a person is liable as an accessory see [4.6]**).³⁰³

²⁹⁴ *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 154 (Windeyer J).

²⁹⁵ *New South Wales v Riley* (2003) 57 NSWLR 496, 528.

²⁹⁶ *Limitation Act 1974* (Tas) s 5(1).

²⁹⁷ *Limitation Act 1974* (Tas) s 5A (3)(a).

²⁹⁸ *Limitation Act 1974* (Tas) s 5A 3(b)

²⁹⁹ *Limitation Act 1974* (Tas) s 26(7)-(8).

³⁰⁰ *Civil Liability Act 2002* (Tas) s 6.

³⁰¹ *Civil Liability Act 2002* (Tas) s 6(2).

³⁰² *Civil Liability Act 2002* (Tas) s 6(1)(a).

³⁰³ The illegality defence will not have an application to any child under the age of 10. This is because under the *Criminal Code* 'no act or omission done or made by a person under ten years of age is an offence.' See, *Criminal Code 1924* sch 1 s 18(1). No act or omission done or made by a person between 10 and 14 years of age is an offence 'unless it be proved that he had sufficient capacity to know that the act or omission was one which he ought not to do or make.' See, *Criminal Code 1924* sch 1 s 18(2).

Questions

6. Should the law clearly establish that medically qualified and non-medically qualified circumcisers have the same legal duties in the provision of their service?
7. Should the law set specific duties for circumcisers in the provision of their service? (Please see Part 10 for some suggestions on the possible content of a set of detailed duties for a circumciser).
8. Should there be a special limitation period for actions brought by an adult for a circumcision performed on them as a minor?

Part 7

Human Rights Law

7.1.1 Australia is a party to over nine hundred treaties and international conventions.³⁰⁴ Some of those instruments create binding obligations that can affect the regulatory framework for circumcision in Australia. Tasmanian and Commonwealth legislation also recognise some limited human rights. The circumcision of an adult against their wishes has previously been condemned by experts as a breach of international human rights law.³⁰⁵ There are almost no other specific pronouncements on male circumcision in international law.

7.1.2 This Part discusses the effect of Australia's international law obligations and explains how international law is interpreted. It also provides a brief outline of the human rights relevant to the practice of male circumcision in Australia. Tasmanian law should be consistent with Australia's international human rights obligations. The Institute will consider the applicable international human rights law when formulating its reform proposal in the Final Report.

7.2 Effect of Australia's international law obligations

7.2.1 International law does not operate as a direct source of rights and obligations in Australia until implemented in domestic legislation.³⁰⁶ Australia is obligated to implement the international law that it has ratified, and Australians are entitled to the rights within those treaties.³⁰⁷ However, Australia has not fully implemented the international law conventions it has ratified. Domestic law is not invalid for inconsistency with an international law obligation.³⁰⁸ There is no legal mechanism in international law to bring Australia into compliance with international law.

7.2.2 Australia has ratified the First Optional Protocol of the *International Covenant on Civil and Political Rights (ICCPR)*.³⁰⁹ That protocol creates a mechanism through which individuals, who feel that they have had their rights under the *ICCPR* infringed, can lodge a public complaint with the United Nations (UN) Human Rights Committee.³¹⁰ Complaints can only be lodged with the Human Rights Committee once the person has exhausted all available domestic remedies.³¹¹ The finding of the Human Rights Committee, although a source of political pressure to change, is not binding on Australia.

7.2.3 The Commonwealth Parliament has passed the *Human Rights and Equal Opportunity Commission Act*.³¹² This Act establishes the Human Rights and Equal Opportunity Commission (now referred to as the Human Rights Commission or HRC). The Act provides the commission with the responsibility of monitoring many of the human rights instruments ratified by Australia, including the *ICCPR*, the *Convention on the*

³⁰⁴ *Minister for Immigration v Teoh* (1995) 183 CLR 273, 316.

³⁰⁵ *Final Report of the Commission of Experts [on the Former Yugoslavia]*, Part IV(F), SC Res 780, S/1994/674 (1994).

³⁰⁶ *Tasmanian Wilderness Society Inc v Fraser* (1982) 153 CLR 270.

³⁰⁷ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 26 (entered into force 27 January 1980).

³⁰⁸ *Horta v Commonwealth* (1994) 181 CLR 183.

³⁰⁹ *[First] Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976).

³¹⁰ *[First] Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302, art 1 (entered into force 23 March 1976).

³¹¹ *[First] Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302, art 2 (entered into force 23 March 1976).

³¹² *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

Rights of the Child (CRC),³¹³ the *Declaration of the Rights of the Child*,³¹⁴ and the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*.³¹⁵

7.2.4 The Commission reviews and monitors legislation, conducts inquiries, investigates and conciliates complaints (made against the Commonwealth or one of its agencies), provides policy advice and delivers human rights education in accordance with those aforementioned treaties. The HRC does not have the power to enforce a remedy against a party for a breach of a human right. Where conciliation is insufficient, the HRC can prepare a report of the matter and present it to the Attorney General for tabling before the Commonwealth Parliament with recommendations for reform.

Subsidiary effects of Australia's international obligations

7.2.5 Ratified treaties may still be used domestically as:

- an aid to statutory interpretation;
- an influence on the development of the common law;
- a basis for judicial review of administrative decisions;
- an aid to the exercise of judicial discretion; and
- a guide for law review and reform proposals.

7.3 The interpretation of international law

7.3.1 The *Vienna Convention on the Law of Treaties* guides the interpretation of international conventions.³¹⁶ Article 31 of the convention requires treaties to be interpreted in good faith and in accordance with the ordinary meaning of the words in their context and in light of the treaty's object and purpose.³¹⁷ The *Vienna Convention* allows recourse to the preparatory work of the treaty to confirm the interpretation suggested by the ordinary words when the method of interpretation in Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.³¹⁸

7.4 The applicable human rights

7.4.1 The human rights obligations possibly relevant to circumcision can be separated into seven categories of rights and freedoms. The seven categories of rights and freedoms are:

- freedom of religion;
- the right to be free from torture and all other cruel, degrading, inhumane, or ill treatment;
- the right to life and health;
- the right to private life, autonomy and development;

³¹³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1777 UNTS 3 (entered into force 2 September 1990).

³¹⁴ *Declaration of the Rights of the Child*, GA Res 1386(XIV) U.N. GAOR 14, Supp No 16, UN Doc A/4354 (1959).

³¹⁵ *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UN GAOR 26, Supp No 51, UN Doc A/36/684 (1981).

³¹⁶ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

³¹⁷ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 31 (entered into force 27 January 1980).

³¹⁸ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 32 (entered into force 27 January 1980).

- the right to security;
- equality and non-discrimination; and
- freedom from economic exploitation

A brief summary of the content of each category, and a brief commentary on its application to circumcision in Tasmania, is provided below.

Freedom of religion

7.4.2 Circumcisions are sometimes performed for religious reasons in Tasmania. Many articles in UN General Assembly declarations and in treaties ratified by Australia enunciate a freedom of religion.³¹⁹ They include: Article 18 of the *Universal Declaration of Human Rights (UDHR)*,³²⁰ Article 18 of the *ICCPR*,³²¹ and Articles 14 and 30 of the *CRC*.³²² International law provides a right to freedom of religion and for a person, including a child, to manifest their own religion or belief in practice and observance. The right to freedom of religion would ordinarily protect a person, including a child who is unable to express their own religious views, from having a religious observance imposed upon them. However, international law recognises that parents may have some influence on the spiritual development of their child.

7.4.3 International law provides parents with discretion to influence and direct their children in religious matters. The *ICCPR* requires State Parties to respect a parent's liberty to ensure the religious and moral education of their children in conformity with their own convictions.³²³ The *CRC* also recognises the rights and duties of parents to provide direction to their child in the exercise of the child's right to freedom of religion that is in a manner consistent with the evolving capacities of the child.³²⁴ Whether the right of parents to 'direct' and 'influence' their child in religious matters would allow a parent to circumcise their son, before the child is capable of expressing his own view about the procedure, has never been decided by a human rights court.

7.4.4 Freedom of religion in international law is to be limited only by restrictions clearly prescribed by domestic law that are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.³²⁵ The UN Human Rights Committee has suggested that:

[I]mitations may be applied only for those purposes for which they are prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.³²⁶

7.4.5 Domestically, freedom of religion is provided for by both the Australian and Tasmanian constitutions. Section 116 of the Australian *Constitution* provides:

³¹⁹ *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UN GAOR 36, Supp No 51, UN Doc A/36/684 (1981).

³²⁰ *Universal Declaration of Human Rights*, GA Res 2171 (III), UN Doc A/810 (1948).

³²¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 18 (entered into force 23 March 1976).

³²² *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1777 UNTS 3, art 14, 30 (entered into force 2 September 1990).

³²³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 18(3) (entered into force 23 March 1976).

³²⁴ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1777 UNTS 3, art 5, 14(2) (entered into force 2 September 1990).

³²⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 18(3) (entered into force 23 March 1976).

³²⁶ Human Rights Committee, *General Comment 22: Article 18*, Sess 48, UN Doc HRI/GEN/1/Rev.1 (1994).

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.³²⁷

Section 46(1) of the Tasmanian *Constitution* provides: '[f]reedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.'³²⁸

7.4.6 The provision in the Commonwealth *Constitution* has been interpreted narrowly and only held to affect Commonwealth legislation.³²⁹ The protection afforded by s 116 to religious acts, like religious circumcision, is certainly not absolute. The High Court has noted that not all infringements on religious freedom would be invalid.³³⁰ What precisely an undue infringement is has not been established with certainty.³³¹ The Tasmanian provision expressly recognises that religious practices may be subject to laws made for public order and morality. The freedom of religion in the Tasmanian *Constitution* is not legislatively entrenched and may be overridden by an ordinary Act of parliament.

Torture and cruel, degrading, inhuman and abusive treatment

7.4.7 All people, including children, have a right to be free from acts that amount to torture or to cruel, inhuman or degrading treatment or punishment under international law. Children, in particular, are to be free from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.³³² Each form of prohibited conduct requires a fairly significant level of pain or suffering and a non-benevolent purpose for, and in the context of, the painful treatment. The forms of prohibited treatment in international law are not particularly well defined, and there is often considerable overlap between them in their application to any given set of facts.

7.4.8 The pain and suffering in every circumcision is inflicted intentionally by a circumciser and would be sufficient to establish the physical element for an act of torture, or other form of ill-treatment. The War Crimes Tribunal in *Kvočka* pointedly suggested that: '[m]utilation of body parts would be an example of acts per se constituting torture.'³³³ The context of the harm, and the purpose of the infliction of the harm, at least for most circumcisions, may possibly not be sufficient to establish torture, or any other form of ill-treatment because the requisite mental element is lacking.³³⁴ Circumcisions are usually performed in a spirit of benevolence and with attempts to mitigate pain and suffering, and to promote post procedure healing.³³⁵ However, there has been a consistent willingness to characterise any excision or cutting, however slight, of the female genitalia as 'cruel, inhumane or degrading treatment' whatever the motivation for, or context of, its performance.³³⁶

³²⁷ *Australian Constitution* s 116.

³²⁸ *Constitution Act 1935* (Tas) s 46(1).

³²⁹ See: *Krygger v Williams* (1912) 15 CLR 366; *Attorney-General (Vic); ex rel Black v The Commonwealth* (1981) 146 CLR 559; *Adelaide Company of Jehovah's Witnesses Incorporated* (1943) 67 CLR 116.

³³⁰ *Adelaide Company of Jehovah's Witnesses Incorporated* (1943) 67 CLR 116, 128 (Latham CJ).

³³¹ The High Court of Australia has, however, suggested that the freedom of religion may be restricted when it is essential for the preservation, existence or protection of the community or social order in Australia under the *Australian Constitution*. See: *Adelaide Company of Jehovah's Witnesses Incorporated* (1943) 67 CLR 116, 131-132 (Latham CJ), 149-150 (Rich J), 155 (Starke J).

³³² *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1777 UNTS 3, art 19(1) (entered into force 2 September 1990).

³³³ *Prosecutor v Miroslav Kvočka, Milojica Kos, Mlado Radic, Zoran Zigic, Dragoljub Prcac* (2001) International Criminal Tribunal Yugoslavia (2 November 2001) [144].

³³⁴ For some of the 'torture purposes' see: *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85, art 1 (entered into force 26 June 1987).

³³⁵ However, it should be noted that it is a breach of international law for a person to conduct medical or scientific experimentation without the consent of the person it is performed upon, irrespective of whether there are efforts taken to mitigate pain and suffering, and to promote post procedure healing. See: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 7 (entered into force 23 March 1976).

³³⁶ See for example: Human Rights Committee, *Concluding observations of the Human Rights Committee: Lesotho*, [12], UN Doc CCPR/C/79/Add.106 (1999); Human Rights Committee, *Concluding observations of the Human Rights Committee: Sudan*, [10], UN Doc CCPR/C/79/Add.85 (1997).

7.4.9 The acceptance shown to the practice of male circumcision within so many treaty signatory States makes the classification of circumcision as prohibited ill-treatment unlikely. However, the issue has never been considered by a human rights court.

Right to life and health

7.4.10 International law not only prohibits state actors from doing harm, it creates a positive obligation on states to protect and further the health of people within their jurisdiction. Under international law, every person, including a child, has a right to life and the highest attainable standard of physical and mental health.³³⁷ Australia, under international law, has an obligation to ensure to the maximum extent possible the survival and development of the child.³³⁸ In particular, Australia is obligated to act to reduce infant mortality and take, 'all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.'³³⁹

7.4.11 Female genital mutilation is considered to be a breach of the right to life and health. It is deemed to be a practice harmful to health because, like non-therapeutic circumcision, it is an unnecessary surgical procedure with the inherent possibility of complications.³⁴⁰

7.4.12 It is unlikely that male circumcision will be classified as a breach of the right to life and health. This is partly because the practice is relatively safe, and perhaps even important to the development of some people, but mostly it is due to the acceptance of the practice by most state parties to the relevant conventions.

7.4.13 Should male circumcision be considered a traditional practice harmful to health, Australia would be required to immediately take measures with a view to abolishing the practice, including:³⁴¹ support for the collection and dissemination of research about the practice, discouragement of those who seek circumcisions without a thorough understanding of the practice, and encouragement of politicians and communities leaders to cooperate in influencing attitudes towards the practice.

Private life, autonomy and development

7.4.14 International law requires Australia to establish law which prohibits arbitrary or unlawful interference with a person's privacy and family.³⁴² The Human Rights Committee has suggested previously that: 'the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone.'³⁴³

7.4.15 ICCPR *General Comment No 16* establishes that under international law interferences into a person's privacy, which may include their right to be circumcised in accordance with their wishes, must be

³³⁷ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, art 12.1 (entered into force 3 January 1976).

³³⁸ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1777 UNTS 3, art 6(2) (entered into force 2 September 1990).

³³⁹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1777 UNTS 3, art 24(3) (entered into force 2 September 1990).

³⁴⁰ World Health Organisation, Office of the High Commissioner for Human Rights, United Nations Development Programme, United Nations Economic Commission for Africa, United Nations Educational, Scientific and Cultural Organization, United Nations Population Fund, the Office of the UN High Commissioner for Refugees, the United Nations Children's Fund, United Nations Development Fund for Women, and the United Nations Joint Programme on HIV/AIDS, *Eliminating Female Genital Mutilation: An Interagency Statement* (2008) 8.

³⁴¹ For an application of the terms 'with a view to abolishing' in the context of female genital mutilation see: The Committee on the Elimination of Discrimination against Women, *General Recommendation No 14*, UN Doc HRI/GEN/1/Rev.6 (2003).

³⁴² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 17 (entered into force 23 March 1976).

³⁴³ Human Rights Committee, *A.R. Coeriel and M.A.R. Aurik v. The Netherlands*, Communication No. 453/1991, [10.2], U.N. Doc. CCPR/C/52/D/453/1991 (1994).

justified by a domestic law that is accessible and stated with precision, that conforms to international law and that is reasonable in the circumstances it is applied to.³⁴⁴

7.4.16 Whether the right to privacy limits, or would allow a state to limit, the ability of a parent to circumcise their child is uncertain. Articles 3 and 5 of the *CRC* and Article 24 of the *ICCPR* recognise parental rights, or the role of parents to direct and guide their children, in their development and their exercise of their human rights.³⁴⁵ The Committee on the Rights of the Child has previously interpreted ‘development’ in the context of Article 6 of the *CRC* broadly:

The Committee expects States to interpret ‘development’ in its broadest sense as a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development.³⁴⁶

Even if a parent’s duty to direct and guide a child’s development is broad enough to include a power to circumcise their children, there are further limits on parental power under international law. The limit on parental influence is the best interests of the child (discussed in detail in relation to domestic law in Part 5) and the recognition that parents may only provide guidance and direction in a manner consistent with the evolving capacities of the child.³⁴⁷ Children, even before they reach the age of majority, may be able to exercise rights themselves.

7.4.17 Freeman has suggested that international law requires parents to make decisions as to the development and best interests of the child on the basis of what he terms ‘future orientated consent’. Freeman states:

The question at its simplest is: can the restrictions be justified in terms that the child would eventually come to appreciate? Looking back, would the child appreciate and accept the reason for the restriction imposed upon him or her, given what he or she now knows as a rationally autonomous and mature adult?³⁴⁸

The application of international law to parental authorisation of non-therapeutic circumcision of their child is uncertain. Once again, practice of the contracting parties suggests that parents, at least when it can be said to be in the best interests of the child, may have their children circumcised.

The right to security

7.4.18 Everyone has the right to security of person under the *ICCPR*.³⁴⁹ Australia is obligated to take action to protect any person who has their physical security threatened within its jurisdiction.³⁵⁰ The obligation extends to protecting people in Australia from attacks from private actors.³⁵¹ An act which is lawful under domestic law and does not otherwise breach human rights law will not breach the right to security of person. Further speculation on the application of the right to security of person to circumcision is not possible until there is greater certainty with the application of domestic and international law generally to circumcision.

³⁴⁴ Human Rights Committee, *General Comment No. 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art 17)*: 08/04/88. Thirty-second session, 1988.

³⁴⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 24 (entered into force 23 March 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1777 UNTS 3, art 3, 25 (entered into force 2 September 1990).

³⁴⁶ Committee on the Rights of the Child, *General Comment No 5*, [6], UN Doc CRC/GC/2003/5 (2003).

³⁴⁷ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1777 UNTS 3, art 5 (entered into force 2 September 1990).

³⁴⁸ Michael Freeman, *The Moral Status of Children* (1997) 39.

³⁴⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 9 (entered into force 23 March 1976). Article 9 ICCPR. There are subtle differences to how the right to security of person is interpreted in other international conventions and national legislation. For a discussion see, Rhonda Powell, *Security and the Right to Security of Person* (D Phil Thesis, Oxford University, 2008).

³⁵⁰ *Delgado Páez v Columbia*, Communication No (195/1985).

³⁵¹ *Delgado Páez v Columbia*, Communication No (195/1985).

Equality and non-discrimination

7.4.19 International law prohibits discrimination in the application of international law.³⁵² Although it does not provide binding precedent, the House of Lords in *Wandsworth London Borough Council v Michalak*³⁵³ proposed a useful four step analysis to the application of the discrimination provisions in international law:

1. Do the facts fall within the ambit of one or more of the substantive provisions?
2. Was there different treatment between the complainant and the comparators?
3. Were the comparators in an analogous situation to the complainant?
4. If so did the differential treatment pursue a legitimate aim and bear a reasonable relationship of proportionality to the aim?

Whether the different way the law treats male and female circumcision, or circumcision and any other expressly prohibited treatment, amounts to relevant discrimination is uncertain. It will largely depend upon the extent to which the judge considers the two situations analogous.

7.4.20 Domestically, the *Anti-Discrimination Act* prohibits certain forms of discrimination in Tasmania.³⁵⁴ Discrimination is unlawful treatment that occurs when someone is treated less favourably or is disadvantaged on the basis of any attribute, in connection with an area of activity, covered by the *Anti-Discrimination Act*.³⁵⁵ Discrimination on the grounds of age, gender or sex, race, religious activity or religious belief is prohibited in the provision of facilities, goods and services (in any trade, business or profession), whether the service provider is a private person or a state authority or council.³⁵⁶ Federal law also prohibits discrimination based upon sex, age and race (which includes ethnic origin) in the provision of services.³⁵⁷

7.4.21 Under the Tasmanian legislation, a complaint may only be made within 12 months of the occurrence of the discrimination, unless there are good reasons to make an exemption. Complaints can be made by a person who believes they have been discriminated against, or by a person on behalf of another person or a class of persons (if the majority of the class is likely to consent to such action). Actions required by law are exempt from discrimination law actions.

7.4.22 There are many potential discrimination law issues in connection with male circumcision that are yet to be resolved. They include: whether prohibiting the performance of female genital mutilation but not circumcision is discriminatory; and whether a circumcision provider may be able to choose on the grounds of age, race or religion to whom they offer their services. The result of such actions may depend upon how the service that is provided is defined. For example, if the service provided by public hospitals is categorised as health related their refusal to perform a religious circumcision may not be discriminatory. It may also depend upon whether an analogy can be made between acts, circumcision and female genital mutilation for example, said to illustrate the difference in treatment.

Economic exploitation

7.4.23 Australia is required by international law to protect children from economic exploitation.³⁵⁸ Claims of economic exploitation may be levelled against circumcision in two circumstances. First, when a circumciser benefits economically from encouraging the practice of the performance of unnecessary

³⁵² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 2, 26 (entered into force 23 March 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1777 UNTS 3, art 2, 24 (entered into force 2 September 1990).

³⁵³ *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617, 625.

³⁵⁴ *Anti-Discrimination Act 1998* (Tas).

³⁵⁵ *Anti-Discrimination Act 1998* (Tas) ss 14,15.

³⁵⁶ *Anti-Discrimination Act 1998* (Tas) ss 16, 22.

³⁵⁷ *Sex Discrimination Act 1984* (Cth); *Age Discrimination Act 2004* (Cth); *Racial Discrimination Act 1975* (Cth).

³⁵⁸ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1777 UNTS 3, art 32(1) (entered into force 2 September 1990).

circumcisions. The procedure is relatively easy to perform, quite low risk and Medicare subsidised. It is commonly performed on children and performed by those who may be perceived as being in a position of authority by those who authorise the procedure.

7.4.24 The second circumstance occurs after the foreskin has been excised. Human foreskins, or often extracts from them, can be used to produce skin for skin grafts, insulin and other medical products.³⁵⁹ They are also used in selected cosmetic products.³⁶⁰ A single foreskin can be used to generate products worth hundreds, and perhaps thousands, of dollars. Circumcisers who charge for performing the procedure, and then also surreptitiously sell the excised foreskin for their own gain, could be economically exploiting their circumcised patient.

7.4.25 There is significant uncertainty in the common law as to whether excised tissue, like a foreskin, can be a person's property. Examining the case law, a tentative conclusion can be reached that human tissue can be property once work or skill, such as efforts to preserve the tissue, have been undertaken.³⁶¹ Little other guidance can be taken from the case law. In Tasmania the *Human Tissues Act* governs the donations of, and trade in, human tissue.³⁶² Section 27(1) of the Act operates to prohibit a person from entering into an arrangement to sell or supply a foreskin for valuable consideration.³⁶³ Section 27(2) creates an exception to the general rule against arrangements for supply and sale of human tissue.³⁶⁴ Section 27(2) would operate to allow the sale or supply of a foreskin,

if the tissue has been subjected to processing or treatment and the sale or supply is made for use, in accordance with the directions of a medical practitioner, for therapeutic or scientific purposes.³⁶⁵

The Act, by requiring 'processing or treatment' (the meaning of which is not defined in the Act) of the tissue, seems to create a significant obstacle for a layperson to overcome if they wished to profit from the sale or supply of their excised foreskin.

7.4.26 Human tissue, which includes foreskin, can only be supplied or sold for use, in accordance with the directions of a medical practitioner, for therapeutic or scientific purposes. Foreskins could not, for example, be supplied for use in cosmetic face creams in Tasmania.³⁶⁶ Despite the *Human Tissue Act*, the legal status of human tissue, including excised foreskins, remains uncertain.

³⁵⁹ See for example, Outi Hovatta, *et al*, above n 38; Scott Oates and Arun Gosain, 'Syndactyly Repair Performed Simultaneously with Circumcision: Use of Foreskin as a Skin-Graft Donor Site' (1997) 32(10) *Journal of Pediatric Surgery* 1482; Dermagraft, *Dermagraft Frequently Asked Questions* (2009) Dermagraft: Get Closure <http://www.dermagraft.com/html/1_info/faqs.html#4> at 15 January 2009

³⁶⁰ Amanda Euringer, *Foreskin Facecream* (2007) Tyee <<http://theyee.ca/Views/2007/01/30/Foreskin/>> at 30 January 2007.

³⁶¹ *Doodeward v Spence* (1908) 6 CLR 406. For a discussion on the complex issue of property in the human body see: Richard Taylor, *Human Property: Threat or Saviour?* (2002) *Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v9n4/taylor94.html>> at 29 January 2009.

³⁶² *Human Tissues Act 1985* (Tas).

³⁶³ *Human Tissues Act 1985* (Tas) s 27(1).

³⁶⁴ *Human Tissues Act 1985* (Tas) s 27(2).

³⁶⁵ *Human Tissues Act 1985* (Tas) s 27(2).

³⁶⁶ See, Rosemary Black, above n 40.

Part 8

Regulation in Foreign Jurisdictions

8.1.1 Only South Africa (along with three of its provinces) and Sweden have legislation dealing specifically with male circumcision. The approach to regulation in those two countries differs remarkably and reflects the particular history of male circumcision in those two nations.

8.2 South Africa

8.2.1 Legislation in South Africa, and three of its provinces – South Eastern Cape, Limpopo and Free State – reflects the fact that male circumcision has, and continues to be, practised outside of a western medical context by many people who live in South Africa. Traditional circumcisions are usually performed in special ‘circumcision schools’. Initiates, typically in their mid-teens to their early twenties, are taken to circumcision schools for a period of many days, and even weeks, circumcised and taken through other manhood ceremonies and lessons. There is a disturbingly high mortality rate in South Africa for those who are circumcised in traditional circumcision schools.³⁶⁷ Much of the legislation is designed to ensure a basic level of health care, and autonomy in their decision making for those who are circumcised.

8.2.2 The law in South Africa offers some protection to those who are chronically ill, disabled, and who are mature enough to express their wish to not be circumcised.³⁶⁸ Children over the age of 16 must provide their own consent to the procedure and must be provided with proper counselling before the procedure is performed.³⁶⁹ Circumcisions for children under the age of 16 may only be performed for medical reasons, with the recommendation of a medical practitioner, or for religious reasons.³⁷⁰

8.2.3 The provinces of South Eastern Cape,³⁷¹ Limpopo³⁷² and Free State³⁷³ have enacted further regulation. Those Acts include regulations that limit who may perform circumcisions; limit where they may be performed; allow the state to regulate how, and in what conditions, circumcisions are performed; require the people circumcised to undergo and pass a medical examination prior to their circumcision; set limits on how old a person must be before they can be circumcised; require consent of a parent or guardian for minors who are under a specific age; and allow for inspections of circumcisers’ equipment, buildings and their patients.

8.3 Sweden

8.3.1 Circumcision is not a traditional practice in Sweden. Until relatively recently circumcision was only practised in Sweden by its small Jewish population. An influx of Muslim immigrants, who practise circumcision, and a high profile death attributed to circumcision, encouraged the Swedish parliament to

³⁶⁷ For the official circumcision statistics of the Eastern Cape of South Africa see: Eastern Cape Department of Health, *Summary Of Seasonal Statistics Since June 2001: Mutilations and deaths from 2001 to 2006* (2006) Eastern Cape Department of Health <<http://www.ecdoh.gov.za/uploads/files/120707095947.pdf>> at 4 February 2009; Eastern Cape Department of Health, *Statistics For June: 2007* (2007) Eastern Cape Department of Health <<http://www.ecdoh.gov.za/uploads/files/281107142127.pdf>> at 4 February 2009.

³⁶⁸ *Children’s Act 2005* (RSA) ss 11(3), 12(10).

³⁶⁹ *Children’s Act 2005* (RSA) s 12(9).

³⁷⁰ *Children’s Act 2005* (RSA) s 12(8).

³⁷¹ *Application of Health Standards in Traditional Circumcision Act 2001* (South Eastern Cape).

³⁷² *Province Circumcision Schools Act 1996* (Limpopo Province).

³⁷³ *Initiation School Health Act 2004* (Free State).

regulate male circumcision.³⁷⁴ A comprehensive legislative scheme for male circumcision was enacted through the *Circumcision of Boys Act 2001*.³⁷⁵ The law was passed with substantial criticism, both locally and internationally, by Jewish groups in particular.³⁷⁶ The legislation was reviewed in 2005 by the National Board of Health and Welfare which recommended that the legislation be maintained.

8.3.2 The *Circumcision of Boys Act* applies to any operation, on a boy younger than 18, that fully or partly removes the foreskin, and that is not for the purpose of the prevention, investigation or treatment of medical disease and injury.³⁷⁷ The Act requires the provision of information to minors to be circumcised if they are capable of understanding it,³⁷⁸ requires the minor's views about the procedure to be determined, and prohibits circumcisions to be performed against the will of the minor.³⁷⁹

8.3.3 A parent or guardian may request, or consent to, the operation after they have been informed of the implications of the procedure.³⁸⁰ If custody of the boy is shared, both parents must be provided with the relevant information by a medically qualified person and both must consent to the procedure.³⁸¹ The procedure itself must be performed with an anaesthetic, administered by a registered nurse or medical practitioner under hygienic conditions in a manner that is in the best interests of the boy.³⁸² Only registered medical practitioners can perform the operation on a child more than two months of age.³⁸³ Before the baby turns two months old, the option to have the baby circumcised by either a registered medical practitioner or a person holding a special licence exists.³⁸⁴ To be given a licence, the person must be capable of fulfilling all government regulations that apply to circumcisers.³⁸⁵ Those regulations include being subject to monitoring and inspections, the maintenance of sterile and hygienic conditions, and the requirement that circumcisers only perform the procedure when a registered health professional (nurse or doctor) provides anaesthetic to the child.³⁸⁶

8.3.4 The National Board of Health and Welfare has the right to inspect the performance of circumcisions and collect information. A circumcision licence can be revoked immediately if the person performs a circumcision in an incompetent or improper manner, or is otherwise unable to carry out circumcisions.³⁸⁷ Illegal circumcisions are punishable by a fine or by imprisonment for up to six months.³⁸⁸

³⁷⁴ *Sweden Restricts Circumcisions* (2001) BBC News <<http://news.bbc.co.uk/2/hi/europe/1572483.stm>> at 2 December 2008.

³⁷⁵ *Circumcision of Boys Act 2001* (Sweden).

³⁷⁶ *Jews Protest Swedish Circumcision Restriction* (2001) Reuters <http://www.canadiancrc.com/Newspaper_Articles/Jews_Protest_Swedish_Circumcision_Restriction_07JUN01.aspx> at 2 December 2008.

³⁷⁷ *Circumcision of Boys Act 2001* (Sweden) s 1; *The Health and Medical Services Act 1982* (Sweden) s 1.

³⁷⁸ *Circumcision of Boys Act 2001* (Sweden) s 3.

³⁷⁹ *Circumcision of Boys Act 2001* (Sweden) s 3.

³⁸⁰ *Circumcision of Boys Act 2001* (Sweden) s 3.

³⁸¹ *Circumcision of Boys Act 2001* (Sweden) s 3.

³⁸² *Circumcision of Boys Act 2001* (Sweden) s 4.

³⁸³ *Circumcision of Boys Act 2001* (Sweden) s 5.

³⁸⁴ *Circumcision of Boys Act 2001* (Sweden) s 5.

³⁸⁵ *Circumcision of Boys Act 2001* (Sweden) s 6.

³⁸⁶ *Circumcision of Boys Act 2001* (Sweden) s 4.

³⁸⁷ *Circumcision of Boys Act 2001* (Sweden) s 7.

³⁸⁸ *Circumcision of Boys Act 2001* (Sweden) s 9.

Part 9

Options for Reform

9.1.1 There are no specific laws that regulate the practice of male circumcision in Australia. Very few clear answers present themselves when the general law is applied to circumcision. What is clear is that the current laws were not framed with male circumcision in mind. As a result there may be some undesirable and unintended consequences when the general law is applied to circumcision. The main purpose of this Issues Paper is to encourage, and provide the background for, deliberation upon whether changes need to be made to the law in Tasmania.

9.1.2 This Part will outline the advantages and disadvantages of the following proposals: leaving the law unchanged; introducing a criminalising provision into the *Criminal Code*; introducing a defence provision into the *Criminal Code*, broad reform through the introduction of new provisions into existing Acts; and comprehensive reform through the establishment of a Circumcision Act. This Part will also outline the three main areas of law which will be the focus of possible reform. Reference will be made to the relevant Parts of the Issues Paper that discuss the existing law and its application to circumcision.

9.2 Option 1: leaving the law unchanged

9.2.1 Very few jurisdictions (see [8.1.1]-[8.3.4]) have chosen to pass laws specifically for the regulation of male circumcision. No substantial legal issues with regard to circumcision have arisen in Australia. Non-therapeutic circumcision is rarely performed in Tasmania (see [3.4]). Circumcision is an emotive topic and regulation of the practice may be controversial. There is arguably no pressing cause for law reform. Changes to the practice of male circumcision in Tasmania have been, and may continue to be made without specific regulatory legislation. Leaders and policy makers in the spheres of government, community, religion and health can all influence how circumcision is performed in Tasmania. The policy decision to stop performing non-therapeutic circumcisions in most public hospitals in Australia is an example of such non-legislative action.

9.2.2 However, reform of the law, particularly if that reform is supported by community leaders, is the strongest means of reinforcing, or changing if necessary, how circumcision is practised in Tasmania. There are also identifiable problems with the application of the general law to circumcision. Taking no legislative action would leave significant uncertainty in the law until a judicial determination on a relevant issue is made, and the possibility of discontent with the decision after it is made. Changing the law by statute, particularly if it is done after a process of community consultation, has the advantage of being able to effect broad changes to the law that are known to have the support of the public and the interested stakeholders.

9.3 Option 2: a criminalising provision in the Criminal Code

9.3.1 This proposal might follow the form, although not necessarily the substance, of Tasmania's response to female genital mutilation. In response to local and international condemnation of female genital mutilation, s 178A was introduced into the Tasmanian *Criminal Code*.³⁸⁹ Section 178A makes it a crime for any person to perform 'female genital mutilation' on another person.³⁹⁰ Consent of the person operated upon, or of the parent of the person operated upon, is not a defence to the charge.³⁹¹ 'Female genital mutilation'

³⁸⁹ *Criminal Code Act 1924* (Tas) s 178A(1).

³⁹⁰ *Criminal Code Act 1924* (Tas) s 178A(1).

³⁹¹ *Criminal Code Act 1924* (Tas) s 178A(2).

means a clitoridectomy; an excision of any other part of the female genital organs; an infibulation or similar procedure; or any other mutilation of the female genital organs.³⁹² The female genital mutilation provision seems to prohibit any form of non-therapeutic female genital alteration, which is not a sexual reassignment procedure. One possibility for law reform, although perhaps not the most desirable, would be to prohibit non-therapeutic male circumcision as has already been done with female genital mutilation.

9.3.2 A complete ban on non-therapeutic male circumcision would severely alienate many members of the Tasmanian community (particularly Tasmanian Jews and Muslims). However, a circumcision, or male genital mutilation section within the *Criminal Code* need not completely prohibit the practice of circumcision. The criminalisation of male circumcision where particular conditions exist, would add certainty to the application of the criminal law to circumcision. It would also clearly indicate, or rather serve as a reminder that circumcisers do not act with impunity. The *Criminal Code* criminalising provision approach would be appropriate if the only purpose of the reform was to clearly prohibit male circumcision, or clearly prohibit male circumcision in particular circumstances.

9.3.3 There are several reasons why even a qualified criminalising provision in the *Criminal Code* may not be the most desirable form of action. There may be concern about the stigmatisation that may occur. The *Criminal Code* is associated with the prohibition and condemnation of reprehensible acts. Those who practise circumcisions may resent its inclusion, even if that inclusion is heavily qualified, in a document whose primary purpose is to prohibit 'criminal' acts. However, this problem may be overcome by distinguishing illegal 'male genital mutilation' (a circumcision, or other male genital alteration, performed in reprehensible circumstances) from lawful circumcision within the *Criminal Code*.

9.3.4 The introduction of a criminalising provision into the *Criminal Code* would also be an inappropriate way of achieving a broad reform agenda, should that be desirable, for three reasons. The first is stylistic, whilst the second and third are substantive. First, although the *Criminal Code* is a substantial document, its provisions are generally brief. A complex or lengthy regulatory regime would be out of place in the *Criminal Code*. Reform that utilised the introduction of a licensing regime, for example, would be particularly cumbersome and extremely unusual within a *Criminal Code*.

9.3.5 Secondly, the rules of general application within the *Code* will add greater complexity to a new circumcision provision, and may produce undesirable or unpredictable results when the law is applied. Finally, the substance of the reform may be incompatible with its inclusion in the *Criminal Code*. Circumcision law reform may require changes to tort, family and commercial law, none of which are normally dealt with within a *Criminal Code*.

9.4 Option 3: a defence provision in the Criminal Code

9.4.1 This proposal involves introducing a provision into the *Criminal Code* that clearly establishes some, or all, of the circumstances in which performing a circumcision is lawful under the criminal law. This approach, or at least a similar one, has been taken in South Australia. In South Australia, a person may consent to harm (including serious harm) if the nature of the harm and the purpose for which it is inflicted fall within limits that are generally accepted in the community.³⁹³ Although more complex, the Tasmanian *Criminal Code* largely operates to the same effect (see [4.3.7]-[4.3.12]).

9.4.2 However, South Australia differs to Tasmania in its approach in two respects. Firstly, legislation clearly establishes in South Australia that: '[a] lawful consent given on behalf of a person who is not of full age and capacity by a parent or guardian will be taken to be the consent of the person for whom the consent was given.'³⁹⁴ Secondly, some examples of acts which are lawful because the nature of the harm and the purpose for which it is inflicted fall within limits that are generally accepted in the community are provided for within the legislation. One example pointedly provides, '[a] person may (within the limits referred to

³⁹² *Criminal Code Act 1924* (Tas) sch 1, s 1 'female genital mutilation'.

³⁹³ *Criminal Law Consolidation Act 1935* (SA) s 22(3).

³⁹⁴ *Criminal Law Consolidation Act 1935* (SA) s 22(2).

above) consent to harm that has a religious purpose (eg male circumcision but not female genital mutilation)³⁹⁵.

9.4.3 Tasmania may wish to take a similar but more detailed approach. A provision which establishes some, or all, of the circumstances in which a circumcision may be performed lawfully may be included into the *Criminal Code*. The provision may describe specific requirements (for example, the presence of patient or parental consent and the use of sterile equipment) which when met in the circumstances of a particular circumcision make the procedure lawful. A general catchall provision, allowing for circumcisions that fall short of the specifically set requirements but still fall within the circumstances generally accepted in the community as lawful, could also be utilised.

9.4.4 This proposal could add significant clarity to the application of the criminal law to circumcision. However, comprehensive circumcision law reform may require changes to tort, family and commercial law. The approach just proposed would not affect those areas of law.

9.5 Option 4: broad reform through new provisions in existing Acts

9.5.1 This form of action would involve the inclusion of independent provisions, addressing each area needing reform, in existing legislation. So, for example, a provision altering the limitation period for actions that arise as a result of a circumcision could be included in the existing *Limitation Act*. Changes to the criminal law might be introduced, as discussed above, through a provision in the *Criminal Code*. Whilst a provision regulating the sale of excised foreskins might be included in the *Human Tissues Act*. This approach has the advantage of being capable of effecting quite broad reform to the law that applies to circumcision.

9.5.2 Nevertheless, this approach is not ideal if comprehensive reform is required. Small alterations in many different Acts may fail to engender the sort of change in consciousness that a single simple accessible Act might. Whereas a 'Circumcision Act' may be drafted to be easily accessible by those directly affected, the same result will be harder to achieve with this proposed method. The creation of many independent provisions may succeed in ending much of the legal uncertainty. However, it may also encourage a regime with significant complexity and technicality. Diffusing the law relating to circumcision across many different Acts will make it harder for the layperson to access and understand. The less accessible and the more complex the law is, the harder it will be for the public to regulate their actions according to the law.

9.5.3 Finally, there may not always be an existing Act appropriate for each proposed change. A provision may lose its coherency or simplicity if it is introduced into an Act that provides for special rules or interpretations that govern the entirety of the Act. Some detailed or complex changes, the creation of a licensing regime for example, almost certainly require a new piece of legislation.

9.6 Option 5: establishing a comprehensive licensing and regulatory regime

9.6.1 This approach would utilise a specific piece of legislation, a *Circumcision Act*, which contains all the law relevant to male circumcision in Tasmania. The focus of the legislation would be the regulation of circumcision through a licensing regime. Sweden, and the three provinces in South Africa noted above, established licensing regimes to regulate non-medically qualified circumcisers in their respective jurisdictions. The Act would need to establish a new circumcision monitoring body, or attribute that function to an existing government or independent body. That body might be empowered to grant licences, monitor compliance with the Act and perhaps set some of the requirements circumcisers have to meet.

³⁹⁵ *Criminal Law Consolidation Act 1935 (SA)* s 22 (Example 1).

9.6.2 The performance of circumcision without a licence would be punishable. Circumcisers would have to provide evidence that they meet certain conditions (that they have undergone sufficient training for example), before they are granted a licence. Circumcisers may also have to meet conditions (such as the provision of information about their practice to a monitoring board) once in possession of a licence. Once in possession of a licence, the failure to meet conditions within the ‘Circumcision Act’ could be punished. Punishments might include the loss or suspension of the circumcision licence, fines or imprisonment.

9.6.3 Regulation within the Act need not necessarily be onerous. A major concern of groups that prefer to use non-medically qualified circumcisers is that the adoption of a regulatory regime will result in the prohibition of their preferred manner of performing circumcisions. A successful Tasmanian regulatory regime will require consultation with such groups and will need to consider their concerns. It should be possible to set minimum standards, encourage higher standards, and collect and distribute information without excessively burdening those to whom circumcision matters most.

9.6.4 There are many advantages to the adoption of a ‘Circumcision Act’ that contains a comprehensive regulatory regime. A dedicated Act would allow for the inclusion of detailed provisions when they are necessary to add certainty to the law. All the law relevant to circumcision could be included in one Act and be made easily understandable and accessible for circumcisers, the legal profession and the public. Greater accessibility should help foster greater consistency between the practice of circumcision in Tasmania and the law. A licensing regime would provide the best means through which the practice can be meaningfully regulated, the standards of the practice raised, and information collected and disseminated.

9.6.5 However, an effective licensing regime depends on a suitable means of enforcement. There may not be the will, or perhaps the means to enforce the Act. A Tasmanian monitoring body, even a small one, will require funding and infrastructure to operate successfully. The low incidence of circumcision in Tasmania suggests that a small monitoring agency, perhaps as a branch in an existing government department, may be feasible. The low incidence of circumcision may also suggest to some that a comprehensive regulatory and monitoring regime may not be entirely necessary.

9.7 Substantive law reform

9.7.1 Whichever form of action is ultimately preferred, reform discussion should focus on the three following areas:

- the circumstances in which a person is criminally liable for performing non-therapeutic circumcision (punishable by either imprisonment, a fine, or other means);
- the circumstances in which a person is liable under civil law for performing a non-therapeutic circumcision; and
- the regulation of the commercial aspects of male circumcision.

When should performing a non-therapeutic circumcision be a punishable offence?

9.7.2 The criminal law ought to be clear as to whether the performance of a particular circumcision is punishable or not. Currently the law is uncertain (see [4.1.2]). Although entirely prohibiting male circumcision, as was done with female genital mutilation, is an available option, to do so may be considered controversial, unacceptable and even a breach of human rights by many. It is possible to regulate a practice through the criminal law without entirely prohibiting it. Any present reform of male circumcision in Tasmania will almost certainly be in the form of regulation rather than prohibition.

9.7.3 Some circumcisions deserve to attract the sanctions of the criminal law. Non-consensual adult circumcisions have already been punished under existing law in Australia.³⁹⁶ The issue arises as to whether the criminal law should play a role in other unethical, or at least ethically contentious, circumstances. One such example, where there was parental disagreement over the circumcision of a child, and the parent in favour of the circumcision had the child surreptitiously circumcised during a brief access period, has already been discussed (see [4.3.5]). Clearer sanctions for those who perform circumcisions using methods or tools that significantly and unnecessarily add to the danger or pain of the procedure may also be preferred.

9.7.4 Reform proposals will need to establish the circumstances in which the performance of a circumcision is punishable by a fine, imprisonment or through some other means (such as the loss of a licence to perform circumcisions legally). One or more of the following matters may be considered relevant to the substance of a circumcision regulatory regime:

- the use of a safe and pain managed method;
- the presence of patient or parental (or joint parental) consent;
- the authorisation of a court or tribunal where certain conditions exist (for example, parental disagreement or uncertainties over the presence of a determined required condition);
- the presence of a qualified medical practitioner and/or anaesthetist during the circumcision;
- a sufficient level of skill and expertise in the performance of the circumcision;
- suitable working conditions for the performance of the procedure;
- the person performing the circumcision has a qualification (for example: that they are a registered medical practitioner; or they have some other qualification certifying their capacity to perform the operation safely) or a licence that is required to perform the circumcision legally;
- a valid purpose for the circumcision. A reform proposal may wish to make distinctions in the application of the law depending on the reason given for the performance of the circumcision (for example, relevant reasons might include: aesthetics, religion, tradition, a belief in possible prophylactic medical benefits);
- that efforts have been made by the circumciser to ensure that the patient meets specific health or age requirements;
- that efforts have been made by the circumciser to ensure that the patient has received counselling; and
- that efforts have been made by the circumciser to ensure the patient, or person authorising the circumcision, understands the material information about the procedure.

Those factors should be considered in any reform proposal that seeks to regulate the practice of male circumcision.

9.7.5 Law reform should establish what requirements have to be met before a person may perform a circumcision without attracting criminal responsibility. Reform also needs to consider what the penalty for performing a circumcision in breach of those requirements should be (eg a fine, imprisonment, and/or the loss or suspension of the right to perform circumcisions legally).

When should a person be liable under civil law for performing a non-therapeutic circumcision?

9.7.6 The main question to be determined in this area is: when can a circumcision be performed without the circumciser incurring civil liability? In particular, when a circumcision may be legally authorised, and by whom, needs to be established with certainty. Under civil law a person is liable to pay compensation to a person for any loss caused by a procedure that is not authorised properly. Any reform should seek to clarify when an adult may authorise their own circumcision, who, if anyone, may authorise the circumcision of a

³⁹⁶ The following news report suggests the circumciser was 'convicted of unlawful wounding': Dispatch Online, *Man Sues for Circumcision* (1997) Dispatch Online < <http://www.dispatch.co.za/1997/10/09/page%2015.htm> > at 27 January 2009.

child too young to understand the nature of the procedure, and when, if ever, court authorisation must be sought for a circumcision.

9.7.7 The conditions cited as relevant to the discussion of reform to the criminal law regulation of circumcision (see [9.7.4]) may be relevant to when a circumcision can be legally authorised in civil law. Because the nature of the sanction is different in the two circumstances (civil law generally provides person to person compensation when a wrong causes a loss to a person, whilst criminal law typically uses fines, community service or imprisonment to punish wrongs) the conditions considered relevant to each may differ. For example, it may be desirable to punish the performance of a circumcision by a person who performs the procedure with an expired circumcision performing licence (presuming that such a licence was required at the time); however it may not be considered desirable to allow the patient to seek personal compensation for the same circumcision if all other standards were met by the circumciser.

9.7.8 Beyond setting conditions for the circumstances in which a circumcision may be legally authorised, reform proposals should also consider whether it is desirable to set special negligence standards for circumcisers, or whether standards should differ between different classes of circumcisers (for example, it seems that Tasmania's current civil liability law may differ in its application to medical professionals and traditional circumcisers) (see [6.5.3]).

9.7.9 The main question in civil law reform for circumcision is: what requirements have to be met before and during a circumcision so that the circumciser can perform a circumcision without being liable to compensate their patient for the losses caused by the operation?

9.7.10 A comprehensive reform proposal may also consider whether there should be a special limitation period for civil actions that arise as a result of male circumcision. In particular, it may be desirable to provide those circumcised as minors with a longer period in which to make a claim for civil wrongs done to them during their circumcision (see [6.9.1]).

Do the commercial aspects of male circumcision require greater regulation?

9.7.11 Circumcision can be a business. Circumcisers in Australia sometimes advertise their services to the public,³⁹⁷ and circumcisions are often performed for a fee (which can vary significantly between practitioners). Circumcisers, because of their position of authority over their patient, which may be religious or medical in nature, will often be in a position to strongly influence the decision to circumcise. An excised foreskin may be put to many uses and may be capable of generating a profit for the person with the right to sell it. Specific regulations limiting when, and how, people, including the person circumcised, the circumciser and others, may profit from excised foreskins may also be desirable (see [7.4.23]-[7.3.26]).

9.7.12 It may also be desirable to enact specific laws in regard to how a circumciser may promote their service (in person and in public advertising) (see [6.2]).

³⁹⁷ See for example, L'Image Cosmetic Surgery, *Circumcision* (2006) L'Image Cosmetic Surgery <<http://www.sydneyaesthetics.com.au/male-circumcision.php>> at 4 January 2009; Circumwise PTY LTD, *Circumwise Home Page*, (2008) Circumwise PTY LTD <<http://www.circumwise.com.au/>> at 16 January 2009.

Part 10

List of Questions

Criminal responsibility

1. Do you think the criminal law relating to non-therapeutic circumcision requires clarification?
2. Under what circumstances do you think a non-therapeutic circumcision should be lawful (under the criminal law)? In the provision of your answer please consider the following matters as possible requirements of lawfulness:
 - the use of a safe and pain managed method;
 - the presence of patient or parental (or joint parental) consent;
 - the authorisation of a court or tribunal where certain conditions exist (parental disagreement, the young age of the person to be circumcised or uncertainties over the presence of any required condition for example);
 - the presence of a qualified medical practitioner and/or anaesthetist during the circumcision;
 - a high level of skill and expertise in the performance of the circumcision;
 - suitable working conditions for the performance of the procedure;
 - the person performing the circumcision has a qualification (for example, that they are a registered medical practitioner, or they have some other qualification certifying their capacity to perform the operation safely) or a licence that is required to perform the circumcision legally;
 - a valid purpose for the circumcision. A reform proposal may wish to make distinctions in the application of the law depending on the reason given for the performance of the circumcision (for example, relevant reasons might include: aesthetics, religion, tradition or a belief in possible prophylactic medical benefits);
 - that efforts have been made by the circumciser to ensure that the patient meets specific health requirements;
 - that efforts have been made by the circumciser to ensure the patient, or person authorising the circumcision, understands the material information about the procedure;
 - that efforts have been made by the circumciser to ensure that the patient (if an older child or adult) has received counselling;
 - that the person to be circumcised has reached a specific age.

Authorisation: family law

3. Do you think the law relating to the authorisation of non-therapeutic circumcision requires clarification?
4. Under what circumstances should a parent be able to legally authorise the circumcision of their child? In the provision of your answer please consider the following matters as possible requirements:
 - the use of a safe and pain managed method;
 - whether both the child's parents ought to provide consent;
 - the authorisation of a court or tribunal where certain conditions exist (parental disagreement, the young age of the person to be circumcised or uncertainties over the presence of any required condition for example);
 - the presence of a qualified medical practitioner and/or anaesthetist during the circumcision;
 - a high level of skill and expertise in the performance of the circumcision;
 - suitable working conditions for the performance of the procedure;

- the person performing the circumcision has a qualification (for example, that they are a registered medical practitioner or they have some other qualification certifying their capacity to perform the operation safely) or a licence that is required to perform the circumcision legally;
 - a valid purpose for the circumcision. A reform proposal may wish to make distinctions in the application of the law depending on the reason given for the performance of the circumcision (for example, relevant reasons might include: aesthetics, religion, tradition or a belief in possible prophylactic medical benefits);
 - that efforts have been made by the circumciser to ensure that the patient meets specific health requirements;
 - that efforts have been made by the circumciser to ensure the patient, or person authorising the circumcision, understands the material information about the procedure;
 - that efforts have been made by the circumciser to ensure that the patient (if an older child or adult) has received counselling;
 - that the person to be circumcised has reached a specific age.
5. Should the authorisation of a court, or some other form of independent body, be required to legally perform a circumcision in some, or in all, circumstances?

Legal responsibilities of circumcisers

6. Should the law clearly establish that medically qualified and non-medically qualified circumcisers have the same legal duties in the provision of their service?
7. Should the law set specific duties for circumcisers in the provision of their service? Please consider whether the law should set special standards for circumcisers as to:
- how a circumciser may promote their service;
 - the information that must be provided to the person authorising the procedure;
 - the form (i.e. a brochure, person to person counselling, or other) that the information provided to the person authorising the procedure comes in.
8. Should there be a special limitation period for civil law actions brought by an adult for a circumcision performed on them as a minor?