

**DTP Child Rights Webinar: Transgender and Gender Diverse Children
and Young People – Australia’s Human Rights Obligations**



The Family Court of Australia’s involvement in medical treatment for children and young people with gender dysphoria: A children’s rights analysis

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Key questions

1. What is gender dysphoria?
2. Which CRC rights are at stake?
3. Why did the Family Court get involved in gender dysphoria treatment?
4. Was the Full Court's decision in *Re Kelvin* (2017) a victory for transgender children's rights?
5. Can the Family Court still get involved in gender dysphoria treatment?
6. What can - and should - be done to better protect the rights of children with gender dysphoria who seek medical treatment?

What is gender dysphoria?

- Experience of a ‘marked incongruence’ between expressed/experienced gender and birth sex, that persists for at least six months and causes ‘clinically significant distress or impairment in social, school or other important areas of functioning’.
- Diagnosis is governed by the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (‘DSM-5’).
- Treatment occurs in two stages:
 - Stage 1: puberty-suppressant hormones (‘blockers’).
 - Stage 2: gender affirming hormones (testosterone or oestrogen to facilitate transition to the opposite sex).
- Not all individuals who identify as transgender will exhibit gender dysphoria.

Which CRC rights are at stake?

- **Art 2 – right to non-discrimination**
- **Art 3 – child’s best interests**
- **Art 5 – evolving capacities; appropriate direction and guidance from parents**
- **Art 8 – right to identity**
- **Art 12 – right to express views and be heard**
- **Art 13 – right to freedom of expression**
- **Art 24 – right to highest attainable standard of health and healthcare**

Some background to the case law

- ***The ‘welfare’ jurisdiction:*** the Family Court can make orders relating to the welfare of children, having regard to the best interests of the child as the paramount consideration (*Family Law Act 1975 (Cth)*, s 67ZC)
- ***Parental responsibility*** ‘...means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.’ (*Family Law Act 1975 (Cth)*, s 61B)
- **‘Special medical procedures’** fall beyond the scope of parental responsibility - they need to be authorised by the Family Court under its welfare jurisdiction.

Why did the Family Court get involved?

- ***Secretary, Department of Health & Community Services v JWB & SMB (1992) 175 CLR 218 ('Marion's case')***: High Court of Australia established the categories of 'special medical procedure' that are presumptively beyond the scope of parental responsibility and for which parents must seek court authorisation.
 - 'invasive', 'irreversible' and 'non-therapeutic' (i.e. not 'appropriately carried out to treat some malfunction or disease');
 - 'significant risk of making the wrong decision' and 'particularly grave' consequences of a wrong decision being made.

Why did the Family Court get involved?

- ***Re Alex: Hormonal Treatment for Gender Dysphoria (2004) 180 FLR 89:*** Family Court of Australia extended the scope of ‘special medical procedures’ to medical treatment for gender dysphoria in children.

The ‘protective’ and ‘paternalistic’ welfare jurisdiction, ‘in modern thinking about children and young people ... must be understood with regard to their rights’. (*Re Alex* (2004) 180 FLR 89, 116 [154] (Nicholson CJ))

Why did the Family Court get involved?

Re Jamie (2013) 278 FLR 155

The Full Court of the Family Court held that:

- stage two treatment for gender dysphoria requires court authorisation, unless the child is *Gillick* competent to give informed consent; and
- the nature of stage two treatment requires the Family Court to determine the question of *Gillick* competence.

It would be contrary to the Convention on the Rights of the Child, and to the autonomous decision-making to which a Gillick competent child is entitled, to hold that there is a particular class of treatment, namely stage two treatment for childhood gender identity disorder, that disentitles autonomous decision-making by the child, whereas no other medical procedure does. (*Re Jamie* (2013) 278 FLR 155, [134] (Bryant CJ))

Why did the Family Court get involved?

Re Kelvin (2017) 351 ALR 329. The Full Court of the Family Court departed from its earlier decision in *Re Jamie*. It held that stage two treatment for gender dysphoria can no longer be considered a ‘special medical procedure’.

- **Majority (Thackray, Strickland and Murphy JJ):** the state of medical knowledge had evolved and ‘the judicial understanding of gender dysphoria and its treatment have fallen behind the advances in medical science’.
- **Minority (Ainslie-Wallace & Ryan JJ):** *Re Jamie* was ‘plainly wrong’ in its application of *Marion’s Case*.

Was *Re Kelvin* a victory for transgender children's rights?

- **On a superficial reading ... yes – BUT, on a children's rights analysis: No!**
 - **'Invisible' rights approach – not a single reference to children's rights in the judgment.**
 - **Central narrative – how far should the state should intrude upon parental decision-making to keep up with advances in medical science?**
 - **Scope for ongoing court involvement where there is 'genuine dispute or controversy'.**

Can the Family Court still get involved in gender dysphoria treatment?

- **The Full Court's caveat in *Re Kelvin*:**

we are not saying anything about the need for court authorisation where the child in question is under the care of a State Government Department. Nor, are we saying anything about the need for court authorisation where there is a genuine dispute or controversy as to whether the treatment should be administered; eg, if the parents, or the medical professionals are unable to agree. There is no doubt that the Court has the jurisdiction and the power to address issues such as those. (*Re Kelvin* (2017) 351 ALR 329, [167])

- **How this has played out recently: *Re Imogen [No 6]* (2020) 61 Fam LR 344**

What can – and should – be done to protect the rights of children with gender dysphoria?

- **What has the legislature done to date? Nothing ...**
- **Scope for an alternative regulatory framework to resolve disputes, where they arise.**
- **There is no role for the Family Court in the medical treatment process for gender dysphoria.**

Thank you

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Forthcoming book: [Decisional Privacy and the Rights of the Child](#) (Routledge, 2022)