



National Legal Aid Secretariat
GPO Box 9898
Hobart TAS 7001

Executive Officer: Louise Smith

t: 03 6236 3813
f: 03 6236 3811
m: 0419 350 065

e: louise.smith@leqalaid.tas.gov.au

Mr C. Ingram
Department of Justice
24/121 Exhibition Street
Melbourne
Victoria 3000

Attention: Ms S. Nieuwenhuysen

16th November 2006

Dear Sir,

Re: Children with Intellectual Disabilities (Regulation of Sterilisation) Bill 2006

Introduction

National Legal Aid (NLA) represents the Directors of each of the 8 State and Territory Legal Aid Commissions. NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- Obtain access to independent legal advice;
- Afford the financial cost of appropriate legal representation;
- Obtain access to the Federal or Territory legal systems; or
- Obtain adequate information about access to the law and legal system

NLA has been identified as a national stakeholder in the Standing Committee of Attorneys-General consultation process relating to the sterilisation of intellectually disabled minors. Individual Legal Aid Commissions have also been consulted about the draft model provisions relating to the sterilisation of children with an intellectual disability by their respective State and Territory Departments of Justice, and State and Territory organisations have been invited to contribute through their "national body" should they so wish. This submission is therefore made on behalf of the 8 State and Territory Legal Aid Commissions and reflects our agreed views.

Executive summary

NLA generally supports the bill. However, we suggest that the bill should:

- include a mens rea component in the offences for hospital service providers
- omit the need to obtain leave if the person has previously applied in another court
- specify that the child representative will act in the best interests of the child
- specify who is responsible for remunerating the child representative

- specify who is responsible for the cost of reports
- be amended to provide the tribunal should not determine the matter without receiving a requested report, unless there are ‘exceptional circumstances’.

Comment on the draft model provisions

Part 1 — preliminary matters

Clause 4. "Terms used in this Act"

Definition of child

NLA supports the proposed definition of child as a person under 18 years of age.

Definition of ‘intellectual disability’

NLA supports the inclusion of a carefully drafted definition of intellectual disability.

We agree that the definition should not:

- cover disabilities that are solely sensory or physical. However, a disability, psychiatric illness or acquired brain injury which significantly impairs intellectual capacity ought to be covered.
- refer to a child's capacity to give informed consent because that is a matter for the Tribunal to decide under clause 9.

Part 2 –Unauthorised sterilisation procedures

Cl. 5. (2) Penalty

NLA supports criminal penalties for individuals and health service providers involved in carrying out unauthorised sterilisation procedures. We consider that a term of imprisonment may be appropriate for a second or subsequent offence or where there are aggravating circumstances.

Cl. 5. (5) Medical necessity exemption

NLA supports the exemptions for sterilisation procedures directed at:

- treating serious physical malfunction or disease
- relieving pain or distress arising from end-stage terminal disease.

Cl. 6. Offences by hospital service providers

NLA prefers offence option 2, which includes a mens rea component—ie. the service provider knows or ought reasonably to know that an offence is being committed in the hospital.

We support the proposed defence of taking all reasonable steps to prevent the offence from being committed. We agree that the liability of the hospital service provider should not depend on the liability of the individual who carried out the procedure.

We agree that the definition of hospital should extend to private clinics and other non-hospital facilities where sterilisation procedures may be carried out. We note that if male sterilisation procedures are considered, then this could cover a broad range of facilities (including general practitioners’ surgeries).

Part 3 Authorisation of Tribunal

Division 1 — Conferral and exercise of jurisdiction

Cl. 7. Conferral and exercise

The issues paper (at page 3) states that the tribunal's jurisdiction is intended to operate concurrently with the existing jurisdiction of the Family and Federal Magistrates' Courts. The Federal Magistrates' Court does not currently have jurisdiction in this area. This is correctly reflected in the definition of court or tribunal at clause 5(1).

Cl. 8. Constitution

NLA strongly supports the proposal that the tribunal must be constituted by a legal member, a medical practitioner and a person who has experience with children with intellectual disabilities.

Cl. 9. Matters Tribunal must be satisfied of

NLA supports the proposal that the tribunal must be satisfied that:

- the child is incapable of giving informed consent
- the child is unlikely to regain or attain that capacity
- the sterilisation procedure is in the best interests of the child.

Cl. 10. Best interests of child

NLA supports the proposed matters that the tribunal must consider when determining the best interests of the child—ie. the tribunal must ensure that child is treated in a way that respects human rights and dignity and take into account:

- the child's wishes
- the wishes of caregivers and other interested parties
- information given by healthcare providers
- the child's well-being
- alternatives to sterilisation
- risks of the procedure
- whether all practical alternatives have been considered
- child's needs and capacity in relation to the procedure
- likely consequences for the child if the procedure is not carried out
- any other relevant matters.

We suggest that Cl. 10 (2) (e) (ii) should take account of the fact that more than one type of sterilisation procedure may be considered.

We suggest that Cl. 10 (3) should include a reference to "reports" as the means by which a child's views and wishes may be expressed. The expert evidence which comes before a Tribunal relating to capacity and consent will include references to children's wishes and views. It makes sense to use this evidence.

We support the proposal that a sterilisation procedure may not be carried out if the sole reason for doing so is:

- eugenic reasons
- to remove the risk of pregnancy resulting from sexual abuse

- because it is a convenient contraceptive or menstruation management measure.

We note that the Tribunal may authorise a sterilisation procedure if the reasons for doing so include one of the above reasons, so long as the procedure is also in the best interests of the child.

Part 3

Division 2 — Procedural matters generally

Cl. 13. Application for authorisation

NLA supports the proposal that a parent, guardian, the Public Advocate, the child's healthcare provider or any other person the tribunal considers has a sufficient interest in the child's well-being will be able to apply for authorisation.

Cl. 14. Leave to apply required if person has applied previously

NLA supports the goal of preventing forum shopping. However, the proposed rule (ie. that a person is not entitled to make an application without leave if that person has made a previous application to any court or tribunal) is also likely to add to cost. We suggest that the issue of forum shopping could best be addressed by the Courts and Tribunal establishing protocols to address this issue as there is not one comprehensive national data base which can be searched to establish whether previous applications have been made.

Cl. 15. Representation of child

NLA supports the mandatory appointment of a child representative. However, we suggest that the Bill should specify that the representative will act in the best interests of the child rather than upon the child's instructions.

The Bill should also specify who is responsible for remunerating the child representative. In matters before the Family Court of Australia, Commissions may fund (or decline to fund) an independent children's lawyer in accordance with the Commonwealth guidelines. Commonwealth guideline 3.1 (2) states that "the Commission should make a Grant of Legal Assistance for the separate representation of a child in any court proceedings relating to special medical procedures (including sterilisation)." NLA seeks confirmation that the states and territories would cover the costs before a State Tribunal on a similar basis.

We note that Commonwealth guideline 9.1 states "The Commission should make a grant of Legal Assistance to the parents of a child in any court proceedings relating to special medical procedures (including sterilisation) involving the child." Guideline 9.2 states that "An application for a Grant of Legal Assistance under this Guideline 9 is not subject to the merits test". NLA suggests that there should be uniformity in relation to funding Guidelines regardless of whether an application has been filed with the Court or a Tribunal. NLA seeks confirmation that the states and territories would provide funding to Commissions for matters before a State Tribunal on a similar basis.

Cl. 16. Intervention by Equal Opportunity Commissioner

NLA supports the proposal that the Equal Opportunity Commissioner may intervene in the proceeding with leave of the tribunal.

Cl. 18. Referral of matter for investigation and report

This provision allows the Tribunal to refer a matter to specific persons for investigation and report. Cl. 18 (4) provides that if the Tribunal does not receive the report by a specified period the Tribunal may determine a question relating to the matter without receiving or considering the report. We assume that there is an expectation that the parties appearing before the Tribunal will submit expert reports and that the child's solicitor in particular will be expected to present relevant independent expert evidence relating to the matters set out in S10 (e). Is it envisaged that the Tribunal would seek further evidence if it is not satisfied that adequate evidence is before it? If this is the case should the Tribunal make a determination without such evidence? Is it envisaged that rules or practice directions will set out guidelines about how expert evidence should be presented to the Tribunal? Should the parties seek leave for expert evidence other than that of a treating medical practitioner to be presented to the Tribunal?

We would expect that a referral for investigation and report would not be made unless it was thought at the time of the referral that the report would be relevant and probative to the tribunal's decision. It would therefore usually be inappropriate for the tribunal to make the decision without receiving the report. We suggest that the bill should be amended to provide that if the tribunal does not receive the report by the due date, then it should not determine the matter without the report, unless there are exceptional circumstances which in the opinion of the Tribunal would warrant it so doing.

The Bill should specify who is responsible for the cost of any investigation or report order under the clause.

Conclusion

Thank you for the opportunity to make these comments. Please do not hesitate to contact us should you require any further information from us.

Yours sincerely,



Suzan Cox QC
Chairperson
National Legal Aid