



FAMILY COURT OF AUSTRALIA

CHAMBERS OF THE HONOURABLE DIANA BRYANT AO
CHIEF JUSTICE

Commonwealth Law Courts
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2 September 2013

Dr Ian Holland
Secretary
Standing Committee on Community Affairs References Committee

By email: community.affairs.sen@aph.gov.au

Dear Dr Holland,

**INQUIRY INTO STERILISATION OF INTERSEX PEOPLE (PEOPLE WITH
DISORDERS OF SEX DEVELOPMENT)**

Thank you for your letter dated 12 August 2013 in which you invited me to make a further submission in respect of the Committee's term of reference concerning sterilisation of intersex people (whom I will henceforth refer to as people with disorders of sex development ("DSD")), as I note that the Royal Children's Hospital's submission states that "[i]n medical nomenclature, intersex conditions are now referred to as Disorders of Sex Development").

My submission dated 22 February 2013 addressed issues pertaining to the sterilisation of people with DSD, which have arisen in cases in which sterilisation was a by-product of surgery for which the Family Court's consent was sought. I cited three cases where that had occurred. I confirm the comments made in that submission and made by me in oral evidence; particularly as to why the concepts of coercion and compulsion are unlikely to have application in cases involving people with DSD, and how the issue of *Gillick* competence (capacity of minors to consent to medical treatment) could be enlivened in a way it may not be in cases involving children and young people with intellectual disabilities.

Since I made my submission, the Full Court of the Family Court (Bryant CJ, Finn and Strickland JJ) delivered its judgment in the matter of *Re: Jamie* (2012) FLC 93-497 (copy attached). *Re: Jamie* was an appeal concerning medical treatment for a young person with gender identity dysphoria and involved consideration of whether and at what stage the Court's consent for the administration of medical treatment was required.

As is apparent from the judgment, the jurisdiction to make orders in applications for permission to perform a medical procedure comes from s 67ZC of the *Family Law Act 1975* (Cth) (“the Act”). That section states:

67ZC Orders relating to welfare of children

(1) In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.

Note: Division 4 of Part XIII A (International protection of children) may affect the jurisdiction of a court to make an order relating to the welfare of a child.

(2) In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration.

Note: Sections 60CB to 60CG deal with how a court determines a child’s best interests.

The basis for the dichotomy between therapeutic and non therapeutic treatment comes from the High Court’s decision in *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 (“Marion’s case”), which is binding on the Family Court. Whether a particular procedure is therapeutic or not is a matter of fact to be established in each case on the basis of the medical evidence given.

The Full Court in *Re: Jamie* also discussed *Gillick* competence.

There is nothing further of substance I wish to add to that which I have already said about sterilisation of people with DSD. I do note however that one submission, submission 88, refers to a ‘Special Medical Procedures Act’ as providing the statutory basis for the approval of non-therapeutic medical treatment by the Family Court. That is not a piece of legislation known to me. As I have already said, the jurisdiction exercisable in applications of that type is found in section 67ZC of the Act.

In conclusion, I also wish to note that one submission (submission 85) refers to the “adversarial nature” of Family Court proceedings, which it is said privileges the voice of the parties to the proceedings to the detriment of young people with DSD. I remind the Committee that in its first report tabled in July 2013 the Committee said the following (at page 137):

6.32 In conducting its inquiry, the committee sought to establish the nature, and the appropriateness, of the procedures that operate in sterilisation cases. As a primary forum for the exercise of the Commonwealth jurisdiction in child sterilisation matters, it was clear from the material before the committee that the Family Court is regularly criticised by non-government organisations. However,

it is equally clear that the precise nature of Family Court procedures is not widely and comprehensively understood. Criticisms were not always founded on a clear analysis of the Family Court's procedural rules or legislative framework. The lack of any reference to the less adversarial trial (LAT), in particular, raises doubt about the validity of the concerns. The committee does not accept that Family Court procedures in sterilisation cases are conventionally adversarial.

I would be happy to elaborate on the contents of this and my earlier submission. I would also encourage the Committee to contact me if there are any discrete topics the members wish to raise with me.

Yours sincerely

Diana Bryant AO
Chief Justice

encl.