LEGAL ISSUES FOR TRANSGENDER CHILDREN

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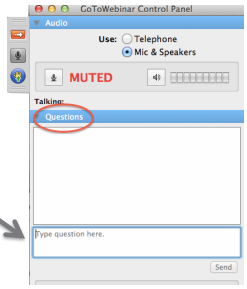
WELCOME

Use your control panel to ask questions by typing in the question box.

Participate & enjoy!



DISCLAIMER

All care has been taken in the presentation of information in this workshop.

This workshop is not intended to take the place of legal advice given by a qualified legal practitioner.

No responsibility is taken for any loss suffered as a result of the information given at this workshop.

LEGAL ISSUES FOR TRANSGENDER CHILDREN

- Definitions
- Stages of medical treatment
- Australian law
- Unanswered questions
- Change of name
- Change of sex on ID documents
- Kids in school
- Further reading

DEFINITIONS – LANGUAGE IS IMPORTANT

DEFINITIONS

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 in order to assign sex.

DEFINITIONS

Gender

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

DEFINITIONS

Gender expression

Characteristics in personality, appearance, and behavior that in a given culture and historical period are designated as masculine or feminine (that is, more typical of the male or female social role)

DEFINITIONS

Transgender

Adjective to describe a diverse group of individuals who cross or transcend culturally- defined categories of gender. The gender identity of transgender people differs to varying degrees from the sex they were assigned at birth.

A person's identification as transgender is not necessarily connected to any change in sexual orientation or preference.

DEFINITIONS

Cisgender

A person whose gender identity corresponds with their sex assigned at birth

DEFINITIONS

Gender dysphoria

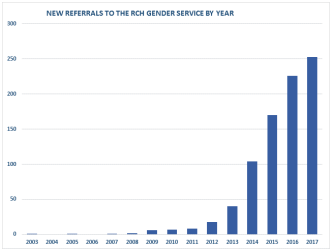
Distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics).

Not every transgender person has gender dysphoria.

Gender dysphoria appears in the DSM-V. 'Gender identity disorder' is an older term which appears in some older cases, and was in the DSM-IV.

Gender dysphoria causes clinically significant distress or impairment in social, occupational, or other important areas of life for a period of at least six months.

EXPONENTIAL RISE IN NEW CASES



Graphic courtesy Royal Children's Hospital

STAGES OF MEDICAL TREATMENT

Physical interventions for transgender young people fall 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*, ie cross-sex hormone treatment to masculinise or feminise the body, through the administration of *oestrogen* or *testosterone*.
- Stage 3 – *irreversible interventions*, ie 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.

(Taken from the *WPATH Standards of Care)*

SPECIAL MEDICAL PROCEDURES

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.

However, there are some forms of medical treatment which are outside these general principles. They are known as *special medical procedures* – special in the sense of being unusual.

Neither parent nor child can give legally valid consent to a special medical procedure in the absence of court involvement.

WHY?

Court involvement is required for special medical procedures because:

- There is significant risk of making a wrong decision, either as to the present or future capacity of a child to consent or the best interests of a child who cannot consent;
- 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.

Applications regarding special medical procedures are dealt with by the Family Court in the welfare jurisdiction conferred by s 67ZC of the *Family Law Act 1975*

MARION'S CASE

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

Much of the discussion in this High Court decision affected later Family Court and Full Court decisions.

This was also the point at which the *Gillick* test of competency was adopted into Australian law.

GILLICK COMPETENCY

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"

Gillick v West Norfolk and Wisbech Area Health Authority [1985] UKHL 7; [1986] AC 112 at 189 per Lord Scarman

AUSTRALIAN LAW BEFORE JULY 2013

Before the decision of the Full Family Court in *Re Jamie* [2013] FamCAFC 110, all stages of treatment for medical transition for young people were considered special medical procedures and required an application to the Family Court.

There were a handful of cases, relating to both cross-sex hormones and top surgery.

A key decision is the 2004 decision *Re Alex*, in which the Family Court was asked to provide authorisation for stage 1 and stage 2. Nicholson J concluded that the current state of knowledge did not allow the court to conclude that the treatment was therapeutic.

AUSTRALIAN LAW AFTER RE JAMIE

In this July 2013 decision, the Full Court determined:

- **Due to its reversible nature, stage 1 treatment no longer required a court application in the absence of dispute;**
- **Stage 2 treatment (due to the fact that the court considered itself bound by *Re Marion*) still required court oversight in all cases:**
  - If there was controversy or the child was not *Gillick* competent, the court would authorise the treatment if it was in the best interests of the child;
  - However, in the absence of controversy the court could find the child competent to provide their own consent if evidence demonstrated they were competent to the *Gillick* standard.

TOP SURGERY

In February 2015 Rees J concluded in *Re Leo* [2015] FamCA 50 that the reasoning of the Full Court in *Re Jamie* regarding stage 2 treatment was applicable to top surgery (a stage 3 treatment).

RE KELVIN

On 16 February 2017, Watts J referred six questions of law to the Full Family Court for determination as a case stated under s 94A(1) of the Family Law Act: *Re Kelvin* [2017] FamCA 78.

The primary two questions ultimately put to the Full Court were:

1. **Does the Full Court confirm its decision in *Re Jamie* that stage 2 treatment requires court authorisation unless the child is *Gillick* competent?**
2. **Is it mandatory to apply for the court to determine competence where:**
   - Stage 2 treatment is proposed;
   - The child consents to the treatment;
   - Treating medical practitioners agree the child is Gillick competent; and
   - The parents of the child do not object?

RE KELVIN

The remaining four questions were technical in nature and related to the determination of applications if stage 2 treatment remained before the court.

RE KELVIN [2017] FAMCAFC 258

By the time the matter was heard on 21 September 2017, there were seven parties:

- The applicant father;
- The independent children's lawyer;
- Department of Family and Community Services;
- Commonwealth Attorney-General;
- Royal Children's Hospital;
- A Gender Agenda; and the
- Australian Human Rights Commission.

RE KELVIN

"It is readily apparent that the judicial understanding of gender dysphoria and its treatment have fallen behind the advances in medical science...

[Stage 2] treatment can no longer be considered a medical procedure for which consent lies outside the bounds of parental authority and requires the imprimatur of the Court "

Per Thackray, Strickland and Murphy JJ , Ainslie-Wallace and Ryan JJ agreeing

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RE MATTHEW [2018] FAMCA 161

First top surgery case decided after *Re Kelvin*

Considered the extensive discussion in the Full Court decision about the court's role where treatment is therapeutic.

Concluded at paragraph 46

It therefore follows 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

UNANSWERED QUESTIONS

- What happens when the child is under the care of a state government department?
- What happens when someone other than a parent has parental responsibility?
- What happens when the child is not in care, but not in the care of their parents either?
- Will other Family Court judges follow the approach taken in *Re Matthew?*

CHANGE OF NAME

The laws about changing a young person's name vary from state to state and depend on the state in which the young person was born.

For a child born in NSW or overseas, the consent of both parents is required unless:

- Only one parent is named on the birth certificate;
- The other parent is dead;
- Parental responsibility has been allocated to someone else;
- Court approval has been given.

Applications are made to the NSW Registry of Births, Deaths and Marriages.

It is possible to obtain a court order regarding a change of name as an ancillary order in Family Court proceedings. Applications are otherwise made to the District Court.

CHANGE OF SEX ON ID DOCUMENTS

- Passport
- Birth certificate
- Driver's licence

CHANGE OF SEX – PASSPORT

Australian passports may be issued marked M, F, or X (indeterminate/unspecified/intersex)

To change the sex marker on an Australian passport, you must supply *either*:

- A birth certificate showing the correct (altered) sex; *or*
- A letter from a medical practitioner saying that the young person has undergone, or is undergoing 'appropriate clinical treatment' for transition.

CHANGE OF SEX – BIRTH CERTIFICATE - NSW

Similarly to change of name, the laws about changing the sex marker recorded on a birth certificate vary from state to state.

In NSW, for the record of your sex to be changed you must:

- Be unmarried
- Have undergone a 'sex affirmation procedure'

A 'sex affirmation procedure' is a 'surgical procedure involving the alteration of a person's reproductive organs' – in this case for the purposes of medical transition.

The procedure and the person's identity must be verified by statutory declarations from two medical practitioners.

REQUIREMENTS FOR CHANGE OF SEX ON BIRTH CERTIFICATE BY STATE/TERRITORY

(Updated version of table in the AHRC report *Resilient Individuals)*

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Requires surgical procedure	✖	✓	✓	✓	✖	✓	✓	✖
Requires divorce from existing marriage	✖	✓	✓	✖	✓	✓	✓	✓

CHANGE OF SEX – RMS DOCUMENTS NSW

In addition to the usual requirements, you must *also* supply:

- A birth certificate showing your correct (changed) sex;
- A passport or other travel document showing your changed sex; or
- A medical certificate from an Australian registered medical practitioner confirming the correct sex.

KIDS IN SCHOOLS

NSW Department of Education policy about transgender students in government schools is set out in *Legal Issues Bulletin No 55* (copy supplied)

Some non-government schools have independently implemented the policies in Bulletin 55.

Generally, transgender students in government schools are also protected by the *Bullying: Preventing and Responding to Student Bullying in Schools* policy and the *Student Welfare* Policy.

School students are also covered by the protections against gender identity discrimination included in state and federal legislation.

FURTHER READING

American Psychiatric Association, *Diagnostic and statistical manual of mental disorders* (5th ed)

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

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 document identifies stages of treatment and common risks and side-effects.

ANY QUESTIONS?