CONSISTENT OR CONFLICTING? SEXUAL HEALTH LEGISLATION AND YOUNG PEOPLE'S RIGHTS IN NEW ZEALAND[1]

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Abstract

This paper reviews current legislative provisions for young people to access sexual health services and sexual health education in New Zealand. The paper focuses specifically on access to contraceptive and abortion services, and school-based sexual health education. Current legislation is considered in light of its consistency in recognising the rights of young people to express their views and have these views considered.

INTRODUCTION

The sexual health of young people is of concern to policy makers around the world. In most countries, access to sexual health services and sexual health education are strongly contested areas of social policy. Strategies to improve adolescent sexual health have varied in their focus and breadth. In Britain, which has the highest rate of teenage pregnancy in Western Europe, the focus has been on reducing teenage pregnancy. A comprehensive action plan, which is part of a strategic agenda to reduce social exclusion, is designed to halve the British teenage pregnancy rate in 10 years' time (Social Exclusion Unit 1999). The action plan has a strong emphasis on the need to provide young people with clear and consistent messages on matters relating to sexual health.

The New Zealand Government is currently preparing a strategy to improve the sexual and reproductive health of all New Zealanders. The development and implementation of such a strategy, particularly components relating to young people, are likely to be contentious. In the past, much of the controversy has focused on the extent to which young people's sexual activity should be acknowledged and responded to, as well as the rights of young people to access sexual health services and education without their parents' knowledge or consent.

This paper outlines current legislative provisions for young people's access to sexual health services and school-based sexual health education. It suggests that current legislation is inconsistent and that this has potential to send mixed messages to young people.

[1] This paper is based on one presented to the Third Pacific Rim Conference of the International Association for Adolescent Health held at Lincoln University, Christchurch 25-28 June 2000.

BACKGROUND

Studies of adolescent sexual activity in New Zealand indicate that by age 15, 8.5% of New Zealand adolescents have had sexual intercourse, and in one third of cases this is unprotected. Girls aged 15 or less are more likely than boys of the same age to have had sex (Lynskey and Fergusson 1993). By 18 years of age, 58% of males and 68% of females report having sexual intercourse in the past 12 months. Sixteen per cent of these report intercourse before they were 15, and 30% before they turned 16 (Dickson et al. 1998).

Contraceptive use in adolescence tends to be erratic. When contraceptives are used, they are often methods that are less effective in preventing pregnancy. As a result, sexual activity results in pregnancy for many young women. In 1998, there were 34 births to women aged 14 or under, and 3,879 to those aged 15-19 (Statistics New Zealand 1999). In addition, many adolescent pregnancies are terminated by abortion. Of the 15,029 induced abortions in 1998, 2,897 (19.3%) were for young women aged 12-19 years (Abortion Supervisory Committee 1999). Between 1986 and 1995, the ratio of induced abortions to live births for those under 15 years of age was approximately 1:1 (Ministry of Health 1998). Within the OECD, New Zealand's birth rate in the 15-19 years age group is second only to the USA.

These data suggest that New Zealand has an urgent need to develop clear and consistent policies to reduce the adverse health, education and welfare consequences of adolescent sexual activity.

CURRENT LEGISLATION IN NEW ZEALAND

This section provides a brief review of legislative provisions for young people to access sexual health services and sexual health education in New Zealand.

Contraceptive Services

Until 1990, legislation in New Zealand restricted access to contraceptives and contraceptive services by people under 16 years of age. Section 3 of the Contraception, Sterilisation and Abortion Act 1977 had made it illegal to provide contraceptives or contraceptive advice to anyone under the age of 16 years, although the legislation included a number of people who were exempt from this restriction. These people included parents or guardians, registered medical practitioners, authorised representatives of any family planning clinic, pharmacists actioning prescriptions, social workers, counsellors and, in the case of a school, any person approved by a principal after agreement with the board of governors or school committee.

The 1990 repeal of Section 3 of the Contraception, Sterilisation and Abortion Act 1977 removed all restrictions on the advice and supply of contraceptives to those under 16 years of age. Young people of any age now have the right to access information about contraception and to be supplied with contraceptive products without parental consent.

Abortion Services

Legislation regarding young people's rights to access abortion services is contained in the Contraception, Sterilisation and Abortion Act 1977, and a 1977 amendment to the Guardianship Act 1968.

Section 32 of the Contraception, Sterilisation and Abortion Act 1977 outlines the procedure that must be followed when a woman of any age seeks an abortion. The law requires two certifying consultants (both of whom must be registered medical practitioners and at least one of whom must be a practising obstetrician or gynaecologist) to consider each woman's case, and agree that her case fits the criteria for abortion outlined in Section 187A of the Crimes Act 1964.

Section 32 (7) of the Contraception, Sterilisation and Abortion Act 1977 notes:

> Every certifying consultant may, in considering any case, with the consent of the patient, consult with any other person (whether or not a registered medical practitioner) as he *(sic)* thinks fit in order to assist him in his consideration of the case, but he shall not disclose that patient's identity without her consent.

In the case of a young woman, this means that a certifying consultant may consult with the young woman's parents only if the young woman agrees. While in most cases practitioners would encourage a young woman to discuss these matters with her parents or other adults, the law provides young women with the right to choose not to involve them.

Further direction on young people's rights regarding abortion services is contained in the Guardianship Act 1968. A 1977 amendment inserted Section 25A (Consent to abortions). This section states:

> a female child (of whatever age) may –
> a) Consent to the carrying out on her of any medical or surgical procedure for the purposes of terminating her pregnancy by a person professionally qualified to carry it out: or

> b) Refuse her consent to the carrying out on her of any such procedure, –
> and her consent or refusal to consent shall have the same effect as if she were of full age.

The Guardianship Act therefore provides young women with legislated rights to decide whether or not to proceed with an abortion. Regardless of age, parental consent is not required.

School-based Sexual Health Education

While legislation provides young people with rights to make their own decisions on accessing contraceptive and abortion services, without parental consent, a contrary stance is adopted in legislation governing access to school-based sexual health education.

Section 105D, entitled "Parents and guardians may require students to be excluded from health education classes", is a 1985 amendment to the Education Act 1964. Subsection 1 reads:

> A parent or guardian of a student enrolled at a State primary or secondary school may at any time, by notice in writing to the principal of that school, require that student to be excluded from every class in which any element of the health education syllabus at that school which is sex education is being taught; and may similarly withdraw such notice.

Subsection 2 reads:

> For so long as a notice under subsection (1) of this section is in force, the principal of the school concerned shall ensure that the student concerned is excluded accordingly.

The Education Act 1964 applies to all students of school age. Potentially, the wishes of a 17- or 18-year-old could be overridden by those of a parent or guardian. Further, the written notice may be prepared by the parent when the student is young and, unless withdrawn, will still be in force when the student is older. Principals are required to follow the wishes of parents, as the Act contains no provisions for the needs or wishes of a young person of any age to be considered.

COMMENTS ON THE LEGISLATION

One might expect that if there were to be constraints on young people's rights to access contraception and abortion services, and sexual health education, an escalating level of

risk might be matched by an escalating level of constraint. In fact, the reverse is true. Young people have rights to consent (or not consent) to the performing of an abortion, and to decide whether to access contraception. But they have no rights to access school-based sexual health education if their parents require their withdrawal from classes.

Some might argue that while contraception and abortion are essentially private matters, school-based sexual health education occurs in a more public environment. But the irony is that the Education Act 1964 provisions have the potential to restrict the access of young people to information that may delay the initiation of sexual activity (and thus of contraceptive use) and prevent the need for access to abortion services. The current legislation has the effect of sending mixed messages to young people on issues regarding sexual health.

Historical Context of the Legislation

A brief background to the development of Section 105D of the Education Act 1964 will aid understanding of the climate within which these provisions were made. Section 105D (together with Section 105C which requires schools to consult parents on the treatment of the health syllabus) was added in 1985 as the legislative underpinning to the introduction of the syllabus *Health Education in Primary and Secondary Schools* (Department of Education 1985). This syllabus contained specific provision for sexual health education beginning at Form 1 Level (Year 7), while supporting the development of knowledge, skills and attitudes to enhance relationships, care for the body and keep safe, at levels below this. The 1985 syllabus replaced one developed in 1945 which contained no provision for the inclusion of group or class instruction in sexual health education at primary school. The development of the 1985 syllabus with its provision for group and class instruction in sexual health education was contentious. It is likely that if clauses relating to parental rights to withdraw their child from sexual health classes had not been included, the introduction of the entire syllabus would have been delayed or its implementation restricted.

Fifteen years later, however, much has changed. Social attitudes to sexual health have become more liberal, other legislative changes have helped to clarify the rights of children and young people in New Zealand, and New Zealand has ratified the *United Nations Convention on the Rights of the Child*.

More liberal societal attitudes, precipitated in part by responsiveness to the AIDS pandemic, have resulted in greater acceptance of the need for young people to have access to knowledge, skills and services to keep themselves and others healthy. This period has also seen the removal of restrictions on access to contraceptives following the 1990 repeal

of Section 3 of the Contraception, Sterilisation and Abortion Act 1977. In addition, a new syllabus for primary and secondary schools, *Health and Physical Education in the New Zealand Curriculum* (Ministry of Education 1999), includes specific provision for sexual health education from Year 1 (new entrants at primary school).

Extensions of the Rights of Children and Young People

The last 15 years have also seen the enactment of new legislation in New Zealand providing an extension of the rights of children and young people. The Children, Young Persons and their Families Act (1989) includes as one of its guiding principles that:

> …consideration should be given to the wishes of the child or young person, so far as those wishes can reasonably be ascertained, and that those wishes should be given such weight as is appropriate in the circumstances, having regard to the age, maturity, and culture of the child or young person. (Section 5d)

This principle recognises that children and young people have a right to express their wishes and to have those wishes considered.

The Bill of Rights Act 1990 has also come into force. Section 14 of this Act, relating to freedom of expression, notes that:

> Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind and in any form.

While this Act does not override inconsistent legislation and applies only to those over 16 years of age, it signals that seeking and receiving information is a fundamental right.

New provisions have also been added to the Education Act 1989. A 1991 amendment to this Act inserted Section 25A, which deals with release from tuition on religious or cultural grounds. Section 25A does not override the provisions of Section 105D of the Education Act 1964, and schools are still bound by the latter when issues relating to sexual health education arise. In common with Section 105D of the Education Act 1964, Section 25A of the Education Act 1989 allows a parent of a student in a State school to write to the principal of that school regarding the release of the student from tuition.

But Section 25A of the Education Act 1989 and Section 105D of the Education Act 1964 contain some significant differences. Section 25A, relating to release from tuition on religious or cultural grounds, indicates that such a letter will "request" that the student be

excluded. Section 105D, relating to release from sex education classes, indicates that such a letter will "require" the student to be excluded from every class in which sex education is taught. Further, Section 25A imposes an age limit. Parents can request this exclusion only for students under 18 years of age. There is no upper age limit in Section 105D. While the overwhelming majority of school students are under 18 years of age, some are older than this, and so could be affected by the provisions of Section 105D.

Most importantly, Section 25A requires the principal to ascertain the student's views on being released from tuition. In doing this, the principal is required to consider the student's age, maturity and ability to express views, as well as any views that the student actually expresses. Only then can the principal consider the release of the student from tuition. There is no provision in Section 105D for the principal to listen to or consider the views of the student in relation to sexual health education.

In the international arena there have also been a number of changes. A landmark case in young people's rights and sexual health is that of *Gillick v West Norfolk and Wisbech Area Health Authority* [1986]. In this case a parent objected to the Area Health Authority's advice that contraceptive advice and devices could be provided to young people without consulting their parents or gaining parental consent. The House of Lords decided that parents have a "dwindling right" to control a child who is a minor and that the child's maturity, intelligence and understanding are relevant factors to be considered. While decisions such as these are not binding in New Zealand, they provide important markers of legal thinking on children's and young people's rights.

There is also growing international recognition of the legal and social rights of children and young people. Paternalistic attitudes, which see adults as always knowing what is best, are being replaced with a growing recognition of the rights of young people to have a voice on issues that affect them. This is reflected most clearly in the 1989 *United Nations Convention on the Rights of the Child*[2], which New Zealand ratified in 1993. Article 12 of the Convention notes:

> State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Section 105D of the Education Act 1964 appears contrary to this Article. When a country ratifies a United Nations Convention it is obliged under international law to comply with the

[2] The Convention defines "child" as a person below the age of 18 years.

Convention's principles and standards. It appears that New Zealand could revisit Section 105D in terms of its obligations under this Convention.

POLICY IMPLICATIONS FOR SEXUAL HEALTH EDUCATION

Issues raised in this paper indicate that New Zealand legislation relating to the provision of sexual health information and services to young people is inconsistent. Section 105D of the Education Act 1964 is not only out of step with other sexual health legislation in New Zealand, but it is also out of step with international developments on children's and young people's rights.

Section 105D of the Education Act 1964 is also inconsistent with Section 25A of the Education Act 1989. Section 25A not only respects the rights of parents to request the exclusion of their children from class, but also provides children and young people with rights to express their views and have these views considered. Although its "under 18 years of age" provisions may be wider than should be sought, it is a preferable alternative to Section 105D which contains no provision for young people's views to be considered.

Section 105D of the Education Act 1964 needs to be repealed because its continuing existence leaves young people without a voice on an issue that fundamentally affects them.

POLICY IMPLICATIONS FOR ABORTION SERVICES

A discussion paper on the review of the Guardianship Act 1968 was released in August 2000 (Ministry of Justice 2000). Issues relating to young women's access to abortion services are not covered in this discussion document. Nevertheless it is likely that some may see the review as providing an opportunity to recommend the removal of Section 25A provisions allowing young women to agree or not agree to the performing of an abortion without parental consent.

Those who oppose these provisions often suggest that young women make such decisions in the absence of adult input. In fact the Section 32 provisions of the Contraception, Sterilisation and Abortion Act 1977, which require all those seeking an abortion to meet with two certifying consultants, ensure that all women discuss pregnancy options with at least two other adults. In addition, women will have been counselled by a (non-certifying consultant) GP, a nurse, a counsellor or other health professional. All of these adults are trained to assess young people's competence to make decisions.

Requirements for adolescents to have parental consent or for parents to receive pre-abortion notification have been enacted in some areas of the USA. All such laws are

required to be accompanied by provision for judicial bypass. A review of these laws indicates that they place greater stress on adolescents and can result in health-compromising delays in seeking abortion. They also place time-consuming requirements on adolescents, health service providers, and courts (Cartoof and Lerman 1986). Comparisons of the effects of such laws in Minnesota, which has mandated parental notification, and Wisconsin which does not, found that similar proportions of adolescents chose to notify or not notify parents of their pregnancy decision. The factor that most determined whether an adolescent notified her parents was her perception of the quality of communication in the home, not the presence of a law requiring parental notification (Blum et al 1990, 1987).

These experiences suggest that any reversal of the current law in New Zealand would have detrimental effects on adolescent health.

CONCLUSION

The development of a reproductive and sexual health strategy provides policy makers with opportunities to improve the health of young New Zealanders. Opportunities for co-ordination, clarity and consistency are more likely to be realised if policy makers address the current legislative inconsistencies.

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