Sterilisation of Young Women with Disabilities: Towards a New Regulatory Framework

Regina Graycar*

The High Court of Australia has recently been confronted with two cases involving young women with disabilities whose families had sought to have them undergo sterilisation for the purpose of managing their menstruation and preventing them from becoming pregnant.[1] The fact that these cases reached the High Court and received some degree of publicity helped to raise public awareness of the substantive issues at stake and of the absence of a clear legal framework for making such difficult decisions.[2] Shortly after the decision in *Marion's Case,* the then Minister for Justice asked the Family Law Council[3] to report on the need for legislative amendments to regulate sterilisation and whether these should be undertaken by the Commonwealth and/or the States; the principles which should govern decision making; which body should make decisions; and the penalties that should be imposed in the event that a child is sterilised without the authorisation required by law.[4] This note will briefly outline the two High Court decisions and will discuss some of the issues considered by the Family Law Council in attempting to formulate a proposal for a legislative framework within which to regulate sterilisation of young people in Australia.[5]

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* Associate Professor of Law, University of New South Wales; Convenor, Medical Powers Committee, Family Law Council. I should like to thank Margie Cronin, Margaret Harrison and Jenny Morgan for their helpful contributions to this discussion.

1 *Secretary, Department of Health and Community Services v JWB and SMB* (hereafter *Marion's Case*) (1992) 175 CLR 218; *P v P* (1994) 120 ALR 545. While it is common to refer to the issue as a gender neutral children's issue, in fact the overwhelming majority of cases (certainly all those heard by courts to date) involve young women. Former Justice Bertha Wilson, of the Supreme Court of Canada, has pointed out that: "Particularly when one has regard to the fact that it has been mentally disabled women who have been the victims of involuntary obstetrical intervention, the gender dimensions of *Re Eve* ([1986] 2 SCR 388) become painfully evident": The Hon Bertha Wilson 'Women, the Family and the Constitutional Protection of Privacy' (1992) 17 *Queen's Law Journal* 5, 17. She went on to note, at 18: "Since it is primarily women who carry the burden in our society of child rearing, it would likely be a woman and not a man who would be responsible for rearing the child of a woman such as Eve."

2 There has also been an extensive academic literature developed around these issues in recent years. The Family Law Council's Discussion Paper *Sterilisation and Other Medical Procedures on Children* (October 1993) (hereinafter "FLC,DP") and *Report* (November 1994) both contain bibliographies .

3 An advisory body, established under s 115 of the *Family Law Act 1975* (Cth).

4 Terms of reference provided to the Family Law Council, October 1992, by Senator Tate. These are set out in full in FLC,DP at 4 .

5 Sterilisation of adults is dealt with by State and Territory guardianship legislation where applicable. For example, the *Guardianship Act 1987* (NSW) provides a decision making framework for those adults who lack the capacity to make decisions about their own medical treatment. The Family Court has no powers in its welfare jurisdiction once children reach 18 years.

Marion's Case

From 1988, a number of applications had been made to the Family Court seeking authorisation for the sterilisation of young women with disabilities.[6] In the first four cases which came before it, the Court had characterised the central issue as being whether parents could consent on behalf of their child who lacked the capacity to consent to such procedures, or whether it was necessary to obtain authorisation from an appropriate external decision maker.[7] These applications were made before the Family Court, considered the appropriate decision maker since it has a broad parens patriae — or welfare — jurisdiction.[8]

Marion's parents had asked the Family Court of Australia either to consent to the carrying out of a hysterectomy on Marion (who has an intellectual disability and suffers from a number of medical conditions), or to declare that it was lawful for them, as Marion's parents, to make that decision. The issue went to the Full Court of the Family Court[9] and then to the High Court in *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)*, where that Court was called upon to clarify the basis of the Family Court's jurisdiction, as well as to consider the role of parents and others in decision making.[10]

Marion and her family live in the Northern Territory and there is no Territory law which deals with the sterilisation of children. Therefore, the matter fell to be decided by reference to the common law and/or the *Family Law Act 1975* (Cth).

The High Court decided that Marion's disabilities were such that she could not give a valid and effective consent to medical treatment. In making this decision, the majority stressed, however, that there is no automatic presumption that a child with an intellectual disability will be incapable of giving a valid and

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6 To date, each application to the Family Court of Australia concerning sterilisation has involved a young woman: while it is possible that cases involving young men could arise, the currently reality is that this is an issue which overwhelmingly concerns women. The cases heard prior to *Marion's Case* are *In re a Teenager* (1988) 13 Fam LR 85, (1989) FLC 92-006; *Re Jane* (1988) 12 Fam LR 662, (1989) FLC 92-007; *Re Elizabeth* (1989) 13 Fam LR 47, (1989) FLC 92-023; *In Re S* (1989) 13 Fam LR 660, (1990) FLC 92-124. In another case heard by the Family Court of Australia, Gee J had cross-vested the jurisdiction under the *Children (Care and Protection) Act 1987* (NSW) (*Re M* (1992) FLC 92-318). Since the High Court's decision in *Marion*, a further application to the Court was rejected in *L and GM and MM and the Director General of the Department of Family Services and Aboriginal and Islander Affairs (Re Sarah)* (1993) 17 Fam LR 357, (1994) FLC 92-449. In *In Re Marion (No 2)* (1994) FLC 92-448, the Family Court approved the application for sterilisation in the case which had gone to the High Court. And in September 1994, the Family Court dismissed the application in *P v P (No 2)*.

7 In *In re a Teenager* and *In re S*, the Court held that parents could consent, while in *Re Jane* and *Re Elizabeth*, it was held that a court's consent was required.

8 For a detailed discussion of the Family Court's welfare jurisdiction, see J Seymour 'The Role of the Family Court of Australia in Child Welfare Matters' (1993) 21 *Federal Law Review* 1. Seymour also points out that the Family Court's jurisdiction over ex-nuptial children may be less extensive than its powers over the children of a marriage, given the express terms in which the states which did so referred their powers over ex-nuptial children to the Commonwealth: see Seymour, especially at 18-19. The recent decision of the High Court in *P v P* (1994) 120 ALR 545 did not resolve this as the case involved a young woman whose parents had been married (though they were now divorced).

9 *Re Marion* (1990) 14 Fam LR 427.

10 (1992) 175 CLR 218.

effective consent: instead, it is always necessary to look at the circumstances of each individual case.[11]

The majority of the Court, while adopting the "Gillick" principle (under which children who are sufficiently mature may make decisions concerning their own medical treatment),[12] held that the common law does not necessarily allow parents or guardians to give a valid and effective consent to certain medical procedures where the child lacks the capacity to do so.[13] Only a court has that power and, in the Northern Territory, because there is no Territory legislation specifically dealing with this situation, the Family Court has jurisdiction to hear applications and, where appropriate, to authorise the performance of the surgery.

The majority explained why it was considered necessary for an outside body (that is, one independent of the parents and the child) to authorise the sterilisation. Sterilisation (in common with some other medical procedures) requires invasive, irreversible and major surgery, and is to be considered appropriate only as a last resort.[14] The majority distinguished it from other medical procedures, noting the significant risk of making the wrong decision, either as to a child's present or future capacity to consent or about what are the best interests of a child who cannot consent.[15] A number of factors contribute to the significant risk of a wrong decision being made. These include[16] the complexity of the question of consent; the central role played by the medical profession in making decisions about sterilisation as well as in the execution of the procedure itself (and the possibility of error); the clash of interests — decisions involve the possibly conflicting, though legitimate, interests of the child, the parents, carers and other family members; the gravity of the consequences of a wrong decision; and (perhaps most significantly) the fact that sterilisation interferes with a "fundamental right to personal inviolability existing in the common law".[17]

The Court held that in the case of children who lack capacity to consent, neither the child nor the child's parents can consent to a sterilisation procedure. Only a court can authorise it, unless legislation provides otherwise. The Family

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11 *Marion's Case*, at 239.

12 See the decision of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112. For discussions, see J Morgan 'Controlling Minors' Fertility' (1986) 12 *Monash University Law Review* 161 and Patrick Parkinson 'Children's Rights and Doctors' Immunities: The Implications of the High Court's Decision in *Re Marion* (1992) 6 *Australian Journal of Family Law* 101. Parkinson suggests (at 102) that *Marion* endorses "one controversial interpretation of the decision in *Gillick* ...".

13 The majority was constituted by Mason CJ, Dawson, Toohey and Gaudron JJ. Brennan, Deane and McHugh JJ (on different grounds and in separate judgments) held that in certain circumstances, parents could consent to sterilisation procedures. However, Deane and McHugh JJ also endorsed the *Gillick* principle.

14 *Marion's Case*, at 259.

15 n 14, at 250.

16 n 14, at 250-3.

17 n 14, at 253

Court of Australia is able to authorise such an operation, but other legislation may give that power to other courts and tribunals.[18]

The one exception made by the High Court majority was the case of a therapeutic procedure in which sterilisation is an incident of treatment, a "by-product of surgery appropriately carried out to treat some malfunction or disease"[19] (for example, surgical removal of the ovaries or testes because of cancer or sterilisation resulting from chemotherapy or radiotherapy).

Brennan, Deane and McHugh JJ dissented. While Deane and McHugh JJ both held that there were circumstances in which parents might authorise sterilisation, Brennan J refused to countenance the possibility of any approval of a "non-therapeutic" sterilisation.[20] He focused on the importance of the integrity of the person and was critical of the indeterminacy of the "best interests" or welfare standard by reference to which decisions about children are made by the Family Court. Brennan J pointed out that the best interests approach "depends upon the value system of the decision-maker" and "creates an unexaminable discretion in the repository of the power".[21]

> [T]he power to authorise sterilisation is so awesome, its exercise is so open to abuse, and the consequences of its exercise are generally so irreversible, that guidelines if not rules should be prescribed to govern it.[22]

Following the High Court's decision that it was appropriate (and necessary) for the Family Court to determine the application, the matter went back to that Court where the application was considered on its merits and eventually approved.[23]

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18 Notably the *Guardianship Act 1987* (NSW) and the *Guardianship and Administration Act 1993* (SA). (At the time of writing, the latter act, which will replace the *Mental Health Act 1976* (SA), has not yet been proclaimed). Although the existence of that legislation, and the potential for conflict, was raised in the majority judgment, it was not directly addressed until the issue arose in *P v P* (discussed below).

19 *Marion's Case*, at 250.

20 Brennan J was the only member of the High Court who expressly endorsed the approach taken by the Supreme Court of Canada in *Re Eve* [1986] 2 SCR 388, (1986) 31 DLR (4th) 1 where that court drew a distinction between therapeutic and non-therapeutic sterilisation. So far as therapeutic sterilisations are concerned, he did not consider that the Family Court has jurisdiction. In his view, the parens patriae power of a court cannot extend to the authorisation of a procedure which parents could not authorise (at 282). "[N]either the parens patriae jurisdiction nor the "welfare" jurisdiction of the Family Court confers on that Court a power to authorise the invasion of a child's personal integrity which could not be authorised by its parents or guardians" (at 287).

21 *Marion's Case*, at 271.

22 n 21, at 272. In *In re Jane* (1989) FLC 92-007, Nicholson J set out a list of factors which should be considered by decision-makers. These included (inter alia): the possibility of the person becoming pregnant, potential trauma from pregnancy or sterilisation, the ability to understand reproduction, less drastic means of contraception; the person's ability or potential ability to care for a child; a demonstration of good faith on the part of those seeking the sterilisation: at 77,252.

23 *In re Marion (No 2)* (1994) FLC 92-448.

P v P

This case, heard in early 1994 and decided by the Court in April 1994, squarely addressed the interaction of the Family Court's jurisdiction under the *Family Law Act* and the jurisdiction of any State or Territory body given a power to make sterilisation decisions about a "child of a marriage". The case involves a young woman, L, whose parents had been married and had subsequently divorced.[24] The *Guardianship Act 1987* (NSW) contains a statutory decision making scheme for people 16 and over unable to make their own decisions. Under s 35, it is an offence to perform "special treatment" - which, as defined by s 33, includes sterilisation - on a person without the authorisation of the Guardianship Board. Under s 45 of the *Guardianship Act*, the Guardianship Board would only have been able to authorise the surgery if it were necessary to save L's life or to prevent serious damage to her health (the statutory criteria under which "special treatment" - which includes sterilisation - may be authorised). The problem raised by the facts of this case was that the purpose of the proposed surgery — "to preclude pregnancy and to prevent menstruation"[25] — would not have fallen within the NSW statutory criteria.

The High Court majority (Mason CJ, Deane, Toohey and Gaudron JJ; McHugh J concurring in the result) reiterated its view from *Marion's Case* that the welfare jurisdiction of the Family Court extends "in the case of an incapable child of a marriage" to the authorisation of medical treatment, including planned sterilisation, "where such treatment is necessary in the best interests of the child".[26]

The majority endorsed, as "plainly correct", the proposition put in *Marion's Case* that

> It is clear enough that a question of sterilisation of a child of a marriage arises out of the marriage relationship and that the sterilisation of a child arises from the custody or guardianship of a child. Therefore, jurisdiction to authorise a sterilisation is within the reach of power of the Commonwealth. . . .[27]

Turning to the State legislation, the majority also held that the general welfare jurisdiction under the *Family Law Act* was not intended to be subject to each State and Territory law containing prohibitions such as s 35 of the *Guardianship Act*. If this were the intention, then it would be spelled out, as it is in the case of s 60H,

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24 For this reason, the High Court was not called on to consider the question of what jurisdiction, if any, the Family Court could have over ex-nuptial children arising from its welfare power.

25 *P v P* (1994) 120 ALR 545 at 553.

26 n 25.

27 n 25, at 554 (quoting *Marion's Case* at 261). The generally accepted view seems to be that, to the extent that the Family Court's jurisdiction flows from its *parens patriae*, or welfare power, it can apply only to children of a marriage since the powers over ex-nuptial children referred by the States under the reference of powers in 1987 were specifically limited in the Acts to custody, guardianship, access and maintenance. However, this extract from the judgments in both cases suggests the possibility that the jurisdiction arises from "custody" independently of welfare. If this is the case, then it would also cover ex-nuptial children. On these issues, see the extensive discussion by Seymour n 8.

dealing with children in the care of the State. The majority held that the prohibition in s 35(1) of the *Guardianship Act* is inconsistent with the *Family Law Act's* welfare jurisdiction and is, to that extent, invalid in so far as it applies to a child of a marriage.[28]

Brennan and Dawson JJ dissented. Brennan J did not agree that the welfare jurisdiction of the Family Court empowered a judge of that Court to make an order authorising the sterilisation of a young woman.[29] He held that there was no inconsistency between the *Family Law Act* and the *Guardianship Act*. According to Brennan J, the Family Court has no jurisdiction to authorise a non-therapeutic sterilisation. Such a power could not arise out of the marriage relationship since the parties to the marriage cannot authorise such a procedure, nor can a child who lacks the capacity to consent. Even if it could be argued that such a procedure was for the welfare of a child, the occasion for authorising it arises simply because the child cannot consent and no one else has that power. That in itself does not arise out of the marriage relationship, or because a child is a child of a marriage.[30]

Brennan J also elaborated upon his critique of the welfare/best interests test outlined in *Marion's Case*.

> Courts and judges, in the absence of governing legal principle or of guidelines more specific than "welfare" to control the exercise of such a daunting power, can rely only on their idiosyncratic perceptions of the circumstances. . . . When the scope of the welfare jurisdiction is undefined by the Family Law Act, I am unable to construe the bare term "welfare" in such a way as to arm a judge with power to make an order authorising a serious and irreversible invasion of personal integrity.[31]

> [T]he power is subject to no rule; it is governed only by the judge's opinion that it is in the child's "best interests" to do so. . . . [T]he diversity of values and circumstances which would affect decisions to make sterilisation orders precludes any realistic expectation that decisions would not be made according to the idiosyncratic opinion of the individual judge.[32]

Dawson J took a similar view to Brennan J on the breadth of the marriage power (s 51(xx)). He held that the marriage power is not a power to make laws with respect to children, or the welfare of children generally. He noted that despite the breadth of the *Family Law Act*, "a law is not a law with respect to marriage simply because it deals with the welfare of the child of a marriage".[33] He also held that a jurisdiction to make orders for the welfare of children is a jurisdiction that must be exercised in accordance with existing law (including prohibitions such as those contained in the *Guardianship Act 1987* (NSW)).[34]

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28 *P v P* (1994) 120 ALR 545 at 558.
29 n 28 at 564.
30 n 28 at 575.
31 n 28 at 564.
32 n 28 at 569.
33 n 28 at 577.
34 McHugh J issued a separate judgment in which he effectively agreed with the majority.

P v P and the federal system

This decision, which applies only to a "child of a marriage",[35] while holding that s 35 of the *Guardianship Act* is inconsistent with the *Family Law Act*, does not go so far as to exclude the jurisdiction of the Guardianship Board altogether.[36] Where a Family Court has exercised its jurisdiction in an application involving sterilisation, the Guardianship Board would be unable to do so. However, the decision does not prevent the Guardianship Board from exercising its jurisdiction under the Act, if an application is made to it. And, if the Board has heard an application and it has been rejected, there would be nothing to prevent a parent from making an application in relation to the same child (so long as her parents had been married) to the Family Court. The decision of the High Court does not appear to affect the jurisdiction of the NSW Guardianship Board in relation to children (16 years and over) whose parents have not been married. Yet, unless legislation is passed by the Commonwealth, these two bodies will continue to have a parallel (and sometimes overlapping) jurisdiction under which decisions can be made by reference to quite different criteria: in the Family Court, the "welfare principle", in all its undefined breadth,[37] is the paramount consideration; whereas in the State Tribunal, a statutory set of guidelines provides a detailed and rigorous threshold which must be crossed before an application can be approved.

Gillick-competent young women and sterilisation

One issue not directly addressed by the High Court in either *Marion* or *P v P* is the question of consent to sterilisation of young women (under 18) who do not have a disability. The Family Law Council's Discussion Paper[38] suggested that it followed from the High Court's decision in *Marion* that even a Gillick-competent child could not consent to her own "non-therapeutic"[39] sterilisation (nor could her parents), unless that procedure falls within the "by-product of necessary surgery" (therapeutic) exception marked out by the High Court.[40]

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35 The High Court did not address the issue of what jurisdiction, if any, the Family Court would have over ex-nuptial children since the parents in *P v P* had been married, but see n 27.

36 Contrary to the suggestion by T Carney, D Tait and K Deane in 'Legal Regulation of Sterilisation: The Role of Guardianship Tribunals in NSW and Victoria' (1994) 8 *Australian Journal of Family Law* 141.

37 Though, as pointed out by the majority in *Marion*, confined by the notion of "step of last resort": (1992) 175 CLR 218 at 259.

38 FLC,DP at n 2 .

39 While the majority did not adopt the "therapeutic/non-therapeutic distinction" which had informed the decision of the Supreme Court of Canada in *Re Eve*, they did draw a distinction between "by-product" or necessary situations and others (at 250). The distinction made in *Re Eve* was endorsed by Brennan J in his dissenting opinion.

40 See the range of views on this canvassed in (1994) 68 *Australian Law Journal* 222 and (1994) 68 *Australian Law Journal* 455.

This matter was the subject of some comment.[41] It was suggested that the decision in *Marion's Case* is authority for the proposition that a "Gillick-competent" child[42] can consent to her own sterilisation procedure, that is, to a surgical procedure that is invasive, dangerous (to the extent that it is major surgery requiring a general anaesthetic), irreversible (most sterilisations, so called, are in fact radical hysterectomies), and a fundamental interference with bodily integrity. I have elsewhere responded to this argument,[43] suggesting that it demonstrates a failure to contextualise the social problem at the centre of the legal debate about sterilisation. Sterilisation is a procedure which is notorious for having been performed on young women with disabilities for various purposes ranging from the eugenic[44] to "menstrual management"[45] to the prevention of pregnancy (and, some would suggest, the avoidance of the issue of sexual abuse).[46]

To raise the question of sterilisation and Gillick-competent young women suggests that there is a real issue at stake: that young women (under 18) are seeking to have themselves sterilised (as a form of birth control?). Is there any evidence that this is happening? Suppose there were: would a doctor asked by a 17 year old woman to perform a hysterectomy for contraceptive purposes do so solely at her request? If, in this hypothetical instance, the young woman is

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41 See (1994) 68 *Australian Law Journal* 222. There were two further submissions to the Family Law Council that made this point.

42 Referring to the decision of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112.

43 See (1994) 68 *Australian Law Journal* 455.

44 For a detailed history of the eugenics debate, see J Goldhar 'The Sterilisation of Women with an Intellectual Disability' (1991) 10 *University of Tasmania Law Review* 157. There is a considerable literature on this in the US, in part responding to the infamous comment of Holmes J in *Buck v Bell*: "It is better for all the world if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. ... Three generations of imbecile is enough": 274 US 200 at 207 (1927). For some other discussions see, N Cica 'Sterilising the Intellectually Disabled: The Approach of the High Court of Australia in *Department of Health v JWB and SMB*' (1993) 1 *Medical Law Review* 186, 224-226; H Little 'Non-Consensual Sterilisation of the Intellectually Disabled in the Australian Context: Potential for Human Rights Abuse and the Need for Reform' [1993] *Australian Yearbook of International Law* 203, 204; the discussion in R Graycar and J Morgan *The Hidden Gender of Law* (1990),, 310-312 (particularly of the racist underpinnings of some eugenic practices), and see also the discussion by Brennan J in *Marion's Case* at 275.

45 For a detailed discussion of menstrual management issues, see G Carlson et al *Menstrual Management and Fertility Management for Women who have an Intellectual Disability: An Analysis of Australian Policy*, Research Project (1992) Commonwealth Department of Health, Housing and Community Services, Canberra In her discussion, Hilary Little commented: "It is likely that if menstruation is an insurmountable problem for the woman, she will also require help with urinary and faecal control, which have stronger implications for personal hygiene than menstruation": Little n 44 , 213.

46 See FLC,DP at 4.35 This issue was also addressed by Brennan J in his judgment in *Marion's Case*: "Those who are charged with responsibility for the care and control of an intellectually disabled girl . . . have a duty to ensure that the girl is not sexually exploited or abused. . . . It is unacceptable that an authority be given for the girl's sterilisation in order to lighten the burden of that duty, much less to allow for its neglect.. . . . Such a situation bespeaks a failure of care, and sterilisation is not the remedy for the failure": at 276. A number of commentators have responded to this argument; for one example, see Little n 44, 214 who suggests: "[I]t is difficult to see how sterilising a woman protects her from sexual abuse. What it protects is society from the burden of caring for a child born as a result, and the abuser from some of the risks of discovery".

sufficiently mature, then under the Gillick test, she herself may give a valid consent. But would a doctor risk criminal or civil liability (since the validity of the consent will depend upon the young woman's maturity).[47] The doctor's assessment of her maturity would be fundamental to the lawfulness of the procedure since if the doctor gets it wrong and she lacks the requisite capacity, an appropriate outside decision maker would be required to consent.[48]

It is certainly the case that neither *Marion's Case* (nor the later decision in *P v P*) provides any real authority on this issue. Nor, for the reasons I have outlined, is it likely that any higher court will be called upon to adjudicate on such an issue. This is because, in practice, it is only the existence of the disability that leads to a consideration of surgical sterilisation. This in turn raises questions about the underlying conceptual framework within which decision making about sterilisation might be approached. Specifically, is sterilisation, in effect, about disability? If so, then it may be that decisions should be made within a framework expressly designed to deal with people with disabilities (such as a guardianship board).[49] But if the issue is characterised legally more as a children's welfare issue (which is what the High Court has said in *Marion* and *P v P*), or as a children's rights issue, then it is perhaps appropriate to confer decision making power on a court experienced in deciding issues about children. In any event, irrespective of arguments about the reach of the Gillick principle, the legislative framework proposed by the Family Law Council (outlined below) would clarify this question by making it an offence to sterilise a child under 18 other than in accordance with the statutory framework proposed. This would effectively preclude approval in the case of a person for whom realistic alternatives are available.

A Human Rights Approach

The debate about sterilisation has attracted considerable attention from those involved in human rights issues in Australia. The Human Rights and Equal Opportunity Commission has intervened in a number of the cases which have gone to the courts, and has also made a detailed submission to the Family Law Council's inquiry. Brennan J in both *Marion's Case* and in *P v P* relied on human

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47 As the High Court reminded us in *Marion's Case*, without an appropriate consent, such an intervention would be a trespass to the person or assault.

48 I have elsewhere expressed doubts about whether a medical intervention which has no treating or therapeutic purpose would ever fall within the so-called *Gillick* principle which deals with "medical or surgical treatment": (1994) 67 *Australian Law Journal* 455, 456. An interesting illustration of what I would argue is likely to be reluctance on the part of doctors to intervene in such cases is provided in *Re A*, an application for gender reassignment of a 14 year old child where Mushin J noted that the surgeon had indicated his/her willingness to undertake the surgical procedure "once we have the backing of the Family Court": (1993) 16 Fam LR 715 at 718. In *Marion's Case*, the High Court referred to the decision of Nicholson CJ in Re Jane (1988) 12 Fam LR 662 and in particular noted and endorsed his comments about the dangers of delegating decision-making to doctors: *Marion's Case* at 243 and 251. Compare the High Court decision in *Rogers v Whittaker* (1992) 175 CLR 479.

49 As it is in relation to adults in a number of states, under guardianship legislation. The legislation in NSW applies to people 16 and over while the SA legislation applies irrespective of age.

rights discourses in concluding that non-therapeutic sterilisation should never be authorised. He said:

> Human dignity requires that the whole personality be respected: the right to physical integrity is a condition of human dignity but the gravity of any invasion of physical integrity depends on its effect not only on the body but also on the mind and self-perception.[50]

Increasingly, published comments on these issues draw upon human rights principles in their discussions. One Australian commentator has examined the issue of sterilisation by reference to international human rights instruments and concluded that while Australian law "falls short of protecting fully the reproductive rights of intellectually disabled people . . . international human rights law provides little guidance to domestic legislatures in this area".[51] Another focus of discussion has been children's rights, and, in particular, the significance of Australia's signing of the *Convention on the Rights of the Child*.[52] It has also been suggested that the "language of rights is employed in the literature and the cases to support the arguments for and against sterilisation", yet "[i]n the case of girls with intellectual disabilities traditional approaches to rights have been insufficient to protect the intrinsic right to bodily integrity".[53] As Jones and Marks point out, rights can be very problematic concepts;[54] after all, in each of the cases, while courts have endorsed a right to bodily integrity, this has not prevented them from authorising sterilisations. They support a "dynamic development model" which gives pre-eminence to bodily integrity, which, they argue, is "the very foundation of all rights". They conclude that "where rights of children are taken seriously, sterilisation procedures cannot ever be justified in the absence of medical necessity." [55]

The Family Law Council's Report

The Council's discussion paper was issued in October 1993, after the decision in *Marion* though before *P v P*. The referral of the latter to the High Court caused the Council to delay its final report so as to await the outcome of the High Court's decision (delivered in April 1994). The final report, released in November 1994, makes the following recommendations:

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50 *Marion's Case* (1992) 175 CLR 218 at 267.

51 H Little n 44 , 225.

52 See the paper by the Chief Justice of the Family Court, the Hon Alastair Nicholson 'The Medical Treatment of Minors and Intellectually Disabled Persons — Convention on the Rights of the Child' delivered at the First World Congress on Family Law and Children's Rights (July 1993) and see also the comment by R Ludbrook in 'Sterilisation of Intellectually Disabled Young People: Who Decides?' (1994) 19 *Alternative Law Journal* 140.

53 M Jones and LA Basser Marks 'The Dynamic Development Model of the Rights of the Child: A Feminist Approach to Rights and Sterilisation' forthcoming in (1994) 2 *International Journal of Children's Rights*. 1.

54 Feminist critiques of rights discourses, and some responses to those critiques are discussed by J Morgan in 'Equality Rights in the Australian Context: A Feminist Assessment' in P Alston (ed) *Towards An Australian Bill of Rights* (1994) HREOC Sydney (forthcoming).

55 M Jones and LA Basser Marks, n 53.

- Commonwealth legislation should be enacted making it an offence to sterilise a child under 18, otherwise than in accordance with the proposed legislation.[56]
- Any decision authorising the sterilisation of a young woman would have to be made by an external decision maker (that is, not the child or her parents) in accordance with criteria set out in the Act.

The legislation would contain a detailed set of criteria which decision makers would be required to apply to any application made under the Act. This is in marked contrast to the current structure of decision making under the *Family Law Act*, under which, subject to the common law notion that sterilisation is a "step of last resort", decisions are governed only by the requirement that "the welfare of the child [is] the paramount consideration." As to the specific criteria, Council proposes a three stage decision-making process. First, the legislation would indicate four situations in which sterilisation could never be authorised. These are sterilisation for eugenic reasons;[57] sterilisation purely for contraceptive purposes; sterilisation as a means of masking or avoiding the consequences of sexual abuse;[58] and sterilisations performed on young women prior to the onset of menstruation, based on predictions about future problems that might be encountered with menstruation.[59] Before an application can be approved, it must be shown that the surgery is necessary to save life or to prevent serious damage to the person's physical or psychological health.[60] In deciding this, the decision maker must have regard to whether, where appropriate, the availability of less permanent means of contraception has been explored and whether the person is able to respond effectively to training in menstrual management. If, after these matters have been investigated, a decision maker is inclined to approve the

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56 The Council's Medical Powers Committee proposed that this Act be separate from the *Family Law Act* and be called the "Young Persons (Limitation of Sterilisation) Act". However, Council considers it more appropriate that the legislation be contained in a separate division of the *Family Law Act*.

57 The role and history of eugenics in this context is discussed extensively in n44 .

58 This factor was addressed in a 1993 decision of the Family Court in which Warnick J rejected an application in *L and GM and MM and the Director General, Department of Family Services and Aboriginal and Islander Affairs (Re Sarah)* (1994) FLC 92-449. In response to a submission that sterilisation might well increase the risk of sexual abuse if it were known that Sarah had been sterilised, he said (at 80,675): "Speculation as to the workings of an abuser's mind may be an especially hazardous business, but it does seem reasonable to observe that there is certainly no correlation between sterilisation and removal of the *risk* of abuse, as distinct from *one potential consequence*" (emphasis in the original). In the recent decision in *P v P (No 2)*, the Court noted that, since L lacked capacity to consent to sexual intercourse, any act of intercourse would be a sexual assault. Justice Moore commented: "What I am asked to do is sanction a sterilisation of this young woman, an act she cannot consent to, to obviate one of the possible consequences of such an assault, should it occur" (Reasons for Decision, 23 September 1994, at 49).

59 Several of the earlier Family Court decisions approved the performance of sterilisations prior to the onset of menstruation. In *In re a Teenager*, Cook J relied on evidence as to the young woman's phobic reaction to blood and stated: "It is obviously a matter of concern that a woman, whether young or old, may well suffer distinct embarrassment and emotional trauma if, unable to manage menstruation, sudden bleeding takes place in a public, or even private situation. Our society is full of taboos, and attitudes and perceptions about menstruation is not the least of such taboos": *In re A Teenager* (1989) FLC 92-006, at 77,231.

60 Compare *Guardianship Act 1987* (NSW) s.45.

application, s/he must not do so unless performance of the procedure would be in the child's best interests.

Finally, a matter which has been the subject of quite differing views, is the forum in which such decisions will be made. On the one hand, the Family Court exercises a *parens patriae* power (the welfare power) and has extensive experience in dealing with children's issues, including an emerging jurisdiction dealing with medical issues.[61] However, the number of such cases is small: the Court's main experience to date is in dealing with children in the aftermath of the breakdown of their parents' relationship. On the other hand, a number of different guardianship boards and tribunals around Australia have developed considerable experience and expertise in decision-making in the context of people with disabilities. But with the exception of NSW and SA, that jurisdiction has to date been confined to adults. While the choice of forum was the subject of a diversity of views in Council's committee, the full Council concluded that, in the interests of consistency in decision making, the Family Court — a national body — should have jurisdiction. In any event, perhaps more important than the decision maker is the set of criteria applied in making decisions. While the Family Court has been criticised for its apparent too ready agreement to approve applications,[62] it is anticipated that the clear articulation of precise decision making criteria would enable that Court, as it would any decision maker, to develop a specialist jurisprudence, perhaps developed by a specialist division,[63] which recognises the important interest in women's bodily integrity which, until now, has been all too readily placed below other interests.

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61 There have been some applications relating to medical procedures heard by the Court, eg *In re A* (1993) FLC 92-402 (gender reassignment) and *In the Matter of the Child "Michael"* (Full Family Court, 9 March 1994). To date, the number of cases involving procedures other than sterilisation remains small. Both for this reason, and because it was considered that sterilisation raised issues quite distinct from some of the other procedures (such as the common feature of disability), Council decided that no new legislation was needed to respond to other medical procedures which can (at least for the present) continue to be governed by the broad welfare/best interests jurisdiction of the *Family Law Act*.

62 See eg the response of the then President of the NSW Guardianship Board, Roger West (in his letter to the *Sydney Morning Herald*, 13 July 1993) to a speech by the Chief Justice of the Family Court, Nicholson CJ n 52 .

63 It may be that this could best be achieved by the establishment of a specialist division, or set of judges who are specially trained in dealing with these cases and which could work in close liaison with the guardianship bodies in the states and territories so as to draw on their established experience and expertise.