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Abstract

Transgender children and adolescents face hardships in all domains of their lives with many experiencing family rejection, social exclusion, discrimination, bullying and assaults. The mental health implications of these experiences include high rates of depression, anxiety, self-harm and attempted suicide. Gender affirming social support and medical treatment has been shown to ameliorate the poor mental health outcomes for transgender youth, with those who are supported in their social and medical transition reporting rates of depression and self-worth equivalent to general population levels. Advocacy efforts that improve access to support and medical treatment are therefore likely to produce significant positive health and wellbeing outcomes for this vulnerable population.

The transgender community in Australia identified the legal restrictions placed on children and adolescents accessing medical treatment as a significant barrier to positive psychological wellbeing. Australian law, unique internationally, required the parents of transgender adolescents to apply for court authorisation prior to the commencement of their child's gender affirming medical treatment. Concerned by the harm created by this process, a coalition of experts, including transgender children, adolescents and their parents, as well as academic and clinical experts in the fields of law and medicine, was created to advocate for reform. Over a period of approximately four years, a collaborative process was undertaken which ultimately led to law reform and improved access to medical treatment for the transgender community.

Introduction

Gender dysphoria, the distress experienced by a person due to incongruence between their gender identity and their sex assigned at birth, is experienced by approximately 1.2% of the adolescent population. (1) Medical treatment for gender dysphoria in children and adolescents has been available in Australia for 15 years, with clinical practice guidelines available both internationally (2, 3) and in Australia. (4) Best practice involves multidisciplinary assessment followed by pubertal suppression (stage 1), administration of gender affirming hormone treatment such as oestrogen or testosterone (stage 2), and surgical interventions such as chest reconstructive surgery (stage 3). The options for interventions are dependent on the clinical presentation and the individual's needs, with some adolescents benefiting from both hormonal intervention and surgery, whilst others may opt to have only one of these or neither. (5)

Serious psychiatric morbidity is seen in children and adolescents who identify as transgender or gender diverse. This is recognised as a consequence of experiences such as family rejection, social exclusion, discrimination, bullying and physical assault. (6-10) A recent study of the mental health of transgender and gender diverse young people in Australia found very high rates of having ever been diagnosed with depression (74.6%), anxiety (72.2%) or post-traumatic stress disorder (25.1%), or having ever self-harmed (79.7%) or attempted suicide (48.1%). (11)

There is increasing evidence that supportive and affirming medical care with social, medical and surgical treatments is associated with improved mental health and wellbeing. (12-14) Withholding of gender affirming treatment is not considered a neutral option, with research indicating it exacerbates distress and increases social withdrawal, depression and anxiety. (7)

The role of the Family Court of Australia in transgender medicine

Until very recently, access to gender affirming medical treatment has been limited by the requirement that the parents of the young person seeking treatment apply for Family Court approval. The legal origins of this mandatory court process date back to 2003, when a 12 year old transgender boy known legally as "Alex" presented to a hospital with gender dysphoria associated with suicidal ideation. Having been rejected by his immediate family, Alex was in the care of the State Government, which acted as his legal guardian and was responsible for decisions relating to his care. With medical transition in adolescents still a novel practice in Australia in 2003, and Alex not yet considered a mature minor and guardianship not residing with his parents, an application was made to the Family Court to approve administration of stage 1 and 2 treatment. After hearing evidence from Alex's treating medical team, school principal, social worker and international experts in gender dysphoria, the court granted authorisation for treatment to start immediately.

Though the judge in *Re Alex* (15) approved the application, the effect of the decision was that treatment for gender dysphoria became classified as a "special medical procedure", necessitating that any transgender adolescent requesting this treatment in the future would also require court authorisation. Special medical procedures lie outside the bounds of usual parental responsibility because of the particular risks they pose to the child. They are typically non-therapeutic procedures that provide no direct benefit to the child, and where the interests of the child and the parents may be in conflict. Examples include the non-therapeutic sterilisation of an intellectually disabled child or a request that a healthy child donate an organ to a sick relative. In such cases, the Court exercises its welfare power, "standing in the place of the parents", to determine if the treatment is in the child's best interest. The decision in *Re Alex* to treat gender affirming medical treatment for transgender adolescents as a special medical procedure set a course for Australia that was unique internationally. No other jurisdiction in the world required legal oversight of the medical treatment of transgender adolescents.

In 2013, an appeal to the Full Court of the Family Court in a case known as *Re Jamie* (16) removed the need for court authorisation for stage 1 treatment, but confirmed that stage 2 treatment, while therapeutic, remained a special medical procedure because it had some irreversible consequences. *Re Jamie* thus confirmed that the parents of a transgender adolescent must seek Family Court approval before commencing oestrogen or testosterone treatment even if the adolescent, their parents and the treating medical professionals were in agreement that treatment was in the adolescent's best interest. The Court did find that an adolescent may be sufficiently competent to consent to hormone treatment for themselves, but the determination of such competency remained with the Court.

What was the impact of Family Court involvement in transgender adolescents?

Research evidence indicated that the Family Court process caused harm to transgender children, adolescents and their families.

A qualitative study of families from across Australia who had completed, or who were preparing for, the Family Court process concluded that the harm caused far outweighed any risks associated with permitting adolescents and their parents to consent to treatment. (17) Specifically, the research found that the court process:

1. Caused significant psychological harm to transgender adolescents, with parents reporting a rapid decline in the mental health of their child while they waited for their hearing;
2. Caused dangerous delays in the adolescent's medical treatment of between 8-10 months;
3. Presented significant cost barriers for the families.

Clinical experience echoed these findings with young people describing their distress at various time points along the treatment process. Many of the young people and their families had no prior experience of being in court and reported increased distress, depression, anxiety and self-harm ideation in anticipation of the court process. Having to go to court due to one's gender identity alone was described as "pathologising" and "discriminatory" and some were worried about their personal and medical information being heard in such a forum. Despite the court hearing 63 cases over the period of July 2013 and August 2017 (18) and not once refusing to authorise treatment, clinicians experienced many occasions where the young person they were treating expressed concern that their case may be the first. It was not uncommon to hear reports of young people accessing hormones illegally over the internet or through friends, despite the known risks of uncontrolled medication quality, dosage and injection practices.

In the years since *Re Jamie*, the number of children and adolescents presenting to gender services across the western world grew rapidly, a phenomenon attributed to increasing transgender visibility and acceptance in the wider community. In Melbourne alone, referrals to the Royal Children's Hospital (RCH) Gender Service increased from 40 in 2013 to over 250 in 2017, creating unprecedented demand on the Family Court to hear cases promptly. At the same time, the legal correctness of the decision in *Re Jamie* came under increasing scrutiny, with legal academics (19, 20) and judges (21-23) arguing that treatment for gender dysphoria was therapeutic and therefore should not be a special medical procedure necessitating court oversight.

How was advocacy for legal reform undertaken?

The transgender community identified the legal restrictions placed on adolescents accessing stage 2 treatment as a significant barrier to positive psychological outcomes. Over a period of approximately four years, a coalition of legal and medical experts, working alongside transgender adolescents and

their parents, embarked upon a multi-disciplinary, collaborative advocacy process with the goal of achieving legal change.

Firstly, law reform options were sought, with legal academics identifying two possible opportunities for reform:

i) Amend the *Family Law Act* via Federal Parliament to remove treatment for gender dysphoria from the definition of "special medical procedure".
ii) Challenge the decision in *Re Jamie* through legal appeals, possibly to the High Court of Australia

Both options were explored over time, often simultaneously. A collaborative approach to advocacy efforts was undertaken, combining the expertise of academic legal experts, clinicians from the RCH Gender Service and transgender children, adolescents and their parents. This coalition of experts was a powerful tool in delivering a consistent and convincing message that combined medical and legal knowledge, clinical expertise and, importantly, the collective insight and personal experience of transgender young people and their families.

Utilising mainstream and social media, information was widely disseminated to educate and inform the general community. The Australian Broadcasting Corporation's 4 Corners program "Being Me" was viewed by over 1.2 million people in November 2014. The Australian Story feature on Georgie Stone, who was now able to speak publicly about being the young woman at the centre of *Re Jamie*, reached a viewing audience of over 1 million nationally in 2016. Interviews were undertaken on commercial television, radio and for print journalism by transgender adolescents and their parents, their clinicians and legal experts both individually and in combination.

Meetings in Canberra with politicians and their advisors were conducted with discussions progressing over time. In 2016 and 2017, members of the collaborative group, including transgender children, adolescents and their parents, presented to the Senate Committee known as the Parliamentary Friends of LGBTI Australians. This engagement led to meetings with leaders from the Australian Labor Party, the Liberal Party of Australia, Australian Greens and Independent members of parliament. Evidence of wider community support was also used as a tool for advocacy, with Georgie Stone's *change.org* petition signed by almost 16,000 people. The petition was presented in 2017 to politicians in person, including the Attorney-General and the Shadow Attorney-General, who indicated bipartisan support for reform. In light of the involvement of the Australian Human Rights Commission in the *Re Jamie* case, meetings with the Australian Human Rights Commissioner occurred in 2015 and 2017, enabling the sharing of information and developments over time.

***Re Kelvin*: An opportunity for change**

In 2017, an opportunity for law reform via the Family Court presented itself. The case, *Re Kelvin*, involved a 16 year old transgender male who was considered by his doctors to be competent to consent to stage 2 testosterone treatment. It was agreed by Justice Watts that Kelvin was competent and treatment was approved. However, the judge also agreed to refer the matter to the

Full Court of the Family Court by way of a case stated. A case stated is a procedure by which a court can ask another (higher) court for its opinion on a point of law. The substantial question stated for the opinion of the five judges of the Full Court was whether granting access to stage 2 medical treatment for gender dysphoria, and the determination of competence to consent, required the Court's involvement. (18)

Kelvin's case stated provided a legal mechanism to bring interested parties together to achieve change. With over four years of advocacy already undertaken, *Re Kelvin* proved timely. The case was heard in Sydney in September 2017. Intervener status was given to A Gender Agenda Inc., the Australian Human Rights Commission, Royal Children's Hospital Melbourne and the Secretary for the Department of Family and Community Services (NSW), with all interveners except the Department supporting Kelvin's position. The Attorney-General of the Commonwealth intervened as of right, also presenting arguments in favour of ending Family Court involvement in stage 2 decision-making.

A paediatric medical expert from the RCH provided evidence to the Court about the nature and diagnosis of gender dysphoria and the important role of gender affirming hormone treatment. Empirical evidence supporting the therapeutic nature of hormone treatment was also presented. The World Professional Association for Transgender Health Standards of Care version 7, the Endocrine Society Guidelines and the Australian Standards of Care and Treatment Guidelines for Trans and Gender Diverse Children and Adolescents were presented and accepted as the relevant treatment protocols both domestically and internationally. Further evidence supporting the position of the medical experts was presented by the Australian Human Rights Commission, A Gender Agenda Inc. and the Office of the Federal Attorney-General. The sole counter-arguments were provided by the Department of Family and Community Services (NSW).

On the 30th November 2017, the decision in *Re Kelvin* was handed down. The Full Court unanimously held that gender affirming medical treatment for transgender adolescents no longer required court authorisation. Writing for the Court, Justice Thackray held that the judicial understanding of gender dysphoria and its treatment had fallen behind the advances in medical science, and that the "risks involved could no longer be said to outweigh the therapeutic benefits of the treatment." Legal reform to ensure that transgender adolescents had unhindered access to internationally recognised therapeutic medical treatment had been achieved.

Just months after *Re Kelvin* was handed down, it was confirmed by the Family Court in the case of *Re Matthew* that stage 3 treatment also did not require Court approval. Applying the Full Court's reasoning from *Re Kelvin*, it was held that surgery for transgender adolescents was therapeutic and therefore not a special medical procedure.

Fourteen years after the Family Court's ruling in *Re Alex*, decisions about the medical care of transgender children and adolescents now reside solely in the hands of parents, medical professionals, and the young people themselves. The Family Court would only be involved where parties disagree about the appropriate treatment. Though the reform process has been lengthy, this case study demonstrates the benefits of multi-disciplinary advocacy, as well as the importance of experts working with grass roots organisations and families to build a case for reform. By utilising a

variety of compelling voices, from children to lawyers to doctors, it was possible to speak to multiple constituencies and ultimately effect permanent change.

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