

New Zealand's abortion law – mum's the word

28 June 2011

The abortion debate has been renewed in New Zealand with the call for mandatory parental notification for girls under 16 who wish to have an abortion. The debate raises broader questions about the rights of parents and children.

Mandatory parental notification

Under current law in New Zealand, a girl "of whatever age" can consent or refuse an abortion and her consent or refusal cannot be overridden by a parent or guardian (section 38, Care of Children Act 2004). There is no requirement to notify a parent or guardian if a girl under 16 requests an abortion.

This provision was first encoded in 1977 by section 125A of the Guardianship Act 1968, following recommendations made by a Royal Commission of Inquiry into Contraception, Sterilisation and Abortion. Interestingly, the Royal Commission in its report considered the situation where there is a division of opinion between the parents and child under 16 as to whether an abortion should be carried out, which assumes the parents are aware of the child's pregnancy and her desire for an abortion. The Commission did not specifically consider the situation where the girl does not wish for her parents to know about her pregnancy or desire for an abortion.

In 2004 the issue of parental notification was debated in Parliament when Judith Collins (then a member of the Opposition, and now Police Minister), proposed amendments to the Care of Children Bill to make parental notification mandatory for girls under 16.

The proposed amendments required medical practitioners, with the consent of the girl, to give prior notice to her parent or guardian before referring her to a certifying consultant. Where the girl did not consent to parental notification, medical practitioners were required to give written notification to a Judge. The Judge could disclose the fact of notification to "a person who, in the opinion of the Judge, should be aware of the matter, bearing in mind the welfare of the female child".

The arguments for and against parental notification were canvassed at length in Parliament. The key issues seem to be that, on the one hand, if a girl has an abortion without her parents knowledge there could be serious repercussions if she is in an incestuous relationship or she returns to a situation of family violence; on the other hand, if disclosure to parents is forced on a girl it may well prevent her from seeking medical attention.

The proposed amendments were defeated by a 62% Parliamentary majority with the then Prime Minister, Helen Clark, refusing a conscience vote for her Members of Parliament.

The parental notification debate was recently renewed with the publication of a story about a school counsellor arranging for a 16 year old to have an abortion without her parents' knowledge. Judith Collins has since pledged to support a private member's bill that would require mandatory parental notification for girls under 16 having abortions, akin to the amendments she unsuccessfully proposed in 2004.

Rights of parents and children

The issue of mandatory parental notification raises broader questions about the rights of children under 16 to consent or refuse consent to disclosure of information and medical treatment.

The law in New Zealand is not entirely free from doubt. Confusion arises because the Care of Children Act 2004 contains a clear statement that a child aged over 16 years can give or refuse consent to medical treatment, but is silent as to the position of a child under 16. Some legal commentators have taken the view that it is implicit in the specific powers given to those over 16 that children under 16 could not give effective consent. However, the prevailing view is that the Care of Children Act does not disempower children under 16 from consenting or refusing consent where they have the capacity to understand the nature and possible consequences of the treatment.

This view is supported on a number of grounds, including the position at common law (the English House of Lords' decision of *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; [1985] 3 All ER 402 (HL), which has been followed by the High Court of Australia and the New Zealand courts), by the New Zealand Code of Health and Disability Services Consumers' Rights, and by the United Nations Convention on the Rights of the Child (UNCROC).

According to this prevailing view, where a child of whatever age has the capacity to understand the nature and possible

consequences of a decision, that decision is absolute. This includes any decision about whether to notify a parent about a child's wishes to have an abortion or any medical treatment.

However, confusion as to the rights of children and parents appears to remain in New Zealand, with Members of Parliament asserting that the general rule in New Zealand is that no medical procedure can be performed on a child without parental consent, and that a school doctor must notify and obtain parental consent in order to give a child a Panadol. This confusion is likely to continue until Parliament clarifies the position of under 16s and brings the Care of Children Act in line with the common law and other New Zealand legislation.

In the meantime, public and Parliamentary debate about abortion will most certainly continue with the suggested introduction of a private member's bill mandating parental notification.

This article was written for the Australasian Legal Business Magazine (issue 9.06, June 2011).

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