

REPUBLIC OF SOUTH AFRICA

STERILISATION BILL

*(As amended by the Select Committee on Social Services
(National Council of Provinces))*

(SELECT COMMITTEE ON SOCIAL SERVICES)

[B 78B—98]

REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP STERILISASIE

*(Soos gewysig deur die Gekose Komitee oor Maatskaplike Dienste
(Nasionale Raad van Provinsies))*

(GEKOSE KOMITEE OOR MAATSKAPLIKE DIENSTE)

[W 78B—98]

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BILL

To provide for the right to sterilisation; to determine the circumstances under which sterilisation may be performed and, in particular, the circumstances under which sterilisation may be performed on persons incapable of consenting or incompetent to consent due to mental disability; and to provide for matters connected therewith.

PREAMBLE

RECOGNISING that the Constitution protects the rights to bodily and psychological integrity of persons which includes the right to make decisions concerning reproduction and the right to security in and control over their bodies;

RECOGNISING that both women and men have the right to be informed of and to have access to safe, effective, affordable and acceptable methods of fertility regulation; and

WHEREAS the inability to give consent should not automatically entail the loss of constitutional rights and whereas it is necessary to ensure that mentally disabled persons are able to exercise these rights as far as possible;

THEREFORE, in order to restore, protect and promote the human dignity of persons, in particular those who are incapable of consenting or who are mentally disabled, by ensuring that decisions about sterilisation are made in a manner that is responsible and considerate,

BE IT ENACTED by Parliament of the Republic of South Africa, as follows:—

Definitions

1. In this Act, unless the context indicates otherwise—
 - (i) “consent” means the consent contemplated in section 4; (viii) 5
 - (ii) “medical practitioner” means a person registered as such in terms of the Health Professions Act, 1974 (Act No. 56 of 1974); (i)
 - (iii) “Member of the Executive Council” means a member of the Executive Council responsible for health in a province; (ii)
 - (iv) “Minister” means the Minister of Health; (iv) 10
 - (v) “nurse” means a person registered as such in terms of the Nursing Act, 1978 (Act No. 50 of 1978), and who holds a qualification in psychiatry; (ix)
 - (vi) “prescribed” means prescribed by regulation made under this Act; (x)
 - (vii) “psychiatrist” means a person registered as such in terms of the Health Professions Act, 1974 (Act No. 56 of 1974); (v) 15
 - (viii) “psychologist” means a person registered as such in terms of the Health Professions Act, 1974 (Act No. 56 of 1974); (vi)

- (ix) “social worker” means a person registered as such in terms of the Social Work Act, 1978 (Act No. 110 of 1978); (iii)
- (x) “sterilisation” means a surgical procedure performed for the purpose of making the person on whom it is performed incapable of procreation, but does not include the removal of any gonad. (vii) 5

Persons capable of consenting

- 2. (1) No person is prohibited from having sterilisation performed on him or her if he or she is—
 - (a) capable of consenting; and
 - (b) 18 years or above. 10
- (2) A person capable of consenting may not be sterilised without his or her consent.
- (3) (a) Sterilisation may not be performed on a person who is under the age of 18 years except where failure to do so would jeopardize the person’s life or seriously impair his or her physical health.
- (b) Section 3(1)(a) and (2) will apply with the necessary changes. 15

Person incapable of consenting or incompetent to consent due to severe mental disability

- 3. (1) Sterilisation may be performed on any person who is incapable of consenting or incompetent to consent—
 - (a) upon a request to the person in charge of a hospital and with the consent of a— 20
 - (i) parent;
 - (ii) spouse;
 - (iii) guardian; or
 - (iv) curator;
 - (b) if a panel contemplated in subsection (2) after considering all relevant 25 information, including the fact that—
 - (i) the person is 18 years of age, unless the physical health of the person is threatened; and
 - (ii) there is no other safe and effective method of contraception except 30 sterilisation, concurs that sterilisation may be performed; and
 - (c) if the person is mentally disabled to such an extent that such a person is incapable of—
 - (i) making his or her own decision about contraception or sterilisation;
 - (ii) developing mentally to a sufficient degree to make an informed 35 judgement about contraception or sterilisation; and
 - (iii) fulfilling the parental responsibility associated with giving birth.
- (2) The person in charge of a hospital contemplated in subsection (1) must upon request, as prescribed for sterilisation, convene a panel which will consist of—
 - (a) a psychiatrist, or a medical practitioner if no psychiatrist is available; 40
 - (b) a psychologist or a social worker; and
 - (c) a nurse.
- (3) Where a person to be sterilised is in custodial care, no member of the panel may be an employee of the custodial institution.
- (4) If sterilisation is to be performed in a private health care facility, the members of 45 the panel may not be employees of, or have a financial interest in, that facility.
- (5) The person performing the sterilisation must ensure that the method of sterilisation used holds the least health risk to the person on whom sterilisation is performed.
- (6) Sterilisation may not be performed in terms of subsection (1) unless the person 50 suffers from a severe mental disability.
- (7) For the purposes of this section, “severe mental disability” means a range of functioning extending from partial self-maintenance under close supervision, together with limited self-protection skills in a controlled environment through limited self care

and requiring constant aid and supervision, to severely restrained sensory and motor functioning and requiring nursing care.

Consent

4. For the purposes of this Act, “consent” means consent given freely and voluntarily without any inducement and may only be given if the person giving it has— 5
- (a) been given a clear explanation and adequate description of the—
 - (i) proposed plan of the procedure; and
 - (ii) consequences, risks and the reversible or irreversible nature of the sterilisation procedure;
 - (b) been given advice that the consent may be withdrawn any time before the 10 treatment; and
 - (c) signed the prescribed consent form.

Place where sterilisation may take place

5. (1) Sterilisation contemplated in section 3(1) may be performed only at a facility designated in writing for that purpose by the member of the Executive Council. 15
- (2) The member of the Executive Council may designate any facility in terms of subsection (1) subject to such conditions and requirements as he or she may consider necessary for achieving the objects of this Act.
- (3) The member of the Executive Council may, if the conditions or requirements contemplated in subsection 2 are not complied with, withdraw any designation under this section after giving reasonable notice of the intended withdrawal to the person in charge of the facility in question. 20

Keeping of records

6. The person in charge of a facility referred to in section 5 or a person designated for such purpose must be notified as prescribed of every sterilisation performed in that facility and must keep a record of every such sterilisation. 25

Delegation

7. (1) The member of the Executive Council may in writing, on such conditions as he or she may determine, delegate to the head of a provincial department of health any power conferred upon him or her under this Act. 30
- (2) The member of the Executive Council is not divested of any power delegated by him or her.

Regulations

8. The Minister may, after consultation with the members of the Executive Council, make regulations relating to any matter which he or she may consider necessary or expedient to prescribe for achieving the objects of this Act. 35

Offences and penalties

9. Any person who contravenes or fails to comply with the provisions of this Act is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years. 40

Repeal of laws

10. This Act repeals any law relating to sterilisation which applied prior to the commencement of this Act.

Short title and commencement

11. This Act is called the Sterilisation Act, 1998, and comes into effect on a date fixed 45 by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE STERILISATION BILL, 1998

PART 1

OBJECTS AND EXPLANATION

1.1 In 1996 Parliament passed the Choice on Termination of Pregnancy Act, 1996, (Act No. 92 of 1996), which repealed the provisions of the Abortion and Sterilization Act, 1975, (Act No. 2 of 1975), which dealt with termination of pregnancies. The provisions of the Abortion and Sterilization Act, 1975, which deal with sterilisation are still in force. These provisions have been reviewed.

1.2 A new Bill is now introduced. The title of the Act will now change to Sterilisation Act.

1.3 The Sterilisation Bill, 1998, deals mainly with the circumstances under which sterilisation, and in particular sterilisation of persons incapable of consenting or incompetent to consent due to mental disability, may be performed.

PART 2

CLAUSE BY CLAUSE ANALYSIS

Clause 1

2.1 Deals with the definitions.

Clause 2

2.2 Provides for sterilisation of persons who are capable of consenting only with their consent and if they are above the age of 18.

Clause 3

2.3 Determines among others—

- (a) the facts on which a panel consisting of a psychiatrist or a medical practitioner if no psychiatrist is available, a psychologist or social worker and a nurse must concur for the purpose of sterilising a person who is incapable of consenting or incompetent to consent;
- (b) that, where a person to be sterilised is in custodial care, no panel member is an employee of the custodial facility;
- (c) that, if sterilisation is to be performed in a private health care facility, the members of the panel may not be employees of, or have financial interest in, that facility;
- (d) that the sterilisation of a person, who is incapable of consenting or incompetent to consent, will not be performed unless a request has been made to the person in charge of a hospital by a—
 - (i) parent;
 - (ii) spouse;
 - (iii) guardian; or
 - (iv) curator.

Clause 4

2.4 Determines what “consent” for the purposes of the Bill means.

Clause 5

2.5 Provides for the designation of facilities by the member of the Executive Council of the province in question at which sterilisation may be performed.

Clause 6

2.6 Provides for the keeping of a record of sterilisations.

Clause 7

2.7 Provides for the delegation by the member of the Executive Council of any power conferred upon him or her under the Bill to the head of a provincial department of health.

Clause 8

2.8 Provides for the Minister to make regulations relating to any matter which he or she may consider necessary or expedient to prescribe for achieving the objects of the Bill.

Clause 9

2.9 Determines the penalties to be imposed on a person who is found guilty of an offence in terms of the Bill.

Clause 10

2.10 Provides for the repeal of legislation relating to sterilization which was applicable prior to the commencement of the Constitution.

Clause 11

2.11 Determines the short title and the date of commencement.

PART 3

OTHER BODIES CONSULTED

The Department consulted the following bodies:

- * Department of Justice
- * South African and International Down's Syndrome Association.

PART 4

IMPLICATIONS FOR PROVINCES

The provincial members of the Executive Council responsible for health are required to designate facilities where sterilisation may be performed. They may also delegate this power to the heads of provincial departments of health.

PART 5

PARLIAMENTARY PROCEDURE

In the opinion of the Department of Health and the State Law Advisers this Bill should be dealt with in terms of section 76 of the Constitution.