ICLC INNER CITY LEGAL CENTRE

Transgender children and medical treatment: the law

Background

This factsheet sets out the law about when and how transgender children under the age of 18 can access hormonal and medical treatment to help them to transition to their affirmed gender. This is general information and should not be taken as a substitute for legal advice that is tailored to your particular circumstances. If you are in NSW, please call the Inner City Legal Centre (ICLC) on 02 9332 1966 for assistance.

In general, the law places some restrictions on when and how transgender children (i.e., young people under the age of 18) can access medical treatment to help them to transition to their affirmed gender. In some cases, court involvement is required.

Legal and medical language is explained at the end of this factsheet under **Terminology.**

Medical treatment

Medical treatment for transgender young people (other than counselling) falls into three stages:

- Stage 1 – *fully reversible interventions*. These involve the use of injectable blockers to delay the onset or progression of puberty by suppressing production of oestrogen or testosterone or can include the use of spironolactone to suppress androgens.
- Stage 2 – *partially reversible interventions*, i.e., cross-sex hormone treatment to feminise or masculinise the body, through the administration of *oestrogen* or *testosterone*.
- Stage 3 – *irreversible interventions*, i.e., surgical interventions. This includes 'top surgery' (bilateral mastectomy and male chest reconstruction). World clinical guidelines do not recommend genital surgery for someone who has not reached the age of majority in their home country and lived in their desired gender role for at least 12 months.

Not every child goes through all stages, and some young people may do stage 3 before stage 2.

The law and medical treatment

Under Australian law, parents can generally give consent to medical treatment for their children. It is also not uncommon for children to provide their own consent to medical and dental procedures as they get closer to the age of 18.

Special medical procedures

However, there are some forms of medical treatment that are outside this general principle and are "special medical procedures". (They are "special" in the sense of being unusual).

For these special medical procedures, neither parent nor child can give legally valid consent to a special medical procedure without court involvement. The authoritative case law on 'special medical procedures' applies across Australia because it was created by the highest court of Australia, the High Court of Australia.[1]

Many of the more recent court decisions about transgender young people and medical treatment have been made in federal courts, in either the Family Court of Australia (Family Court) or in its court of appeal, the Full Court of

[1] *Department of Health and Community Services v JWB and SMB (Marion's case)* [1992] HCA 15.

the Family Court. The Full Court of the Family Court is the next step up from the Family Court of Australia.

These courts have held that court involvement is required for special medical procedures because:

- There is significant risk of making a wrong decision; and
- The consequences of a wrong decision are particularly serious; and
- Treatment is invasive, permanent and irreversible, and not for the purposes of curing a (physical) malfunction or disease.

Under section 67ZC of the *Family Law Act 1975* (Cth), the Family Court has the power to make orders relating to the welfare of children (defined as a person under the age of 18). Family Court applications regarding special medical procedures are filed under this section.

Until 2013, Australian law said that all three stages of treatment for transgender young people were "special medical procedures". This meant that an application to the Family Court was mandatory before treatment could legally start, regardless of if the parents and medical team were in support of the young person transitioning.

Since 2013, this has gradually changed. Under Australian law, stage 1 and stage 2 treatments are no longer special medical procedures. This is because the Full Court of the Family Court has made decisions that have changed this law. The law about stage 3 treatment is less clear, as there has not been a decision by the Full Court or by the High Court that clearly changes the law so that stage 3 is unquestionably not something that requires you to go to court anymore.

We now explain the law about competency, and current Australian law for each stage of treatment.

Competency

Competency, in this context, describes someone's ability to consent to medical treatment. The test for medical competency for young people under the age of 18 in Australian law is *Gillick* competence.

This test takes its name from and English case, *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.[2]

A *Gillick* competent child is one who has achieved "a sufficient understanding and intelligence to enable him or her to understand fully what is proposed".

In practice, whether a child is *Gillick* competent will depend on whether they are able to demonstrate that they understand the content of the proposed treatment, its side-effects, its negative risks, and the physical changes that it will cause.

Blockers (stage 1 treatment)

If there is no disagreement or "controversy" among the child's parents and the members of the treating medical team that the child should start on blockers, there is no requirement for court involvement. Treatment can commence when the child's treating medical team considers it appropriate.

If there is disagreement, there must be an application to the Family Court asking the court to decide about whether the treatment should be authorised on the basis that it is in the best interests of the child.[3]

The application should be supported by:

- Affidavit evidence from the parent or parents filing the application (about the young person, their transition, and their understanding of the treatment); and
- Expert evidence from the child's treating psychiatrist regarding the diagnosis of dysphoria and whether the child is *Gillick* competent; and
- Expert evidence from the child's treating

[2] Although that case relates to treatment of children under the age of 16, *Gillick* applies in Australian law in relation to children under the age of 18.

[3] *Re Jamie* [2013] FamCAFC 110.

endocrinologist about the content of the proposed treatment and whether the child is *Gillick* competent.

Oestrogen or testosterone (stage 2 treatment)

If there is no disagreement or "controversy" among the child's parents and the members of the treating medical team that the child should start on oestrogen or testosterone, there is no longer any requirement for court involvement.[4] Treatment can commence when the child's treating medical team consider it appropriate.

In the latest case of *Re Imogen*,[5] the family Court clarified that when there is such disagreement or "controversy" between the child, the child's parents or guardians, and the members of the treating medical team, an application to the Family Court to authorise treatment becomes mandatory.

This disagreement or "controversy" is usually about:

- (1) the child's *Gillick* competence, or
- (2) the diagnosis of Gender Dysphoria, or
- (3) the proposed treatment for Gender Dysphoria.

If the only dispute is about the child's *Gillick* competence, then, as discussed above, the Court will determine that matter only. If the Court declares that it is satisfied that the child is competent to make a transition treatment decision, then the child is left to determine their treatment without further Court authorisation.

However, if the dispute is regarding the diagnosis of, or treatment for, Gender Dysphoria, and the Court is called upon to approve the treatment, then the Court must determine these matters, with the best interests of the child as the paramount consideration.

Surgery (stage 3 treatment)

The law in this area is less clear. In the 2018 decision of *Re Matthew*,[6] which is the most recent current case, Justice Rees of the Family Court looked at a Full Court decision (*Re Kelvin*) that discussed the therapeutic nature of medical treatment for transgender young people in transition.

Her Honour concluded that:

> … where appropriately qualified medical and health professionals are satisfied that a subject child is *Gillick* competent, and the treatment which is proposed is therapeutic, and there is no controversy, there is no necessity for this Court to determine whether the subject child is *Gillick* competent before Stage 3 treatment for Gender Dysphoria can proceed.

This decision was affirmed in 2019 in Re Ryan[7] where the child's parents disagreed on stage 3 treatment. But the way that our court system works means that other Family Court judges do not have to make the same decision as the judge did in *Re Matthew*, as it was just a decision of a single judge. Another Family Court judge could conclude that a court application was required, applying the principles from other cases about when something is a special medical procedure, or court supervision is required.

This uncertainty can only be stopped by a decision of the Full Court of the Family Court, or a decision of the High Court (or by legislation). *Re Matthew* means that it is possible that a surgeon may agree to do stage 3 surgery without a court application – but they don't have to.

However, a medical practitioner must establish positive parental consent before commencing any stage of treatment for medical transition. Moreover, in the case of *Re Imogen*, another decision of a single judge, the judge made clear that where there is controversy or disagreement between any of the child, the child's parents or guardians, or the treating medical team, an application to the Family

[4] *Re Kelvin* [2017] FamCAFC 258.
[5] *Re Imogen (No. 6)* [2020] FamCA 761.
[6] [2018] FamCA 161.
[7] [2019] FamCA 112.

Court for authorisation is required.

In *Re Imogen*, the Court, in the context of a Stage 2 treatment dispute, declined to grant parental responsibility for decisions regarding the child's "future medical treatment" (probably including Stage 3 treatment), so that any controversy must be resolved by the Court.

Other formal requirements

The Family Law Rules (the court rules for the Family Court) require court applications about medical treatments to be served on any parent who is not an applicant, and on the "prescribed child welfare authority". The prescribed child welfare authority in New South Wales is the Department of Family and Community Services.

My child's other parent is not in their life. Do I have to tell them about the treatment before it can start?

Depending on whether there are parenting orders in place, you may not always have to notify the other parent about the proposed treatment. As the law in this area can be complex, we encourage you to contact the **ICLC** on **02 9332 1966** for advice and assistance.

I'm a young person who wants treatment. What if I don't have parental support?

If you are a young person under 18 and you want to have treatment (and your parents are not part of your life or are not supportive), then the law about your situation is different. As the law is too complex to set out clearly here, we encourage you to contact the **ICLC** on **02 9332 1966** for advice and assistance.

New South Wales legislation and medical treatment for transgender children

Under New South Wales (NSW) legislation (section 175 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW)), special medical treatment for children under the age of 16 is also subject to certain restrictions. A medical practitioner who does not follow this law may be charged with a criminal offence.

"Special medical treatment" under NSW legislation is defined as:

- Any medical treatment that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out, not being medical treatment:
    - That is intended to remediate a life-threatening condition; and
    - From which permanent infertility, or the likelihood of permanent infertility, is an unwanted consequence.

Stage 2 treatment would be likely to be considered "special medical treatment" for the purposes of section 175 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) as it is treatment that is reasonably likely to render a person permanently infertile. Special medical treatment cannot be carried out on a person under the age of 16 unless the requirements of section 175 are satisfied.

However, under the NSW legislation, a medical practitioner may carry out special medical treatment if they are "of the opinion that it is necessary, as a matter of urgency, to carry out the treatment on the child in order to save the child's life, or to prevent serious damage to the child's health" (subsection 175(2)(a)). It is arguable that early cross-sex hormone treatment (oestrogen or testosterone) for a transgender child under the age of 16 may be necessary for the prevention of serious damage to their mental health, and therefore it is arguable it will be acceptable under the NSW legislation.

Terminology

Affidavit: a written statement setting out the evidence of a person, that is, information that tends to prove a fact is true or not true.

Blockers: colloquial term for *Stage 1 treatment*.

Cisgender: a person whose *gender identity* corresponds to the *sex* assigned to them at birth.

Endocrinologist: a medical specialist in the treatment of the endocrine system.

Endocrine system: the collection of glands that produce hormones that regulate metabolism, growth and development, tissue function, sexual function, reproduction, sleep, and mood, among other things.

Expert report or expert evidence: written material supplied by an expert in the relevant area, in response to a formal request by a lawyer for the report. The report is verified or endorsed by an *affidavit* signed by the medical practitioner that wrote the report.

Gender dysphoria: the distress or unease sometimes experienced from being misgendered and/or when someone's gender identity and body personally don't feel connected or congruent. Gender dysphoria does not mean being trans or gender diverse. Many trans and gender diverse people do not experience gender dysphoria and if they do, it may cease with access to gender affirming healthcare (if medial transition is desired). The trans and gender diverse experience is not a mental illness.

Gender identity: A person's intrinsic sense of being male (a boy or a man), female (a girl or woman), or an alternative gender (e.g., brotherboy, sistergirl, genderqueer, masculine or feminine spectrum).

Gender expression: characteristics in personality, appearance, and behaviour that, in a given culture and historical period, are designated as masculine or feminine (i.e., more typical of the male or female social role).

Intersex: people with innate *sex characteristics* that do not fit medical and social norms for female or male bodies, and that create risks or experiences of stigma, discrimination, and harm.

Oestrogen: the female sex hormone, responsible for the development and maintenance of female characteristics of the body.

Plastic surgeon: a medical doctor who has done extra training in surgery with the purpose of altering or restoring the shape of the body.

Psychologist: a professional with a qualification in psychology who can provide counselling and other support but is not medically qualified.

Psychiatrist: a medical doctor who has done extra training to become a specialist in mental health.

Service: the formal process of providing a document to another person or organisation, while following the relevant legal rules.

Sex: sex is assigned at birth as male or female, usually based on the appearance of the external genitalia. When the external genitalia are ambiguous, other components of sex (internal genitalia, chromosomal and hormonal sex) are considered to assign sex.

Sex characteristics: physical features relating to sex, including chromosomes, genitals, gonads, hormones, and other reproductive anatomy, and secondary features that emerge from puberty.

Stage 1 treatment: treatment to delay the onset of puberty, administered by way of injection. Also known as *blockers*. Oral contraceptives to suppress menstruation may also form part of stage 1 treatment. All Stage 1 treatment is fully reversible.

Stage 2 treatment: cross-sex hormone treatment to feminise or masculinise the body, through the administration of *oestrogen* or *testosterone*. Stage 2 treatment may be partially reversible.

Stage 3 treatment: surgical procedures, such as *top surgery*. Stage 3 treatment is irreversible.

Testosterone: the male sex hormone, responsible for the development and maintenance of male characteristics of the body.

Top surgery: Colloquial term for bilateral mastectomy and male chest reconstruction, a

form of *Stage 3 treatment*.

Transgender: a person who has a gender identity that differs form the sex assigned to them at birth. A person's identification as transgender is not necessarily connected to any change in sexual orientation or preference.

Further references

Inner City Legal Centre – please see our factsheet on changing sex on ID documents at iclc.org.au/factsheets.

Intersex Human Rights Australia (www.ihra.org.au). IHRA is the national body by and for people with intersex variations.

Telfer, M.M., Tollit, M.A., Pace, C.C., & Pang, K.C. *Australian Standards of Care and Treatment Guidelines for Trans and Gender Diverse Children and Adolescents*. Melbourne: The Royal Children's Hospital; 2017.

NSW Department of Education policy about transgender students in government schools is set out in *Legal Issues Bulletin 55*. Some independent schools have voluntarily chosen to follow this policy.

World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender and Gender Nonconforming People* (Version 7). Available at www.wpath.org.

This information is current to 1 September 2021 and reflects the law in New South Wales. It is general information and is no substitute for legal advice tailored to your particular circumstances. For assistance, contact the ICLC on 9332 1966.