MENTAL HEALTH LAW CENTRE (WA) Inc.
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Our Ref: SB/MK: NCW#769

12 April 2013

Committee Secretary
Senate Standing Committees on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

**By email:** community.affairs.sen@aph.gov.au

Dear Sir/Madam

**SENATE COMMITTEE INQUIRY INTO THE INVOLUNTARY OR COERCED STERILISATION OF PEOPLE WITH DISABILITIES IN AUSTRALIA**
**MENTAL HEALTH LAW CENTRE WA Inc. SUBMISSION**

The Mental Health Law Centre (WA) Inc. (the Centre) is a state-wide community legal centre specialising in the provision of free legal advice and representation to people affected by mental illness in Western Australia.

The Centre makes this submission pursuant to the Senate Committee's invitation for comment on the important matter of involuntary or coerced sterilisation of people with disabilities in Australia.

**Sterilisation and Mental Health Legislation in Western Australia**

Draft Mental Health Bill 2011

At page 15 of the WA Mental Health Commission's paper Update from Feedback on Draft Mental Health Bill 2011 (the 2011 Bill) the Commission advised that about half of the 1,200 submissions it received on the 2011 Bill related to the issue of greater control regarding the approval of sterilisation for involuntary patients. The Commission advised that in response "all reference to sterilisation has been removed" from the 2011Bill.

Draft Green Mental Health Bill 2012 (the 2012 Bill)

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In her Ministerial Statement on the 2012 Bill of 7 November 2012, the Honourable Helen Morton, Minister for Mental Health & Disability Services in Western Australia advised on the subject of sterilisation "There are appropriate safeguards in other legislation to make inclusion in this Bill unnecessary". Accordingly any reference to sterilisation as a treatment for mental illness was removed from the 2012 Bill. The submission period on the Bill has closed but the outcomes of the submissions have not yet been published.

It is important to examine the effect of the lack of any reference to sterilisation in the 2012 Bill.

Clause 171 of the 2012 Bill provides that involuntary patients and mentally impaired accused patients can be treated without their informed consent.

By clause 4 of the 2012 Bill:

'treatment' means the provision of a psychiatric, medical, psychological, social or other therapeutic intervention intended (whether alone or in combination with one or more other therapeutic interventions) to alleviate or prevent the deterioration of—

(a) mental illness; or

(b) condition that is a consequence of a mental illness,

and does not include bodily restraint or seclusion;

It is evident that sterilisation could come within the definition of "treatment" in the Bill if it was intended to "alleviate or prevent the deterioration of a mental condition or a condition that is a consequence of a medical condition". As there are no controls contemplated in the 2012 Bill on sterilisation, involuntary patients or mentally impaired accused patients could be sterilised without their consent and without any supervision or control, simply as part of treatment for their mental illness. This is clearly an unacceptable almost unfettered power.

The Centre is not aware of what "appropriate safeguards in other legislation" are referred to by the Minister in her statement. Part 5 Division 3 of the *Guardianship and Administration Act 1990* (WA) does place limits on sterilisation, namely the requirement for the consent of State Administrative Tribunal (SAT). However, the Division applies only to adults in respect of whom a guardianship order is in force or an application for guardianship has been made.

Under the 2012 Bill, all involuntary patients – children and adults - do not necessarily fall into that category (although we have submitted to the 2012 Bill that all involuntary patients have guardians appointed for the purpose of obtaining legal representation).

Furthermore, in respect of children, the welfare jurisdiction under the *Family Law Act* does not necessarily fetter State law relating to sterilisation of children. (see N. O'Neill, C. C Peisah referring to the effect of the High Court decision of *P v P [1994] HCA 20*, (1994) 181 CLR 583 in Chaper 15 – Sterilisation [2011]SydUPLawBk17; in Capacity and the Law (2011) @ 15.4 - URL:http://www.austlii.edu.au/au/journals/SydUPLawBk/2011/17.html)

**Comment and Submissions**

Sterilisation

Given the finality of the procedure of sterilisation, and the concern evidenced by the great number of submissions on the 2011 Bill, we have urged and recommended that the matter be re-considered in finalising the 2012 Bill, so that sterilisation and long term contraception are expressly prohibited as a treatment for mental illness.

The Senate may wish to examine the many submissions received by the WA Mental Health Commission on this issue, which are to be found on the MHC website.

Involuntary Enforced Contraception

It is our opinion that if sterilisation is sought as a treatment for any patient of the mental health service – private or public - a guardian should be appointed, legal representation for the patient obtained and approval should first be required from the SAT exercising its jurisdiction under the *Guardianship and Administration Act 1990* (WA), at the minimum.

Similar issues apply to long - term involuntary contraception. This is sometimes included as involuntary "treatment" and is in reality a form of sterilisation. Various grounds may be advanced for it, some of which may have little validity, although they may be under the guise of being psychiatric considerations. If the reason is merely to stop someone having a baby because they cannot look after it or it will be affected by the mother's medication, the grounds are social or medical, and the decision should rest only with SAT, and not the treating psychiatrist or mental health service.

Thus long - term involuntary contraception should also only be authorised by the SAT, and only ordered if there are clear grounds for it on the basis of prescribed statutory criteria.

**Recommendation 72 to the WA Mental Health Commission on the 2012 Bill**

The carrying out of sterilisation must be subject to the approval of SAT sitting in its *Guardian and Administration Act 1990* (WA) jurisdiction.

**Recommendation 73 to the WA Mental Health Commission on the 2012 Bill**

Long - term involuntary contraception should also only be authorised by the SAT, and only ordered if clear grounds are shown.

**SUMMARY AND SUBMISSION**

We urge the Senate to take notice of the issues raised above and ensure that sterilisation and long term enforced involuntary contraception are not in the control or decision making of a mental health service or treating psychiatrist delivering detention and treatment without consent.

If you have any inquiries, please don't hesitate to contact our Ms Sandra Boulter

Yours faithfully
Mental Health Law Centre

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