

The Involuntary or Coerced Sterilisation of People with Disabilities in Australia

Submission to the Senate Community Affairs Committee

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I SCOPE OF SUBMISSION

This submission highlights a number of intricacies in the legal framework governing the performance of sterilisation procedures that would benefit from consideration prior to replacing or reforming the existing compliance model. The submission covers two issues, namely:

- (a) the distinction between ‘therapeutic’ and ‘non-therapeutic’ sterilisations; and
- (b) enforcement measures.

The recommendations outlined in this submission are derived predominantly from an analysis of the law that applies to the sterilisation of intellectually disabled children and therefore may require adaptation in order to fit within the legal framework that applies to involuntary or coerced sterilisation of adults with intellectual disability or persons with physical disabilities.

II ISSUES

A *Therapeutic/non-therapeutic distinction*

1 *Background*

As the Committee would be aware, the High Court in *Marion’s Case* recognised that an intellectually disabled child may be lawfully sterilised where the sterilisation procedure falls within parental power to consent to medical treatment and that consent is subsequently provided. In practice, sterilisation procedures that fall within parental power to consent have been referred to as ‘therapeutic sterilisations’. The primary definition of a ‘therapeutic sterilisation’ (according to the High Court in *Marion’s Case*) is a procedure that causes infertility that is either (a) a ‘by-product of surgery appropriately carried out to treat some malfunction or disease’; or (b) an ‘incidental result of surgery performed to cure a disease or correct some malfunction’ (**Current Test**).

In light of the empirical and testimonial evidence which suggests that sterilisation procedures have been carried out otherwise than in accordance with the procedural requirements mandated by *Marion’s Case*,¹ it is submitted that medical practitioners

¹ The case of *Re Angela* [2010] 43 Fam LR 98 wherein the child’s treating gynaecologist claimed that court authorisation was not necessary in the circumstances because the procedure involved a ‘therapeutic sterilisation’

may in some cases be applying the legal test for determining a 'therapeutic sterilisation' incorrectly. Preference should be given to the idea that medical practitioners will act in accordance with their legal and ethical obligations where these are clear and unambiguous. Therefore, the incidence of unauthorised sterilisation raises a serious doubt regarding the clarity of the law in this area.

At the centre of this submission is the contention that the legal meaning of the term 'therapeutic sterilisation' differs from the meaning of the term as understood by medical practitioners. This divergence between the legal meaning of the term 'therapeutic sterilisation' and its practical application has occurred inter alia because the primary definition of a 'therapeutic sterilisation' (i.e. a procedure that causes infertility as a 'by-product' of surgery appropriately carried out to treat some malfunction or disease):

- (a) has been subject to judicial interpretation in the case law that has proceeded since *Marion's Case* which has led to the term having a legal meaning that is not immediately apparent on the face of the Current Test;
- (b) is not sufficiently narrow to remove sterilisation procedures in the context of gender dysphoria from the ambit of parental power to consent to medical treatment (which has resulted in the FCA applying the criteria of a 'special medical procedure' in these cases); and
- (c) is comprised of inherently confusing terminology because the Current Test often results in a sterilisation procedure that may be described as 'therapeutic' according to the principles of medical ethics being described as 'non-therapeutic'.

In order to address the issues identified above, the most effective (and also the most restrictive) method of removing uncertainty regarding whether parental consent is sufficient to render the performance of a sterilisation procedure lawful in a particular

of the child is also particularly thought-provoking given the medical practitioner had appeared before the Family Court previously as an expert in another application for sterilisation. It would not seem unreasonable to expect that the medical practitioner would have possessed a higher level of knowledge of sterilisation law than what may be possessed by other medical practitioners as a result of their prior experience as an expert in these proceedings.

instance would be to require all sterilisation procedures in minors (with or without an intellectual disability) to be referred to an external body for either authorisation or review in respect of which avenue of authorisation is applicable in the circumstances. However, it is arguable that medical practitioners should be permitted to perform sterilisation procedures in certain clinical scenarios without first seeking regulatory oversight of the decision (surgical repair of congenital abnormalities and removal of malignant reproductive tissue are two examples of procedures that may be allowed to proceed without referral to another body for consideration of matters concerning consent).

Proceeding on the basis that medical practitioners should retain professional autonomy in respect of certain sterilisation procedures, the key question addressed by this submission is: What is an appropriate test for determining whether sterilisation procedures fall within parental power to consent to medical treatment and do not require referral to a court/tribunal/authority?

2 What is the legal meaning of a 'therapeutic sterilisation'?

This submission aims to clarify the meaning of a 'therapeutic sterilisation' (i.e. a procedure that falls within parental power to consent and does not require court or tribunal authorisation) as that term is defined by the common law. It does not propose to put forward a normative meaning of the term 'therapeutic sterilisation'.

The FCA has taken a restrictive approach to deciding whether a sterilisation procedure is 'therapeutic'. Sterilisation procedures to treat epilepsy, menorrhagia, pre-menstrual syndrome, or problems with contraception and menstrual management are 'non-therapeutic sterilisations' that require court authorisation. The Committee is referred to the author's recent article 'When is the sterilisation of an intellectually disabled child "therapeutic": A practical analysis of the legal requirement to seek court authorisation' (2012) 20 *Journal of Law and Medicine* 453 for an analysis of the legal meaning of the term 'therapeutic sterilisation'. The upshot of this analysis is that a 'therapeutic sterilisation' of an intellectually disabled child involves

the performance of a procedure(s) that would be clinically indicated according to the standards that would be applied to a child with normal intellectual functioning. Therefore, a 'non-therapeutic sterilisation' involves a procedure(s) that would not be recommended in a hypothetical child with normal cognitive capacities who suffers from the same level of pathology.

3 *A 'therapeutic sterilisation' is not synonymous with the prevention of 'serious damage' to a child's health*

It is not uncommon for the term 'therapeutic sterilisation' to be used to describe a class of procedures that are necessary to save a child's life or prevent serious damage to a child's health. However, whilst a 'therapeutic sterilisation' may encompass procedures that 'save life or prevent serious damage to health' and vice versa, the two categories of procedures are conceptually distinct.

For example, it has been suggested that section 175 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) makes the power of the New South Wales Guardianship Tribunal to 'consent' to sterilisation procedures conditional upon the proposed procedure constituting a 'therapeutic sterilisation'. However, section 175 does not make reference to the term 'therapeutic sterilisation' and instead states that the Tribunal may consent to the sterilisation procedure if it is indicated 'as a matter of urgency ... to save the child's life or to prevent serious damage to the child's psychological or physical health'.² Sterilisation procedures that prevent serious damage to a child's health differ from 'therapeutic sterilisations' because they (amongst other things) include prophylactic treatment and do not necessarily require the presence of any 'disease or malfunction' of the body. The decision in *JLS v JES*³ is illustrative of the risks of perpetuating an incorrect association between 'therapeutic sterilisations' and procedures that prevent serious damage to a child's health.

In *JLS v JES* an application was made to the Supreme Court of New South Wales to authorise a hysterectomy on a 14 year old girl with epilepsy, cerebral palsy and an intellectual disability.⁴ The sterilisation was intended to end menstruation and protect

² *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 175(2)(a).

³ (1996) 20 Fam LR 485.

⁴ The application was made under the superseded *Children (Care and Protection) Act 1987* (NSW) which is mirrored by the *Children and Young Persons (Care and Protection) Act 1998* (NSW) in all respects relevant to this submission.

the child from pregnancy. Menstruation was said to be 'traumatic' and caused the child to become 'upset, anxious and angry' causing hardship to herself and her mother. Bryson J accepted evidence from a consultant neurologist that 'as [the child] was an attractive girl, she was at great risk of pregnancy and also of pelvic infection as she develops sexual maturity'. His Honour also accepted evidence from the child's gynaecologist, that the child had had 'two menstrual periods which were both severely heavy', associated with 'extreme terror' and were described overall as 'catastrophic with the need to change pads hourly'.

Bryson J authorised the procedure on the basis that sterilisation was in the best interests of the child. In doing so he was required to satisfy the statutory requirement that the sterilisation was necessary to save life or prevent 'serious damage' to the child's health. His Honour held that this requirement was satisfied because sterilisation would remove the risk that the child would develop anaemia as a consequence of heavy menstrual periods as well as sparing her the 'trauma of menstruation'.⁵ The child's health was also held to be promoted by the prevention of pregnancy which was determined to be beyond her capacities of understanding.

Such a decision demonstrates that the category of procedures which prevents 'serious damage' to a child's health is a significantly broader than the category of procedures that meet the legal definition of a 'therapeutic sterilisation'. There is a real risk of an illegitimate broadening of the category of sterilisation procedures that may proceed without court or tribunal consent if 'therapeutic sterilisation' is not adequately distinguished from procedures that are necessary to 'save life' or prevent 'serious damage' to health. The Committee may wish to consider this recommendation carefully in the event there is a category of procedures that is carved out of any general requirement to obtain court/tribunal/board approval of sterilisation procedures.

4 *The 'but for' test*

The 'but for' test may be a useful practical tool to assist medical practitioners to apply the legal test for determining whether sterilisation requires court authorisation in a way that accords with the current jurisprudence concerning sterilisation procedures

⁵ *JLS v JES* (1996) 20 Fam LR 485, 494.

in *intellectually disabled* children. However, the 'but for' test is not without its limitations. Foremost, the 'but for' test is not applicable to non-*Gillick* competent children of normal intellectual functioning. Second, the test could also not be applied in a case involving a child with an intellectual disability who presents with a concurrent diagnosis of gender dysphoria or where the medical treatment proposed constitutes a 'special medical procedure' aside from sterilisation (e.g. termination of pregnancy). Notwithstanding its limitations, the 'but for' test is deserving of attention because of its ability to facilitate the identification of a 'therapeutic sterilisation' quickly and simply in the vast majority of sterilisation procedures involving children with an intellectual disability.

The 'but for' test in the context of sterilisation recognises that a child's intellectual disability often changes the equation that indicates a case for or against sterilisation. It therefore isolates the distinctive feature of these children, which is their intellectual disability, and compels the removal of that distinctive feature from the decision-making process. In practical terms, it asks 'but for' the child's intellectual disability would the outcome of the clinical decision be any different?

With regard to the decision in *Re Angela* [2010] 43 Fam LR 98 (a decision that the Committee would be aware of), the medical practitioner would have asked the question: Would hysterectomy for the treatment of excessive menstrual bleeding be recommended in a non-*Gillick* competent child who did not have an intellectual disability? The test is equally applicable if the whole of the child's presenting complaints are considered: Would hysterectomy be recommended as treatment for excessive menstrual bleeding, possible increased seizures and behavioural problems associated with menstruation 'but for' the child's intellectual disability? The answer to both of these questions would most likely have been no and thus would have signalled to the medical practitioner – not necessarily that sterilisation was not indicated in the circumstances – but that court authorisation prior to sterilisation was required.

B *Enforcement measures*

This submission makes the following points in respect of enforcement procedures:⁶

- Children residing in Victoria, Western Australia, Queensland, the Northern Territory and the Australian Capital Territory are afforded less legal protection against unauthorised sterilisation as compared with children residing elsewhere in Australia. This is because these States do not have a legislative penalty that enforces a statutory prohibition against unauthorised sterilisation and rely exclusively on the common law. This lack of uniformity is particularly unsatisfactory in light of Australia's international human rights obligations.
- The enforcement measures at common law are inadequate because it is arguably undesirable to prosecute medical practitioners (some of whom may have acted bona fide but contrary to the law) and parents under general assault and battery offences/provisions. Civil law enforcement measures are ill-suited to providing a remedy or achieving deterrence in light of the barriers that intellectually disabled children are likely to face accessing justice.

The implementation of a statutory prohibition on unauthorised sterilisation that is linked to an offence that is capable of applying to a corporation (i.e. hospital service provider) is recommended throughout all of the States and Territories. It may be sensible to adopt a systems approach to compliance which would shift the burden of regulatory compliance (where possible) from individual practitioners to hospital service providers thus leading to the broader development of policies, procedures and professional development training for health care professionals.

III **KEY POINTS**

The legal definition of the category of procedures that are within parental power to consent to medical treatment should be determined carefully in the event that it is deemed not administratively feasible or necessary to oversee all sterilisation procedures that are performed on persons with an intellectual disability. The use of the terminology 'serious damage' is discouraged. The 'but for' test may play a useful

⁶ Further discussion regarding the inadequacy of the legal enforcement measures that currently apply to unauthorised sterilisation can be found in the author's recent article 'Sterilising without consent: Intellectually disabled children and unauthorised sterilisation' (2012) 37 *Alternative Law Journal* 175.

role in clarifying the meaning of a 'therapeutic sterilisation' if this term is to continue to have significance post reform of the current legal framework that applies to sterilisation procedures.

With regard to enforcement measures, common law remedies are unsuitable for dealing with the issue of unauthorised sterilisation and should be supplanted with a statutory prohibition on the practice that is linked to an offence for non-compliance in all States and Territories. Penalties for non-compliance should be capable of being imposed on a hospital service provider to transfer a degree of the burden of compliance from individual practitioners to organisations.