Chapter 6

Family Court of Australia

6.1 The previous chapter discussed a range of matters that are relevant to all legal jurisdictions where sterilisation matters, either in relation to children or adults, are considered. There was, in addition, debate during the inquiry about the appropriate role and effectiveness of the Family Court of Australia (the Family Court). There was some concern that the Family Court is an inappropriate forum for the child sterilisation proceedings.[1] The Family Court was characterised as unnecessarily adversarial, unnecessarily expensive, and without the necessary expertise to adjudicate child sterilisation cases.

An adversarial process?

6.2 The Qld Centre for Intellectual and Developmental Disability, Queenslanders with Disabilities Network, and Qld Advocacy Inc. agreed that combative court proceedings direct attention away from the needs of the child:

> They are usually adversarial in their approach with the respective parties becoming locked into winning. This can mean that families do not have the opportunity to hear information which could under other circumstances, change their minds.[2]

6.3 The committee heard from both individuals and organisations who argued that the Family Court's procedures are adversarial. Mr Jim Simpson, Lawyer, New South Wales Council for Intellectual Disability, submitted that the families who seek orders from the Family Court 'are locked into an adversarial system'.[3] It was argued that the apparent adversarial nature of Family Court proceedings detracts from its capacity to appropriately hear child sterilisation cases. As the Office of the Public Advocate (the OPA) submitted, the apparent adversarial process 'significantly weakens the ability of the Court to provide effective oversight of ethically complex medical treatment decisions concerning children'.[4]

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1 See, for example, Office of the Public Advocate, *Submission 14*, pp. 7–8.
The committee was not advised of any concerns with the Family Court of Western Australia relating to child sterilisation cases. However, it is noted that the issues raised about the Family Court of Australia may be relevant to the Family Court of Western Australia to the extent that the Family Court of Western Australia applies the provisions of the *Family Law Act 1975* and the mirror provisions in the Western Australian *Family Court Act 1997*.

2 Qld Centre for Intellectual and Developmental Disability, Queenslanders with Disabilities Network, and Qld Advocacy Inc, *Submission 37*, Attachment 3, p. 21.

3 Mr Jim Simpson, Lawyer, New South Wales Council for Intellectual Disability, *Committee Hansard*, 11 December 2012, p. 18.

4 Office of the Public Advocate, *Submission 14*, pp. 7–8.

6.4 As the OPA recognised,[5] such concerns reflect the view of the High Court of Australia in the 1992 decision in *Marion's Case*, in which the High Court questioned whether 'strictly adversarial' court procedures are appropriate for child sterilisation cases:

> [T]here is less likelihood of (intentional or unintentional) abuse of the rights of children if an application to a court is mandatory, than if the decision in all cases could be made by a guardian alone. In saying this we acknowledge that it is too costly for most parents to fund court proceedings, that delay is likely to cause painful inconvenience and that the strictly adversarial process of the court is very often unsuitable for arriving at this kind of decision.[6]

Analysis of Family Court procedures

6.5 While the Family Court procedures were criticised, those procedures were, with the exception of information provided by the Chief Justice of the Family Court of Australia and the Commonwealth Attorney-General's Department, not outlined. While it was commonly asserted that the Family Court processes are adversarial, the committee was not provided with detailed analysis of the procedures.

6.6 In contrast, one submitter, Dr Wendy Bonython, Assistant Professor, School of Law, University of Canberra, noted that the High Court's characterisation of the Family Court as adversarial has been criticised. Commenting in 1996, former Chief Justice of the Family Court, the Hon. Alastair Nicholson AO RFD QC, highlighted that the High Court failed to take into account the capacity of the Family Court to 'act as an inquisitorial forum'.[7]

6.7 Subsequent to this, in 2006 the *Family Law Act 1975* was amended to require the Family Court to adopt a less adversarial, that is, a more inquisitorial, approach in all children's cases. This requirement extends to applications for orders authorising child sterilisation procedures. Known as the less adversarial trial (LAT), LAT proceedings were introduced to ensure that:

> proceedings are managed in a way that considers the impact of the proceedings themselves (not just the outcome of the proceedings) on the child. The intention is to ensure that the case management practices adopted by courts will promote the best interests of the child by encouraging parents to focus on their parenting responsibilities.[8]

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5 Office of the Public Advocate, *Submission 14*, p. 7.

6 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 54.

7 Dr Wendy Bonython, *Submission 22*, p. 7.

8 Family Law Amendment Bill (Shared Parental Responsibility) Bill 2005, *Explanatory Memorandum*, p. 3.

6.8 LAT cases are required to be conducted with as little formality, undue delay and legal technicality as possible.[9] Accordingly, the formal rules of evidence under the *Evidence Act 1995* do not automatically apply.[10] Judicial officers are required to actively direct the proceedings,[11] which can take the form of a dialogue between the presiding judicial officer and the parties.[12] The child may also participate in the proceedings.[13] As the Family Court advised:

> [a] less adversarial trial is focused on the children and their future, flexible to meet the needs of particular situations, expected to cost less and reduce the time spent in court, and is less formal and less adversarial than a traditional trial.[14]

6.9 In evidence before the committee, Ms Diana Bryant AO, Chief Justice of the Family Court of Australia, emphasised the less adversarial nature of child sterilisation cases. The committee was provided with an example of the procedures adopted in a case in which the Chief Justice presided:

> Alex No. 2...was done in a less adversarial format. We did Alex No. 2 in my chambers, actually, rather than the court room. We had everybody sitting around and people asked questions of doctors and so forth, without it being a formal setting. These are different types of cases and we do try to deal with them in a less adversarial way.[15]

The cost of Family Court proceedings

6.10 It was further reported that the cost of Family Court proceedings presents a barrier for families wishing to seek court approval for a sterilisation procedure. According to the OPA, costs are a 'significant disincentive' for seeking Family Court orders.[16] This view was reflected in evidence provided by individual families. Commenting on their experience, one family estimated that Family Court proceedings would cost approximately $10 000. As the family commented, such costs are unrealistic:

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9 *Family Law Act 1975*, s. 69ZN.

10 *Family Law Act 1975*, s. 69ZN; The Hon. Diana Bryant, AO, Chief Justice, Family Court of Australia, *Submission 36*, p. 10.

11 *Family Law Act 1975*, ss. 69ZN(4).

12 *Family Law Rules 2004*, r. 16.08.

13 The Hon. Diana Bryant, AO, Chief Justice, Family Court of Australia, *Submission 36*, p. 11.

14 The Hon. Diana Bryant, AO, Chief Justice, Family Court of Australia, *Submission 36*, p. 9.

15 The Hon. Diana Bryant, AO, Chief Justice, Family Court of Australia, *Committee Hansard*, 27 March 2013, p. 58.

16 Office of the Public Advocate, *Submission 14*, p. 7.

> I then had to engage a solicitor at my own expense and was advised that it would cost approximately $10 000 to present my application to the Family Court. Unfortunately, my family is not in a position to do this.[17]

6.11 The committee heard that for this family the high costs of Family Court proceedings were prohibitive, and effectively denied the family access to options otherwise available under Commonwealth law:

> I can assure you that parents go overseas because this subject is taboo, because the court system is too complicated and too expensive. Who has $10 000 to apply to the Family Court to do something to better their child's health?...We have been on one wage for 16 years because I look after my daughter. We have sacrificed. I don't have $10 000. I would love to because she is suffering every day. I'm disappointed in the system.[18]

6.12 Court costs were also noted with concern by the Royal Australian and New Zealand College of Obstetricians and Gynaecologists, which similarly highlighted that the costs of court proceedings may be unrealistic for families caring for children with disabilities:

> The College notes with dismay that families applying through a court system may suffer financially when they may already be resource poor and those limited resources are needed to care for a child with a severe disability.[19]

6.13 The high cost of child sterilisation procedures was acknowledged by the Chief Justice of the Family Court:

> I cannot say exactly what the charge is. It is not an inexpensive procedure. They are required to seek court ratification of a decision, then they are going to generally have legal advice. They are going to have to prepare affidavits, get medical evidence or get affidavits from the medical practitioners—and there are a number of those—plus psychiatrists and so forth. So while, in the end, the process itself is less adversarial, I accept that it is not an inexpensive process.[20]

6.14 Concerns with the capacity of parents to fund court proceedings were noted by the High Court of Australia in *Re Marion*, in which the court commented that 'it is too costly for most parents to fund court proceedings'.[21] Reporting two years following *Re Marion*, the Family Law Council also commented on the high cost of Family Court proceedings. The Council recommended that the cost of legal

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17 Mrs Louise Robbins, Private capacity, *Committee Hansard*, 27 March 2013, p. 47.

18 Mrs Louise Robbins, Private capacity, *Committee Hansard*, 27 March 2013, p. 52.

19 Royal Australian and New Zealand College of Obstetricians and Gynaecologists, *Submission 30*, p. 2.

20 The Hon. Diana Bryant, Family Court of Australia, *Committee Hansard*, 27 March 2013, p. 59.

21 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 54.

representation for the child and the child's parent or guardian, and all other costs associated with the application, should be met by the Commonwealth government. The recommendation responded to concerns that the cost of accessing options available under the Commonwealth law far exceeds the cost of applications to state and territory Guardianship Boards.[22] In 2001, the Human Rights and Equal Opportunity Commission also noted with concern the cost of Family Court proceedings.[23] However, court costs were not included among the key areas of reform that the Commission identified.[24]

6.15 The committee was advised that government assistance to meet the cost of court proceedings, known as 'legal aid', is available in certain circumstances. Legal aid grants are administered by State and Territory legal aid commissions funded under the National Partnership Agreement on Legal Assistance Services. According to information provided by the Commonwealth Attorney-General's Department, the Agreement establishes the legal aid service priorities for Commonwealth law matters. In the area of family law, priorities include assistance for children and the appointment of Independent Children's Lawyers (ICLs).[25] However, with the exception of funding to meet the costs of the ICL, to be eligible to receive a grant of legal aid a family would be required to pass a means and merits test.[26] Neither the Commonwealth Attorney-General's Department nor State and Territory Legal Aid Commissions actively record data on the number of Independent Children's Lawyers appointed for child sterilisation cases or other cases involving special medical procedures.[27]

Expertise of Family Court judicial officers

6.16 It was also questioned whether the justices of the Family Court possess the necessary expertise and training to adjudicate child sterilisation cases. A number of grounds were identified.

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22 Family Law Council, *Sterilisation and other medical procedures on children*, 1994, paragraphs 5.16; Recommendation 4(i).

23 Susan Brady, John Britton, Sonia Grover, *The sterilisation of girls and young women in Australia: issues and progress*, A report jointly commissioned by the Sex Discrimination Commissioner and the Disability Discrimination Commissioner at the Australian Human Rights Commission, 2001, p. 50.

24 Susan Brady, John Britton, Sonia Grover, *The sterilisation of girls and young women in Australia: issues and progress*, A report jointly commissioned by the Sex Discrimination Commissioner and the Disability Discrimination Commissioner at the Australian Human Rights Commission, 2001, pp. 57–59.

25 Attorney-General's Department, answer to question on notice, 19 April 2013 (received 14 May 2013).

26 Ms Cathy Rainsford, Assistant Secretary, Family Law Branch, Attorney-General's Department, *Committee Hansard*, 31 May 2013, p. 15.

27 Attorney-General's Department, answer to question on notice, 31 May 2013 (received 2 July 2013).

Exposure and capacity to build expertise

6.17 As the Family Court acknowledged,[28] the court hears relatively few child sterilisation cases. OPA argued that this lack of exposure to child sterilisation cases undermines the Family Court's capacity to build expertise in child sterilisation matters.[29] The argument was articulated by Dr John Chesterman, Manager of Policy and Education, OPA, Victoria:

> The cases are relatively rare, and that is one of the real problems—that you have a judge suddenly sitting in on a very ethically complex matter with no experience in that kind of area.[30]

6.18 Commenting in 1994, the Family Law Council drew a distinction between the expertise of Guardianship Boards in disability matters and the proficiency of the Justices of the Family Court of Australia in child sterilisation cases.[31] While noting the 'high degree' of expertise in disability matters existing within the Guardianship Boards, the Council concluded that it was essential that 'specifically designed awareness programs' be developed for the Justices of the Family Court hearing cases involving applications for medical procedures.[32] Accordingly, the Council recommended that sterilisation cases be heard only by specially trained justices.[33] Similar themes emerged in a 2001 report, commissioned by the Australian Human Rights Commission, into the sterilisation of persons with disabilities in Australia. The report highlights that members of state and territory tribunals are appointed for their specialist knowledge and experience with people with disabilities, and concludes that this specialist knowledge 'is part of the "equipment" of the tribunal and places it in a position where it can independently assess evidence put before it from both a professional and personal perspective'.[34]

6.19 Over a decade on, the Attorney-General's Department (the Department) advised that the capacity to appropriately respond to family law issues is a key determinant of whether a person is suitable to be appointed as a Justice of the Family

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28 The Hon. Diana Bryant, Family Court of Australia, *Committee Hansard*, 27 March 2013, p. 57.

29 Office of the Public Advocate, *Submission 14*, p. 7.

30 Dr John Chesterman, Manager of Policy and Education, Office of the Public Advocate, Victoria, *Committee Hansard*, 11 December 2013, p. 13.

31 Family Law Council, *Sterilisation and other medical procedures on children*, 1994, paragraphs 5.36–40.

32 Family Law Council, *Sterilisation and other medical procedures on children*, 1994, paragraphs 5.24; 5.40.

33 Family Law Council, *Sterilisation and other medical procedures on children*, 1994, Recommendation 4.

34 Susan Brady, John Britton, Sonia Grover, *The sterilisation of girls and young women in Australia: issues and progress*, A report jointly commissioned by the Sex Discrimination Commissioner and the Disability Discrimination Commissioner at the Australian Human Rights Commission, 2001, p. 44.

Court. As the Department advised, section 22 of the *Family Law Act 1975* (Family Law Act) directs that a person shall not be appointed unless he or she, by reason of training, experience and personality, is suitable to deal with family law matters. The Department also noted that there is no requirement for the judicial officers to attend training programs. Judicial training is a matter for the courts.[35] The Department did not directly engage with concerns with the training or expertise of Family Court justices in child sterilisation and disability matters. It was, however, submitted that any departmental involvement in the training of federal judicial officers could be seen as infringing the doctrine of separation of powers.[36]

6.20 In response to concerns with the expertise of Family Court justices, the Family Court of Australia also highlighted the expectation that Family Court justices have the capacity to 'negotiate the difficulties and complexities' of family law cases.[37] Chief Justice Diana Bryant submitted that, as family law is a specialist area, it is probable that presiding justices would have been exposed to sterilisation cases prior to being appointed to the Family Court bench.[38]

6.21 The committee was further informed that the Family Court has access to third-party advice. Relevant to sterilisation cases, Chief Justice Diana Bryant noted that the Family Court has authority to obtain input from State and Territory child welfare departments, the Australian Human Right Commission, the OPA or its equivalents, and medical experts.[39] As has been discussed, the court may also have before it the advice of an Independent Children's Lawyer. The Chief Justice further advised that where parties are in agreement the court may, where appropriate, invite a contradictor to provide a counterview.[40] However, the Chief Justice also noted that there have been cases where organisations have declined the court's invitation to become a party to the case.[41]

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35 Attorney-General's Department, answer to question on notice, 19 April 2013 (received 14 May 2013).

36 Mr Daniel Abraham, Assistant Secretary, Human Rights Policy Branch, Attorney-General's Department, *Committee Hansard*, 31 May 2013, p. 14.

37 The Hon. Diana Bryant, AO, Chief Justice, Family Court of Australia, *Submission 36*, p. 8.

38 The Hon. Diana Bryant, AO, Chief Justice, Family Court of Australia, *Committee Hansard*, 27 March 2013, p. 59.

39 The Hon. Diana Bryant, AO, Chief Justice, Family Court of Australia, *Submission 36*, p. 8.

40 The Hon. Diana Bryant, AO, Chief Justice, Family Court of Australia, *Committee Hansard*, 27 March 2013, p. 58. Parties to proceedings include the people who may institute proceedings, which include the child's parents, the child, child's grandparents, or any other person concerned with the child's welfare care or development (see *Family Law Act 1975*, s. 69C). In addition, the court may in the late the persons to be party to the proceedings, including State and Territory child welfare officers (see *Family Law Act 1975*, s. 91B).

41 The Hon. Diana Bryant, AO, Chief Justice, Family Court of Australia, *Committee Hansard*, 27 March 2013, p. 58.

6.22 Pursuant to the *Family Law Rules 2004* (Family Law Rules), evidence before the court for applications for court approval of a special medical procedure must include evidence from a medical, psychological or other relevant expert witness. This evidence is to include an assessment of the likely long-term physical, social and psychological effects if the proposed procedure is, or is not, carried out and must establish whether the procedure is necessary for the child's welfare.[42] The evidence must also indicate whether the child, if capable of making an informed decision about the procedure, agrees to the proposed procedure. If the child is incapable of making an informed decision, the evidence also needs to establish the probability of whether the child will be able to make an informed decision within the time in which the procedure should be carried out or within the foreseeable future.[43]

6.23 Given the depth of advice available to the court, and the presiding justices' experience with complex matters, the Chief Justice concluded:

> Family Court judges are optimally placed to make informed and responsible decisions about individual special medical procedure applications and to arrive at a decision that is in the best interests of the child in all the circumstances.[44]

Ideology and judicial reasoning

6.24 It was further contended that Family Court decisions are based on personal ideology rather than objective, rights-based criteria. Speaking to the committee, Ms Carolyn Frohmader, Executive Director, Women With Disabilities Australia (WWDA), argued that '[y]ou only have to look back through the Family Court judgments that have been made to see the value judgements'.[45] WWDA advised that its analysis reveals that Family Court decisions are based on genetic/eugenic arguments; theories that sterilisation is for the good of the state, the community, or the family; arguments that disabled persons are without the capacity for parenthood; the notion that persons with intellectual disabilities are incapable of developing the capacity for self-determination; and to minimise the risk of sexual abuse.[46]

6.25 People with Disabilities Australia (PWDA) agreed.[47] PWDA shared the view that Family Court decisions are based on personal values:

> Other examinations of Family Court decision-making also reveal that prejudicial assumptions and values about girls and young women with disability are embedded in reports to the Court and in final judgements. Not

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

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

44 The Hon. Diana Bryant, AO, Chief Justice, Family Court of Australia, *Submission 36*, p. 8.

45 Ms Carolyn Frohmader, Executive Director, Women With Disabilities Australia, *Committee Hansard*, 27 March 2013, p. 4.

46 Women With Disabilities Australia, *Submission 49*, pp. 30, 38.

47 People with Disabilities Australia, *Submission 50*, p. 16.

> surprisingly, Family Court judgements have overwhelmingly found that non-therapeutic sterilisation is appropriate in the circumstances of the case.[48]

6.26 Similar concerns were raised by Ms Miriam Taylor, Queensland Centre for Intellectual and Development Disability, University of Queensland, and Ms Linda Steele, Lecturer, Faculty of Law, University of Wollongong. Ms Taylor submitted that the judgements of the Family Court Australia are 'based on a whole lot of assumptions that there is a devalued status for young women in particular with intellectual disabilities and quite severe physical disabilities'.[49] Ms Steele also commented on the status of persons with disabilities. It was submitted that given the scope of the court's child welfare jurisdiction, 'individuals who are the subject of sterilisation applications can only be known within its jurisdiction as children and in terms of their relationship to their parents'. Accordingly, Ms Steele argued:

> this has the effect of freezing time in terms of that person's individual life course, and easily folds into the construction of people with intellectual disability as eternal children.[50]

6.27 In support of the view that Family Court decisions are based on idiosyncratic, personal ideology, WWDA provided nine case examples. Of the nine cases, five predate the May 1992 High Court of Australia's decision in *Re Marion*. Accordingly, while representative of the history of the Family Court and illustrative of its evolution in responding to sterilisation matters, the cases do not represent current law or practice. Of the remaining four cases, two predate the commencement of the Family Law Rules in 2004. However, rule 4.09 of the Family Law Rules replicates Order 23B, which existed prior to the introduction of the Family Law Rules.

6.28 Of the post *Re Marion* cases, WWDA highlighted ideological statements in the evidence before the court. However, the views of parties to the proceedings were equated with the opinions of the presiding judicial officers. For example, in support of the proposition that Family Court judgements are based on genetic or eugenic arguments, WWDA provided an extract of the judgement in *Re H* [2004] FamCA 496. The extract is itself an extract of a summary of medical evidence presented during the proceedings:

> A laparoscopic hysterectomy will be associated with a relatively short stay in hospital and significantly less post-operative pain (and therefore easier management) than a formal laparotomy. The result will be complete absence of menstruation and this will undoubtedly be of benefit to H who already appears to have substantial difficulties with cleanliness following defecation and micturition. As a by–product of an absence of the uterus H will never become pregnant. Given the genetic nature of her disorder and

48 People with Disabilities Australia, *Submission 50,* p. 16.

49 Miriam Taylor, Queensland Centre for Intellectual and Development Disability, University of Queensland, *Proof Committee Hansard*, 30 January 2013, p. 6.

50 Ms Linda Steele, *Submission 44*, p. 23.

> the 50% inheritance risk thereof, this would in my view be of great benefit to H.[51]

6.29 While the court may accept views into evidence, it does not follow that the court gives weight to, or agrees with opinions, offered. Indeed, the fact that the judgement records the evidence says nothing about the views of the court itself. It is notable that the court's reasons in *Re H* do not cite eugenic arguments, or the statement of the medical expert quoted above. Rather, in accordance with rule 4.09 of the Family Law Rules, the court weighed the benefits and likely risks of carrying or not carrying out the procedure to determine whether the procedure would be in the best interests of the child. The listed benefits do not include eugenic considerations.

6.30 An analysis of the reasons for Family Court decisions in sterilisation cases does, however, give weight to WWDA's argument that sterilisation may be authorised 'for the good of the family'. For example, in *Re H* and *Re: Angela* [2010] FamCA 98, the court linked the best interests of the child to the interests of the parents. This matter was further explored in Chapter 5.

6.31 WWDA's submission also highlighted the need for greater direction for persons preparing evidence for sterilisation cases. Reporting in 1994, the Family Law Council concluded that there are four situations in which sterilisation should never be authorised. These include scenarios in which sterilisation is proposed for eugenic reasons. In contrast, WWDA's analysis highlighted that, regardless of the weight given to such views by the court, such considerations may underlie applications for child medical procedures such as sterilisation.

Committee view

6.32 In conducting its inquiry, the committee sought to establish the nature, and the appropriateness, of the procedures that operate in sterilisation cases. As a primary forum for the exercise of the Commonwealth jurisdiction in child sterilisation matters, it was clear from the material before the committee that the Family Court is regularly criticised by non-government organisations. However, it is equally clear that the precise nature of Family Court procedures is not widely and comprehensively understood. Criticisms were not always founded on a clear analysis of the Family Court's procedural rules or legislative framework. The lack of any reference to the less adversarial trial (LAT), in particular, raises doubt about the validity of the concerns. The committee does not accept that Family Court procedures in sterilisation cases are conventionally adversarial. However, the committee does encourage officers of the Family Court of Australia to consider whether state and territory procedures can be adapted to further strengthen non-adversarial procedures for Commonwealth child sterilisation cases.

6.33 Evidence before the committee did highlight two areas of concern.

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51 Prof T, *Re H* [2004] FamCA 496, 49; as cited, in part, in Women With Disabilities Australia, *Submission 49*, p. 32.

Training and expertise of members of the judiciary

6.34 All participants in child and adult sterilisation cases must have sufficient expertise in disability matters. The committee is concerned with the lack of evidence about the training and expertise of officers of the Family Court of Australia in disability matters. The committee accepts evidence that presiding officers are proficient in family law issues. However, the committee considers that child sterilisation is a special category of matter that does not fall neatly within the broader family law framework.[52] Additional knowledge, skills, and experience are required. Accordingly, the committee urges the Family Court of Australia to develop training courses in child disability matters, and to make participation in such courses mandatory for any judicial officer who may hear special medical procedure cases.

6.35 The committee notes the approval among not only the submitters to this inquiry but within previous inquiries of the skills and expertise of members of state and territory tribunals. The committee encourages state and territory tribunals to continue prioritising training in disability matters.

Recommendation 20

6.36 The committee recommends that the Family Court of Australia gives strong consideration to the evidence gathered by this inquiry about the absolute necessity of ensuring that judicial officers participating in special medical procedure cases have appropriate skills and expertise in disability matters. The committee urges the Family Court of Australia to develop training courses about disability matters and to ensure that such courses are completed by any judicial officer who may hear cases concerning special medical procedures.

6.37 Currently under the Family Law Act, the Court may seek external assistance. A general power to do this lies in section 102B:

> In any proceedings under this Act (other than prescribed proceedings), the court may, in accordance with the applicable Rules of Court, get an assessor to help it in the hearing and determination of the proceedings, or any part of them or any matter arising under them.

6.38 'Assessor' is not defined in the Act. The Family Law Rules provide for procedures for either the parties to a case to seek the appointment of an assessor, or for the Court to appoint an assessor at its own initiative.[53] There are also detailed provisions on the obtaining of expert evidence, in particular from a 'single expert witness'.[54] Division 4.2.3 of the Rules, as outlined in chapter 3 of this report, imposes particular requirements on the form of applications to the Court for a sterilising

52 This matter is also taken up in the next chapter.

53 *Family Law Rules 2004*, Part 15.4, especially r. 15.38(3).

54 *Family Law Rules 2004*, Part 15.5.

medical procedure. This must 'include evidence from a medical, psychological or other relevant expert witness' on certain matters.

6.39 It is clear to the committee from evidence received during this inquiry that there is a range of views and practices among medical professionals and other experts in the field, in respect of sterilisation and menstrual management for people with disability, as well as for intersex people. Reliance on the advice of a single expert carries with it the risks that that particular person's views may or may not be consistent with best practice or evidence, in both medical and non-medical matters. This is particularly acute in cases where there is no contradictor (no party to the case with a different view to the other party or parties), cases in which, as Chief Justice Diana Bryant pointed out, the Court has to proceed with caution.[55]

6.40 The committee concluded that there should be greater expert discussion of cases in this area, and that the Family Court, as well as other jurisdictions, could benefit from drawing on that discussion. This could be achieved by the establishment of an advisory committee of experts in the field, which could regularly discuss best practice, and provide advice to courts upon request, including on specific case information placed before the committee. The scope of the committee would be to discuss best practice and provide advice in relation to sterilisation procedures and related matters, sometimes referred to as special medical procedures.

6.41 The committee should include individuals expert in medical and in psychological care, but must also include non-medical expertise in relation to disability care, and non-medical expertise in relation to disability rights. There are a number of existing organisations that could assist in identifying appropriate members for the committee, but the committee is intended to be expert in nature, and not representative of interests or views. Organisations that could assist in identifying suitable members include:

- Australian Human Rights Commission
- Royal Australian and New Zealand College of Obstetricians and Gynaecologists
- Australasian Paediatric Endocrine Group
- Sexual Health and Family Planning Australia
- National Council on Intellectual Disability
- Women With Disabilities Australia
- Australian Guardianship and Administration Council

6.42 The advisory committee would be established by the Commonwealth government, and would be supported through the Department of Health and Ageing. The Family Court would then be able to appoint it as an assessor under existing

55 The Hon. Diana Bryant, AO, Chief Justice, Family Court of Australia, *Submission 36*, p. 7.

Family Law Rules. As the rules state, it would be strictly advisory: 'The court is not bound by any opinion or finding of the assessor'.[56]

6.43 This mechanism will allow the Family Court to, as a matter of routine, draw on the best information available, and to minimise the risks associated with choosing a single expert to provide evidence. At the same time, by utilising the committee as an assessor, it would avoid introducing a multiplicity of experts into the court's proceedings.

6.44 While recommending the establishment of this advisory committee in the context of providing more effective support to the Family Court, the committee could potentially provide similar assistance to other jurisdictions. This would be a matter for discussion with the Standing Committee on Law and Justice, and with the Australian Guardianship and Administration Council.

Recommendation 21

6.45 The committee recommends that the Commonwealth government establish a special medical procedures advisory committee, to provide expert opinion to the Family Court upon request in relation to specific cases, and to other statutory decision-makers and government as appropriate on best practice in relation to sterilisation and related procedures for people with disability; and that the committee must include non-medical disability expertise as well as medical expertise.

The cost of sterilisation procedures

6.46 The cost of accessing Family Court proceedings is likely to be out of the reach of families whose resources are dedicated to supporting a child with a disability. Where the cost of accessing the legal system is excessive, the system becomes inaccessible. Accordingly, the committee endorses the recommendation first made by the Family Law Council in 1994 for child sterilisation cases to be funded through legal aid. Families' access to legal aid in child sterilisation cases should not be subject to means or merits testing, and should not be limited by funding caps.

Recommendation 22

6.47 The committee recommends that legal aid should be provided to cover the costs incurred by the parents or guardians in child sterilisation cases. The legal aid grant should not be subject to capping or to a means or merits test.

Should jurisdiction for child sterilisation cases be retained within the Family Court of Australia?

6.48 Concerns with the operation and expertise of the Family Court in child sterilisation cases have raised the question of whether it is appropriate for the Family

56 *Family Law Rules 2004*, r. 15.39(4).

Court to continue hearing these cases. The committee concluded that, at present, it would not be appropriate for the jurisdiction to be removed. As the Commonwealth court, the Family Court facilitates consistency in policy and practice for children regardless of where they live. Accordingly, Family Court decisions can act as a benchmark for consistency and uniformity for all Australian children. The committee does however acknowledge the excellent work of the Australian Guardianship and Administration Council in preparing and endorsing the 2009 *Protocol for Special Medical Procedures (Sterilisation)*, which is also intended to ensure consistency across jurisdictions.[57]

6.49 As the committee's survey of jurisdictions in chapter 3 has shown, there is variation in practice across the states and territories, including matters such as the circumstances under which procedures will be approved. Given the current inconsistency throughout the State and Territory legislation, the committee is concerned that were the Family Court jurisdiction to be removed, protections of the child's rights will vary to some extent according to where the child lives. The committee is particularly concerned about the rights of children in the states and territories that have not legislated to regulate child sterilisation cases.

6.50 However, the committee does recognise the valuable expertise in state and territory tribunals, and the strong protections of rights in place in many cases. The committee recognises that the specialisation of tribunals may deliver stronger understanding of cases in some circumstances. It also notes the argument that tribunals may be cheaper or more accessible for families.

6.51 The committee concluded that this is a matter that needs to return to the agenda of the Standing Council on Law and Justice, which dealt with some aspects briefly in the mid-2000s. There needs to be ongoing review of the effectiveness with which all jurisdictions are managing applications for sterilising procedures, and the extent to which rights are being protected. The Standing Council's deliberations will provide an opportunity to consider whether there may be benefits to further changes to the scope or operation of the various jurisdictions.

Recommendation 23

6.52 The committee recommends that the matter of the scope and operation of the relevant courts and tribunals be placed on the agenda of the Standing Council on Law and Justice for ongoing review.

6.53 The committee suggests that the Standing Council may wish to refer aspects of the matter for more detailed examination by other specialist organisations. During the course of review, the Standing Council should consult with the Australian Law Reform Commission and the Australian Human Rights Commission as well as the tribunals and the Australian Guardianship and Administration Council.

57 Australian Guardianship and Administration Council, *Submission 28*, p. 2.

6.54 The committee also has a concern that there are cases which should be reaching tribunals or courts, but which are being labelled as 'therapeutic' by medical professionals and are not being adequately scrutinised. This is also a matter to which the Standing Council should give consideration.

Recommendation 24

6.55 The committee recommends that the Standing Council on Law and Justice obtain information about the frequency and nature of 'therapeutic' sterilisation cases being conducted, and compare the circumstances of those cases with 'non-therapeutic' cases that have been authorised by courts or tribunals.