

Western Australia

DRAFT 17

## **Children with Intellectual Disabilities (Regulation of Sterilisation) Bill 2006**

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**CONFIDENTIAL**

Western Australia

LEGISLATIVE ASSEMBLY/COUNCIL

DRAFT 17

## **Children with Intellectual Disabilities (Regulation of Sterilisation) Bill 2006**

**A Bill for**

**An Act —**

- **to prohibit sterilisation procedures being carried out on children with intellectual disabilities without the authorisation of the Family Court [of Australia], Supreme Court or State Administrative Tribunal; and**
- **to confer jurisdiction on the State Administrative Tribunal to authorise sterilisation procedures to be carried out on children with intellectual disabilities in certain circumstances, and for related purposes.**

*[1. The Bill has been drafted on the assumption it will be enacted in WA. It uses terms specific to WA and assumes that the WA Interpretation Act 1984 and the WA Criminal Code will apply. Other jurisdictions will need to adjust the provisions of the Bill to take into account their particular interpretation legislation and criminal law. Jurisdictions may choose to enact the Bill as stand-alone legislation or to give effect to the provisions of the Bill by amending their existing legislation.]*

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2. *The Bill is not intended to exclude the parens patriae jurisdiction of superior courts. Any sterilisation procedure ordered by a superior court exercising its parens patriae jurisdiction will be lawful.*
  3. *In WA legislation, references to the Family Court are to the Family Court of Western Australia (see section 5 of the WA Interpretation Act 1984). Other jurisdictions will need to refer to the Family Court of Australia.]*

The Parliament of Western Australia enacts as follows:

## Part 1 — Preliminary matters

### 1. Short title

This is the *Children with Intellectual Disabilities (Regulation of Sterilisation) Act 2006*.

### 5 2. Commencement

This Act comes into operation on a day fixed by proclamation.

### 3. Objects of Act

The objects of this Act are —

- 10 (a) to protect children with intellectual disabilities from unauthorised sterilisation procedures being carried out on them; and
- (b) to facilitate a nationally consistent approach to authorising sterilisation procedures to be carried out on children with intellectual disabilities in certain
- 15 circumstances.

20 [ *The terminology of “authorise” and “carried out” reflects the High Court’s language in Marion. A number of jurisdictions already use the terminology of “consent” in relation to sterilisation of adults who are under guardianship orders. Those jurisdictions may prefer, for consistency, to use that terminology instead.* ]

### 4. Terms used in this Act

In this Act, unless the contrary intention appears —

“**child**” means a person under 18 years of age;

25 “**Equal Opportunity Commissioner**” has the meaning given to “Commissioner” in the *Equal Opportunity Act 1984* section 4(1);

“**health care provider**”, of a child, means a person who, in the practice of a profession or in the ordinary course of business, provides or has provided care or treatment of or a

service or procedure for the child for the purpose of  
diagnosing, maintaining or treating the child's physical or  
mental health;

5           **“intellectual disability”** means...*[A uniform definition across  
all jurisdictions is preferred. It should not cover disabilities  
that are solely physical or sensory. In addition, it should  
not refer to a child's capacity to give informed consent  
because that is a matter for the Tribunal under clause 9.]*;

10           **“Public Advocate”** has the meaning given to that term in the  
*Guardianship and Administration Act 1990* section 3(1);

**“sterilisation procedure”** means a surgical procedure or other  
medical treatment that —

- 15           (a) is intended to make a child, or to ensure a child is,  
permanently infertile; or
- (b) is reasonably likely to have that effect;

**“Tribunal”** means the State Administrative Tribunal.

- 20           [1. *Definition of “child” — The provisions must apply only to persons  
under 18 years of age. Some jurisdictions may prefer to use the term  
“young person” in relation to older teenagers.*
2. *Definition of “health care provider” — The definition is modelled on  
the definition of “health care provider” and paragraph (a) of the  
definition of “health care” in the Qld Guardianship and  
Administration Act 2000.]*

## Part 2 — Unauthorised sterilisation procedures

### 5. Sterilisation procedure prohibited

(1) In this section —

“court or tribunal” means —

- 5
- (a) the Family Court [of Australia]; or
  - (b) the Supreme Court; or
  - (c) the Tribunal.

10 (2) A person must not carry out on a child with an intellectual disability a surgical procedure or other medical treatment that —

- (a) is intended by the person to make the child, or to ensure the child is, permanently infertile; or
- (b) is reasonably likely to have that effect.

Penalty: ?????

15 (3) A person does not commit an offence against subsection (2) if the sterilisation procedure is authorised by a court or tribunal.

(4) A person does not commit an offence against subsection (2) if the sterilisation procedure is carried out only after —

- 20
- (a) a court or tribunal has found that the child is capable of giving informed consent to the sterilisation procedure; and
  - (b) the child has given that consent.

(5) A person does not commit an offence against subsection (2) if the sterilisation procedure is directed at —

- 25
- (a) treating an organic malfunction or disease of the child (for example, cancer affecting the child’s reproductive system) that is likely to cause serious or irreversible damage to the child’s physical health; or

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- 5                      (b) relieving the child’s pain, discomfort or distress when an organic malfunction or disease of the child that is likely to be terminal has reached the phase when there is no real prospect of recovery or remission on a permanent or temporary basis.

*[1. Clause 5 will need to be adjusted to suit the particular requirements of each jurisdiction in relation to the framing of offences and defences.*

10                     2. *As noted previously, the Bill is not intended to exclude the parens patriae jurisdiction of superior courts. Any sterilisation procedure ordered by a superior court exercising its parens patriae jurisdiction will be lawful.*

15                     3. *For WA, it is suggested that jurisdiction be conferred on the State Administrative Tribunal because section 13(e) of the WA Guardianship and Administration Act 1990 already confers jurisdiction on that Tribunal to consent to sterilisation of adults who are under guardianship orders. However, it is emphasised that no formal policy decision in this regard has been made.]*

**6.                    Offence by hospital service provider**

- 20                     (1) In this section —  
                          “**hospital**” has the meaning given to that term in the *Hospitals and Health Services Act 1927* section 2(1);  
                          “**hospital service provider**” has the meaning given to that term in the *Hospitals and Health Services Act 1927* section 2(1).

**Option 1:**

- 25                     (2) A hospital service provider commits an offence if an offence against section 5(2) is committed in the provider’s hospital.  
                          Penalty: ?????

**Option 2:**

- 30                     (2) A hospital service provider commits an offence if the provider knows or ought reasonably to know that an offence against section 5(2) is being committed in the provider’s hospital.

**Defence for Options 1 and 2:**

- 5 (3) It is a defence to a prosecution for an offence against subsection (2) if the defendant proves that the defendant took all reasonable steps to prevent the offence against section 5(2) from being committed in the defendant's hospital.
- (4) The hospital service provider may be prosecuted and found guilty of an offence against subsection (2) whether or not the person who committed the offence against section 5(2) has been prosecuted for or found guilty of that offence.
- 10 *[1. Option 1 is intended to be a strict liability offence.*
- 2. Clause 6 will need to be adjusted to suit the particular requirements of each jurisdiction in relation to the framing of offences and defences.*
- 15 *3. It is a matter for each jurisdiction whether "hospital" and "hospital service provider" or other appropriate terms are used. The provision should extend to private clinics and other non-hospital facilities where sterilisation procedures may be carried out.*
- 4. Under the WA Hospitals and Health Services Act 1927, hospitals include private hospitals and day hospital facilities.]*

## **Part 3 — Authorisation of Tribunal**

### **Division 1 — Conferral and exercise of jurisdiction**

#### **7. Conferral and exercise**

5 The Tribunal has jurisdiction to authorise a sterilisation procedure to be carried out on a child with an intellectual disability and must exercise that jurisdiction in accordance with this Division.

#### **8. Constitution**

10 For the purpose of exercising that jurisdiction, the Tribunal must be constituted by —

- (a) a judicial member or a member with legal experience; and
- (b) a member who is a medical practitioner registered under the *Medical Act 1894* as a specialist in paediatrics; and
- 15 (c) a member who has extensive knowledge of, or experience with, children with intellectual disabilities.

20 *[1. For the purpose of hearing an application for authorisation of a sterilisation procedure, the Tribunal should be constituted by a lawyer, a paediatrician and a person with knowledge or experience of children with intellectual disabilities.*

*2. Under the WA State Administrative Tribunal Act 2004, a judicial member is the President (who is a Supreme Court judge) or a Deputy President (who is a District Court judge).]*

#### **9. Matters Tribunal must be satisfied of**

25 The Tribunal must not authorise the sterilisation procedure unless satisfied that —

- (a) because of the child's intellectual disability, the child is incapable of giving informed consent to the sterilisation procedure; and

- (b) the child is unlikely to regain or attain the capacity to give informed consent; and
- (c) the sterilisation procedure is in the best interests of the child.

5 **10. Best interests of child**

(1) In this section —

“alternatives”, to a sterilisation procedure, include —

- (a) surgical procedures or other medical treatments that do not have the effect of permanent infertility; and
- 10 (b) counselling, education, training, supervision and other forms of personal assistance.

(2) Subject to this section, in deciding whether the sterilisation procedure is in the best interests of the child, the Tribunal must —

- 15 (a) ensure the child is treated in a way that respects the child’s human worth and dignity; and
- (b) as far as practicable, seek the child’s wishes and views and take them into account; and
- 20 (c) as far as practicable, seek the wishes and views of each of the following persons and take them into account —
  - (i) the parents and guardians of the child;
  - (ii) if a person who is not the child’s parent or guardian is responsible for the day-to-day care of the child — that person;
  - 25 (iii) any person appointed under section 15 to represent the interests of the child;
  - (iv) any other person the Tribunal considers has a sufficient interest in the child’s wellbeing;
- and
- 30 (d) take into account any information given to the Tribunal by any health care provider of the child; and

- (e) take into account the following —
- (i) the child's wellbeing;
  - (ii) the alternatives to the sterilisation procedure that are available or likely to become available in the foreseeable future;
  - (iii) the nature and extent of any significant risks (whether short or long-term) associated with the sterilisation procedure and the alternatives that are available;
  - (iv) whether all practicable alternatives to the sterilisation procedure have been considered or trialled and will not or have failed to alleviate the situation so that the child can lead a life in keeping with the child's needs and capacities;
  - (v) whether the sterilisation procedure is necessary to enable the child to lead a life in keeping with the child's needs and capacities;
  - (vi) the likely consequences for the child if the sterilisation procedure is not carried out;
- and
- (f) take into account any other relevant matters.
- (3) For the purposes of subsection (2)(b), the child's wishes and views may be expressed —
- (a) orally; or
  - (b) in writing; or
  - (c) by conduct; or
  - (d) by a combination of any of those means.
- (4) The sterilisation procedure is not in the best interests of the child if the procedure is to be carried out for one or more of the following reasons and for no other reason —
- (a) eugenic reasons;

- (b) to remove the risk of pregnancy resulting from sexual abuse;
- (c) because it is a convenient contraceptive or menstruation management measure.

5 [ *The effect of clause 10(4) is that the Tribunal may authorise a sterilisation procedure to be carried out if the reasons for doing so include a reason in paragraph (a), (b) or (c) as long as the procedure is also in the best interests of the child.* ]

## **Division 2 — Procedural matters generally**

### 10 **11. Procedure generally**

This Division applies in relation to applications and proceedings under this Part in addition to the provisions of the *State Administrative Tribunal Act 2004*.

15 [ *Under section 5 of the WA State Administrative Tribunal Act 2004, if there is any inconsistency between this Division and the provisions of that Act, this Division will prevail.* ]

### **12. Accessibility of proceedings**

20 A proceeding under this Part must be conducted so as to make it as accessible as practicable to all parties to the proceeding, including the child.

[*1. It is assumed that the body on which jurisdiction is conferred will have the following characteristics.*

- 25 • *It must have to act fairly but with as little formality and technicality as possible. See for example sections 9 and 32 of the WA State Administrative Tribunal Act 2004.*
- *It must have the power to authorise a sterilisation procedure subject to conditions and to give directions about any sterilisation procedure it authorises. See for example section 73 of the WA State Administrative Tribunal Act 2004.*
- 30 • *It must have to give reasons for its decisions. See for example section 77 of the WA State Administrative Tribunal Act 2004. If not, provisions to that effect will need to be included.*

- 5                   2. *Clauses 13 to 18 have been drafted as stand-alone provisions. They deal with the specific procedural matters in the Working Group's instructions and are not intended to be a complete procedural scheme. Subject to the comments in relation to clause 15, each jurisdiction will need to modify those provisions in accordance with the procedural rules of the body on which jurisdiction is conferred. When making any modifications, jurisdictions need to bear in mind clause 12.]*

**13. Application for authorisation**

- 10           (1) Subject to section 14, an application for authorisation under section 7 may be made by any of the following —
- (a) a parent of the child;
  - (b) a guardian of the child;
  - (c) the Public Advocate;
  - (d) a health care provider of the child;

15           (e) any other person the Tribunal considers has a sufficient interest in the child's wellbeing.
- (2) The applicant must give written notice of the application to —
- (a) each of the child's parents and guardians; and
  - (b) if another person is responsible for the day-to-day care of the child — that person.

20
- (3) The notice must inform the person to whom it is given that the person —
- (a) is a party to the proceeding in respect of the application; and
  - (b) has a right to appear at any hearing in the proceeding.

25

30           *[ Under section 97(1)(a) of the WA Guardianship and Administration Act 1990, the Public Advocate's functions include appearing before the State Administrative Tribunal if the Public Advocate thinks fit or is required to do so by the Tribunal. Equivalent officeholders in other jurisdictions may have similar functions.]*

**14. Leave to apply required if person has applied previously**

- 5
- (1) Subsection (2) applies if a person has ever made an application to any court or tribunal of the Commonwealth or a State or Territory for authorisation for a sterilisation procedure to be carried out on the child.
- (2) The person is not entitled to make an application under section 13 without the leave of the Tribunal.

**15. Representation of child**

- 10
- (1) In this section —
- “appropriate professional discipline”** includes social work, child health and disability advocacy;
- “legal practitioner”** has the meaning given to that term in the *Legal Practice Act 2003* section 3.
- 15
- (2) The Tribunal —
- (a) must appoint a legal practitioner who has appropriate experience to represent the interests of the child in the proceeding; and
- 20
- (b) may appoint a person who has qualifications or experience in another appropriate professional discipline to work with the legal practitioner in representing the interests of the child.
- (3) However, the Tribunal must not appoint under subsection (2)(a) or (b) a person who —
- 25
- (a) is entitled to be a party to the proceeding; or
- (b) represents a party to the proceeding.

*[1. All jurisdictions must include subclause (2)(a) as a minimum requirement. The nature and extent of the experience the legal practitioner is required to have is a matter for each jurisdiction.]*

2. *Jurisdictions may wish to include subclause (2)(b) as well. The kinds of qualifications and nature and extent of the experience the professional is required to have are matters for each jurisdiction.*

5 3. *Under the WA Legal Practice Act 2003, a legal practitioner must be admitted to practice but is not required to hold a practice certificate. A local practitioner under that Act is required to hold a practice certificate.]*

**16. Intervention by Equal Opportunity Commissioner**

10 The Equal Opportunity Commissioner may, with the leave of the Tribunal, intervene in the proceeding.

*[ Each jurisdiction should ensure there is an appropriate procedure for giving notice of the application to the Equal Opportunity Commissioner or equivalent statutory officeholder.]*

**17. Parties to proceeding**

15 Each of the following persons is a party to the proceeding —

- (a) the applicant;
- (b) the child;
- (c) a person entitled to be notified of the application under section 13(2);
- 20 (d) if given leave to intervene under section 16 — the Equal Opportunity Commissioner.

**18. Referral of matter for investigation and report**

- (1) The Tribunal may refer a matter relating to the proceeding to any of the following persons for investigation and report —
  - 25 (a) the chief executive officer of a department of the Public Service;
  - (b) the Public Advocate;
  - (c) any other person.

- (2) The person must investigate and report to the Tribunal on the matter by the date or within the period specified by the Tribunal.
- 5 (3) If the Tribunal receives the report by that date or within that period, the Tribunal must not determine a question relating to the matter until it has considered the report.
- (4) 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.
- 10 *[1. The list in subclause (1) will need to be tailored for each jurisdiction.*
- 2. Section 5 of the WA Interpretation Act 1984 defines “person” to include a public body and a body corporate or unincorporate. Other jurisdictions may wish to refer expressly to persons and bodies.]*

## **Part 4 — Miscellaneous matters**

### **19. Jurisdiction of Family Court and Supreme Court not affected**

5 This Act does not affect the jurisdiction of the Family Court [of Australia] or the Supreme Court to authorise a sterilisation procedure to be carried out on a child with an intellectual disability.

10 *[1. As noted previously, the Bill is not intended to exclude the parens patriae jurisdiction of superior courts. Any sterilisation procedure ordered by a superior court exercising its parens patriae jurisdiction will be lawful. Each jurisdiction should consider whether it is necessary to include a reference in this clause to its Supreme Court to ensure that the Court's parens patriae jurisdiction is not affected.*

15 *2. WA will need to consider whether the exclusive, non-federal jurisdiction conferred on the WA Family Court by section 36(2) and (8) of the WA Family Court Act 1997 affects the WA Supreme Court's parens patriae jurisdiction. In addition, it may be desirable to amend those provisions to acknowledge the Tribunal's jurisdiction.]*

### **20. Regulations**

20 The Governor may make regulations prescribing matters —  
(a) required or permitted to be prescribed by this Act; or  
(b) necessary or convenient to be prescribed for giving effect to this Act.

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### COMMENTS