



## **PROTECTING THE HUMAN RIGHTS OF PEOPLE BORN WITH VARIATIONS IN SEX CHARACTERISTICS**

### **CONSENT FOR CHILDREN**

The capacity to provide full and informed consent to medical interventions is fundamental to the enjoyment of bodily autonomy and integrity and to achieving the highest attainable standard of health.

Particular concerns arise in relation to the capacity of children to consent to medical interventions.

In Australia, generally a child under the age of 18 may consent to a medical procedure if medical professionals have formed the view that the child has sufficient maturity and understanding to give valid consent to the procedure (this is known as ‘*Gillick* competency’, referring to a United Kingdom House of Lords decision that has been adopted by Australian courts).

If the child is not *Gillick* competent, the child is considered not to have legal capacity to provide consent. Instead, decision-making responsibility about medical treatment typically vests in the parents or guardians.

Parents and carers play an important role in making decisions for their child. A human rights based approach to decision making on behalf of children requires the decision maker to make decisions that are in the ‘best interests’ of the child. It also requires a consideration of the growing capacity of their child to be increasingly involved in decision-making.

In some circumstances, court authorisation of the decision will be required regardless of whether the child is *Gillick* competent or whether the parents consent. The Family Court of Australia is able to provide such authorisation under its ‘welfare jurisdiction’ and will consider if the medical procedure is in the ‘best interests’ of the child. Following the legal decision of *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218 (*Marion’s case*), Court authorisation is required where the proposed treatment is:

- non-therapeutic;
- invasive, irreversible and considered major treatment;
- there is a significant risk of making the wrong decision about the best interests of the child; and
- the consequences of a wrong decision are particularly grave.

However, what constitutes the ‘best interests’ of the child can be difficult to ascertain, and may conflict with other rights, like a child’s right to privacy, autonomy, self-determination and freedom of expression.



## Legal oversight mechanisms

Whether authorisation for these procedures should come under the jurisdiction of the Family Court is contested. Few cases have been brought to the Court, and those that have reveal an inconsistent approach to the reasons considered in decision-making and understandings of the jurisdiction of the Court.

### Case study: *Re: Carla*

In the 2016 Family Court case of *Re: Carla (Medical Procedure)* [2016] FamCA 7, Justice Forrest found that the surgical treatment proposed by a multidisciplinary team for five-year old Carla, a gonadectomy, was ‘therapeutic’ within the meaning of the term used by the majority in *Marion’s case*. On this basis, the Court concluded that the treatment fell within the bounds of permissible parental authority and did not require Court authorisation. The Court reached a similar conclusion in the 2014 case of *Re: Sarah* and the 2010 case of *Re: Sean and Russell (Special Medical Procedures)*.

In recounting the facts, Justice Forrest noted that Carla had previously undergone surgery that had ‘enhanced the appearance of her female genitalia’, including a clitoral recession and labioplasty. These procedures were conducted without an application for court authorisation.

Despite finding that court authorisation was not required for the proposed gonadectomy, Justice Forrest noted that the bringing of an application by a parent or health authority for court authorisation ‘can, in many circumstances, be understandably considered “as a prudent step”’. His Honour declined to set out the conditions that would make the reasons for seeking court authorisation compelling.

Justice Forrest’s decision in *Re: Carla* departed from the decision in *Re: Lesley*, in which Justice Barry found that the same procedure proposed in *Re: Carla*, a gonadectomy, **did** require the sanction of the Court.

Alternative approaches have been suggested. For example, oversight over decision-making could be provided by a civil and administrative tribunal, by an expert tribunal that includes human rights experts, clinicians, and intersex-led community organisations, or by an expert multidisciplinary management team in hospitals.



## Australian Human Rights Commission

### Discussion questions:

- To what extent should parents and carers be involved in making decisions on behalf of their child? How can parents and carers be best supported to make these decisions?
- What, if any, legal oversight mechanism(s) should be in place to guide decision-making about medical interventions involving a person born with a variation in sex characteristics where the person does not have the legal capacity to provide consent?

If such a mechanism existed:

- how could this mechanism adequately address different interventions and different variations?
- how can it best respect the future capacity of a child to consent?
- should there be distinct processes for children with parents and for adults who lack legal capacity?

This sheet forms part of the Australian Human Rights Commission's inquiry into how best to protect the rights of people born with variations in sex characteristics in the context of medical interventions. These sheets are designed to prompt thoughts and considerations for written submissions. Submissions do not need to be limited to the issues raised in this sheet.

**Writing a submission?** Please complete a Participant Consent Form and attach it to your submission. Submissions should be sent by email to [sogii@humanrights.gov.au](mailto:sogii@humanrights.gov.au) or by post to GPO Box 5218, Sydney NSW 2001.

Your information will be stored securely and your identity/information will be kept strictly confidential, except as required by law. Inquiry findings may be published, but you will not be individually identifiable in these publications. Submissions on behalf of organisations may be identifiable only where the organisation has given permission for the Commission to publish information attributable to that organisation.

For further information about the project, please email [sogii@humanrights.gov.au](mailto:sogii@humanrights.gov.au) or phone 02 9284 9650 or 1300 369 711.

Consultation for this project has been approved by an external, independent Human Research Ethics Committee (HREC). Any queries or concerns about ethics may be directed to the University of Sydney Human Research Ethics Committee by email to [human.ethics@sydney.edu.au](mailto:human.ethics@sydney.edu.au), citing reference 2018/338.