Balancing Rights on a Knife Edge: the Legality of Non-Therapeutic Male Circumcision

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In 2012, a German court held that circumcision of a male infant may constitute child abuse. Given the religious and cultural importance of this practice worldwide, the court's decision caused substantial controversy and led many jurisdictions to question the procedure’s legality. This paper considers how the German court reached its decision, then moves to look at the New Zealand legal and social context. It considers relevant criminal, health and human rights law, including a focus on the New Zealand Bill of Rights Act. It also touches upon the differences which may be drawn between infant male circumcision and its widely-condemned counterpart, female genital mutilation. This paper concludes that given the finely-balanced rights, competing interests and relative medical neutrality of infant male circumcision, any change to the law in New Zealand is likely to come from Parliament, not the courts.

And ye shall circumcise the flesh of your foreskin; and it shall be a token of the covenant betwixt me and you.

– Genesis 17:11

Since circumcision is medically unwarranted mutilation and disfigurement, it would appear to be a clear case of child abuse.

– W.E. Brigman

Male circumcision is the world’s oldest known surgical procedure. Its practice forms an integral part of Jewish and Muslim tradition. It is still widely performed today, for a variety of religious and cultural reasons. But is it lawful?

A 2012 decision of the Landgericht Cologne calling into question the legality of circumcision of male children sparked a storm of controversy in Europe and beyond. Although the decision concerned a Muslim family, it wrought large Germany’s most feared allegation: of anti-semitism. German Premier Angela Merkel herself was forced to comment on the ruling. She reassured Germany’s Jewish and Muslim communities that their right to religious freedom would prevail.

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5 Landgericht Köln, 151 Ns 169/11, 07.05.2012.

6 “Angela Merkel Backs Circumcision Right After German Ruling” (13 July 2012) BBC News Europe <www.bbc.co.uk>.
The decision gave many countries pause to think. Could circumcision be considered child abuse, as W.E. Brigman suggests? Does it warrant legal sanction? Should the practice of circumcision at least be regulated, something presently done only by Sweden? Do the rights to bodily integrity of a male minor outweigh the rights of his parents to express their religious or cultural freedom? This paper hopes to address those questions with regard to the New Zealand context. It will:

1) Consider the elements and impact of the German decision;
2) Examine the place circumcision holds in New Zealand culture;
3) Discuss the relevant New Zealand law;
4) Compare male circumcision to its controversial counterpart, female genital mutilation; and
5) Conclude.

I Controversial Cutting: the Landegericht Cologne Decision

A The Facts

On November 4th, 2010, Ali al-Akbar, the 4-year-old son of a Tunisian national, was circumcised by Dr. Omar Kezze in Cologne, Germany. The procedure was one that Dr. Kezze had done at parents’ requests many times before. Following the surgery, Ali’s wound continued to bleed, allegedly because his mother removed his wound dressing too soon. The following day, Ali was taken to hospital where the wound was opened, the sutures replaced, and the bleeding stopped; all under general anaesthesia. Ali required no further medical attention.

In 2011, Dr. Kezze was charged with aggravated battery. On the 21st of September that year, the Amtsgericht Cologne refused to pursue the case. But on appeal, the Landsgericht allowed the case to be tried.

B The Judgment

The court’s judgment weighed up the rights of Ali, as a minor unable to consent to the circumcision, with his parents’ right to inaugurate him into their religious tradition. It held that the right of parents contained in the German Civil Code to make decisions about the care of their children only extends to educational matters. This parental right must also be exercised in light of their child’s best interests.

Ali was obviously too young to consent to the procedure himself. Although consent was given by his mother, the court held that such proxy consent was not sufficient to justify what

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8 Spiegel Online International, above n 7.
9 The German equivalent of the New Zealand District Court.
it judged to be a serious invasion of Ali’s bodily integrity. In attempting to strike a balance between the competing rights of the child and his parents, the court found that the fundamental right of the child to bodily integrity and self-determination outweighed the parents’ right to exercise their religious freedom.

In short, the Cologne court held that parents may not have their minor male children circumcised for ritual or non-therapeutic purposes. Any such procedure must wait until the child himself can consent, having reached sufficient maturity to fully understand the proposed treatment.\(^{10,11}\)

C The Verdict and its Impact

Despite its conclusion that parental consent does not justify the performance of non-therapeutic circumcision, the court acquitted Dr. Kezze. It said that the law and literature surrounding circumcision of this kind was so unsettled that a mistake of law on his part was unavoidable.

Following publication and publicity of the court’s decision, several hospitals in Austria and Switzerland suspended their circumcision services, citing alleged legal uncertainty.\(^{12}\) The ensuing legal debate had, according to Martin Killias of the University of Zurich, been brewing for some time. He said that the German decision was simply a “point of ignition”\(^{13}\) that further fired up the debate.

The decision also sparked sharp criticism from the Jewish community. Pinchas Goldschmidt, the President of the Conference of European Rabbis, called the decision "one of the gravest attacks on Jewish life in the post-Holocaust world".\(^{14}\) The Head Rabbi of Britain, Jonathan Sacks, similarly stated that:\(^{15}\)

> …it is hard to think of a more appalling decision. Did the court know that circumcision is Judaism’s most ancient historical ritual, dating back almost four thousand years to the days of Abraham?

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11 This decision would not apply in a situation where circumcision is medically indicated (for example, where an infant has phimosis); but rather concerns circumcision performed for non-therapeutic reasons. Reference to “circumcision” below is to be understood as such.


In Germany itself, a complaint was lodged against a Rabbi from the city of Hof for practising circumcision, citing the June decision. However, Ethikrat\textsuperscript{16} has recommended that circumcision be allowed so long as its practice is regulated.

\textit{D Conclusion}

Whether or not the decision is ultimately reversed, it has provoked interesting comment from all corners. What does it mean for New Zealand? What, indeed, is New Zealand’s current position on male circumcision?

\textit{II New Zealand’s Circumcision Culture: Under the Knife, and Under the Radar}

\textit{A Cultural and Religious Perspectives}

Ritual circumcision is practised by several minority religious groups in New Zealand, who consider it integral to the observance of their beliefs: namely, members of the Jewish and Islamic faiths. These groups consider the performance of male circumcision an integral component of Abraham’s covenant with God.\textsuperscript{17} While Islam does not specify an exact age at which the procedure should occur, Judaism dictates that the circumcision shall occur on the eighth day of life.\textsuperscript{18}

However, infant circumcision in New Zealand has not always been the exclusive dominion of its religious minorities. In the late 19\textsuperscript{th} century, circumcision was common practice among the middle and upper classes of Western countries such as the United States of America, Canada, the United Kingdom and Australia.\textsuperscript{19} As well as being considered hygienic, circumcision was employed to discourage masturbation, which was believed to lead to cause madness, epilepsy, and all manner of other ghastly maladies.\textsuperscript{20} Circumcised males were also thought to be at less risk of penile cancer, and less likely to spread venereal disease.\textsuperscript{21}

Circumcision regained popularity in New Zealand during World War II. Faced with the prospect of hot climates and desert deployments, soldiers were encouraged to be circumcised in an effort to reduce sand-related infection and promote general cleanliness.\textsuperscript{22}

Circumcision rates peaked in New Zealand in the 1950s,\textsuperscript{23} and have since declined.\textsuperscript{24} The Royal Australasian College of Physicians estimates that between 10 and 20\% of male infants

\textsuperscript{16} The German Ethics Council. \\
\textsuperscript{17} Les Haberfield, “The Law and Male Circumcision- Medical, Legal and Cultural Issues.” (1997) 23 Mon LR 92 at 94. \\
\textsuperscript{18} Haberfield, above n 17, at 94. \\
\textsuperscript{19} Haberfield, above n 17, at 95. \\
\textsuperscript{20} W.E. Brigman, above n 2. \\
\textsuperscript{21} Haberfield, above n 17, at 95. \\
\textsuperscript{22} H. Y. and Ken McGrath,“The Rise and Fall of Circumcision in New Zealand” (December 8, 2000) The Intactivism Pages <http://www.circumstitions.com/NZ.html>. \\
\textsuperscript{23} RACP statement, above n 3, at 6.
born in New Zealand and Australia are currently circumcised. However other statistics suggest that while the Australian rate may be around 25 per cent, the New Zealand rate may be as low as 2 per cent.

Despite this decline in popularity among the majority of New Zealanders, minority groups continue to observe the practice of circumcision. Some Pacific Island cultures, including pre-European Maori, practised super-incision - the slitting of the dorsal prepuce – as a manhood ritual. Missionaries to the Pacific Islands in the 19th and 20th centuries assimilated this custom of childhood super-incision with infant circumcision – something more in line with colonial culture. When immigrants arrived from Tonga and Samoa to New Zealand in the 1960s, they brought with them a tradition of male circumcision. Reportedly, this tradition remains alive and well among these communities in New Zealand.

In his article in the New Zealand Listener, Alistair Bone cited the New Zealand Medical Council’s statistic that while only 1 per cent of caucasian boys were currently circumcised at birth, nearly 100 per cent of Tongan, Samoan and Jewish male infants underwent the procedure. In the same article Dr Sitakei Finau, Pasifika Director at Massey University, said of the tradition’s importance within his culture: "If you’re not circumcised, you are not a man, you haven’t gone through the rites of passage and you are considered dirty.”

New Zealand has had a strong tradition of infant male circumcision across various cultural and religious groups. However that tradition has waned among the majority of New Zealanders. What standpoint does the public health system take on non-therapeutic male circumcision?

B Health Policy and Practice

Recently there has been a lot of research into the risks and benefits of circumcision, especially because it seems that circumcised males carry a reduced risk of HIV infection. Routine circumcision has been identified by the World Health Organisation as a possible weapon against the spread of heterosexually-transmitted HIV. Other benefits include a reduced risk of genital cancer and urinary tract infection. On the other hand, infant circumcision – like any surgical procedure - carries risks of complications and may also risk

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25 RACP statement, above n 3, at 5.
26 Haberfield, above n 17, at 96, citing: G.L. Williams “Newborn Circumcision: An Enigma of Health” (paper presented to the Second International Childbirth Conference, University of Sydney, 7 October 1992) at 3.
27 RACP statement, above n 3, at 6.
28 H.Y. and Ken McGrath, above n 22.
29 See, for example, the discussion in “Pacific Circumcision of Boys”, Pacific Health Dialogue Vol 14 No 2. Sep 2007.
31 Bone, above n 30.
32 Heyns and Krieger, above n 4, at 1.8.5, page 203.
34 World Health Organisation, above n 33.
ongoing psychological resentment by the individual. Where circumcision is not indicated by other factors, it constitutes the removal of healthy tissue from an otherwise healthy child.

Weighing up these considerations, and taking into account Australasia’s low HIV rates, the Royal Australasian College of Physicians concluded in its 2010 statement on male circumcision:

> After reviewing the currently available evidence, the RACP believes that the frequency of diseases modifiable by circumcision, the level of protection offered by circumcision and the complication rates of circumcision do not warrant routine infant circumcision in Australia and New Zealand.

In practice, infant male circumcision is currently far from widespread in New Zealand. Should you decide to, how easy is it to have your newborn son circumcised here?

According to Nicola Austin, Clinical Director of the Neonatal Service at Christchurch Women's Hospital, circumcisions are not performed in the newborn period in New Zealand’s public health system. The general advice given by clinicians in the public system is against routine circumcision. Parents may opt to have the procedure performed privately by a pediatric urologist; and some obstetricians and general practitioners also offer to carry out the procedure on a fee-for-service basis.

C Conclusion

It is clear that non-therapeutic male circumcisions are performed in New Zealand. However the practice seems to fly under the radar: it is not performed as a matter of course in the public health system, and seems to be the preserve of private clinicians and specialists who choose to offer the service. Might this status quo shift in light of the German court’s decision?

III New Zealand’s Legal Position: Walking the Rights-Balancing Knife-Edge

The German judgment was a rights-balancing exercise, and any move to legislate against infant male circumcision in New Zealand would require the same balancing act. Firstly, does New Zealand’s current criminal law prevent circumcisions on non-consenting minors? Secondly, what legal instruments – domestic and international – bear on the rights of the child to his bodily integrity and the rights of his parents to express their beliefs?

A The Criminal Law

Dr Kezze, the defendant in the German case, was charged with criminal battery. Could New Zealand’s criminal law similarly be used to convict a defendant doctor or practitioner who performs non-therapeutic circumcision on a male minor?

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35 RACP statement, above n 3, at 9.
36 RACP statement, above n 3, at 5.
Common assault, s 196 of the Crimes act 1961, encompasses the common law concepts of both assault (the threat of applied force) and battery (the actual application of force).\textsuperscript{37} Despite use of the word ‘force’, it is clear that even mere touching can amount to a battery.\textsuperscript{38} Section 2 of the same Act defined assault as “the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly.” Surgical removal of healthy penile tissue – that is, circumcision – would amount to common assault on a plain reading of sections 196 and 2.

However, section 60A of the Crimes Act 1961 protects from criminal responsibility everyone who performs, with reasonable care and skill, any surgical operation, if done so with the consent of the person operated on and for a lawful purpose.

Similarly, section 20 of the Act preserves the common law defence of consent. Where the victim has consented to the defendant’s actions, or the defendant has a genuine belief that there is consent, the defendant may raise a defence to common assault. Since the child in this context cannot himself consent, our concern here is with the parent or guardian’s ability to consent on his behalf.

Section 204A(6) of the Crimes Act 1961 makes an exception to the defence of consent, saying that consent, whether actual or perceived, is no defence to female genital mutilation. No similar provision is made for male circumcision.

As such, any possible liability turns on:

1) Whether the performance of non-therapeutic circumcision on a male minor is a “lawful purpose” per s 60A; and

2) Whether a parent’s proxy consent for circumcision of their child is valid.

\textit{B Lawful Purpose?}

In an obiter statement from his speech in \textit{R v Brown}, Lord Templeman suggested that ritual male circumcision is a lawful activity.\textsuperscript{39} However his lordship did recognise that what society considers lawful can change over time. If medical opinion reaches the point that circumcision’s risks seriously outweigh any benefits, the law may then respond by making the performance of non-therapeutic circumcision unlawful.

Given that no other statutory prohibition against male circumcision exists, and there is no New Zealand case law on point, it seems that the “lawful purpose” element of section 60A does not present a barrier. Performing non-therapeutic circumcision is almost certainly a lawful purpose.

\textsuperscript{37} Bruce Robertson, Jeremy Finn (eds) \textit{Adams on Criminal Law} (Brookers, Wellington, New Zealand, 2010) at CA 196.03.

\textsuperscript{38} See, for example \textit{Police v Raponi} (1989) 5 CRNZ 291, at 296 per Wylie J.

\textsuperscript{39} \textit{R v Brown} [1994] 1 AC 212, 231.
In terms of criminal liability then, as in the German case, the key legal issue is whether parents can consent to circumcision of their baby boys. Should parents be able to consent to such an invasive, irreversible and non-indicated treatment? The German court did not think so. How might a New Zealand court respond?

C Is Consent from a Parent or Guardian Sufficient?

A guardian of a child may consent on their behalf to any medical, surgical or dental procedure for which such consent is “necessary or sufficient”.40 In this context, a ‘child’ encompasses a minor of between zero and 15 years of age.41 On the assumption that circumcision is a procedure for which a guardian’s consent is sufficient, there will be no problems where a parent consents to the procedure, and a practitioner may circumcise a child at a parent’s request under the protection of section 60A of the Crimes Act 1961.

However there are some limits as to the kind of procedure parents can give proxy consent for.42 Medical law authority Professor P.D.G. Skegg cites as an example the removal of a healthy kidney from a healthy child, for transplantation to an unrelated adult, where there is no prospective benefit to the child. Is the removal of healthy foreskin tissue from a newborn baby sufficiently distinct as to make parental consent valid?

The underlying assumption behind parents’ or guardians’ ability to consent to the medical treatment of children in their care arises from an assumption that they have the child’s best interests in mind.43 Consideration of whether a medical treatment is in a child’s best interests may have a bearing on whether their parent can lawfully consent to that treatment. From a medical point of view,44 it seems that the risks and benefits of non-therapeutic circumcision are roughly balanced. In a 2007 policy statement, the World Health Organization declared circumcision to be safe when performed by well-trained and well-equipped health professionals.45 As such, it is difficult to argue that non-therapeutic circumcision is strongly against a child’s best interests, at least medically.

It may be argued that it is in a child’s best interests to have the procedure done when they are in a position to consent themselves, probably in early adolescence. In terms of Jewish belief, however, “the timing is non-negotiable”46 and cannot wait until the child is able to consent himself. Furthermore, “circumcision beyond early infancy is an extremely painful and probably traumatic procedure.”47

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40 Care of Children Act 2004 section 36(c).
41 P.D.G. Skegg Medical Law in New Zealand (Thomson Brookers, Wellington, New Zealand, 2006) at 198.
42 Skegg, above n 41 at 198.
43 Haberfield, above n 17, at 106, citing Marion’s case (1992) 175 CKR 218 at 312.
44 As discussed more fully above.
47 Haberfield, above n 17, at 107.
Les Haberfield suggests that when considering what is in a child’s best interests, that child’s spiritual well-being must be evaluated. A child left uncircumcised in a Jewish, Muslim or Pacific Island community that values male circumcision may feel physically, spiritually and psychologically estranged from his religion and culture.

It may be that the decision to circumcise or not should rightfully be left to parents and guardians to make. New Zealand law leaves many such decisions in parents’ hands. It does not, for example, compel parents to have their children vaccinated or undergo metabolic screening at birth. However, circumcision is arguably distinct in that it involves a positive decision to submit a child to unindicated surgery, rather than a refusal to undergo minimally-invasive, recommended procedures. While they are more trivial, and more reversible in nature, tattoos or piercings performed on a child at a parent’s request would probably not attract sanction.

There are many factors to consider when asking whether parents can lawfully consent to their child’s circumcision. Given that cultural imperatives make it difficult to wait until the child himself can consent; the parental autonomy already provided by New Zealand law; and the balance between medical risks and benefits, it seems reasonable to say that parental or guardian proxy consent is valid for male circumcision.

In his chapter on consent to treatment in Medical Law in New Zealand, Professor P.D.G. Skegg suggests than any decision about whether to outlaw the practice of male circumcision is best left to Parliament, and is unlikely to be adjudicated upon by a court. As such, without an official law change, medical practitioners should not hesitate about the legality of non-therapeutic male circumcision as the Swiss and Austrian hospitals are doing.

**D The United Nations Convention on the Rights of the Child**

New Zealand’s international obligations may also have a bearing on the legality of non-therapeutic male circumcision. New Zealand signed the United Nations Convention on the Rights of the Child (CRC) on the 1st of October, 1990, and ratified the convention on the 6th of April 1993. Article 3(1) of the CRC highlights the importance of a child’s best interests as the primary consideration in any decision-making by states-parties. However article 3(2) also mentions that the interests of parents should also be taken into account. As already discussed, there are many competing factors to consider when asking what acting in a child’s best interests means. On one hand, from an autonomy point of view, allowing non-therapeutic male circumcision of minors may go against affected children’s best interests. On the other hand, from a cultural or religious acceptance point of view, such circumcision may be in their best interests. As such, while this imperative from the CRC is important to keep in mind, it does not help us greatly to adjudicate on what is, objectively, in a child’s best interests.

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48 Haberfield, above n 17, at 107.
49 Haberfield, above n 17, at 107.
51 Skegg, above n 41, at 168.
Article 24(3) of the CRC is more specific. It says that: “States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.” There is no doubt that ritual male circumcision is a “traditional practice”. But is it one that is “prejudicial to the health of children”? Given the earlier conclusion that such circumcision is probably medically neutral – in the sense that risks associated with it are roughly balanced by benefits (such as a reduced spread of HIV) – it is hard to maintain that ritual circumcision is “prejudicial” to a child’s health. Furthermore, the CRC was written at a time when ritual female genital mutilation was the human rights outrage du jour.\(^\text{52}\) It seems likely that Article 24(3) was written with particularly the condemnation of this practice in mind, and was not intended to limit the practice of male circumcision.

Article 24(3) of the CNC has not sparked any changes to the domestic law of other states-parties to it with regard to ritual male circumcision, and is unlikely to impact New Zealand law significantly. However, New Zealand’s ratification of, and obligations to, the CNC does flavour the rights-balancing process, underlining the important of children’s best interests and protecting them from harm.

\textit{E The New Zealand Bill of Rights Act 1990}

The German court focussed on finding a proportionate balance between what it saw as competing and conflicting rights: that of the child to his bodily integrity and personal autonomy; and that of his parent to inaugurate him in his or her religious tradition via the ritual of circumcision. A similar rights-balancing exercise would need to be undertaken in New Zealand if a court or Parliament were to outlaw non-therapeutic male circumcision. Two particular sections of the New Zealand Bill of Rights Act 1990 (NZBORA) may be in conflict here. These are: section 11, the right to refuse medical treatment; and section 15, the right to manifestation of religion and belief. The freedoms expressed in these sections are not absolute: section 5 NZBORA says that they are subject to such reasonable limits that can be justified in a free and democratic society.\(^\text{53}\) Section 4 may also influence these rights, making it clear that other enactments are not impliedly repealed or revoked simply because they are inconsistent with NZBORA rights. As such, were a law passed that banned ritual male circumcision, it could not be struck down solely because of an inconsistency with, for example, section 15 NZBORA.

\textit{I Section 11 New Zealand Bill of Rights Act}

Section 11 protects the right of a person to refuse medical treatment. This section recognises the right of autonomy over one’s own body, including both an internal sense of physical integrity, and external protection against violation of one’s body by others. It seems that New Zealand as a country particularly values this protection of the human body - it is the only

\(^{52}\) Kirsten Bell “Genital Cutting and Western Discourses on Sexuality” (2005) 19 Med. Anthropol. Q. at 128.

\(^{53}\) New Zealand Bill of Rights Act, s 5.
country to have enshrined the right to refuse medical treatment in a constitutional document.\textsuperscript{54}

That a child has the right to choose what happens to his or her own body seems beyond contention. But as already mentioned, section 11 is not an absolute right. From a practical point of view, a 4-week-old baby whose parents wish to be circumcised cannot make an informed choice on the matter. Someone else must make a proxy decision for that child, until he is of sufficient maturity to decide for himself. In the NZBORA context, parental consent may operate as a section 5 justified and reasonable limit on a child’s right to complete bodily autonomy.\textsuperscript{55} However it seems that such a limit would only be justified if the treatment proposed were judged to be in the child’s best interests.\textsuperscript{56} In this context there may be scope for seeking a medical opinion - rather than simply a parental one - about whether a treatment is in a child’s best interests.

Ultimately though, section 11 is unlikely to preclude parents from having their minor sons circumcised. As already discussed, the procedure is not so harmful as to make it clearly against a child’s best interests, especially given the cultural and religious significance with which it may be associated. It follows that a parent’s proxy consent is probably valid as a section 5 limit on the child’s section 11 right.

\textbf{2 Section 15 New Zealand Bill of Rights Act}

The conclusion reached above is also supported by section 15, which enshrines a parent or guardian’s right to manifest their religion or belief. The performance of ritual circumcision on their son could constitute the “practice” or “observance” of a religion, for example Abraham’s command; or of another, cultural, belief such as that shared by some Pacific Island groups.

The right to manifest one’s religion or belief is not absolute and is, like section 11, subject to the limiting provision of section 5 NZBORA. If, for example, a parent’s belief system dictated that her female child should be circumcised, both sections 5 and 4 would operate to limit that parent’s section 15 right.

One consideration may be whether the practice in question, which presents conflict with another right (here, section 11) is an “integral part” of the religion or belief; or whether the practice is a mere by product.\textsuperscript{57} For the belief systems discussed – Judaism, Islam, Pacific Island groups – it seems that male circumcision is an important rite of passage rather than a mere byproduct of each tradition. This factor would weigh in favour of a parent’s section 15 rights being vindicated, even when in competition with a child’s section 11 right.

\textsuperscript{54} Andrew Butler and Petra Butler \textit{The New Zealand Bill of Rights Act: A Commentary} (LexisNexis, Wellington, 2005) at 248.
\textsuperscript{55} Butler and Butler, above n 54, at 279.
\textsuperscript{56} Secretary, Department of Health and Community Services \textit{v JMB and SMB} (1992) 15 Fam LR 392 at [28].
\textsuperscript{57} Butler & Butler, above n 54, at 410. This test has been adopted by the European Court of Human Rights and the European Committee on Human Rights.
F Conclusion

The key rights to be balanced here are the child’s right to autonomy, and his parents’ right to express their beliefs. New Zealand’s NZBORA may go further than the equivalent German Constitutional document in recognising parental rights to expression of religion and belief. While the NZBORA specifically protects the right to refuse medical treatment, it also subjects all of its rights to reasonable limitations. One such limitation is probably the ability of parents to consent to the children’s medical treatment, so long as the treatment is in the child’s best interests. Ritual male circumcision does not appear to be so harmful that allowing parents to consent to it would be an unjustified limit on a child’s section 11 rights. Regardless of medical factors, it may be in a child’s best interests to be circumcised if it means they are accepted into a faith or belief-system in which ritual circumcision is a central tradition. Ultimately, it seems unlikely that section 11 can justify a complete ban on ritual circumcision.

IV The Male/Female Circumcision Distinction: A Conceptual Fallacy?

The legality of male circumcision in New Zealand remains up for debate. However, without a clear judicial or legislative indication to the contrary, its practice is probable legal. By contrast, there is no question that female genital mutilation is illegal in New Zealand. Why does it attract specific criminal sanction, while male circumcision remains legal? As discussed above, it seems likely that Article 24(3) of the United Nations Convention on the Rights of the Child was written specifically to condemn female genital mutilation – a cultural practice abhorrent to Western ideals. Politically, male circumcision and female genital mutilation have always been kept well separate. While both involve the removal of healthy tissue from an otherwise healthy child, the latter has been put on a completely different political plane – indicated, even, in the use of the word “mutilation” to describe the practice. While male circumcision could also be described as “male genital mutilation”, it isn’t – probably because of its entrenchment in Jewish, Islamic and 20th-century Western culture. As R.S. Van Howe puts it: “[t]he notion that female circumcision is more damaging than male circumcision may be more the product of cultural blindness than any actual difference in severity.”

Similarly, Kristen Bell contends:

Ultimately, the message is clear: genital mutilation is gendered. These male and female genital operations are not merely seen to differ in degree, they are seen to differ in kind. Thus, despite the heterogeneous voices speaking out against female circumcision, a common thread unites many: all forms of female genital cutting are seen to constitute a sexual mutilation and violation of bodily integrity, and male genital operations are dismissed as benign.

58 Crimes Act 1961, s 204A.
60 Bell, above n 52.
Are male and female circumcision sufficiently different that only the latter deserves international condemnation and specific criminal sanction?\textsuperscript{61} Or is our cultural priming such that the former seems acceptable, an innocuous tradition, while the latter is just plain savagery? From a cultural and religious point of view, the reasons for ritual male and female circumcisions are often the same.\textsuperscript{62} Distinguishing one procedure from the other may make sense to Western culture, but does not to many Africans, “who who consider these operations to be fundamentally related in both their functions and effects.”\textsuperscript{63} However, female genital cutting arouses much more passion in human rights policy than does male circumcision. While female circumcision is perceived as a vicious mutilation and invasion of bodily integrity, male circumcision connotes a health-promoting procedure in the eyes of many.\textsuperscript{64} As already mentioned, the World Health Organization actually promotes male circumcision as a tool in the war against HIV transmission, while declaring female circumcision “[u]niversally unacceptable because it is an infringement on the physical and psychosexual integrity of women and girls and is a form of violence against them.”\textsuperscript{65}

The distinction may be justified: while female genital mutilation removes erogenous tissue such that the woman in question may never be able to reach climax, claims that male circumcision reduces sexual pleasure have never been substantiated. Furthermore, possible some medical benefits of male circumcision may be weighed against the procedure’s invasiveness. By contrast, no medical benefits exist for female genital mutilation.

\textit{V Stitching it Together: a New Zealand Conclusion}

A New Zealand court is unlikely to make the same decision as the Landegericht Cologne. New Zealand’s criminal law, health law and the New Zealand Bill of Rights Act all impact on the issue of non-therapeutic male circumcision, but do not give a definitive answer against its practice – unlike the clear illegality associated with female genital mutilation. While on one view the two practices are comparable in their infringement on individuals’ rights to bodily integrity, it seems unlikely that the legal status of elective male circumcision will be aligned with that of female genital mutilation any time soon. While the latter will continue to attract Western condemnation, the former is likely to be practised widely across the globe, continuing long-standing religious and cultural traditions. New Zealand’s own minority groups will likely continue to practice ritual male circumcisions, even if the procedure has fallen out of mainstream cultural favour. Any move to outlaw male circumcision would likely come from Parliament, not the courts; and given the finely-balanced rights, competing interests and relative medical neutrality of the procedure, such a move is unlikely to occur in the near future.

\textsuperscript{61} Crimes Act 1961, s 204A.
\textsuperscript{62} Bell, above n 52, at 127.
\textsuperscript{63} Bell, above n 52, at 128.
\textsuperscript{64} Bell, above n 52, at 130.