

Consent to Sterilisation of Minors

Terms of Reference

In 1981 the Commission was given a general reference to examine the law relating to medical treatment for minors and report on the adequacy of existing civil and criminal law.

Background of Reference

The Commission prepared a discussion paper on the broader reference in 1988. A number of submissions received in response to the discussion paper referred to the question of sterilisation of children. As a result of these submissions and developments in the law following the release of the discussion paper, the Commission decided to divide the reference into two parts. This part ("Part II") deals with the question whether sterilisation of children should be permissible, and if so, in what circumstances; and whether parents should be able to consent to such a procedure or whether it should be carried out under the authority of a court.

Work on the report for Part II was suspended in 1990 to await the decision of the High Court in *Department of Health and Community Services v JWB & SMB ("Marion's Case")*.¹ In 1992 the High Court published its reasons for decision. A majority of the Court held that a decision to sterilise a child should not come within the normal scope of parental consent to medical treatment.² The majority considered that in order to protect the best interests of the child, a court authorisation was necessary. However, recognising problems of cost and delay associated with court proceedings, the High Court recommended legislative reform to introduce a more appropriate decision-making process in respect of applications for sterilisation of a minor.³

In completing its final report on this subject, the Commission focussed upon the implications of the decision in *Marion's Case* and how the recommendation by the High Court regarding legislative reform of decision-making could best be implemented in Western Australia. The final report was delivered in October 1994.⁴

Nature and Extent of Consultation

Following the High Court's decision in *Marion's Case* the Commission invited submissions through advertisements placed in public newspapers. The issue was given significant publicity and a number of media interviews were conducted by Commission officers. As a result of this, the Commission received a large number of written and oral submissions from parents, representative bodies, government, community organisations, religious groups, medical and legal practitioners and others.

Recommendations

1. That the Commonwealth be asked to vacate the field in matters of sterilisation, so that the Western Australian Parliament can enact the Commission's ideal scheme. Under this scheme, all sterilisation decisions would be made by the Guardianship and Administration Board. It would be competent to deal with all children, both those who were children of a marriage and those who were not. The federal jurisdiction of the Family Court of Australia under the *Family Law Act 1975* (Cth) and the jurisdiction of the Family Court of Western Australia in state matters, would be excluded.

1 (1992) 175 CLR 218.

2 The High Court distinguished sterilisation that would occur as a consequence of surgery proposed for the treatment of some malfunction or disease (therapeutic) from the sterilisation of a healthy person undertaken solely to cause infertility (non-therapeutic). Parental consent would suffice in respect of the former but not the latter.

3 *Marion's Case* (1992) 175 CLR 218, 253.

4 Law Reform Commission of Western Australia, *Consent to Sterilisation of Minors*, Project No 77(II) (1994).

2. If the Commonwealth enacts legislation giving exclusive jurisdiction in matters of sterilisation to state Guardianship Boards, the Commission recommends (provided the Commonwealth legislation is in acceptable form) that Western Australia should enact mirror legislation giving state jurisdiction in such matters to the Guardianship and Administration Board of Western Australia.
3. If the Commonwealth enacts legislation giving exclusive jurisdiction in matters of sterilisation to the Family Court of Australia, the Commission recommends (provided the Commonwealth legislation is in acceptable form) that Western Australia should enact mirror legislation giving state jurisdiction in such matters to the Family Court of Western Australia.
4. If the Commonwealth:
 - (i) enacts legislation under which the Family Court of Australia retains non-exclusive jurisdiction in matters of sterilisation; or
 - (ii) elects not to enact any legislation, so that the Family Court of Australia retains its current non-exclusive jurisdiction,
 the Commission recommends (provided Commonwealth legislation is in acceptable form) that Western Australia enact legislation giving state jurisdiction to the Guardianship and Administration Board.

Legislative or Other Action Undertaken

It may be discerned from the recommendations that legislative action by Western Australia is contingent upon Commonwealth legislation defining the jurisdiction. To date no relevant legislative action in regard to defining the jurisdiction for determinations upon the lawful sterilisation of minors has been taken by the Commonwealth. However, certain Commonwealth initiatives have been implemented to prevent *unauthorised* sterilisation of young women including notations to the Medicare Benefits Schedule, advice to professional medical bodies, amendment to Legal Aid guidelines and education programmes.⁵

Currency of Recommendations

The Commission's recommendations remain current. The proposed allocation of jurisdiction in respect of sterilisation of minors to the Guardianship and Administration Board of Western Australia continues to be both feasible and desirable. Similar allocation of jurisdiction prior to *Marion's Case* in New South Wales and South Australia continues to operate effectively. The High Court has indicated the legitimacy of such allocation of concurrent jurisdiction so long as the relevant state legislation does not attempt to remove or alter the existing powers of the Family Court of Australia under the *Family Law Act*⁶

Since the publication of the Commission's 1994 report on this subject there have been a series of further reports and investigations by other bodies. Most notable of these is the recent report commissioned by the Human Rights and Equal Opportunity Commission.⁷

Action Required

Having regard to the lack of Commonwealth legislation in this area, the only feasible option available to the Western Australian Parliament is that outlined in Recommendation 4. Currently Western Australia has

⁵ For a fuller outline, see Commonwealth, Minister for Family and Community Services and the Minister Assisting the Prime Minister for the Status of Women, *Sterilisation of Women and Young Girls with an Intellectual Disability* (6 December 2000).

⁶ *P v P* (1994) 120 ALR 545.

⁷ S Brady, J Briton and S Grover, *The Sterilisation of Girls and Young Women: Issues and Progress*, commissioned jointly by the Sex Discrimination Commissioner and Disability Discrimination Commissioner, Human Rights and Equal Opportunity Commission (2001). See also S Brady and S Grover, *The Sterilisation of Girls and Young Women in Australia: a Legal, Medical and Social Context*, commissioned by the Disability Services Commissioner, Human Rights and Equal Opportunity Commission (1997).

◀ Consent to Sterilisation of Minors

exclusive responsibility for ex-nuptial children and those under state care. Western Australia may legislate with regard to nuptial children, provided such legislation is not inconsistent with Commonwealth law.

The remaining of the Commission's alternative recommendations are somewhat dependent upon legislative action by the Commonwealth Parliament. However, the Commission's preferred option (Recommendation 1), could be assisted by a formal request of the Commonwealth Parliament to vacate the field to allow Western Australia to legislate in accordance with the Commission's recommendations.

Priority – Medium-High

It is now almost a decade since the High Court decision in *Marion's Case* where the pressing need for reform was highlighted. Statistics revealed in the most recent HREOC report⁸ on the subject demonstrate that families are more likely to seek authorisation for sterilisation of a minor where the guardianship tribunal option is available. The very small number of sterilisation applications brought before the Family Court of Western Australia⁹ may be taken to suggest that unauthorised sterilisations are being performed in this state. Expedient implementation of suggested reforms can only improve the current situation.

⁸ S Brady, J Briton and S Grover, *The Sterilisation of Girls and Young Women: Issues and Progress*, above n 7, fn 73.

⁹ Only one case was brought before the Family Court of Western Australia between 1992 and 1998 in contrast with 17 in New South Wales and 12 in South Australia where the jurisdiction is exercised by a tribunal. *Ibid*, table 3.4.