'Something less than human'

Sterilising minors with **intellectual disabilities** in NSW

By Ranjini Acharya

The issue of extra-clinical approval for sterilising minors with intellectual disabilities has been the subject of ongoing debate in Australia.[1] Due caution is rightly required when considering this issue, because history has repeatedly shown that subjective social values can cloud our vision and encourage a perception of those with intellectual disabilities as 'somewhat less than human'.[2]

The leading High Court decision in this area has strongly recommended the development of clear legislative criteria to govern this area of medico-legal decision-making.[3] Subsequent attempts at reform, however, have been impeded by conflicting views as to the exact incidence of sterilisation of minors in Australia.[4] Nevertheless, hopes of legislative reform were revived in 2006, when the Standing Committee of Attorneys-General (SCAG) released model draft legislation that proposed to confer authority for giving extra-clinical approval to state and territory administrative tribunals.[5] Unfortunately, following two years of extensive consultation with stakeholder groups, it was agreed at a meeting of SCAG members in March 2008 that the issue be removed from the agenda, because 'there are existing processes in place in each jurisdiction to authorise sterilisation procedures, which appear to be working adequately'.[6]

However, the problem in NSW is the existence of legislation that allows for both the federal Family Court and the NSW Guardianship Tribunal (the Tribunal) to exercise concurrent jurisdictions in hearing applications for sterilisation of minors. This has led to considerable confusion among medical practitioners and parents of minors with intellectual disabilities and, as this article argues, reveals a system of existing processes that are *not* in fact working adequately to protect the interests of those directly affected by this issue.[7]

THE COMMON LAW APPROACH

Marion's case is the leading High Court authority on this issue. The case concerned the sterilisation of Marion, a severely disabled 14-year-old girl. Marion's parents were concerned about her ability to manage both her menstruation and fertility. They applied to the Supreme Court of the Northern Territory and then the Family Court for a declaration that they, as parents, could consent to sterilisation procedures on Marion's behalf. Failing that, they sought court authorisation for these procedures. The Family Court sought clarification on a point of law from the High Court. The question before the High Court was whether court approval was necessary before the procedure could be lawfully performed and, if so, the appropriate procedure to be adopted by the court in considering whether to grant such approval.[8]

In answering this question, the High Court was presented with the opportunity to consider the diverging approaches of the Canadian and British courts on the issue of sterilisation.

The Canadian approach

The leading Supreme Court of Canada authority absolutely

prohibits non-therapeutic sterilisation of minors. In *Eve's case*,[9] having defined 'therapeutic' operations as those necessary for the physical or mental health of a person,[10] the Court unanimously held that the non-therapeutic sterilisation of a mentally incompetent person could never be authorised under a court's *parens patriae* jurisdiction.[11] There was no further guidance on exactly where to draw the line between therapeutic and non-therapeutic sterilisation, but the Court did warn that 'utmost caution must be exercised'[12] in classifying any case. Thus, according to Canadian law, neither the courts nor parents nor medical practitioners have the authority to consent to the sterilisation of a minor, save for those operations that are therapeutic because they are necessary for the patient's physical or mental health.

The British approach

The distinction made in *Eve's case* between therapeutic and non-therapeutic sterilisation was severely criticised by the House of Lords in the subsequent English case of *In Re B*,[13] which authorised the sterilisation of a 17-year-old mentally handicapped girl. Lord Hailsham considered the distinction to be 'totally meaningless, and, if meaningful, quite irrelevant to the correct application of the welfare principle'.[14] Lord Bridge declared the true issue to be whether sterilisation is in the best interests of a minor, and dismissed the therapeutic/non-therapeutic distinction as 'an area of arid semantic debate'.[15]

The situation in Australia

In *Marion's case*, the high Court has adopted an approach that can best be described as a 'hybrid' of the reasoning of the courts of Canada and the UK. Six of the seven judges of the High Court[16] acknowledged that it is 'necessary to make the [therapeutic/non-therapeutic] distinction, however unclear the dividing line may be'.[17] However, in an echo of Lord Templeman's remarks in *In Re B*, the majority joint judgment of Mason CJ, Dawson, Toohey and Gaudron JJ held that court authorisation of non-therapeutic sterilisation is always required as a necessary procedural safeguard of the interests of the child.[18] Such court authorisation should be given only when the procedure is determined as being in the child's best interests in the sense that sterilisation is 'necessary to enable her to lead a life in keeping with her needs and capacities',[19] even when it is not necessary for her physical or mental health *per se*, provided that it is demonstrated that all alternative and less invasive procedures have failed or will not work.[20]

The majority joint judgment refused to make explicit the guidelines a court should use to determine whether a non-therapeutic sterilisation procedure is in the child's best interests, stating that '[i]t is not possible to formulate a rule which distinguishes ... the "clear cases"'.[21] The majority went on to call for legislative reform in this area, 'since a more appropriate process for decision-making can only be introduced in that way'.[22]

As a result of the decision in *Marion's case*, the Family Court, in determining proposed sterilisation applications, is guided only by a broad discretion to consider the welfare of the child or the best interests of the child.

The *Family Law Act* 1975 (Cth) does spell out, in general terms, the matters that the court should consider in determining what are the best interests of the child, but these are not given any specific application to decisions about a child's medical care.[23] Moreover, while the Family Court has embraced the discretionary approach, it has rejected recommendations by law reform agencies for more prescriptive criteria.[24]

Thus, it is clear that in Australia parents cannot consent to the non-therapeutic sterilisation of their children, but courts can. The problem, at least in NSW, is that the Guardianship Tribunal is considered to exercise concurrent jurisdiction alongside the Family Court in relation to such applications, but is guided by much more restrictive criteria.

THE REGULATORY FRAMEWORK IN NSW

In NSW, s20B of the *Children (Care and Protection) Act* 1987 (NSW) provides that a registered medical practitioner cannot carry out 'special medical treatment'[25] on a child under 16 without first obtaining approval from the Tribunal, except in cases of emergency, and irrespective of whether or not the child would otherwise be considered legally competent to consent. The Tribunal can consent to the treatment only if it is satisfied that the treatment is necessary to save the child's life or to prevent serious damage to the child's psychological or physical health.[26]

For a young person aged 16 or over who is found to be incapable of giving personal informed consent, a medical practitioner cannot carry out 'special treatment'[27] without first obtaining the consent of the Tribunal,[28] except in cases of emergency.[29] For treatment intended, or reasonably likely, to render the person permanently infertile, the Tribunal must give consent only if satisfied that it is necessary to save the patient's life, or to prevent serious damage to the patient's health.[30]

The legislative regime in NSW effectively places an absolute prohibition on the Tribunal authorising non-therapeutic sterilisation: the sole criterion for the Tribunal is whether sterilisation is necessary to avoid serious damage to the health of the minor. This position is clearly at odds with the common law principles set out in *Marion's case*, which established that the Family Court has power under legislation[31] to authorise sterilisation if it finds that it is in the child's best interests to do so, in the sense that sterilisation is 'necessary to enable her to lead a life in keeping with her needs and capacities'.[32]

The High Court considered the possibility of such conflict in the case of *P v P*;[33] and held that, notwithstanding the potential conflict and duplication by a state body of a federal court's powers, the state tribunal's power to hear and decide such applications remains valid, but with several qualifications. Firstly, the states cannot alter the grounds on which the Family Court exercises the welfare jurisdiction conferred upon it by the *Family Law Act*. Secondly, if the Family Court has already heard and determined a particular application, the tribunal cannot subsequently hear and >>

decide the same application. Finally, the enactment of any future state legislation, which narrows the circumstances for authorising sterilisation by prescribing more restrictive criteria than those established by *Marion's case*, will be invalid.[34]

This position opens up the possibility of 'forum shopping' in NSW because the Tribunal and the Family Court are guided by two different sets of criteria but are considered to exercise their jurisdictions concurrently. The Tribunal, however, is guided by a more structured decision-making process, with NSW legislation clearly stating specific matters to consider in deciding whether or not to authorise the medical procedure in question.[35] These criteria set a very high threshold that must be met before a procedure can be authorised, requiring that the treatment be necessary either to save the patient's life or to prevent serious damage to the person's health. By contrast, the Family Court is guided by a broad discretion, with reference only to considerations of the welfare of the child or the best interests of the child. The Chief Justice of the Family Court has, subsequent to *Marion's case*, listed a number of factors to be considered in determining whether sterilisation is in the best interests of the child, including considerations such as the likelihood of sexual activity or rape and the possibility of pregnancy, among others.[36]

The practical consequence of this is that the same case may, potentially, have a different outcome depending on the forum in which it is heard.[37] More disturbingly, parents in NSW could apply to the Tribunal for authority to order the sterilisation of their child and, if the Tribunal dismisses that application, they could have a second attempt by applying to the Family Court.[38] Furthermore, there remains a good deal of confusion in the minds of parents, lawyers and medical practitioners as to the precise jurisdictional limits of the various bodies in hearing an application in the first instance.

CONCLUSION

Far from there being 'existing processes in place which appear to be working adequately', legislative reform in NSW is in fact urgently needed to remove the confusion surrounding the issue of sterilisation.[39] However, as a result of the High Court's decision in *P v P*, any legislative reform to the framework regulating the sterilisation of children must in the first instance at least come from the Commonwealth in the form of amendments to the *Family Law Act*. It is to be hoped that the issue returns to the forefront of the SCAG agenda in the near future. ■

Notes: **1** See, for example: *Re a Teenager* (1988) 13 Fam LR 85; *Re Jane* (1988) 12 Fam LR 662; *Re Elizabeth* (1989) 13 Fam LR 47; *Re S, Attorney-General (Qld) v Parents* (1989) 13 Fam LR 660. See also: Melanie Fellowes, 'Australia's Recommendations for the Sterilisation of the Mentally Incapacitated Minor – A More Rigorous Approach?' [2000] 2 *Web Journal of Current Legal Issues* 1; Henry Little (1993) 'Non-Consensual Sterilisation of the Intellectually Disabled: Potential for Human Rights and The Need for Reform', *Australian Yearbook of International Law*, 203. **2** *E (Mrs) v Eve* [1986] 2 SCR 388 [*Eve's case*]. **3** *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 [*Marion's case*] at 407 per Mason CJ, Dawson, Toohey and Gaudron JJ. **4** See Susan Brady, John Briton, and Sonia Grover (2001) *The Sterilisation of Girls and Young Women in Australia: Issues and Progress*, Report to the Human Rights and Equal Opportunity Commission, Sydney, at pp14-21. **5** The full text of the Children with Intellectual Disabilities (Regulation of Sterilisation) Bill 2006 available at http://wwda.org.au/steriladv07.htm#scag2. **6** Communiqué of Standing Committee of Attorneys-General, 28 March 2008, available at http//www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/RWPA7434F9ED00CDACBCA25741A003910D7. **7** Similar legislation exists in South Australia; however, remarks are confined to the NSW context, as a comparative discussion of the regimes in other states and territories of Australia is beyond the scope of this paper. **8** For an excellent summary of the events leading up to *Marion's case*, and a summary of the approaches of the various judgments in that case, see Elizabeth Handsley, '"Sterilisation" of Young Intellectually Disabled Women' (1994) 20 *Monash Law University Review* 271. **9** *Eve's case*, above, n 2. **10** *Eve's case*, above, n 2 at 434. **11** *Eve's case* above, n 2 at 431. **12** *Ibid.* **13** *In Re B* [1988] 1 AC 199 [*Re B*]. **14** *Re B*, above n 14, at 204. **15** *Ibid.* **16** These were Mason CJ, Dawson, Toohey and Gaudron JJ (joint judgment) and Brennan J. Deane J agreed with the remarks of the House of Lords in *Re B*: see *Marion's case*, above n 3 at 443-8. **17** *Marion's case*, above n 3 at 404 per Mason CJ, Dawson, Toohey and Gaudron JJ. **18** *Ibid.* **19** *Marion's case*, above n 3 at 412-13 per Mason CJ, Dawson, Toohey and Gaudron JJ. **20** *Ibid.* **21** *Marion's case*, above n 3 at 407 per Mason CJ, Dawson, Toohey and Gaudron JJ. **22** *Ibid.* **23** See *Family Law Act* 1975 (Cth), s68F. **24** See *P v P (No. 2)* (1994-1995) 19 Fam LR 1. For examples of recommendations, see: Family Law Council (1994) *Sterilisation and Other Medical Procedures on Children: A Report to the Attorney-General*, November; Law Reform Commission of Western Australia (1994) *Report on consent to sterilisation of minors*, Report No. 77, Perth, Western Australia. **25** The definition of 'special medical treatment' includes any medical treatment that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out: see *Children and Young Persons (Care and Protection) Act* 1998 (NSW), s175; *Children and Young Persons (Care and Protection) Regulation* 2000 (NSW), cl 15. **26** *Children and Young Persons (Care and Protection) Act* 1998 (NSW), s175. **27** 'Special treatment' in this context includes any treatment intended, or reasonably likely, to have the effect of rendering the person permanently infertile: see *Guardianship Act* 1987 (NSW), s33(1); *Guardianship Regulation* 2000 (NSW), cl 6. **28** *Guardianship Act* 1987 (NSW), s36(1)(b) read in conjunction with s33. **29** *Guardianship Act* 1987 (NSW), s37. **30** *Guardianship Act* 1987 (NSW), s45(2). **31** *Family Court of Australia Act* 1976 (Cth) s27AZ. **32** See *Marion's case* above n 3, at 412-13. **33** (1994) 181 CLR 583. **34** *Ibid.* **35** See *Guardianship Act* 1987 (NSW), s45, which sets out the matters for the Tribunal to consider in deciding whether to authorise certain procedures, such as sterilisation. **36** *In re Jane* (1989) FLC 92-007; adapted from *In re Grady* (74) (1981) NJ 426 A 2d 467. **37** This is reflected by the difference in the number of sterilisations authorised by the Federal Court and the NSW Guardianship Tribunal in the period 1992-1998 – seven and three, respectively. For a full national profile of the incidence of sterilisation, see Brady et al, above n 4, at 22-32. **38** Jo Ford 'The Sterilisation of Young Women with an Intellectual Disability: A Comparison between the Family Court of Australia and The Guardianship Board of New South Wales' (1996) 10 *Australian Journal of Family Law* 236. **39** For examples of proposed legislative reform, see: John McHale 'Mental Incapacity: Some Proposals for Legislative Reform' (1998) 24 *Journal of Medical Ethics* 322; Henry Little (1993) 'Non-Consensual Sterilisation of the Intellectually Disabled: Potential for Human Rights and the Need for Reform' *Australian Yearbook of International Law* 203.

The author would like to thank Joaquin Zuckerberg at the University of Toronto for his comments on an earlier version of this article.

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