

BOOK REVIEW

New South Wales Law Reform Commission, *Young People and Consent to Health Care*, Report No 119 (2008)

I THE REPORT

The New South Wales Law Reform Commission ('NSWLRC') Report No 119 (2008) entitled *Young People and Consent to Health Care* is the final report of an inquiry into the law relating to young people's consent to health care in New South Wales.¹ The Report provides a discussion of the law in New South Wales as it relates to minors and consent to medical treatment, with a clear focus on the provision of general health care. The special statutory provisions in New South Wales regarding mental health care,² human tissue donation,³ the care and protection of young people,⁴ and some aspects of guardianship⁵ are considered to be beyond the scope of the inquiry. Consideration of the issues raised by cosmetic surgery, medical and scientific research, and clinical trials are also omitted.

The Report addresses some of the current difficulties encountered in the operation of the law in New South Wales. It notes the fragmented and uncertain state of the law, the presence of obsolete rules, and the problems that arise from confused or inconsistent application of the law. It notes the overarching powers invested in the inherent jurisdiction of the New South Wales Supreme Court, and in the Family Court under the *Family Law Act 1975* (Cth), to intervene in decisions about young people's health care. In particular, it points out that the *parens patriae* jurisdiction of the New South Wales Supreme Court may be used to override both a parent's decision about his or her child's health care, and a competent young person's decision about their own health care.⁶

The principal Recommendation of the Report is that the New South Wales Parliament should create a new statutory framework to regulate the decision-making process for young people's health care.⁷

II OVERVIEW OF CONTENT

Chapter 2 of the Report includes a brief overview of empirical research concerning the development of a young person's decision-making capacity. It includes a

1 New South Wales Law Reform Commission ('NSWLRC'), *Young People and Consent to Health Care*, Report No 119 (2008). See also NSWLRC, *Minors' Consent to Medical Treatment*, Issues Paper 24 (2004).

2 *Mental Health Act 2007* (NSW) s 6.

3 *Human Tissue Act 1983* (NSW).

4 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ch 9.

5 *Guardianship Act 1987* (NSW) pt 5.

6 NSWLRC, *Young People and Consent to Health Care*, above n 1, [4.49].

7 Ibid Recommendation 1. The Commission declines to recommend a location for the new statutory framework: at [1.53].

valuable discussion about the role and responsibilities of parents and carers, and the application of the 'best interest' principle in Australian health law. Chapter 3 addresses the intended scope of proposed legislation. Chapter 4 outlines the common law test of *Gillick*⁸ competency and its interaction with New South Wales statute law.⁹ The rationale for the Commission's Recommendation to formulate legislation based on the *Gillick* test appears in Chapter 5. In this discussion the Commission indicates its preference for an approach that assesses competence according to an individualised notion of maturity and values the principle of best interests as an overriding standard. The recommended test for competence places the onus upon the treating practitioner to assess the young person's competence.¹⁰ Chapter 5 also includes an outline of law reform initiatives across Australia and the current position in Canada, the United Kingdom, and New Zealand. Chapter 6 outlines proposed arrangements for young people who lack capacity. Chapters 7 and 8 discuss emergency and special medical treatment respectively. Chapter 9 addresses the question of liability.

III NOTABLE RECOMMENDATIONS

The Report recommends that new legislation should contain rules for determining when a young person is legally entitled to make decisions about his or her health care and when other decision-makers are legally entitled to override those decisions.¹¹ It should be guided by the following principles:

- Young people should be informed about matters relating to their health care, to the extent and in a manner appropriate to their age and maturity, and should be given the opportunity to express their views freely about these matters, and their views should be given due weight in accordance with their age and maturity.
- The developing autonomy of the young person should be acknowledged.
- Respect should be given to the responsibilities and role of parents in the health care of their child or, where applicable, the members of the extended family or persons legally responsible for the young person, in a manner consistent with the evolving capacities of the young person.
- Account should be taken of the culture, disability, language, religion and sexuality of the young person and, if relevant, those with parental responsibility for the young person.
- Access by young people to appropriate health care should be promoted.
- The best interests of the young person should be the primary consideration.¹²

8 *Gillick v West Norfolk* [1986] AC 112 ('*Gillick*').

9 NSWLRC, *Young People and Consent to Health Care*, above n 1, [4.26]-[4.46].

10 *Ibid* [5.34].

11 *Ibid* Recommendation 1.

12 *Ibid* Recommendation 2.

Overall, the Report emphasises the ability of a young person to lawfully consent to, or refuse, medical treatment. It recommends that legislation should:

- enable a competent young person to accept or refuse health care;¹³
- provide that a young person is competent if he or she ‘understands the information that is relevant to making a decision about the health care and appreciates the reasonably foreseeable consequences of that decision’;¹⁴
- presume that a young person who is aged 16 years or over is competent;¹⁵
- provide that a competent young person who is a parent can give consent to the provision of health care for his or her child;¹⁶ and
- provide that the conflicting acceptance or refusal of health care by a parent or guardian must not be relied upon if the young person is competent.¹⁷

These Recommendations reflect the interpretation of the common law position that is presented in the Report.¹⁸

The Report declines to include a Recommendation that the legislation should protect a competent young person’s right to confidentiality because this area of law is currently subject to a broader inquiry into the law of privacy in New South Wales.¹⁹ The Report does acknowledge, however, the legitimacy of the general view that a young person who is competent to consent to health care is entitled to confidentiality. It supports the position expressed by practitioners with expertise in the provision of health care to young people that confidentiality is an essential element of accessible and appropriate care.²⁰ As confidentiality in health care is a matter that is frequently accompanied by confusion, and a young person’s fear that their confidentiality will not be respected is often cited as a reason for young people avoiding health services, it seems unfortunate that the opportunity to make a preliminary Recommendation in relation to confidentiality for competent young people, as defined by the Report, was not taken.

Recommendation 13 is noteworthy because it proposes to authorise medical treatment without consent. The Report envisages that a medical practitioner, nurse, midwife or dental practitioner who considers that treatment is necessary may provide treatment that ‘will most successfully promote the young person’s health and well-being’, provided the young person does not object to the treatment.²¹ This Recommendation is designed to facilitate young people’s access

13 Ibid Recommendation 4.

14 Ibid.

15 Ibid Recommendation 6.

16 Ibid Recommendation 11.

17 Ibid Recommendation 5.

18 *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218, 241-2 (*Marion’s Case*). Mason CJ and Dawson, Toohey and Gaudron JJ approved the statement in *Gillick* that a minor’s capacity to make his or her decision depends on the minor having sufficient understanding and intelligence to make the decision.

19 NSWLRC, *Young People and Consent to Health Care*, above n 1, [1.54]-[1.64].

20 See the Report’s helpful discussion: *ibid* [6.88]-[6.90].

21 Ibid Recommendation 13.

to needed health care services, remove barriers to access to health services and protect practitioners. It addresses the difficulties faced by practitioners who may sometimes provide urgently required sexual and reproductive health care or drug and alcohol related health care. In these situations it is not clear whether the young person has the capacity to consent to treatment or whether an alternative source of formal consent is available. This Recommendation is sensitive to the needs of disadvantaged young people, particularly homeless young people, and proposes a welcome extension of existing law in relation to the provision of health care.

The Recommendations also address the question of substituted consent for young people who lack capacity. They propose that a 'hierarchy of "persons responsible"' be identified to provide consent on behalf of a young person who is not competent to give consent.²² It is also proposed that designated 'special medical treatments' for young people below the age of 16 will only be authorised by the Guardianship Tribunal.²³ The report envisages that a panel of medical and other experts in relevant fields should be appointed to advise the government on the determination of 'special medical treatments'.²⁴ Determination of the procedures, which will be listed as 'special medical treatments', will be crucial to the operation of these proposals.

In relation to questions of liability, Recommendation 21 proposes that breaches of the legislation be included as grounds for complaint to the Health Care Complaints Commission under the *Health Care Complaints Act 1993* (NSW) or the relevant health registration authority. Recommendation 23 proposes that, if a complaint or action is based on a practitioner's assessment of a young person's competence, a defence should be available to a health practitioner who 'reasonably but mistakenly believes that the young person is competent or incompetent, according to the criteria set out in Recommendation 4'. These Recommendations aim to strike a balance between the need for accountability and the need to protect the reasonable determinations of health practitioners.

The statutory provisions relating to involuntary admission and treatment of young people in the *Mental Health Act 2007* (NSW) will be retained, as will the special rules relating to medical and dental treatment in the *Guardianship Act 1987* (NSW), the statutory provisions relating to donation of tissue and blood in the *Human Tissue Act 1983* (NSW), and the special consent provision dealing with children in need of care and protection under the *Children and Young Persons (Care and Protection) Act 1998* (NSW). It is recommended that s 49 of the *Minors (Property and Contracts) Act 1970* (NSW) be repealed²⁵ and the definition of incapacity in s 33(2) in pt 5 of the *Guardianship Act 1987* (NSW) be amended.²⁶

In summary, the proposals seek to overcome significant gaps in the laws that govern the provision of health care to young people in New South Wales.

22 Ibid Recommendation 12.

23 Ibid Recommendation 16, [8.66]-[8.67].

24 Ibid Recommendation 17.

25 Ibid Recommendation 8. See discussion at [1.19]-[1.20], [5.1], [4.27]-[4.32], [5.50].

26 Ibid Recommendation 9.

IV CONCLUSION

Report No 119 is a thorough and informed discussion of the matters relevant to the general provision of health care to young people. It contains some promising proposals. The limited consideration of some pressing contemporary questions, such as cosmetic surgery, mental health care and confidentiality, however, detracts from the Report's overall purpose. Coupled with the observation that the proposals are not intended to oust the common law and will not impinge on the overarching jurisdictions of the Supreme Court and Family Court, the proposals may fail to deliver the clarity and consistency they promise.

Nevertheless, the NSWLRC Report makes for compelling reading. The development of the law in Australia regarding young people occurs against the backdrop of an international children's rights movement and the almost universal adoption of the *Convention on the Rights of the Child*.²⁷ The NSWLRC responds to international human rights standards by seeking to improve young people's access to appropriate health care. It also explicitly bases its analysis on a human rights approach.²⁸ Whether or not Australian jurisdictions have adopted human rights instruments,²⁹ the effort of the NSWLRC to position the law of consent within an overarching framework of rights and entitlements will be of real interest to other jurisdictions in Australia.

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27 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

28 NSWLRC, *Young People and Consent to Health Care*, above n 1, [2.10], ch 2.

29 The Australian Capital Territory and Victoria have adopted human rights legislation: see *Human Rights Act 2004* (ACT) and *Charter of Human Rights and Responsibilities Act 2006* (Vic).

