

# National Human Rights Consultation

## Submission

Human rights include the right to bodily integrity and to protection from unwanted surgical interventions

In this submission it is argued that there is a glaring gap in the Australian human rights framework, namely, that boys are not given any protection against unwanted and unnecessary surgical interventions such as circumcision. It is suggested that boys are entitled to as much protection from circumcision (male genital mutilation) as girls from female genital mutilation (female circumcision). Since it is unlikely that any such protection will be provided by legislative measures, alternative means such as public education and the removal of financial incentives are proposed.

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## A Socratic dialogue

Diogenes: It seems to me that circumcision of girls is fundamentally wrong. Not only is it physically harmful, but it is a breach of a baby girl's human rights.

Philo: If it is a breach of human rights, then, since boys are human, it would follow that circumcision of boys is a breach of human rights too.

Diogenes: That would appear to be the case.

Philo: Yet many authorities on medical ethics and human rights make no mention of boys when discussing genital mutilation or even argue that the bioethical or human rights principles applying to girls do not apply to boys.

Diogenes: If circumcision of girls is a violation of their human rights but circumcision of boys is not, there are two logical implications: either it is not a breach of their human rights to circumcise girls, or boys are not human.

Philo: Neither of those propositions seem reasonable or logical, so there must be a further possibility.

Diogenes: Which is?

Philo: That the ethical and human rights authorities are mistaken when they assert or imply by silence that the arguments against circumcision of girls do not apply to boys.

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## Importance of the individual

The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right. ... The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual.

– John Stuart Mill, *On Liberty*

## Introduction: Human rights

Attempting to define human rights, the Australian Human Rights Commission website states:

Every person has inherent dignity and value. Human rights help us to recognise and respect that fundamental worth in ourselves and in each other. Human rights are the same for all people everywhere – male and female, young and old, rich and poor, regardless of our background, where we live, what we think or what we believe. This is what makes human rights “universal”.

Human rights are important. They recognise our freedom to make choices about our life and develop our potential as human beings. They ensure that we can live free from fear, harassment or discrimination.

The background paper to this consultation similarly states, “Human rights are about equality and fairness for everyone. A society that commits to human rights, commits to ensuring that everyone is treated with dignity and respect.” “Everyone” explicitly encompasses both males and females, boys and girls.

It would be hard to imagine a more gross violation of personal dignity than to restrain and forcibly subject a male infant or boy to surgery that excises a significant part of his penis. Any such procedure carried out on minors is necessarily performed without consent. It is not treating them with dignity and respect.

### **Human rights protect individuals**

The key points about human rights are that they pertain to individuals, not to groups or collectivities, and that their purpose is to protect the dignity of the individual and the integrity of his or her body and personhood. The modern concept of human rights emerged in the eighteenth century as part of the European Enlightenment, expressed most vividly in the Declaration of the Rights of Man, but the modern concept of an individual right derives from John Locke’s arguments against the divine right of kings in his *Treatise on Government*, where he wrote that “every Man has a Property in his own Person. This no Body but himself has any Right to but himself. The Labour of his Body, and the work of his Hands, we may say, are properly his.”<sup>1</sup>

An important implication of this perspective is that a right is an assertion against power, something conferred by law or custom that those without power can deploy in their defence against those that do have power. In the relations between children and adults, it is the children who are powerless and the adults who hold the power, and it follows that the children are the party in need of the rights. It

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<sup>1</sup> John Locke, *An Essay Concerning the True, Original Extent and End of Civil Government* (Second Treatise on Government), Book II, Chapter V

makes no sense to say that parents have the right to circumcise their children because parents already have vast power over them and can, in practice, do anything they like to them. Law, custom and (in recent times) human rights instruments attempt to even up this disparity in power by setting limits on what parents may do to their children.

Several of these instruments make direct or implied reference to circumcision.

Relevant human rights instruments

### **Universal Declaration of Human Rights**

Composed in the shadow of the Second World War, this has nothing direct or indirect to say about genital or other bodily mutilations, but it is interesting to recall that the initial seed idea for a declaration of rights emerged from attempts by H.G. Wells to formulate some war aims in 1939, and that his first draft included a prohibition on bodily mutilation. The draft was included in a letter to the *Times*, Article 9 of which included the following words: "That no man shall be subjected to any sort of mutilation or sterilization except with his own deliberate consent, freely given, nor to bodily assault, except in restraint of his own violence, nor to torture, beating or any other bodily punishment."<sup>2</sup> No statement as explicit as this was included in the declaration that emerged after the war, but some authorities have seen an implied criticism of mutilations in its provisions on self-determination, physical and moral integrity, and protection of children.<sup>3</sup>

### **United Nations Convention on the Rights of the Child, 1989**

This contains two provisions relevant to circumcision, including one that has been interpreted as a specific prohibition of genital mutilation.

Article 19 (1)

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Article 24 (3)

States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

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<sup>2</sup> H.G. Wells, "The rights of man", letter to Times, 25 October 1939, 6A; reprinted in *The Rights of Man; or What Are We Fighting For?* (Harmondsworth: Penguin Special, n.d. [1940])

<sup>3</sup> For example, the United States group, Attorneys for the Rights of the Child, at [http://www.arclaw.org/arc\\_human\\_rights\\_table](http://www.arclaw.org/arc_human_rights_table)

It is hard to know what Article 24 (3) could refer to unless it was genital mutilation of children, and it has generally been interpreted as having this intent. Following the adoption of the convention, many western countries and some Australian states introduced legislation criminalising any form of female genital mutilation, and in 1993 the Queensland Law Reform Commission looked into the possibility of a law along the same lines to protect boys. Its conclusion was that circumcision of minors was technically illegal on two grounds: first, on the common law ground that

if the young person is unable, through lack of maturity or other disability, to give effective consent to a proposed procedure and if the nature of the proposed treatment is invasive, irreversible and major surgery and for non-therapeutic purposes, then court approval is required before such treatment can proceed. The court will not approve the treatment unless it is necessary and in the young person's best interests. The basis of this attitude is the respect which must be paid to an individual's bodily integrity.

Secondly, circumcision of a minor could be regarded as an assault as defined by the Queensland Criminal Code:

On a strict interpretation of the assault provisions of the Queensland *Criminal Code*, routine circumcision of a male infant could be regarded as a criminal act. Further, consent by parents to the procedure being performed may be invalid in light of the common law's restrictions on the ability of parents to consent to the non-therapeutic treatment of children.

In other words, the Commission concluded not merely that circumcision was a violation of a person's bodily integrity, and thus of his human rights, but potentially a breach of the law. It suggested some remedies, but acknowledged that given wide community acceptance of circumcision as a legitimate intervention, the prospects for legislation were slim – and so it proved. While the Queensland Criminal Code (S323A) prohibits genital mutilation even on an adult female who desires and has consented to such a procedure, and recent legislation has restricted the right of minors to get themselves decorated with tattoos or piercings, boys remain without any protection against being circumcised at the request of somebody else.<sup>4</sup>

The reasons why the wording of the Convention on the Rights of the Child was so vague may be guessed, but that it was intended to refer to both male and female genital cutting was made clear in some of the subsequent consultations, such as in Lesotho, where a local committee reported:

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<sup>4</sup> Queensland Law Reform Commission, *Circumcision of Male Infants Research Paper* (Brisbane 1993). The full report may be seen at <http://www.cirp.org/library/legal/QLRC/>

Culture is a component of education. Cultural activities like circumcision are not to be a hindrance to a child's right to education. It is proposed that proper medication be administered at circumcision schools. Children should be allowed to decide at 21 years of age whether or not they want to be circumcised.<sup>5</sup>

The reference here is to children's right to decide, meaning both boys and girls. In Guinea-Bissau another report made clear that "traditional practices" were those affecting all children, not just girls:

The report states that traditional practices and customs are causing serious problems for children and women. The circumcision of boys aged 9 to 13 years and female genital mutilation in girls aged between 7 and 12 years among the Fula and Mandinga ethnic groups are the most cruel and harmful practices. There are no effective measures at the national level to eliminate them.<sup>6</sup>

Despite the reference to children, however, the rest of the report forgot about boys and went on to talk about the need for campaigns against female genital mutilation, and made no further mention of circumcision of males.

This tendency for "traditional practices prejudicial to ... children" to be increasingly interpreted as applying to girls only was deplored in a report to the United Nations by the National Organization of Circumcision Information Resource Centers, which pointed out:

That international humanitarian law, insofar as it provides protection against rape and other sexual assaults, is applicable to men as well as women is beyond any doubt as the international human right not to be discriminated against (in this case on the basis of sex) does not allow derogation. Males may not be discriminated against in the application of human rights principles. United Nations experts have acknowledged that at least under certain circumstances male circumcision constitutes a human rights violation.<sup>7</sup>

The reference in the last sentence is to a UN report on the civil war in Yugoslavia, which states that as well as women suffering rape and other forms of sexual

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<sup>5</sup> Committee on the Rights of the Child, Initial reports of States parties due in 1994: Lesotho. 20/07/98. CRC/C/11/Add.20. (State Party Report), seen at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/739266a4d55f1969802566e2003f7b92?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/739266a4d55f1969802566e2003f7b92?Opendocument)

<sup>6</sup> Committee on the Rights of the Child Considers Initial Report of Guinea-Bissau, United Nations Press Release, 22 May 2002, seen at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/39E976491EF5DD8DC1256BC20029E249?opendocument>

<sup>7</sup> Submission by Nocirc to the U.N. Sub-Commission on the Promotion and Protection of Human Rights, 23 March 2002, Document E/CN.4/Sub.2/2002/NGO/1. Available at: <http://www.cirp.org/library/ethics/>.

violence, “Men are also subject to sexual assault. ... They have also been subjected to castration, circumcision or other sexual mutilation.”<sup>8</sup>

### **Other treaties: bioethics**

There are several further international conventions in the bioethics field that explicitly give children protection against unwanted or unnecessary medical procedures. These are the Council of Europe’s Convention on Human Rights and Biomedicine 1997, and the UNESCO Universal Declaration on Bioethics and Human Rights 2005.

#### *1. Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine*

Chapter II (Consent), Article 5, states as a general rule that

An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it. This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks. The person concerned may freely withdraw consent at any time.

Article 6, Protection of persons not able to consent, states that “an intervention may only be carried out on a person who does not have the capacity to consent, for his or her direct benefit.”<sup>9</sup>

Here the term “person” clearly refers to both males and females, both adults and children, and requires fully informed consent for any medical intervention. The provision amounts to an acknowledgement that people of any age or sex have the right to refuse unwanted medical or surgical interventions and to be protected from interventions they do not understand.

#### *2. UNESCO, Universal Declaration on Bioethics and Human Rights*

This includes a number of clauses that appear to protect individuals from unwanted medical interventions. These are quoted in full:

Article 3 – Human dignity and human rights

1. Human dignity, human rights and fundamental freedoms are to be fully respected.

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<sup>8</sup> United Nations Security Council, Commission of Experts’ Final Report [on the former Yugoslavia], 27 May 1994, document S/1994/674, part IV, section F. Seen at <http://www.his.com/~twarrick/commxyu1.htm>

<sup>9</sup> Council of Europe, Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, seen at <http://conventions.coe.int/Treaty/en/Treaties/Html/164.htm>

2. The interests and welfare of the individual should have priority over the sole interest of science or society.

#### Article 6 – Consent

1. Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information. The consent should, where appropriate, be express and may be withdrawn by the person concerned at any time and for any reason without disadvantage or prejudice.

#### Article 7 – Persons without the capacity to consent

In accordance with domestic law, special protection is to be given to persons who do not have the capacity to consent.

#### Article 8 – Respect for human vulnerability and personal integrity

In applying and advancing scientific knowledge, medical practice and associated technologies, human vulnerability should be taken into account. Individuals and groups of special vulnerability should be protected and the personal integrity of such individuals respected.<sup>10</sup>

It is readily apparent that circumcision of a non-consenting minor, unless essential to correct a deformity, injury or disease that has not responded to conservative treatment after a fair trial, would breach every one of these provisions. In Article 3 (2), “interest” should be interpreted in a wide sense as including all the individual’s interests apart from “welfare”. These might include self-esteem, body image, aesthetic preferences, cultural allegiances, erotic practices and self-identification, all of which might be seriously affected by the presence or absence of the foreskin. Article 8 gives special protection to the personal integrity of those unable to protect themselves, that is, to infants and children.

### **Developments in bioethics and law**

In the decade that followed the passage and ratification of the United Nations Convention on the Rights of the Child there has been a proliferation of studies by legal scholars, human rights experts and bioethicists who have developed convincing arguments that medically unnecessary circumcision of non-consenting minors is a violation of accepted principles of medical ethics and human rights. Some commentators have even raised doubts as to the legality of the procedure. Important landmarks include essays showing that “informed consent” for such an intervention constitutes a “legal and ethical conundrum”; that the justifications for such an operation as a prophylactic measure cannot override the ethical

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<sup>10</sup> UNESCO, Universal Declaration on Bioethics and Human Rights, 2005, seen at [http://portal.unesco.org/en/ev.php-URL\\_ID=31058&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=31058&URL_DO=DO_TOPIC&URL_SECTION=201.html)

objections; and that circumcision of boys is a violation of the rights of the child.<sup>11</sup> Other scholars have shown that the ethical and physical harm arguments against female genital mutilation apply just as strongly to circumcision of boys, that the physiological parallels of the two sets of procedures are very close, and that there is no justification for quarantining discussion of male circumcision from FGM.<sup>12</sup>

Australia's obligations under the Sex Discrimination Act 1984 and as a signatory to the Convention on the Rights of the Child require the national and state governments to treat males and females equally and without discrimination on the basis of sex, and to take action to eradicate traditional practices harmful to children. Article 24 (3) of the Convention requires parties to take "all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children." As noted above, in pursuance of this development several states passed laws to prohibit any form of female circumcision, and the Commonwealth specifically excluded such procedures from the Medical Benefits Schedule. Although there was nothing in the wording of the Convention to suggest that it did not include male children, no action has yet been taken to protect them. Although the Medicare guidelines state that payments are not available for cosmetic or clinically unnecessary procedures, a rebate for circumcision is still provided, thus subsidising and encouraging the procedure and sending a signal that it is socially and ethically acceptable. This failure to take any action to protect boys is increasingly recognised as constituting, as a recent article in the *Australian Journal of Human Rights* argued, "a hidden human rights violation".<sup>13</sup>

## Background: Circumcision in Australia

Circumcision of normal male minors as a preventive health precaution became common during the late Victorian period in Britain and the United States and soon spread to other Anglophone communities. The practice was never adopted anywhere else, except in South Korea after 1953 as a consequence of the U.S. occupation following the Korean War. Although circumcision was abandoned in Britain in the 1950s, it remained common in New Zealand until the 1960s, in Australia until the 1970s and in Canada until the 1980s, and it is still widely practised, and obstinately defended, in the United States.<sup>14</sup> Over the past thirty

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<sup>11</sup> For a list of key articles, see Appendix 2

<sup>12</sup> Christine Mason, "Exorcising excision: Medico-legal issues arising from male and female genital surgery in Australia", *Journal of Law and Medicine*, Vol. 9, 2001; Kirsten Bell, "Genital Cutting and Western Discourses on Sexuality". *Medical Anthropology Quarterly* 19(2):125-148; Robert Darby and J. Steven Svoboda, "A rose by any other name: Rethinking the differences/similarities between male and female genital cutting", *Medical Anthropology Quarterly*, Vol. 21, September 2007

<sup>13</sup> Ranipal Narulla, "Circumscribing circumcision: Traversing the moral and legal ground around a hidden human rights violation", *Australian Journal of Human Rights*, Vol. 12, 2007, 89-118

<sup>14</sup> David Gollaher, *Circumcision: A History of the World's Most Controversial Surgery* (New York: Basic Books, 2000); Robert Darby, *A Surgical Temptation: The Demonization of the Foreskin and the Rise of Circumcision in Britain* (Chicago and London: University of Chicago Press, 2005)

years Australian medical authorities have consistently sought to discourage the procedure; in policy statements issued in 1971, 1983, 1996, 2002 and 2004 they have stressed that there is no medical indication or need for circumcision as a routine or precautionary procedure, and that serious legal, ethical and human rights concerns hang over the procedure when performed on minors.

The motivations for circumcision fall into four broad categories: religious or cultural (as in Judaism, Islam and a number of tribal societies); customary or social (to look like dad or the neighbours); therapeutic (to correct a deformity, injury or disease); or prophylactic (to reduce the supposed risk of potential health problems or disease in the future). In addition, a very small number of adults seek circumcision for a variety of personal reasons. It is widely accepted that most circumcision procedures in Australia, especially on boys under the age of ten years, are not clinically necessary and are performed either because the parents prefer the boy to have a circumcised penis ("social circumcision"), or because there has been a false or premature diagnosis of phimosis or other foreskin problem and conservative measures have not been given a fair trial.<sup>15</sup> For this reason, public hospitals in most states have deleted circumcision from their schedule of free services. Unfortunately, this decision has opened the field for opportunistic GPs who ignore the recommendation against circumcision issued by the Royal Australasian College of Physicians and advertise themselves as "circumcision specialists". Some even claim to provide a "bloodless and non-surgical procedure", a false and misleading claim that should be investigated by the Australian Competition and Consumer Commission.

### Policy statements by medical authorities

All the medical organizations that have issued a policy on routine circumcision of minors agree that the procedure is medically unnecessary and should not be performed unless there is a serious medical problem that cannot be resolved in any other way. These bodies include the British Medical Association, the Canadian Pediatric Association, the American Academy of Pediatrics and the Royal Australasian College of Physicians. In its most recent statement the RACP states there is "no medical indication for routine male circumcision" and that there is "no evidence of benefit outweighing harm for circumcision as a routine procedure". Medical organizations in Scandinavia take an even stronger line against the operation.<sup>16</sup>

In Finland, the Central Union for Child Welfare has issued a policy which states that circumcision of boys violates their personal integrity and is not acceptable

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<sup>15</sup> Spilsbury K, Semmons JB, Wisniewski ZS, Holman CD. Routine circumcision practice in Western Australia 1981–1999. *ANZ J Surg* 2003;73(8):610-4; Spilsbury et al, Circumcision for phimosis and other medical indications in Western Australian boys, *Medical Journal of Australia* 2003;178 (4): 155-158

<sup>16</sup> Statements from medical organizations are conveniently collected at [www.cirp.org/library/statements](http://www.cirp.org/library/statements)

unless it is done for medical reasons to treat an illness. The basis for the measures of a society must be an unconditional respect for the bodily integrity of an under-aged person. ... Circumcision can only be allowed to independent major persons, both women and men, after it has been ascertained that the person in question wants it of his or her own free will and he or she has not been subjected to pressure.<sup>17</sup>

In Denmark, an editorial in the principal medical journal, *Today's Medicine*, affirmed that "is that no adult is entitled to carry out irreversible surgery on a child, unless it is for health reasons", that is, to correct a problem that has not responded to conservative treatment. The editorial continued:

the operation is associated with a small but unnecessary risk of severe mutilation. Therefore circumcision and all other permanent body modifications should be deferred until the child has reached the age of majority. Only then can individuals choose to have themselves circumcised, tattooed or otherwise beautified, for religious, cultural or other reasons. However, prior to 18 years of age, Danish children have a right to be protected from ritual interventions which can cause pain or permanent damage.<sup>18</sup>

In Britain prophylactic circumcision is not practised and therapeutic circumcision only rarely, and nearly all procedures are done for cultural or religious reasons (mainly at the desire of Muslim parents). Guidelines issued by the British Medical Association therefore place strict conditions on the operation, recognising that the rights of the child are paramount and that his wishes in the matter should be respected, as set out in the following principles:

- The welfare of child patients is paramount and doctors must act in the child's best interests.
- Children who are able to express views about circumcision should be involved in the decision-making process.
- Consent for circumcision is valid only where the people (or person) giving consent have the authority to do so and understand the implications and risks.
- Both parents must give consent for non-therapeutic circumcision.
- Where people with parental responsibility for a child disagree about whether he should be circumcised, doctors should not circumcise the child without the leave of a court.

Much of the document refers to religiously-motivated circumcision, but of particular relevance to the Australian situation is the BMA's advice that there is no

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<sup>17</sup> Finland, Central Union for Child Welfare, Position Statement of the Circumcision of Boys (Helsinki 2003), available at <http://www.cirp.org/library/statements/finland2003/>

<sup>18</sup> Editorial, "Ban circumcision of boys", *Today's Medicine*, 19 December 2002, seen at <http://www.courtchallenge.com/news/dagmed1.html>

consensus in the medical world as to the health benefits of circumcision and that parents should be warned against uncritical belief in the (often improbable) “health” claims of interested parties:

There is significant disagreement about whether circumcision is overall a beneficial, neutral or harmful procedure. At present, the medical literature on the health, including sexual health, implications of circumcision is contradictory, and often subject to claims of bias in research. Doctors performing circumcisions must ensure that those giving consent are aware of the issues, including the risks associated with any surgical procedure: pain, bleeding, surgical mishap and complications of anaesthesia. ... Doctors should ensure that any parents seeking circumcision for their son in the belief that it confers health benefits are fully informed of the lack of consensus amongst the profession over such benefits, and how great any potential benefits and harms are. The BMA considers that the evidence concerning health benefit from non-therapeutic circumcision is insufficient for this alone to be a justification for doing it.<sup>19</sup>

Australian medical authorities have lagged behind in their recognition of the ethical and human rights questions surrounding circumcision, but in 1996 the Australian Association of Paediatric Surgeons issued a position statement in which it declared its opposition to routine circumcision of neonates: not only was there no medical justification for such an intervention, but there was the distinct possibility that the boy would regret losing his foreskin:

We do not support the removal of a normal part of the body, unless there are definite indications to justify the complications and risks which may arise. In particular, we are opposed to male children being subjected to a procedure, which had they been old enough to consider the advantages and disadvantages, may well have opted to reject the operation and retain their prepuce.<sup>20</sup>

In other words, in the absence of any urgent medical necessity, it was unethical and cruel to deprive a boy of a normal body part that he might later appreciate. The argument, it will be noted, was quite independent of any “health” considerations, since it assumed that an individual has the right to manage his own health and to make his own decisions about the appropriate balance of risks and pleasures.

## Circumcision and public health

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<sup>19</sup> British Medical Association, *The Law and Ethics of Male Circumcision: Guidance for Doctors*, November 2007, at [http://www.bma.org.uk/health\\_promotion\\_ethics/consent\\_and\\_capacity/malecircumcision2006.jsp](http://www.bma.org.uk/health_promotion_ethics/consent_and_capacity/malecircumcision2006.jsp)

<sup>20</sup> The Australasian Association of Paediatric Surgeons, *Guidelines for Circumcision* (1996), text available at [www.circinfo.org/previous\\_statements.html](http://www.circinfo.org/previous_statements.html)

Although certain prominent circumcision evangelists have predicted dire health consequences as an effect of Australia's abandonment of circumcision, a study by the Australian Institute of Health and Welfare in 2005 found that there had been a major improvement in child health outcomes between the early 1980s and 2000 – the very period when routine circumcision disappeared.<sup>21</sup> A recent cost utility analysis of neonatal circumcision found that even if the extreme claims of advocates were true, the associated complications and adverse outcomes would cancel out and exceed the benefit to health.<sup>22</sup>

In places such as Australia, with a past history of widespread circumcision, it is common to find misconceptions about the normal development of the penis and the correct care of the natural (uncut) penis, especially in rural areas. Many people, including doctors, continue to believe that the foreskin should be retractable soon after birth, or at 3 or 4 years at the latest, and that it should be forcibly retracted for cleaning purposes as soon as possible. These ideas are incorrect, since it is quite common for the foreskin not to become retractable until puberty; this rarely causes any problems, and no action is needed unless the boy is experiencing pain or discomfort.<sup>23</sup>

It is also often assumed that minor foreskin problems (discomfort arising from tightness, minor skin infections, minor UTIs, persistent phimosis etc) cannot be cured by conservative treatment but require amputation. The normal rule in modern medical practice is medical treatment first, followed by surgical intervention only if medical treatment fails; this rule has often not been, but should be, applied to the penis as much as to other parts of the body. There is, in fact, abundant evidence that most foreskin problems can be successfully treated with conservative measures;<sup>24 25 26 27 28</sup> since parents and even doctors are not always aware of them, this information should be publicised more widely.

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<sup>21</sup> Australian Institute of Health and Welfare, *A Picture of Australia's Children* (Canberra: AIHW 2005). Summary at <http://www.circinfo.org/news.html#42>

<sup>22</sup> Van Howe RS. A cost-utility analysis of neonatal circumcision. *Medical Decision Making* 2004;24:584-601

<sup>23</sup> Dan Bollinger, "The penis-care information gap: Preventing improper care of intact boys", *THYMOS: Journal of Boyhood Studies*, Vol. 1, Fall 2007, 205-219.

<sup>24</sup> Concern at unnecessary circumcision. *The Age*, Melbourne, Sunday, 16 February 2003. Seen at [www.cirp.org/news/theage02-16-03/](http://www.cirp.org/news/theage02-16-03/)

<sup>25</sup> Rickwood AMK, Walker J. Is phimosis overdiagnosed in boys and are too many circumcisions performed in consequence? *Ann R Coll Surg Engl* 1989; 71(5):275-7. Available at [www.cirp.org/library/treatment/phimosis/rickwood2](http://www.cirp.org/library/treatment/phimosis/rickwood2)

<sup>26</sup> Griffiths D, Frank JD. Inappropriate circumcision referrals by GPs. *Journal of the Royal Society of Medicine* 1992; 85:324-325. Available at [www.cirp.org/library/procedure/griffiths-frank](http://www.cirp.org/library/procedure/griffiths-frank)

<sup>27</sup> Robert S. Van Howe, Cost-effective Treatment of Phimosis, *Pediatrics* Vol. 102 No. 4 October 1998, p. e43 Electronic article at: <http://pediatrics.aappublications.org/cgi/content/full/102/4/e43>

<sup>28</sup> Rickwood AMK, Kenny SE and Donnell SC, Towards evidence based circumcision of English boys: Survey of trends in practice, *British Medical Journal* 2000; 321:792-793. Available at

## HIV-AIDS

While there is evidence from Africa that circumcised men who have frequent unprotected intercourse with infected female partners are less vulnerable to infection with HIV, and world health authorities have recommended circumcision of sexually active adult men as an adjunct to controlling the spread of AIDS in severely affected regions of Africa, there has been no suggestion from responsible authorities that such measures are appropriate in developed nations or in places with a low incidence of female to male transmission. The Australian Federation of AIDS organization has stated that circumcision has no role in the management of HIV in Australia, where the disease is largely confined to specific sub-cultures.<sup>29</sup> In any case, protection against HIV would not be a justification for circumcising infants or children, since they are not sexually active and thus not at any risk of contracting the disease (unless through surgery itself.) Even in Africa the recommendations of the World Health Organisation have been contested, and its gung-ho approach to what it calls the circumcision roll-out has been attacked by the *South African Medical Journal* as costly, ineffective, a violation of accepted principles of bioethics and human rights, culturally insensitive and smacking of medical colonialism.<sup>30</sup> It has also been criticized by child health and human rights experts as neither medically necessary nor ethically permissible.<sup>31</sup> To cite the African data as an argument for circumcision of male infants and boys in Australia would be irresponsible and inappropriate.

In this context it is useful to recall the framework proposed by Hodges et al for balancing the requirements of human rights with the those of public health. In an important article published in the *Journal of Medical Ethics* in 2002, they considered prophylactic interventions in children and how conflicts between the demands of public health and human rights might be resolved. Noting that such interventions were traditionally justified on the grounds of “best interests of the child” and/or “public health”, they proposed two sets of criteria which had to be met before an intervention could be accepted as ethical. The criteria for the “best interests of the child” argument were (1) presence of clinically verifiable disease,

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[www.bmj.com/cgi/content/full/321/7264/792](http://www.bmj.com/cgi/content/full/321/7264/792). See also Spilsbury K, Semmons JB, Wisniewski ZS, Holman CD. Routine circumcision practice in Western Australia 1981–1999. *ANZ J Surg* 2003;73(8):610-4; Spilsbury et al, Circumcision for phimosis and other medical indications in Western Australian boys, *Medical Journal of Australia* 2003;178 (4): 155-158

<sup>29</sup> Australian Federation of AIDS Organisations, Briefing Paper, 23 July 2007, Male circumcision has no role in the Australian AIDS epidemic. Available at [www.afao.org.au/library\\_docs/policy/Circumcision07.pdf](http://www.afao.org.au/library_docs/policy/Circumcision07.pdf)

<sup>30</sup> D. Sidler, J. Smith, H. Rode, “Neonatal circumcision does not reduce HIV/AIDS infection rates”; A. and J. Myers, “Editorial: Rolling out male circumcision as a mass HIV/AIDS intervention seems neither justified nor practicable”, both in *South African Medical Journal*, Vol. 98, No. 10, October 2008. Available at <http://www.cirp.org/library/disease/HIV/>

<sup>31</sup> Robert Van Howe and J. Steven Svoboda, “Neonatal circumcision is neither medically necessary nor ethically permissible: A reply to Clark et al”, *Medical Science Monitor*, Vol. 14, 2008, available at <http://www.medscimonit.com/abstracted.php?level=5&icid=865808>

deformity or injury; (2) least invasive and most conservative treatment option; (3) net benefit to the patient and minimal negative impact on patient's health; (4) competence to consent to the procedure; (5) standard practice; (6) individual at high risk of developing the disease. The criteria for the "public health benefit" argument were: (1) substantial danger to public health; (2) condition must have serious consequences if transmitted; (3) effectiveness of the intervention; (4) invasiveness of the intervention; (5) whether individual receives an appreciable benefit not dependent on speculation about future behaviour; (6) the health benefit to society must outweigh the human rights cost to the individual. The authors evaluated several interventions against one or other of these sets of criteria, and neonatal circumcision against both of them. They concluded that while immunisation generally satisfied the "best interests" and "public health" justifications, circumcision failed to satisfy either of them. Such an intervention was thus impermissible because it was performed on a minor without consent; the human rights cost to the individual exceeded the proven public health benefit; and the disease could be avoided through appropriate behavioural choices.<sup>32</sup>

### Harm of circumcision

The risks and complications of circumcision are well known (see RACP policy for a summary), and the most common of these (bleeding) is so frequent that there is a MBS code dedicated to its treatment.<sup>33</sup> But even the most conscientious procedure causes bodily harm insofar as it removes an integral, functioning, visually prominent and emotionally significant part of the body. It is now known that the foreskin supports the main nerve centres of the penis, and that its removal significantly alters sexual sensation and response. Taylor *et al* found that circumcision excises highly innervated skin and mucosa from the penis,<sup>34</sup> while Cold and Taylor showed that the human foreskin has numerous physiological functions, including protective, immunological, mechanical, sensory, and sexual functions.<sup>35</sup> A Korean study found circumcised men significantly more dissatisfied with their condition following the procedure: "There was a decrease in masturbatory pleasure and sexual enjoyment after circumcision, indicating that adult circumcision adversely affects sexual function in many men".<sup>36</sup> In the United States Sorrells *et al* found that the areas of the penis most sensitive to fine-touch

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<sup>32</sup> Hodges FM, Svoboda JS, Van Howe RS. Prophylactic interventions on children: balancing human rights with public health. *J Med Ethics* 2002;**28**: 10-16

<sup>33</sup> Infection and haemorrhage are the most common causes of death following circumcision, especially in infants. For an account of the inquiry into the death of a child following hospital circumcision in Canada in 2002, see [www.circinfo.org/account.html#ryleigh](http://www.circinfo.org/account.html#ryleigh)

<sup>34</sup> Taylor JR, Lockwood AP, Taylor AJ. The prepuce: specialized mucosa of the penis and its loss to circumcision. *Br J Urol* 1996; **77**:291-5. Available at [www.cirp.org/library/anatomy/taylor](http://www.cirp.org/library/anatomy/taylor)

<sup>35</sup> Cold CJ, Taylor JR., The prepuce. *BJU Int* 1999;**83** Suppl. 1:34-44. Available at [www.cirp.org/library/anatomy/cold-taylor](http://www.cirp.org/library/anatomy/cold-taylor)

<sup>36</sup> Kim DS and Pang M-G. The effect of male circumcision on sexuality, *BJU International* 2006;**99**:619-622.

are located on the foreskin.<sup>37</sup> Until the late nineteenth century it had been a truism of Western medical knowledge that the foreskin made a significant contribution to sexual sensation and that its loss was a misfortune to be regretted – so much so that in the eighteenth century men regarded it as “the best of your property.”<sup>38</sup>

There are particularly strong reasons for not performing circumcision procedures on very young boys, since the small size of the penis makes it difficult to operate on, and the need to tear the foreskin from the glans (since it is usually adherent at that age) adds a further dimension of both pain and injury.

- The Australasian Association of Paediatric Surgeons advised that if elective circumcision has to be performed, it should always be after 6 months of age.<sup>39</sup>
- A recent study in Saudi Arabia, where circumcision of young boys is common as a result of adherence to Muslim custom, concluded that neonatal circumcision should not be recommended and that circumcision at 5 months (if it must be done for social reasons) resulted in “significantly fewer serious complications than circumcision in the neonatal period, irrespective of the method used.”<sup>40</sup>
- It is not possible to give effective pain relief to very young children. While EMLA is frequently used as a pain relief for infants,<sup>41</sup> the manufacturers specifically state that “EMLA should not be used in children under 6 months of age. We do not have enough knowledge yet to be sure it is safe in very young

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<sup>37</sup> Sorrells ML, Snyder JL, Reiss MD, *et al.* Fine-touch pressure thresholds in the adult penis. *BJU Int* 2007;99:864-9. Text but not the illustrations is available at [www.cirp.org/library/anatomy/sorrells\\_2007](http://www.cirp.org/library/anatomy/sorrells_2007). For a clearer presentation of the data and illustrations, see <http://www.circumstitions.com/Sexuality.html#sorrells>. See also H.S. Meislahn and J.R. Taylor, “The importance of the foreskin to male sexual reflexes”, in George Denniston, Frederick Hodges and Marilyn Milos (eds), *Flesh and Blood: Perspectives on the Problem of Circumcision in Contemporary Society* (New York and London: Kluwer Academic and Plenum Publishers, 2004)

<sup>38</sup> *Surgical Temptation*, chap 2; Darby Svoboda, “A rose by any other name”

<sup>39</sup> J. Fred Leditschke, *Guidelines for Circumcision*. Australasian Association of Paediatric Surgeons, Herston, QLD: 1996. Available at [www.cirp.org/library/statements/aaps/](http://www.cirp.org/library/statements/aaps/)

<sup>40</sup> M. Machmouchi, A. Alkhotani, Is Neonatal Circumcision Judicious? *Eur J Pediatr Surg* 2007; 17: 266-269. Available at [www.thieme-connect.com/ejournals/abstract/ejps/doi/10.1055/s-2007-965417](http://www.thieme-connect.com/ejournals/abstract/ejps/doi/10.1055/s-2007-965417)

<sup>41</sup> Despite such warnings, Australia’s most vigorous champion of circumcision, Dr Terry Russell, uses EMLA cream, claiming that it is both totally effective and completely safe. (See [www.russellmedical.com.au/Introduction.htm](http://www.russellmedical.com.au/Introduction.htm).) One mother on a discussion forum said that he used EMLA cream on a 5-week-old baby, “We had our son circumcised at 5 weeks. We saw Dr Terry Russell at Mt Gravatt in Brisbane. Dr Russell makes two appointments with you. The first is to discuss the circumcision with you and to give you the EMLA cream (anaesthetic) for the procedure”. (Seen at <http://huggies.com.au/ibb/posts.aspx?postID=988919>).

babies.”<sup>42</sup> Yet circumcision without effective anaesthesia is extremely painful. Lander found “extreme distress” in babies circumcised without pain relief,<sup>43</sup> and Taddio found a stronger pain response when circumcised boys were vaccinated several months later.<sup>44</sup>

There is in fact abundant evidence that many men have bitterly resented having been circumcised, and that many have suffered serious emotional, psychological and physical harm as a result.<sup>45</sup> Agonising though it is, the pain of the operation is insignificant compared with the life-long harm of being deprived of an integral, visually prominent, aesthetically attractive and erotically significant component of the body.

### An anomaly in law and ethics: Boys need protection

In Australia it is evident that boys are in far greater need of protection from genital mutilation than girls. On a world scale it has been estimated that some 13 million boys are circumcised each year, compared with only two million girls subjected to FGM.<sup>46</sup> Societies that circumcise girls are found in Africa, the Middle East and parts of south-east Asia, but the practice is all but unknown elsewhere, except among immigrants from these regions. It might be argued that the laws against FGM that have been passed in many western countries are aimed at a problem that scarcely exists. In Australia, as in the United States, however, thousands of boys annually are the victims of circumcision procedures, the vast

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<sup>42</sup> For EMLA Consumer Medicine Information see [www.emla.com.au/\\_mshost311841/homepage/emlaCMI.pdf](http://www.emla.com.au/_mshost311841/homepage/emlaCMI.pdf). See also the warnings collected at [www.cirp.org/library/complications/EMLA/](http://www.cirp.org/library/complications/EMLA/)

<sup>43</sup> Lander J, Brady-Freyer B, Metcalfe JB, *et al.* Comparison of ring block, dorsal penile nerve block, and topical anesthesia for neonatal circumcision. *Journal of the American Medical Association* 1997; 278:2158-62. “Although our physicians were highly experienced in performing circumcision and had excellent surgical technique, every newborn in the placebo group exhibited extreme distress during and following circumcision.” Available at [www.cirp.org/library/pain/lander](http://www.cirp.org/library/pain/lander).

<sup>44</sup> Taddio A, Goldbach M, Ipp E, *et al.* Effect of neonatal circumcision on pain responses during vaccination in boys. *Lancet* 1995;345:291-2. Available at [www.cirp.org/library/pain/taddio](http://www.cirp.org/library/pain/taddio)

<sup>45</sup> John Warren *et al.* Circumcision of children. *British Medical Journal* 1996;**312**;377; Hammond T. A preliminary poll of men circumcised in infancy or childhood”. *BJU International* 1999; **83** (Supplement 1):85-92; Robert Darby and Laurence Cox, “Objections of a sentimental character: The subjective dimension of foreskin loss”, in Chantal Zabus (ed.), *Fearful Symmetries: Essays and Testimonies around Excision and Circumcision* (Amsterdam and New York: Rodopi, forthcoming); Shane Peterson, “Assaulted and mutilated: A personal account of circumcision trauma”, in George C. Denniston, Frederick Hodges and Marilyn Milos (eds), *Understanding circumcision: A Multi-disciplinary Approach to a Multi-dimensional Problem* (London and New York, Kluwer Academic and Plenum Press, 2001), available at [http://www.historyofcircumcision.net/index.php?option=com\\_content&task=view&id=93&Itemid=50](http://www.historyofcircumcision.net/index.php?option=com_content&task=view&id=93&Itemid=50)

<sup>46</sup> George C. Denniston, Frederick Hodges and Marilyn Milos (eds), *Understanding Circumcision: A Multi-disciplinary Approach to a Multi-dimensional Problem* (London: Kluwer Academic-Plenum Press, 2001), v

majority of which are not required for any health reason, are certainly not desired by the child, and are probably not in his best interests.

To give an example of how vulnerable boys are, consider a case in Bundaberg in 2002, when an estranged father who had been denied custody of the two boys (aged 5 and 9) from his former marriage took advantage of a regular visit to race the boys off to a surgeon and have them circumcised. Although the frantic mother made efforts to have him prosecuted, he was let off without even a slap on the wrist. The boys were traumatized and bitter. Even more shameful than the father's conduct was that of the surgeon, who made no attempt to consult the views of the mother, the feelings of his two terrified and unwilling "patients", or even if the father was entitled to authorise the operation (which he was not).<sup>47</sup> His motivation arose from his Turkish-Islamic background, but it could just as easily have been a young mother who had been alarmed by scaremongering assertions on talk-back radio, or the advertising of circumcision "experts", or stories about the dreadful fate awaiting boys whose foreskins were not snipped off before it was too late, such as getting caught in their zipper, becoming infected and ultimately succumbing to gangrene and causing death.<sup>48</sup>

## Summary

In this submission I have attempted to show the following.

- International treaties in the human rights field give people the right to bodily integrity without discrimination as to gender.
- The Australian Sex Discrimination Act 1984 commits the Commonwealth to treating the sexes equally. While the legislation does not refer specifically to protection from bodily harm, it would be contrary to its spirit to deny boys protection given to girls.
- Many human rights authorities and bioethics experts consider circumcision of minors to be a human rights violation.
- Circumcision causes physical and psychological harm and is often resented by those who have been subjected to it.
- Medical authorities do not consider circumcision a desirable routine measure for child health and have raised serious doubts about the ethics and even the legality of the procedure.
- There are no "compelling" public health arguments that would justify circumcision of non-consenting minors in Australia.

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<sup>47</sup> For details of the case, see <http://www.circinfo.org/ethics.html>

<sup>48</sup> As Brian Morris solemnly warns parents: *In Favour of Circumcision* (Sydney: New South Wales University Press, 1999), 27

- Boys in Australia are at far greater risk of genital mutilation than girls.

## Conclusion

It is, however, difficult to suggest an effective and widely acceptable means of protecting boys from adults (usually their parents) who want to get them circumcised. The issue is a contentious and highly emotional one, touching on both the relations between parents and their children and the sensibilities of ethnic/religious minorities who regard circumcision as a requirement of their faith or a necessary mark of their tribal identity. Previous attempts to take action have foundered on precisely this rock. When, in 1986, the Commonwealth government dropped circumcision from the Medical Benefits Schedule the decision aroused protests from Jewish religious leaders, who considered the reform discriminatory in that it applied to circumcision only of boys under six months. The decision was reversed without a fight. In the early 1990s the Queensland Law Reform Commission was considering the possibility of legislation that would give boys protection from genital mutilation similar to that already accorded to girls. It received such a flood of contradictory submissions that it was unable to reach a firm conclusion, and nothing was done. Many of the submissions were from Jewish and Muslim organisations which insisted that any restriction on their right to circumcise boys would be an infringement of their religious freedom and thus a breach of Australia's human rights obligations.

Interestingly, however, most of the public submissions did not try to justify circumcision on the culturally relativist ground of ethnic/religious particularity, but in terms of an old fashioned set of health benefits, the validity of which had already been rejected by medical authorities. Nonetheless, the reliance on medico-scientific arguments to defend a traditional cultural practice was not a new strategy, and it would become more pronounced as the 1990s wore on. It has been argued that the revival of old claims for the "health benefits" of circumcision that became apparent in the mid-1990s is really a response by traditional circumcising cultures to developments in human rights, law and medical ethics that were threatening to outlaw their practices: the power of modern science and medicine was to be harnessed in defence of ancient customs.<sup>49</sup>

The problem for critics of circumcision was that any general ethical or human rights argument against circumcision could not avoid applying to the cultural and religious groups that were most committed to the practice, and most loath to give it up, who naturally reacted fiercely. They, in turn, formulated their arguments in favour of circumcision in terms that applied to all boys, not just their own sub-culture. The result has been that in order to preserve circumcision among the

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<sup>49</sup> See Robert Darby and J. Steven Svoboda, "A rose by any other name: Symmetry and asymmetry in male and female genital cutting", in Chantal Zabus (ed.), *Fearful Symmetries: Essays and Testimonies around Excision and Circumcision* (Amsterdam and New York: Rodopi, forthcoming)

ethnic/religious groups that traditionally practise it, all other boys have been placed at risk of the operation, and many have, in consequence, been subjected to it.

Is there no way out of this dilemma? At least for the foreseeable future there is unlikely to be legislation similar to that criminalising FGM to protect boys from circumcision. In this environment, all we can hope for is better education of parents as to its non-necessity for health, and the cessation of signals that it is a medically-approved procedure. Notwithstanding the government's failure in 1986, the simplest and least discriminatory way of achieving this is by dropping medically unnecessary circumcision from the Medical Benefits Schedule and deleting circumcision from the list of allowable childbirth expenses under the Medicare Safety Net.

## **Recommendation**

### **Medical Benefits Schedule**

#### **Items 30653, 30659, 30660, 30656**

30653 – Circumcision of male under 6 months of age

30656 – Circumcision of male over 6 months and under 10 years

30659 – Circumcision of male 10 years of age and older by a GP

30660 – Circumcision of male 10 years or older by a specialist

#### **Proposal**

Confine the Medical Benefits Schedule rebate for these procedures to cases of genuine medical need. This can be achieved quite simply by adding the words "where medically necessary" at the end of each item.

#### **Explanation**

The Medicare guidelines state that a medical benefit is payable only for medical procedures that are clinically necessary and is not payable for cosmetic or other unnecessary surgery.<sup>50</sup> It is widely accepted that most circumcision procedures, especially on boys under the age of ten years, are not clinically necessary and are performed either because the parents prefer the boy to have a circumcised penis ("social circumcision"), or because there has been a false or premature diagnosis of phimosis or other foreskin problem and conservative measures have not been given a fair trial. It is, further, a sound principle of public finance that government programs should be directed strictly at areas of need and administered with economy and prudence; to use the health budget to subsidise procedures that are not clinically necessary is a violation of this principle.

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<sup>50</sup> "What Medicare covers", at <http://www.medicareaustralia.gov.au/public/claims/what-cover.jsp>

## **Definition**

“Genuine medical need” means a case where (1) there is a medical problem that has not responded to conservative (non-surgical) treatment after reasonable efforts; **and** (2) this is certified by two qualified medical practitioners, one of whom must be an appropriate specialist, and neither of whom may be the surgeon who is to perform the surgery.

## **Justification**

The justifications for the policy reform proposed here may be considered under the headings of medical policy, consistency, human rights and economy. Since medical policy and human rights have already been covered, only consistency and economy are dealt with here.

## ***Consistency***

The Australian Government is the only national jurisdiction in the world that provides no-questions-asked coverage of circumcision of minors through the health budget. This policy is despite the fact that most State governments (Victoria, Western Australia, Tasmania, New South Wales and South Australia) do not provide free coverage of circumcision in public hospitals, and it is in sharp contrast with the practice of comparable developed nations.

- In Britain the National Health Service has never included circumcision among its free procedures, and covers it only as a therapeutic procedure in cases of medical necessity. The same is true of New Zealand.
- In Canada, where medical insurance is the responsibility of the provinces, the only province to include circumcision in its cover is Manitoba.
- In the United States, the central government provides the funds for public health insurance to the states, which make their own decisions as to which services they cover. When the program was introduced in the mid-1960s all states covered circumcision, but since the 1970s at least sixteen states have ceased to fund it, except in cases of genuine medical need;<sup>51</sup> in a country where circumcision is deeply entrenched as a social ritual,<sup>52</sup> this is a remarkable development.

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<sup>51</sup> Amber Craig and Dan Bollinger, “Of waste and want: A nationwide survey of Medicaid funding for medically unnecessary, non-therapeutic circumcision”, in George C. Denniston et al (eds), *Bodily Integrity and the Politics of Circumcision: Culture, Controversy and Change* (New York: Springer, 2006), p. 234

<sup>52</sup> Geoffrey Miller, “Circumcision: Cultural-legal analysis”, *Virginia Journal of Social Policy and the Law*, Vol. 9, 2002, 497-585; Sarah Waldeck, “Using circumcision to understand social norms as multipliers”, *University of Cincinnati Law Review*, Vol. 72, 2003, 455-526

- Circumcision is not funded by the governments of Israel or Turkey, countries where the procedure is widely practised as a cultural/religious ritual, not even when the operation is performed in hospitals rather than (as is traditional) in the boy's home.
- The Dutch national health insurance service withdrew coverage of circumcision in 2004 when it was realised that 90 per cent of the procedures were done for religious/cultural rather than for health reasons (mainly by the Netherlands substantial Moslem population).<sup>53</sup>

The Commonwealth Sex Discrimination Act, Section 3 (b), states that the Act applies to the administration of Commonwealth laws and programs, while Section 22 (b) makes it illegal to discriminate on the basis of sex in the provision of goods, services and facilities. It could be argued that the exclusion of female circumcision from the MBS is a breach of this provision, since it denies to women a benefit given to men;<sup>54</sup> whether or not circumcision is regarded as a benefit or a deprivation, it is certainly anomalous that the MBS specifically denies coverage for cutting procedures on the female genitals while providing no-questions-asked coverage for comparable procedures on the genitals of boys.

The simplest way to remove this anomaly and restore the principle of equal treatment is to limit coverage of male circumcision to cases of proven medical necessity.

The policy issued in 1983 by the Australian College of Paediatrics led the National Health and Medical Research Council to recommend that circumcision be dropped from the Medical Benefits Schedule, and this recommendation was partly accepted by the Health Department and endorsed by the then Minister, Neal Blewett in 1985. The Department made the mistake, however, of limiting the withdrawal of benefits to circumcision below the age of 6 months and leaving it in place for circumcision above that age. This was seen as discriminatory by some members of the Jewish community (since Jews traditionally perform circumcision at 8 days), and they successfully lobbied the government to reverse the decision. Since that time the Health Department has replied to letters which urge the abolition of the circumcision subsidy that a previous attempt to do so aroused widespread protests and had to be abandoned.

This claim is far from the truth, since the decision was in fact widely applauded; it was objected to only by the Jewish community, and even then mainly on account of the discrimination inherent in continuing the benefit for circumcision

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<sup>53</sup> [www.cirp.org/news/canadianpress12-17-04](http://www.cirp.org/news/canadianpress12-17-04)

<sup>54</sup> In June 1995 sub-regulation 4.24 of the Health Insurance (General Medical Services Table) Regulations was amended to change "circumcision of a person" to "circumcision of a male". The explanatory memorandum stated that the change reflected "government policy that this procedure should be restricted to males". The amendment was in response to the UN Convention on the Rights of the Child and was aimed at protecting girls and women from genital mutilation. Whether this qualification contravenes the Sex Discrimination Act has not yet been tested.

procedures on boys older than 6 months. Had the decision been to withdraw the subsidy for all circumcision procedures except in cases of genuine medical need there might have been some complaints, but there would have been no valid grounds for objection.<sup>55</sup> The way forward is to treat everybody equally and without discrimination by confining the rebate for circumcision to situations of genuine medical need as defined above.

### *Economy*

All government welfare programs should be targeted at genuine need and be administered with prudence and economy. An open-slather approach to funding a medically unnecessary procedure is wasteful and invites over-servicing. It also acts as a signal that circumcision is a socially acceptable and even medically recommended operation, thus encouraging more parents to seek to have it done.

- Assuming 15,000 unnecessary circumcision procedures per year at a cost of between \$100 and \$1600 each, Spilsbury et al have estimated that the removal of medically unnecessary circumcision from the MBS would save between \$1.5 million and \$24 million per year. They state that “the potential savings to the public purse would be considerable if elective and discretionary circumcision was removed from the Medicare schedule in line with other cosmetic surgeries, leaving rebates for the genuine medically indicated circumcision.”<sup>56</sup>
- In the 2006-07 financial year, Medicare item 30653 alone cost \$1,260,869 to circumcise 17,877 babies under 6 months of age<sup>57</sup>. This is more than a million dollars spent on a service that is not medically necessary and which is discouraged by the Australasian Association of Paediatric Surgeons and other responsible medical authorities.
- These figures do not include the cost of treating complications and long-term adverse effects, which may not become apparent until adolescence. An American cost utility analysis of neonatal circumcision found that even if the extreme claims of advocates were true, the associated complications and adverse outcomes would cancel out and exceed the benefit to health.<sup>58</sup>
- Now that public hospitals in most states do not include circumcision among their free services, the field is open for medical entrepreneurs and private

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<sup>55</sup> “Medical advice and the politics of healthcare: Public funding of routine circumcision, and the Australian debate over Medicare in 1986”, unpublished research paper by Dr Robert Darby, Canberra, 2005.

<sup>56</sup> Spilsbury, Routine circumcision practice, 613

<sup>57</sup> Medicare statistics at [http://www.medicareaustralia.gov.au/cgi-bin/broker.exe?\\_PROGRAM=dyn\\_mbs.mbs\\_tab4.sas&\\_SERVICE=default&DRILL=ag&\\_DEBUG=0&GROUP=30653&VAR=services&STAT=count&RPT\\_FMT=by+state&PTYPE=finyear&START\\_DT=200607&END\\_DT=200706](http://www.medicareaustralia.gov.au/cgi-bin/broker.exe?_PROGRAM=dyn_mbs.mbs_tab4.sas&_SERVICE=default&DRILL=ag&_DEBUG=0&GROUP=30653&VAR=services&STAT=count&RPT_FMT=by+state&PTYPE=finyear&START_DT=200607&END_DT=200706)

<sup>58</sup> Van Howe RS. A cost-utility analysis of neonatal circumcision. *Med Decis Making* 2004;24:584-601

clinics to exploit the situation through advertising that is likely to mislead the public as to the benefits and acceptability of the surgery.<sup>59</sup>

These might not seem substantial sums in the context of today's billion-dollar budgets, but when every effort is being made to rein in public expenditure, especially the ever-expanding health budget, every million saved can make a difference. Not only this: given the irresponsible media commentary on the role of circumcision in HIV control and the efforts of scaremongering local evangelists to instil a mood of panic, the demand for circumcision is likely to increase as ignorant parents become fearful of the alleged risks of not taking action. The cost of the circumcision subsidy is thus likely to increase unless it is restricted. Removal of circumcision from the MBS will send a clear signal to Australian parents that routine circumcision is not a medically recommended procedure and is not necessary for the health and safety of their child.

Speaking of safety, some of the practitioners who perform many circumcision procedures are not necessarily the most competent, as suggested by the cases of Dr Aladdin Mattar and Dr Suman Sood, both of whom were deregistered (eventually) on account of the crudeness of their surgery and the high incidence of complications and severe disfigurement.<sup>60</sup>

### **Summary and conclusion**

- It is both humane and good medical practice to discourage circumcisions in the newborn period and infancy, when the operation is both more risky and more damaging, and when safe, effective pain relief cannot be given.
- There is evidence that the younger a circumcision procedure is performed, the greater the risks. Abolishing the subsidy for neonatal circumcision would encourage parents and doctors to wait until the procedure is less risky and can be performed in a more humane manner.

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<sup>59</sup> Both Terry Russell and "Dr Snip" advertise extensively on Google. Contrary to RACP guidelines, "Dr Snip" states that he confines his services to babies of less than 6 months. Dr Russell was caught taking advantage of babies brought into to be circumcised to perform another unnecessary cutting operation, this time of the tongue web after a diagnosis of "tongue-tie". The Professional Services Review of 5 October 2004 found this service to be "inappropriate" and ordered him to be reprimanded and to refund the sums charged to Medicare. See [www.psr.gov.au/docs/publications/PSRAR04.rtf](http://www.psr.gov.au/docs/publications/PSRAR04.rtf)

<sup>60</sup> Dr Aladdin Mattar, a Sydney GP, was deregistered for a minimum of three years in 2000 after ignoring conditions imposed on him in 1996 and continuing to perform circumcisions on young babies. Six counts of "grossly unethical" and serious misconduct were proved against him. Medical Tribunal, New South Wales, Determination 40021 of 1999, 3 August 2000. Details at [www.nswmb.org.au/download.pl?param=143](http://www.nswmb.org.au/download.pl?param=143). See also "Circumcised baby almost died", Daily Telegraph, 14 June 2000. In 2006 Dr Suman Sood was deregistered for 10 years for misconduct in relation to both abortion and circumcision. NSW Medical Tribunal, Determination 774 of 2005, 6 October 2006. Details at [www.nswmb.org.au/system/files/f10/f20/o585//SOOD.pdf](http://www.nswmb.org.au/system/files/f10/f20/o585//SOOD.pdf)

- Confining the MBS subsidy for circumcision to cases of proven medical necessity would save public money by limiting unnecessary surgery. It would also discourage rogue practitioners, promote ethical medical practice by recognising the human rights of male children, restore the principle of equal treatment on the basis of sex, and bring Australia into line with best practice as seen in comparable developed nations.
- The sensibilities of the Moslem and Jewish communities would not be affronted by this reform, since the new rules would apply to everybody, without discrimination. The reform would not restrict the right of Jewish, Aboriginal or Muslim parents to circumcise their children in accordance with their respective traditions.

## **Appendix**

### **Relevant MBS codes and payments**

30653: Circumcision of a male under 6 months of age  
Scheduled fee: \$42; Benefit: \$31.50 (75%); \$35.75 (85 %)

30656: Circumcision of a male under 10 years of age but not less than 6 months of age  
Scheduled fee: \$97.65; Benefit: \$73.25 (75%); \$83.05 (85%)

30659: Circumcision of a male 10 years of age or over by a GP  
Scheduled fee: \$135.20; Benefit \$101.40 (75%); \$114.95 (85%)

30660: Circumcision of a male 10 years of age or over by a specialist  
Scheduled fee: \$167.65; Benefit \$125.75 (75%); \$142.55 (85%)

30663: Haemorrhage, arrest of, following circumcision requiring general anaesthesia  
Scheduled fee: \$130.35; Benefit \$97.80 (75%); \$110.80 (85%)

Until 1995 these codes were unisex and read “circumcision of a person”, thus authorising a benefit for circumcision of females as well as of males. In order to protect girls from genital mutilation as part of the general development of laws and policies against FGM that followed the passage of the UN Convention on the Rights of the Child in 1989, “person” was changed to “male”, thus introducing two elements of discrimination: females were denied a service that remained available to males; but males were denied the protection that was accorded to females.

## Appendix 2: Key articles in human rights and medical ethics

William E. Brigman, "Circumcision as child abuse: The legal and constitutional issues", *Journal of Family Law*, Vol. 23, 1985

Ross Povenmire, "Do parents have the legal authority to consent to the surgical amputation of normal, healthy tissue from their infant children? The practice of circumcision in the United States", *Journal of Gender, Social Policy & the Law*, Vols. 8-7, 1998-1999

Gregory J. Boyle, J. Steven Svoboda, Christopher P. Price, J. Neville Turner, "Circumcision of healthy boys: Criminal assault?" *Journal of Law and Medicine*, Vol. 7, 2000

Arif Bhimji, Infant male circumcision: A violation of the Canadian charter of rights and freedoms", *Health Care Law (Toronto)* 2000, January 1:1-33

J. Steven Svoboda, Robert Van Howe and James Dwyer, "Informed consent for neonatal circumcision: An ethical and legal conundrum", *Journal of Contemporary Health Law and Policy*, Vol. 17, 2000, 61-133

Margaret Somerville, "Altering baby boys' bodies: The ethics of infant male circumcision", in *The Ethical Canary: Science, Society and the Human Spirit* (Toronto: Viking, 2000)

Frederick Hodges et al, "Prophylactic interventions on children: Balancing human rights with public health", *Journal of Medical Ethics*, Vol. 28, 2002, 10-16

S.K. Hellsten, "Rationalising circumcision: From tradition to fashion, from public health to individual freedom - Critical notes on cultural persistence of the practice of genital mutilation", *Journal of Medical Ethics*, Vol. 30, 2004, 248-53

Jacqueline Smith, "Male Circumcision and the Rights of the Child", in Mielle Bulterman, Aart Hendriks and Jacqueline Smith (eds.). *To Baehr in Our Minds: Essays in Human Rights from the Heart of the Netherlands*. Utrecht: Netherlands Institute of Human Rights, 1998 (SIM Special No. 21): 465-498; available on-line at <http://www.cirp.org/library/legal/smith/>

Marie Fox and Michael Thomson, "Short Changed? The Law and Ethics of Male Circumcision". *International Journal of Children's Rights* 2005;13:161-181

Clark P.A. "To circumcise or not to circumcise?: A Catholic ethicist argues that the practice is not in the best interest of male infants". *Health Prog* 2006; 87(5): 30-9; "Is infant male circumcision an abuse of the rights of the child? Yes!"

Geoff Hinchley, *British Medical Journal*, Vol. 335, 8 Dec. 2007, p. 1180.

Doctors Opposing Circumcision, "Genital Integrity Policy Statement", June 2008, at <http://www.doctorsopposingcircumcision.org/DOC/statement0.html>.

Full texts of many of these references are available at <http://www.cirp.org/library>