

# The legal position on gender dysphoria treatment in Australia

JUNE 2022



## At a glance

- The laws governing consent for the treatment of gender dysphoria are distinct from those for routine medical procedures.
- Generally, gender affirmation surgery is only available to people aged 18 or over, and only after extensive consultation with a multidisciplinary team of medical professionals.
- For children under the age of 18 years, issues of parental consent, Gillick competency, diagnosis and treatment need to be considered.

“A medical practitioner may be held criminally or civilly liable if the child is found not to be Gillick competent

Recent political discourse and debate around ‘gender affirmation surgery’ justifies a review on the current state of the law that underpins the provision of medical care to Australia’s transgender youth.

The laws governing consent for the treatment of gender dysphoria are distinct from those for routine medical procedures, where a child who is considered to be Gillick competent may consent to their own treatment. A minor is said to be Gillick competent when they have “a sufficient understanding and intelligence to enable them to understand fully what is proposed”.

## A brief history

In 2004, the Family Court of Australia in the case of *Re: Alex* determined that treatment for gender dysphoria was non-therapeutic, fell outside the boundaries of parental consent, and required court approval before it could proceed.

In 2013, the Full Court of the Family Court of Australia in *Re: Jamie* recognised that as gender dysphoria was no longer a novel or unusual condition, court authorisation for pubertal blocking treatment (Stage 1), which was to be regarded as therapeutic treatment, was unnecessary. However, as hormone suppression (Stage 2) treatment was irreversible, it still warranted the court assessing the young person’s capacity to consent in all cases.

A subsequent ruling of the Court in *Re: Kelvin* in 2017 removed the need for court approval for Stage 2 treatment for Gillick competent young people under 18 years of age. The Court stated that while parental consent was preferable, it was not mandatory when an adolescent was considered competent to provide informed consent.

In 2020, the Family Court in *Re: Imogen* clarified that gender affirming treatment could be commenced in persons under the age of 18 only when there was no dispute between the parents, the treating medical practitioner(s), and the young person themselves having regard to competence, a medical diagnosis of gender dysphoria and the proposed treatment plan. In circumstances where there was disagreement between parents, and notwithstanding a positive assessment of capacity, the Court would need to determine whether treatment could proceed.

The decision has received criticism as diminishing the decision-making capacity and autonomy of competent young people in circumstances where there are already significant barriers to receiving treatment. For example, the court process can impose additional obstacles for a young person who does not have contact with a parent for many valid reasons.

## The current legal position

- Generally, gender affirmation surgery is only available to people aged 18 or over and only after extensive consultation with a multidisciplinary team of medical professionals.
- Medical practitioners must not initiate Stage 1 or Stage 2 treatment in a child under the age of 18 years without ascertaining whether or not a child's parents or legal guardians consent to the proposed treatment.
- If there is a dispute about any or all of competence, consent, diagnosis and treatment, a doctor should not administer Stage 1 or Stage 2 treatment and an application should be made to the court for a determination.

## Issues for practitioners

If there is any dispute or concern about gender affirmation surgery for children under the age of 18, practitioners should seek legal advice about making an application to the court for a determination.

Without such a determination, a medical practitioner may be held criminally or civilly liable if the child is found not to be Gillick competent.

## Need to know more?

For more information, please contact our authors.



**Claudine Watson-Kyme**

Partner (Sydney)

T: +61 2 8273 9859

[claudine.watson-kyme@wottonkearney.com.au](mailto:claudine.watson-kyme@wottonkearney.com.au)



**Marie-Clare Elder**

Partner (Sydney)

T: +61 2 9064 1862

[marie-clare.elder@wottonkearney.com.au](mailto:marie-clare.elder@wottonkearney.com.au)