



4 April 2011

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The Honourable Stephen Wade MP
Shadow Attorney-General
Parliament House
North Terrace
ADELAIDE SA 5000

Dear Mr Shadow Attorney

Consent to Medical Treatment and Palliative Care (Parental Consent) Amendment Bill

I refer to an email from your adviser, Mr Biar, of 8 October 2010 and thank you for inviting the Society to comment on the above Bill, which was introduced by the Honourable Robert Brokenshire MP.

It is noted that the legislation purports to alter the position of the common law in Australia in relation to consent to medical treatment by minors under the age of 16. It also purports to raise the age of consent for medical treatment from 16 years of age to 18 years of age.

The common law position regarding consent to medical treatment by minors under the age of 16 was clearly endorsed by the High Court of Australia in the case of *Department of Health and Community Services v JWB and SMB ("Marion's Case")* (1992) 175 CLR 218 and remains the common law in Australia.

In *Marion's Case* the High Court approved the decision of the House of Lords in *Gillick v West Norfolk AHA* (1986) AC 112. In the *Gillick* case the majority found that a minor under the age of 16 years was capable of giving informed consent when he or she "*achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed*".

The proposition endorsed by the majority in *Gillick* was that parental power to consent to medical treatment on behalf of a child diminishes gradually as the child's capacities and maturity grow and this rate of development depends on the individual child.

Lord Scarman stated (at pp 183-184):

"Parental rights ... do not wholly disappear until the age of majority. ... but the common law has never treated such rights as sovereign or beyond review and control. Nor has our law ever treated the child as other than a person with capacities and rights recognised by law. The principle of the law ... is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child".

As stated by Deane J in *Marion's Case*, the authority of parents to make decisions on behalf of their child

"is a 'dwindling right' which diminishes as the legal competence of the child to make decisions for herself or himself increases. That means that the relationship between a child and her or his parents will ordinarily pass through a transitional stage in which authority is shared".

The Society considers that the proposed amendments to the *Consent to Medical Treatment and Palliative Care Act 1995* are in conflict with the established common law position in Australia regarding the consent to medical treatment by children and young people. The Society supports the common law provisions.

It is noted that 16 years of age has been the age of consent in South Australia for over 15 years. It is not clear why the legislation seeks to change this longstanding position. As far as the Society is aware, there have not been any serious issues raised by the general community about the existing legislation. Doctors continue to attempt to involve parents in medical treatment decisions whenever possible and are aware that a young person's interests are best protected in most cases by working with parents and children in concert.

For these reasons, the Bill is not supported.

I trust these comments are of assistance.

Yours sincerely



Ralph Bönig
PRESIDENT