Family Law Council

The Hon Phillip Ruddock MP,
Attorney-General
Parliament House
Canberra Act 2600

Dec 6th 2006

Dear Attorney,

Children with Intellectual Disabilities (Regulation of Sterilisation Bill) 2006

The Family Law Council was invited to comment on this draft Bill which is on the agenda for SCAG. We only had time for a limited discussion at our last meeting in Perth, and it is fair to say that there was a significant difference of opinion amongst its members. Some members had no problems with the draft Bill. Others, of whom I was one, had serious concerns about whether it is appropriately drafted to achieve its policy intent. As a response was required within a limited time-frame, it was not possible for the Council as a whole to reach a common view.

Accordingly, while I am not presenting a position on behalf of the Council as a whole, I thought it would be appropriate to write to you to record the concerns of those members of Council who believe the protections for young women from non-therapeutic and unnecessary sterilisation procedures are inadequate in this draft Bill. Some significant human rights and child protection issues are involved.

The particular concern is that if uniform state and territory legislation were drafted on the lines proposed, it would lead to a diminution in the protection of vulnerable young women and would involve a significant departure from the principles adopted by the High Court in affirming the jurisdiction of federal courts in this area. The High Court insisted that a court authorisation was required for *all* children as a procedural safeguard, not just 'intellectually disabled' children.

Background: The policy intent

The policy intent of the Bill, as we understand it, is to give a national framework for the protection of intellectually disabled young women from unnecessary and non-therapeutic sterilisations in accordance with the principles laid down by the High Court in *Re Marion*

(*Secretary, Dept of Health and Community Services v J.M.B. and S.M.B.* (1992) 175 CLR 218.). It is considered that this protection is better achieved through state and territory legislation than relying on applications being made to courts exercising Family Law Act jurisdiction. Such legislation already exists in NSW.

The draft legislation

The draft legislation however, is confined to 'intellectually disabled' children. One of the fundamental issues that is not yet determined in the drafting of this legislation is how to define intellectual disability. Section 4 indicates that a uniform definition is to be preferred but does not offer such a definition. Such a definition would indeed be hard to provide. Decision-making capacity, and indeed the capacity to raise a child, is on a spectrum. There is no marker below which one can readily define a person as having an intellectual disability for the purposes of consent to medical treatment and above which it can be assumed that the person has such a capacity. As the majority judges in the High Court said in *Re Marion*, the intellectually disabled are a heterogeneous group (at 238-39). It follows that any proposed definition of intellectual disability is likely to be highly problematic.

The issue can readily be avoided by defining the prohibition on non-therapeutic sterilisation as applying to all children under 18. This is the position in NSW: Children and Young Persons (Care and Protection) Act 1998, s.175. Of course, intellectually disabled young women are the group most obviously in need of such protection, however, the majority of the High Court in *Re Marion* insisted that the consent of a court was needed in relation to *all* children because of the magnitude of the risk of making the wrong decision either about the capacity of a young woman to consent (or to refuse to consent) to such an operation or about what would be in the best interests of a young woman who does not have that capacity (majority judges at 249-50). Sterilisation operations were considered to be a special category of medical treatment because of the grave and irreversible nature of such an operation. The majority judges said that court authorisation was in essence, a procedural safeguard (at 249).

The present Bill confines that procedural safeguard to those children under 18 who fall within the definition of being 'intellectually disabled' however that is to be defined. This is a substantial retreat from the position adopted by the High Court in *re Marion* and by statute in NSW that the consent of a court or tribunal is required for all cases of non-therapeutic sterilisation of a minor.

In summary, the problem with confining the proposed legislation to "intellectually disabled" children (even though they are clearly the target group for protection), is two-fold.

1. As noted above, it involves very complex problems of definition of intellectual disability. Where is the boundary-line to be drawn and who gets to decide whether a young woman has a sufficiently serious disability that a court application is required? What criteria should govern that decision whether or not a court application is necessary?
2. The current drafting raises the question of whether a parent may lawfully give consent to a non-therapeutic operation of a minor who is not competent to make her own decision but who is deemed to fall outside of the definition of intellectual disability to be used in the legislation. This opens up an area of controversy and uncertainty that was resolved by the High Court in *Re Marion*.

Insisting that court approval is required for a sterilisation operation on any child under 18 other than where the conditions in the draft Bill are satisfied (in s.5) is both consistent with the present law as laid down by the High Court and represents sensible policy. Why would any doctor be justified in performing a sterilisation on a healthy teenage girl, without this being the necessary collateral effect of the treatment of a serious disease, based upon the consent of the young woman concerned? Arguably, any doctor who performed such an operation in these circumstances would be committing a most serious breach of his or her ethical obligations towards the patient.

We hope that you will draw these concerns of some members of the Council to the attention of your colleagues on the Standing Committee of Attorneys-General.

Yours sincerely

Professor Patrick Parkinson
Chairperson