

## SUMMARY OF THE LAW: TRANSGENDER ADOLESCENTS SEEKING STAGE 2 TREATMENT

### What is the current state of the law?

It is usually within the bounds of parental responsibility to consent to children's medical treatment. However, there are certain procedures, referred to as "**special medical procedures**", which fall outside parental responsibility and require Family Court authorisation. Special medical procedures are typically non-therapeutic procedures that provide no direct benefit to the child. Examples include the sterilisation of an intellectually disabled child or requiring a healthy child to donate an organ to a sick relative. In such cases, parents must get the approval of the Family Court. The Court will authorise treatment only if it is in the child's best interests.

The Full Court of the Family Court confirmed in 2013 (*Re Jamie*) that **Stage 2 treatment (the administration of hormones) for gender dysphoria is a "special medical procedure" and therefore requires Family Court approval**. Approval is required even if the parents, the child, and the treating medical professionals all agree that treatment is in the child's best interests.

It is possible that a transgender adolescent can consent to Stage 2 treatment, however only the Court can make that determination. **It is therefore necessary that every child who wants Stage 2 treatment appear before the Family Court**. Australia is the only jurisdiction in the world to impose this condition. Every Stage 2 case to have come before the Family Court has resulted in an order approving treatment.

There has been substantial academic<sup>1</sup> and judicial criticism<sup>2</sup> of the legal correctness of the decision in *Re Jamie*. It is argued that because Stage 2 treatment is therapeutic it is *not* a special medical procedure and thus should not be subject to court oversight.

### What is the impact of the existing law?

**Research indicates that the Family Court process is harmful to transgender children and their families.** A recent qualitative study of families who had completed, or who were preparing for, the Family Court process found that the process causes: (i) significant psychological harm to transgender adolescents and their parents; (ii) dangerous delays in the child's medical treatment; and (iii) presents significant cost barriers for the families.<sup>3</sup> Research has concluded that the harm caused by the process far outweighs any risks associated with permitting parents to consent to treatment.

### What law reform would solve the problem?

Simple legislative reform can remove Stage 2 treatment decision-making from the Family Court. Reform can be achieved by amending Division 4.2.3 of the *Family Law Rules* 2004 (Cth) which provides the framework for medical procedure applications. A new provision could be introduced stating that stage two treatment for gender dysphoria is not a medical procedure for which Family Court approval is required. As special medical procedures are not referenced in the *Family Law Act* itself no additional amendments are needed.

### What would happen after reform?

Removing the Court approval requirement does not mean that Stage 2 treatment will be unregulated. The Court process will be replaced with stringent medical oversight. Australian doctors are required to follow internationally recognised treatment protocols for treating transgender adolescents. Treatment will only proceed if the medical evidence supports it. This approach will bring Australia in line with other jurisdictions.

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<sup>1</sup> Felicity Bell, "Children with Gender Dysphoria and the Jurisdiction of the Family Court" (2015) 38 *University of NSW Law Journal* 426; Fiona Kelly, "Australian Children living with Gender Dysphoria: Does the Family Court have a role to play?" (2014) 22(1) *Journal of Law and Medicine* 105-120; Lisa Young, "Gender Identity Dysphoria Update and Developments in Property Settlement Law" (2014) *International Survey of Family Law* 1.

<sup>2</sup> *Re Lucas* [2016] FamCA 1129; *Re Harley* [2016] FamCA 334; *Re: Martin* [2015] FamCA 1189.

<sup>3</sup> Fiona Kelly, "'The Court Process is Slow but Biology is Fast': Assessing the impact of the Family Court approval process on transgender children and their families" (2016) 30(2) *Australian Journal of Family Law* 112.