

Questions for Commonwealth Attorney-General's Department

Standing Council on Law and Justice

- 1. The 2004 discussion paper and the 2006 draft bill on the sterilisation of children with disabilities have been publicly released on the WWDA website. However, the documents do not appear on the Council's website. Did the Council publicly release either document? If not, for what reasons?**

The Standing Committee of Attorneys-General's 2004 discussion paper and the 2006 draft bill were the subject of targeted consultation and were only released to select relevant stakeholders for the purpose of receiving comments and submissions.

To release documents publicly the Committee required the agreement of all Attorneys-General. The Committee did not release these documents publicly at the time.

Public release of the Committee's documents is only considered where specific requests are made. The Department is not aware of any such requests having been made to the Committee, or to the subsequent Standing Council on Law and Justice.

- 2. Did the Council receive submissions on the issues paper or the draft bill? If yes, from which organisations or individuals? Please provide a summary of stakeholder responses to both the issues paper and the draft bill.**

The former Standing Council of Attorneys-General received over 50 submissions on the 2004 discussion paper and the 2006 draft bill. Submissions were received from various government and non-government bodies, including: legal and medical associations, State and Federal human rights and equal opportunity bodies, disability rights advocates, women's rights advocates, carer organisations, health and human services agencies, religious organisations, guardianship bodies and tribunals, courts, community legal centres and legal aid services.

The former Standing Council of Attorneys-General did not publicly release these submissions at the time of consideration. The submissions are held by Victoria which was the lead jurisdiction on this item. A complete list of submissions is not held by the Commonwealth.

Submissions which have not been made public by author organisations are treated as sensitive and confidential. Therefore, such documents and their contents cannot be made public without approval of all Ministers on the Standing Council on Law and Justice (which has replaced the Standing Council of Attorneys General) and the submissions' authors.

- 3. What was the Council's final position regarding the regulation of the therapeutic and non-therapeutic sterilisation of children?**

Item 6 of the March 2008 of the former Standing Council of Attorneys-General Summary of Decisions states:

Sterilisation of Intellectually Disabled Minors

Ministers:

- (i) Noted that the Working Group's further work and research since April 2007 has revealed that:
 - a. The number of reported sterilisations that are now occurring in Australia appears to be significantly less than the numbers suggested in the 1997 Human Rights and Equal Opportunity Commission (HREOC) Report on Sterilisation of Children with an Intellectual Disability that was the trigger for this item being placed on the SCAG agenda.
 - b. Doctors and hospitals have a better appreciation and understanding of their legal obligations as a result of steps taken to educate these groups following the 1997 HREOC Report .
 - c. Alternatives to surgical procedures to manage the menstruation and contraceptive needs of women are increasingly available (e.g. Depo Provera and the Mirena IUD) and seem to be successful in most cases.
 - d. There are existing processes in place in each jurisdiction to authorise sterilisation procedures, which appear to be working adequately in light of recent improvements in treatment options and education initiatives. There would be limited benefit in developing model legislation.
- (ii) Supported measures to continue the promotion of ongoing awareness of the non-surgical alternatives to manage the menstruation and contraceptive needs of intellectually disabled people and the obligations of doctors and hospitals to seek Court authorisation before performing these procedures; and
- (iii) Agreed to review current arrangements to ensure that all tribunals or bodies with the power to make orders concerning the sterilisation of minors with an intellectual disability are required to be satisfied that all appropriate alternatives to sterilisation have been fully explored and/or tried before such an order is made.
- (iv) Agreed to remove this item from the agenda.

This decision is available at www.sclj.gov.au.

4. At what time, and for what reasons, was the matter removed from the Council's agenda?

See answer to question 3.

- 5. The committee understands that in 2011 the Commonwealth Attorney-General undertook to initiate further discussions with State and Territory counterparts about the laws regulating the sterilisation of persons with disabilities.**
 - a. What are the objects of these discussions?**
 - b. What progress has been made?**
 - c. What concerns have been identified with the operation of existing legislation and court and tribunal processes? Have these been assessed against Australia's international obligations?**

- d. **Is it anticipated that legislative reform will follow? For example, is the Council considering additional draft model legislation? Are sanctions against the unauthorised sterilisation of persons being considered?**

The Government committed to working with the states and territories on the regulation of sterilisation of women and girls with disability in the 2012 National Human Rights Action Plan, which was released on 10 December 2012. This commitment, to initiate further discussions with State and Territory counterparts, was made in response to recommendation 39 of the United Nations Universal Periodic Review of Australia in 2011.

Further discussions with State and Territory Ministers have not yet commenced. However, discussions were undertaken at an officials level to inform Australia's response to a request in July 2011 from the United Nations Special Rapporteurs on Health and on Violence Against Women about the alleged ongoing practice of non-therapeutic, forced sterilisation of girls and women with disabilities in Australia.

On 10 October 2011, the then Attorney-General, the Hon Robert McClelland MP, directed the Department to consider options before he raised the issue with States and Territories.

On 20 October 2011, former Attorney-General, the Hon Robert McClelland MP, wrote to then Minister for Health, the Hon Nicola Roxon MP, seeking assistance with obtaining data on the nature and number of unlawful sterilisation procedures carried out on children and adults who are unable to consent to the procedure.

On 2 December 2011, the then Minister for Health, wrote to the then Attorney-General, confirming the Department of Health and Ageing does not collect data on the prevalence of non-therapeutic forced sterilisation.

The Department continued to work on options to progress the National Human Rights Action Plan commitment with regards to sterilisation of people with disability.

However, on 20 September 2012 the Senate Standing Committees on Community Affairs announced this inquiry into the involuntary or coerced sterilisation of people with disabilities in Australia. The Department believes the outcomes of this inquiry should inform the Department's advice to the Attorney-General and discussions with States and Territory Ministers. The Department intends to brief the Attorney-General, the Hon Mark Dreyfus MP QC, on this matter following the Committee's report.

On 26 October 2012, then Attorney-General replied to a letter from Disability Discrimination Commissioner, Graeme Innes AM, regarding Family Court of Australia data in this area.

- 6. The committee notes that the Council is considering the interface between the federal family courts and state and territory child welfare authorities. Has the work undertaken to date included consideration of the overlapping jurisdiction between the family courts' welfare jurisdiction as it relates to the sterilisation of children and the capacity of state and territory authorities to make child sterilisation orders?**

The focus of this project to date has been on greater information sharing between the Federal Family Courts and the State and Territory child welfare authorities systems. It has not specifically considered the overlapping jurisdiction in relation to child sterilisation orders.

International obligations

1. In the government's view, what are Australia's international obligations with respect to the coerced or involuntary sterilisation of intersex persons and children or adults with disabilities?
2. General Comment number nine (2006) of the Committee on the Rights of the Child urges States parties to prohibit by law the forced sterilisation of children on grounds of disability.
 - a. What is Australia's interpretation of this direction? In particular, what practices and procedures are encompassed by the term 'forced sterilisation'?
 - b. What steps have Australian jurisdictions taken to comply with this direction?

The above questions have been addressed in whole below under the subheading international obligations.

3. In the March 2012 report of the Office of the United Nations High Commissioner for Human Rights *Thematic study on the issue of violence against women and girls and disability*, the Council notes with concern evidence of the forced sterilisation of women in Australia.
 - a. What is the Government's response to the Council's conclusion that the forced sterilisation of women is occurring in Australia? Is the Commonwealth consulting with the states and territories about the report?
 - b. Please provide any data held by the Commonwealth on the incidence of sterilisation of adults or children with disabilities, or of intersex persons, that has occurred without court or tribunal authorisation.
 - c. Please provide a copy of any information Australia provided to the Council to assist its preparation of its report.

The *Thematic study on the issue of violence against women and girls and disability* concerned a broad range of issues.

The public record on the Australian Permanent Mission and Consulate-General in Geneva, Switzerland's website (<http://www.geneva.mission.gov.au/gene/Statements2012.html>) indicates that Australia's Statement at the Human Rights Council's 19th Session in response to this study did not canvas the issue of Sterilisation.

The Department has not been made aware of any recent evidence to indicate forced sterilisation of adults or children with disabilities, or of intersex persons, is occurring without court or tribunal authorisation. The Commonwealth does not hold data on incidences of sterilisation that may have occurred without court or tribunal authorisation. The Department of Human Services holds data on the operation of Medicare.

4. Given that the United Nations has repeatedly noted concerns about the sterilisation of children and persons with disabilities in Australia, for example in the 2011 Human Rights Council's Universal Periodic Review–Australia and the March 2012 report of the Office of the United Nations High Commissioner for Human Rights *Thematic study on the issue of violence against women and girls and disability*, does the government hold the view that the legal and procedural frameworks that regulate the sterilisation of children and persons with disabilities in Australia are consistent with Australia's international obligations?

Best interest tests

1. In January 2011, the Human Rights Council recommended that Australia enact national legislation prohibiting the use of non-therapeutic sterilisation of children, regardless of whether they have a disability, and adults with a disability without their informed and free consent. The Australian Government accepted the recommendation in part, advising that 'best interests' tests are consistent with Australia's international obligations.
 - a. Please provide an explanation of how the best interest test complies with Australia's international obligations.
 - b. In preparing this response, please have regard to the March 2012 report of the Office of the United Nations High Commissioner for Human Rights *Thematic study on the issue of violence against women and girls and disability*, in which the Council notes that 'international human rights standards also prohibit the coerced treatment of people suffering from intellectual disabilities, regardless of arguments of their "best interests"'.^[1]

International Obligations

A number of the Committee's questions on Australia's international obligations with respect to sterilisation are in effect requests for legal advice on the interpretation of these obligations.

It is the longstanding practice of governments that the Attorney-General's Department does not give legal advice to parliamentary committees. Consequently, the Department is constrained in its ability to respond specifically to a number of the Committee's questions.

However, in the interests of assisting the Committee's considerations, the Department provides the following information with respect to Australia's international human rights law obligations.

A number of human rights treaties to which Australia is a party are relevant to the issue of sterilisation of children and adults with disabilities and intersex persons. Whether a particular right under a treaty is relevant may also depend on the particular circumstances of the individual.

Australia's international human rights obligations are principally reflected in the *International Covenant on Civil and Political Rights* (ICCPR), and the *International Covenant on Economic Social and Cultural Rights* (ICESCR), which are the central, overarching treaties on civil and political rights and economic, social and cultural rights for all persons. The rights under each Covenant apply without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The obligations under those treaties are reflected and elaborated in the other human rights treaties, namely the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), *Convention on the Rights of the Child* (CRC) and *Convention on the Rights of Persons with Disabilities* (CRPD), which apply in the particular cases of women, children and persons with disability.

Rights under these treaties relevant to sterilisation include:

- *Personal integrity*: The right to privacy prohibits unlawful or arbitrary interference with a person's privacy, family, home and correspondence. Article 17 of the CRPD

^[1] Office of the United Nations High Commissioner for Human Rights *Thematic study on the issue of violence against women and girls and disability*, 30 March 2012, p. 10.

specifically recognises the right of every person with disability to respect for his or her physical and mental integrity on an equal basis with others.

- *Health:* Rights in relation to health are protected under these treaties. In particular, article 25 of the CRPD requires State parties to recognise that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination. Article 25 also requires State parties to ensure access for people with disability to health services which are gender-sensitive, and access to health services provided to others, with specific reference to sexual and reproductive health programmes.
- *Family:* These treaties also protect rights in relation to respect for the family. Of particular relevance to the issue of sterilisation is article 23(1) of the CRPD, which requires State parties to take effective and appropriate measures to ensure the right of people with disability to found a family, including having access to reproductive and family planning education, and to retain their fertility on an equal basis with others.
- *Non-discrimination:* Finally, State parties are required to ensure that people with disability have the right to enjoy all human rights on an equal basis as others without disability (articles 2, 3 and 26 of ICCPR, article 4 and 5 of the CRPD).

Also of relevance to sterilisation are obligations concerning decision making by and about children and people with disabilities, including:

- the best interests of the child being the primary consideration in all matters concerning children, respecting the evolving capacities of a child, and assuring that children capable of forming their own views have the ability to express those views (articles 3, 5 and 12 of the CRC, and article 7 of the CRPD), and
- that people with disability have a right to equal recognition before the law, which may require States to take steps to ensure people with disability have access to support in order to exercise their legal capacity on an equal basis with others, and to prevent abuse of this right (article 12 of the CRPD).

A number of the questions asked by the Committee about Australia's international obligations relate to whether Australia's laws, programs and policies governing sterilisation are consistent with its international obligations. The Government stated in its formal response to the Universal Periodic Review Recommendations that it considers the 'best interests' tests as articulated and applied in Australia to be consistent with Australia's international obligations.

It is the Government's policy that Australia will not become a party to a treaty until any necessary implementation action has been taken, either by the Commonwealth or by State or Territory Governments. For example, prior to ratifying the CRPD, the Government undertook a national interest analysis in which it determined that Australia's Commonwealth, State and Territory legislation, policies and programs were in compliance with the immediately applicable obligations and substantially achieve implementation of the progressively realisable obligations under the CRPD (*National Interest Analysis [2008]* ATNIA 18).

Finally, in response to the Committee's question regarding General Comment No. 9, the Department makes the following comments. In General Comment No. 9, State parties are urged to prohibit by law the forced sterilisation of children on the grounds of disability.

The Department notes that as a matter of international law the general comments and views of the human rights treaties bodies are non-binding on State parties. However, they are considered to be a persuasive source of guidance when interpreting treaty obligations.

The Attorney-General's Department also notes that beyond recommending a prohibition on forced sterilisation, Comment No. 9 does not provide any guidance on what practices and procedures are encompassed by the term 'forced sterilisation' from an international law perspective.

Marion's case and the Family Court of Australia and the Family Court of Western Australia's Commonwealth welfare jurisdiction

- 1. Has the Department identified any human rights concerns with the operation of the principles in Marion's case or the family courts' welfare jurisdiction with respect to sterilisation orders? If yes, please provide a summary of the concerns.**
- 2. In the March 2012 report of the Office of the United Nations High Commissioner for Human Rights *Thematic study on the issue of violence against women and girls and disability*, it is argued that procedural safeguards to protect the right to informed consent should be 'watertight and strictly applied'. Furthermore, it is submitted that States are obligated to facilitate the genuine participation of children in processes affecting their development. How does the *Family Law Act 1975* and proceedings in the Family Court of Australia, and the Family Court of Western Australia exercising its Commonwealth jurisdiction, meet these requirements?**

The Government has previously stated in its formal response to the Universal Periodic Review Recommendations that it considers the 'best interests' tests as articulated and applied in Australia to be consistent with Australia's international human rights obligations.

Section 67ZC of the Family Law Act 1975 (Cth) gives the family courts' jurisdiction to make orders relating to the welfare of children (the equivalent section in Western Australia is s.162 of the Family Court Act 1997 (WA)).

The Family Law Rules

Guidance for judges in the Family Court can be found in the *Family Law Rules 2004* which make special provision in relation to applications for authorisation of a medical procedure. In particular, Rule 4.09(1) provides that "if a Medical Procedure Application is filed, evidence must be given to satisfy the court that the proposed medical procedure is in the best interests of the child."

Further, Rule 4.09(2) requires, under the heading "Evidence supporting application," that the evidence a court should consider in such cases:

"...must include evidence from a medical, psychological or other relevant expert witness that establishes the following:

- (a) the exact nature and purpose of the proposed medical procedure;
- (b) the particular condition of the child for which the procedure is required;
- (c) the likely long-term physical, social and psychological effects on the child:

- i. if the procedure is carried out; and
 - ii. if the procedure is not carried out;
- (d) the nature and degree of any risk to the child from the procedure;
- (e) if alternative and less invasive treatment is available — the reason the procedure is recommended instead of the alternative treatments;
- (f) that the procedure is necessary for the welfare of the child;
- (g) if the child is capable of making an informed decision about the procedure — whether the child agrees to the procedure;
- (h) if the child is incapable of making an informed decision about the procedure — that the child:
 - i. is currently incapable of making an informed decision; and
 - ii. 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;
- (i) whether the child’s parents or carer agree to the procedure.”

(The equivalent rule in WA is Rule 12 Family Court Rules 1998 (WA))

Together with the HCA’s decision in *Marion’s Case*, these Rules provide guidance as to the factors the Family Court should consider when determining whether it is in the best interests of a child to authorise the performance of a sterilisation procedure on that child.

Section 68L of the Family Law Act 1975 provides that an Independent Children’s Lawyer (ICL) can be appointed in cases in which a child’s best interests are, or a child’s welfare is, the paramount, or relevant consideration. Guidance on the factors to be taken into account when appointing ICLs are outlined in the Full Court case of *Re K* (1994) FLC 92-461. In *Re K*, Nicholson CJ, Fogarty and Baker JJ stated at p 80,773 that the broad general rule for appointments of independent children’s lawyers is that the Family Court will make such appointments when it considers that a child’s interests require independent representation.

Subject to that general rule their Honours suggested several guidelines. Appointments should normally be made in the following circumstances:

- i. There are allegations of child abuse whether physical, sexual or psychological
- ii. There is an apparently intractable conflict between the parents
- iii. The child is apparently alienated from one or both parents
- iv. There are real issues of cultural or religious differences affecting the child
- v. The sexual preferences of either or both of the parents or some other person having significant contact with the child are likely to impinge upon the child’s welfare
- vi. The conduct of either or both of the parents or some other person having significant contact with the child is alleged to be anti-social to the extent that it significantly impinges upon the child’s welfare
- vii. There are issues of significant medical, psychiatric or psychological illness or personality disorder in relation to either party or a child or other persons having significant contact with the children

- viii. Any case in which, on the material filed by the parents, neither seems a suitable custodian
- ix. Any case in which a child of mature years is expressing strong views, the giving of effect to which would involve changing a long-standing custodial arrangement or a complete denial of access to one parent
- x. One of the parties proposes that the child will either be permanently removed from the jurisdiction or permanently removed to such a place within the jurisdiction as to greatly restrict or, for all practical purposes, exclude the other party from the possibility of access to the child
- xi. Cases where it is proposed to separate siblings
- xii. Custody cases where none of the parties are legally represented,
- xiii. Applications in the court's welfare jurisdiction relating in particular to the medical treatment of children where the child's interests are not adequately represented by one of the parties.

3. What proportion of legal aid funding is allocated to the appointment of Independent Children's Lawyers?

Legal aid commissions are funded under the National Partnership Agreement on Legal Assistance Services. The Agreement sets out general principles and Commonwealth legal aid service priorities. The family law priorities include assistance for children and the appointment of a court appointed independent children's lawyer. The Australian Government does not allocate proportions of funding to service priorities, although around 80% of total Commonwealth funding to commissions goes to family law matters.

Neither legal aid commissions nor the Attorney-General's Department collect statistics on the proportion of funding that goes to independent children's lawyers.

Independent children's lawyers may be appointed by a legal aid commission following an order by the Family Court. Legal aid commissions are independent statutory bodies established under State and Territory legislation. Commissions have discretion to determine the extent of assistance they will provide in individual cases.

4. Is special training required before a lawyer can act as an Independent Children's Lawyer? If yes, please provide an overview of this training and, in particular, note whether any part of this training is relevant to special medical procedures such as sterilisation cases.

Training of independent children's lawyers and maintaining panels is the responsibility of legal aid commissions. The Attorney-General's Department does not hold the details of those requirements.

5. What proportion of legal aid funding is allocated to legal assistance to parents seeking a sterilisation order from the family courts? Is a means test or funding cap applied in such cases? Can Legal Aid Commissions seek to recover the costs of the Independent Children's Lawyer should one be appointed?

The Government does not allocate specific funding to specific legal issues. The National Partnership Agreement on Legal Assistance Services sets out general principles and Commonwealth legal aid service priorities.

Means and merits tests are not applied to a grant of legal aid for independent children's lawyers. Each legal aid commission sets its own guidelines for determining grants of legal aid. Under family law guidelines, commissions set funding caps on family law matters. Legal Aid NSW, for example, sets a cap of \$12,000.

Under their guidelines, commissions have the ability to recover the costs of the independent children's lawyer from a non-legally aided party. For example, Legal Aid NSW guidelines state that if Legal Aid NSW makes a grant of legal aid for an independent children's lawyer, it must give consideration as to the ability of the parties to the proceedings to contribute to the costs and disbursements associated with the grant of legal aid for the independent children's lawyer. Legal Aid NSW may determine an amount to be paid by each party taking into account the party's capacity to pay; the party's legally aided status; and contributions assessed on existing files.

- 6. The committee is aware of concerns that the Justices of the family courts lack appropriate qualifications to hear child sterilisation cases. What are the criteria for the appointment of justices to the family courts? What measures has the Attorney-General taken to ensure that the Justices of the family courts have the necessary expertise to adjudicate child sterilisation matters?**

Criteria for judicial appointments to the Family Court

To be eligible to be appointed as a Family Court judge, a person must have been enrolled as a legal practitioner of the High Court or a Supreme Court of a State or Territory for at least 5 years. Additionally, by reason of training, experience and personality, the person must be a suitable person to deal with matters of family law (*Family Law Act 1975 s 22*).

Judges must also have the following personal and professional qualities of the highest degree:

- legal expertise
- conceptual, analytical and organisational skills decision-making skills
- the ability (or the capacity quickly to develop the ability) to deliver clear and concise judgments
- the capacity to work effectively under pressure
- a commitment to professional development interpersonal and communication skills
- integrity, impartiality, tact and courtesy, and
- the capacity to inspire respect and confidence.

Judicial education and building expertise to adjudicate child sterilisation matters

There is no requirement for judges to attend training during their careers. However, development programs are available for judicial officers and continuous training is encouraged. The emphasis on judicial training is largely a matter of court practice and the individual judge.

In Australia, judicial development and education is delivered by bodies such as the National Judicial College of Australia (NJCA) and the Australasian Institute of Judicial Administration (AIJA). Both bodies receive funding from the Commonwealth, through the Attorney-General's Department, to contribute to their ongoing operation.

The NJCA provides programs and professional development resources to judicial officers. The role of the College is to assist judicial officers, including judicial officers hearing family law matters, to administer the law in a just, competent and speedy way by offering opportunities to:

- share lessons learned from experience, leading to identification and adoption of best professional practices
- broaden and enhance their general and legal educational standards
- undertake individual learning programs
- develop their skills in management (including case management), conduct of trials and appeals, and judgment writing, and
- participate in educational programs which will help judicial officers develop substantive and procedural law, thereby engaging in the future shaping of the law and its administration

The AIJA is a research and educational institute associated with Monash University. Its principal objectives include research into judicial administration and the development and conduct of educational programmes for judicial officers, court administrators and members of the legal profession in relation to court administration and judicial systems.