

**STANDING COMMITTEE OF ATTORNEYS GENERAL**

**ISSUES PAPER**

**STERILISATION OF INTELLECTUALLY DISABLED MINORS**

**SEPTEMBER 2006**

**NOTE: THIS ISSUES PAPER AND THE ASSOCIATED DRAFT MODEL PROVISIONS DO NOT NECESSARILY REPRESENT THE VIEWS OF THE STANDING COMMITTEE OF ATTORNEYS GENERAL OR ANY INDIVIDUAL ATTORNEY GENERAL. THE DOCUMENTS HAVE BEEN PREPARED FOR THE PURPOSE OF CONSULTATION AND DISCUSSION.**

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**Background**

In August 2003, the Standing Committee of Attorneys-General (SCAG) agreed that a nationally consistent approach to the authorisation procedures required for the lawful sterilisation of minors is appropriate.

This proposal followed the High Court's decision in *Re Marion* (1992) 175 CLR 218 and the 1997 Human Rights and Equal Opportunity Commission Report on the Sterilisation of Minors.

Currently, in Western Australia, Victoria and the Northern Territory, the Family Court of Australia and the Federal Magistrates' Court have exclusive jurisdiction to decide on sterilisation matters. New South Wales, South Australia, Queensland and Tasmania have conferred concurrent jurisdiction in relation to sterilisation decisions on their respective Guardianship Tribunals and Boards<sup>1</sup>.

A SCAG Working Group was formed after the 2003 meeting. In 2004, targeted stakeholders were asked to comment on an Issues Paper prepared by the Working Group titled *Sterilisation of Minors with a Decision-Making Disability*.

The Working Group reviewed the submissions received. To assist Ministers resolve a number of outstanding policy issues, the Working Group developed draft model provisions. The draft model provisions set out the criteria and procedures that jurisdictions could adopt in authorising the sterilisation of children who have an intellectual disability to the extent that the child is incapable of giving informed consent to the sterilisation procedure. A copy of the draft model provisions is attached. The draft provisions do **not** represent a settled policy position at this time.

It should be noted that the current version of the draft model provisions incorporate terms specific to the Western Australian legislation. If adopted, other jurisdictions may need to modify some of the provisions to reflect their own circumstances, for example the definitions included in draft clause 4 and the procedural circumstances in draft clauses 13 to 18.

SCAG has agreed that the draft model provisions be released to stakeholders as the basis for further discussion and consultation.

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<sup>1</sup> The relevant legislation is the *Children and Young Persons (Care and Protection) Act 1998* (NSW); *Guardianship and Administration Act 1993* (SA); *Guardianship and Administration Act 2000* (Qld) and *Guardianship and Administration Act 1995* (Tas).

Key features of the draft model provisions are outlined below.

## **Outline of the suggested scheme**

### Conferral of jurisdiction: draft clauses 7, 9 and 19.

It is proposed that jurisdiction will be conferred on State and Territory guardianship boards and tribunals in respect of sterilisation decisions for children under 18 years old who, because of their intellectual disability, are incapable of giving valid informed consent to a sterilisation procedure and where the child is unlikely to regain or attain the capacity to give such consent. The jurisdiction is to operate concurrently with the existing jurisdiction of the Family and the Federal Magistrates' Courts of Australia.

It is not intended that the draft model provisions exclude the *parens patriae* jurisdiction of the superior courts: see draft note on page 1, note 3 to clause 5 and note 1 to clause 19.

### Who do the draft provisions apply to? What is an 'intellectual disability'? : draft clause 4.

As noted above, it is suggested that State and Territory guardianship boards and tribunals be able to authorise sterilisation decisions for children under 18 years old, who because of their intellectual disability, are incapable of giving valid informed consent to a sterilisation procedure and where the child is unlikely to regain or attain the capacity to give such consent.

While the term 'intellectual disability' is not specifically defined in the draft model provisions, certain criteria that the Working Group suggests should be features of the definition are included.

The Working Group suggests that any definition of intellectual disability not cover disabilities that are solely physical or sensory. The Working Group is considering what types of disabilities should be included in the definition of intellectual disability e.g. psychiatric disabilities. The Working Group is interested in stakeholders' views on this point.

It is also intended that the definition of intellectual disability should not refer to the child's capacity to give informed consent to the sterilisation procedure: see draft clause 4. This is because it is not intended that applications be made only on behalf of children who, because of their intellectual disability, are incapable of giving informed consent to the sterilisation procedure. Rather, it is suggested that an application be made on behalf of an intellectually disabled child and the Tribunal would decide whether or not, because of the child's intellectual disability, the child is incapable of

giving informed consent to the sterilisation procedure and is unlikely to regain or attain the capacity to give informed consent: see draft clauses 9(a) and (b).

To authorise a sterilisation procedure, the Tribunal must also be satisfied that the sterilisation procedure is in the best interests of the child: clause 9(c).

It is suggested that if the child is capable of giving informed consent to the sterilisation procedure or is likely to regain or attain that capacity, the Tribunal must not authorise the sterilisation procedure: see draft clause 9.

#### Who can bring an application?: draft clauses 13 and 16.

It is proposed that a parent, guardian, the Public Advocate, the child's health care provider or any other person the Tribunal considers has a sufficient interest in an intellectually disabled child's wellbeing will be able to apply for authorisation of the child's sterilisation. An applicant will need to provide written notice of the application to each of the child's parents and guardians and any other person who has responsibility for the day-to-day care of the child: see draft clause 13.

There will be scope for an independent third party, such as the Equal Opportunity Commission Victoria, to intervene: see draft clause 16.

#### What procedures may a Tribunal authorise?: draft clause 5.

The draft model provisions are intended to cover surgical procedures or medical treatments intended, or reasonably likely, to have the effect of making or ensuring that a child with an intellectual disability is permanently infertile: draft clause 5(2). It is intended that the Tribunal hearing the matter will have the power to authorise a sterilisation procedure subject to conditions and to give directions about any sterilisation procedure it authorises: see note 3 to draft clause 12.

The draft model provisions specify that authorisation will not be necessary if:

- A court or tribunal has found that the child is capable of giving informed consent to the sterilisation procedure and the child has given that consent: see draft clause 5(4).
- The sterilisation procedure is directed at:

- treating an organic malfunction or disease that is likely to cause serious or irreversible damage to the child's physical health: see draft clause 5(5)(a); or
- relieving the child's pain, discomfort or distress in the terminal phase of a terminal illness: see draft clause 5(5)(b).

Emergency situations will be covered by existing state legislation: see for example section 37 of the *Guardianship Act 1987* (NSW).

When can a Tribunal authorise a sterilisation?: draft clauses 9 and 10.

The draft model provisions specify that a Tribunal must not authorise a sterilisation procedure unless it is satisfied of certain criteria, including that the procedure is in the best interests of the child: see draft clause 9.

It is proposed that in determining whether a sterilisation is in the best interests of the child, the Tribunal must:

- ensure the child is treated in a way that respects the child's human worth and dignity;
- as far as practicable, seek and take into account the wishes and views of the child, the parents and guardians of the child, any other person who is responsible for the day-to-day care of the child or whom the Tribunal considers has a sufficient interest in the child's well being: see draft clauses 10(2)(b) and (c);
- take into account information provided by any health care provider of the child: see draft clause 10(2)(d); and
- take into account various specified factors including the child's wellbeing; whether the sterilisation procedure is necessary for the child to lead a life in keeping with the child's needs and capacities; alternatives to the sterilisation procedure; the nature and extent of any significant risks and whether all practicable alternatives have been considered or trialled and failed or will not alleviate the situation so that the child can lead a life in keeping with his or her needs and capacities: see draft clause 10(2)(e).

The draft model provisions specify that the sterilisation procedure is not in the best interests of the child if it is to be carried out for one or more of the following reasons and for no other reason: eugenic reasons; to remove the risk of pregnancy resulting from sexual

abuse or because it is a convenient contraceptive or menstruation management measure: see draft clause 10(4).

The best interests test is intended to reflect relevant case law including *Re Marion* and some elements of Chapter 5A of the *Guardianship and Administration Act 2000* (Qld).

Criminal sanctions to apply: draft clauses 5 and 6.

The draft model provisions propose criminal sanctions for persons who carry out a sterilisation procedure on a child with an intellectual disability without the authorisation of a Tribunal: see draft clause 5(2). There are various circumstances in which it is suggested that a person will not have committed an offence against clause 5(2): see draft clauses 5(4) and (5).

The draft model provisions also propose that hospital service providers be liable if a person carries out a sterilisation procedure contrary to draft clause 5(2) in the provider's hospital: see draft clause 6(2). Two options in relation to the offence by a hospital service provider are suggested. The first option is that the offence be one of strict liability so that no mental element is necessary. The second option is that to be liable, the hospital service provider must know or ought reasonably to know that an offence is being committed. It is a defence to clause 6(2) (either options one or two) if the hospital service provider proves that it took all reasonable steps to prevent the offence against clause 5(2) being committed: see draft clause 6(3).

'Hospital' and 'hospital service provider' are defined in the draft model provisions in line with the Western Australian legislation<sup>2</sup>. If adopted, individual jurisdictions would need to define the terms according to their own laws and practices. However, it is suggested that the term 'hospital service provider' cover private clinics and other non hospital facilities where sterilisation procedures may be carried out: see draft note 4 to clause 6.

Any liability of a hospital service provider does not depend on the liability of an individual: see draft clause 6(4).

The severity of these criminal sanctions is not specified in the draft model provisions, but it is intended that they be uniform between the jurisdictions.

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<sup>2</sup> Section 2(1) *Hospitals and Health Services Act 1927* (WA)

## **Suggested Procedural provisions**

### Protection against Forum Shopping: draft clause 14.

The draft model provisions aim to prevent persons making applications in multiple jurisdictions for approval of a sterilisation procedure. This will preserve the integrity of any tribunal or court decisions and avoid unnecessary overlap and costs. Draft clause 14 provides that if a person has ever made an application to any court or tribunal of the Commonwealth or a State or Territory for authorisation of a sterilisation procedure to be carried out on the child, the person is not entitled to make an application for authorisation without the leave of the Tribunal.

### Mandatory appointment of a legal practitioner: draft clause 15.

The draft model provisions provide that the Tribunal must appoint a legal practitioner with appropriate experience to represent the interests of the child in the proceeding, and may appoint a person who has qualifications or experience in another appropriate professional discipline to work with the practitioner in representing the interests of the child: see draft clause 15.

### Constitution of the Tribunal: draft clause 8.

It is proposed that to exercise the jurisdiction conferred by the draft model provisions, the Tribunal must be constituted by a judicial member or a member with legal experience; a member who is a medical practitioner registered as a specialist in paediatrics and a member who has extensive knowledge of, or experience with, children with intellectual disabilities: see draft clause 8.

This suggested provision is based on section 80F of the *Guardianship and Administration Act 2000* (Qld).

### Investigations by the Board/Tribunal: draft clause 18

The draft model provisions allow the Tribunal to refer a matter relating to the proceeding to the Chief Executive Officer of a Department of the Public Service; the Public Advocate or any other person. The person must investigate and report to the Tribunal on the matter by the date or within the period specified by the Tribunal: see draft clauses 18(1) and (2).

If the Tribunal receives the report by the date or within the period specified, the Tribunal must not determine a question relating to the matter until it has considered the report. If the Tribunal does not receive the report by that date or within that period, the Tribunal may determine a question relating to the matter without receiving or considering the report: see draft clauses 18(3) and (4).