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**CONSENT TO HEALTH CARE OF
YOUNG PEOPLE**

Report No 51

**Volume Three
Summary of the Commission's Report**

Queensland Law Reform Commission
December 1996

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Research Paper	<i>Female Genital Mutilation</i>	(MP7, December 1993)
Draft Report	<i>Female Genital Mutilation</i>	(WP42, July 1994)
Report	<i>Female Genital Mutilation</i>	(R47, September 1994)
Discussion Paper	<i>Consent to Medical Treatment of Young People</i>	(WP44, May 1995)
Miscellaneous Paper	<i>Medical Examinations in Cases of Suspected Child Abuse</i>	(MP17, June 1996)

This Report is in three volumes:

Volume 1: The Law and the Need for Reform
Volume 2: The Commission's Legislative Scheme for Consent to Health Care of Young People
Volume 3: Summary of the Commission's Report

PREFACE

This Reference covers a diverse range of sensitive and often controversial issues. It has evoked strong opinions on the steps that should or should not be taken to address particular problems relating to consent to health care of young people. Nevertheless, the Commission has been guided throughout this project by a philosophical understanding which has been soundly supported by the responses to the Discussion Paper¹ and by the extensive consultations undertaken following the release of the Discussion Paper. That understanding is that the law should not be an impediment to young people's access to appropriate health care in Queensland. In the context of the Reference, the health needs of young Queenslanders have been the Commission's principal concern.

The Commission believes that, whenever possible, parents have and should retain a vital role in the health care of their children and its recommendations for reform contained in this Report reflect that belief. However, that role should always be subject to what is in the best interests of the child - and there will be circumstances where what the parents want for the child and what the child needs are two different things. There will also be situations where the child needs treatment but is unwilling to be treated if his or her parents are involved in the decision-making processes relating to the treatment. At that point the risks to the child of not being treated and what is perceived by many as a right in the parents to control the health care of the child, may clash. The Commission has attempted to identify those types of situations in this Report and to ensure, to the maximum degree possible, that the vital role of parents and the needs of young people are both reflected in its recommendations.

Currently, the health needs of young Queenslanders appear to be of little significance in the context of the common law and in the limited statute law relating to consent to health care. The results of the current situation are outlined in Volume One of this Report.

The Commission has also acknowledged the psychological and health advantages to young people of their being involved in decision-making affecting their health, irrespective of their ability at law to consent to or refuse health care. Although it would be inappropriate to dictate by statute that all health care providers and/or parents should involve young people in the decision-making process relating to the health of those young people, the involvement of young people should nevertheless be encouraged in relevant community and professional education programs and in treatment situations.

The Commission has also been concerned that its recommendations should recognise the autonomy of the individual. This is a concept which underlies the legal requirement for consent to health care. That requirement is intended to ensure protection for the patient against unauthorised interference with his or her right to bodily integrity. The right in each person to bodily integrity is the right in an individual to choose what occurs

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

(ii)

with respect to his or her own person. The right to bodily integrity also extends to young people although where the young person is not legally competent to consent, others, such as his or her parents, may consent on the young person's behalf in certain circumstances.²

The Commission acknowledges the role parents generally play in the health care of their children and, in particular, the role of decision-maker assumed by parents when a child is too young or otherwise not legally competent to make decisions or a particular decision in relation to his or her own health. During the course of the consultation meetings and from the submissions received in response to the Discussion Paper there was wide acknowledgment of the significance of the parental role in the health care of children. However, there was also recognition of instances where due, for example, to family circumstances or to the seriousness or sensitivities attaching to the health problem being experienced by a young person, parents are unavailable, unable or unwilling to assist their child. At that point the health needs of the young person should become the paramount concern of other people with an interest in the young person.

The position of the many homeless young people in Queensland who have little or no contact with their parents highlights the need to ensure that the law does not hinder their access to appropriate health care. A number of submissions pointed out that homelessness amongst young people is the exception rather than the rule and that the Commission's recommendations should reflect the typical family situation rather than the unusual or the "dysfunctional" family. The fundamental issues relating to the need for treatment and the requirement of consent are currently no different for young people residing in a family situation than for young people who are homeless. The Commission's preliminary recommendations in the Discussion Paper did not distinguish between such young people and the recommendations in this Report apply to young people irrespective of their family or living conditions or arrangements. What the plight of homeless young people highlights, however, is that where parental support is not readily available, other accessible and acceptable mechanisms need to be in place to ensure the delivery of appropriate health care.

Young people living in a family situation may, on occasion, be in much the same position as homeless young people vis à vis their ability to access appropriate health care - particularly if young people are unable to communicate with parents about a particular, perhaps sensitive, health concern.

Further, there are many young people in Queensland who are not competent to consent to their own health care and who are in the care of someone who is not legally authorised to make decisions about their health care. These may include young people being cared for in residential facilities or boarding schools, or by relatives or friends.

² See Ch 5 in Volume 1 of this Report.

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There is no general statutory provision in Queensland enabling a person other than a parent or a court-appointed person to consent to a young person's health care.³ Young people who are not in the care of a person with authority to consent to their health care are among the most vulnerable people in our community - primarily because they may very well lack the most natural advocate that most people have during their childhood and youth - a parent. The Commission is concerned that these young people should not be denied the opportunity given to other young people to access appropriate health care when required.

Incidental to ensuring that Queensland law does not hinder young people's access to appropriate health care, is the issue of the current uncertain criminal and civil liability for assault and/or battery faced by health care providers when presented with a young patient in a variety of contexts. According to numerous respondents to the Discussion Paper and views expressed in the consultation meetings, the current lack of protection from liability in cases where the health care provider is dealing with a young person with all due care and attention and in the best interests of the young person, actually deters some health care providers from treating young people without the consent or involvement of the young person's parents or without appropriate Court authorisation. This is despite the fact that the young person may otherwise be competent at law to consent to his or her own health care or may be suffering from a condition which, if left untreated, may have serious consequences for the health and/or well-being of the young person. The Commission believes that in appropriate cases no criminal or civil liability for assault or battery should attach to a health care provider who treats a young person if the health care is in the best interests of the young person.

Although the health care provider's potential criminal or civil liability for assault and battery is secondary to the Commission's concern that, generally, a valid consent be obtained before proceeding with the treatment of young people, the Commission recognises that the willingness of health care providers to treat young people is fundamental to young people's ability to access health care. Hence, an aim of the Commission has been to reduce the incidence of health care providers refusing to treat young people on the basis of the health care providers' real or perceived fear of litigation.

A secondary, but important aim of the scheme is to protect vulnerable young people from inappropriate or exploitative health care.

A further basis of any scheme relating to the health care of young people should be that it be simple to read, understand and enforce. If health care providers are not confident in their understanding of the provisions in the scheme which directly affect them, such as the provisions which protect their actions, they are less likely to treat young people

³ In all cases other than an emergency, a person who, without court approval, consents to the health care of a young person not his or her child, could be liable as an accessory to the assault of the young person - as the consent would not necessarily have been a valid consent. See 15-17 in Volume 2 of this Report for a discussion of the need for consent and Ch 2 in Volume 1 of this Report for a discussion of the various consequences that can flow from providing health care without a valid consent.

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in circumstances where they would currently, and reasonably, fear liability. The Commission's preferred scheme as set out in the Discussion Paper was necessarily more complex than the scheme constituted by the Commission's final recommendations, which are set out in Volume Two of this Report. In the Discussion Paper the Commission needed to consider all appropriate options for reform known to the Commission at that time.

A number of the respondents to the Discussion Paper and participants at meetings held during the consultation process emphasised the need for simplicity and readability - and the Commission has endeavoured to do this to the extent possible given the natural complexity of this area of the law and the need to protect the interests of all concerned.

The Commission acknowledges that the problems facing young people's access to appropriate health care are not confined to, nor are they primarily due to, the existing law. The law does currently hinder young people's access to appropriate health care but, to a greater extent, so do entrenched personal and organisational attitudes towards young people, or towards the types of problems experienced by many young people - such as sexual health problems, sexuality problems, alcohol and drug related problems and psychological and psychiatric problems. The Commission has therefore felt compelled to make a number of recommendations which are not directly within the terms of the Commission's reference but which nevertheless may have a significant impact on young people's access to appropriate health care. For example, the Commission has recommended a comprehensive and ongoing education program for all key players concerning the proposed legislation scheme.⁴

A number of issues covered by the Report are the subject of strongly held views by various groups within the community. It is unlikely that a broad consensus of opinion will ever be achieved in relation to the resolution of some of these issues. For example, some parents and organisations are adamant that parents should always be informed before their children are treated or advised on matters involving sexual activity such as contraception and sexually transmitted diseases - so that young people can be guided, warned, counselled or disciplined by their parents. There are others, however, who are of the view that young people who fail to be advised or treated in relation to such matters may suffer greatly and that a requirement of parental involvement may contribute to the failure to be properly treated.

The Commission is of the view that the treatment of a young person who is unable to consent to his or her own health care should always be provided on the basis that the treatment is in the young person's best interests and not on the basis of the religious, cultural or moral beliefs of others - no matter how strongly those beliefs are held. Similarly, for a young person who is able to consent to or refuse health care on his or her own behalf, his or her decision concerning the health care should not be overridden

⁴ See 29 of this Summary.

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or interfered with on the basis of the religious, cultural or moral beliefs of others - particularly if the health care is in the young person's best interests.

The Commission believes that the proposed scheme, if enacted, would go some significant way towards addressing the needs of a most vulnerable group in our community.

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PART 1

THE NEED FOR REFORM

1. SUMMARY OF THE COMMON LAW

(a) For adults (18 years of age or older)

Health care providers may be liable for criminal and/or civil assault for any touching involved in the health care of an adult if they do not have a valid consent. Adults are generally competent to consent to health care if they are able to understand broadly the nature of the decision to be made.⁵ Irrespective of the issue of consent, a health care provider may also be liable for negligence if he or she breaches a duty of care owed to the patient and the patient suffers damages as a result.⁶

(b) For young people (0-17 years of age)

- (i) As is the case with adults, health care providers may be liable for criminal and/or civil assault for any touching involved in the provision of health care to a young person of any age (0-17 years of age) if they do not have a valid consent. Additionally, they may be liable if the health care is not in the best interests of the young person.⁷ For health care not involving a touching of the young person, there may be liability for false imprisonment, depending on the circumstances of the case. In any case there may be liability for negligence, although consent to health care is not normally relevant to liability for negligence.⁸
- (ii) For there to be a valid consent from a young person of any age (0-17 years of age), the young person must be intelligent and mature enough to understand the nature and consequences of the proposed health care (generally referred to as “*Gillick* competence”). *Gillick* competence is relative to the health care being proposed. Presumably a very young child could be competent to consent to relatively minor procedures and a young person of any age, depending on his or her maturity and understanding, could consent to any health care, however serious.⁹

⁵ See 15-16 in Volume 1 of this Report.

⁶ See 24 in Volume 1 and 240 in Volume 2 of this Report for a discussion of the law of negligence in this context.

⁷ See 90-91 in Volume 1 of this Report.

⁸ See 24 in Volume 1 and 240 in Volume 2 of this Report for a discussion of the law of negligence in this context.

⁹ See Ch 3 in Volume 1 of this Report.

- (iii) If a young person is not in fact *Gillick* competent to consent to his or her own health care, a health care provider who relies on the purported consent of the young person may be liable for treating the young person without a valid consent. It is irrelevant that the health care provider honestly believed the young person to be *Gillick* competent.¹⁰
- (iv) A health care provider who treats a young person upon a wrong, albeit honest, assessment as to which treatment is in the young person's best interests will not be relieved of liability for assault of the young person.¹¹
- (v) A health care provider can obtain a valid consent to treat a young person from a parent, although it is not clear whether a parent can still give a valid consent once the young person is competent to consent on his or her own behalf.¹²
- (vi) It is not clear whether a young person can refuse health care to which a parent has consented.¹³
- (vii) People with a legal duty to seek health care for a young person, other than parents and legal guardians, are not automatically entitled by law to consent to such health care.¹⁴
- (viii) Parents are unable to consent to certain non-therapeutic forms of health care (such as sterilisations for non-therapeutic purposes) for their children without first obtaining court approval (*Marion's case*).¹⁵
- (ix) A health care provider and any other person can treat a young person in an emergency situation without a valid consent.¹⁶

¹⁰ The health care provider may, however, have a defence to any criminal liability under s24 of the *Criminal Code* (Qld). See the discussion of this defence at 26 in Volume 1 of this Report.

¹¹ See 90-91 in Volume 1 of this Report. The health care provider may, however, have a defence to any criminal liability under s24 of the *Criminal Code* (Qld). See the discussion of this defence at 26 in Volume 1 of this Report.

¹² See 72-74 in Volume 1 of this Report.

¹³ *Ibid.*

¹⁴ See Ch 5 in Volume 1 of this Report.

¹⁵ See 59-61 in Volume 1 of this Report.

¹⁶ See 44-48 in Volume 1 of this Report.

2. INEFFECTIVENESS OF THE COMMON LAW

The submissions received by the Commission in response to the Discussion Paper and the earlier Information Paper highlighted the uncertainty and confusion that have resulted from the current law in Queensland relating to the authorisation of health care for young people. The confusion results primarily from the fact that the law in this area is the common law and that, in the absence of relevant Australian case law, United Kingdom cases provide the only persuasive statements of the law.

The paucity of case law relevant to the issues covered by this Report may be a result of the reluctance of law enforcers to invoke the criminal law in situations involving health care providers and their patients. It may also result from the inability or unwillingness (perhaps through ignorance) of young people and those concerned with their interests to pursue civil law remedies against health care providers in appropriate circumstances.

Very few criminal charges relating to the provision of health care are brought in Australia against health care providers. The Commission is unaware of any reported cases in Australia of a medical practitioner or other health care provider being charged with assault arising from health care provided to a young person without a valid consent either from the young person (if legally competent) or from the young person's parents or guardian. Similarly, the Commission is unaware of any reported cases of health care providers being charged with an offence such as "deprivation of liberty" (false imprisonment) under the *Criminal Code* (Qld)¹⁷ or its equivalent in other Australian jurisdictions.

To date, the common law in this area has primarily been concerned with the protection from civil liability of health care providers who treat young people. Although the common law has paid regard to the "best interests" of young people, it has paid very little regard to the unfulfilled need some young people have for health care. Concepts such as self-determination and autonomy have played little or no part in the development of the common law to date.

Despite the lack of relevant case law and the inadequacy of criminal and/or civil remedies for non-consensual health care not involving a touching, there is an obvious concern, at least within the medical profession, that health care providers are in a vulnerable position. That concern manifests itself in a reluctance by a number of health care providers to treat young people without parental involvement. It also manifests itself in policies of health care organisations which identify parental knowledge or involvement as a prerequisite for the provision of health care to young people.

¹⁷ *Criminal Code* (Qld) s355.

None of the respondents to the Discussion Paper, nor anyone with whom the Commission has consulted on this matter, has challenged the Commission's view as to the ineffectiveness of the common law in addressing the needs of young people in the context of the provision of health care.¹⁸

A number of respondents suggested that the Commission was proposing to take away from parents certain rights that they currently have in relation to their children. However, those respondents appeared generally to have misunderstood the state of the current law.¹⁹

In fact, the current law would enable health care providers to provide any health care to a young person of any age, without the knowledge or approval of parents, provided the young person was intelligent and mature enough to be able to understand the nature and consequences of the proposed health care.²⁰

It is apparent that the law in its present state may in fact hinder a young person's ability to obtain the health care he or she needs. If the young person is too young to seek health care on his or her own, his or her parents will usually assist by way of arranging for the health care and providing a valid consent for the health care to proceed. However, even if the young person is old enough to take the initiative to consult a health care provider on his or her own, he or she will not be able to give a valid consent unless he or she satisfies the competency test. Further, the young person must first find a health care provider willing to treat in the absence of parental involvement. If the health care provider proceeds without a valid consent even though he or she honestly believes there was a valid consent, he or she may be liable under the criminal law for assault, and/or to pay damages under the civil law for trespass to the person.

The current test of a young person's capacity to consent to health care pays no regard to the relative independence or emancipation of the young person.

The situation is even more confused in relation to a young person's refusal of health care. The common law as stated in *Gillick's case*²¹ says nothing about a *Gillick*

¹⁸ But see Manitoba Law Reform Commission, Report *Minors' Consent to Health Care* (Report #91, 1995) in which that Commission has recommended the retention of the common law of Manitoba (which appears to be similar to the common law in Queensland) in relation to consent to health care of young people, with the exception of legislation to protect a health care provider who acts in accordance with a young person's instructions and believes in good faith that the young person possesses the necessary capacity. The Manitoba Law Reform Commission was confident that the current common law principle relating to mature young people's capacity to consent to health care "has a sufficient degree of flexibility to allow for the sensitive resolution of current and future questions" (at 340).

¹⁹ For example, Submissions 6, 11, 13, 17, 20, 22, 25, 26, 37, 38, 47 and 48. Many of those respondents were concerned with one treatment or procedure in particular, namely, abortion. See Ch 3 in Volume 1 of this Report for a summary of the current law on competence to consent to health care.

²⁰ See Ch 3 in Volume 1 of this Report.

²¹ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112. See Ch 3 in Volume 1 of this Report for an analysis of this case.

competent young person's ability to refuse health care to which his or her parents have consented. Given the variety of judicial opinions expressed *Gillick's* case, it is also unclear whether a *Gillick* competent young person's parents are able to override the young person's consent to health care.²²

Nor has the common law resolved the confusion that may result when parents differ in their opinion as to what is in the best interests of the young person - apart from providing that the Supreme Court, exercising its *parens patriae* jurisdiction,²³ can make such a determination (provided, of course, someone with a sufficient interest in the matter takes the time and trouble and undergoes the expense of applying to the court for an exercise of that jurisdiction). It is not clear whether a health care provider can, in a particular case, rely on any one consent over the objection of another relevant party. For example, the young person may have refused a particular treatment; one of his or her parents may insist that the treatment proceed; and the other parent may be indifferent as to whether or not the treatment should proceed. All may have the best interests of the young person at heart - but may be influenced by different considerations when determining what would be in the young person's best interests.

It is also unclear what rights and responsibilities parents have, at law, in relation to the health care of their children. Parents are under a duty to protect their children and to provide them with the necessities of life (including health care when required). However, their authority to make decisions relating to their children, particularly medical decisions, is limited in two important respects. Parents are unable to provide a valid consent to health care for their child that is not in the child's best interests. They are also unable to make decisions relating to health care which is at law required to be authorised by a court (for example, sterilisation).

When a young person is incapable, by reason of his or her age, of making his or her own decision, the young person's parents ordinarily assume that role and their decision is usually respected unless there has been a judicial or medical determination that the decision made would not be in the best interests of the young person.

The common law has not yet devised a definitive set of circumstances that would give a parent final decision-making authority in relation to his or her child. It cannot be said that a parent now has the right to consent to, or to refuse, particular health care for his or her child - particularly if there is a question as to whether or not the young person is legally competent, or if there is a question as to whether or not the health care would be in the child's best interests.

Gillick's case has been cited as authority for the proposition that, as a young person

²² See, however, Ch 4 in Volume 1 of this Report. The approach adopted by the English Court of Appeal in *In re R (A Minor) (Wardship: Consent to Treatment)* [1992] Fam 11 and *In re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1993] Fam 64 in its interpretation of *Gillick's* case is that a young person cannot refuse treatment to which his or her parents have consented and if the young person consents to treatment, that cannot be overridden by the young person's parents.

²³ See 94-95 in Volume 1 of this Report.

matures, parental authority yields to the young person's developing capacity to make his or her own decisions in relation to proposed health care. It is unclear, however, what role or "rights" are left to the parents once the young person is considered to be capable of making his or her own decisions. The decision in *Gillick's* case does not of itself prevent the health care provider from informing the young person's parents about the proposed health care (although that would probably constitute a breach of the health care provider's duty of confidence to the young person);²⁴ nor does that decision require the health care provider to accept the consent of a *Gillick* competent young person.

The common law position of health care providers other than medical practitioners is also uncertain. It is not clear whether health care provided by persons other than health care providers is covered by the principle(s) for which *Gillick's* case is claimed to be authority, although from the Commission's observations it is widely assumed that all health care providers are covered.

From the health care provider's perspective, it is unclear in what circumstances he or she will be protected from liability for touching a young person in the course of an examination or treatment of the young person. If the young person purports to consent to the health care but does not wish to involve his or her parents, the health care provider must assess whether or not the young person is intelligent and mature enough to be capable of understanding the nature and consequences of the proposed health care. It would seem that the health care would also have to be in the young person's best interests. At common law, if the health care provider is mistaken as to the young person's maturity, or mistaken as to what is in the best interests of the particular young person, he or she may be liable for criminal and/or civil assault for treating the young person without a valid consent.²⁵

It is also unclear what the effect of the common law (as found in *Gillick's* case) is on the provision of advice or information or on non-touching health care (such as hypnosis or counselling) as opposed to health care involving physical touching of the young patient. Even though the facts of *Gillick's* case related solely to the provision of contraceptive advice to young people, the case has been relied upon to justify what would otherwise constitute a criminal and/or civil assault (as in physical contact) on the young person. It is generally considered that little, if any, liability exists, apart from potentially in negligence, for non-touching health care provided without a valid consent. The requirement of a valid consent is usually justified on the basis that it ensures protection for the patient against unauthorised interference with his or her right to bodily integrity - that is, where physical contact is threatened or applied. The common law has failed to develop a general consent requirement for health care not involving a touching. An action for false imprisonment may be unrealistic in many of the situations envisaged by the Commission.

²⁴ See 140-147 in Volume 1 and 346-348 in Volume 2 of this Report.

²⁵ See Ch 2 in Volume 1 of this Report.

The provision of certain forms of counselling, psychiatric treatment, hypnosis and other serious non-touching "treatments" may result in profound consequences for the young person.²⁶ If the health care provider need not obtain the consent of either the young person or his or her parents before providing such health care, then there may be little or no protection for the young person from inappropriate treatment.

The common law has also failed to address particular problems relating to the treatment of infants whose parents are not adults.²⁷ It has also failed to ensure that people other than parents, who have the care and control of a young person, are able to provide a valid consent for the young person's health care - despite the fact that they may be under a common law and/or statutory duty to seek such health care.

There is a need for clarity in the area of consent to health care of young people. It is unlikely that the common law will provide that clarity in the foreseeable future. It has failed to do so since *Gillick's case*, apart from the relatively restricted number of procedures covered by the High Court of Australia's decision in *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)*.²⁸

Since *Marion's case*, the High Court has not had occasion to examine further issues relating to consent to health care of young people.²⁹

The Commission believes that, in view of the important issues that the common law does not address, it would be unrealistic to leave the development of the law in this area to the common law of Queensland.

²⁶ A number of submissions made the point that interference with a person's psychological integrity can result in serious damage to the person. For example, a submission from a psychiatrist (submission 81): "[T]here are increasing anecdotes appearing in the British press about stage hypnosis leading to serious psychological disturbance as a result of a hypnotic suggestion being made to the individual, then being carried through into the normal waking state subsequently. In fact, there is on record an account of a young man suddenly dropping dead following the instruction that he should imagine that he is being electrocuted by a power line. I would submit therefore that hypnotherapy can be an extremely powerful tool, which, whilst there may not be any actual physical contact between therapist and patient, the suggestion taking place during hypnotherapy can subsequently lead to serious consequences beyond the control of the subject."

²⁷ See Ch 14 in Volume 2 of this Report.

²⁸ (1992) 175 CLR 218. See the discussion of this case at 59-61 in Volume 1 of this Report.

²⁹ However, the High Court has determined the interaction of the Family Court's welfare jurisdiction under the *Family Law Act 1975* (Cth) and the jurisdiction of any State or Territory body with power to make sterilisation decisions about a "child of a marriage": see *P v P* (1994) 181 CLR 583, which is discussed at 97-99 in Volume 1 of this Report.

3. THE ROLE OF THE COMMON LAW IN THE COMMISSION'S PROPOSED LEGISLATIVE SCHEME

The Commission does not propose that its legislative scheme outlined in Volume 2 of this Report be a code of the law relating to consent to health care of young people, although it is anticipated that it would be rare for a health care provider or other person working under the scheme to have to go beyond the legislation to ascertain the law on any particular issue relating to consent to health care of a young person.

To the extent that the scheme specifically states the law on any issue, then the current common law on that issue will be displaced by the relevant legislative provision. Otherwise the common law is retained. For example, the common law limitations on the power of a parent to consent to health care of a child are not affected.³⁰

In relation to those aspects of the common law that have broader application than the health care of young people - such as the law in relation to emergency health care and confidentiality - the common law is specifically preserved by the legislation. The draft legislation merely proposes changes to certain aspects of the law with respect to emergency health care of young people.

³⁰ See Ch 5 in Volume 1 of this Report.

PART 2

THE COMMISSION'S RECOMMENDATIONS

CHAPTER 1: INTRODUCTION

1. TISSUE AND BLOOD DONATION BY A COMPETENT YOUNG PERSON

The Commission recommends that its legislative scheme should not make any changes to the law relating to tissue or blood donations by young people, but that those issues should be addressed in the context of a specific review of the *Transplantation and Anatomy Act 1979* (Qld).

2. HEALTH CARE TO BE COVERED BY THE COMMISSION'S SCHEME

For the purposes of this Report "health care" will be defined broadly, as follows:

"Health care" of a young person is any assessment, care, treatment, service or procedure to maintain, diagnose or treat the young person's physical or mental condition.³¹

For the purposes of the Commission's legislative scheme some further refinement of the definition is proposed in Chapter 9 of this Report.³²

3. HEALTH CARE PROVIDERS TO BE COVERED BY THE COMMISSION'S SCHEME

For the purposes of this Report a "health care provider" will be defined as a person who provides health care in the practice of a profession or in the ordinary course of business.

CHAPTER 7: THE NEED FOR REFORM

1. INEFFECTIVENESS OF THE COMMON LAW

The Commission believes that, in view of the important issues that the common law does not address, it would be unrealistic to leave the development of the law in this

³¹ This definition is similar to the definition of "health care" adopted in the Commission's Report, *Assisted and Substituted Decisions* (R49, June 1996) at 57.

³² See 10-11 of this Summary.

area to the common law of Queensland.

2. THE ROLE OF THE COMMON LAW IN THE COMMISSION'S PROPOSED LEGISLATIVE SCHEME

The Commission recommends that the legislative scheme be regarded as a modification rather than a codification of the existing law regarding consent to health care of young people.

CHAPTER 9: A LEGISLATIVE SCHEME FOR THE AUTHORISATION OF HEALTH CARE FOR YOUNG PEOPLE

1. AUTHORISATION BY CONSENT OF A COMPETENT PERSON

The Commission recommends that for the purposes of the legislative scheme a young person³³ should be able to provide a valid consent to health care if he or she:

- understands the nature and consequences of the health care; and
- communicates his or her decision about the health care in some way.

This recommendation is reflected in clause 20 of the draft legislation in Part 4 of this Summary.

2. CATEGORISATION BY TYPE OF HEALTH CARE

The Commission recommends a distinction between health care that involves a touching and health care that does not. Health care that does not involve a touching does not normally require a valid consent before it can be lawfully carried out. The Commission considers that generally this should remain the case, except in relation to some serious forms of non-touching health care, which may pose a significant risk to a young person (for example, some forms of psychotherapy).³⁴ In those cases, there should be a valid consent before a health care provider will be protected from liability for assault and/or battery for performing the health care.

³³ For most health care the Commission has recommended that there be a lower limit of 12 years of age on a young person's capacity to consent to health care. The lower age restriction on the competence of a young person to consent to health care is discussed in Ch 10 in Volume 2 of this Report.

³⁴ See 163-164 in Volume 1 of this Report.

The Commission is of the view that Queensland Health and the Department of Families, Youth and Community Care would be the most appropriate bodies jointly to devise and review the list of non-touching health care that cannot proceed without a valid consent (whether from the young person, if competent, from a parent, or pursuant to a court order).

This recommendation is reflected in clause 8, clauses 1 and 2 of schedule 1, and schedule 2 of the draft legislation in Part 4 of this Summary.

3. PROTECTION FROM LIABILITY FOR HEALTH CARE CARRIED OUT UNDER THE PROPOSED LEGISLATIVE SCHEME

The Commission makes the following recommendations regarding protection for health care providers:

- (a) A health care provider³⁵ who carries out health care of a young person in accordance with the proposed scheme should be protected from liability for assault.

“Liability for assault” for the purposes of the proposed scheme means:

- civil liability for assault or battery;
- criminal liability for assault; and
- liability under the new categories of civil and criminal liability created by the scheme.³⁶

- (b) If a person³⁷ carries out health care of a young person with an honest and reasonable, but mistaken, belief in the existence of any state of things, the person's liability for assault should be decided as if the real state of things had been such as he or she believed to exist.

- (c) A health care provider who carries out health care of a young person under the supervision of another health care provider should also be protected from liability for assault if the supervising health care provider would not incur that liability for carrying out the health care.

However, the supervised health care provider will continue to be liable if he or

³⁵ Note the discussion of “health care provider” at 19-21 in Volume 1 of this Report and the Commission's recommendations at 9 of this Summary.

³⁶ See 344 and 345 in Volume 2 of this Report and 27 of this Summary.

³⁷ The proposed legislative scheme authorises a person who may not be a health care provider to carry out certain health care in limited circumstances. See, for example, the Commission's recommendations in relation to minor health care at 21-22 of this Summary.

she knew, or could reasonably be expected to have known, that the health care was not authorised by the scheme.

These recommendations are reflected in clauses 43, 44 and 47 of the draft legislation in Part 4 of this Summary.

CHAPTER 10: AUTHORISATION OF HEALTH CARE BY COMPETENCY AND AGE OF YOUNG PERSON: BIRTH TO 11 YEARS OF AGE

The Commission makes the following recommendations with respect to the health care by a health care provider of a young person under 12 years of age:

- (a) A parent of a young person under 12 years of age should be able to consent to, and refuse, health care of the young person.
- (b) A young person under 12 years of age should not be able to consent to, or refuse, his or her own health care.³⁸ Subject to the recommendation in paragraph (c) below, the refusal of health care by a young person should not make ineffective a valid consent to health care given by a parent.
- (c) Although the refusal of health care by a young person should not generally make ineffective consent to health care given by a parent, there should be a statutory list of health care that cannot be carried out over the objection of a young person under 12 years of age.

If the young person objects to the health care, the consent of a parent to such health care should be ineffective unless:

- (i) the health care is carried out pursuant to an appropriate court order; or
- (ii) the young person has minimal or no understanding of one or both of the following:³⁹
 - what the health care involves; or
 - why the health care is required;

and the proposed health care is likely to cause the young person:

³⁸ But see Ch 13 in Volume 2 of this Report for a discussion of those forms of health care for which consent should not be a requirement.

³⁹ See Queensland Law Reform Commission, *Assisted and Substituted Decisions* (R49, June 1996) Vol 2 *Assisted and Substituted Decision Making Bill* cl 163, for a similar provision in relation to the health care of adults with a decision-making disability.

- no distress; or
- temporary distress that is outweighed by the benefit to the young person.

The statutory list of health care that should not be carried out over the objection of a young person should be devised and updated jointly by Queensland Health and the Department of Families, Youth and Community Care.⁴⁰ Initially, the list should include:

- termination of pregnancy; and
- contraceptive health care.

- (d) A health care provider may carry out health care of a young person under 12 years of age if:
- (i) a parent⁴¹ of the young person consents to the health care; and
 - (ii) the health care is in the best interests of the young person's health and well being.

These recommendations are reflected in clause 24 of the draft legislation in Part 4 of this Summary.

The Commission recommends the following definitions of "termination of pregnancy" and "contraceptive health care":

- "Termination of pregnancy" of a young person does not include a procedure primarily to treat organic malfunction or disease of the young person.⁴²
- "Contraceptive health care" means health care of a young person that is primarily intended to prevent pregnancy, but does not include sterilisation or termination of pregnancy.

This recommendation is reflected in clauses 8 and 11 of schedule 1 of the draft legislation in Part 4 of this Summary.

⁴⁰ See note 823 at 237 in Volume 2 of this Report.

⁴¹ See the broad definition of "parent" recommended by the Commission in Ch 15 in Volume 2 of this Report and at 26 of this Summary.

⁴² This definition is derived from the definition of "termination of pregnancy" in the Queensland Law Reform Commission's Report, *Assisted and Substituted Decisions* (R49, June 1996) Vol 2, *Assisted and Substituted Decision Making Bill* cl 14, Sch 1.

CHAPTER 11: AUTHORISATION OF HEALTH CARE BY COMPETENCY AND AGE OF YOUNG PERSON: 12 TO 15 YEARS OF AGE

The Commission makes the following recommendations with respect to the health care of a young person between 12 and 15 years of age:

- (a) Subject to the recommendation in paragraph (b) below, a valid consent to health care can be given by:
 - (i) a parent of the young person;⁴³ or
 - (ii) the young person, if the young person is competent, that is, if the young person understands the nature and consequences of the health care.⁴⁴

- (b) A young person between 12 and 15 years of age should not be able to provide a valid consent to a sterilisation.⁴⁵ The sterilisation of the young person can only be carried out with court approval.

“Sterilisation”, for the purposes of the proposed legislative scheme, means health care performed on a young person (other than a procedure to treat organic malfunction or disease) that -

 - (i) if the young person is not yet, or is reasonably likely to not yet be, fertile - is intended, or reasonably likely, to prevent the young person ever becoming, or ensure the young person does not ever become, fertile; or
 - (ii) if the young person is, or is reasonably likely to be, fertile - is intended, or reasonably likely, to make the young person, or the ensure the young person is, permanently infertile.⁴⁶

- (c) A parent may refuse health care of a young person between 12 and 15 years of age, but a refusal of health care by a parent should not make ineffective a valid consent to health care given by:

⁴³ See the broad definition of “parent” recommended by the Commission in Ch 15 in Volume 2 of this Report and at 26 of this Summary.

⁴⁴ See the discussion of competency at 198-201 in Volume 2 of this Report and the recommendation relating to competency at 10 of this Summary.

⁴⁵ Note also that the Commission has recommended that the common law limitations on a parent’s power to consent should be preserved. See 8 and 10 of this Summary. At common law, a parent is unable to provide a valid consent for the non-therapeutic sterilisation of his or her child. See the discussion at 59-61 and 92-93 in Volume 1 of this Report.

⁴⁶ This definition is derived from the definition of “sterilisation” in the Queensland Law Reform Commission’s Report, *Assisted and Substituted Decisions* (R49, June 1996) Vol 2, *Assisted and Substituted Decision Making Bill* cl 14, Sch 1.

- (i) the young person; or
- (ii) another parent.

As long as a health care provider has one valid consent to the health care, he or she can lawfully carry out health care on a young person, regardless of a refusal by a parent.

- (d) Subject to the recommendation in paragraph (e) below, a young person between 12 and 15 years of age should not be able to refuse health care.
- (e) Although the refusal of health care by a young person should not generally make ineffective a consent to the health care given by a parent, there should be a statutory list of health care that cannot be carried out over the objection of a young person between 12 and 15 years of age.

If the young person objects to the health care, the consent of a parent will be ineffective unless:

- (i) the health care is carried out pursuant to an appropriate court order; or
- (ii) the young person has minimal or no understanding of one or both of the following:
 - what the health care involves; or
 - why the health care is required;

and the proposed health care is likely to cause the young person:

- no distress; or
- temporary distress that is outweighed by the benefit to the young person.

The statutory list of health care that should not be carried out over the objection of a young person should be devised and updated jointly by Queensland Health and the Department of Families, Youth and Community Care.⁴⁷ Initially, the list should include:

- termination of pregnancy;⁴⁸ and

⁴⁷ See note 823 at 237 in Volume 2 of this Report.

⁴⁸ The Commission has defined "termination of pregnancy" as follows:
"Termination" of a pregnancy does not include a procedure performed primarily to treat organic malfunction or disease of the young person.

- contraceptive health care.⁴⁹
- (f) A health care provider may carry out health care of a young person between 12 and 15 years of age if:
- (i) either
- A. • the young person consents to the health care;
- the young person understands the nature and consequences of the health care; and
- the health care is of a kind to which the young person can provide a valid consent (that is, the health care is not in the nature of a sterilisation, as defined, of the young person);⁵⁰
- or
- B. • a parent of the young person consents to the health care; and
- if the health care is of a kind to which the young person can object, the young person does not object to the health care;
- and
- (ii) the health care is in the best interests of the health and well-being of the young person.

These recommendations are reflected in clause 30 of the draft legislation in Part 4 of this Summary.

CHAPTER 12: AUTHORISATION OF HEALTH CARE BY COMPETENCY AND AGE OF YOUNG PERSON: 16 AND 17 YEARS OF AGE

1. 16 OR 17 YEARS OF AGE AND COMPETENT

The Commission makes the following recommendations in relation to health care of a competent 16 or 17 year old young person:

- (a) A competent 16 or 17 year old person should be able to consent to, and refuse, his or her own health care.

⁴⁹ The Commission has defined "contraceptive health care" as follows:
"Contraceptive health care" means health care of a young person that is primarily intended to prevent pregnancy, but does not include sterilisation or termination of pregnancy.

⁵⁰ Note that in recommendation (b) a young person will not be able to provide a valid consent to a sterilisation procedure.

- (b) No other person should be able to consent to, or refuse, health care of a competent 16 or 17 year old person.
- (c) A health care provider may carry out health care of a young person who is 16 or 17 years of age if:
 - (i) the young person consents to the health care; and
 - (ii) the young person understands the nature and consequences of the health care.

These recommendations are reflected in clause 36 of the draft legislation in Part 4 of this Summary.

2. 16 OR 17 YEARS OF AGE AND NON-COMPETENT

The Commission makes the following recommendations in relation to health care of a 16 or 17 year old young person who is not competent:

- (a) A parent of a young person who is 16 or 17 years of age and not competent to consent to his or her own particular health care should be able to consent to, or refuse, that health care for his or her child.
- (b) A young person who is 16 or 17 years of age and not competent should not be able to consent to, or (subject to paragraph (c) below) refuse, his or her own health care.⁵¹
- (c) There should be a statutory list of health care that cannot be carried out over the objection of a young person who is 16 or 17 years of age and not competent.

If the young person objects to the health care, the consent of a parent to such health care will be ineffective unless:

- (i) the health care is carried out pursuant to an appropriate court order; or
- (ii) the young person has minimal or no understanding of one or both of the following.⁵²

⁵¹ But see Ch 13 in Volume 2 of this Report for a discussion of those forms of health care for which consent should not be a requirement. See also recommendations at 19-25 of this Summary.

⁵² See Queensland Law Reform Commission, Report *Assisted and Substituted Decisions* (R49, June 1996) Vol 2 *Assisted and Substituted Decision Making Bill* cl 163, for a similar provision in relation to the health care of adults with a decision-making disability.

- what the health care involves; or
- why the health care is required;

and the proposed health care is likely to cause the young person:

- no distress; or
- temporary distress that is outweighed by the benefit to the young person.

The statutory list of health care that should not be carried out over the objection of a young person should be devised and updated jointly by Queensland Health and the Department of Families, Youth and Community Care.⁵³ Initially, the list should include:

- termination of pregnancy;⁵⁴ and
- contraceptive health care.⁵⁵

- (d) A health care provider may carry out health care of a young person who is 16 or 17 years of age if:
- (i) a parent of the young person consents to the health care;
 - (ii) the young person does not understand the nature and consequences of the health care;
 - (iii) the health care is in the best interests of the health and well-being of the young person.

These recommendations are reflected in clause 37 of the draft legislation in Part 4 of this Summary.

3. RETENTION OF THE *PARENS PATRIAE* JURISDICTION OF THE SUPREME COURT OF QUEENSLAND

The Commission recommends that the *parens patriae* jurisdiction of the Supreme Court of Queensland be retained with respect to all young people under 18 years of age.

⁵³ See note 823 at 237 in Volume 2 of this Report.

⁵⁴ The Commission has defined "termination of pregnancy" in the following way:
 "Termination" of a pregnancy does not include a procedure performed primarily to treat organic malfunction or disease of the young person.

⁵⁵ The Commission has defined "contraceptive health care" to mean health care of a young person that is primarily intended to prevent pregnancy but does not include sterilisation or termination of pregnancy.

This recommendation is reflected in clause 12(5) of the draft legislation in Part 4 of this Summary.

CHAPTER 13: HEALTH CARE FOR WHICH CONSENT SHOULD NOT BE A REQUIREMENT

1. EMERGENCY HEALTH CARE

The Commission makes the following recommendations with respect to the provision of health care to a young person in an emergency situation:

- (a) Subject to the recommendations made below, the common law with respect to emergency health care should be preserved.
- (b) Before carrying out emergency health care of a young person who is under 16 years of age, or who is 16 or 17 years of age but not competent, a health care provider is encouraged to take reasonable steps to contact a parent of the young person, unless the health care provider honestly and reasonably believes that the delay associated with taking such steps would not be in the best interests of the young person's health and well-being.
- (c) A young person who is 16 or 17 years of age and competent (that is, who understands the nature and consequences of the health care), should be able to refuse emergency health care, including a blood transfusion.
- (d) Regardless of whether a parent refuses, or a young person objects to, emergency health care, a person (including a health care provider) who carries out emergency health care on a young person should be protected from liability for assault⁵⁶ if the person honestly and reasonably believes that:
 - (i) the health care should be urgently carried out to meet imminent risk to the young person's life or health; and
 - (ii) the health care is in the best interests of the young person's health and well-being.
- (e) However, a health care provider should not be protected under the previous recommendation if he or she carries out emergency health care on a young person who:
 - (i) has refused the health care; and

⁵⁶ See 11 of this Summary for the definition of "liability for assault".

- (ii) was 16 or 17 years of age and competent at the time of the refusal;
if the health care provider knows, or ought to know, that the young person:
- (iii) had refused the health care;
- (iv) was 16 or 17 years of age and competent at the time of the refusal; and
- (v) had not subsequently retracted that refusal.

These recommendations are reflected in clauses 25, 31, 38 and 52 of the draft legislation in Part 4 of this Summary.

2. REVIEW OF EMERGENCY HEALTH CARE LAW

The Commission considers it desirable for a general review to be undertaken either by Queensland Health or by this Commission of all Queensland law regulating consent requirements for emergency health care and the liability of people who carry out emergency health care. This would include a review of section 20 of the *Transplantation and Anatomy Act 1979* (Qld).⁵⁷

3. HEALTH CARE REQUIRED WITHOUT DELAY

The Commission recommends the following:

- (a) An authorised health care provider (that is, a registered medical practitioner, registered dentist, registered nurse or other health care provider who may be prescribed by regulation) may carry out health care of a young person without a valid consent if:
 - (i) the health care should be carried out without delay;
 - (ii) the young person is not competent to consent to the health care (that is, that the young person is under 12 years of age, or is 12 years of age or older but does not understand the nature and consequences of the health care);
 - (iii) the health care does not involve:
 - health care to which a young person can object (whether or not the young person objects or could object to the health care, for

⁵⁷ This section protects certain people who carry out emergency blood transfusions on young people without a consent or over the refusal of a parent.

- example, a termination of pregnancy or contraceptive health care);
or
- health care for a sexually transmitted disease.
- (iv) the health care is in the best interests of the young person's health and well-being; and
- (v) either:
- the delay associated with taking reasonable steps to contact a parent for parental consent to the health care would not be in the best interests of the young person's health and well-being; or
 - reasonable steps have been taken to contact a parent for parental consent to the health care, but no parental consent to, or parental refusal of, the health care has been given.
- (b) Health care will not be authorised under the previous recommendation if:
- (i) a parent, if contacted, refuses the health care; or
- (ii) the authorised health care provider knows that a parent of a young person has previously indicated that the particular type of health care is not to be carried out on the young person, and, since then, the parent has not indicated otherwise.

These recommendations are reflected in clauses 26, 32 and 39 of the draft legislation in Part 4 of this Summary.

4. MINOR HEALTH CARE

The Commission recommends that a person may carry out minor health care of a young person without consent if:

- (a) the young person is not competent to consent to the health care (that is, the young person is under 12 years of age, or is 12 years of age or older but does not understand the nature and consequences of the health care); and
- (b) the health care is in the best interests of the young person's health and well-being.

The Commission recommends the following definition of "minor health care":

- (a) first aid;

- (b) a non-intrusive examination for diagnostic purposes; or
- (c) the administration of a pharmaceutical drug if-
 - (i) a prescription is not needed to obtain the drug; and
 - (ii) the administration is for a recommended purpose and at a recommended dosage level;

but does not include:

- (d) health care in respect of which a young person's objection makes a parental consent ineffective;
- (e) emergency health care; or
- (f) a blood transfusion; or
- (g) health care required without delay; or
- (h) health care for a sexually transmitted disease; or
- (i) contraceptive health care.

These recommendations are reflected in clauses 27, 33 and 40 of the draft legislation in Part 4 of this Summary.

5. SEXUALLY TRANSMITTED DISEASES

The Commission makes the following recommendations in relation to the health care of a young person for a sexually transmitted disease:

- (a) A young person is competent to consent to health care for a sexually transmitted disease if the young person understands the nature and consequences of the health care.
- (b) A valid consent to health care of a young person for a sexually transmitted disease can be given by:
 - (i) if the young person is under 16 years of age and is competent to consent to the health care-
 - a parent; or
 - the young person;
 - (ii) if the young person is 16 or 17 years of age and is competent to consent to the health care - the young person.
 - (iii) if the young person is under 18 year of age, but is not competent - a parent.

- (c) An authorised health care provider⁵⁸ may carry out health care of a young person for a sexually transmitted disease if:
- (i) there is a valid consent to the health care from the young person or from a parent of the young person; and
 - (ii) the health care is in the best interests of the young person's health and well-being.⁵⁹
- (d) An authorised health care provider may carry out health care of a young person for a sexually transmitted disease, without a valid consent, if:
- (i) the young person is not competent to consent to the health care;
 - (ii) the health care is in the best interests of the young person's health and well-being; and
 - (iii) the young person does not object⁶⁰ to the health care.
- (e) Section 36 of the *Health Act 1937* (Qld) should be amended to ensure that it authorises the treatment for a sexually transmitted disease of a young person who is not competent to consent to the particular health care, and that it authorises such treatment even if a parent of a young person refuses the treatment.

These recommendations are reflected in clauses 28, 34, 36 and 41 of the draft legislation in Part 4 of this Summary.

⁵⁸ The recommendations apply to a registered medical practitioner, a registered dentist, a registered nurse and such other health care providers as may be prescribed by regulation.

⁵⁹ This requirement does not apply to the health care if it is a competent 16 or 17 year old who consents to the health care. See 16-17 of this Summary.

⁶⁰ See 12-13, 15-16 and 17-18 of this Summary where it is recommended that a young person's objection will be effective unless:

- (i) the health care is carried out pursuant to an appropriate court order; or
- (ii) the young person has minimal or no understanding of one or both of the following:
 - what the health care involves; or
 - why the health care is required;and the proposed health care is likely to cause the young person:
 - no distress; or
 - temporary distress that is outweighed by the benefit to the young person.

Note, however, that if a young person objected to health care for a sexually transmitted disease, it is probable that an order would be made under s36 of the *Health Act 1937* (Qld) that the young person be detained at a public hospital and treated.

6. CONTRACEPTIVE HEALTH CARE

The Commission makes the following recommendations in relation to contraceptive health care for a young person:

- (a) A young person is competent to consent to contraceptive health care if the young person understands the nature and consequences of the health care.
- (b) A valid consent to contraceptive health care of a young person can be given by:
 - (i) if the young person is under 16 years of age and is competent to consent to the health care -
 - a parent; or
 - the young person;
 - (ii) if the young person is 16 or 17 years of age and is competent to consent to the health care - the young person.
 - (iii) if the young person is under 18 year of age, but is not competent - a parent.
- (c) If a young person of any age objects to contraceptive health care, the consent of a parent will be ineffective unless:
 - (i) the health care is carried out pursuant to an appropriate court order; or
 - (ii) the young person has minimal or no understanding of one or both of the following:
 - what the health care involves; or
 - why the health care is required;and the proposed health care is likely to cause the young person:
 - no distress; or
 - temporary distress that is outweighed by the benefit to the young person.⁶¹

⁶¹ See the discussion of this recommendation in relation to contraceptive and other types of health care at 236-237, 255-256 and 278-279 in Volume 2 of this Report.

- (d) An authorised health care provider⁶² may carry out contraceptive health care of a young person if:
- (i) • there is a valid consent to the health care from the young person; or
 - there is a valid consent to the health care from a parent of the young person and the young person does not object to the health care;
- and
- (ii) the health care is in the best interests of the young person's health and well-being.⁶³
- (e) An authorised health care provider may carry out contraceptive health care of a young person, without consent, if:
- (i) the young person is not competent to consent to the health care;
 - (ii) the young person requests the health care; and
 - (iii) the health care is in the best interests of the young person's health and well-being.

These recommendations are reflected in clauses 29, 35, 36 and 42 of the draft legislation in Part 4 of this Summary.

CHAPTER 14: YOUNG PEOPLE AS PARENTS

The Commission recommends that a parent who is under 18 years of age should be able to consent to, or refuse, health care of his or her child if the parent:

- (a) understands the nature and consequences of the health care; and
- (b) communicates his or her decision about the health care in some way.

⁶² The recommendations apply to a registered medical practitioner, a registered dentist, a registered nurse and such other health care providers as may be prescribed by regulation.

⁶³ This requirement does not apply if it is a competent 16 or 17 year old who consents to the health care. See 16-17 of this Summary.

This recommendation is reflected in subclauses 21(1) and (6) of the draft legislation in Part 4 of this Summary.

CHAPTER 15: CONSENT BY A SIGNIFICANT CARER

1. CAPACITY TO CONSENT FOR PERSONS WITH DUTY TO SEEK HEALTH CARE

The Commission recommends that each of the following persons be regarded as a “parent” for the purposes of being able to provide a valid consent to health care of a young person:

- (a) a natural⁶⁴ or adoptive parent, as well as a guardian of a young person appointed by operation of law, a guardian appointed by deed or by will to care for the testator’s children upon the testator’s death,⁶⁵ or a guardian appointed by order of the Family Court of Australia, or by the Supreme Court of Queensland or pursuant to care and protection proceedings;
- (b) a step-parent or foster parent who has full-time care of the young person; and
- (c) a competent person of or over 16 years of age (including the head of a residential facility) who has the full-time or significant care of a young person, but only if the young person’s parents:
 - (i) are not reasonably contactable; or
 - (ii) are not themselves competent to consent to health care of the young person.

This recommendation is reflected in clause 21 of the draft legislation in Part 4 of this Summary.

2. RELATIONSHIP BETWEEN THE COMMISSION’S RECOMMENDATIONS AND THE *FAMILY LAW ACT 1975 (CTH)*

The Commission recommends that if a person carries out health care of a young person contrary to a court order, the person’s liability for assault should be decided as if there were no court order unless the person knew, or ought reasonably to have known, of the court order.

⁶⁴ But see s28(1) of the *Adoption of Children Act 1964* (Qld) which provides that upon the making of an adoption order the adopted child ceases to be the natural child of a person who was a parent of the child before the making of the adoption order.

⁶⁵ See *Children’s Services Act 1965* (Qld) s90.

This recommendation is reflected in clause 46 of the draft legislation in Part 4 of this Summary.

CHAPTER 16: MISCELLANEOUS

1. PENALTIES AND ENFORCEMENT

(a) Statutory cause of action for unauthorised health care

The Commission recommends that the legislative scheme contain a statutory cause of action that will enable a young person to recover damages and/or compensation from a health care provider who, without lawful excuse, carries out on the young person health care that is not authorised by the legislative scheme or by another law.

The Commission recommends:

- (a) that if a person, without lawful excuse, carries out on a young person health care that is not authorised by the scheme or another law, the scheme should provide the young person with a statutory cause of action against the person who carried out the unauthorised health care;
- (b) that the cause of action be in addition to any other cause of action that the young person may have under any other law against the person who carried out the unauthorised health care; and
- (c) that in a proceeding under the proposed statutory provision, damages for non-pecuniary loss and exemplary damages should be able to be awarded, whether or not other damages are awarded.

These recommendations are reflected in clause 22 of draft legislation in Part 4 of this Summary.

(b) Criminal offence for unauthorised health care

The Commission recommends that it should be an offence for a person, without lawful excuse, to carry out on a young person health care that is not authorised by the legislative scheme or by another law.

This recommendation is reflected in clause 23 of the draft legislation in Part 4 of this Summary.

(c) Summary of consequences of unauthorised health care

The Commission's recommendations as to the consequences of treating a young person without a valid consent are summarised below:

- (a) Criminal liability for carrying out health care in the following circumstances:
- (i) health care involving a touching, given without a valid consent⁶⁶ (existing liability under Part V of the *Criminal Code* (Qld) and new liability - so many penalty units);
 - (ii) certain prescribed non-touching health care, given without a valid consent (new liability - so many penalty units);
 - (iii) health care to which a young person can object, if the young person objects to the health care (existing liability under Part V of the *Criminal Code* (Qld) and new liability - so many penalty units).
- (b) Civil liability for carrying out health care in the following circumstances:
- (i) health care involving a touching, given without a valid consent (existing liability - that is, action for trespass to the person and liability under a cause of action to be created by the legislative scheme⁶⁷);
 - (ii) certain prescribed non-touching health care, given without a valid consent (liability under a cause of action to be created by the legislative scheme).

2. NOTIFICATION OF MALTREATMENT

The Commission recommends that Queensland Health and the Department of Families, Youth and Community Care jointly consider whether section 76K of the *Health Act 1937* (Qld) should be amended so as to apply to all health care providers.

3. REVIEW OF LEGISLATION

The Commission recommends that after the legislation has been in operation for three years, the legislation should be reviewed in the following respects:

⁶⁶ This would include sterilisation of a young person (other than of a competent 16 or 17 year old young person who consents to the procedure) without court approval. Note the Commission's definition of "sterilisation" at 14 of this Summary.

⁶⁷ See the discussion of this recommendation at 341-344 in Volume 2 of this Report.

- (a) the appropriateness of the types of health care regulated by Schedules 2 and 3 of the legislation; and
- (b) whether there are any types of health care, in addition to sterilisation, to which a competent young person under 16 years of age should be unable to provide a valid consent.

4. ADVOCACY FOR YOUNG PEOPLE

The Commission recommends that the Queensland Government investigate the merits of conferring specific jurisdiction on the office of the Children's Commission to provide an advocacy service for young people, including, among other things, an advocacy service for young people in need of assistance with health care decisions.

5. THE ISSUE OF MEDICARE CARDS

The Commission requests the Health Insurance Commission to reconsider its policy in relation to the issue of separate Medicare cards to young people. Young people of any age should be able to apply for and receive their own Medicare card.⁶⁸

6. PUBLIC EDUCATION

The Commission recommends that, prior to the commencement of the proposed legislative scheme, Queensland Health, in consultation with the Queensland Law Reform Commission instigate an education program on the content and effect of the legislation. The program should be directed to the key players in the area of young people's health including, for example, young people, health care providers and parents. The education program should be ongoing.

⁶⁸ The health care that could be provided to a young person with a Medicare card would still be required to be given in accordance with the Commission's scheme.

PART 3

TABLE OF THE COMMISSION'S LEGISLATIVE SCHEME

LEGEND

The following meanings and abbreviations apply in Tables 1, 2, 3 and 4:

Competent means, in relation to particular health care, that the young person understands the nature and consequences of the health care, and communicates a decision about the health care in some way.

Parent is a reference to the broad definition of "parent" recommended by the Commission in Chapter 15 of this Report.

HCP means health care provider.

Authorised HCP means a registered medical practitioner, registered dentist, registered nurse, or such other health care provider as may be prescribed by a regulation made under the proposed legislative scheme.

Health care generally, unless otherwise stated, is a reference to all touching health care and certain forms of serious non-touching health care to be regulated by the proposed scheme.

Health care required without delay does not include:⁶⁹

- (a) emergency health care;
- (b) a termination of pregnancy;
- (c) contraceptive health care;
- (d) health care for a sexually transmitted disease; or
- (e) a blood transfusion.

Minor health care means:⁷⁰

- (a) first aid;
- (b) a non-intrusive examination for diagnostic purposes; or
- (c) the administration of a pharmaceutical drug if-
 - (i) a prescription is not needed to obtain the drug; and
 - (ii) the administration is for a recommended purpose and at a recommended dosage level.

All four tables list the consent requirements for health care, as well as the circumstances in which the proposed legislative scheme authorises particular types of health care to be carried out without consent.

⁶⁹ See the Commission's recommendations about "health care required without delay" at 20-21 of this Summary.

⁷⁰ See the Commission's recommendations about "minor health care" at 21-22 of this Summary.

TABLE 1: UNDER 12 YEARS OF AGE

Type of health care	Person protected under scheme	Competency of young person	Consent by	Restrictions
Consent requirements				
1.1 Health care generally ⁷¹	Any HCP	Not applicable	A parent	Health care must be in young person's best interests. A parent cannot, without court authorisation, provide a valid consent to a sterilisation that is not medically necessary.
1.2 Health care for a sexually transmitted disease ⁷²	An authorised HCP	Competent	A parent; or Young person	Health care must be in young person's best interests.
		Not competent	A parent	
1.3 Contraceptive health care ⁷³	An authorised HCP	Competent	A parent; or Young person	Health care must be in young person's best interests. A parent's consent is not effective if the young person objects to the health care.
		Not competent	A parent	
Exceptions to the need for consent				
1.4 Emergency health care	Any person	Not applicable	No consent requirement	Health care must be urgently required to meet imminent risk to young person's life or health. Health care must be in young person's best interests. Health care can be given over the refusal of a parent.

71 This excludes health care for a sexually transmitted disease, contraceptive health care and emergency health care. The Commission has made specific recommendations for each of those types of health care. See 1.2, 1.3 and 1.4 of this Table.

72 See 1.7 of this Table for when health care for a sexually transmitted disease can be carried out without consent.

73 See 1.8 of this Table for when contraceptive health care can be carried out without consent.

1.5	Health care required without delay	An authorised HCP	Not applicable	No consent requirement	Health care must be required without delay. The delay associated with taking reasonable steps to contact a parent for his or her consent would not be in the young person's best interests, or, if the authorised HCP has taken reasonable steps to contact a parent, no parental consent to, or refusal of, the health care is given. Health care must be in young person's best interests. Health care cannot be carried out under this provision if a parent has previously indicated in similar circumstances that the health care should not be carried out, and since then the parent has not indicated otherwise.
1.6	Minor health care	Any person	Not applicable	No consent requirement	Health care must be in young person's best interests.
1.7	Health care for a sexually transmitted disease	An authorised HCP	Not competent	No consent requirement	Health care must be in young person's best interest. Health care cannot be carried out under this provision if young person objects to it. ⁷⁴
1.8.	Contraceptive health care	An authorised HCP	Not competent	No consent requirement if the young person requests the health care.	Health care must be in young person's best interests.

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The Commission has recommended that s36 of the *Health Act 1937* (Qld) be amended to ensure that it authorises health care for a notifiable disease of a young person who is not competent to consent to any "reasonable examination" etc and, therefore, presumably not competent to provide a refusal of health care, or whose parent refuses the health care of the young person. A young person who objected to health care for a sexually transmitted disease would be treated under s36 of the *Health Act 1937* (Qld) as amended.

TABLE 2: FROM 12 TO 15 YEARS OF AGE (INCLUSIVE)

Type of health care	Person protected under scheme	Competency of young person	Consent by	Restrictions
Consent requirements				
2.1 Health care generally ⁷⁵	Any HCP	Competent Not competent	A parent; or Young person A parent	Health care must be in young person's best interests. Neither a parent nor a young person can, without court authorisation, provide a valid consent to a sterilisation that is not medically necessary.
2.2 Health care for a sexually transmitted disease ⁷⁶	An authorised HCP	Competent Not competent	A parent; or Young person A parent	Health care must be in young person's best interests.
2.3 Contraceptive health care ⁷⁷	An authorised HCP	Competent Not competent	A parent; or Young person A parent	Health care must be in young person's best interests. A parent's consent is not effective if the young person objects to the health care.
Exceptions to the need for consent				
2.4 Emergency health care	Any person	Not applicable	No consent requirement	Health care must be urgently required to meet imminent risk to young person's life or health. Health care must be in young person's best interests. Health care can be given over the refusal of a parent.

⁷⁵ This excludes health care for a sexually transmitted disease, contraceptive health care and emergency health care. The Commission has made specific recommendations for each of those types of health care. See 2.2, 2.3 and 2.4 of this Table.

⁷⁶ See 2.7 of this Table for when health care for a sexually transmitted disease can be carried out without consent.

⁷⁷ See 2.8 of this Table for when contraceptive health care can be carried out without consent.

2.5	Health care required without delay	An authorised HCP	Not competent	No consent requirement	Health care must be required without delay. The delay associated with taking reasonable steps to contact a parent for his or her consent would not be in the young person's best interests, or, if the authorised HCP has taken reasonable steps to contact a parent, no parental consent to, or refusal of, the health care is given. Health care must be in young person's best interests. Health care cannot be carried out under this provision if a parent has previously indicated in similar circumstances that the health care should not be carried out, and since then the parent has not indicated otherwise.
2.6	Minor health care	Any person	Not competent	No consent requirement	Health care must be in young person's best interests.
2.7	Health care for a sexually transmitted disease	An authorised HCP	Not competent	No consent requirement	Health care must be in young person's best interests. Health care cannot be carried out under this provision if young person objects to it. ⁷⁸
2.8	Contraceptive health care	An authorised HCP	Not competent	No consent requirement if young person requests the health care	Health care must be in young person's best interests.

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The Commission has recommended that s36 of the *Health Act 1937* (Qld) be amended to ensure that it authorises health care for a notifiable disease of a young person who is not competent to consent to any "reasonable examination" etc and, therefore, presumably not competent to provide a refusal of health care, or whose parent refuses the health care of the young person. A young person who objected to health care for a sexually transmitted disease would be treated under s36 of the *Health Act 1937* (Qld) as amended.

TABLE 3: 16 OR 17 YEARS OF AGE AND COMPETENT FOR THE HEALTH CARE

Type of health care	Person protected under scheme	Competency of young person	Consent	Restrictions
Consent requirements				
3.1 Health care generally ⁷⁹	Any HCP	Competent	Young person only (Young person can also refuse health care)	-
Exceptions to the need for consent				
3.2 Emergency health care	Any person	Competent	No consent requirement, but young person can refuse emergency health care ⁸⁰	Health care must be urgently required to meet imminent risk to young person's life or health. Health care must be in young person's best interests.

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This includes the capacity to consent to health care for a sexually transmitted disease or to contraceptive health care. Those two types of health care are not, in the case of a competent 16 or 17 year old young person, subject to specific consent requirements. However, it excludes emergency health care, for which the Commission has made specific recommendations. See 3.2 of this Table.

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A HCP will not be protected if he or she knows, or ought to know, that the young person has refused the health care, was 16 or 17 and competent at the time he or she refused the health care, and that the young person has not subsequently retracted the refusal.

TABLE 4: 16 OR 17 YEARS OF AGE BUT NOT COMPETENT FOR THE HEALTH CARE

Type of health care	Person protected under scheme	Competency of young person	Consent by	Restrictions
Consent requirements				
4.1 Health care generally ⁸¹	Any HCP	Not competent	A parent	Health care must be in young person's best interests. A parent cannot, without court authorisation, provide a valid consent to a sterilisation that is not medically necessary.
4.2 Health care for a sexually transmitted disease ⁸²	An authorised HCP	Not competent	A parent	Health care must be in young person's best interests.
4.3 Contraceptive health care ⁸³	An authorised HCP	Not competent	A parent	Health care must be in young person's best interests. A parent's consent is not effective if the young person objects to the health care.
Exceptions to the need for consent				
4.4 Emergency health care	Any person	Not competent	No consent requirement	Health care must be urgently required to meet imminent risk to young person's life or health. Health care must be in young person's best interests. Health care can be given over the refusal of a parent.

81 This excludes health care for a sexually transmitted disease, contraceptive health care and emergency health care. The Commission has made specific recommendations for each of those types of health care. See 4.2, 4.3 and 4.4 of this Table.

82 See 4.7 of this Table for when health care for a sexually transmitted disease can be carried out without consent.

83 See 4.8 of this Table for when contraceptive health care can be carried out without consent.

4.5	Health care required without delay	An authorised HCP	Not competent	No consent requirement	Health care must be required without delay. The delay associated with taking reasonable steps to contact a parent for his or her consent would not be in the young person's best interests, or, if the authorised HCP has taken reasonable steps to contact a parent, no parental consent to, or refusal of, the health care is given. Health care must be in young person's best interests. Health care cannot be carried out under this provision if a parent has previously indicated in similar circumstances that the health care should not be carried out, and since then the parent has not indicated otherwise.
4.6	Minor health care	Any person	Not competent	No consent requirement	Health care must be in young person's best interests.
4.7	Health care for a sexually transmitted disease	An authorised HCP	Not competent	No consent requirement	Health care must be in young person's best interests. Health care cannot be carried out under this provision if the young person objects to it. ⁸⁴
4.8	Contraceptive health care	An authorised HCP	Not competent	No consent requirement if the young person requests the health care.	Health care must be in young person's best interests.

The Commission has recommended that s36 of the *Health Act 1937* (Qld) be amended to ensure that it authorises health care for a notifiable disease of a young person who is not competent to consent to any "reasonable examination" etc and, therefore, presumably not competent to provide a refusal of health care, or whose parent refuses the health care of the young person. A young person who objected to health care for a sexually transmitted disease would be treated under s36 of the *Health Act 1937* (Qld) as amended.

PART 4

DRAFT LEGISLATION

This Chapter contains draft legislation, prepared by the Office of the Queensland Parliamentary Counsel, for implementing the Commission's recommendations. The Commission gratefully acknowledges the contribution made to the formulation of its recommendations by the drafting process and, in particular, wishes to thank Ms Theresa Johnson, First Assistant Parliamentary Counsel, for her assistance.

The proposed legislative scheme is not intended to be a codification of the law relating to consent to health care for young people. Rather, the proposed legislative scheme is a modification of the existing law.

The draft legislation preserves a number of aspects of the common law applying to consent to health care for young people. For example, the common law limitations on the power of a parent to consent to health care for a child and the *parens patriae* jurisdiction of the Supreme Court of Queensland are not affected by the draft legislation.⁸⁵

⁸⁵ See clause 12(3) of the draft legislation.

DRAFT

Queensland



**HEALTH CARE
AUTHORISATION FOR
YOUNG PEOPLE BILL 1996**

Queensland



**HEALTH CARE AUTHORISATION FOR
YOUNG PEOPLE BILL 1996**

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1996

1

A BILL

2

FOR

3

**A Bill for an Act regulating authorisation of health care of young
people, and for other purposes**

4

5

6

7

Health Care Authorisation for Young People

The Parliament of Queensland enacts—	1
CHAPTER 1—PRELIMINARY	
Short title	3
1. This Act may be cited as the <i>Health Care Authorisation for Young People Act 1996</i> .	4 5
Act binds all persons	6
2.(1) This Act binds all persons, including the State, and, so far as the legislative power of the Parliament permits, the Commonwealth and the other States.	7 8 9
(2) Nothing in this Act makes the State liable to be prosecuted for an offence.	10 11
Philosophy	12
3.(1) This Act deals with the law on the authorisation of health care of young people under 18 years.	13 14
(2) It acknowledges the following—	15
(a) the desirability of minimising legal impediments to young people's access to appropriate health care;	16 17
(b) the psychological and health advantages to young people of their being involved in decision making affecting their own health;	18 19
(c) the developing autonomy of the individual young person;	20
(d) the need to protect vulnerable young people from inappropriate or exploitative health care;	21 22
(e) the vital role parents have in the health care of their children;	23
(f) the need to ensure, if parental support is not readily available, other accessible and appropriate mechanisms are available to	24 25

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facilitate health care of a young person;	1
(g) the desirability of minimising uncertainty about the legal liability of health care providers who carry out health care of young people.	2 3 4
Purpose to achieve balance	5
4. This Act seeks to strike a balance between—	6
(a) ensuring the law does not hinder young people’s access to health care; and	7 8
(b) ensuring the law protects young people from inappropriate health care.	9 10
Way purpose achieved—under 12	11
5. For health care, of a young person who is under 12 years, requiring consent, this Act generally authorises only a parent ¹ of the young person to consent. ²	12 13 14
Way purpose achieved—12 to 15	15
6. For health care, of a young person who is 12 to 15 years, requiring consent, this Act generally—	16 17
(a) authorises a parent of the young person to consent to health care of the young person; and	18 19
(b) also authorises the young person, if the young person understands the nature and consequences of particular health care, to consent to the health care of himself or herself (other than sterilisation ³) even if a parent refuses the health care. ⁴	20 21 22 23

¹ The definition of “parent” is wider than its common meaning—section 21.

² See section 24 (Health care generally—under 12).

³ “Sterilisation” is defined—schedule 1, section 10.

⁴ See section 30 (Health care generally—12 to 15).

Health Care Authorisation for Young People

Way purpose achieved—16 or 17	1
7. For health care, of a young person who is 16 or 17 years, requiring consent, this Act generally—	2 3
(a) treats as an adult, a young person who understands the nature and consequences of particular health care so only the young person may consent to, or refuse, the health care of himself or herself; ⁵ and	4 5 6 7
(b) authorises a parent of a young person who does not understand the nature and consequences of particular health care to consent to the health care of the young person. ⁶	8 9 10
 Way purpose achieved—health care without consent	 11
8. This Act—	12
(a) does not regulate the authorisation of health care of a young person not involving a touching (other than certain serious non-touching health care); ⁷ and	13 14 15
(b) authorises certain health care of a young person to be carried out	16

⁵ See section 36 (Health care generally—16 or 17 and competent).

⁶ See section 37 (Health care generally—16 or 17 and non-competent).

⁷ See section 18 (Meaning of health care); schedule 1, section 1 (Non-touching health care); and schedule 2 (Scheduled non-touching health care). The Law Reform Commission has adopted this approach because the existing law does not generally impose any liability for assault for non-touching health care carried out without consent.

Health Care Authorisation for Young People

without consent; ⁸ and	1
(c) amends the <i>Transplantation and Anatomy Act 1979</i> , in relation to blood transfusions to young people without consent, to give effect to a refusal of a blood transfusion, by a young person who is 16 or 17 years old and who understands the nature and consequences of a blood transfusion, by removing the protection from liability for assault if the young person refuses the blood transfusion. ⁹	2 3 4 5 6 7 8
Way purpose achieved—young parents	9
9. For particular health care of a young person, whose parent is under 18 years and understands the nature and consequences of the health care, this Act treats the young parent in the same way as it treats an adult parent so the young parent may consent to, or refuse, the health care. ¹⁰	10 11 12 13
Way purpose achieved—significant carers	14
10. In certain circumstances, this Act treats a person with the significant care of a young person as a parent of the young person. ¹¹	15 16
<hr style="width: 20%; margin-left: 0;"/>	
⁸ For a young person under 12 years—see sections 26 to 29; for a 12 to 15 year old—see sections 32 to 35; and for a 16 or 17 year old who is not competent—see sections 39 to 42. These sections authorise health care required without delay, minor health care, STD health care and contraceptive health care to be carried out without consent in certain limited circumstances. Except as provided by this Act, the common law about emergency health care for young people under 18 years, as it exists from time to time, applies—section 12(4) (Act’s relationship with other law). In the Law Reform Commission’s view, consent is not relevant to the provision of emergency health care under the common law. So, emergency health care of a young person may always be carried out without a consent. Sections 25, 31 and 38 then provide protection from liability for assault for a person who carries out emergency health care without a consent in certain circumstances.	
⁹ See chapter 6 (Consequential amendments), part 2 (Amendment of <i>Transplantation and Anatomy Act 1979</i>).	
¹⁰ See section 21 (Meaning of parent, guardian and significant carer), particularly subsections (1) and (6).	
¹¹ See section 21 (Meaning of parent, guardian and significant carer), particularly subsections (2) and (4).	

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Way purpose achieved—safeguards	1
11. This Act also—	2
(a) generally authorises only health care of a young person that is in the best interests of the young person’s health and wellbeing; ¹² and	3 4 5
(b) provides that a young person’s objection ¹³ to certain serious types of health care makes a parental consent to the health care ineffective; ¹⁴ and	6 7 8
(c) encourages health care providers and others to comply with this Act by—	9 10
(i) protecting health care providers and others who carry out health care of young people under ¹⁵ this Act from liability for assault; ¹⁶ and	11 12 13
(ii) providing criminal and civil consequences for carrying out health care not authorised under this Act or another law. ¹⁷	14 15

¹² See, for example, section 30(3).

¹³ “Objects” is defined in schedule 1 (Additional Health Care Concepts), section 12.

¹⁴ For an objection to scheduled objectionable health care, see sections 24(2)(b) and (e), 30(2)(c) and (g) and 37(2)(b) and (e). For an objection to contraceptive health care, see sections 29(1)(c) and (f), 35(1)(c) and (f) and 42(1)(b) and (d).

¹⁵ ‘ “Under”, for an Act or a provision of an Act, includes ... in accordance with’—*Acts Interpretation Act 1954*, section 36.

¹⁶ “liable for assault” means—

(a) civilly liable for assault or battery or under section 22; and

(b) criminally liable for assault or under section 23.

See— section 43 (Protection for health care under Act)

section 44 (Protection if mistaken belief)

section 45 (Protection for health care by court order)

section 46 (Protection if unaware of court order)

section 47 (Protection for supervised health care provider).

¹⁷ See sections 22 (Civil action if unauthorised health care) and 23 (Offence to carry out unauthorised health care).

Health Care Authorisation for Young People

Act's relationship with other law

12.(1) To remove any doubt, this section makes the following declarations.

(2) This Act is not intended to operate as a code and the common law, as it exists from time to time, about authorisation and confidentiality of health care for young people under 18 years continues to apply to the extent it is not inconsistent with this Act.

(3) Without limiting subsection (2), this Act does not affect any common law limitation on the power of a parent to consent to health care of a young person.

Example—

A young person's parents cannot consent, without court approval, to the young person's sterilisation—*Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

(4) Also, without limiting subsection (2), except as provided by sections 25, 31 and 38, the common law, as it exists from time to time, about emergency health care for young people under 18 years applies.¹⁸

(5) This Act is not intended to displace any of the following jurisdictions—

- the *parens patriae* jurisdiction of the Supreme Court for young people under 18 years;¹⁹
- the jurisdiction of the Family Court of Australia by virtue of the *Commonwealth Powers (Family Law—Children) Act 1990* for

¹⁸ The Law Reform Commission recommends a review of all Queensland laws on emergency health care.

¹⁹ By way of background, the Law Reform Commission advises as follows—
The *parens patriae* jurisdiction is based on a need to protect those who lack the capacity to protect themselves. Although the jurisdiction has been likened to a parental role (*R v Gyngall* [1893] 2 QB 232), a court acting in its *parens patriae* jurisdiction has wider powers than those of a natural parent (see, for example, *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218 at 258-259). Accordingly, the court may override the wishes both of a young person's parents and of a legally competent young person (*In re R (A Minor) (Wardship: Consent to Treatment)* [1992] Fam 11 at 25 and *In re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1993] Fam 64 at 81).

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young people under 18 years. ²⁰	1
(6) Also, a consent or refusal given under this Act may be varied or overridden by a court order or may be subject to another law.	2 3
<i>Example—</i>	4
Parental consent is subject to Commonwealth law if a parent's power to consent to health care has been removed or reduced by a parenting order made under the <i>Family Law Act 1975</i> (Cwlth), pt VII, div 6—see <i>Family Law Act 1975</i> (Cwlth), s 61D(2).	5 6 7 8
(7) If a person carries out health care, of a young person, that could have been, but was not, authorised under this Act, the <i>Criminal Code</i> , section 282 ²¹ does not relieve the person from liability for assault.	9 10 11
(8) Finally, this Act does not affect a person's liability under another law, for example, in contract or negligence, for carrying out health care authorised under this Act.	12 13 14

CHAPTER 2—INTERPRETATION AND CONCEPTS	15 16
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PART 1—CONCEPTS	17
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Explanation	18
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13. Generally, the authorisation of health care of a young person under this Act varies according to the following factors—	19 20
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²⁰ The Law Reform Commission notes this Act could not affect the Family Court's jurisdiction under Commonwealth law.

²¹ The Criminal Code, section 282 provides as follows—

'Surgical operations

282. A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for the patient's benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.'

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• the type of health care	1
• the type of person to carry out the health care	2
• the age group to which the young person belongs	3
• the competency of the young person to understand the nature and consequences of the health care and to communicate a decision.	4 5
Types of health care	6
14.(1) The authorisation of health care of a young person under this Act varies according to which of the following types of health care ²² is involved—	7 8 9
• health care generally	10
• emergency health care	11
• health care required without delay	12
• minor health care	13
• STD health care	14
• contraceptive health care.	15
(2) This Act also mentions the following types of health care—	16
• blood transfusion	17
• non-touching health care and scheduled non-touching health care ²³	18 19
• sterilisation, termination of a pregnancy and health care primarily to treat organic malfunction or disease ²⁴	20 21
• scheduled objectionable health care.	22

²² Schedule 1 contains definitions of the types of health care.

²³ Of non-touching health care, only scheduled non-touching health care is regulated by this Act.

²⁴ Health care primarily to treat organic malfunction or disease is only mentioned in the definitions of sterilisation and termination of a pregnancy.

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Type of person carrying out health care	1
15. This Act distinguishes between health care carried out by the following people—	2
<ul style="list-style-type: none"> • health care providers²⁵ • authorised health care providers²⁶ • people who are not health care providers. 	3 4 5 6
Age groups	7
16. This Act divides young people into the following age groups—	8
<ul style="list-style-type: none"> • under 12 years • 12 to 15 years • 16 or 17 years. 	9 10 11
PART 2—INTERPRETATION	
Dictionary	12 13
17. The dictionary in schedule 4 defines particular words used in this Act. ²⁷	14 15

²⁵ See section 19 (Meaning of health care provider).

²⁶ See schedule 4, dictionary, “authorised health care provider”.

²⁷ In some Acts, definitions are contained in a dictionary that appears as the last schedule and forms part of the Act—*Acts Interpretation Act 1954*, section 14(4). Words defined elsewhere in the Act are generally signposted by entries in the dictionary. However, if a section has a definition applying only to the section, or a part of the section, it is generally not signposted by an entry in the dictionary and is generally set out in the last subsection of the section. Signpost definitions in the dictionary alert the reader to the terms defined elsewhere and tell the reader where the definitions can be found. For example, the definition “health care” see section 18’ tells the reader there is a definition of health care in the section.

Meaning of health care

18. “Health care” of a young person is care or treatment of, or a service or procedure for, the young person to assess, diagnose, maintain or treat the young person’s physical or mental condition, but does not include—

- (a) a blood transfusion under the *Transplantation and Anatomy Act 1979*;²⁸ or
- (b) non-touching health care.²⁹

Meaning of health care provider

19. A “health care provider” is a person who provides health care in the practice of a profession or the ordinary course of business.³⁰

Meaning of competent

20.(1) A young person is “competent” for his or her own particular health care if the young person understands the nature and consequences of the health care and communicates his or her decision about the health care in some way.³¹

(2) A young person’s ability to understand the nature and consequences

²⁸ Blood transfusions to young people are regulated under this Act and the *Transplantation and Anatomy Act 1979*. A blood transfusion with consent may be authorised, and protection from liability for assault given, under section 24 (Health care generally—under 12), section 30 (Health care generally—12 to 15), section 36 (Health care generally—16 or 17 and competent) or section 37 (Health care generally—16 or 17 and non-competent). For a blood transfusion without consent, the *Transplantation and Anatomy Act 1979*, part 2A (Blood transfusions to children without consent) protects a person who carries it out from liability for assault in certain limited circumstances.

²⁹ Schedule 1 explains the types of health care used in this Act.

³⁰ See also schedule 4, dictionary, “authorised health care provider”.

³¹ This standard of competency has been developed by the Law Reform Commission from the *Gillick* test. [*Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112]. The Commission considers that, in order to assess a young person’s competency, a health care provider would probably need to explain to the young person the nature and consequences of, and alternatives to, the health care.

Health Care Authorisation for Young People

of health care may vary according to the particular health care involved or the young person's circumstances.	1 2
<i>Example—</i>	3
At a given time, a young person may be a competent young person for certain health care but not for other health care.	4 5
Meaning of parent, guardian and significant carer	6
21.(1) A “parent” for particular health care of a young person is a person who is—	7 8
(a) either—	9
(i) a natural parent, adoptive parent or guardian of the young person; or	10 11
(ii) a step-parent or foster parent of the young person who has full-time care of the young person; and	12 13
(b) competent for the health care.	14
(2) If there is no parent under subsection (1) who is reasonably contactable for particular health care of a young person, a “parent” for the health care also includes a significant carer of the young person.	15 16 17
(3) A “guardian” of a young person is—	18
(a) a person, appointed by operation of law or under a deed or will, with responsibility for the young person's welfare; or	19 20
(b) a person appointed under a court order with responsibility for the young person's welfare; or	21 22
(c) a legally authorised representative or delegate, of a person appointed under a court order with responsibility for the young person's welfare, who actually discharges the responsibility; or	23 24 25
(d) a person who has custody of the young person under the	26

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<i>Children's Services Act 1965, section 49(2), (2B) or (2C).</i> ³²	1
(4) A “significant carer” for particular health care of a young person is a person who—	2 3
(a) is 16 years or more; and	4
(b) has full-time or significant care of the young person; and	5
(c) is competent for the health care.	6
<i>Examples—</i>	7
The head of a boarding school caring for a young person who boards 5 days a week during the school year is a significant carer of the young person.	8 9
A young person's casual baby sitter, who has only the temporary care of the young person, is not a significant carer of the young person.	10 11
(5) An adult is “competent” for particular health care of a young person if the adult broadly understands the nature of the health care and communicates his or her decision about the health care in some way. ³³	12 13 14
(6) A young person is “competent” for particular health care of another young person, if the young person first mentioned understands the nature	15 16

³² *Children's Services Act 1965, section 49—*

‘(2) An officer of the department authorised in that behalf by the director or any police officer may, without further authority than this Act, take into custody on behalf of the director any child who appears or who such officer suspects on reasonable grounds to be in need of care and protection.

(2B) Pending determination by the Children's Court of such an application the child shall be cared for in a manner consistent with the child's best interests—

(a) by a person chosen by the court; or

(b) in the absence of such a choice, by the person who took the child into custody or by a person chosen by the person;

and for this purpose the person entrusted with the child may retain custody of the child.

(2C) If under subsection (2) the court chooses the director to care for a child it shall remand the child into the temporary custody of the director.’.

³³ The Law Reform Commission has based this standard of competency on *Chatterton v Gerson* [1981] QB 432 per Bristow J at 443.

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and consequences of the health care and communicates his or her decision
about the health care in some way.³⁴

CHAPTER 3—UNAUTHORISED HEALTH CARE

Civil action if unauthorised health care

22.(1) If, without lawful excuse, a person carries out health care of a
young person not authorised under this Act or another law, the young
person has a cause of action for damages against the person for the
unauthorised health care.

(2) The cause of action is in addition to any cause of action the young
person may have under another law.

(3) In a proceeding under this section, exemplary damages, or damages
for non-pecuniary loss, may be awarded, whether or not other damages are
awarded.

Offence to carry out unauthorised health care

23.(1) A person must not, without lawful excuse, carry out health care of
a young person not authorised under this Act or another law.

Maximum penalty—

(2) This offence is in addition to any offence under another law and the
Acts Interpretation Act 1954, section 45(1) does not apply to this section.³⁵

³⁴ The Law Reform Commission considers that, in order to assess a young person's
competence, a health care provider would probably need to explain to the young
person the nature and consequences of, and alternatives to, the health care.

³⁵ *Acts Interpretation Act 1954*, section 45(1) (Offence punishable only once)—
'(1) If an act or omission is an offence under each of 2 or more laws, the
offender may be prosecuted and punished under any of the laws, but the offender
may not be punished more than once for the same offence.'

CHAPTER 4—AUTHORISATION OF HEALTH CARE BY AGE GROUP AND TYPE OF HEALTH CARE

PART 1—UNDER 12

Health care generally—under 12

24.(1) In this section—

“health care” does not include—

- (a) emergency health care;³⁶ or
- (b) STD health care;³⁷ or
- (c) contraceptive health care.³⁸

(2) For health care,³⁹ of a young person who is under 12 years, by a health care provider—

- (a) a parent⁴⁰ of the young person may consent to, or refuse, the health care;⁴¹ and
- (b) if the health care is scheduled objectionable health care,⁴² the

³⁶ See schedule 1 (Additional health care concepts), section 4 for definition.

³⁷ See schedule 1 (Additional health care concepts), section 7 for definition.

³⁸ See schedule 1 (Additional health care concepts), section 8 for definition. Also, sections 25, 28 and 29 deal specifically with emergency health care, STD health care and contraceptive health care of a young person who is under 12 years.

³⁹ See section 18 for definition.

⁴⁰ The definition of “parent” is wider than its common meaning—section 21.

⁴¹ However, this Act does not affect any common law limitation on the power of a parent to consent to health care of a young person—section 12(3). For example, a young person’s parents cannot consent, without court approval, to the young person’s sterilisation—*Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

⁴² Scheduled objectionable health care is listed in schedule 3.

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young person may object ⁴³ to the health care; and	1
(c) the young person may not consent to, or refuse, the health care; and	2 3
(d) a consent by 1 parent is effective even if another parent refuses the health care; and	4 5
(e) a consent by a parent to scheduled objectionable health care is ineffective if the young person objects to the health care.	6 7
(3) Health care, of a young person who is under 12 years, may be carried out by a health care provider with a consent if the health care is in the best interests of the young person's health and wellbeing. ⁴⁴	8 9 10
 Emergency health care—under 12	 11
25.(1) Before a health care provider carries out emergency health care, of a young person who is under 12 years, the health care provider is encouraged to take reasonable steps to contact a parent of the young person about the health care.	12 13 14 15
(2) Subsection (1) does not apply if the health care provider honestly and reasonably believes the delay associated with taking the steps would not be in the best interests of the young person's health and wellbeing.	16 17 18
(3) A person is not liable for assault for carrying out health care of a young person who is under 12 years if—	19 20
(a) the health care should be carried out urgently to meet imminent risk to the young person's life or health; and	21 22
(b) the health care is in the best interests of the young person's health and wellbeing. ⁴⁵	23 24

⁴³ See schedule 1 (Additional health care concepts), section 12 for definition.

⁴⁴ For protection from liability for assault for health care carried out under this Act, see section 43.

⁴⁵ Except as provided by this section, the common law, as it exists from time to time, about emergency health care for young people under 12 years applies—section 12(4) (Act's relationship with other law). In the Law Reform Commission's view, consent is not relevant to the provision of emergency health care under the common law. So, emergency health care of a young person may always be carried out without a consent.

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(4) Subsection (3) applies even if a parent of the young person refuses the health care or the young person objects to the health care.⁴⁶

Health care required without delay—under 12

26.(1) This section does not apply for particular health care required without delay, by an authorised health care provider,⁴⁷ if the authorised health care provider knows a parent of the young person previously indicated the health care of the young person is not to be carried out and, since then, the parent has not indicated otherwise.

Example—

This section does not apply to the administration by a school doctor or nurse of an injection of a particular drug to a school student if the student's parent had previously told the doctor or nurse not to administer the drug to the student.

(2) Health care required without delay,⁴⁸ of a young person who is under 12 years, may be carried out by an authorised health care provider without a consent if—

- (a) either—
 - (i) the delay associated with taking reasonable steps to contact a parent of the young person for parental consent to the health care would not be in the best interests of the young person's health and wellbeing; or
 - (ii) reasonable steps have been taken to contact a parent of the young person for parental consent to the health care, but no parental consent to, or parental refusal of, the health care is given; and
- (b) the health care is in the best interests of the young person's health and wellbeing.

⁴⁶ Subsections (3) and (4) reflect the Law Reform Commission's understanding of the common law.

⁴⁷ See schedule 4 (Dictionary) for definition.

⁴⁸ See schedule 1 (Additional health care concepts), section 5 for definition.

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Minor health care—under 12	1
<p>27. Minor health care,⁴⁹ of a young person who is under 12 years, may be carried out by a person without a consent if the health care is in the best interests of the young person's health and wellbeing.⁵⁰</p>	2 3 4
STD health care—under 12	5
<p>28.(1) For STD health care, of a young person who is under 12 years, by an authorised health care provider—</p>	6 7
<p style="padding-left: 2em;">(a) a parent of the young person may consent to, or refuse,⁵¹ the health care; and</p>	8 9
<p style="padding-left: 2em;">(b) if the young person is competent⁵² for the health care, the young person may consent to the health care; and</p>	10 11
<p style="padding-left: 2em;">(c) the young person may object to, but not refuse, the health care; and</p>	12 13
<p style="padding-left: 2em;">(d) a consent by the young person is effective even if a parent refuses the health care; and</p>	14 15
<p style="padding-left: 2em;">(e) a consent by 1 parent is effective even if another parent refuses the health care; and</p>	16 17
<p style="padding-left: 2em;">(f) a consent by a parent is effective even if the young person objects to the health care.</p>	18 19
<p>(2) STD health care, of a young person who is under 12 years, may be</p>	20

⁴⁹ See schedule 1 (Additional health care concepts), section 6 for definition.

⁵⁰ For minor health care by a health care provider carried out with a consent—see section 24 (Health care generally—under 12). Minor health care by another person carried out with a consent is subject to the common law, as it exists from time to time, about authorisation of health care for young people—see section 12(2).

⁵¹ However, a parental refusal has very little effect. It is ineffective if a competent young person consents to the health care (paragraphs (b) and (d)) or a non-competent young person does not object to the health care (subsection (3)). Finally, if not authorised under this Act, the health care may be authorised by an order made under the *Health Act 1937*, section 36, as amended by this Act—see section 50.

⁵² See section 20 for definition.

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carried out by an authorised health care provider with a consent if the health care is in the best interests of the young person's health and wellbeing. 1
2

(3) Further, STD health care, of a young person who is under 12 years and not competent for the health care, may be carried out by an authorised health care provider without a consent, even if a parent of the young person refuses the health care, if— 3
4
5
6

(a) the health care is in the best interests of the young person's health and wellbeing; and 7
8

(b) the young person does not object to the health care.⁵³ 9

Contraceptive health care—under 12 10

29.(1) For contraceptive health care, of a young person who is under 12 years, by an authorised health care provider— 11
12

(a) a parent of the young person may consent to, or refuse,⁵⁴ the health care; and 13
14

(b) if the young person is competent for the health care, the young person may consent to the health care; and 15
16

(c) the young person may object to, but not refuse, the health care;⁵⁵ and 17
18

(d) a consent by the young person is effective even if a parent refuses the health care; and 19
20

(e) a consent by 1 parent is effective even if another parent refuses the health care; and 21
22

(f) a consent by a parent is ineffective if the young person objects to the health care. 23
24

⁵³ If a young person objects to STD health care and there is no parental consent to the health care, the health care may be authorised by an order made under the *Health Act 1937*, section 36, as amended by this Act—see section 50.

⁵⁴ However, a parental refusal is ineffective if a competent young person consents to the contraceptive health care (subsection (1)(b) and (d)) or a non-competent young person asks for the contraceptive health care (subsection (3)).

⁵⁵ However, the young person's objection makes a parental consent ineffective—see paragraph (f).

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- (2) Contraceptive health care, of a young person who is under 12 years, may be carried out by an authorised health care provider with a consent if the health care is in the best interests of the young person's health and wellbeing. 1
2
3
4
- (3) Further, contraceptive health care, of a young person who is under 12 years and not competent for the health care, may be carried out by an authorised health care provider without a consent, even if a parent of the young person refuses the health care, if— 5
6
7
8
- (a) the health care is in the best interests of the young person's health and wellbeing; and 9
10
- (b) the young person asks for the health care. 11

PART 2—12 TO 15 YEARS 12

- Health care generally—12 to 15** 13
- 30.(1)** In this section— 14
- “health care”** does not include— 15
- (a) emergency health care; or 16
- (b) STD health care; or 17
- (c) contraceptive health care.⁵⁶ 18
- (2) For health care, of a young person who is 12 to 15 years, by a health care provider— 19
20
- (a) a parent⁵⁷ of the young person may consent to, or refuse, the 21

⁵⁶ Sections 31, 34 and 35 deal specifically with these types of health care of a young person who is 12 to 15 years.

⁵⁷ The definition of “parent” is wider than its common meaning—section 21.

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health care; ⁵⁸ and	1
(b) if the young person is competent for the health care, the young person may consent to the health care (except if the health care is sterilisation ⁵⁹); and	2 3 4
(c) if the health care is scheduled objectionable health care, ⁶⁰ the young person may object to the health care; and	5 6
(d) the young person may not refuse the health care; and	7
(e) a consent by the young person is effective even if a parent refuses the health care; and	8 9
(f) a consent by 1 parent is effective even if another parent refuses the health care; and	10 11
(g) a consent by a parent to scheduled objectionable health care is ineffective if the young person objects to the health care.	12 13
(3) Health care, of a young person who is 12 to 15 years, may be carried out by a health care provider with a consent if the health care is in the best interests of the young person's health and wellbeing. ⁶¹	14 15 16
 Emergency health care—12 to 15	 17
31.(1) Before a health care provider carries out emergency health care, of a young person who is 12 to 15 years, the health care provider is encouraged to take reasonable steps to contact a parent of the young person about the health care.	18 19 20 21
(2) Subsection (1) does not apply if the health care provider honestly and reasonably believes the delay associated with taking the steps would not be	22 23

⁵⁸ However, this Act does not affect any common law limitation on the power of a parent to consent to health care of a young person—section 12(3). For example, a young person's parents cannot consent, without court approval, to the young person's sterilisation—*Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

⁵⁹ See schedule 1 (Additional health care concepts), section 10 for definition.

⁶⁰ Scheduled objectionable health care is listed in schedule 3.

⁶¹ For protection from liability for assault for health care carried out under this Act, see section 43.

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in the best interests of the young person’s health and wellbeing.	1
(3) A person is not liable for assault for carrying out health care of a young person who is 12 to 15 years if—	2 3
(a) the health care should be carried out urgently to meet imminent risk to the young person’s life or health; and	4 5
(b) the health care is in the best interests of the young person’s health and wellbeing. ⁶²	6 7
(4) Subsection (3) applies even if a parent of the young person refuses the health care or the young person objects to the health care.	8 9
Health care required without delay—12 to 15 and non-competent	10
32.(1) This section does not apply for particular health care required without delay, by an authorised health care provider, if the authorised health care provider knows a parent of the young person previously indicated the health care of the young person is not to be carried out and, since then, the parent has not indicated otherwise.	11 12 13 14 15
<i>Example—</i>	16
This section does not apply to the administration by a school doctor or nurse of an injection of a particular drug to a school student if the student’s parent had previously told the doctor or nurse not to administer the drug to the student.	17 18 19
(2) Health care required without delay, of a young person who is 12 to 15 years and not competent for the health care, may be carried out by an authorised health care provider without a consent if—	20 21 22
(a) either—	23
(i) the delay associated with taking reasonable steps to contact a parent of the young person for parental consent to the health care would not be in the best interests of the young person’s health and wellbeing; or	24 25 26 27

⁶² Except as provided by this section, the common law, as it exists from time to time, about emergency health care for young people who are 12 to 15 years applies—section 12(4) (Act’s relationship with other law). In the Law Reform Commission’s view, consent is not relevant to the provision of emergency health care under the common law. So, emergency health care of a young person may always be carried out without a consent.

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(ii) reasonable steps have been taken to contact a parent of the young person for parental consent to the health care, but no parental consent to, or parental refusal of, the health care is given; and	1 2 3 4
(b) the health care is in the best interests of the young person's health and wellbeing.	5 6
 Minor health care—12 to 15 and non-competent	 7
33. Minor health care, of a young person who is 12 to 15 years and not competent for the health care, may be carried out by a person without a consent if the health care is in the best interests of the young person's health and wellbeing. ⁶³	8 9 10 11
 STD health care—12 to 15	 12
34.(1) For STD health care, of a young person who is 12 to 15 years, by an authorised health care provider—	13 14
(a) a parent of the young person may consent to, or refuse, ⁶⁴ the health care; and	15 16
(b) if the young person is competent for the health care, the young person may consent to the health care; and	17 18
(c) the young person may object to, but not refuse, the health care; and	19 20
(d) a consent by the young person is effective even if a parent refuses the health care; and	21 22

⁶³ For minor health care by a health care provider carried out with a consent—see section 30 (Health care generally—12 to 15). Minor health care by another person carried out with a consent is subject to the common law, as it exists from time to time, about authorisation of health care for young people—see section 12(2).

⁶⁴ However, a parental refusal has very little effect. It is ineffective if a competent young person consents to the health care (paragraphs (b) and (d)) or a non-competent young person does not object to the health care (subsection (3)). Finally, if not authorised under this Act, the health care may be authorised by an order made under the *Health Act 1937*, section 36, as amended by this Act—see section 50.

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(e) a consent by 1 parent is effective even if another parent refuses the health care; and	1 2
(f) a consent by a parent is effective even if the young person objects to the health care.	3 4
(2) STD health care, of a young person who is 12 to 15 years, may be carried out by an authorised health care provider with a consent if the health care is in the best interests of the young person's health and wellbeing.	5 6 7
(3) Further, STD health care, of a young person who is 12 to 15 years and not competent for the health care, may be carried out by an authorised health care provider without a consent, even if a parent of the young person refuses the health care, if—	8 9 10 11
(a) the health care is in the best interests of the young person's health and wellbeing; and	12 13
(b) the young person does not object to the health care.	14
Contraceptive health care—12 to 15	15
35.(1) For contraceptive health care, of a young person who is 12 to 15 years, by an authorised health care provider—	16 17
(a) a parent of the young person may consent to, or refuse, ⁶⁵ the health care; and	18 19
(b) if the young person is competent for the health care, the young person may consent to the health care; and	20 21
(c) the young person may object to, but not refuse, the health care; ⁶⁶ and	22 23
(d) a consent by the young person is effective even if a parent refuses the health care; and	24 25
(e) a consent by 1 parent is effective even if another parent refuses	26

⁶⁵ However, a parental refusal is ineffective if a competent young person consents to the contraceptive health care (subsection (1)(b) and (d)) or a non-competent young person asks for the contraceptive health care (subsection (3)).

⁶⁶ However, the young person's objection makes a parental consent ineffective—see paragraph (f).

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the health care; and	1
(f) a consent by a parent is ineffective if the young person objects to the health care.	2 3
(2) Contraceptive health care, of a young person who is 12 to 15 years, may be carried out by an authorised health care provider with a consent if the health care is in the best interests of the young person’s health and wellbeing.	4 5 6 7
(3) Further, contraceptive health care, of a young person who is 12 to 15 years and not competent for the health care, may be carried out by an authorised health care provider without a consent, even if a parent of the young person refuses the health care, if—	8 9 10 11
(a) the health care is in the best interests of the young person’s health and wellbeing; and	12 13
(b) the young person asks for the health care.	14
PART 3—16 OR 17 YEARS	15
Health care generally—16 or 17 and competent	16
36.(1) In this section—	17
“health care” does not include emergency health care. ⁶⁷	18
(2) If a young person who is 16 or 17 years is competent for particular health care, only the young person may consent to, or refuse, the health care of himself or herself.	19 20 21
(3) Health care, of a young person who is 16 or 17 years and competent for the health care, may be carried out, with the young person’s consent, by a health care provider.	22 23 24

⁶⁷ Section 38 deals specifically with emergency health care of a young person who is 16 or 17 years.

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Health care generally—16 or 17 and non-competent	1
37.(1) In this section—	2
“health care” does not include—	3
(a) emergency health care; or	4
(b) STD health care; or	5
(c) contraceptive health care. ⁶⁸	6
(2) For health care, of a young person who is 16 or 17 years and not competent for the health care, by a health care provider—	7 8
(a) a parent ⁶⁹ of the young person may consent to, or refuse, the health care; ⁷⁰ and	9 10
(b) if the health care is scheduled objectionable health care, ⁷¹ the young person may object to the health care; and	11 12
(c) the young person may not consent to, or refuse, the health care; and	13 14
(d) a consent by 1 parent is effective even if another parent refuses the health care; and	15 16
(e) a consent by a parent to scheduled objectionable health care is ineffective if the young person objects to the health care.	17 18
(3) Health care, of a young person who is 16 or 17 years and not competent for the health care, may be carried out by a health care provider	19 20

⁶⁸ Sections 38, 41 and 42 deal specifically with these types of health care of a young person who is 16 or 17 years and not competent for the health care.

⁶⁹ The definition of “parent” is wider than its common meaning—section 21.

⁷⁰ However, this Act does not affect any common law limitation on the power of a parent to consent to health care of a young person—section 12(3). For example, a young person’s parents cannot consent, without court approval, to the young person’s sterilisation—*Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

⁷¹ Scheduled objectionable health care is listed in schedule 3.

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with a consent if the health care is in the best interests of the young person's health and wellbeing.⁷² 1
2

Emergency health care—16 or 17 3

38.(1) Before a health care provider carries out emergency health care, of a young person who is 16 or 17 years and not competent for the health care, the health care provider is encouraged to take reasonable steps to contact a parent of the young person about the health care. 4
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(2) Subsection (1) does not apply if the health care provider honestly and reasonably believes the delay associated with taking the steps would not be in the best interests of the young person's health and wellbeing. 8
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10

(3) A person is not liable for assault for carrying out health care of a young person who is 16 or 17 years if— 11
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(a) the health care should be carried out urgently to meet imminent risk to the young person's life or health; and 13
14

(b) the health care is in the best interests of the young person's health and wellbeing.⁷³ 15
16

(4) Subsection (3) applies even if a parent of the young person refuses the health care or the young person objects to the health care. 17
18

(5) However, subsection (3) does not apply to a health care provider who knows, or ought reasonably to know, that— 19
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(a) the young person has refused the health care; and 21

(b) at the time the young person refused the health care, the young person was 16 or 17 years and competent for the health care; and 22
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(c) the young person has not subsequently withdrawn the refusal. 24

⁷² For protection from liability for assault for health care carried out under this Act, see section 43.

⁷³ Except as provided by this section, the common law, as it exists from time to time, about emergency health care for young people who are 16 or 17 years applies—section 12(4) (Act's relationship with other law). In the Law Reform Commission's view, consent is not relevant to the provision of emergency health care under the common law. So, emergency health care of a young person may always be carried out without a consent.

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Health care required without delay—16 or 17 and non-competent	1
39.(1) This section does not apply for particular health care required without delay, by an authorised health care provider, if the authorised health care provider knows a parent of the young person previously indicated the health care of the young person is not to be carried out and, since then, the parent has not indicated otherwise.	2 3 4 5 6
<i>Example—</i>	7
This section does not apply to the administration by a school doctor or nurse of an injection of a particular drug to a school student if the student’s parent had previously told the doctor or nurse not to administer the drug to the student.	8 9 10
(2) Health care required without delay, of a young person who is 16 or 17 years and not competent for the health care, may be carried out by an authorised health care provider without a consent if—	11 12 13
(a) either—	14
(i) the delay associated with taking reasonable steps to contact a parent of the young person for parental consent to the health care would not be in the best interests of the young person’s health and wellbeing; or	15 16 17 18
(ii) reasonable steps have been taken to contact a parent of the young person for parental consent to the health care, but no parental consent to, or parental refusal of, the health care is given; and	19 20 21 22
(b) the health care is in the best interests of the young person’s health and wellbeing.	23 24
 Minor health care—16 or 17 and non-competent	25
40. Minor health care, of a young person who is 16 or 17 years and not competent for the health care, may be carried out by a person without a	26 27

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consent if the health care is in the best interests of the young person's health and wellbeing.⁷⁴ 1
2

STD health care—16 or 17 and non-competent 3

41.(1) For STD health care, of a young person who is 16 or 17 years and not competent for the health care, by an authorised health care provider— 4
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(a) a parent of the young person may consent to, or refuse,⁷⁵ the health care; and 6
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(b) the young person may object to, but not refuse, the health care; and 8
9

(c) a consent by 1 parent is effective even if another parent refuses the health care; and 10
11

(d) a consent by a parent is effective even if the young person objects to the health care. 12
13

(2) STD health care, of a young person who is 16 to 17 years and not competent for the health care, may be carried out by an authorised health care provider, if the health care is in the best interests of the young person's health and wellbeing— 14
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16
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(a) with the consent of a parent of the young person; or 18

(b) without a consent, even if a parent of the young person refuses the health care, unless the young person objects to the health care. 19
20

Contraceptive health care—16 or 17 and non-competent 21

42.(1) For contraceptive health care, of a young person who is 16 or 22

⁷⁴ For minor health care by a health care provider carried out with a consent—see section 37. (Health care generally—16 or 17 and non-competent). Minor health care by another person carried out with a consent is subject to the common law, as it exists from time to time, about authorisation of health care for young people—see section 12(2).

⁷⁵ However, a parental refusal has very little effect. It is ineffective if the young person does not object to the health care (subsection (2)(b)). If not authorised under this Act, the health care may be authorised by an order made under the *Health Act 1937*, section 36, as amended by this Act—see section 50.

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17 years and not competent for the health care, by an authorised health care provider—	1 2
(a) a parent of the young person may consent to, or refuse, ⁷⁶ the health care; and	3 4
(b) the young person may object to, but not refuse, the health care; ⁷⁷ and	5 6
(c) a consent by 1 parent is effective even if another parent refuses the health care; and	7 8
(d) a consent by a parent is ineffective if the young person objects to the health care.	9 10
(2) Contraceptive health care, of a young person who is 16 or 17 years and not competent for the health care, may be carried out by an authorised health care provider, if the health care is in the best interests of the young person's health and wellbeing—	11 12 13 14
(a) with the consent of a parent of the young person; or	15
(b) without a consent, even if a parent of the young person refuses the health care, if the young person asks for the health care.	16 17

CHAPTER 5—MISCELLANEOUS 18

Protection for health care under Act 19

43. A person is not liable for assault for carrying out health care of a young person under this Act. 20
21

Example— 22

With a young person's consent, a health care provider carries out health care (as defined for section 30, but not sterilisation) of the young person. The young person is 15 years old and competent for the health care. Under section 30(3), the health care 23
24
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⁷⁶ However, a parental refusal is ineffective if a young person asks for the contraceptive health care (subsection (2)(b)).

⁷⁷ However, the young person's objection makes a parental consent ineffective—see paragraph (d).

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provider may carry out the health care, if—	1
(a) the health care is in the best interests of the young person’s health and wellbeing; and	2 3
(b) either—	4
(i) a parent of the young person consents to the health care and, for scheduled objectionable health care, the young person does not object to the health care (section 30(2)(a) and (g)); or	5 6 7
(ii) the young person consents to the health care (section 30(2)(b)).	8
So, assuming the health care is in the best interests of the young person’s health and wellbeing, the health care provider has carried out the health care of the young person under this Act and is not liable for assault for carrying it out.	9 10 11
Also, if the health care provider has an honest and reasonable, but mistaken, belief about something, the health care provider is still protected from liability for assault because of section 44.	12 13 14
Protection if mistaken belief	15
44. A person who carries out health care of a young person under an honest and reasonable, but mistaken, belief in the existence of any state of things is not liable for assault to any greater extent than if the real state of things had been as the person believed.	16 17 18 19
<i>Example—</i>	20
A health care provider carries out health care (as defined for section 30, but not sterilisation) of an 11 year old on the basis of the young person’s consent. The health care provider honestly and reasonably believes the young person is a 12 year old who is competent for the health care—see section 30 requirements. Under this section, the health care provider’s liability is no more than if his or her beliefs about these matters were correct.	21 22 23 24 25 26
Assuming the health care was not sterilisation and the health care provider also honestly and reasonably believed the health care was in the best interests of the young person’s health and wellbeing, then the health care provider does not incur any liability for assault because of section 30, particularly subsections (2)(b) and (3), and this section.	27 28 29 30 31

Protection for health care by court order	1
45. A health care provider is not liable for assault for carrying out health care of a young person in accordance with a court order. ⁷⁸	2 3
Protection if unaware of court order	4
46.(1) A person who carries out health care of a young person contrary to a court order ⁷⁹ is not liable for assault to any greater extent than if there were no court order.	5 6 7
(2) Subsection (1) does not apply if the person knew, or ought reasonably to have known, of the court order.	8 9
Protection for supervised health care provider	10
47.(1) A health care provider who carries out health care of a young person under the supervision of another health care provider is not liable for assault to any greater extent than the supervising health care provider.	11 12 13
(2) Subsection (1) does not apply if the supervised health care provider knew, or ought reasonably to have known, the carrying out of the health care was not authorised under this Act.	14 15 16
<i>Example—</i>	17
If a nurse knows a 16 year old who is competent for health care refuses the health care, but the doctor supervising the nurse does not know, subsection (1) does not apply to protect the nurse from liability for assault. Under section 36, the young person may consent to, or refuse, his or her own health care.	18 19 20 21
Regulation-making power	22
48. The Governor in Council may make regulations under this Act.	23

⁷⁸ See section 12 (Act's relationship with other law).

⁷⁹ For example, a parenting order may be made under the *Family Law Act 1975* (Cwlth), pt VII, div 6 removing or reducing a parent's power to consent to health care—see particularly section 61D.

CHAPTER 6—CONSEQUENTIAL AMENDMENTS	1
PART 1—AMENDMENT OF HEALTH ACT 1937	2
Act amended in pt 1	3
49. This part amends the <i>Health Act 1937</i> .	4
Amendment of s 36 (Removal and detention of person suffering from notifiable disease)	5
50. Section 36(1)—	6
<i>insert—</i>	7
‘(c) is under 18 years and the notifiable disease is a sexually transmitted disease, the health care for which is not authorised under the <i>Health Care Authorisation for Young People Act 1996</i> .’	8
	9
	10
	11
	12
PART 2—AMENDMENT OF TRANSPLANTATION AND ANATOMY ACT 1979	13
	14
Act amended in pt 2	15
51. This part amends the <i>Transplantation and Anatomy Act 1979</i> .	16
Amendment and relocation of s 20 (Blood transfusions to children without consent)	17
	18
52.(1) Section 20(1), ‘criminal liability’—	19
<i>omit, insert—</i>	20
‘liability for assault’.	21
(2) Section 20(3)—	22

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<i>renumber</i> as section 20(4).	1
(3) After section 20(2)—	2
<i>insert</i> —	3
‘(3) However, for a medical practitioner administering, or a person acting in aid of a medical practitioner and under the medical practitioner’s supervision in administering, a blood transfusion to a 16 or 17 year old patient, subsections (1) and (2) do not apply if the medical practitioner, or the person, as the case may be, knows, or ought reasonably to have known—	4 5 6 7 8 9
(a) the patient has refused the blood transfusion; and	10
(b) the patient was a competent 16 or 17 year old at the time the patient refused the blood transfusion; and	11 12
(c) the patient has not subsequently withdrawn the refusal.’.	13
(4) Section 20 (as amended)—	14
<i>relocate</i> to part 2A and renumber as section 21B.	15
Insertion of new pt 2A	16
53. After part 2—	17
<i>insert</i> —	18
‘PART 2A—BLOOD TRANSFUSIONS TO CHILDREN WITHOUT CONSENT	19 20
‘Definitions for pt 2A	21
‘21A. In this part—	22
“blood transfusion” see section 16.	23
“competent 16 or 17 year old”, for administration of a blood transfusion, means an individual who—	24 25
(a) is 16 or 17 years; and	26
(b) understands the nature and consequences of the administration; and	27 28

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- (c) communicates his or her decision about the administration in some way. 1
2
- “liability for assault” means—** 3
- (a) civil liability for assault or battery; and 4
- (b) criminal liability for assault.’. 5
6

SCHEDULE 1	1
ADDITIONAL HEALTH CARE CONCEPTS	2
schedule 4	3
Non-touching health care	4
1. “Non-touching health care” is health care not involving a touching or the application of force, whether direct or indirect, other than scheduled non-touching health care. ⁸⁰	5 6 7
<i>Examples—</i>	8
Counselling is an example of non-touching health care. On the other hand, X-raying a person is not an example of non-touching health care because it involves the application of force.	9 10 11
Scheduled non-touching health care	12
2. “Scheduled non-touching health care” means health care specified in schedule 2.	13 14
Scheduled objectionable health care	15
3. “Scheduled objectionable health care” means health care specified in schedule 3.	16 17
Emergency health care	18
4. “Emergency health care” does not include a blood transfusion.	19
Health care required without delay	20
5. “Health care required without delay” is health care that should be carried out without delay, but does not include—	21 22

⁸⁰ Scheduled non-touching health care is health care set out in schedule 2.

SCHEDULE 1 (continued)

(a) scheduled objectionable health care; or	1
(b) emergency health care; or	2
(c) a blood transfusion; or	3
(d) STD health care; or	4
(e) contraceptive health care.	5
<i>Example—</i>	6
If a young person is in severe pain following a serious accident, administration of pain relief might be health care required without delay.	7 8
Minor health care	9
6. “Minor health care” is—	10
(a) first aid; or	11
(b) a non-intrusive examination for diagnostic purposes; or	12
(c) the administration of a pharmaceutical drug if—	13
(i) a prescription is not needed to obtain the drug; and	14
(ii) the administration is for a recommended purpose and at a recommended dosage level;	15 16
but does not include—	17
(d) scheduled objectionable health care; or	18
(e) emergency health care; or	19
(f) a blood transfusion; or	20
(g) health care required without delay; or	21
(h) STD health care; or	22
(i) contraceptive health care.	23
STD health care	24
7. “STD health care”, of a young person, is health care of the young person for a sexually transmitted disease.	25 26

SCHEDULE 1 (continued)

Contraceptive health care	1
8. “Contraceptive health care” is health care primarily intended to prevent pregnancy and does not include sterilisation or termination of a pregnancy.	2 3 4
Health care primarily to treat organic malfunction or disease	5
9. “Health care primarily to treat organic malfunction or disease”, of a young person, is health care without which an organic malfunction or disease of the young person is likely to cause serious or irreversible damage to the young person’s physical health.	6 7 8 9
<i>Examples—</i>	10
1. Health care involving sterilisation may be primarily to treat organic malfunction or disease if the young person has cancer affecting the reproductive system or cryptorchidism.	11 12 13
2. Health care involving termination of a pregnancy may be primarily to treat organic malfunction if a pregnant young person requires abdominal surgery for injuries suffered in an accident.	14 15 16
Sterilisation	17
10. “Sterilisation” is health care carried out on a young person (other than health care primarily to treat organic malfunction or disease) that—	18 19
(a) if the young person is not yet, or is reasonably likely to not yet be, fertile—is intended, or reasonably likely, to prevent the young person ever becoming, or to ensure the young person does not ever become, fertile; or	20 21 22 23
(b) if the young person is, or is reasonably likely to be, fertile—is intended, or reasonably likely, to make the young person, or to ensure the young person is, permanently infertile.	24 25 26
Termination	27
11. “Termination”, of a pregnancy of a young person, does not include	28

SCHEDULE 1 (continued)

health care primarily to treat organic malfunction or disease of the young person.	1 2
Objection to health care	3
12.(1) A young person “objects” to health care if—	4
(a) the young person—	5
(i) indicates (for example, in writing, orally or by conduct) the young person does not wish to have the health care; or	6 7
(ii) previously indicated, in similar circumstances, the young person did not then wish to have the health care and since then the young person has not indicated otherwise; and	8 9 10
(b) the indication is not ineffective because of subsection (2).	11
(2) An indication is ineffective if the health care provider proposing to carry out the health care honestly and reasonably believes—	12 13
(a) the young person has minimal or no understanding of 1 or both of the following—	14 15
(i) what the health care involves;	16
(ii) why the health care is required; and	17
(b) the health care is likely to cause the young person—	18
(i) no distress; or	19
(ii) temporary distress that is outweighed by the benefit to the young person of the health care.	20 21
	22

SCHEDULE 2	1
SCHEDULED NON-TOUCHING HEALTH CARE	2
schedule 1, section 2	3
[Note—The Law Reform Commission recommends that the Department of Families, Youth and Community Care and the Department of Health would be the most appropriate bodies jointly to devise and review this schedule.]	4 5 6 7

SCHEDULE 3	1
SCHEDULED OBJECTIONABLE HEALTH CARE	2
(WHERE YOUNG PERSON'S OBJECTION MAKES	3
PARENT'S CONSENT INEFFECTIVE)	4
sections 24, 30 and 37	5
schedule 1, section 3	6
1. termination of a pregnancy	7
	8

SCHEDULE 4	1
DICTIONARY	2
section 17	3
“authorised health care provider” means a health care provider who is—	4
(a) a doctor; ⁸¹ or	5
(b) a dentist; or	6
(c) a registered nurse; or	7
(d) a person of a type prescribed by regulation as an authorised health care provider.	8 9
“blood transfusion” see <i>Transplantation and Anatomy Act 1979</i> , section 16. ⁸²	10 11
“competent” (other than for section 21 ⁸³) see section 20.	12
“contraceptive health care” see schedule 1, section 8.	13
“dentist” see <i>Dental Act 1971</i> , section 4. ⁸⁴	14
“emergency health care” see schedule 1, section 4.	15
“health care” see section 18.	16
“health care primarily to treat organic malfunction or disease” see	17

⁸¹ **“Doctor”** means medical practitioner within the meaning of the *Medical Act 1939—Acts Interpretation Act 1954*, section 36.

⁸² **“blood transfusion”** means the transfusion of human blood, or any of the constituents of human blood, into a person and includes the operation of removing all or part of the blood of a person and replacing it with blood taken from another person.

⁸³ Section 21 (Meaning of parent, guardian and significant carer).

⁸⁴ *Dental Act 1971*, section 4 states—

‘**“Dentist”** means a person registered as a dentist under this Act and whose name remains upon the register of dentists.’

SCHEDULE 4 (continued)

schedule 1, section 9.	1
“health care provider” see section 19.	2
“health care required without delay” see schedule 1, section 5.	3
“liable for assault” means—	4
(a) civilly liable for assault or battery or under section 22; ⁸⁵ and	5
(b) criminally liable for assault or under section 23. ⁸⁶	6
“minor health care” see schedule 1, section 6.	7
“non-touching health care” see schedule 1, section 1.	8
“objects” , by a young person to health care, see schedule 1, section 12.	9
“parent” see section 21.	10
“registered nurse” see <i>Nursing Act 1992</i> , section 4. ⁸⁷	11
“scheduled non-touching health care” see schedule 1, section 2.	12
“scheduled objectionable health care” see schedule 1, section 3.	13
“STD health care” see schedule 1, section 7.	14
“sterilisation” see schedule 1, section 10.	15
“termination” , of a pregnancy, see schedule 1, section 11.	16
“young person” means an individual who is under 18 years.	17
	18

⁸⁵ Section 22 (Civil action if unauthorised health care)

⁸⁶ Section 23 (Offence to carry out unauthorised health care)

⁸⁷ *Nursing Act 1992*, section 4—

‘**“registered nurse”** means a person who is registered under this Act as a registered nurse.’

