



Getting Treatment: what to do if you are trans and under 18

This fact sheet sets out the law about when and how transgender young people 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 tailored to your particular circumstances. If you are in NSW, please call the ICLC on 02 9332 1966 for advice. Legal and medical language is explained under Terminology.

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

BACKGROUND

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 that are outside this general principle and are considered to be 'special medical procedures'. (They are '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. Court involvement is required for special medical procedures because:

- There is significant risk of making a wrong decision;
- 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). Court applications about special medical procedures are made under this section.

Whether treatment requires court involvement depends broadly on:

- Whether there is 'disagreement' (eg active opposition rather than support) between any of the parents and the medical team and the child about the treatment; and
- Whether the treatment is reversible.¹

We now set out the legal requirements for each stage of treatment.

Stage 1 treatment: blockers

If a child's parents and the treating medical team agree that the child should start on treatment to delay the onset or progression of puberty, 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 asking the court to make a decision about whether the treatment should be authorised. In deciding whether to authorise treatment, the court will have regard to the best interests of the child as the paramount consideration, and will give significant weight to the views of the child in accordance with his or her age and maturity.

Stage 2 treatment: oestrogen or testosterone

Court involvement is mandatory before a transgender child can start Stage 2 treatment (oestrogen or testosterone). This is because many of the effects of stage 2 treatment are only reversible with surgical intervention. If there is any dispute between the child's parents and members of the treating medical team, then the court must consider whether the treatment should be authorised on the basis that it is in the best interests of the child.

If there is no dispute, then the court must decide whether the child is *competent* to provide their own consent to the treatment.² For a child to be competent to the relevant standard (*Gillick* competent) they must have reached 'a sufficient understanding and intelligence to understand fully what is proposed'. This test takes its name from an English case, *Gillick v West Norfolk and Wisbech Area*

¹ See *Re Jamie* [2013] FamCAFC 110.

² An application for a declaration of competence will also ask 'in the alternative' (in other words as a plan B) that the court authorise the treatment on the basis that it is in the best interests of the child if the child is not found to be competent to the relevant standard.

Health Authority [1986] AC 112.³ Whether the child is competent will generally depend on whether they are able to demonstrate that they understand the content of the treatment, its side-effects, its negative risks, and the physical changes that it will cause.

Procedure

The court application is supported by:

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

Evidence may also be supplied from a psychologist or counsellor. The evidence is usually dealt with without witnesses attending court. The young person gives no evidence.

The Family Law Rules (the court rules for the Family Court) require the service of applications of this kind on any parent who is not an applicant, and on the 'prescribed child welfare authority'. The prescribed child welfare authority in NSW is the Department of Family and Community Services.

It is routine for the court to appoint an independent children's lawyer. An independent children's lawyer represents the best interests of the child. They are obliged to consider the views of the child, but ultimately provide their own, independent perspective about what arrangements or decisions are in the child's best interests. The independent children's lawyer is usually a Legal Aid employee, and some costs are payable to Legal Aid by the parent or parents making the court application unless they are able to demonstrate financial hardship.

Stage 3 treatment: surgery

The legal principles and process are the same as for Stage 2 treatment (although top surgery is irreversible). The only difference is that the application is supported by an affidavit from a plastic surgeon, rather than an affidavit from an endocrinologist.

Treatment without court involvement

³ Although that case relates to treatment of children under the age of 16, *Gillick* has been applied in Australian law in relation to children under the age of 18.

Where court involvement is required, neither a parent nor the young person can give valid consent to the treatment unless that court process takes place. Medical treatment that takes place without the required court involvement is unlawful and it is possible that it may lead to criminal charges, or the involvement of child protection services. Treatment provided unlawfully is also at greater risk of being interrupted, which will disrupt continuity of physical transition for the young person.

What if my parents aren't in my life?

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 it 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 special medical treatment

Under New South Wales legislation (section 175 of the *Children and Young Persons (Care and Protection) Act* 1998), 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' 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.

Phase 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.

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 Phase 2 treatment for a transgender child under the age of 16 may be necessary for the prevention of serious damage to their mental health, and will so be within the terms of the section.



Terminology

The language used in this factsheet reflects the language used by the courts.

Affidavit: a written statement setting out the evidence of a person, that is, information that tends to prove or disprove a fact.

Affirmed gender: the gender that a transgender person identifies as, rather than their *assigned gender*.

Assigned gender: the gender that a transgender person was assigned at birth.

Blockers: colloquial term for *Stage 1 treatment*.

Endocrinologist: a medical specialist in the treatment of the endocrine system (glands that produce hormones that regulate body, mood, development and growth).

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.

Gillick competency: whether a child has reached a sufficient understanding and intelligence to understand fully proposed medical treatment.

Gender dysphoria: a marked difference between a person's experienced or expressed gender, and their *assigned gender*, lasting for at least six months. Gender dysphoria causes clinically significant distress or impairment in social, occupational, or other important areas of life. Gender dysphoria was formerly known as *gender identity disorder*.

Intersex: means the status of having physical, hormonal or genetic features that are neither wholly female nor wholly male, or a combination of female and male, or neither female nor male. Being intersex is about biological variations, and is not about a person's gender identity or sexual orientation.

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 relevant legal rules.

Stage 1 treatment: treatment to delay the onset or progression 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 masculinise or feminise 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 the biological characteristics of one sex but who experiences herself or himself as being of another sex. A person's identification as transgender is not necessarily connected to any change in sexual orientation or preference.

Further References

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.

This legal information is a general guide to the law. It should not be relied on as legal advice. If you have a specific legal problem you should consult a lawyer. This legal information applies to people who live in or are affected by the law as it applies in New South Wales, Australia. Last updated 23 February 2016.