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Committee Secretary
Senate Standing Committees on Community Affairs
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Dear Committee Secretary

Senate Committee of Community Affairs inquiry into involuntary or coerced sterilisation of people with disabilities in Australia

1. Australian Lawyers for Human Rights (ALHR) thanks the Senate Committee of Community Affairs for the opportunity to comment on the inquiry into involuntary or coerced sterilisation of people with disabilities in Australia.
2. ALHR was established in 1993. ALHR is a network of Australian law students and lawyers active in practising and promoting awareness of international human rights. ALHR has a national membership of over 2,500 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.
3. This submission will briefly comment on the nature of involuntary or coerced sterilisation in Australia, before detailing Australia's obligations under international human rights law and making a series of recommendations that would see Australia comply with those obligations in respect of women and girls with disabilities.

4. Involuntary or coerced sterilisation is a practice that disproportionately impacts upon women and girls with intellectual disabilities in Australia. ALHR acknowledges that there may be cases in which men and boys are sterilised without informed consent. However of the cases that have come before the courts and tribunals in Australia, ALHR understands that all have involved women and girls.¹ This submission will therefore focus on the involuntary or coerced sterilisation of children, particularly girls, and women with a disability.
5. Involuntary or coerced sterilisation in this submission refers to any sterilisation that occurs without the free and informed consent of the individual subject to the procedure, including sterilisations authorised by law.² Sterilisation required to save life or treat a serious threat to health is a separate issue and is not included in the phrase 'involuntary or coerced sterilisation' in this submission.
6. In summary, ALHR recommends the following measures be adopted and implemented. In our opinion, these measures are necessary to ensure consistency with Australia's obligation under core international human rights treaties ratified by Australia:
 - a. Immediate legislative prohibition of the sterilisation of children, particularly girls, regardless of whether they have a disability, and women with disability, without their free and informed consent and an order from a competent court or tribunal;
 - b. Increased resourcing for sexual and reproductive health, information, education and support services and programs tailored towards the needs and strengths of women and girls with disabilities, as well as their families and/or carers;
 - c. Training of medical staff, police, lawyers, judiciary and staff of courts and tribunals on the rights of, and effective communication with, persons whose disability impacts upon communication;
 - d. Robust oversight mechanisms in institutional settings and training of staff in the identification, reporting and response of abuse in a manner that respects the rights of persons with a disability; and
 - e. A broad public awareness and education campaign challenging stereotypes and assumptions relating to people with disabilities, as recommended by the Australian Human Rights Commission.

Nature of involuntary or coerced sterilisation in Australia

7. ALHR acknowledges that women and girls with a disability experience compounding discriminations based on their gender and disability.³ The practice of involuntary or coerced sterilisation is just one manifestation of a broader social issue. People in institutional care and girls under the age of 18 years are particularly vulnerable to discrimination.⁴ As a result of these intersecting discriminations, women and girls are

¹ See Women With Disabilities Australia (WWDA), *Moving Forward and Gaining Ground: The Sterilisation of Women and Girls with Disabilities in Australia* (June 2012), 6.

² United Nations High Commissioner for Human Rights (OHCHR), *Thematic study on the issue of violence against women and girls and disability*, (30 March 2012), A/HRC/20/5, [4].

particularly vulnerable to violence, abuse, exploitation and other human rights violations both within the home and outside the home.⁵ Forced sterilisation is a form of violence against women and girls.⁶

8. Involuntary or coerced sterilisation of women or girls with a disability is regulated by a range of Commonwealth, State and Territory laws. For adults deemed incapable of giving consent, only State or Territory tribunals that deal with capacity, guardianship and administration issues may authorise sterilisation. For children, authorisation for sterilisation is typically sought from the Family Court of Australia. However, some State tribunals also have this jurisdiction. It is not within the scope of this submission to detail the different legal frameworks that exist in each State and Territory.
9. In the case of children, *Marion's Case* (1992)⁷ established that court or tribunal authorisation was required before any child could be sterilised. This was intended to establish a decision-making process with transparency and accountability. ALHR notes with concern, however, the existence of significant anecdotal evidence that sterilisations are being performed without court or tribunal authorisation.⁸
10. Sterilisation can only be authorised for children if deemed to be in the child's "best interests" and no "alternative and less invasive procedure" is viable.⁹ 'Best interests' are determined by medical professionals, legal guardians, courts and tribunals. Of concern to ALHR is that the child has no voice due to lack of legal capacity and is not guaranteed to have her interests independently represented by way of an independent children's lawyer.¹⁰
11. Consistent with socially constructed assumptions about disability, the sterilisation of women and girls with a disability has been justified for a range of reasons, including:
 - a. as a means of preventing sexual abuse and resulting pregnancy;
 - b. a way to manage menstruation and sexual behaviour so as to reduce the burden on parents, carers and public resources;

³ *Convention on the Rights of Persons with Disabilities*, Article 6.

⁴ Committee on the Rights of the Child (CROC), *General Comment No.9: The rights of children with disabilities* (2006) CRC/C/GC/9, [42].

⁵ WWDA, 'Assessing the situation of women with disabilities in Australia: A human rights approach', *A Policy Paper by Women With Disability Australia*, (June 2011), 9.

⁶ Rashida Manjoo, *Report of the Special Rapporteur on violence against women, its causes and consequences*, (67th Sess) (2012) A/67/227 [37]; Radhika Coomaraswamy, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences: Policies and practices that impact women's reproductive rights and contribute to, cause or constitute violence against women*, (55th Sess.), (1999) E/CN.4/1999/68/Add.4, [51]

⁷ *Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 106 ALR 385; [1992] HCA 15

⁸ S.Brady, J.Briton & S.Grover, *The Sterilisation of Girls and Young Women in Australia: issues and progress*, Human Rights and Equal Opportunity Commission (2001), accessed on 12 February 2013 at

http://humanrights.gov.au/disability_rights/sterilisation/sterilisation_report.pdf, 14. Note that this is an update of an earlier report that found 1,045 sterilisations had been recorded by the health insurance commission, whilst only 17 had been authorised by courts and tribunals in Australia: S.Brady & S.Grover, *The sterilisation of girls and young women in Australia - a legal, medical and social context*, Human Rights and Equal Opportunity Commission (1997).

⁹ *Marion's Case*, above n 6, 412

¹⁰ *Re: Angela* [2010] FamCA 98 (16 February 2010), [42].

- c. a perceived incapacity to be a parent; and
 - d. to stop the passing of genetic irregularity.¹¹
12. ALHR is concerned that, in some cases, the ‘best interests’ of the woman or girl with a disability will be impacted upon by consideration of the interests of parents, carers and the broader health and disability support system. ALHR notes the view expressed by Women With Disabilities Australia (WWDA) that underlying each rationale for involuntary or coerced sterilisation are socially and culturally embedded stereotypes that posit disability as “a personal tragedy, a burden and/or a matter for medical management and rehabilitation.”¹² Women and girls with a disability may be viewed as lacking in intelligence, competence or control, being compliant, non-sexual beings and, therefore, objects of decision-making, rather than rights holders entitled to sexual and reproductive lives.¹³
13. A lack of resourcing for health, care, educational and support services tailored for women with disabilities, particularly in the area of reproductive health, is causing significant hardship on families and carers. However, medical management of what is essentially a social resourcing issue is an inappropriate response, particularly, where the medical procedure irreversibly impairs reproductive capacity and violates fundamental human rights.¹⁴
14. ALHR is particularly concerned that prevention of sexual abuse and resulting pregnancy contributes to decisions to authorise sterilisation. Disturbingly, a link between “attractive looks”¹⁵ and the risk of sexual assault has been made in past judgments authorising sterilisation. ALHR emphasises that such an approach reshapes sexual violence against women and girls with disabilities as behaviour caused by them and, therefore, unjustly lays the burden of prevention on women and girls with disabilities. Further, it is not supported by research that suggests that sterilisation could inadvertently increase the risks of sexual abuse because:
- a. Women and girls with disabilities are less likely to receive sex education because they are perceived as non-sexual beings;¹⁶ and
 - b. The fact that pregnancy is not possible means that one of the primary forms of evidence of sexual assault will not be available. The intersection of gender and disability based discriminations impacts on the credibility given to women and girls with a disability when sexual abuse is reported. Thus, pregnancy may be the only way to prove sexual activity is taking place. Perversely, this may encourage potential perpetrators because there is less fear of being caught or having to deal with the complications of pregnancy.¹⁷

¹¹ WWDA (2012), above n 1, 6

¹² Ibid

¹³ OHCHR, above n 2, [14] & [19]; See also *Report of the Special Rapporteur on violence against women, its causes and consequences*, (3 August 2012) A/67/227, [36]; *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health* (10 August 2009), A/64/272, [71]; and Linda Steele, ‘Making sense of the Family Court’s decisions on the non-therapeutic sterilisation of girls with intellectual disability’ (2008) *Australian Journal of Family Law* 22(1), 12

¹⁴ WWDA, above n 1, 8

¹⁵ *In Re A Teenager* (1988) 13 Fam LR 85, 87.

¹⁶ OHCHR above n 2, [19]; CROC, *General Comment 9*, above n 4, [42(e)]

¹⁷ WWDA, above n 1, 11; See also *In Re Elizabeth* (1989) 13 Fam LR 47, 60.

Australia's international human rights law obligations

15. Australia is a party to the *International Covenant on Civil and Political Rights* (ICCPR), *International Covenant on Economic, Social and Cultural Rights* (ICESCR), *Convention on the Elimination of Discrimination against Women* (CEDAW), *Convention on the Rights of the Child* (CRC) and *Convention on the Rights of Persons with Disabilities* (CRPD). The rights contained in each of these core international human rights instruments extend to persons with disabilities by virtue of the obligations of non-discrimination and equality under the law that each casts on Australia. The involuntary or coerced sterilisation of persons with disabilities impacts on rights contained in each of these treaties.
16. Australia has ratified each of the above international legal Conventions and is, therefore, obliged to ensure that the rights contained in each of the above Conventions are respected and protected, including the rights of people with disabilities.
17. Specifically, ALHR notes that involuntary or coerced sterilisation is recognised as violating the right to freedom from torture and cruel, inhuman and degrading treatment and the right to privacy protected by Articles 7 and 17 of ICCPR.¹⁸ The right to privacy extends to the protection of individual autonomy and bodily integrity, both of which are negated when medical procedures are performed without informed consent.
18. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has observed that, given the particular vulnerability of women with disabilities, any forced sterilisation of these women even where they are the result of a lawful process, whereby decisions are made on their behalf by their legal guardians against their will, may constitute torture or ill-treatment.¹⁹
19. Article 12 of ICESCR obligates Australia to respect, protect and fulfil the right to the highest attainable standard of physical and mental health, including sexual and reproductive health.²⁰ Informed consent, bodily integrity and security of the person are inherent aspects of the right to health. Specifically, legal authorisation of non-consensual sterilisation of women and girls with disabilities is discriminatory and directly interferes with the rights to informed consent, bodily integrity and autonomy and, therefore, constitutes a violation of the obligation to *respect* the right to health.²¹ This necessitates immediate action to prohibit sterilisation procedures being conducted without informed consent. Additionally, the obligation to *fulfil* the right to health requires that legislative, administrative, social and educational measures are put in place to support women and girls with disabilities and facilitate their participation in decision-making in respect of their sexual and reproductive health.
20. Article 10 of ICESCR requires the widest possible protection and assistance to the family including mothers and children. In interpreting the normative content of this right, in respect of persons with disabilities, the Committee on Economic, Social and Cultural

¹⁸ Human Rights Committee, *General Comment No. 28: Equality of rights between men and women*, (29 March 2000), CCPR/C/21/Rev.1/Add.10, [11] & [20]; See also UN Committee against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, (24 January 2008), CAT/C/GC/2 [22].

¹⁹ *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak*, (15 January 2008), A/HRC/7/3, [38]-[39].

Rights emphasised that women with disabilities “*must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood.*”²² The performance of a sterilisation procedure without informed consent is considered a serious violation of Article 10(2).²³

21. The CEDAW Committee has emphasised that involuntary or coerced sterilisation has serious physical and mental health consequences for women and violates rights to informed consent, dignity and to decide the number and spacing of children.²⁴ Furthermore, health services must be sensitive to the needs of women with disabilities and must be respectful of their rights and dignity.²⁵ The provision of accessible information about contraceptives and access to sex education and family planning services tailored to the differing needs and strengths of women with disabilities is an essential alternative.²⁶
22. Involuntary or coerced sterilisation is also a form of gender-based violence.²⁷ Consistent with Article 4 of the *Declaration on the Elimination of Violence against Women*, Australia must act with due diligence to prevent women with disabilities being coerced into ‘consenting’ to sterilisation procedures.²⁸ The due diligence obligation also requires effective measures to prevent, investigate and prosecute acts of sexual violence against women and girls with disabilities, including those perpetrated by private persons.
23. The sterilisation of girls with a disability also violates Australia’s obligation under Article 19 of CRC to protect children from all forms of mental and physical harm. The Committee on the Rights of the Child has observed that such a practice “*seriously violates the right of the child to her or his physical integrity and results in adverse life-long physical and mental health effects*”.²⁹
24. ALHR emphasises that Article 25 of CRPD affirms that persons with disabilities have the same right to the highest attainable standard of health without discrimination, including discrimination on the basis of disability. This requires the mandatory provision of the “*same range, quality and standard of free and affordable health care and programmes...including in the area of sexual and reproductive health*”³⁰ and on the basis of free and informed consent. Article 23 of CRPD recognises the rights of persons with a disability to reproductive freedom, including: the right to decide freely and responsibly on the number and spacing of children; the right to access appropriate

²⁰ Committee on Economic, Social and Cultural Rights, *General Comment No.14: The right to the highest attainable standard of health* (11 August 2000) E/C.12/2000/4, [34]-[37]

²¹ See generally A/64/272, above n 12.

²² CESCR, *General Comment No.5: Persons with disabilities* (1994) E/1995/22, [31]

²³ Ibid.

²⁴ CEDAW, Article 16(e); CEDAW Committee, *General Recommendation 21: Equality in marriage and family relations* (1994), [22]; CEDAW Committee, *General Recommendation 24: Women and health* (1999), [22]; *A.S. v Hungary*, Communication 4/2004, (29 August 2006), CEDAW/C/36/D/4/2004. See also A/64/272, above n 12, [55]

²⁵ CEDAW Committee, *General Recommendation No.24*, *ibid*, [22] & [25].

²⁶ CEDAW Committee, *General Recommendation No.21*, above n 23, [22]

²⁷ CEDAW Committee, *General Recommendation No.19: Violence against women* (1992), [22]; A/67/227, above n 12, [37]; Committee on the Rights of the Child, *General comment No. 13 (2011): Article 19: The right of the child to freedom from all forms of violence*, (17 February 2011), CRC/C/GC/13 [16] & [21]

²⁸ *Declaration on the Elimination of Violence against Women*, United Nations General Assembly resolution 48/104 (20 December 1993), Article 4.

²⁹ CROC, *General Comment No. 9*, above n 4, [60].

³⁰ CRPD, Article 25

information and education on family planning and reproductive and sexual health; and the right to retain fertility on the basis of equality with others.

25. ALHR urges the Commonwealth, and all State and Territory Governments to comply with their obligations under the above international laws. These laws are unambiguous in their articulation that involuntary or coerced sterilisation is repugnant to human rights, including the rights of women and girls with a disability.
26. ALHR further highlights that the CEDAW Committee and CRC Committee have, in their reviews of Australia in 2010³¹ and 2012,³² respectively, expressed serious concern about the practice of sterilisation of women and girls with disabilities and have clearly called on Australia to legislatively prohibit such a practice. It is these comments that have prompted the current Senate Inquiry. Further, in its Universal Periodic Review (UPR) at the United Nations Human Rights Council, Australia was urged to “*Enact national legislation prohibiting the use of non-therapeutic sterilisation of children, regardless of whether they have a disability, and of adults with disability without their informed and free consent*”.³³

Recommendations

27. The Australian Government committed to “*improve laws and practices governing the sterilisation of women and girls with disability*” in its National Human Rights Action Plan.³⁴
28. ALHR believes that the only way to improve laws and practices governing sterilisation is to comply with the abovementioned recommendations made by the CEDAW Committee, CRC Committee and the UPR process. This requires legislative prohibition of the sterilisation of children, particularly girls, regardless of whether they have a disability, and adults without free and informed consent and an order from a competent court or tribunal.
29. ALHR also notes that the National Plan to Reduce Violence against Women and their Children details the goal of supporting better services for women and children with disabilities through new evidence-based approaches.
30. Consistent with this objective, ALHR strongly believes that further resources must be directed towards sexual and reproductive health information, education and support services and programs tailored towards the needs and strengths of women and girls with disabilities, as well as their families and/or carers. Tailored information and education about sex, contraception and family planning is essential for supporting the participation of women and girls with disabilities in decision-making about their sexual and reproductive health. Programs and services should be developed and implemented with the participation of women and girls with disabilities and must link disability with the

³¹ CEDAW Committee, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Australia* (12 – 30 July 2010), CEDAW/C/ AUS/CO/7

³² CROC, *Concluding Observations: Australia*, (2012), CRC/C/AUS/CO/4 (2012), [46]-[47] & [57]-[58].. See also CROC, *Concluding Observations: Australia*, (2005), CRC/C/15/Add.268, [45]-[46(e)]

³³ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, (2011) A/HRC/17/10, [86.39]

³⁴ Commonwealth of Australia, *Australia's National Human Rights Action Plan 2012*, Priority 272, 66.

concept of gender-based violence in a meaningful way.³⁵

31. ALHR recommends regular training of medical staff, police, lawyers, judiciary and staff of courts and tribunals on the rights of, and effective communication with, persons with intellectual, sensory and related disabilities, so as to support the reporting and prosecution of abuse and autonomous decision-making on sexual and reproductive health matters.³⁶
32. To address the heightened risks of sexual violence faced by women and girls with disabilities, particularly in institutional settings, ALHR recommends robust oversight mechanisms, together with training of staff in the identification, reporting and response of abuse in a manner that respect the rights of persons with a disability.
33. Finally, ALHR endorses the recommendation of the Australian Human Rights Commission for a broad public awareness and education campaign challenging stereotypes and assumptions about people with disabilities, which underpin the acceptance of involuntary sterilisation of women and girls with disabilities in Australia.³⁷
34. If you would like to discuss any aspect of this submission, please feel free to contact me

Best regards,

Stephen Keim SC
President
Australian Lawyers for Human Rights

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³⁵ OHCHR, above n 2, [35]

³⁶ Ibid, [43]

³⁷ Australian Human Rights Commission, *The Involuntary or Coerced Sterilisation of People with Disabilities in Australia: Australian Human Rights Commission Submission to the Senate Community Affairs References Committee* (20 November 2012), 10.