

7 DECEMBER 2021

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Dear Ministers,

CHILDREN, CONSENT AND MEDICAL PROCEDURES

We write to you on behalf of a group of thousands of concerned parents, professionals and citizens.

Many of the parents who have instructed us to write this letter have attempted to raise the issues contained within directly with their children's schools to no avail. Indeed, a group of 150 parents attended the Parramatta Department of Education offices in person, desperate for an audience, only for the office to be locked down and for the group to be barred entry.

The ability of a parent to care freely for their child is, in general, one of the pillars of our society. As Ministers responsible for education in this country, this will be the most important issue in your tenure; these are, however you look at it, historic times, and as Ministers for Education, you have an opportunity, and indeed a responsibility, to ensure that the integrity of the parent child relationship is maintained.

The Issue

As parents, our children have informed us that;

- their teachers are talking to them about, and encouraging them to receive, medical procedures that they don't understand;
- pop up clinics are being set up in schools, without parental consent, for the administering of medical procedures;
- children are being encouraged to attend these clinics and to undergo these procedures irrespective of their parents' wishes; and
- 'vaccination buses' are being driven to schools, particularly in regional areas, where children are being ushered onto these buses and vaccinated before being returned to school.

These practices are not only greatly concerning, but unlawful.

The purpose of this letter is to ask that you clarify with schools their lawful responsibility and duty of care in relation to the children in their supervision.

I will explain the law for your benefit; in the hope that you may stand against a well-intentioned (but misguided) attempt to vaccinate as many of our children as possible; irrespective of their level of understanding of what vaccination does or means, and irrespective of parental consent.

Sanctity must be brought back to the parent-child relationship promptly. We must be reasonable and balanced about this, for the sake of the future of this country.

Case Studies

Joan and Mitchell*

Joan is the mother of Mitchell. Mitchell is 12 years old and suffers from severe Autism.

As a result of his disability, Mitchell has been graded as having the intellectual capacity of a 6 year old.

Joan did not want Mitchell to undergo vaccination for Covid-19. Although her reasons are her own, they consist of a lack of data going towards long term adverse reactions, the lack of testing around how vaccination might interact with both her son's disability as well as the medication he takes for it, as well as the lack of danger Covid-19 presents to him vis-à-vis the risks of vaccination.

One day, Mitchell came home from school crying. Eventually, Joan realised that Mitchell had a band aid on his shoulder. Shocked, she called his school, who confirmed that a pop up clinic had been set up that day for children to attend. The school said they had taken a position of allowing children to choose whether or not to attend the clinic, and that they had encouraged it. Joan had not been contacted at all about this.

Horrified, Joan said to the school; "Mitchell is only 12, and as you know, only has the capacity of a 6 year old. How could you allow him to attend the clinic without asking me first?"

The school did not provide a meaningful response and has since refused to engage with Joan on this topic.

The second account has been provided by the father of a boy who is currently in hospital suffering from pericarditis.

*Due to the intense stigmatisation of people in our community at present, we have used pseudonyms to protect the subjects' identities.

To illustrate the issues we are seeing, we present two initial case studies here . The first account has been provided directly by the mother of a child with Autism, who was horrified to learn that he had been vaccinated without her consent.

Thomas and Steven*

Thomas is Steven's father. Steven is in Year 9; 15 years old.

One day, Steven's teacher asked everyone in the class who had not been vaccinated to put up their hand. Steven, the only child in his class who hasn't been vaccinated, put up his hand. The other kids laughed at him, and the teacher asked him to stay back after class.

That afternoon, Steven's teacher asked him why he hadn't been vaccinated. Steven told his teacher he had spoken to his parents about it and they had decided to wait for a while longer before taking the vaccine. Steven's teacher said, "the pop up clinic is next week. We've all been vaccinated. It's ok, we are all ok. Do what you want to do".

The next day, Steven's teacher said to him, "if you don't get the vaccine, you won't be able to come on excursions, and you probably won't be able to come to school".

Worried about being bullied and excluded from school, Steven went to the pop up clinic and received the vaccine. The staff at the clinic did not ask Steven whether his parents consented to the procedure, nor did they contact Steven's parents.

Steven has been suffering from pericarditis since having received the vaccine. He has been advised not to exert himself or to do any exercise for 3 months. He is missing a significant amount of school due to this vaccine injury.

What does the law say?

At law, consent is a requisite for any intervention. Even touching somebody requires their consent, whether express or implied, to avoid liability in battery and/or assault.

In the field of medicine, any kind of intervention, including taking a history or performing a physical examination, requires clear patient consent. Except in emergency or very unusual circumstances, health professionals cannot treat any individual without informed consent for fear of liability in battery or negligence.

With respect to children, consent is much more important. Obviously, there is a point in life where the ability to consent to anything, including medical procedures, passes from parent to offspring. Until that time, a parent acts as their child's guardian; making the decision that they deem best in all the circumstances. The age and capacity of minors to give consent is therefore a critical issue at law, and one which is relevant here.

The age at which a person becomes an 'adult' in Australia, and at which time they can give valid consent for medical treatment, is 18 years. Consent for people under the age of 18 is therefore to be provided by the child's parents. Although there are circumstances in which a child less than 18 can give valid consent, these circumstances are extremely limited. We elaborate on this below.

The Legislation

Two states in Australia, New South Wales and South Australia, have legislation going towards the ability of children to consent to medical procedures.

New South Wales

In New South Wales, the *Minors (Property and Contracts) Act 1970* (**the MPC Act**), at Section 49, provides a defence in actions for assault and battery against minors aged less than sixteen years "where medical treatment...is carried out with the prior consent of the parent or guardian". The MPC Act does not provide said defence in circumstances where a parent has **not** provided their consent, even if their child has.

Section 49 (2) also states that a medical practitioner who provides treatment with the consent of a child 14 years or over will have a defence to any action for assault or battery. In saying that, the MPC Act does not assist a medical practitioner in a situation where there is a conflict between a child and their parent, and a parent can still generally override a child's consent to treatment. It is also worth noting that "consent" is not defined in the MPC Act, and the ability of a child aged 14

years and above to give *valid* consent will depend on the application of the common law principles explained below to the individual circumstances of that child’s case.

South Australia

In South Australia, the *Consent to Medical Treatment and Palliative Care Act 1995* (the **CMPA**) states, at Part 2, Division 1, Section 6, that a person over the age of 16 years can “make decisions about his or her own treatment as validly and effectively as an adult”. South Australia, therefore, is the only state in Australia where it is clear that a child aged between 16 and 18 could lawfully consent to vaccination in the absence of parental consent. In saying that, even here, consent must still be informed and valid; a child must have capacity to give consent, like any adult, in order to be capable of giving it. So, therefore, the common law principles still have some application even here.

Additionally, in regards to children who are under the age of 16, the CMA states the following:

Division 4—Medical treatment of children

12—Administration of medical treatment to a child

A medical practitioner may administer medical treatment to a child if—

- (a) the parent or guardian consents; or
- (b) the child consents and—
 - (i) the medical practitioner who is to administer the treatment is of the opinion that the child is capable of understanding the nature, consequences and risks of the treatment and that the treatment is in the best interest of the child's health and well-being; and
 - (ii) that opinion is supported by the written opinion of at least one other medical practitioner who personally examines the child before the treatment is commenced.

As the name implies, this section is intended to relate to “medical treatment”. Treatment implies the administering of medicine for an illness or ailment that somebody already has, as opposed to a medical intervention designed to be preventative. In addition, in terms of the administering of vaccinations in schools, the checks and balances this section provides, such as seeking the written opinion of another medical practitioner, are unlikely to occur.

The Common Law

The common law is the primary guide in Australia as to the limited circumstances in which a child has capacity to give consent to medical intervention in the absence of parental consent of same. Even in NSW and South Australia, where there is some legislation on this issue, the common law is required to clarify its application. In all other states and territories, we are completely reliant on the common law to determine the issue in its totality, as there is no applicable legislation on this point.

The Concept of a 'Mature Minor', or 'Gillick Competency'

The case often referred in regards to a child's ability to give consent to a medical procedure or treatment is *Gillick v West Norfolk and Wisbech Area Health Authority* (**Gillick**).¹

First, it must be noted that Gillick was a case in which it was debated whether a 15 year old could consent, without parental knowledge, to a prescription for the contraceptive pill. So, the circumstances are quite different to consent for an invasive medical procedure.

Nonetheless, in Gillick, Lords Scarman and Fraser agreed that in most cases it is in the child's best interests for parental consent to be obtained. They said, however, that "exceptional" and "special" circumstances could exist where minors could consent to medical treatment on their own, provided certain conditions were met. Lords Scarman and Fraser provided their own versions of these conditions.

Problematically, this decision is often over-simplified to suggest that as long as a minor has a "sufficient understanding and intelligence to enable him or her to fully understand what is proposed"² that a child will be capable of giving lawful consent. This is often referred to as 'Gillick Competence'.

What is often ignored is the complexity inherent within the test Lord Scarman proposes. As Lord Scarman himself notes, to be deemed competent to make a decision without parental consent or knowledge, a minor must fully understand the moral, emotional and familial, long, and short term implications of the decision they are purporting to make.³ Put another way, it is very difficult to determine the time at which, and the circumstances where, a child will be capable of "fully understanding" a medical procedure.

¹ [1986] 1 AC 112.

² *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 at [189].

³ *Ibid.*

This is particularly true in the case of vaccination against Covid-19, which, to be frank, no child (nor adult) could “fully understand” due to the lack of long term safety data available. Though we will elaborate below, our own High Court has noted that the test for Gillick Competence is a “very high threshold”; described as the ability to exercise a “wise choice”,⁴ and one that medical doctors have expressed as “higher than they would expect from some competent adults”.⁵ Another implication of Lord Scarman’s test is that competency will differ from child to child, pursuant to their own capacity and circumstances. Quite a forensic assessment of that child would need to occur in order for the threshold of Lord Scarman’s test to be reliably met. Finally, and again oft ignored, was the requirement Lord Scarman proposed for the doctor to first try to persuade the child to include their parents in the decision-making process.⁶

Lord Fraser gave his own version of the conditions which must be met for ‘Gillick Competence’, or for a ‘mature minor’, to be capable of consenting to medical treatment absent his/her parents. His Lordship described the following steps a health professional should follow to determine whether to give treatment to a minor without parental consent. Again, this judgment was made specifically in the context of contraceptive treatment, so the steps are relevant to that scenario:⁷

[The practitioner must be satisfied of the following matters]:

- (1) that the [child] will understand his advice;
- (2) that he cannot persuade [the child] to inform her parents or to allow him to inform the parents that [the child] is seeking contraceptive advice;
- (3) that [the child] is very likely to begin or to continue having sexual intercourse with or without contraceptive treatment;
- (4) that unless [the child] receives contraceptive advice or treatment [their] physical or mental health or both are likely to suffer; and
- (5) that [the child’s] best interests require him to give [the child] contraceptive advice, treatment or both without the parental consent.

So, this test makes clear too the high threshold that must be met. To be ‘satisfied of understanding’ is no simple thing when it comes to a child, and further, the role of the parent is not negated

⁴ Patrick Parkinson, “Children’s Rights and Doctors’ Immunities: The Implications of the High Court’s decision in *Re Marion*” (1992) 6 AJFL at 111.

⁵ Diana Brahams, “The Gillick Case: A Pragmatic Compromise” (1986) 136 NLJ 75 at 76; New South Wales Law Reform Commission Report 199: Young People and Consent to Health Care (Sydney, 2008) at 82.

⁶ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 at [189].

⁷ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 at [174].

completely given the requirement to attempt to persuade the child to seek their parents' consent. In addition, and importantly, there are requirements around the detriment to be suffered if the child does *not* receive the treatment, as well as the child's best interests. Both of these matters are, on a conservative view, at the very least unclear in the case of Covid-19 vaccination. The evidence is clear that there is a very low risk to children of severe or long term illness from the virus,⁸ and unclear with respect to whether the vaccines currently available will detriment their health, at the very least in the long term.

Marion's Case

In Australia, *Secretary, Department of Health and Community Services v J.W.B. and S.M.B (Marion's Case)*⁹ examined "whether a child, intellectual disabled or not, is capable, in law or in fact, of consenting to medical treatment on his or her behalf".¹⁰

In determining this question, Marion's Case laid the following foundations:

- First, Section 63F(1) of the *Family Law Act 1975* (Cth) recognises and empowers parents as guardians and custodians of children until they attain the age of 18 years;¹¹
- Second, that "the responsibilities and powers of parents extend to the physical, mental, moral, educational and general welfare of the child...they extend to every aspect of the child's life";¹² and
- Third, "A fortiori, if the child is incompetent to give consent, whether by reason of age, illness, accident or intellectual disability, the parents have the responsibility and power to authorize the administration of therapeutic medical treatment".¹³

Importantly, the High Court emphasised the extreme care that must be taken if parental consent is to be set aside, quoting an established precedent as follows:¹⁴

⁸ See *How Common is Long Covid in Children and Adolescents?* The Pediatric Infectious Disease Journal, Zimmermann, Petra MD, PHD, and Ors, available at https://journals.lww.com/pidj/Fulltext/2021/12000/How_Common_is_Long_COVID_in_Children_and_20.aspx

⁹ (1992) 175 CLR 218, 6 May 1992.

¹⁰ *Secretary, Department of Health and Community Services v J.W.B. and S.M.B (Marion's Case)* at [7].

¹¹ *Secretary, Department of Health and Community Services v J.W.B. and S.M.B (Marion's Case)* at [27]

¹² *Secretary, Department of Health and Community Services v J.W.B. and S.M.B (Marion's Case)* at [28]

¹³ *Secretary, Department of Health and Community Services v J.W.B. and S.M.B (Marion's Case)* at [28]

¹⁴ *Secretary, Department of Health and Community Services v J.W.B. and S.M.B (Marion's Case)* at [31]

In exercising the jurisdiction to control or to ignore the parental right the court must act cautiously, not as if it were a private person acting with regard to his own child, and acting in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be suspended or superseded. **There must be some clear justification for a court's intervention to set aside the primary parental responsibility for attending to the welfare of the child.**

And, Brennan J even cast doubt on whether Gilick, in laying out the test for competency, placed enough emphasis on the parents' view, stating that "I would respectfully doubt whether the primacy of parental responsibility was sufficiently recognised in the leading English case of Gilick".¹⁵

So, in summary, the legal position can be distilled into the following principles:

- Parental consent is generally essential to any medical procedure for somebody under the age of 18;
- There are exceptional circumstances where somebody under the age of 18 can give consent absent their parents, subject to strict conditions which will rarely be met;
- Such conditions would need to be met on a case by case basis; and
- If such conditions aren't met, medical treatment provided absent parental consent is likely to constitute liability for battery and/or negligence.

Moving Forward

What is happening in Australia at the moment is a complete abdication of these principles. Schools and teachers should **not** be discussing Covid-19 vaccination with their students. Students should not be encouraged to undergo vaccination by their schools or their teachers, who themselves are not medical professionals in any event, and whose duty of care is supervisory, but does not extend to the provision of medical care, treatment or procedures.

Further, the provision of 'pop-up clinics' and 'vaccination buses' to schools is highly problematic. None of the Covid-19 vaccines, which are still in Phase IV trials, have been added to the National Immunisation Program Schedule (**the Schedule**). Generally, vaccines on the Schedule are administered at schools, but only subject to strict parental consent given in writing.

¹⁵ *Secretary, Department of Health and Community Services v J.W.B. and S.M.B (Marion's Case)* at [31]

At present, hundreds, and likely thousands of children are undergoing vaccination with provisionally approved vaccines which don't feature on the Schedule, absent parental consent. **This is concerning both for the wellbeing of our children, as well as for the integrity of our medical profession. It also raises serious questions of liability for both those administering the vaccines in these settings as well as the schools in which they are being administered.**

Put simply, these practices need to stop. We ask that you:

1. Issue immediate guidance to all schools in your State/Territory emphasising the importance of express parental consent for any medical procedure, including vaccination;
2. Immediately halt the practice of pop-up clinics and vaccination buses, as they enliven the potential for coercion and exclusion of those who do not wish to be vaccinated, as well as the potential for children to undergo vaccination without parental consent.

Children should be left, with their parents and guardians, to attend either their Doctor or the many other available vaccination clinics to undergo vaccination for Covid-19, as per normal. There are plenty of opportunities and spaces available if parents wish to undertake them. Medical interventions and a child's education must remain separate so that the issues noted above don't arise, and this must be attended to urgently.

Given the urgency of this matter, we ask that you provide a response to this letter within 10 days, being **Friday 17 December 2021**.

7 December 2021



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