NSW Government Submission – Inquiry into involuntary or coerced sterilisation of people with disabilities in Australia

Introduction

This document sets out the NSW Government position in response to the Terms of Reference of the Commonwealth Parliament's Inquiry into involuntary or coerced sterilisation of people with disabilities in Australia.

The NSW Government is committed to protecting the rights of all people with disability. We recognise the reproductive rights of people with disability, and consider that sterilisation should only be performed for therapeutic reasons (i.e. medically necessary).

As detailed in the NSW Government Submission, non-therapeutic sterilisation of children and adults with disabilities is contrary to NSW law.

NSW records show that the instance of therapeutic sterilisations consented to by the Guardianship Tribunal in NSW is low. Data is not available to comment on the prevalence of any unlawful sterilisation procedures within NSW, or involving NSW residents performed in another Australian or international jurisdiction.

NSW would support measures to harmonise regimes across Australia, noting that the NSW test, which requires a sterilisation to be for therapeutic reasons, is a more stringent barrier than that applied in many other jurisdictions, including the Family Court.

Response to individual Terms of Reference

The involuntary or coerced sterilisation of people with disabilities in Australia, including:

(a) the types of sterilisation practices that are used, including treatments that prevent menstruation or reproduction, and exclusion or limitation of access to sexual health, contraceptive or family planning services;

No comment.

(b) the prevalence of these sterilisation practices and how they are recorded across different state and territory jurisdictions;

NSW keeps records on applications for sterilisation both under the *Children and Young Persons (Care and Protection) Act 1998* (the Care Act), and the *Guardianship Act 1987* (the Guardianship Act).

The NSW Department of Family and Community Services (Community Services) records, which begin from July 2007, show that there have been no applications under section 175 of the Care Act for consent to perform sterilisations on a child in the parental responsibility of the Minister.

The Guardianship Tribunal, located in the NSW Department of Attorney General and Justice, considers and approves applications for the sterilisation of children and involuntary sterilisation of adults. From 1 July 2006 - 30 June 2012, there were 38 applications to the Tribunal for sterilisation, of which 14 were approved. Details of all applications are below.

Applications for Sterilisation 1 July 2006 – 30 June 2012[1]

	Consent Given	Application Dismissed	Application Withdrawn	Total
Female	11	15	7	33
Male	2	2	0	4
Child	1	0	1	2
Total	14	17	8	39

NSW does not collect data on the number of applications made to the Family Court, as the NSW Government is not a party to those applications.

(c) the different legal, regulatory and policy frameworks and practices across the Commonwealth, states and territories, and action to date on the harmonisation of regimes;

Legal and regulatory frameworks

In NSW, non-therapeutic sterilisation of children and adults with disabilities is contrary to the law. The current law governing sterilisation of children and adults with disabilities in NSW is a mix of common law and statute law.

At common law, only a court may authorise the planned sterilisation of a child who is not competent to give consent, not a parent or carer, unless the treatment is required for medical or therapeutic purposes [*Secretary*, *Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992)]. The High Court has held that the Family Court has jurisdiction under the *Family Law Act 1975* to make an order authorising special medical treatment, and that this jurisdiction co-exists with State jurisdiction (*P v P* (1994) 120 ALR 545).

In NSW, the main legislative provisions dealing with sterilisation of children and people who are not capable of giving consent are contained in section 175 of the Care Act, and in Part 5 of the Guardianship Act, which is now administered by the Attorney General.

Children and Young People

Section 175 of the Care Act applies to all children in NSW aged under 16 years, not just those in need of care and protection.

Section 175(1) makes it an offence to carry out special medical treatment on a child otherwise than in accordance with the section. Special medical treatment includes non-therapeutic sterilisation, that is, medical treatment that is intended, or is reasonably likely to render a person

[1] Statistics provided by the NSW Guardianship Tribunal

permanently infertile. It does not include medical treatment where infertility is an unwanted consequence of life-saving treatment.

Section 175(2) provides that non-therapeutic sterilisation may only be performed in an emergency where it is necessary to save the child's life or prevent serious damage to health, or with the approval of the Guardianship Tribunal, which must apply similar criteria when determining whether to give consent.

Consent must not be given unless the Guardianship Tribunal is satisfied that it is necessary to carry out the treatment on the child in order to save the child's life or to prevent serious damage to the child's psychological or physical health (s175(3) of the Care Act).

Again, an exception applies where the medical practitioner is of the opinion that it is necessary, as a matter of urgency, to carry out the treatment on the child in order to save the child's life or to prevent serious damage to the child's health. There is no requirement that it be the most appropriate form of treatment and no consideration of best interests or non-therapeutic reasons for the treatment (s174 of the Care Act).

The Care Act does not include any provision in relation to whether the child is capable of providing their own consent for treatment.

Please refer to the following published decisions for further information about the Tribunal's reasoning: LDS [2012] NSWGT 9 (20 March 2012), XTV [2012] NSWGT 5 (6 February 2012), WAK [2010] NSWGT 25 (13 July 2010) , TAC [2010] NSWGT 23 (23 July 2010)

Adults

Part 5 of the *Guardianship Act 1987* (NSW) prohibits the sterilisation of a person aged 16 years and above, who is incapable of giving consent, unless it is necessary as a matter of urgency to save the patient's life or prevent serious damage to health, or unless the Guardianship Tribunal has consented. The Guardianship Act defines special treatment as "any treatment that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out" (s33).

Two exceptions apply:

- the guardian of a patient may also consent to the carrying out of continuing or further special treatment if the Tribunal has previously given consent to the carrying out of the treatment and has authorised the guardian to give consent to the continuation of that treatment or to further treatment of a similar nature (s36(2));
- if the medical practitioner or dentist carrying out or supervising the treatment considers the treatment is necessary, as a matter of urgency to save the patient's life or to prevent serious damage to the patient's health (s37(1))

Part 5 of the Guardianship Act allows the Guardianship Tribunal to consent to:

- any medical treatment that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out (not being medical treatment that is intended to remediate a life-threatening condition and from which permanent infertility, or the likelihood of permanent infertility, is an unwanted consequence);
- any medical treatment that is for the purpose of contraception or menstrual regulation declared by the Regulations to be special medical treatment (there are currently no prescribed treatments in the Children and Young Persons (Care and Protection) Regulation 2012 for this provision);
- any medical treatment that is in the nature of a vasectomy or tubal occlusion.

In considering whether to give consent, if the Tribunal is satisfied that it is appropriate for the treatment to be carried out, it may consent to the carrying out of the treatment (s44(1)). However, the Tribunal must not give consent to the carrying out of the treatment unless satisfied that the treatment is the most appropriate form of treatment for promoting and maintaining the patient's health and well-being (s45(1)). The Tribunal must not give consent to the carrying out of *special* treatment unless it is satisfied that the treatment is necessary to save the patient's life or to prevent serious damage to the patient's health (s45(2)).

The *Guardianship Regulation 2010* also prescribes that the Tribunal can consent to any treatment in the nature of a vasectomy or tubal occlusion (cal 9). For these treatments, the Tribunal must be satisfied of the above requirements in ss 44 and 45(1) and must also be satisfied that the treatment is the only or the most appropriate way of treating the patient, it is manifestly in the best interests of the patient and any relevant National Health and Medical Resource Council guidelines are complied with (s45(3)).

In considering applications for special medical treatment, the Tribunal must also have regard to the views of the patient, the medical practitioner proposing the treatment, and any 'persons responsible' for the patient (meaning substitute decision makers (s44)(2)). Section 42 of the Act lists a number of considerations which the Tribunal must give consideration to before making its decision, which are:

a) the grounds on which it is alleged that the patient is a patient to whom this Part applies,
b) the particular condition of the patient that requires treatment,
c) the alternative courses of treatment that are available in relation to that condition,
d) the general nature and effect of each of those courses of treatment,
e) the nature and degree of the significant risks (if any) associated with each of those courses of treatment, and
f) the reasons for which it is proposed that any particular course of treatment should be carried out.

The Tribunal must also have regard to the objects of Part 5 of the Guardianship Act, which are to ensure people are not deprived of necessary treatment merely because they lack capacity to consent and to ensure that any treatment is carried out for the purpose of promoting and maintaining their health and well-being (s32). The Tribunal must also consider the principles in section 4 of the Act, which include but are not limited to ensuring that the welfare and interests of the person are the paramount consideration, the freedom of decision making of the person is restricted as little as possible and the views of the person should be taken into consideration.

Penalties

Significant penalties of imprisonment for up to 7 years apply to persons who carry out unauthorised sterilisations under both Acts.

Practice

A system for regulating special medical treatments is necessary to safeguard the rights and well-being of children and young persons, especially those with disabilities. Requiring a court's or tribunal's authorisation ensures that there is independent scrutiny and objective decision-making before procedures with potentially serious repercussions can be performed on children and young people.

The NSW Department of Family and Community Services (FACS) would only make an application for the sterilisation of a child or young person if it was part of the Children and Young Persons Health Management Plan which is prepared by NSW Health following a health screening or review. Health screening is a complete health assessment undertaken when a child comes into care (introduced in July 2010). Legal advice would then be sought before making an application to the Guardianship Tribunal. For children in care before July 2010, any application for

sterilisation would only be on the basis of advice and a recommendation from Medical/Health professionals, and after seeking legal advice.

The right of a person with a disability to exercise the same rights as other people in the community to express their sexuality, including the right to have access to information and education from health professionals on sexual health issues such as contraception and reproduction, is reinforced in the FACS (Ageing, Disability and Home Care) Sexuality and Human Relationships Policy (2010).

(d) whether current legal, regulatory and policy frameworks provide adequate:

(i) steps to determine the wishes of a person with a disability,

In relation to applications made to the Guardianship Tribunal for consent to special medical treatment under the Guardianship Act 1987, the Tribunal is required to have regard to the views of the patient (s44(2)(a)(i)). The principles of the Guardianship Act in section 4 also require the Tribunal to consider the views of the person with the disability. There are no similar provisions in the Care Act for applications relating to children (as children are not legally able to consent).

(ii) steps to determine an individual's capacity to provide free and informed consent,

In relation to the determination of the adult's capacity to consent to the special medical treatment, the Guardianship Act contains a definition of incapacity, which is that the patient is incapable of understanding the general nature and effect of the proposed treatment or he or she is incapable of indicating whether or not he or she consents or does not consent to the treatment being carried out (s33). Applicants are required to provide evidence of the patient's incapacity to consent (s42(2)(a) in their application. The Tribunal may inform itself as it sees fit in relation to proceedings before it (s55(1)), including requiring witnesses to answer questions or to provide evidence (ss60 and 61). The Tribunal's proceedings are inquisitorial (s55(2)).

As stated above in part (c), there is no requirement for the Tribunal to test for capacity in the Children and Young Person's (Care and Protection) Act.

(iii) steps to ensure independent representation in applications for sterilisation procedures where the subject of the application is deemed unable to provide free and informed consent, and

In proceedings for consent to special medical treatment commenced under both the Guardianship Act for an adult and the Care Act for a child, the Guardianship Tribunal will appoint a separate representative for the person who is the subject of the application (s58(3)). The role of a separate representative is to, where possible:

- meet with the person the hearing is about and obtain their views, if the person is able to express views;
- review the evidence available and obtain any further evidence that is relevant to the matters to be determined and is likely to assist the Tribunal in its deliberations (e.g. obtain independent assessments of the person's capacity).
- make submissions in the hearing as to whether the evidence supports the legal tests and whether an order should be made.

Separate representatives are provided by Legal Aid NSW.

In applications made pursuant to the Guardianship Act, any party, including the person who is the subject of an application, may seek the leave of the Tribunal to be legally represented (s58(1)).The Children and Young Persons (Care and Protection) Act provides that a child is entitled to be legally represented in proceedings before the Guardianship Tribunal (s174(4)).

In respect of Legal Aid, Legal Aid policy states that legal aid is available to a child or adult who is the subject of proceedings relating to an application for special treatment (including sterilisation). There is no means or merit test applied. Legal aid is also available to an applicant who is significant to the care and well-being of the child or adult who is the subject of proceedings relating to an application for special treatment, subject to means and merits test and an availability of funds test; and that the Tribunal has granted leave for the person to be represented.

(iv) application of a 'best interest test' as it relates to sterilisation and reproductive rights;

Differences between the Family Court and the Guardianship Tribunal

At common law, only a court may authorise the planned sterilisation of a child who is not competent to give consent, not a parent or carer, unless the treatment is required for medical or therapeutic purposes [Marion's Case]. In Marion's Case, the High Court found that court authorisation is required first, because of the significant risk of making the wrong decision (either as to a child's present or future capacity to consent or about what are the best interests of a child who cannot consent) and secondly, because the consequences of a wrong decision are particularly grave. The High Court found that the factors which contribute to the significant risk of a wrong decision being made include the question of consent and the possibility of conflicting interests of parents or family members, and in relation to medical professionals "there are those who act with impropriety as well as those who act bona fide but within a limited frame of reference. And the situation with which they are concerned is one in which incorrect assessments may be made" (Marion's Case at 262).

The High Court has held that the Family Court and Guardianship Tribunal have concurrent jurisdiction to make an order authorising special medical treatment (P v P (1994) 120 ALR 545). Regardless of any jurisdictional issues which may arise, the approval of either the Family Court or the Guardianship Tribunal is required for children under 16. This provides procedural safeguard against making the "wrong" decision.

In applications under the Family Law Act, the Family Court applies the principles enunciated in Marion's Case and expanded upon in later cases. The High Court proscribed guiding principles which include:

- the issue for the court in considering whether to consent to a sterilisation procedure is whether in all the circumstances of the particular child the procedure is in the child's best interests (Marion's Case, at 259);
- sterilisation procedures should never be authorised unless "some compelling justification is identified and demonstrated" (Marion's Case, at 268); and
- to come to the view that a sterilisation procedure is in a child's best interests the court has to be satisfied that sterilisation is a step of "last resort", or in other words

that "alternative and less invasive procedures have all failed or it is certain that no other procedure or treatment will work" (Marion's Case, at 259-260).

The test applied by the Family Court is a broader test than the Guardianship Tribunal in that it is based on what is in the best interests of the child rather than a need to prove that the treatment is necessary, as a matter of urgency, to either save life or prevent serious damage to the child's health (see s37 of the Guardianship Act 1987)

Another difference between the two jurisdictions is that the Guardianship Tribunal panel will include members with medical and other expertise whereas the Family Court is presided over by a judge. To try and balance this, the Court will have before it medical expert evidence which can be tested. It will also expect that the parties will have received appropriate counselling and other assistance in helping them decide which option they might pursue with the Court.

Given the invasive and irreversible nature of sterilisation, NSW is of the view that non-therapeutic sterilisation of a person should only ever be performed by order of a court or tribunal, and that in making the order, a court should consider whether other practical alternatives have been exhausted, it is a measure of last resort and medically necessary as well as in the best interest of the person.

Guardianship Tribunal – vasectomies and tubal occlusions

S. 45(3)(b) of the Guardianship Act 1987 provides that the Tribunal may give consent to *prescribed* special treatment (other than special treatment of a kind specified in paragraph (a) of that definition) if it is satisfied that the treatment is the only or most appropriate way of treating the patient and is manifestly in their best interests.

Any treatment in the nature of a vasectomy or a tubal occlusion is *prescribed* special treatment pursuant to cl. 9 of the Guardianship Regulation 2010. However given that such treatment amounts to special treatment of a kind specified in paragraph (a) of the definition (i.e. any treatment that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out), the best interest consideration does not apply. To provide consent to such treatments, the Tribunal would need to be satisfied that it is necessary to save the patient's life, or, to prevent serious damage to the patient's health.

(e) the impacts of sterilisation of people with disabilities;

NSW notes that the involuntary or coerced sterilisation of people with disabilities is an issue which impacts women more than men. The Australian Human Rights Commission notes that women and girls with disabilities can be subject to multiple and intersecting forms of discrimination (on the basis of disability, gender, and in the case of girls, age), and therefore are particularly at risk of having their rights violated.

According to the principle of body integrity and the right of a woman to make her own reproductive choices, a woman, regardless of her ability to consent, conceive or care for a child, should not be forcibly sterilised. However, historically women with disabilities (intellectual, physical or a mental illness) were sterilised in institutions, and without their consent. Even now, some parents seek sterilisation as a genuine wish to protect and care for their child with an intellectual disability from risk of pregnancy, or from a care and hygiene perspective (for example, to eliminate menstruation).

Given the invasive and irreversible nature of sterilisation, a decision to sterilise a woman who cannot make the decision herself should be given careful consideration and treated with the

utmost seriousness and respect, taking into account a range of issues not just those that are medical.

(f) Australia's compliance with its international obligations as they apply to sterilisation of people with disabilities;

NSW supports current safeguards, and notes that the common law, the *Children and Young Persons (Care and Protection) Act 1998*, and the *Guardianship Act 1987* (NSW) are consistent with international human rights standards that seek to prevent the practice of non-therapeutic forced sterilisation of children and adults with disabilities.

(g) the factors that lead to sterilisation procedures being sought by others for people with disabilities, including:

> **(i) the availability and effectiveness of services and programs to support people with disabilities in managing their reproductive and sexual health needs, and whether there are measures in place to ensure that these are available on a non-discriminatory basis,**
>
> **(ii) the availability and effectiveness of educational resources for medical practitioners, guardians, carers and people with a disability around the consequences of sterilisation, and**
>
> **(iii) medical practitioners, guardians and carers' knowledge of and access to services and programs to support people with disabilities in managing their reproductive and sexual health needs**

No comment.

(h) any other related matters.

The NSW Government recognises that women with disabilities experience a high risk and incidence of violence and sexual abuse. The Australian Institute of Family Studies reports that adults with physical, intellectual or psychiatric disabilities face particular risks of sexual assault and exploitation. In addition, victims of sexual assault face particular barriers to making a disclosure. One reason sometimes given in favour of sterilisation in the absence of consent is the prevention or minimisation of the harms of sexual abuse of women and girls with disabilities because of the risk of pregnancy and incapacity for parenthood. As the Australian Human Rights Commission notes, however, appropriate measures should be taken to ensure the physical safety of women and girls with disability, and to address the trauma and health implications which result from sexual abuse.

The Australian Centre for the Study of Sexual Assault has noted that access to information about sexuality and sexual violence prevention across the life course is essential for adults with disabilities, and that sexuality education programs need to be lifelong as an important safety strategy and part of a wider preventative approach. Importantly, such sexuality education must include more than just the biological details of reproductive sex and sexual health, but also engagement with the meaning and negotiation of sexual consent (ACSSA, ‘Sexual assault and adults with a disability’, Issues No 9, 2008).

Women with disabilities who also experience domestic and family violence (DFV) or sexual abuse also risk falling into a gap in service provision. DFV or sexual assault service providers may be less likely to have significant experience assisting persons with disabilities, and may be unfamiliar with finding ways to reach out to members of the disabled community to advertise available

services. Disability service providers may be able to refer people to a range of community services, but may have little training on how to identify and deal with domestic violence or sexual assault.

Under the new Domestic and Family Violence Framework being developed in NSW, prevention approaches will be targeted to respond to the needs of those at higher risk of domestic and family violence, or who face barriers in accessing supports and services, including women with disabilities who experience violence in a domestic or family relationship.

ENDS