

# Fact sheet

## Access to medical treatment for transgender young people: Reform to the *Family Law Act 1975* (Cth)

### What is the problem?

Currently transgender young people can only access cross sex hormones (Stage 2 treatment) for 'gender dysphoria' if they have approval from the Family Court.

- We understand that Australia is the only **jurisdiction in the world** that requires transgender young people to go to court for this type of medical treatment.
- The court process **delays access to vital medical treatment** for transgender young people to affirm their identity and causes **significant stress, uncertainty and financial strain** for trans young people and their families.
- The delay and stress of court exacerbates symptoms of gender dysphoria, causing **serious negative mental health outcomes** for transgender teenagers.
- The court process **takes time away from doctors** treating other patients because they must prepare evidence for legal proceedings.
- Every application for stage 2 treatment considered by the Family Court has been approved, demonstrating that this process is **unnecessary**.
- Courts are being asked to deal with increasing numbers of cases causing **court delays and diverting court resources**.
- The current law places a **burden on lawyers** who attempt to provide free legal representation for families rather than charge around \$30,000 in legal fees for an application.

*It's so distressing, it's expensive and it's unnecessary. It's actually harming those children it is supposed to protect* (17 year old trans advocate Georgie Stone)

*The requirement for court approval has been identified by Victorian medical experts as the most significant contributor to mortality rates amongst transgender young people* (Dr Michelle Telfer, Royal Children's Hospital)

*As if the general turmoil and challenges which being a teenager in our modern world generates are not enough, the additional burden of requiring an already vulnerable and highly marginalised group to individually litigate to vindicate their identity seems inhumane.*

*No other group of adolescents is required to do so. Having already traversed a far more difficult path than many of their peers, it can only serve to further increase their burden...*

*The sooner that children such as Lucas and their families do not have to endure the ordeal of litigation in order to get on with their lives, the better* (Family Court Judge Peter Tree)

### What needs to change?

Law reform is urgently needed and requires only a simple change to the *Family Law Act 1975* (Cth) (**FLA**).

The FLA should be amended to confirm that stage 2 treatment for gender dysphoria does not require court authorisation. However, in exceptional cases where there is disagreement about the treatment or the young person is not Gillick competent, court approval may be appropriate.<sup>i</sup>

As a separate but related matter, we also recommend law reform to ensure adequate oversight of medical interventions on infants, children and young people with intersex variations or differences of sex development. For example, amending the FLA to confirm that court authorisation is required for any non-therapeutic treatment on intersex children that has invasive, permanent and irreversible consequences.

## What does transgender mean?

The term transgender describes people whose gender identity or expression is different from that which was assigned at birth, or that which is expected of them by society. For example, a person who was born as male but lives their life as a woman may identify as a transgender woman.

## What is gender dysphoria?

Gender dysphoria is the distress a person experiences as a result of the sex and gender they were assigned at birth.<sup>ii</sup> Gender dysphoria is a psychological condition experienced by people who are transgender.

## What is 'stage 2 treatment' and why is it important?

Transgender teenagers with gender dysphoria can be prescribed "cross hormones" (oestrogen or testosterone) to initiate puberty in their affirmed gender when they are around 16 years old.

A medical specialist will only prescribe cross hormones where this is in a young person's best interests. Access to puberty blockers and cross hormones results in a range of positive outcomes for transgender young people, including **improved mental health outcomes, higher education completion levels** and quality of life and vocational outcomes equal to other teenagers their age.

In contrast, transgender young people who cannot access treatment face significantly lower mental health outcomes: clinicians report that 50% of these young people self-harm and 28% attempt suicide.<sup>iii</sup>

## What is the legal process?

Parents can generally make decisions about their child's medical treatment, but section 67ZC of the *Family Law Act* gives the Family Court jurisdiction to make 'orders relating to the welfare of children'. This includes 'special medical procedures' which are typically 'non-therapeutic',<sup>iv</sup> where there is a significant risk of the wrong decision being made and the consequences of a wrong decision are particularly grave, even if the parents agree to the treatment.

The Family Court has held that stage 2 treatment for gender dysphoria is a 'special medical procedure' and court approval is required.<sup>v</sup> The Court has previously held that stage 1 treatment does not require court approval. Stage 1 treatment is 'puberty blockers' that delay the onset of puberty to give the child time to develop cognitively and socially before irreversible physical changes occur.<sup>vi</sup>

In the vast majority of cases, the young person fully understands the treatment and can give informed consent. In these cases, judges defer to the expertise of treating medical specialists on whether the treatment is in the child's best interests and the capacity of the child to provide informed consent.

In a very small number of cases, there is a disagreement about the treatment or the young person does not have the capacity to consent.<sup>vii</sup> In these cases, the Family Court must consider all of the circumstances and decide whether the treatment is in the best interests of the young person.

## How many teenagers does this affect?

Roughly 1 in 100 teenagers are transgender. At least 45,000 teenagers around Australia will be affected by this law when they are around 16 years old. Referrals to the Royal Children's Hospital's Gender Service have increased by more than 200% in the last 10 years as access to information and changing social attitudes is allowing more trans teenagers to safely talk to their parents about their gender identity. As a result, this estimate is likely to increase over time.

## For further information contact:

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<sup>i</sup> *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

<sup>ii</sup> Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5).

<sup>iii</sup> Dr 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, *La Trobe Law and Justice Research Paper Series* (2016) 10-11.

<sup>iv</sup> For example, the non-therapeutic sterilisation of a girl with an intellectual disability and organ donations from a child to a relative.

<sup>v</sup> *Re Jamie* [2013] FamCAFC 110.

<sup>vi</sup> For example, puberty blockers would stop or limit a transgender boy developing breasts or menstruating and a transgender girl developing facial hair, an Adam's apple, a deeper voice and undergoing penis or testes growth.

<sup>vii</sup> See, e.g. *Re Isaac* [2014] FamCA 1134 and *Re Jordan* [2015] FamCA 175.