

## Submission to Australian Law Reform Commission Inquiry Issue Paper, Review of the Family Law System (2017)

Dr Linda Steele, Senior Lecturer and Member Law Health Justice Research Centre, Faculty of Law, University of Technology & Senior Visiting Fellow, Faculty of Law, Humanities and the Arts, University of Wollongong

21 May 2018

---

1. Thank you for the opportunity to make a submission to the ALRC's review of the family law system. This submission is focused on sterilisation of girls with disability. The submission sets out some possible areas of inquiry by the ALRC in the next stage of its review. I will make a more detailed submission in response to the ALRC's discussion paper.

### Introductory comments on sterilisation and the family law system

2. The family law system, through the Family Court's welfare jurisdiction, provides a key legal process through which sterilisation of girls with disability is possible, legally permissible, non-violent and just. Appreciating how this is so requires an understanding of the relationship between the Family Court's welfare jurisdiction and criminal and civil legal definitions of violence.<sup>1</sup> The Family Court's welfare jurisdiction is not simply authorising practices that are universally understood as non-violent and just. Rather, the Family Court's welfare jurisdiction is itself central to producing the legal status of these practices as non-violent and just and, in turn, limiting the capacity for girls with disabilities to have their sterilisation recognised as acts of violence and injustices worthy of criminal sanction and civil redress. This means that the family law system is complicit in the perpetration of violence and discrimination against girls with disabilities. The ALRC should recommend that the family law system be reformed to end the Family Court's role in authorising sterilisation and that the Federal Government introduce reparations and redress mechanisms for women and girls who have been sterilised through the family law system.
3. For decades Women with Disabilities Australia and other disability rights organisations that represent the voices and interests of people with disability have advocated against the legality of sterilisation of girls with disabilities, including specifically in the context of the family law system.<sup>2</sup> Their arguments in favour of

---

<sup>1</sup> See, eg, Linda Steele, 'Court-Authorised Sterilisation and Human Rights: Inequality, Discrimination and Violence Against Women and Girls with Disability?' (2016) 39(3) *UNSW Law Journal* 1002; Linda Steele, 'Disability, Abnormality and Criminal Law: Sterilisation as Lawful and Good Violence' (2014) 23(3) *Griffith Law Review* 467; Linda Steele, 'Sterilisation, Disability and Wellbeing: The Curative Imaginary of the "Welfare Jurisdiction"' in Claire Spivakovsky, Kate Seear and Adrian Carter (eds), *Critical Perspectives on Coercive Interventions: Law, Medicine and Society* (Routledge, 2018); Linda Steele, 'Lawful Institutional Violence Against Disabled People' (2017) 143 (November/December) *Precedent* 4.

<sup>2</sup> See, eg, Leanne Dowse, Karen Soldatic, Aminath Didi, Carolyn Frohmader, and Georgia van Toorn, *Stop the Violence: Addressing Violence Against Women and Girls With Disabilities in Australia: Background paper*

prohibition of sterilisation (including in the context of the family law system) have been made in part on human rights grounds and on the empirical evidence of the harm caused to girls with disabilities through sterilisation. For example, Women with Disabilities Australia have argued that sterilisation is a state sanctioned mode of discrimination, violence and torture. Women with Disabilities Australia have argued in favour of prohibition of sterilisation and the introduction of reparations and redress schemes for those who have been sterilised. It is vital that the ALRC acknowledge, listen to and adopt the approaches and recommendations of Women with Disabilities and other disability rights organisations, insofar as these articulate the views and experiences of women and girls with disability about their own bodies.

4. These arguments against the legality of sterilisation and in favour of the prohibition of sterilisation (including in the context of the family law system) are supported by a body of international human rights reports and statements, particularly following the coming into force of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).<sup>3</sup> For example, in its General Comment on Article 6 of the UNCRPD, the United Nations Committee on the Rights of Persons with Disabilities has recently stated:

Certain forms of violence, exploitation or abuse may be considered as cruel, inhuman, degrading treatment or punishment and breaches a number of

---

(Women with Disabilities Australia, 2013) <http://www.stvp.org.au/National-Symposium.htm>; Carolyn Frohmader, Women with Disabilities Australia, Submission No 49 to Senate Community Affairs References Committee, Parliament of Australia, *Inquiry into Involuntary or Coerced Sterilisation of People with Disabilities in Australia*, March 2013; Carolyn Frohmader, 'Submission to the United Nations Committee Against Torture' (Submission, Women with Disability Australia, 24 September 2014); Carolyn Frohmader, Leanne Dowse and Aminath Didi, 'Preventing Violence against Women and Girls with Disabilities: Integrating a Human Rights Perspective' (Think Piece, January 2015, Women with Disability Australia); Carolyn Frohmader and Stephanie Ortoleva, 'The Sexual and Reproductive Rights of Women and Girls with Disabilities' (Issues Paper presented at ICPD Beyond 2014 International Conference on Human Rights, The Hague, Netherlands, 7–10 July 2013); Carolyn Frohmader and Therese Sands, Australian Cross Disability Alliance (ACDA) Submission No 147 to the Senate Community Affairs References Committee, Parliament of Australia, *Inquiry into Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings, including the Gender and Age Related Dimensions, and the Particular Situation of Aboriginal and Torres Strait Islander People with Disability, and Culturally and Linguistically Diverse People with Disability* (August 2015); Women With Disabilities Australia (WWDA), *Position Statement 4: Sexual and Reproductive Rights*, (September 2016, WWDA).

<sup>3</sup> See, e.g., See generally Catalina Devandas Aguilar, Report of the Special Rapporteur on the rights of persons with disabilities: Sexual and reproductive health and rights of girls and young women with disabilities, 14 July 2017, A/72/133; Juan E Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN GAOR, 22<sup>nd</sup> sess, Agenda Item 3, UN Doc A/HRC/22/53 (1 February 2013) [48]; Committee on the Rights of the Child, *General Comment No 13: The Right of the Child to Freedom from All Forms of Violence*, UN Doc CRC/C/GC/13 (18 April 2011) [16], [21]; Committee on the Rights of Persons with Disabilities, *General comment No. 3 - Article 6: Women and Girls with Disabilities*, 2 September 2016. In relation to Australia, see, eg, Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia, Adopted by the Committee at Its Tenth Session (2–13 September 2013)*, UN Doc CRPD/C/AUS/CO/1 (21 October 2013) 5–6 [39]–[40] ('*Concluding Observations*'); Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, UN GAOR, 17<sup>th</sup> sess, Agenda Item 6, UN Doc A/HRC/17/10 (24 March 2011) 15 [86.39]. See discussion in Linda Steele and Beth Goldblatt, 'Violent and Discriminatory Responses to Menstruation of Women and Girls with Disabilities: A Human Rights Response' in Chris Bobel, Breanne Fahs, Katie Ann Hasson, Elizabeth Kissling, Tomi-Ann Roberts and Inga Winkler (eds), *The Palgrave Handbook of Critical Menstrual Studies* (forthcoming, on file with author).

international human rights treaties. Among these are forced, coerced and otherwise involuntary pregnancy or sterilisation; as well as any other medical procedure or intervention performed without free and informed consent ...

Restricting or removing legal capacity can facilitate forced interventions, such as: sterilisation...

In the light of the normative content and obligations outlined above, State parties should take the following steps to ensure the full implementation of article 6 of the Convention on the Rights of Persons with Disabilities, providing adequate resources in this regard:

a) Combat multiple discrimination through inter alia:

Repealing discriminatory laws, policies and practices that prevent women with disabilities from enjoying all the rights of the Convention; outlawing gender and disability-based discrimination and its intersectional forms; criminalizing sexual violence against girls and women with disabilities; prohibiting all forms of forced sterilization...<sup>4</sup>

5. Moreover, the United Nations Special Rapporteur on the rights of persons with disabilities recently reported that:

The forced sterilization of girls and young women with disabilities represents a widespread human rights violation across the globe. Girls and young women with disabilities are disproportionately subjected to forced and involuntary sterilization for different reasons, including eugenics, menstrual management and pregnancy prevention. Women with intellectual and psychosocial disabilities, as well as those placed in institutions, are particularly vulnerable to forced sterilization. Despite the limited data on current practices, studies show that the sterilization of women and girls with disabilities continues to be prevalent, and up to three times higher than the rate for the general population.

While United Nations human rights instruments, mechanisms and agencies have recognized that the forced sterilization of persons with disabilities constitutes discrimination, a form of violence, torture and other cruel, inhuman or degrading treatment, the practice is still legal and applied in many countries. Across the globe, many legal systems allow judges, health-care professionals, family members and guardians to consent to sterilization procedures on behalf of persons with disabilities as being in their “best interest”, particularly for girls with disabilities who are under the legal authority of their parents. The practices are often conducted on a purported precautionary basis because of the vulnerability of girls and young women with disabilities to sexual abuse, and under the fallacy that sterilization would enable girls and young women with disabilities who are “deemed unfit for parenthood” to improve their quality of

---

<sup>4</sup> Committee on the Rights of Persons with Disabilities, *General comment No. 3 - Article 6: Women and Girls with Disabilities*, 2 September 2016, CRPD/C/GC/3, [32], [44], [62].

life without the “burden” of a pregnancy. However, sterilization neither protects them against sexual violence or abuse nor removes the State’s obligation to protect them from such abuse. Forced sterilization is an unacceptable practice with lifelong consequences on the physical and mental integrity of girls and young women with disabilities that must be immediately eradicated and criminalized.

...

States must immediately repeal all legislation and regulatory provisions that allow the administration of contraceptives to and the performance of abortion, sterilization or other surgical procedures on girls and young women with disabilities without their free and informed consent, and/or when decided by a third party. Furthermore, States should consider adopting protocols to regulate and request the free and informed consent of girls and young women with disabilities with regard to all medical procedures.

...

States should consider reparations and redress mechanisms for girls and young women with disabilities who have been subjected to harmful practices, such as forced sterilization and forced abortion, particularly within institutions.<sup>5</sup>

6. Recognition of the artificial, political and discriminatory division of legal subjects on the basis of mental in/capacity is central to being able to see sterilisation as a human rights violation and in turn prohibiting the use of the family law system to authorise sterilisation of girls with disability through denial of their legal capacity. This is particularly important in the current moment of the jurisprudence on the Family Court’s welfare jurisdiction where *Gillick* competency and issues of mental capacity are being politicised and ‘modernised’ in the specific context of transgender and intersex children. I submit that the ALRC should approach its consideration of mental capacity and *Gillick* competency in a manner that acknowledges the universal right to legal capacity provided by the UNCRPD including children with disability. Caution is needed in an approach to mental capacity and *Gillick* competency that orders non-normative children into different categories (e.g., transgender and intersex children as capable, girls with disability as incapable) and hierarchises them on the basis of assumptions about mental in/capacity (e.g., impermissibility of non-consensual interventions in relation to capable transgender and intersex children, cf permissibility of non-consensual interventions in relation to incapable girls with disability). Selective consideration of mental capacity in relation to particular groups of non-normative children risks affirming the in/capacity divide and further naturalising, depoliticising and entrenching the mental incapacity of girls with disability as a basis on which to legitimise their sterilisation through the welfare jurisdiction.

---

<sup>5</sup> Catalina Devandas Aguilar, Report of the Special Rapporteur on the rights of persons with disabilities: Sexual and reproductive health and rights of girls and young women with disabilities, 14 July 2017, A/72/133, [29]-[30]; [40]; [49].

7. Contemporary practices of sterilisation that occur in an individualised justice model of court and tribunal authorisation (including in the context of the family law system) need to be situated along a continuum of historical practices of sterilisation of women and girls with disabilities (and other non-normative and oppressed groups) that includes eugenics era large-scale policies of sterilisation, rather than being seen as a break from these practices. Contemporary features of procedural ‘safeguards’ and judicial decisionmaking simply demonstrate the complicity of the courts and judiciary in sterilisation rather than transforming sterilisation into a just and non-violent practice.<sup>6</sup>
8. Any reforms to the family law system which impact on the future operation of the Family Court’s welfare jurisdiction should be accompanied by reforms that will address and redress historical injustices of sterilisation perpetrated by the family law system, irrespective of whether these were ‘legal’ at the time the sterilisation occurred.
9. The rate at which sterilisation is currently occurring through the family law system is irrelevant to whether the family law system should be reformed to prohibit sterilisation of girls with disabilities. The fact that sterilisation still remains ‘on the books’ sends a powerful legal, ethical, cultural and political message that sterilisation is permissible, non-violent and just. Indeed, *Marion’s Case* is routinely included in torts and criminal law textbooks for its ‘principles’ on third party consent and the non-violence/legality of medical interventions. The inclusion of *Marion’s Case* generally occurs in an unreflective and self-evident manner with no critical commentary to guide teachers and students about what is actually happening to the bodies of the women the subject of these cases and the broader systemic issues of disability that these decisions reflect. Without a reform intervention to prohibit the authorisation of sterilisation, these principles and the welfare jurisdiction more broadly will continue to inform broader cultural, legal, professional, pedagogical and ethical understandings and tolerance of the permissibility of sterilisation and violence against girls with disability.
10. The use of the Family Court’s welfare jurisdiction to authorise sterilisation of girls with disabilities is inconsistent with the role of the family law system in protecting girls from family violence.<sup>7</sup>
11. By reason of the welfare jurisdiction being Constitutionally grounded in the relationship of the child’s parents, the use of the Family Court’s welfare jurisdiction to authorise sterilisation also individualises structural social, political and economic

---

<sup>6</sup> Linda Steele, ‘Sterilisation, Disability and Wellbeing: The Curative Imaginary of the “Welfare Jurisdiction”’ in Claire Spivakovsky, Kate Seear and Adrian Carter (eds), *Critical Perspectives on Coercive Interventions: Law, Medicine and Society* (Routledge, 2018).

<sup>7</sup> Linda Steele, ‘Disability, Abnormality and Criminal Law: Sterilisation as Lawful and Good Violence’ (2014) 23(3) *Griffith Law Review* 467.

issues to the family unit and places the burden of reducing the impact of these issues onto the bodies of girls with disabilities.<sup>8</sup>

12. The ALRC is urged not to follow the recommendations made by the 2013 Senate Community Affairs References Committee in its inquiry into sterilisation,<sup>9</sup> including those related to the regulation of sterilisation pursuant to a test of 'best protection of rights'. This is because these recommendations were premised on a foundational position of the fundamental inequality of girls with and without disabilities which completely negates the rights of girls with disabilities to non-discrimination and equality.<sup>10</sup> This inequality was naturalised in the inquiry by reason of medicalised assumptions about the mental incapacity of girls with disabilities which renders them absolutely different to girls without disability. The recommendations of this inquiry cannot be sustained in light of the compelling arguments and evidence provided by disability rights and international human rights organisations concerning the status of sterilisation as a grave human rights violation. Indeed, this was acknowledged as such by the United Nations Committee on the Rights of Persons with Disabilities which stated in 2013 that it was 'deeply concerned that the Senate inquiry report ... puts forward recommendations that would allow this practice to continue'.<sup>11</sup> The Committee urged Australia to adopt laws prohibiting sterilization 'in the absence of their prior, fully informed and free consent'.<sup>12</sup>

## Responses to Specific Questions in Issues Paper

### Question 7: How can the accessibility of the family law system be improved for people with disability?

13. The ALRC's consideration of the accessibility of the family law system for people with disability cannot be considered distinct from its consideration of the issue of sterilisation. This is because the family law system will be inherently inaccessible to girls with disabilities if it remains a forum for authorising the perpetration of violence

---

<sup>8</sup> See, eg, discussion of *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 in Linda Steele, 'Making Sense of the Family Court's Decisions on the Non-Therapeutic Sterilisation of Girls with Intellectual Disability' (2008) 22(1) *Australian Journal of Family Law* 1; Linda Steele, 'Sterilisation, Disability and Wellbeing: The Curative Imaginary of the "Welfare Jurisdiction"' in Claire Spivakovsky, Kate Seear and Adrian Carter (eds), *Critical Perspectives on Coercive Interventions: Law, Medicine and Society* (Routledge, 2018).

<sup>9</sup> Senate Community Affairs References Committee, Parliament of Australia, *Involuntary or Coerced Sterilisation of People with Disabilities in Australia* (2013).

<sup>10</sup> Linda Steele, 'Court-Authorised Sterilisation and Human Rights: Inequality, Discrimination and Violence Against Women and Girls with Disability?' (2016) 39(3) *UNSW Law Journal* 1002.

<sup>11</sup> Committee on the Rights of Persons with Disabilities (CRPD) 2013, *Concluding Observations on the Initial Report of Australia, Adopted by the Committee at Its Tenth Session (2–13 September 2013)*, 21 October, UN Doc CRPD/C/AUS/CO/1, [39].

<sup>12</sup> Committee on the Rights of Persons with Disabilities (CRPD) 2013, *Concluding Observations on the Initial Report of Australia, Adopted by the Committee at Its Tenth Session (2–13 September 2013)*, 21 October, UN Doc CRPD/C/AUS/CO/1, [40].

against them through sterilisation. As such, the accessibility of the family law system for girls with disability must not only involve reforms to justice processes and services.<sup>13</sup> Accessibility must also extend to reforms to understandings of substantive concepts in law, including 'violence' and 'capacity'. In particular, family violence needs to be defined to include sterilisation and other forms of (lawful) or (medical) violence that might be used specifically against girls with disability. Arguably the ALRC itself acknowledges sterilisation as a form of violence when it states in the Issues Paper:

Particular concerns have been raised in relation to the safety needs of women and girls with disability. Women and girls with disability are twice as likely as women and girls without disability to experience violence during their lives. They are also more likely to experience violence over a longer timeframe, resulting in more severe trauma, and are more vulnerable to particular types of abuse, such as sexual assault, financial abuse and forced or coerced sterilisation.<sup>14</sup>

Question 14: What changes to the provisions in Part VII of the *Family Law Act* could be made to produce the best outcomes for children?

14. For the reasons discussed in my introductory discussion, Part VII of the *Family Law Act* needs to be reformed to prevent its use to authorise sterilisation of girls with disabilities. For the reasons discussed in para 9 above, it is immaterial that 'the Family Court has noted that it is increasingly rare for such applications to be brought'.<sup>15</sup>
15. For the reasons discussed above at para 12, the ALRC should not follow the recommendations of the Senate Inquiry regarding the 'development of uniform model legislation to regulate the sterilisation of people with disability'.<sup>16</sup> Sterilisation should be *prohibited*, not regulated. The human rights of girls with disabilities cannot be protected through sterilisation. Finetuning legal tests, procedural safeguards and the role of the judiciary simply further entrenches the court and judiciary's complicity in sterilisation, rather than negating its violence and injustice. This much is clear from the unequivocal statements by international human rights bodies discussed above.

---

<sup>13</sup> On this topic, see, e.g., JaneMaree Maher, Claire Spivakovsky, Jude McCulloch, Jasmine McGowan, Kara Beavis, Meredith Lea, Jessica Cadwallader and Therese Sands, *Women, Disability and Violence: Barriers to Accessing Justice: Final Report* (ANROWS Horizons, Issue 02, 2018).

<sup>14</sup> Australian Law Reform Commission, *Review of the Family Law System: Issues Paper*, IP 48 (Australian Law Reform Commission, March 2018) [75].

<sup>15</sup> Australian Law Reform Commission, *Review of the Family Law System: Issues Paper*, IP 48 (Australian Law Reform Commission, March 2018) [135].

<sup>16</sup> Australian Law Reform Commission, *Review of the Family Law System: Issues Paper*, IP 48 (Australian Law Reform Commission, March 2018) [135].

16. For the reasons discussed at para 6 above, it is submitted that the ALRC avoid either siloing its consideration of mental capacity and *Gillick* competence in terms of different categories of non-normative children and having an exclusive focus on transgender and intersex children in light of *Re Kelvin*.<sup>17</sup> While such an approach might improve the legal situation for transgender and intersex children, it could also further entrench in/capacity along the lines of dis/ability and retain the unjust and violent status quo in the welfare jurisdiction for girls with disability. Instead, it is submitted that the ALRC could consider the broader political and social contingency of mental capacity and *Gillick* competency as it relates to non-normative bodies generally.
17. In recognition of the past *failures* of the *Family Law Act* to ensure the ‘best outcomes’ of girls with disabilities who have been sterilised pursuant to the welfare jurisdiction, the Federal Government should introduce reparations and redress mechanisms for women and girls who have been sterilised.

Question 15: What changes could be made to the definition of family violence, or other provisions regarding family violence, in the *Family Law Act* to better support decision making about the safety of children and their families?

18. Family violence needs to be defined to include sterilisation and other forms of (lawful) or (medical) violence that might be used specifically against girls with disability.

### Further documents

Please refer to the following publications where the above points have been explored:

- Linda Steele, ‘Making Sense of the Family Court’s Decisions on the Non-Therapeutic Sterilisation of Girls with Intellectual Disability’ (2008) 22(1) *Australian Journal of Family Law* pp 1-23
- Linda Steele, ‘Sterilisation, Disability and Wellbeing: The Curative Imaginary of the “Welfare Jurisdiction”’ in Claire Spivakovsky, Kate Seear and Adrian Carter (eds), *Critical Perspectives on Coercive Interventions: Law, Medicine and Society* (Routledge, 2018)
- Linda Steele, ‘Court-Authorised Sterilisation and Human Rights: Inequality, Discrimination and Violence Against Women and Girls with Disability?’ (2016) 39(3) *UNSW Law Journal* pp 1002-1037

---

<sup>17</sup> Australian Law Reform Commission, *Review of the Family Law System: Issues Paper*, IP 48 (Australian Law Reform Commission, March 2018) [137].



- Linda Steele, 'Disability, Abnormality and Criminal Law: Sterilisation as Lawful and Good Violence' (2014) 23(3) *Griffith Law Review* pp 467-497
- Linda Steele, 'Lawful Institutional Violence Against Disabled People' (2017) 143 (November/December) *Precedent* pp 4-8
- Linda Steele, 'Temporality, Disability and Institutional Violence: Revisiting *In Re F*' (2017) 26(3) *Griffith Law Review* pp 378-400, DOI: 10.1080/10383441.2017.1436368
- Linda Steele and Leanne Dowse, 'Gender, Disability Rights and Violence Against Medical Bodies' (2016) 31(88) *Australian Feminist Studies* pp 117-124, DOI: 10.1080/08164649.2016.1224081
- Linda Steele and Beth Goldblatt, 'Violent and Discriminatory Responses to Menstruation of Women and Girls with Disabilities: A Human Rights Response' in Chris Bobel, Breanne Fahs, Katie Ann Hasson, Elizabeth Kissling, Tomi-Ann Roberts and Inga Winkler (eds), *The Palgrave Handbook of Critical Menstrual Studies* (forthcoming, on file with author)