

Chapter 3

Legal frameworks relevant to the sterilisation of people with disabilities in Australia

The international human rights framework

3.1 Australia's regulation of the involuntary or coerced sterilisation of persons with disabilities is influenced by a network of international treaties that seek to protect the rights of, and promote the highest attainable standards of health for, persons with disabilities.¹ As identified by submitters to the inquiry, the international human rights framework includes numerous treaties that expressly specify the rights of individuals. Relevant treaties include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.² While not as commonly cited, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment were also noted as relevant.³

3.2 As a signatory to these treaties, Australia has chosen to be bound by the treaty requirements. Accordingly, Australia is obligated to give good faith effect to their terms.⁴ As Australian Lawyers for Human Rights submitted:

Australia has ratified each of the above international legal Conventions and is, therefore, obliged to ensure that the rights contained in each of the above Conventions are respected and protected, including the rights of people with disabilities.⁵

3.3 What follows is an overview of key provisions of treaties identified as relevant to Australia's regulation of the sterilisation of persons with disabilities, highlighting key aspects of international law as identified by submitters to the inquiry.

1 Office of the United Nations High Commissioner for Special Procedures of the Human Rights Committee, AL Health (2002–7) G/SO 214 (89–15), 18 July 2011, p. 2, as cited in Women With Disabilities Australia, *Submission 49*, Attachment 1, p. 86.

2 See, for example, Advocacy for Social Inclusion, *Submission 35*, p. 5; Australian Association of Developmental Disability Medicine Inc., *Submission 59*, p. 1; Australian Lawyers for Human Rights, *Submission 41*, p. 5; Adult Guardian of Queensland and the Public Advocate of Queensland, *Submission 19*, p. 2.

3 Law Institute of Victoria, *Submission 79*, p. 6; Women With Disabilities Australia, *Submission 49*, pp. 58–59, 68.

4 *Commonwealth v Tasmania (the Tasmanian Dam Case)* (1983) 158 CLR 1, 219 – 220 (per Brennan J).

5 Australian Lawyers for Human Rights, *Submission 41*, p. 5.

The Convention on the Rights of Persons with Disabilities

3.4 The Convention on the Rights of Persons with Disabilities seeks to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities'.⁶ Notably, the preamble declares that 'discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person', and emphasises 'the need to incorporate a gendered perspective in all efforts to promote the full enjoyment of human rights and fundamental freedoms by persons with disabilities'.⁷

3.5 Article 12 provides that persons with disabilities have the right to legal recognition, and to enjoy legal capacity, on an equal basis with others. This right includes access to necessary support to exercise their legal capacity. Article 17 declares that '[e]very person with disabilities has the right to respect for his or her physical and mental integrity on an equal basis with others'. This principle underscores the direction in Article 23 for States Parties to take 'effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others'. Article 25 notes the relevance of obtaining free and informed consent. Specifically, clause (d) of Article 25 states:

[In particular, States Parties shall] Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care.⁸

3.6 Submitters also drew attention to Articles 4 to 7, which collectively reiterate the State's obligation to protect the equality of all persons before the law. Article 4 makes clear that the State's obligation to give effect to the rights expressed in the treaty may require legislative and administrative action, and the evaluation of policies and programs. Articles 5, 6 and 7 direct States to give particular consideration to ensuring equal access for women and children. Article 16 was also noted. This Article directs States to take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home,

6 Convention on the Rights of Persons with Disabilities, Article 1, United Nations, *Convention on the Rights of Persons with Disabilities*, <http://www.un.org/disabilities/convention/conventionfull.shtml> (accessed 3 May 2013).

7 Convention on the Rights of Persons with Disabilities, clause h, clause s, United Nations, *Convention on the Rights of Persons with Disabilities*, <http://www.un.org/disabilities/convention/conventionfull.shtml> (accessed 3 May 2013).

8 Convention on the Rights of Persons with Disabilities, Article 25(d), United Nations, *Convention on the Rights of Persons with Disabilities*, <http://www.un.org/disabilities/convention/conventionfull.shtml> (accessed 3 May 2013).

from all forms of exploitation, violence and abuse. Article 16 specifically notes the potential for gender-based exploitation, violence and abuse.⁹

3.7 It was put to the committee that the Convention has the effect that 'an individual's right to decision-making cannot be substituted by decision-making of a third party'.¹⁰ However, Australia's obligations are shaped by reservations made at the time Australia entered into the Convention. Australia's consent to the provisions of the Convention on the Rights of Persons with Disabilities was not without caveats. In entering to the treaty, Australia declared its view that the Convention allows for substituted decision-making and compulsory medical treatment:

Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards...Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards.¹¹

3.8 Australia's reservation seems to reflect the objects of the largely superseded Article 7 of General Assembly Resolution 2856 (XXVI) (1971). The resolution, using the dated language of that time, considered the possibility of a need for third-party involvement in decisions affecting persons with intellectual disabilities:

Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities.¹²

9 Convention on the Rights of Persons with Disabilities, Articles 4, 5, 6, 7, 16, United Nations, *Convention on the Rights of Persons with Disabilities*, <http://www.un.org/disabilities/convention/conventionfull.shtml> (accessed 3 May 2013). See, for example, Associate Professor Lee Ann Basser, *Submission 61*, pp. 2–3; Australian Human Rights Commission, *Submission 5*, p. 7.

10 Women With Disabilities Australia, *Submission 49*, p. 56.

11 United Nations, *United Nations Treaty Collection*, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en#EndDec (accessed 3 May 2013).

12 Declaration on the Rights of Mentally Retarded Persons, University of Minnesota, Human Rights Library, *Declaration on the Rights of Mentally Retarded Persons*, <http://www1.umn.edu/humanrts/instreet/t1drmrp.htm> (accessed 7 May 2013); United Nations enable, *Developmental and psychiatric disabilities*, <http://www.un.org/esa/socdev/enable/disdevelopmental.htm> (accessed 7 May 2013).

The Convention on the Rights of the Child

3.9 The Convention on the Rights of the Child (the CRC) commits Australia to respect and ensure the rights of every Australian child. The CRC makes clear that rights equally apply to every child regardless of the child's, or his or her parents', race, colour, sex, language, religion, political opinion, national, ethnic or social origin, property, disability, birth or other status. The CRC further directs that actions concerning children undertaken by courts of law shall have as their primary consideration the child's best interests.¹³ Article 37 requires States Parties to ensure that no child is subject to torture or other cruel, inhuman or degrading treatment or punishment.¹⁴ Article 19 enjoins States to take all appropriate legislative, administrative, social and educational measures to protect children from all forms of physical or mental violence.¹⁵

3.10 Article 5 makes specific provision for the recognition of the responsibilities of a child's parents or guardians in relation to the exercise and implementation of a child's rights:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.¹⁶

3.11 Article 3(2) also directs States Parties to consider the rights and duties of a child's parents or guardians:

States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally

13 Convention on the Rights of the Child, Articles 2 and 3, available at Office of the High Commissioner for Human Rights, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (accessed 3 May 2013).

14 Convention on the Rights of the Child, Article 37, available at Office of the High Commissioner for Human Rights, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (accessed 3 May 2013).

15 Convention on the Rights of the Child, Article 19, available at Office of the High Commissioner for Human Rights, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (accessed 3 May 2013).

16 Convention on the Rights of the Child, Article 5, available at Office of the High Commissioner for Human Rights, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (accessed 3 May 2013).

responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.¹⁷

3.12 Australia has made one reservation under the CRC, however, the reservation does not relate to the Articles relevant to the sterilisation of children.¹⁸

The Convention on the Elimination of All Forms of Discrimination against Women

3.13 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 'affirms women's rights to reproductive choice'. CEDAW also requires State Parties to take all appropriate measures to eliminate discrimination against women in the area of health care. This requirement extends to ensuring access to healthcare services such as services relating to family planning.¹⁹

3.14 In accordance with Article 24, through becoming a signatory to CEDAW Australia undertook to 'adopt all necessary measures at the national level aimed at achieving the full realisation of the rights recognised in the...Convention'.²⁰ In entering into CEDAW, the Government specified two reservations. However, neither affect the Articles relevant to the sterilisation of persons with disabilities.²¹

17 Convention on the Rights of the Child, Article 3(2), available at Office of the High Commissioner for Human Rights, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (accessed 3 May 2013).

18 Article 37 requires any child in prison to be separated from adults unless it is considered to be in the child's best interest to do otherwise. In signing the treaty, Australia advised that it only accepted the obligation to detain children in facilities separate from adults to the extent that responsible authorities consider this to be feasible and consistent with the child's right to maintain contact with their families, having regard to the geography and demography of Australia.

19 Convention on the Elimination of All Forms of Discrimination against Women, Articles 12 and 16, United Nations, Division for the Advancement of Women, Department of Economic and Social Affairs, <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (accessed 8 April 2013).

20 Convention on the Elimination of All Forms of Discrimination against Women, Article 24, United Nations, Division for the Advancement of Women, Department of Economic and Social Affairs, <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (accessed 8 April 2013).

21 At the time of signing CEDAW, Australia made two reservations. First: 'The Government of Australia states that maternity leave with pay is provided in respect of most women employed by the Commonwealth Government and the Governments of New South Wales and Victoria. Unpaid maternity leave is provided in respect of all other women employed in the State of New South Wales and elsewhere to women employed under Federal and some State industrial awards. Social Security benefits subject to income tests are available to women who are sole parents.' Second: 'The Government of Australia advises that it is not at present in a position to take the measures required by article 11 (2) to introduce maternity leave with pay or with comparable social benefits throughout Australia.'

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

3.15 Women With Disabilities Australia (WWDA) highlighted Australia's obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²² Article 2 directs State Parties to take effective legislative, administrative, judicial and other measures to prevent acts of torture in any territory under its jurisdiction.²³

3.16 The Convention adopts a narrow definition of torture that focuses on the circumstances in which severe pain or suffering is intentionally afflicted:

For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as:

- obtaining from him or a third person information or a confession;
- punishing him for an act he or a third person has committed or is suspected of having committed;
- intimidating or coercing him or a third person; or
- for any reason based on discrimination of any kind

when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.²⁴

The International Covenant on Civil and Political Rights

3.17 The International Covenant on Civil and Political Rights prohibits torture, and cruel, inhuman or degrading treatment. This includes an express prohibition on subjecting a person to medical and scientific experimentation without his or her free

22 Women With Disabilities Australia, *Submission 49*, p. 58.

23 Australian Government, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - Human rights at your fingertips - Human rights at your fingertips*, <http://www.humanrights.gov.au/convention-against-torture-and-other-cruel-inhuman-or-degrading-treatment-or-punishment-human-rights> (accessed 7 May 2013).

24 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1; Australian Government, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - Human rights at your fingertips - Human rights at your fingertips*, <http://www.humanrights.gov.au/convention-against-torture-and-other-cruel-inhuman-or-degrading-treatment-or-punishment-human-rights> (accessed 7 May 2013).

consent. The Covenant also recognises the right to privacy and the right to marry and found a family, and mandates special protections for children.²⁵

The International Covenant on Economic, Social and Cultural Rights

3.18 Article 10 of the International Covenant on Economic, Social and Cultural Rights directs that 'special protection should be accorded to mothers during a reasonable period before and after childbirth'. Article 12 recognises the 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.²⁶

Treaty interpretation – United Nations' committees and officials

3.19 According to the Human Rights Committee, it is the role of United Nations' committees and officials to provide guidance about treaty provisions to avoid doubt about their scope and meaning. Such guidance is provided in *General Comments*, which 'are normally directed at States parties and usually elaborate the Committee's view of the content of the obligations assumed by States'.²⁷ United Nations' committees have commented on several Articles identified as relevant to the sterilisation of persons with disabilities. The following provides an overview of the broad approach adopted by United Nations committees. Comments specifically relating to Australian law and practice are provided in chapter 4.

The Convention on the Rights of Persons with Disabilities

3.20 Commenting on the implementation of the Convention by States Parties, the Committee on the Rights of Persons with Disabilities has exhorted States Parties to 'abolish the administration of medical treatment, in particular sterilization, without the full and informed consent of the patient'.²⁸

25 International Covenant on Civil and Political Rights, Articles 7, 17, 23, and 24; available at Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (accessed 3 May 2013).

26 International Covenant on Economic, Social and Cultural Rights, available at Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> (accessed 3 May 2013).

27 United Nations, Human Rights Committee, *Human Rights Committee – Working Methods*, <http://www2.ohchr.org/english/bodies/hrc/workingmethods.htm#a9> (accessed 8 April 2013).

28 See, for example, Committee on the Rights of Persons with Disabilities, *Consideration of reports submitted by States parties under article 35 of the Convention, Concluding observations of the Committee on the Rights of Persons with Disabilities–Spain*, 19 October 2011, p. 6.

The Convention on the Rights of the Child

3.21 The Committee on the Rights of the Child has defined physical violence, for the purposes of Article 19, to include forced sterilisation.²⁹ The committee has also commented on the application of the child's best interest test, concluding that any interpretation of 'child's best interests' must be consistent with all rights and principles established by the CRC:

The Committee emphasizes that the interpretation of a child's best interests must be consistent with the whole Convention, including the obligation to protect children from all forms of violence. It cannot be used to justify practices, including corporal punishment and other forms of cruel or degrading punishment, which conflict with the child's human dignity and right to physical integrity. An adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention.³⁰

3.22 In relation to the sterilisation of children with disabilities, the Committee on the Rights of the Child has urged States Parties to prohibit the forced sterilisation of children with disabilities:

The Committee is deeply concerned about the prevailing practice of forced sterilisation of children with disabilities, particularly girls with disabilities. This practice, which still exists, seriously violates the rights of the child to her or his physical integrity and results in adverse life-long physical and mental health effects. Therefore, the Committee urges States Parties to prohibit by law the forced sterilisation of children on the grounds of disability.³¹

The Convention on the Elimination of All Forms of Discrimination against Women

3.23 The committee was advised that the Committee on the Elimination of All Forms of Discrimination against Women has 'clearly articulated the link between forced sterilisation and violation of the right to reproductive self-determination'.³² Further, it was submitted that the United Nations committee 'characterises forced sterilisation as a form of violence against women, and directs States to ensure that forced sterilisations do not occur'.³³

29 Committee on the Rights of the Child, *General comment No. 13 (2011)*, p. 10, http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf (accessed 7 May 2013).

30 Committee on the Rights of the Child, *General comment No. 13 (2011)*, p. 23, http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf (accessed 7 May 2013).

31 United Nations, Committee on the Rights of the Child, *General Comment No. 9 (2006): The rights of children with disabilities*, CRC/C/GC/9, 27 February 2007, Article 60.

32 Women With Disabilities Australia, *Submission 49*, p. 60.

33 Women With Disabilities Australia, *Submission 49*, p. 60.

3.24 Commenting on Article 16 of the Convention, (regarding the elimination of discrimination against women in matters relating to marriage and family relations) the Committee expressed its view of the effects of compulsory sterilisation and abortion:

Compulsory sterilization or abortion adversely affects women's physical and mental health, and infringes the right of women to decide on the number and spacing of their children.³⁴

3.25 The United Nations Committee has formed the view that Article 16 also provides a right to access education and family planning services, arguing that such services can reduce the incidence of forced sterilisations:

Some reports disclose coercive practices which have serious consequences for women, such as forced pregnancies, abortions or sterilization. Decisions to have children or not, while preferably made in consultation with spouse or partner, must not nevertheless be limited by spouse, parent, partner or Government. In order to make an informed decision about safe and reliable contraceptive measures, women must have information about contraceptive measures and their use, and guaranteed access to sex education and family planning services, as provided in article 10 (h) of the Convention.³⁵

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

3.26 As noted by WWDA, the Committee Against Torture has criticised the involuntary sterilisation of women.³⁶ However, in keeping with the ambit of the Convention, the Committee's comments are focused on incidences where sterilisation appears to be part of a broader racial discrimination agenda. For example, calls for the Czech Republic and Slovakia to impartially investigate allegations of the involuntary sterilisation of Roma women were made in the context of condemning attacks on the Roma population.³⁷ Similarly, the committee's 2013 reprimand of Peru for sterilisations that occurred between 1996 and 2000 was made in the context of

34 Committee on the Elimination of All Forms of Discrimination against Women, *General recommendation No. 19*, paragraph 22, <http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html> (accessed 7 May 2013).

35 Committee on the Elimination of All Forms of Discrimination against Women, *General recommendation No. 21*, paragraph 22, <http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html> (accessed 7 May 2013).

36 Women With Disabilities Australia, *Submission 49*, pp. 59–60.

37 Committee Against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention, Concluding observations of the Committee against Torture–Slovakia*, 17 December 2009, p. 4, <http://www2.ohchr.org/english/bodies/cat/sessions.htm> (accessed 7 May 2013); Committee Against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention, Concluding observations of the Committee against Torture–Czech Republic*, 13 July 2012, pp. 4–5, <http://www2.ohchr.org/english/bodies/cat/sessions.htm> (accessed 7 May 2013).

allegations that the sterilisations were part of a broader policy of targeting ethnic minorities.³⁸ In 2005, the Committee reviewed Australia's implementation of the Convention. In contrast to comments contained in other States' reviews, the Committee did not comment on any sterilisation procedures occurring in Australian jurisdictions.³⁹

3.27 As WWDA,⁴⁰ Australian Lawyers for Human Rights,⁴¹ and others submitters citing WWDA's analysis,⁴² noted, relevant United Nation's comments are also found in reports of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Most recently, the 2013 *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* focuses on 'abusive practices that occur under the auspices of health care policies', and 'abuse in healthcare settings that may cross the threshold of mistreatment that is tantamount to torture or cruel, inhuman or degrading treatment or punishment'.⁴³ In considering the issue, the Special Rapporteur sought to identify 'abuses that exceed the scope of violations of the right to health and could amount to torture and ill-treatment'.⁴⁴ The report recognises a growing consensus among the international community that torture may occur in contexts other than interrogation, punishment or intimidation of a detainee.⁴⁵

3.28 The Special Rapporteur noted that discrimination on the grounds of disability:

38 Committee Against Torture, *Consideration of reports submitted by States Parties under article 19 of the Convention, Concluding observations of the Committee against Torture–Peru*, 21 January 2013, pp. 5–6, <http://www2.ohchr.org/english/bodies/cat/sessions.htm> (accessed 7 May 2013).

39 Committee Against Torture, *Consideration Of Reports Submitted By States Parties Under Article 19 of the Convention: Concluding observations of the Committee against Torture–Australia*, 22 May 2008 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/421/66/PDF/G0842166.pdf?OpenElement> (accessed 7 May 2013).

40 Women With Disabilities Australia, *Submission 49*, p. 8.

41 Australian Lawyers for Human Rights, *Submission 41*, p. 5.

42 See, for example, Mr Graeme Innes, Disability Discrimination Commissioner, Australian Human Rights Commission, *Committee Hansard*, 27 March 2013, p. 34.

43 Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/22/53, 1 February 2013, p. 1.

44 Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/22/53, 1 February 2013, p. 2.

45 Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/22/53, 1 February 2013, p. 4.

is particularly relevant in the context of medical treatment, were serious violations and discrimination...may be defended as 'well intended' on the part of health-care professionals.⁴⁶

3.29 Focusing on situations of powerlessness and denial of legal capacity, the Special Rapporteur concluded:

medical treatments of an intrusive and irreversible nature, where lacking a therapeutic purpose, may constitute torture or ill-treatment when enforced or administered without the free or informed consent of the person concerned.⁴⁷

3.30 The report specifically warned against giving 'dubious grounds of medical necessity' priority over a person's legal capacity and right to provide, or withhold, free and informed consent.⁴⁸ Sterilisations performed for reasons of racial discrimination, 'coercive' family planning policies, and notions that certain persons, such as persons with disabilities, are 'unfit to bear children' were criticised.⁴⁹

3.31 The report concluded that the grounds on which a medical procedure can be performed without a person's free and informed consent should be the same for persons with or without a disability.⁵⁰ However, recommendations contained in the report do not include explicit calls for the prohibition of sterilisation without informed consent.

The International Covenant on Civil and Political Rights

3.32 The Australian Human Rights Commission advised that '[t]he Human Rights Committee has also recognised that involuntary or coerced sterilisation of women may breach the prohibition against torture in article 7 of the International Covenant on Civil and Political Rights.'⁵¹ Similarly, WWDA stated that the Human Rights Committee 'has clarified to State parties that forced sterilisation is in contravention of Articles 7, 14, 17 and 24 of the [International Covenant on Civil and Political Rights]'.⁵²

46 Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/22/53, 1 February 2013, p. 5.

47 Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/22/53, 1 February 2013, p. 7.

48 Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/22/53, 1 February 2013, p. 8.

49 Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/22/53, 1 February 2013, p. 11.

50 Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/22/53, 1 February 2013, p. 15.

51 Australian Human Rights Commission, *Submission 5*, p. 6.

52 Women With Disabilities Australia, *Submission 49*, p. 63.

3.33 In support of these statements, the committee was provided with the Human Rights Committee's *General Comment No. 28*, paragraphs 11 and 20. However, the General Comment does not contain an express condemnation of the practice of involuntary or coerced sterilisation. Rather, the text directs States to report on the incidence of sterilisation and other matters:

11. To assess compliance with article 7 of the Covenant, as well as with article 24, which mandates special protection for children, the Committee needs to be provided information on national laws and practice with regard to domestic and other types of violence against women, including rape. It also needs to know whether the State party gives access to safe abortion to women who have become pregnant as a result of rape. The States parties should also provide the Committee with information on measures to prevent forced abortion or forced sterilization. In States parties where the practice of genital mutilation exists information on its extent and on measures to eliminate it should be provided. The information provided by States parties on all these issues should include measures of protection, including legal remedies, for women whose rights under article 7 have been violated.⁵³

3.34 A similar direction is provided at paragraph 20:

20. States parties must provide information to enable the Committee to assess the effect of any laws and practices that may interfere with women's right to enjoy privacy and other rights protected by article 17 on the basis of equality with men. An example of such interference arises where the sexual life of a woman is taken into consideration in deciding the extent of her legal rights and protections, including protection against rape. Another area where States may fail to respect women's privacy relates to their reproductive functions, for example, where there is a requirement for the husband's authorization to make a decision in regard to sterilization; where general requirements are imposed for the sterilization of women, such as having a certain number of children or being of a certain age, or where States impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion. In these instances, other rights in the Covenant, such as those of articles 6 and 7, might also be at stake. Women's privacy may also be interfered with by private actors, such as employers who request a pregnancy test before hiring a woman. States parties should report on any laws and public or private actions that interfere with the equal enjoyment by women of the rights under article 17, and on the measures taken to eliminate such interference and to afford women protection from any such interference.⁵⁴

53 Human Rights Committee, *General Comment No. 28*, paragraph 11, <http://www.unhchr.ch/tbs/doc.nsf/0/13b02776122d4838802568b900360e80> (accessed 7 May 2013).

54 Human Rights Committee, *General Comment No. 28*, paragraph 20, <http://www.unhchr.ch/tbs/doc.nsf/0/13b02776122d4838802568b900360e80> (accessed 7 May 2013).

3.35 However, the Human Rights Committee has made clear its view on the need for 'free and effective legal representation' in cases concerning a person's legal capacity. The Committee has also noted its concern with the potentially negative consequences of the courts' authority to authorize procedures such as abortion and sterilization for women with disabilities who are considered to be without legal capacity. The committee's recommendation provides clear direction about court procedure in these cases. States are directed to provide free and effective legal representation for cases concerning a person's legal capacity, and to 'take appropriate measures to facilitate legal support to persons with disabilities in all matters impacting on their physical and mental health'.⁵⁵

International Covenant on Economic, Social and Cultural Rights

3.36 The Committee on Economic, Social and Cultural Rights has held that Article 14 of the International Covenant on Economic, Social and Cultural Rights defends a person's right to control one's health and body. This includes the right to sexual and reproductive freedom and the right to be free from interference, which has been defined to include non-consensual medical treatment.⁵⁶ Further, the committee has concluded that sterilisation of a woman with disabilities without her prior informed consent is a 'serious violation' of Article 10 of the Convention:

Women with disabilities also have the right to protection and support in relation to motherhood and pregnancy. As the Standard Rules state, 'persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood'. The needs and desires in question should be recognized and addressed in both the recreational and the procreational contexts. These rights are commonly denied to both men and women with disabilities worldwide. Both the sterilization of, and the performance of an abortion on, a woman with disabilities without her prior informed consent are serious violations of article 10 (2).⁵⁷

Thematic study on the issue of violence against women and girls and disability

3.37 The United Nations' interpretation of international obligations is also found in thematic studies. In its 2012 *Thematic study on the issue of violence against women and girls and disability*, the Human Rights Committee emphasised the importance of obtaining the person's consent prior to performing a sterilisation procedure. As the

55 Human Rights Committee, *Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding observations adopted by the Human Rights Committee at its 150 session, 9–27 July 2012–Lithuania*, p. 4, <http://www2.ohchr.org/english/bodies/hrc/hrcs105.htm> (accessed 7 May 2013).

56 United Nations, Committee on Economic Social and Cultural Rights, *General Comment No. 14 (2000)*, [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En) (accessed 8 April 2013).

57 United Nations, Committee on Economic Social and Cultural Rights, *General Comment No. 5*, [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/4b0c449a9ab4ff72c12563ed0054f17d?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4b0c449a9ab4ff72c12563ed0054f17d?Opendocument) (accessed 8 April 2013).

Committee noted, 'consent to treatment is one of the most important human rights issues relating to mental disability'. Accordingly, States are obligated to ensure that 'procedural safeguards protecting the right to informed consent are both watertight and strictly applied'.⁵⁸ These safeguards extend to children. The Human Rights Committee has directed States Parties to facilitate the genuine participation of children in processes affecting their development.⁵⁹ Further, the Committee has cast doubt on the use of 'best interests' tests, advising that 'international human rights standards...prohibit the coerced treatment of people suffering from intellectual disabilities, regardless of arguments of their "best interests"'.⁶⁰

The federal framework

3.38 Australia gives effect to its international treaty obligations through, federal, state and territory legislation. As noted in Article 28 of the International Covenant on Civil and Political Rights, human rights obligations in the Covenant are binding on Australia as a whole. Accordingly, the obligations must be given effect to at the Commonwealth and State and Territory levels.

3.39 In keeping with Australia's federal system of government, the Commonwealth government has recognised that the implementation of treaty provisions will be affected by constitutional powers and governing arrangements throughout all Australian jurisdictions. Express declarations to this effect are attached to Australia's ratification of the International Covenant on Civil and Political Rights, and the Convention on the Elimination of All Forms of Discrimination against Women:

Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent states. Implementation of the treaty throughout Australia will be affected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.⁶¹

58 Office of the United Nations High Commissioner for Human Rights, *Thematic study on the issue of violence against women and girls and disability: Report of the Office of the United National High Commissioner for Human Rights*, A/HRC/20/5, 30 March 2012, pp.10–11.

59 Office of the United Nations High Commissioner for Human Rights, *Thematic study on the issue of violence against women and girls and disability: Report of the Office of the United National High Commissioner for Human Rights*, A/HRC/20/5, 30 March 2012, p. 11.

60 Office of the United Nations High Commissioner for Human Rights, *Thematic study on the issue of violence against women and girls and disability: Report of the Office of the United National High Commissioner for Human Rights*, A/HRC/20/5, 30 March 2012, p. 10.

61 UN Treaty Collection, International Covenant on Civil and Political Rights, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec (accessed for July 2013).

Commonwealth

3.40 The Commonwealth's jurisdiction in child sterilisation cases was confirmed by the High Court of Australia in the 1992 case *Secretary, Department of Health and Community Services (NT) v JWB and SMB* (1992) 66 ALJR 300 (*Re Marion*). The High Court held that decisions about the non-therapeutic sterilisation of children fall outside of the scope of parental authority.⁶² Court authorisation is required.

3.41 The High Court identified two reasons for the finding that parents are unable to validly consent to the non-therapeutic sterilisation of their child:

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.⁶³

3.42 In commenting upon the consequences of a 'wrong decision', the High Court noted that:

[t]he gravity of the consequences of wrongly authorising a sterilisation flows both from the resulting inability to reproduce and from the fact of being acted upon contrary to one's wishes or best interests. The fact of violation is likely to have social and psychological implications concerning the person's sense of identity, social place and self-esteem.⁶⁴

3.43 The High Court confirmed that the Family Court of Australia's (Family Court) child welfare jurisdiction under section 67ZC of the *Family Law Act 1975* (Family Law Act) empowers the court to make orders for the sterilisation of a child. Before making an order, the Family Court must be satisfied that two conditions are met. First, the sterilisation is, in the circumstances of the particular case, in the child's best interests.⁶⁵ Second, alternative and less invasive procedures have failed or it is certain that no other procedure or treatment will work.⁶⁶

3.44 The High Court concluded that '[i]n the circumstances with which we are concerned, the best interests of the child will ordinarily coincide with the wishes of

62 The meaning of therapeutic and non-therapeutic sterilisation is considered in the previous chapter.

63 Mason C.J., Dawson, Toohey and Gaudron JJ, *Secretary, Department of Health and Community Services (NT) v JWB and SMB* (1992) 66 ALJR 300 (*Re Marion*), at 49.

64 Mason C.J., Dawson, Toohey and Gaudron JJ, *Secretary, Department of Health and Community Services (NT) v JWB and SMB* (1992) 66 ALJR 300 (*Re Marion*), at 51.

65 Mason C.J., Dawson, Toohey and Gaudron JJ, *Secretary, Department of Health and Community Services (NT) v JWB and SMB* (1992) 66 ALJR 300 (*Re Marion*), at 73; *Family Law Act 1975*, ss. 67ZC(2).

66 Mason C.J., Dawson, Toohey and Gaudron JJ, *Secretary, Department of Health and Community Services (NT) v JWB and SMB* (1992) 66 ALJR 300 (*Re Marion*), at 74.

the parents'.⁶⁷ However, it was also noted that whether sterilisation is in the child's best interests is a matter to be determined according to the circumstances of each case.⁶⁸

The best interests test

3.45 As noted in section 67ZC, sections 60CB to 60CG of the Family Law Act detail how the court is to determine the child's best interests. In addition, the Family Court has developed rules to assist the adjudication of applications for special medical procedures. These rules can be found in case law and the *Family Law Rules 2004* (Family Law Rules).

3.46 In the 1994 case *Re Marion (No. 2)* (1994) FLC 92-448, the Family Court endorsed consideration of the following factors to determine whether the procedure would be in the child's best interests:

- the particular condition of the child which requires the procedure or treatment;
- the nature of the procedure or treatment proposed;
- the reasons for which it is proposed that the procedure or treatment be carried out;
- the alternative courses of treatment available in relation to the condition;
- the desirability and effect of authorising the procedure or treatment proposed rather than available alternatives;
- the physical effects on the child and the psychological and social implications for the child of authorising or not authorising the proposed procedure or treatment;
- the nature and degree of any risk to the child of authorising or not authorising the proposed procedure or treatment; and
- the views expressed by the guardians of the child, a person who is entitled to the custody of the child, the person who is responsible for the daily care and control of the child, and the child.

3.47 Division 4.2.3 of the Family Law Rules imposes additional requirements for the conduct of proceedings for applications for 'special medical procedures', defined to include sterilisation procedures. The rules require applications for special medical procedures to include evidence from a medical, psychological or other relevant expert witness about the nature and purpose of the proposed medical procedure, the particular condition of the child, and the likely long-term physical, social and

67 Mason C.J., Dawson, Toohey and Gaudron JJ, *Secretary, Department of Health and Community Services (NT) v JWB and SMB* (1992) 66 ALJR 300 (*Re Marion*), at 76.

68 Mason C.J., Dawson, Toohey and Gaudron JJ, *Secretary, Department of Health and Community Services (NT) v JWB and SMB* (1992) 66 ALJR 300 (*Re Marion*), at 73.

psychological effects on the child if the procedure is, or is not, carried out. In addition, expert evidence must establish:

- the nature and degree of any risk to the child from the procedure;
- the reason the procedure is recommended instead of any available alternative and less invasive treatments;
- that the procedure is necessary for the welfare of the child;
- whether the child agrees to the procedure— if the child is capable of making an informed decision about the procedure;
- if the child is incapable of making an informed decision about the procedure— that the child is currently incapable of making an informed decision and is unlikely to develop sufficiently to be able to make an informed decision within the time in which the procedure should be carried out, or within the foreseeable future; and
- whether the child's parents or carer agree to the procedure.⁶⁹

3.48 The Family Court may appoint an independent children's lawyer (an ICL).⁷⁰ An ICL does not act on the child's instructions and is not the child's legal representative. Rather, an ICL is required to form an independent view of what is in the best interests of the child. An ICL must ensure that any views expressed by the child are fully put before the court.⁷¹ An ICL's costs are paid by the Commonwealth rather than the child's family. This issue is considered further in chapter 5.

Concurrent jurisdiction

3.49 The Family Court's jurisdiction exists concurrent with State and Territory legislation. That is, where State and Territory legislation regulates the involuntary or coerced sterilisation of children, the Family Court's jurisdiction continues to operate. Parents or guardians may seek orders in either jurisdiction.

3.50 Commenting in 1994, the Family Law Council summarised the effect of this concurrent jurisdiction. The Council noted that State and Territory tribunals or courts are unable to hear cases where the Family Court has already adjudicated the matter.⁷² Further concerns around the operation and expertise of the Family Court in child sterilisation cases are discussed in chapter 6. The committee has seriously considered the question of whether it is appropriate for the Family Court to continue hearing child sterilisation cases. At present, the committee concludes that it would not be appropriate for the jurisdiction to be removed. As the Commonwealth court, the

69 *Family Law Rules 2004*, r. 4.09.

70 *Family Law Act 1975*, s. 68L.

71 *Family Law Act 1975*, s. 68LA.

72 Family Law Council, *Sterilisation and other medical procedures of children*, November 1994, paragraph 3.30; *P v P* (1994) 120 ALR 545.

Family Court provides consistency for all Australian children regardless of where they live. It is the one court where the child residing in, for example, the Australian Capital Territory will be treated in the same way as a child living in, for example, Victoria. Accordingly, Family Court decisions can act as a benchmark for consistency and uniformity for all Australian children.

3.51 As the committee will discuss, it is concerned that this uniformity and consistency is lacking in State and Territory jurisdictions. Given the current inconsistency throughout the State and Territory legislation, the committee is concerned that were the Family Court's jurisdiction to be removed, protections of the child will depend on where the child lives. The committee is particularly concerned about the rights of children in jurisdictions which have not legislated to regulate child sterilisation cases.

State and Territory

3.52 Additional regulatory requirements in relation to sterilisation exist at the State and Territory level. Each State and Territory has the autonomy to determine its own rules and legislative frameworks. Accordingly, the requirements can differ across jurisdictions. Furthermore, State and Territory requirements for the sterilisation of adults with disabilities can differ from the requirements that apply to the sterilisation of children.

3.53 In addition to the legislative provisions, which are outlined below, the states and territories have adopted the *Protocol for Special Medical Procedures (Sterilisation)*. Developed in May 2009 by the Australian Guardianship and Administration Council (AGAC), the protocol has been endorsed by AGAC members, which include State and Territory guardianship Tribunals, Public Guardians, Adult Guardians and Public Advocates.⁷³ The protocol, which applies to both cases involving adult disabilities and cases involving children, is intended to promote consistency in like sterilisation cases regardless of the jurisdiction in which the case is heard.⁷⁴ Its objectives also include:

- promoting, enhancing, and protecting the best interests of the person;
- ensuring clarification of, and delineation between, what is in the best interests of the person and what is in the interests of person's caregivers;
- promoting positive outcomes for the person;
- providing the people involved an opportunity to raise and discuss all relevant issues; and

73 Australian Guardianship and Administration Council, *Submission 28*, p. 1.

74 Australian Guardianship and Administration Council, *Submission 28*, Attachment 1, *Protocol for Special Medical Procedures (Sterilisation)*, cl. 3.2.

- ensuring that sterilisation is a last resort, having tried or considered alternative and less invasive procedures.⁷⁵

3.54 AGAC advised that it considers the protocol to be consistent with Article 23 of the *Convention on the Rights of Persons with Disabilities*.⁷⁶

3.55 The following outlines of State and Territory regulatory frameworks are based on the legislation operative in each jurisdiction. Further details about the protocol are provided in chapter 5.

Australian Capital Territory

Child

3.56 The Australian Capital Territory (ACT) has not expressly conferred jurisdiction to hear child sterilisation cases on any ACT court or tribunal. In the ACT, families may only apply to the Family Court.

Adult

3.57 Part 5 of the *Guardianship and Management of Property Act 1991* authorises the ACT Civil and Administrative Tribunal to make orders to authorise prescribed medical procedures in certain circumstances. The Tribunal's authority applies in circumstances where a guardian has been appointed,⁷⁷ following the decision by the Tribunal that the person has impaired decision making ability for matters affecting the person's health or welfare.⁷⁸ A parent may be appointed the person's guardian. A person is taken to have impaired decision-making ability if their decision-making ability is impaired due to physical, mental, psychological or intellectual condition or state. A person may be found to have impaired decision-making ability even if the condition or state is not a diagnosable illness.⁷⁹

3.58 'Prescribed medical procedure' is defined to include reproductive sterilisation, hysterectomies, and medical procedures concerned with contraception.⁸⁰ The Tribunal may make an order consenting to the prescribed medical procedure if satisfied that the treatment would be in the person's best interests. To determine this, the Tribunal must take into account the person's wishes, insofar as they can be ascertained, the likely consequences were the procedure not carried out, the availability of alternative treatments and whether the treatment can be postponed because better treatments may

75 Australian Guardianship and Administration Council, *Submission 28*, Attachment 1, *Protocol for Special Medical Procedures (Sterilisation)*, cl. 3.2.

76 Australian Guardianship and Administration Council, *Submission 28*, p. 5.

77 *Guardianship and Management of Property Act 1991*, s. 69.

78 *Guardianship and Management of Property Act 1991*, s. 7.

79 *Guardianship and Management of Property Act 1991*, s. 5.

80 *Guardianship and Management of Property Act 1991*, Dictionary.

become available.⁸¹ The Tribunal must appoint the person's guardian, the public advocate or some other independent person as the person's representative.⁸²

3.59 If a person purports to provide consent to medical treatment but is not authorised to do so, the medical practitioner does not commit an offence if he or she acted in good faith and did not know, or could not reasonably be expected to know, that the person did not have authority to provide consent.⁸³

New South Wales

Child

3.60 In New South Wales, the sterilisation of children aged no more than 16 years is governed by section 175 of the *Children and Young Persons (Care and Protection) Act 1998*. The Act authorises the Guardianship Tribunal to consent to 'special medical treatment' for children in certain circumstances. 'Special medical treatment' is defined to include any medical treatment that:

- is intended to, or is reasonably likely to have the effect of, rendering the person permanently infertile;
- is conducted for the purpose of contraception or menstrual regulation, if such treatments have been declared by the regulations to be a special medical treatment; or
- is in the nature of a vasectomy or tubal occlusion.⁸⁴

3.61 The Guardianship Tribunal must not consent to treatment unless satisfied that it is necessary to save the child's life or to prevent serious damage to the child's psychological or physical health.⁸⁵ For these proceedings, a child has a right to legal representation.⁸⁶ However, the legislation does not direct the Guardianship Tribunal to consider whether the child is capable of consenting to the treatment.⁸⁷

3.62 It is an offence subject to a maximum penalty of imprisonment for seven years for a person to carry out special medical treatment without Tribunal authorisation. That is, a medical practitioner does not commit an offence if, in his or her opinion, the special medical procedure is necessary, as a matter of urgency, to save the child's life or to prevent serious damage to the child's health.⁸⁸ In addition, it

81 *Guardianship and Management of Property Act 1991*, ss. 70(3).

82 *Guardianship and Management of Property Act 1991*, ss. 70(2).

83 *Guardianship and Management of Property Act 1991*, s. 69.

84 *Children and Young Persons (Care and Protection) Act 1998*, ss. 175(5).

85 *Children and Young Persons (Care and Protection) Act 1998*, ss. 175(3).

86 *Children and Young Persons (Care and Protection) Act 1998*, ss. 175(4).

87 New South Wales Government, *Submission 66*, p. 3.

88 *Children and Young Persons (Care and Protection) Act 1998*, ss. 175(1).

is not an offence to conduct life-saving medical treatment even where infertility is an 'unwanted consequence'.⁸⁹

Adult

3.63 Part 5 of the *Guardianship Act 1987* authorises the Guardianship Tribunal to provide consent to 'special (medical) treatment' for persons who are 16 years of age or older and who are incapable of consenting to medical treatment.⁹⁰ A person is considered to be incapable of giving consent to the medical procedure if he or she is incapable of understanding the general nature and effect of the proposed treatment, or is incapable of indicating whether or not he or she consents or does not consent to the treatment.⁹¹

3.64 'Special treatment' is defined to include 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.⁹² The Tribunal must not give consent unless satisfied that the treatment is necessary to save the patient's life or to prevent serious damage to the patient's health.⁹³

3.65 A person who carries out special medical treatment without Tribunal authorisation commits an offence subject to a maximum penalty of imprisonment for seven years.⁹⁴

Northern Territory

Child

3.66 In the absence of express legislation, the Family Court's child welfare jurisdiction under the Family Law Act applies to non-therapeutic sterilisation.⁹⁵ However, a child capable of providing consent may consent to therapeutic sterilisation. Where a child is incapable of giving valid consent, for example due to intellectual disability or immaturity, the child's parents or guardians may consent to the child's therapeutic sterilisation.⁹⁶

89 *Children and Young Persons (Care and Protection) Act 1998*, ss. 175(5); New South Wales Government, *Submission 66*, p. 3.

90 *Guardianship Act 1987*, s. 34.

91 *Guardianship Act 1987*, s. 33.

92 *Guardianship Act 1987*, s. 33.

93 *Guardianship Act 1987*, s. 45.

94 *Guardianship Act 1987*, s. 35.

95 Northern Territory Government, *Submission 34*, p. 3.

96 Northern Territory Government, *Submission 34*, p. 2.

3.67 It is an offence subject to a maximum of 85 penalty units to perform sterilisation as a treatment for mental illness, mental disturbance or complex cognitive impairment such as behavioural disturbance.⁹⁷

Adult

3.68 The *Adult Guardianship Act* authorises the local courts to make orders consenting to major medical procedures for adults for whom a guardianship order is in effect and adults who, due to an intellectual disability, lack decision making capacity.⁹⁸ Intellectual disability is defined as 'a disability in an adult resulting from an illness, injury, congenital disorder or organic deterioration by reason of which the person appears to be unable to make reasonable judgments or informed decisions relevant to daily living'.⁹⁹ Decisions of local courts may be appealed to the Supreme Court of the Northern Territory.¹⁰⁰

3.69 'Major medical procedure' is defined to include procedures that relate to contraception. However, procedures that remove an immediate threat to a person's health are not considered to be major medical procedures for which court authorisation is required.¹⁰¹ A court may make an order authorising the proposed major medical procedure if satisfied that the procedure would be in the best interests of the person.¹⁰² In exercising its authority, the court is to have regard to the requirement in section 4 of the Act for decisions to:

- be the least restrictive of a represented person's freedom of decision and action as is possible in the circumstances;
- promote the best interests of the represented person; and
- give effect to the person's wishes where possible.

3.70 A court must ascertain the wishes of the person as far as reasonably possible, and give effect to the person's wishes if satisfied that the person understands the nature of the proposed procedure and is capable of giving or refusing consent.¹⁰³

3.71 Proceedings for professional misconduct may be taken against a medical practitioner who performs a major medical procedure without court authorisation.¹⁰⁴

97 *Mental Health and Related Services Act*, s. 60.

98 *Adult Guardianship Act*, s. 21.

99 *Adult Guardianship Act*, s. 3.

100 Northern Territory Government, *Submission 34*, p. 1.

101 *Adult Guardianship Act*, s. 21.

102 *Adult Guardianship Act*, s. 21.

103 *Adult Guardianship Act*, s. 21.

104 *Adult Guardianship Act*, ss. 21(2) Note.

Queensland

Child

3.72 In Queensland, the sterilisation of certain children is governed by Chapter 5A of the *Guardianship and Administration Act 2000*. The Act applies only to individuals under 18 years with a cognitive, intellectual, neurological or psychiatric impairment (the legislation uses the term 'child with an impairment'). As the Adult Guardian of Queensland and the Public Advocate of Queensland advised, the Queensland Civil and Administrative Tribunal does not have authority to hear applications for the sterilisation of children without 'an impairment'.¹⁰⁵

3.73 The legislation authorises the tribunal to order the sterilisation of a child with an impairment in certain circumstances. Sterilisation is defined as a procedure that would make permanently infertile a child who is, or who is likely to be, fertile. Examples specified in the Act include hysterectomy and vasectomy. However, sterilisation is expressly defined to not include sterilisation that occurs as a consequence of a medical procedure that is necessary to prevent serious or irreversible damage to a child's physical health. The legislation provides the following example:

If the child has cancer affecting the reproductive system and, without the health care, the cancer is likely to cause serious or irreversible damage to the child's physical health, the health care is not sterilisation.¹⁰⁶

3.74 The Tribunal may only make a child sterilisation order if the order is in the child's best interests.¹⁰⁷ The Act contains criteria that must be satisfied for the sterilisation to be considered in the child's best interests. The criteria focus on the medical and social needs of the child, and whether the child's impaired capacity to consent is likely to continue into adulthood.¹⁰⁸ They also require that, unless the sterilisation is 'medically necessary', it can only be conducted if postponement would be unreasonable and if either:

the child is, or is likely to be, sexually active and there is no method of contraception that could reasonably be expected to be successfully applied;
[or]

if the child is female—the child has problems with menstruation and cessation of menstruation by sterilisation is the only practicable way of overcoming the problems.¹⁰⁹

105 Adults Guardian of Queensland and the Public Advocate of Queensland, *Submission 19*, p. 3.

106 *Guardianship and Administration Act 2000*, s. 80B (Example).

107 *Guardianship and Administration Act 2000*, s. 80C.

108 *Guardianship and Administration Act 2000*, ss. 80D(1).

109 *Guardianship and Administration Act 2000*, ss. 80D(1).

3.75 Sterilisation will automatically be taken to not be in the best interests of the child if it is proposed for eugenic reasons or to remove the risk of pregnancy resulting from sexual abuse.¹¹⁰

3.76 The Tribunal is required to take into account the child's views in a manner appropriate for the child, for example orally, in writing, or by conduct.¹¹¹ The Tribunal must appoint a child representative to act in the child's best interests and, to the greatest extent practicable, represent the child's views and wishes.

Adult

3.77 Chapter 5, Part 3 of the *Guardianship and Administration Act 2000* authorises the Queensland Civil and Administrative Tribunal to consent to the sterilisation of an adult with 'impaired capacity'.¹¹² A person is taken to have impaired capacity if he or she does not have 'capacity for the matter'. In determining whether a person has capacity, the Tribunal considers whether the person:

- is capable of understanding the nature and effect of decisions about the matter;
- can freely and voluntarily make decisions about the matter; and
- can communicate their decisions in some way.¹¹³

3.78 'Sterilisation' is defined as 'health care of an adult who is, or is reasonably likely to be, fertile that is intended, or reasonably likely, to make the adult, or ensure the adult is, permanently infertile'. The Act lists endometrial ablation, hysterectomy, tubal ligation and vasectomy as examples of sterilisation. Sterilisation is expressly defined not to include medical procedures that are primarily to treat organic malfunction or disease.¹¹⁴

3.79 The Tribunal may only make a sterilisation order if satisfied that:

- the sterilisation is medically necessary;
- the person is, or is likely to be, sexually active;
- there is no method of contraception that could reasonably be expected to be successfully applied; and

110 *Guardianship and Administration Act 2000*, ss. 80D(2).

111 *Guardianship and Administration Act 2000*, ss. 80D(4).

112 *Guardianship and Administration Act 2000*, s. 70.

113 *Guardianship and Administration Act 2000*, Schedule 4.

114 *Guardianship and Administration Act 2000*, s. 9.

- for women, there are problems with menstruation for which cessation of menstruation by sterilisation is the only practicable way of overcoming these problems.¹¹⁵

3.80 The Act specifies that sterilisation is taken to not be medically necessary if it is for eugenic reasons or to remove the risk of pregnancy resulting from sexual abuse.¹¹⁶ The Tribunal must also consider whether other forms of health care are available or are likely to become available in the future, and the nature and extent of the short term and long term significant risks associated with the proposed procedure and alternative forms of health care.¹¹⁷

3.81 All active parties to proceedings have a right to appear before the Tribunal in person.¹¹⁸ 'Active party' is defined to include the person who would be the subject of the proposed sterilisation order.¹¹⁹

South Australia

Child

3.82 South Australia's *Guardianship and Administration Act 1993* applies without regard to age, and therefore the arrangements for adults, described below, may also apply to children. In practice, it is understood child applications are very rare. Families may also apply to the Family Court.¹²⁰

Adult

3.83 The *Guardianship and Administration Act 1993* authorises the Guardianship Board of South Australia to make sterilisation orders for persons who are the subject of a guardianship order under the Act.¹²¹ A guardianship order may be made if the Board is satisfied that the person subject to the application has a mental incapacity.¹²² 'Mental incapacity' is defined as an inability to look after personal health, safety or welfare or to manage personal affairs, because of damage to, or any illness, disorder, imperfect or delayed development, impairment or deterioration of, the brain or mind;

115 *Guardianship and Administration Act 2000*, ss. 70(1).

116 *Guardianship and Administration Act 2000*, ss. 70(2).

117 *Guardianship and Administration Act 2000*, ss. 70(3).

118 *Guardianship and Administration Act 2000*, s. 103.

119 *Guardianship and Administration Act 2000*, s. 123.

120 Office of the Public Advocate, *Prescribed medical treatment*, http://www.opa.sa.gov.au/documents/10_Fact_Sheets/10-Prescribed_Medical_Treatment_GAA.pdf (accessed 15 July 2013).

121 *Guardianship and Administration Act 1993*, s. 61.

122 *Guardianship and Administration Act 1993*, s. 29.

or any physical illness or condition that renders the person unable to communicate his or her intentions or wishes in any manner whatsoever.¹²³

3.84 Sterilisation is defined as 'any treatment given to a person that results in, or is likely to result in, the person being infertile'.¹²⁴ The Board may make a sterilisation order if satisfied that sterilisation is therapeutically necessary. Alternatively, the Board may make a sterilisation order if satisfied that:

- the Board has no knowledge of any refusal on the part of the person to consent to the carrying out of the sterilisation, being a refusal that was made by the person while capable of giving effective consent and that was communicated by the person to a medical practitioner;
- there is no likelihood of the person acquiring at any time the capacity to give an effective consent;
- the person is physically capable of procreation; and
- the person is, or is likely to be, sexually active, and there is no method of contraception that could, in all the circumstances, reasonably be expected to be successfully applied; or in the case of a woman, cessation of her menstrual cycle would be in her best interests and would be the only reasonably practicable way of dealing with the social, sanitary or other problems associated with her menstruation.¹²⁵

3.85 If reasonably practical, in the person's best interests and in the Board's view appropriate, the Board must hear from the person's parents prior to making an order.¹²⁶

3.86 Except in circumstances of emergency medical treatment, as defined by the *Consent to Medical Treatment and Palliative Care Act 1995*, a medical practitioner commits an offence subject to \$10 000 fine or imprisonment for up to two years if performing a sterilisation without the Board's consent.¹²⁷

Tasmania

Child

3.87 In Tasmania, the *Guardianship and Administration Act 1995* authorises the Guardianship and Administration Board to make orders for the 'special (medical) treatment' of persons with a disability who are incapable of giving consent to medical treatment. A person is taken to be unable to provide consent if he or she is incapable

123 *Guardianship and Administration Act 1993*, s. 3.

124 *Guardianship and Administration Act 1993*, s. 3.

125 *Guardianship and Administration Act 1993*, s. 61.

126 *Guardianship and Administration Act 1993*, s. 61.

127 *Guardianship and Administration Act 1993*, s. 61.

of understanding the general nature and effect of the proposed treatment or is incapable of indicating whether or not he or she consents or does not consent to the carrying out of the treatment.¹²⁸ The Board's jurisdiction extends to children with disabilities.¹²⁹

3.88 'Special treatment' is defined to include 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.¹³⁰ The Board may consent to special treatment if the treatment is otherwise lawful and in the best interests of the person.¹³¹ To determine the best interests of the person, the Board is to consider the person's wishes, so far as they can be ascertained, the consequences to the person if the treatment is not carried out, any alternative treatments available, whether the proposed treatment can be postponed on the ground that better treatment may become available and whether that person is likely to become capable of consenting to the treatment.¹³² Applicants for special treatment orders must supply a written Health Care Professional Report provided by a medical practitioner or psychologist detailing the person's decision making capacity.¹³³

3.89 A person who carries out unauthorised special treatment commits an offence liable to imprisonment for a period not exceeding one year or to a fine not exceeding 10 penalty units or both.¹³⁴ However, it is not an offence to carry out special medical treatment if the medical practitioner considers that, as a matter of urgency, the treatment is necessary to save the person's life or to prevent serious damage to person's health.¹³⁵ It is also an offence to purport to give consent to special medical treatment. A person who gives unlawful consent to treatment is guilty of an offence subject to a fine not exceeding 20 penalty units.¹³⁶

3.90 More broadly, the Family Court's child welfare jurisdiction under the Family Law Act applies to applications for the sterilisation of children without disabilities,¹³⁷ and exists concurrent with Tasmania's jurisdiction over children with disabilities.¹³⁸

128 *Guardianship and Administration Act 1995*, s. 36.

129 Tasmanian Government, *Submission 57*, p. 2.

130 *Guardianship and Administration Act 1995*, s. 3.

131 *Guardianship and Administration Act 1995*, s. 45.

132 *Guardianship and Administration Act 1995*, ss. 45(2).

133 Tasmanian Government, *Submission 57*, p. 3.

134 *Guardianship and Administration Act 1995*, s. 38.

135 *Guardianship and Administration Act 1995*, s. 40.

136 *Guardianship and Administration Act 1995*, s. 42.

137 Tasmanian Government, *Submission 57*, p. 2.

138 *P v P* (1994) 120 ALR 545.

Adult

3.91 The legislative requirements applying to orders of the sterilisation of children with disabilities also applies to orders for the sterilisation of adults with disabilities.

*Victoria**Child*

3.92 Victoria has not expressly conferred jurisdiction to hear child sterilisation cases on any Victorian court or tribunal. Families may only apply to the Family Court.

Adult

3.93 The *Guardianship and Administration Act 1986* authorises the Victorian Civil and Administrative Tribunal to make an order giving consent to special (medical) treatment for persons 18 years of age or older who are incapable of consenting to the proposed treatment.¹³⁹ A person is considered to be incapable of providing consent if he or she is incapable of understanding the general nature and effect of the proposed procedure or treatment, or is incapable of indicating whether or not he or she consents or does not consent to the carrying out of the proposed procedure or treatment.¹⁴⁰

3.94 'Special procedure' is defined to include any procedure that is intended, or is reasonably likely, to have the effect of rendering a person permanently infertile.¹⁴¹ The Tribunal may consent to the carrying out of a special procedure only if satisfied that the person is incapable of giving consent and is not likely to be capable, within a reasonable time, of giving consent; and the special procedure would be in the person's best interests.¹⁴² To determine whether the special procedure would be in a person's best interests, the Tribunal is to consider the following:

- the person's wishes, so far as they can be ascertained;
- the wishes of any nearest relative or any other family members of the patient;
- the consequences to the person if treatment is not carried out;
- any alternative treatment available;
- the nature and degree of any significant risks associated with the treatment or any alternative treatment; and
- whether the treatment to be carried out is only to promote and maintain the person's health and well-being.

139 *Guardianship and Administration Act 1986*, s. 36, s. 39.

140 *Guardianship and Administration Act 1986*, s. 36.

141 *Guardianship and Administration Act 1986*, s. 3.

142 *Guardianship and Administration Act 1986*, s. 42E.

3.95 It is an offence subject to imprisonment for two years or a fine of 240 penalty units or both for a registered practitioner to conduct a special procedure without Tribunal consent.¹⁴³ However, it is not an offence, or professional misconduct, for the registered practitioner to act in response to a medical emergency or in good faith reasonably believing that consent had been obtained.¹⁴⁴ It is also an offence to purport to give consent to special medical treatment. A person who gives consent to treatment knowing that he or she is not authorised to do so is guilty of an offence subject to a fine not exceeding 20 penalty units.¹⁴⁵

Western Australia

Child

3.96 The Family Court of Western Australia exercises both Commonwealth and Western Australian jurisdiction. If the parties to the court proceedings are, or were, married and the child resides in Western Australia, the Family Court of Western Australia applies the provisions in the Family Law Act. Accordingly, the Family Court of Western Australia has the authority to adjudicate sterilisation cases under section 67ZC of the Family Law Act.

3.97 For the children of de facto couples, the Family Court of Western Australia has authority to make sterilisation orders under section 162 of the *Family Court Act 1997*. Section 162 mirrors section 67ZC of the Family Law Act.

Adult

3.98 The *Guardianship and Administration Act 1990* authorises the Full Tribunal of the State Administrative Tribunal to consent, or to withhold consent, to the sterilisation of a person subject to a guardianship order under the Act.¹⁴⁶ A guardianship order may be made for persons 18 years of age or older who are incapable of looking after their own health and safety, unable to make reasonable judgements, is in need of oversight, care or control in the interests of their health and safety or the protections of others, and who are considered to be in need of a guardian.¹⁴⁷

3.99 For sterilisation procedures to be lawfully conducted, both the Tribunal and the guardian must consent.¹⁴⁸ The Act expressly states that a guardian cannot validly

143 *Guardianship and Administration Act 1986*, s. 42G.

144 *Guardianship and Administration Act 1986*, s. 42A.

145 *Guardianship and Administration Act 1986*, s. 42.

146 *Guardianship and Administration Act 1990*, s. 13, s. 56A.

147 *Guardianship and Administration Act 1990*, s. 43.

148 *Guardianship and Administration Act 1990*, s. 57.

consent to the proposed sterilisation unless the Tribunal's consent has first been obtained.¹⁴⁹

3.100 Sterilisation does not include lawful procedures that incidentally result, or may result, in sterilisation.¹⁵⁰ The definition of sterilisation adopted under the Act also does not include treatment such as oral contraception.¹⁵¹ As correspondence from the Western Australian State Administrative Tribunal noted, this narrow definition of sterilisation has the effect that 'some sterilisation procedures do not require specific application'.¹⁵² Accordingly, in Western Australia the circumstances in which sterilisation may occur without court authorisation are broader than what may exist in other states and territories. As the Tribunal advised:

Unlike legislation, such as in New South Wales, which focuses on the effect of the proposed treatment, section 56 of the *Guardianship and Administration Act 1990* focuses on the purpose of the procedures. A procedure that incidentally results or may result in sterilisation is specifically excluded. Treatment which is not for the purpose of sterilisation, even if it results in sterilisation, it is not required the consent of the Tribunal.¹⁵³

3.101 The Tribunal may only make a sterilisation order if satisfied that sterilisation is in the person's best interests.¹⁵⁴

3.102 Prior to conducting a hearing to determine whether to make a sterilisation order, the Tribunal must provide at least seven days' notice to the Public Advocate and any other person who, in the Tribunal's opinion, has sufficient interest in the proceedings.¹⁵⁵

Conclusion

3.103 As a signatory to numerous relevant international treaties, Australia's regulation of the sterilisation of persons with disabilities cannot be viewed in isolation. Australian law and practice must be viewed through the lens of international policy and legal requirements. The committee received extensive information about the international legal framework, and it extends its thanks to submitters for the

149 *Guardianship and Administration Act 1990*, s. 45, s. 58.

150 *Guardianship and Administration Act 1990*, s. 56.

151 Correspondence received from the State Administrative Tribunal Western Australia, 2 May 2013, p. 1.

152 Correspondence received from the State Administrative Tribunal Western Australia, 2 May 2013, p. 1.

153 Correspondence received from the State Administrative Tribunal Western Australia, 2 May 2013, p. 1.

154 *Guardianship and Administration Act 1990*, s. 63.

155 *Guardianship and Administration Act 1990*, s. 60.

comprehensive material provided. Further analysis revealed that not all the information cited, in particular United Nations committee comments, was directly relevant, and some, while expressing opinion, is not legally binding. However, all information is of value in identifying the tenor of international community views and determining international best practice. The implications of international law for Australian policy and practice are the subject of chapter 4.

3.104 Domestically, it is evident that Australia has a multilayered and multifaceted approach to the regulation of the sterilisation of persons with disabilities. Differences abound and affect fundamental matters such as the kinds of procedures that require court or tribunal authorisation, the factors used to determine whether a sterilisation procedure may be authorised, and ease of access to legal representation and participation in the proceedings. There are even differences in defining for whom a court or tribunal order is required before that person may access a sterilisation procedure. Subsequent chapters will examine some of these differences, and consider whether any of the laws and practices that regulate the sterilisation of persons with disabilities in Australia provide an adequate safety net for the protection of fundamental individual human rights.

