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# **CONSENT TO MEDICAL TREATMENT OF YOUNG PEOPLE**

Discussion Paper: Summary  
WP 44A

Queensland Law Reform Commission  
May 1995



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OF YOUNG PEOPLE**

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<sup>1</sup> A full copy of the Discussion Paper may be obtained from the Commission by telephoning (07) 247 4544, by facsimile (07) 247 9045, or by writing to The Secretary, PO Box 312, Roma St Qld 4003. The closing date for the submissions is 31 August 1995.

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Previous Queensland Law Reform Commission publications on this reference:

Information Paper *Consent to Medical Treatment* 1993 (MP2)  
Research Paper *Circumcision of Male Infants* 1994 (MP6)  
Research Paper *Female Genital Mutilation* 1994 (MP7)  
Report *Female Genital Mutilation* 1994 (R47)

The Commission's premises are located on the 13th floor, 179 North Quay, Brisbane. The postal address is PO Box 312, Roma Street, Q 4003. Telephone (07) 247 4544. Facsimile (07) 247 9045.

### HOW TO MAKE COMMENTS AND SUBMISSIONS

You are invited to make comments and submissions on the issues and on the preliminary proposals in this Paper.

Written comments and submissions should be sent to:

The Secretary  
Queensland Law Reform Commission  
PO Box 312  
ROMA STREET QLD 4003

or by facsimile on: 07 - 247 9045

Oral submissions may  
be made by telephoning: 07 - 247 4544

Closing date: 31 August 1995

It would be helpful if comments and submissions addressed specific issues or preliminary recommendations in the Paper.

### CONFIDENTIALITY

Unless there is a clear indication from you that you wish your submission, or part of it, to remain confidential, submissions may be subject to release under the provisions of the *Freedom of Information Act 1992* (Qld).

The Commission may refer to or quote from submissions in future publications. If you do not wish your submission or any part of it to be used in this way, or if you do not want to be identified, please indicate clearly.

## INTRODUCTION

The Attorney-General of Queensland has referred to the Queensland Law Reform Commission a review of the law concerning consent to medical treatment of young people.

In the Discussion Paper<sup>2</sup> the Commission considers the ability of young people to consent to, or to refuse, treatment and the ability of parents or other substitute decision makers to consent to, or refuse, treatment on behalf of young people.

The Paper does not deal with issues relating to consent to those treatments which the courts have said require special consent of a court or tribunal (e.g. sterilisation of young people unable to consent on their own behalf). Those issues will be dealt with in a future paper.

The health needs of young Queenslanders are of principal concern to the Commission; they appear to be of little significance in the context of the current common (case) law and in the limited statute law relating to consent to treatment.

A further significant consideration has been the vital and appropriate roles 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.

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 young people's access to appropriate health-care.

Also of concern to the Commission has been the uncertain criminal and civil liability faced by health-care providers when presented with a young patient in a variety of contexts. The young person may not want parental involvement and may in fact refuse or not seek necessary treatment if he or she believes parents would be informed. Parents and child may disagree on the need for, or appropriateness of, proposed treatment. Parents of a young person who is in need of treatment may themselves not be competent to make decisions relating to the child's treatment, or may not be easily contactable to consult with on proposed treatment.

A number of issues dealt with in the Discussion Paper 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 the young people can be guided, warned, counselled or

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<sup>2</sup> Queensland Law Reform Commission Discussion Paper on *Consent to Medical Treatment of Young People* WP44 May 1995.

disciplined by the 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 from non-treatment and that a requirement of parental involvement may contribute to the failure to be properly treated.

## USE OF TERMS

### (a) Use of term *young person*

The Commission prefers to use the term "young person" rather than "child" throughout the Discussion Paper. The term "child" is inappropriate for many of the situations the Commission has dealt with during the course of this reference. Although people under the age of 18 are children or "minors" in the eyes of the law,<sup>3</sup> many of the "children" the Commission will be considering are in fact young adults.

### (b) The concept of *consent*

The absence of a valid consent is a determining factor in establishing liability for criminal assault or civil assault (trespass to the person). However, the Commission is interested less in health care providers' potential liability for assault than in the desirability of obtaining an appropriate consent before proceeding with any form of treatment - whether or not refusal or absence of consent for any particular treatment would result in the health care provider's criminal or civil liability.

There can be no criminal or civil liability<sup>4</sup> for assault and battery (in Queensland the definition of "assault" under section 245 of the *Criminal Code* includes battery) unless there has been physical contact or a threat of imminent physical contact. Accordingly, treatments which do not involve physical contact, such as hypnotherapy or counselling, even if undertaken without the consent of, or in the face of refusal by, the patient, are unlikely to attract criminal or civil liability for assault.

However, interference with a person's psychological integrity can result in serious damage to the person. For that reason, although the current law may fail to provide a remedy to the patient for non-consensual interference with the person's psychological integrity, the law should not be seen as condoning such interference. There is no valid reason known to the Commission why there should not be a statutory prohibition on treating patients (whether involving physical contact or

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<sup>3</sup> *Age of Majority Act 1974* (Qld) s5.

<sup>4</sup> Battery and assault are crimes as well as torts. In torts they are two forms of trespass to the person.



otherwise) without an appropriate consent. The Commission has proceeded on the basis that it is desirable for an appropriate consent to be obtained from the patient before any form of treatment of the patient is undertaken - whether or not treatment involves physical contact.

**The Commission invites comment on the proposal that it be a legal requirement for consent to be obtained before treatment is undertaken whether or not treatment involves physical contact.**

**(c) Use of term *treatment***

The Commission has adopted a wide definition of the term "medical procedures" as used in the terms of reference to include any type of health-care, treatment or advice provided for the health or well-being of a young person (referred to hereafter as "treatment"). It follows that treatment provided by any health-care provider, including alternative health-care providers, is considered relevant to the reference. Similarly, treatment of any nature, whether or not it involves physical contact (such as counselling, hypnotherapy or the provision of medication) is considered relevant.

There will be some types of relatively minor types of "treatment" (broadly defined) which many people might consider should not be the subject of legal consent requirements.<sup>5</sup> The following definition of "health-care", which has been used in the Commission's Draft Assisted and Substituted Decisions Bill<sup>6</sup>, may be useful in determining the appropriate definition of "treatment" for the purposes of this Paper:<sup>7</sup>

- (1) "Health care" of an adult is any care, treatment, service or procedure -
  - (a) to maintain, diagnose or treat the adult's physical or mental condition; and
  - (b) carried out by, or under the supervision of, a health care provider.

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<sup>5</sup> Note: accepted every day contact between people may not amount to an assault.

<sup>6</sup> Ch13 of the Queensland Law Reform Commission's Draft Report on *Assisted and Substituted Decisions* February 1995. Note the Draft Report and Bill relate only to adults. A number of the Commission's preliminary recommendations in the Discussion Paper suggest an expanded coverage of the Bill to deal with treatment decisions affecting young people.

<sup>7</sup> *Id* at s17. Cf the definition of "health care" in s16(1) *Infants Act* 1992 (RS BC 1979 c196):  
means anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health related purpose and includes a course of health care.

- (2) However, "health care" does not include -
- (a) the administration of a pharmaceutical drug if -
    - (i) a prescription is not needed to obtain the drug; and
    - (ii) the drug is normally self-administered; and
    - (iii) the administration is for a recommended purpose and at a recommended dosage level; and
  - (b) first aid treatment of the adult; and
  - (c) a non-intrusive examination made for diagnostic purposes.

Example of subsection (2)(c) -

A visual examination of an adult's mouth, throat, nasal cavity, eyes or ears.

**The Commission invites comment on the definition of "treatment" for the purposes of this reference.**

**(d) Use of term *health-care provider***

The doctor-patient relationship is not the only one which results in treatment of health related problems or concerns. Treatment by nurses, dentists, counsellors, psychologists and numerous other health-care providers also plays an important role in ensuring the physical and psychological health and well-being of people. Any person treating another may be criminally and/or civilly liable if the treatment involves physical contact with the patient and if the appropriate consent has not been obtained either from the patient (if legally competent) or from a substitute decision-maker; liability for unauthorised treatment is not limited to medical practitioners. Moreover, the consequences to the patient of inappropriate or unauthorised treatment may be as serious for treatment provided by an alternative health-care provider as for treatment provided by a medical practitioner.

Most people have reason to treat another person at some stage in their lives - whether it be by way of administering medication, dressing injuries or any of a multitude of other, in most cases, relatively minor procedures. However, the Commission is primarily concerned with investigating issues relating to the treatment of young people by people for reward or by people who profess to be in the business of health-care.<sup>8</sup>

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<sup>8</sup> In its Draft Report on *Assisted and Substituted Decisions* February 1995 at 129, the Commission defines "health-care provider" as "a person who provides health care in the ordinary course of business or the practice of a profession".

**The Commission invites comment on the appropriate definition of health-care provider for the purposes of discussion of the issues in this reference.**

## **MATTERS EXCLUDED FROM REFERENCE**

The Commission has decided to restrict its consideration to young people from their birth to 18 years of age. Although medical treatment of foetuses is becoming more common,<sup>9</sup> there are very strongly held community views and basic philosophical differences concerning the "rights" of the foetus versus the "rights" of the mother/parents.<sup>10</sup> Further, the issues involved in the medical treatment of foetuses, in particular, the possible conflict between the right of the expectant mother to the inviolability of her own body and the "physical condition" of the foetus are quite distinct from those raised in relation to consent to medical treatment of young people (being from birth to 18 years of age). In the latter case, the medical treatment of the young person does not involve the interference with the bodily integrity of any other person in order to effect the treatment.

The Commission has not interpreted Item 4(a) of the Fourth Programme to include the ability of young people, or of substituted decision-makers to consent to the withholding, or withdrawal, of life-sustaining treatment. The Commission is of the view that separate, difficult and controversial issues are raised in considering such matters which are equally relevant to the use of life-sustaining treatments on adults. The Commission therefore believes that those issues would be best dealt with in a separate project concerning life-sustaining treatments.

The Commission is also of the view that consent to participation in medical research should not be covered in this Reference as it may not relate specifically to the treatment of the young person. Similar issues will arise in relation to participation of adults in research projects.<sup>11</sup> It may be appropriate for a separate project to be undertaken at a future date on participation in medical research.

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<sup>9</sup> For example, foetuses can now successfully undergo complex surgery within the womb, such as heart operations, and can be treated for a number of conditions which, if left unchecked, could pose a threat to the viability of the foetus or lead to abnormalities at birth.

<sup>10</sup> If the mother refuses to permit medical intervention to assist her foetus, the foetus may die or be seriously handicapped. If someone else is able to consent to the treatment of the foetus, obviously there will be a conflict between the rights of the mother to the inviolability of her own body and the rights (if any) of the unborn foetus.

<sup>11</sup> In relation to participation of adults unable to consent without assistance, in research projects, see Queensland Law Reform Commission Draft Report *Assisted and Substituted Decisions* February 1995.

## **SUBMISSIONS ON THE DISCUSSION PAPER**

The Commission would welcome submissions on the issues dealt with in the Discussion Paper and on the preliminary proposals for reform set out below. The Commission has not made a final decision in relation to any of the preliminary proposals, although it is strongly of the opinion that reform in this area is much overdue. Information about how to make a submission is set out at the beginning of this Summary.

## SUMMARY OF PRELIMINARY RECOMMENDATIONS

This Summary of Recommendations is an extract from the Commission's Discussion Paper on Consent to Medical Treatment of Young People.<sup>12</sup>

### THE COMMISSION'S PREFERRED SCHEME

#### Consent for all treatments

1. No one can treat a person under the age of 18 years unless there is a valid consent in accordance with the recommendations listed below or in an emergency situation where it is not practical to obtain consent. Treatment is to include treatment involving physical and/or non physical contact with the patient.

#### Treatment of young people 16 or older

2. At 16 years of age a young person can consent to or refuse treatment as if an adult. A health-care provider can treat the young person upon that consent and is prevented from treating the young person if he or she refuses the treatment.
3. The proposed Assisted and Substituted Decisions legislation and the jurisdiction of the Tribunal to be established thereunder should be extended to cover 16 and 17 year olds who are not legally competent to make treatment decisions or who are in need of assistance in making such decisions.

#### Treatment of young people 15 or younger

4. Where a registered health-care provider treats a young person 15 years of age or younger, the treatment must be, in the registered health-care provider's opinion [subjective test], in the young person's best interests. Where a non-registered health-care provider treats a young person 15 years of age or younger, the treatment must be [objective test] in the young person's best interests.

#### Treatment of young people 13 or older by registered health-care providers

5. At 13 years of age or older, a young person can validly consent to treatment by a registered health-care provider and a registered health-care provider can treat the young person upon that consent provided that:

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<sup>12</sup> Queensland Law Reform Commission Discussion Paper WP44 May 1995. A full copy of the Discussion Paper may be obtained from the Commission by telephoning 07-247 4544, by facsimile 07-247 9045, or by writing to The Secretary, PO Box 312, Roma Street QLD 4003.

- (a) in the opinion of the health-care provider [subjective test], the young person understands the nature and consequences of the proposed treatment and of the consequences of not being treated;
  - (b) the young person has been provided with relevant information on advantages and disadvantages of the proposed treatment in a mode which the young person is likely to understand;
  - (c) the young person has signed a written "consent to treatment" form;
  - (d) in the opinion of the health-care provider [subjective test], treatment is in the young person's best interests.
6. A health-care provider who is registered as a health-care provider pursuant to a Queensland statute or whose registration as a health-care provider in another jurisdiction is recognised in Queensland, acting in accordance with 5 (above) upon the consent of a young person 13 years of age or over is to be immune from criminal liability for assault or battery and from civil liability for trespass to the person or false imprisonment in relation to the provision of treatment consented to. Such immunity should extend to any person acting in aid of the registered health-care provider and under the registered health-care provider's supervision.

#### Treatment of young people 13 or older by non-registered health-care provider

7. At 13 years of age or older a young person can validly consent to treatment by a non-registered health-care provider and a non-registered health-care provider can treat the young person upon that consent provided that:
- (a) the young person understands [objective test] the nature and consequences of the proposed treatment and of the consequences of not being treated;
  - (b) the young person has been provided with relevant information on advantages and disadvantages of the proposed treatment in a mode which the young person is likely to understand;
  - (c) the young person has signed a written "consent to treatment" form;
  - (d) the treatment is in the young person's best interests [objective test].

#### Treatment of young people 13 or older upon consent of parent

8. A health-care provider can treat a young person 13 years of age or older upon the consent of a legally competent parent of the young person **BUT QUERY WHETHER** treatment should proceed over the refusal of a legally competent young person of that age.

Treatment of young people 13 or older upon consent of substitute decision-maker

9. Where a parent of a not legally competent young person 13 years of age or older is not himself or herself legally competent or conveniently contactable, or refuses consent to treatment which is in the best interests of the young person, the health-care provider can treat the young person upon the consent of a substitute decision-maker or upon the authorisation of the Supreme Court or the Family Court.
10. A substitute decision-maker for a young person 13 years of age or older who is not legally competent may be appointed by, if and when established, the proposed Assisted and Substituted Decisions Tribunal. **QUERY** alternative of extending the jurisdiction of the Children's Court to make such appointments.

Refusal of treatment by young people 13 or older

11. **QUERY WHETHER**, at 13 years of age or older, a young person who is legally competent to consent to particular treatment should be entitled to refuse such treatment provided, in the opinion of the health-care provider [subjective opinion of registered health-care provider; objective opinion of non-registered health-care provider], he or she understands the consequences of refusal.

Treatment of young people 12 or younger

12. Health-care providers can treat a young person 12 years of age or younger upon the consent of a legally competent parent of the young person. Where a parent of a young person 12 years of age or younger is not legally competent or conveniently contactable, or refuses consent to treatment which is in the best interests of the young person, the health-care provider can treat the young person upon the consent of a substitute decision-maker or upon the authorisation of the Supreme Court or the Family Court.

A substitute decision-maker for the parent of a young person 12 years of age or younger may be appointed by, if and when established, the proposed Assisted and Substituted Decisions Tribunal. **QUERY** alternative of extending the jurisdiction of the Children's Court to make such appointments.

In all cases, a registered health-care provider cannot treat a young person 12 years of age or younger unless, in his or her opinion [subjective test], the treatment is in the young person's best interests. A non-registered health-care provider cannot treat a young person unless the treatment is in the young person's best interests [objective test].

13. A health-care provider who is registered as a health-care provider pursuant to a Queensland statute or whose registration as a health-care provider in another jurisdiction is recognised in Queensland, acting in accordance with 12 (above) upon the consent of the parent of a young person 12 years of age or younger or a substitute decision-maker is to be immune from criminal liability for assault or battery and from civil liability for trespass to the person or false imprisonment in relation to the provision of treatment consented to. Such immunity should extend to any person acting in aid of the registered health-care provider and under the registered health-care provider's supervision.

#### Involvement of young people and parents in treatment decision-making

14. Health-care providers should be encouraged to involve young people in the decision-making process relating to proposed treatment irrespective of the age and legal competency of the young people.
15. Unless it is considered inappropriate, health-care providers should encourage young people seeking treatment to inform their parents prior to the treatment taking place.

#### Young people as parents

16. Young people who are parents can consent to the treatment of their children by registered health-care providers provided the young people understand the nature and consequences of the proposed treatment. In all cases, a registered health-care provider cannot treat a child of a young person unless in his or her opinion [subjective test] the treatment is in the child's best interests. A non-registered health-care provider cannot treat a child of a young person unless the treatment is in the child's best interests [objective test].
17. A health-care provider who is registered as a health-care provider pursuant to a Queensland statute or whose registration as a health-care provider in another jurisdiction is recognised in Queensland, acting in accordance with 16 (above) upon the consent of a young person, is to be immune from criminal liability for assault or battery and from civil liability for trespass to the person or false imprisonment in relation to the provision of treatment consented to. Such immunity should extend to any person acting in aid of the registered health-care provider and under the registered health-care provider's supervision.

#### Treatment of prescribed conditions

18. A registered health-care provider can treat a young person of any age and irrespective of the young person's legal competency, upon the request of the young person, for conditions to be prescribed by regulation. Those



conditions may include sexually transmitted diseases and other serious communicable diseases. In such cases, the health-care provider shall, subject to any statutory requirement to the contrary, respect the young person's wishes relating to confidentiality.

#### Disagreement between parents

19. **QUERY WHETHER**, if the parents of a young person disagree as to the need for or type of treatment required for their child, then the proposed Assisted and Substituted Decisions Tribunal, the Supreme Court or the Family Court may be approached for resolution of the dispute.

#### Consent to examination of alleged victim of child abuse

20. A young person who is or is suspected of being at risk of abuse may be removed by authorised officers (such as Family Services officers and police) and kept in a place of safety for a 96 hour period, extendable for a further 96 hour period, during which time the Director-General or his or her delegate is deemed to have custody of the young person for the purposes of conducting a medical examination and providing necessary treatment. **QUERY WHETHER** removal should be preceded by a written request to parents or guardian to hand over the young person.

The power of hospital authorities to keep suspected victims of child abuse for a 96 hour period is to be retained, and made extendable for a further 96 hour period.

During the currency of a 96 hour order, the consent of the Director-General or his or her delegate to medical examination or treatment is sufficient in the absence of parental consent.

A written protocol is to be developed as to the obtaining of consent to medical examination and treatment of suspected victims of child abuse.

A medical examination is not to proceed over the refusal of the young person.

#### Ability to consent where legal duty exists

21. **QUERY WHETHER**, if a person or institution (the carer) is under a legal duty to provide treatment to a young person who is not legally competent and where, in the opinion of a registered health-care provider and the carer, a delay in treating the young person in order to locate legally competent parents or to obtain the appointment of a substitute decision-maker would prejudice the health of the young person, the carer should be able to consent to the treatment and should the registered health-care provider and the carer be immune from liability.

Retention of *parens patriae* jurisdiction

22. The *parens patriae* jurisdiction of the Supreme Court is to be specifically retained.