

SENATE STANDING COMMITTEE ON COMMUNITY AFFAIRS

Inquiry into the involuntary or coerced sterilisation of people with disabilities in Australia

Joint submission by the Adult Guardian of Queensland and the Public Advocate of Queensland

The Senate Standing Committee on Community Affairs has called for submissions for its inquiry into the involuntary or coerced sterilisation of people with disabilities in Australia.

The following outlines the position in Queensland in relation to this issue and the approach of the Queensland Parliament to recognise the rights of not only people with a disability but also their families, carers, friends and supporters.

1 An equal rights perspective

It must be clearly stated from the outset that the concept of disability utilised in the Senate Inquiry is too broad a statement. Many people have various forms of disability that in no way impact upon their capacity to exercise their legal rights or make decisions about themselves or their bodies. It is only where an individual lacks 'capacity' to exercise those rights and make those decisions that there is any justification for intervention in their lives.

For a comprehensive general discussion of the legal issues that are raised in these circumstances, the Committee is referred to Chapter 5 (Children and Consent to Medical Treatment) and Chapter 6 (Adults Who Lack Capacity: Substitute Decision-Making) in *Health Law in Australia* White, McDonald & Willmott, Lawbook Co, 2010.

In Queensland it is clear that adults who possess the relevant capacity to consent to medical treatment may undergo a sterilisation procedure by a medical practitioner without any intervention by government or society. Such procedures are conducted in accordance with the general law regulating the delivery of health services and the general criminal law.

It is similarly important to acknowledge that an adult with capacity may also choose to forego a medical procedure (even if the procedure is for life-saving purposes) on religious or similar grounds. This is most often applied in cases where those with particular religious affiliations are able to legally forego life-saving blood transfusions. This right should also, arguably, be afforded to people with disability and may also be applied to the issue of sterilisation.

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It is suggested by some that the whole process of sterilisation should be illegal for children and adults with disability. To do so however would constitute discrimination against children and against people with disability (both children and adults) and constitute a denial to them of a right to access a procedure available to persons without disability.

What Queensland legislation seeks to achieve is to give people with a decision-making impairment (whether adults or children) access to the same rights as people without an impairment by means of a decision made by an independent and impartial tribunal that openly and objectively considers all surrounding circumstances and alternatives before granting permission for such a procedure to occur.

In according people with disability the same rights as others in society, it is therefore incumbent upon society to ensure that there are appropriate mechanisms in place to enable people who have a disability that affects their capacity to make decisions about themselves the right and ability to make informed decisions about sterilisation procedures, and to ensure that the systems that are in place to protect those with impaired decision-making capacity operate in a manner that upholds these rights while offering appropriate protections.

The assumption that sterilisation is *not* what a person with disability would choose if he/she were able to make an informed decision needs to be challenged.

It would seem that society has a tendency to assume that an individual would *not* choose sterilisation rather than applying an equilateral perspective that considers that both choices are ones that may be rightly made by an individual if they are in a situation where such a decision is being considered. The right to choose as well as the best interests of the person (taking into account all short and long term circumstances) must both be considered.

Article 23 of the United Nations Convention on the Rights of Persons with Disabilities states that people with disabilities should “retain their fertility on an equal basis with others”. Many argue that this focuses on the physical protection of an individual's fertility. However the intention of Article 23 is to prevent discrimination against people with a disability in the areas of marriage, family, parenthood and relationships.

Preventing discrimination is as much about allowing people with disabilities the right to decide between the same range of options that are available to people who do not have a disability as it is about ensuring that people with disability are not forced to undergo procedures that would not be applied to a person without disability where all other circumstances are equal.

Applying an equal rights perspective to the Convention, this would provide people who have a disability that affects their capacity to decide the right to choose to undergo a sterilisation procedure as much as it provides for the right to choose not to be sterilised.

In accordance with this approach, if society and the law allow a Queensland adult without disability to undergo a medical sterilisation procedure by a medical practitioner, then adults with

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disability, including those with impaired decision-making capacity, should be afforded the same entitlement.

Given that, as noted in the opening paragraph to this submission, the intervention of society and/or the law should only occur if a person is deemed to lack capacity for decision-making in relation to sterilisation procedures, the remainder of this submission will deal primarily with adults with a disability who lack decision-making capacity, and with children.

2 An individualised approach to decision-making

Regardless of whether a sterilisation procedure is being considered for an adult with impaired decision-making capacity or a child, each person's situation and circumstances should be considered individually and independently taking into account the person's wishes as well as all other information relevant to ensuring that the procedure is in the person's best interests.

Taking an equal rights perspective, then, where an adult has impaired decision-making capacity, there should be the provision for consent to be given. In Queensland, this exists in a number of formats. In the case of sterilisation of an adult with impaired decision-making capacity in Queensland, this is permissible if the approval of the Queensland Civil and Administrative Tribunal (QCAT or the Tribunal) is obtained as outlined in section 3A below and detailed in Appendix 1.

In essence, this involves an enquiry by an independent tribunal (QCAT) into whether the sterilisation process is appropriate and in the best interests of the person given all circumstances. Queensland legislation specifies that every endeavour must be made by QCAT to ascertain the true wishes of the person prior to consent being given. The role of the Tribunal supplements the *parens patriae* jurisdiction held from common law by the Supreme Court of Queensland to approve such a procedure.

Where sterilisation is sought in relation to a child then two alternative options exist. Whether the child possesses impaired decision-making capacity or not, it is clear from the views expressed by the High Court of Australia in *Marion's Case [Secretary, Department of Health and Community Services (NT) v JWB and SMB (1992) 175 CLR 218 (Marion's Case)]* that because of the serious and usually irreversible nature of sterilisation of a child, the usual power of a parent to consent to medical treatment for their child is subject to the over-riding power of a court to approve this serious medical procedure.

In the case of a child for whom no question of impaired capacity exists, an application to a court (usually the Family Court of Australia) would still be required for approval for a sterilisation procedure. The Supreme Court could also still exercise a *parens patriae* jurisdiction as well. It is clear from judicial comments that the power to approve such procedures will only be exercised in extremely limited circumstances.

Where a child has an impairment or disability, however, an additional procedure exists (as outlined in section 3B and detailed in Appendix 2 of this submission) that utilises the procedures of

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QCAT to approve such a procedure. As can be seen, the very detailed criteria that must be complied with to obtain QCAT approval ensures that, as occurs for an adult with impaired decision-making capacity, approval for sterilisation of a child with impairment or disability will only be granted after a comprehensive examination of all the circumstances surrounding the application.

For both children and adults with impaired decision making capacity, the Queensland legislation seeks to balance various conflicting rights. People who have an impairment or disability that affects their capacity to consent should not, as a matter of principle, be denied access to the same rights that people without impairment or disability may exercise. If people without decision-making impairment may freely and voluntarily choose to undergo a sterilisation procedure, then that same right should be available to people with decision-making impairment.

However because people with a decision-making impairment are *prima facie* not able to exercise their rights in the same manner as persons without impairment then mechanisms should be put in place to objectively ensure that, as far as possible, the true wishes of the person with impairment are ascertained and complied with and the decision that is made is one made in their best interests. The Queensland legislation seeks to do so.

Where the person with impairment is also a child, then even greater care needs to be exercised in determining whether such a procedure should be applied to the child. Again the special legislative provisions enacted in Queensland seek to achieve this objective.

The Queensland legislation seeks to balance all interests involved in relation to the person for whom the sterilisation procedure is proposed. It should be noted that all decisions of QCAT are subject to appeal using the process provided for under the *Guardianship and Administration Act 2000*. This ensures that the activities of the Tribunal itself are subject to appropriate oversight, and correction if required.

3 The Queensland system

3A Adults.....

The *Guardianship and Administration Act 2000* (the Act) makes provision in Schedule 2 Section 7 for a series of **Special health care** matters for an adult. Among the matters covered are:

- (b) sterilisation of the adult.

Appendix 1 provides specific sections of Queensland legislation pertaining to making decisions regarding sterilisation procedures for adults with impaired decision-making capacity.

This legislation provides for an accountable system whereby QCAT can only consent to sterilisation of an adult with a disability if the Tribunal is satisfied that:

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- there is a medical necessity; or
- there is no successful method of contraception available for the adult who is or is likely to be sexually active; or
- the female adult has problems with menstruation and cessation of menstruation by sterilisation is the only practicable way of overcoming the problem.

In addition QCAT must be satisfied that:

- sterilisation cannot be reasonable postponed; and
- the adult is unlikely in the future to have capacity to make decisions about sterilisation.

QCAT cannot authorise sterilisation of an adult:

- for eugenic reasons; or
- to remove the risk of pregnancy arising from sexual abuse.

In making a decision about whether to grant consent to an application for sterilisation, QCAT must take into account:

- alternative forms of health care (including other sterilisation procedures) that are available or are likely to be available in the foreseeable future; and
- the short term and long term risk associated with both the sterilisation procedure for which approval is being sought and alternative forms of health care including other sterilisation procedures.

When an application is made to QCAT for approval for sterilisation of an adult with impaired decision-making capacity a very detailed consideration must be undertaken of the application including detailed consideration of all of the following:

- The medical justification for the application. This normally involves evidence of the best available medical practice in relation to the person the subject of the application and usually involves seeking advice from more than one medical practitioner.
- Full details of all forms of contraception that have been trialled in relation to the person subject to the application and consideration regarding other forms of contraception that might be available to be tried with the individual.
- Full details of all forms of menstruation management that have been trialled with the female adult the subject of the application together with a consideration of the practical application of any other alternative form of menstruation management that might be available to be considered. This will necessitate the provision of appropriate expert medical and other advice to enable QCAT to make a reasoned decision.
- Any urgency underpinning the application and consideration regarding whether a decision with such irreversible consequences can be reasonably postponed.
- Whether under the General Principles or the Health Care Principle, the adult has expressed an opinion on the application and the issue of sterilisation or whether in the future the adult is

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likely to have the capacity to express such an opinion. If there is a reasonable likelihood that the adult may have such a future capacity, the inference is that QCAT should not make any decision in relation to approving the application for sterilisation.

Queensland Law specifically forbids sterilisation being approved for purposes of eugenics i.e. preventing a disabled person from having children or purely to remove the risk of pregnancy from sexual abuse.

It should be noted, however, that special provision is made in section 71 to enable QCAT to consent, in an appropriate case (i.e. where it is satisfied that the termination is necessary to preserve the adult with impaired capacity from serious danger to her life or physical or mental health) to the termination of the pregnancy of a female with impaired decision-making capacity.

3B Children.....

The Act also contains a specific Chapter [Chapter 5A] with detailed provisions regulating the process of obtaining consent for the sterilisation of a child with impairment. This is a comprehensive regime but does not seek to address the issue of sterilisation of children generally. In Queensland this is left to the interplay of the power of the Family Court of Australia and the exercise of the *parens patriae* jurisdiction of the Supreme Court of Queensland.

Appendix 2 provides specific sections of Queensland legislation pertaining to making decisions regarding sterilisation procedures for children with impairment.

It should be noted that there is a slight difference in paragraph (2) of the definitions of sterilisation for an adult and a child. For a child, sterilisation does not include health care without which the treatment of organic malfunction or disease must be likely to cause serious or irreversible damage to a child's physical health.

The definition of health care for both an adult [Schedule 2 Section 5] and a child [Section 80A] is wide enough to encompass both physical and mental health. It is unclear, however, whether sterilisation of a child for mental health reasons has ever been considered by QCAT.

For a child with impairment to be subject to a sterilisation procedure, it is first necessary that the consent of QCAT is obtained (see Part 2 Chapter 5A). To consent, the Tribunal must be satisfied that the sterilisation is in the best interests of the child [S80C (2)].

Section 80D (2) specifically provides that it is not in a child's best interest for sterilisation to be suggested for eugenic reasons or to remove the risk of pregnancy resulting from sexual abuse.

QCAT must undertake a detailed examination of any application received. The importance of this process is stressed by the provisions in Part 3 of Chapter 5A that make specific provisions for the composition of the tribunal when considering applications for sterilisation of a child with impairment (see Appendix 2 for details).

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The application must also be accompanied by a report from the doctor who is treating the child. The detail provided in the doctor's report is open to be challenged by any of the parties who may be given notice of the proceedings.

The Act in S80L also mandates that the child who is the subject of the application **must be** provided with separate representation before the tribunal (a **child representative**). The child representative must be a lawyer with experience in dealing with children with impairment [S80L (2)] and must [S80L (3)]:

- act in the child's best interests; and
- have regard to any expressed views or wishes of the child; and
- to the greatest extent practicable, present the child's views and wishes to the Tribunal.

The Tribunal can order that information be provided to the child representative [S80L (4)], which must be complied with unless there is a reasonable excuse [S80L (5)]; this may include a tendency to incriminate [S80L (6)]. The provision over-rides any claims of confidentiality or legal professional privilege [S80L (7)].

The intention of Parliament that the child representative and thus the Tribunal have full access to all information before a decision is made in relation to the potential sterilisation of a child with impairment is therefore clear.

This purpose is also made clear in S80P, which empowers the Tribunal considering any such application in relation to a child to have the power to order any health care provider to provide any information it might have about the child and to over-ride any claims of privilege or confidentiality, excepting one based on claims of self incrimination.

The Act goes on in S80Q to give any person who carries out the sterilisation of a child with the consent of the Tribunal the same protection that would exist if the child were a person who had consented to the procedure.

4 Good practice elements that support equal rights in Queensland

The General Principles of the *Guardianship and Administration Act 2000* indicate that the basic human rights of people with impaired decision-making capacity should be upheld. Arguably, the point of the special health care provisions in the Act is to ensure the maximum human rights protections for people with impaired decision-making capacity.

When making a decision regarding sterilisation for adults with impaired capacity, QCAT encourages the participation of the adult in the decision-making process and seeks to ascertain the true wishes of the adult with impaired decision-making capacity (and not the needs or conveniences of their carer/s).

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In Queensland there is provision under section 125 of the *Guardianship and Administration Act 2000* for the QCAT to appoint a representative in proceedings before the tribunal.

In many cases regarding sterilisation the Adult Guardian is appointed as the adult's representative. The role of the representative is to communicate the adult's views and wishes and report on what is in the adult's interests to the Tribunal.

The representative ascertains the views and wishes of the adult about the proposed sterilisation procedure and obtains a holistic overview of the adult's life. This includes a comprehensive healthcare, social/lifestyle and educational history.

Details of the adult's sexual and reproductive history, sexual health education and, where the adult is female, their menstrual management history are also obtained.

In addition to discussions with the adult, members of their key support network are also consulted. The adult's family, friends, service providers and relevant others who have an active and ongoing interest in the wellbeing of the adult are approached with a view to ascertaining and reporting on what is in the best interests of the adult.

The representative attends the QCAT hearing with the adult (where possible) and plays a vital role in ensuring that the adult participates and that their views and wishes are heard throughout the decision-making process.

By considering 'all circumstances', QCAT is able to ensure, as far as possible, that its decision is in the best short term and long term interests of the adult.

A wrong decision to consent to sterilisation can have serious consequences for an individual. However, it should also be noted that an unplanned pregnancy can similarly have serious consequences for *any* person and it is important that we don't have different standards for people with disability in this regard. The Queensland system, in its design, provides for stringent safeguards to mitigate the risk of inappropriate decisions being made.

5 Areas for improvement and/or further exploration

From a legal point of view, Australia arguably does not have strong legally enforceable human rights protections. While Australia is a signatory to the United Nations Convention on the Rights of Persons with Disabilities, this in and of itself is a relatively weak approach to human rights protection compared to formal enactment of human rights legislation in Australia.

In many cases, legislative regulation in relation to specific issues can encroach on individual liberty. Liberty includes both negative freedom (i.e. freedom from state interference) and positive freedom (i.e. freedom to develop your human potential). It is important that both aspects of freedom are considered when thinking about the appropriateness of regulating decision-making processes regarding sterilisation for people with disability.

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An argument for the development of stronger human rights legislation that could potentially overrule the *parens patriae* jurisdiction (such as exercised by Courts or Tribunals) by mandating decision-making approaches that better support the engagement of the person with disability in circumstances such as when sterilisation is being considered may arguably provide better protection for the rights of Australians with a decision making disability. However that argument needs to be considered in the context of the much broader argument as to whether Australia needs to constitutionally protect Human Rights, how such Rights can be agreed to and the implementation in domestic law of rights that are reflected in International Treaties and Conventions.

At the local level in Queensland, while a consideration for QCAT clearly relates to whether sterilisation is the least restrictive alternative for the adult with impaired decision-making capacity, the 'least restrictive' argument is not necessarily the sole legitimate legal or human rights consideration in the case of sterilisation. The availability and effectiveness of services to assist the adult (or child) to manage their reproductive and sexual health needs should also be considered.

People with decision making disability and children would be better supported in their decision-making if they were able to more readily access services to manage their reproductive and sexual health needs. While these services exist, very few resources are targeted toward ensuring their appropriateness and accessibility for people with disability.

Recognition of the sexual identity of people with decision making disability and other forms of disability and their right to be educated about and engage in sexual activities, should they so choose, is an issue that has not been well promoted or acknowledged in Queensland or indeed Australia for many years. It is timely that this inquiry has commenced in that it offers the opportunity to pursue a shift in values, practices and resources to enable this recognition and provide for appropriate educational opportunities and the availability of information to assist people with decision making disability and children to make informed choices.

Broad community consideration of these issues would better support people with disability (including those with impaired decision-making capacity) and children and their families, carers, etc to gain a full understanding of available options. This will assist decision-making and facilitate full consideration of the issue prior to approaching QCAT. It is also likely that this would assist QCAT in considering any applications it would ultimately receive for sterilisation.

It should be noted however that the 'true wishes' of the individual subject to such an application may be in conflict with their 'best interests', in which case, the inherent conflict should be noted. From a human rights perspective, it is incumbent upon the system to view the 'adult's wishes' as paramount. As for people without disability, people with disability have the same right to make poor decisions and/or decisions on grounds such as religion, even where these decisions contradict medical advice. In the case of children, the Tribunal has an even more difficult task of weighing the wishes of the child, parents or carers and both the short and long term "best interests" of the child

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The focus of any system should be to ensure that it is an effective and individualised one that provides for appropriate decision-making while protecting the rights and interests of the person with decision making disability and also the child. Demonstrated and proven effectiveness in decision-making ultimately increases people's willingness to use the system rather than find ways to work around it.

6 Summary

It is the submission of the Adult Guardian of Queensland and the Public Advocate of Queensland that the existing Queensland legislative regime represents an appropriate mechanism by which the rights of people with impairment regarding their capacity to freely and voluntarily consent to a form of medical procedure (whether adults or children) can be given expression by means of the decision of an independent and impartial tribunal, which is itself subject to control through relevant appeal mechanisms.

The Queensland Civil and Administrative Tribunal, in the case of people with impaired decision-making capacity, can only exercise its powers after a comprehensive investigation involving independent medical and other experts providing evidence that is able to be challenged in an open hearing. Such evidence includes evidence of the viability of any available alternative treatment to the sterilisation that is proposed to be approved.

In accordance with this, it is the submission of the Adult Guardian of Queensland and the Public Advocate of Queensland that the Queensland legislative regime provides adequate and appropriate protection in relation to the issue of sterilisation for people (whether adults or children) who lack the capacity to consent to such a procedure.

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Appendix 1

Queensland legislation pertaining to making decisions regarding sterilisation procedures for adults with impaired decision-making capacity - *Guardianship and Administration Act 2000*

The *Guardianship and Administration Act 2000* (the Act) makes provision in Schedule 2 Section 7 for a series of **Special health care** matters for an adult. Among the matters covered are:

- (c) sterilisation of the adult.

Sterilisation in relation to an adult is defined in Schedule 2 Section 9 as follows:

9 Sterilisation

- (1) **Sterilisation** is health care of an adult who is, or is reasonably likely to be, fertile that is intended, or reasonably likely, to make the adult, or ensure the adult is, permanently infertile.

Examples of sterilisation—

endometrial ablation, hysterectomy, tubal ligation and vasectomy

- (2) Sterilisation does not include health care primarily to treat organic malfunction or disease of the adult.

Note the emphasis on the concept of “health care” for the adult. This is defined in Schedule 2 Section 5 as follows:

5 Health care

- (1) **Health care**, of an adult, is care or treatment of, or a service or a procedure for, the adult—
 - (a) to diagnose, maintain, or treat the adult’s physical or mental condition; and
 - (b) carried out by, or under the direction or supervision of, a health provider.
- (2) **Health care**, of an adult, includes withholding or withdrawal of a life-sustaining measure for the adult if the commencement or continuation of the measure for the adult would be inconsistent with good medical practice.
- (3) **Health care**, of an adult, does not include—
 - (a) first aid treatment; or
 - (b) a non-intrusive examination made for diagnostic purposes; or
 - (c) the administration of a pharmaceutical drug if—
 - (i) a prescription is not needed to obtain the drug; and
 - (ii) the drug is normally self-administered; and
 - (iii) the administration is for a recommended purpose and at a recommended dosage level.

Example of paragraph (b)—

a visual examination of an adult’s mouth, throat, nasal cavity, eyes or ears

There must be under this definition both:

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1. involvement of a health provider in delivering or supervising the service; and
2. the procedure must be to diagnose, maintain or treat an adult's physical or mental condition.

Chapter 5: Health matters and special health matters

Chapter 5 of the Act deals with health matters and special health matters.

The Act specifically provides the purpose for this Chapter in the following terms:

61 Purpose to achieve balance for health care

This chapter seeks to strike a balance between—

- (a) ensuring an adult is not deprived of necessary health care only because the adult has impaired capacity for a health matter or special health matter; and
- (b) ensuring health care given to the adult is only—
 - (i) health care that is necessary and appropriate to maintain or promote the adult's health or wellbeing; or
 - (ii) health care that is, in all the circumstances, in the adult's best interests.

This purpose must also align with the principles within the Act that apply to adults with a disability regarding their capacity to consent to medical treatment as follows:

11 Principles for adults with impaired capacity

- (1) A person or other entity who performs a function or exercises a power under this Act for a matter in relation to an adult with impaired capacity for the matter must apply the principles stated in schedule 1 (the **general principles** and, for a health matter or a special health matter, the **health care principle**).

Example 1—

If an adult has impaired capacity for a matter, a guardian or administrator who may exercise power for the matter must—

- (a) apply the general principles; and
- (b) if the matter is a health matter, also apply the health care principle.

Example 2—

The tribunal in deciding whether to consent to special health care for an adult with impaired capacity for the special health matter concerned, must apply the general principles and the health care principle.

Note—

Function includes duty and **power** includes authority—see the *Acts Interpretation Act 1954*, section 36.

- (2) An entity authorised by an Act to make a decision for an adult about prescribed special health care must apply the general principles and the health care principle.
- (3) The community is encouraged to apply and promote the general principles.

The General Principles are set out in Schedule 1 Part 1 of the Act whilst the Health Care Principle is set out in Schedule 1 Part 2 of the Act.

In particular the Health care principle provides for the following:

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Health care principle

- (1) The **health care principle** means power for a health matter, or special health matter, for an adult should be exercised by a guardian, the adult guardian, the tribunal, or for a matter relating to prescribed special health care, another entity—
- (a) in the way least restrictive of the adult’s rights; and
 - (b) only if the exercise of power—
 - (i) is necessary and appropriate to maintain or promote the adult’s health or wellbeing; or
 - (ii) is, in all the circumstances, in the adult’s best interests.

Example of exercising power in the way least restrictive of the adult’s rights—

If there is a choice between a more or less intrusive way of meeting an identified need, the less intrusive way should be adopted.

- (2) In deciding whether the exercise of a power is appropriate, the guardian, the adult guardian, tribunal or other entity must, to the greatest extent practicable—
- (a) seek the adult’s views and wishes and take them into account; and
 - (b) take the information given by the adult’s health provider into account.

Note—

See section 76 (Health providers to give information).

- (3) The adult’s views and wishes may be expressed—
- (a) orally; or
 - (b) in writing, for example, in an advance health directive; or
 - (c) in another way, including, for example, by conduct.
- (4) The health care principle does not affect any right an adult has to refuse health care.
- (5) In deciding whether to consent to special health care for an adult, the tribunal or other entity must, to the greatest extent practicable, seek the views of the following person and take them into account—
- (a) a guardian appointed by the tribunal for the adult;
 - (b) if there is no guardian mentioned in paragraph (a), an attorney for a health matter appointed by the adult;
 - (c) if there is no guardian or attorney mentioned in paragraph (a) or (b), the statutory health attorney for the adult.

Chapter 5 Part 3: Consent to special health care

This Part of Chapter 5 makes specific provision in relation to aspects of special health care.

Under Section 68 the Queensland Civil and Administrative Tribunal is empowered, by order, to consent to special health care for an adult other than electroconvulsive therapy or psychosurgery.

Special provision is made in Section 70 to regulate the role of QCAT in relation to applications for sterilisation as follows:

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70 Sterilisation

- (1) The tribunal may consent, for an adult with impaired capacity for the special health matter concerned, to sterilisation of the adult only if the tribunal is satisfied—
 - (a) one of the following applies—
 - (i) the sterilisation is medically necessary;
 - (ii) the adult is, or is likely to be, sexually active and there is no method of contraception that could reasonably be expected to be successfully applied;
 - (iii) if the adult is female—the adult has problems with menstruation and cessation of menstruation by sterilisation is the only practicable way of overcoming the problems; and
 - (b) the sterilisation can not reasonably be postponed; and
 - (c) the adult is unlikely, in the foreseeable future, to have capacity for decisions about sterilisation.
- (2) Sterilisation is not medically necessary if the sterilisation is—
 - (a) for eugenic reasons; or
 - (b) to remove the risk of pregnancy resulting from sexual abuse.
- (3) Also, in deciding whether to consent for the adult to a sterilisation procedure, the tribunal must take into account—
 - (a) alternative forms of health care, including other sterilisation procedures, available or likely to become available in the foreseeable future; and
 - (b) the nature and extent of short-term, or long-term, significant risks associated with the proposed procedure and available alternative forms of health care, including other sterilisation procedures.
- (4) An adult's sterilisation, to which the tribunal has consented for the adult, is not unlawful.

It should be noted that special provision is made in section 71 to enable QCAT to consent, in an appropriate case (i.e. where it is satisfied that the termination is necessary to preserve the adult with impaired decision-making capacity from serious danger to her life or physical or mental health) to the termination of the pregnancy of a female with impaired capacity.

71 Termination of pregnancy

- (1) The tribunal may consent, for an adult with impaired capacity for the special health matter concerned, to termination of the adult's pregnancy only if the tribunal is satisfied the termination is necessary to preserve the adult from serious danger to her life or physical or mental health.
- (2) Termination of an adult's pregnancy, to which the tribunal has consented for the adult, is not unlawful.

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Appendix 2

Queensland legislation pertaining to making decisions regarding sterilisation procedures for children with impairment - *Guardianship and Administration Act 2000*

The Guardianship and Administration Act 2000 specifically defines impairment in relation to a child [S80A] as:

impairment means a cognitive, intellectual, neurological or psychiatric impairment.

Sterilisation in relation to a child with impairment is specifically defined in Section 80B as follows:

80B Sterilisation

(1) **Sterilisation** is health care of a child who is, or is reasonably likely to be, fertile that is intended, or reasonably likely, to make the child, or to ensure the child is, permanently infertile.

Examples of sterilisation—

endometrial ablation, hysterectomy, tubal ligation and vasectomy

(2) However, sterilisation does not include health care without which an organic malfunction or disease of the child is likely to cause serious or irreversible damage to the child's physical health.

Example—

If the child has cancer affecting the reproductive system and, without the health care, the cancer is likely to cause serious or irreversible damage to the child's physical health, the health care is not sterilisation.

Note the slight difference in paragraph (2) of the definitions of sterilisation for an adult and a child. For a child sterilisation does not include health care without which the treatment of organic malfunction or disease must be likely to cause serious or irreversible damage to a child's physical health.

Health Care for a child under Chapter 5A is defined as follows [S80A]:

health care, of a child, is care or treatment of, or a service or a procedure for, the child—

- (a) to diagnose, maintain, or treat the child's physical or mental condition; and
- (b) carried out by, or under the direction or supervision of, a health provider.

The definition of health care for both an adult [Schedule 2 Section 5] and a child [Section 80A] is wide enough to encompass both physical and mental health. It is unclear whether sterilisation of a child for mental health reasons has ever been considered by QCAT.

In order that a child with impairment might be subject to a sterilisation procedure it is first necessary that the consent of QCAT must be obtained (see Part 2 Chapter 5A). To consent, the tribunal must be satisfied that the sterilisation is in the best interests of the child [S80C (2)].

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To determine if it is in the best interest of the child the following criteria must be established [S80D]:

- (a) one or more of the following applies—
 - (i) the sterilisation is medically necessary;
 - (ii) the child is, or is likely to be, sexually active and there is no method of contraception that could reasonably be expected to be successfully applied;
 - (iii) if the child is female—the child has problems with menstruation and cessation of menstruation by sterilisation is the only practicable way of overcoming the problems; and
- (b) the child’s impairment results in a substantial reduction of the child’s capacity for communication, social interaction and learning; and
- (c) the child’s impairment is, or is likely to be, permanent and there is a reasonable likelihood, when the child turns 18, the child will have impaired capacity for consenting to sterilisation; and
- (d) the sterilisation can not reasonably be postponed; and
- (e) the sterilisation is otherwise in the child’s best interests.

Section 80D (2) specifically provides that it is not in a child’s best interest for sterilization to be suggested for eugenic reasons or to remove the risk of pregnancy resulting from sexual abuse.

In addition to the above criteria that must be satisfied for the tribunal to exercise its power the tribunal must address the following [S80D (3)]:

- (a) ensure the child is treated in a way that respects the child’s dignity and privacy; and
- (b) do each of the following—
 - (i) in a way that has regard to the child’s age and impairment, seek the child’s views and wishes and take them into account;
 - (ii) to the greatest extent practicable, seek the views of each of the following persons and take them into account—
 - (A) any parent or guardian of the child;
 - (B) if a parent or guardian is not the child’s primary carer, the child’s primary carer;
 - (C) the child representative for the child;
 - (iii) take into account the information given by any health provider who is treating, or has treated, the child; and
- (c) take into account—
 - (i) the wellbeing of the child; and
 - (ii) alternative forms of health care that have proven to be inadequate in relation to the child; and
 - (iii) alternative forms of health care that are available, or likely to become available, in the foreseeable future; and
 - (iv) the nature and extent of short-term, or long-term, significant risks associated with the

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proposed sterilisation and available alternative forms of health care.

(4) The child's views and wishes may be expressed in the following ways—

- (a) orally;
- (b) in writing;
- (c) in another way including, for example, by conduct.

It is thus clear that QCAT must undertake a detailed examination of any application received prior to it being granted. The importance of this process is stressed by the provisions in Part 3 of Chapter 5A that make specific provisions for the composition of the tribunal when considering applications for sterilisation of a child with impairment. These include:

- a special tribunal of 3 members [S80F(1)]
- the tribunal must include members who in the opinion of the President (a Supreme Court Justice) have knowledge and experience of persons with an impaired capacity and who are:
 - (i) a senior member who is an Australian lawyer or
 - (ii) an ordinary member who is an Australian lawyer
 - (iii) a member who is paediatrician who is registered under the Practitioner Regulation National Law
 - (iv) another member

Detailed provision is made in Division 2 of Part 3 of Chapter 5A as to how applications for approval are to be made to the tribunal. These include:

- Applications must be made by either a parent or guardian or an interested person i.e. a person who has a sufficient and continuing interest in the child [S80H]
- Applications must be in writing, signed by the applicant and filed in the tribunal [S80I (1)]
- Include the following as provided for in S80I (2):

- (a) the reason for the application, including information about why the proposed sterilisation would, in the applicant's view, be in the child's best interests;
- (b) a detailed description of—
 - (i) the child's impairment; and
 - (ii) how the child communicates; and
 - (iii) the impact of the impairment on the child's capacity for communication, social interaction and learning;

(c) whether the child has been informed of the application;

(d) whether the child has indicated the child does not wish to have the proposed sterilisation;

Note—

See section 80D(4) (Whether sterilisation is in child's best interests).

(e) information about the help, if any, the child might need at the hearing of the application;

(f) if urgent action is required—an explanation of the urgency;

(g) any other information in relation to the wellbeing of the child the applicant considers relevant;

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- (h) to the best of the applicant's knowledge, information about the following persons—
- (i) the applicant;
 - (ii) the child;
 - (iii) any parent or guardian of the child;
 - (iv) if a parent or guardian of the child is not the primary carer of the child, the primary carer of the child;
 - (v) a doctor who is treating the child.
- (h) to the best of the applicant's knowledge, information about the following persons—
- (i) the applicant;
 - (ii) the child;
 - (iii) any parent or guardian of the child;
 - (iv) if a parent or guardian of the child is not the primary carer of the child, the primary carer of the child;
 - (v) a doctor who is treating the child.

The information provided is to enable the Tribunal to give notice of the hearing to all interested parties [S80I (3)].

The application must be accompanied by report of a doctor who is treating the child [S80I (4)] and must detail the following information [S80I (5)]:

- (a) the child's impairment and the impact of the impairment on the child's capacity for communication, social interaction and learning; and
- (b) the proposed sterilisation, including information about—
- (i) the reason for the proposed sterilisation, including information about why the proposed sterilisation would, in the doctor's view, be in the child's best interests; and
 - (ii) whether the child is, or is reasonably likely to be, fertile; and
 - (iii) the type of proposed sterilisation and a description of the procedure; and
 - (iv) when and where the proposed sterilisation would be carried out; and
 - (v) why the sterilisation can not be reasonably postponed; and
 - (vi) any alternative forms of health care that have proven to be inadequate in relation to the child; and
 - (vii) alternative forms of health care that are available, or likely to become available, in the foreseeable future; and
 - (viii) any risks to the child if the proposed sterilisation is carried out; and
 - (ix) any risks to the child if the proposed sterilisation is not carried out; and
 - (x) the likely long-term social and psychological effects of the sterilisation on the child; and

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(xi) whether the child's impairment is, or is likely to be, permanent.

Under S80J the Tribunal is also given a statutory obligation to, at least 7 days before a hearing, give notice of the hearing to the child and as far as practical to the following:

- (a) the applicant; and
- (b) any parent or guardian of the child; and
- (c) if a parent or guardian of the child is not the primary carer of the child, the primary carer; and
- (d) a doctor who is treating the child; and
- (e) the child representative for the child; and
- (f) anyone else the tribunal considers should be notified.

Provision is made not to give notice to the child if this would prove prejudicial to its physical or mental health [S80J (2)] and also to abridge the necessary time [S80J (3)].

Section 80K deems the following persons to be "active parties" to such proceedings:

- (a) the child;
- (b) the applicant;
- (c) any parent or guardian of the child;
- (d) if a parent or guardian of the child is not the primary carer of the child, the primary carer of the child;
- (e) a doctor who is treating the child;
- (f) the child representative for the child;
- (g) a person joined as a party to the proceeding by the tribunal.

Active parties are given a right to appeal to the Supreme Court of Queensland against any Tribunal decision [S80O].