



## The king, the courts and ‘incompetent’ children: the welfare jurisdiction of the Family Court of Australia

### Introduction

On 13 April 2004, the then Chief Justice of the Family Court of Australia published his decision in the matter of *Re Alex: Hormonal Treatment for Gender Identity Dysphoria* [2004] Fam CA 297. The decision was the subject of much public comment, with some commentators criticising the decision and other persons applauding it.<sup>1</sup>

In short, his Honour relied on section 67ZC of the *Family Law Act 1975* (‘the Act’) to permit a 13-year-old girl to begin a program of hormone treatment to become a boy. His Honour agreed with psychiatric evidence that the child has ‘gender identity dysphoria’ and found that she has a ‘profound and longstanding wish to undergo a transition to become male in appearance’ (paragraph 2).

Section 67ZC of the Act provides the Family Court (or another court exercising jurisdiction under the Act) with a broad welfare jurisdiction, analogous to the historic common law doctrine of *parens patriae* (discussed below). The jurisdiction raises issues about the nature and extent of parental responsibility and the capacity (or competency) of children to be responsible for making decisions.

This research note explains the welfare jurisdiction of the Family Court by highlighting its historic roots and noting some of the cases in which it has been applied. It also examines the concept and extent of parental responsibility in so far as it relates to the welfare jurisdiction.

### The statutory welfare jurisdiction

Section 67ZC was enacted in 1995 (when Part VII of the Act, which deals with children, was completely revised). It provides that the Family Court has jurisdiction to make orders ‘relating to the welfare of children’. It also provides that in deciding whether to make such an order, the Family Court ‘must regard the best interests of the child as the paramount consideration’.

Section 67ZC replaced subsection 64(1), which provided that in proceedings related to ‘the custody, guardianship or welfare of, or access to, a child ... the court must regard the welfare of the child as the paramount consideration’.

The welfare jurisdiction comprises elements of the *parens patriae* jurisdiction, but it does not equate to the *parens patriae* jurisdiction. It does not, for example, include the wardship jurisdiction (which permits a court to make children wards of state).

### The *parens patriae* jurisdiction

‘*Parens patriae*’ means ‘the parent of his country’. In practice in common law nations, it involves the crown (or head of state) assuming responsibility for those persons unable to care for themselves, such as children and the mentally ill.

The *parens patriae* jurisdiction is a nebulous, historic doctrine. As La Forest J (Supreme Court of Canada) said in *Re Eve* [1986] 2 SCR at 410:

... [the] Crown has an inherent jurisdiction to do what is for the benefit of the incompetent. Its

limits (or scope) have not, and cannot, be defined.

Lord Eldon (Court of Chancery, England) provided a useful explanation of the jurisdiction in *Wellesley v Duke of Beaufort* (1827) 4 ER 1078 at 1081:

[It] belongs to the King, as *parens patriae*, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown around them.

Today, the *parens patriae* jurisdiction is almost limited to supervising the exercise of parental responsibility and is guided by the principle that the best interests of the child are paramount.

### Parental responsibility

‘Parental responsibility’ means ‘all the duties, powers, responsibilities and authority which, by law, parents have in relation to children’: section 61B of the Act. It includes responsibility for making decisions about day-to-day issues (such as what the child will eat) and long-term decisions (such as where the child will attend school and if the child will practise a religion). Unless a court order says otherwise, each parent of a child under 18 years has parental responsibility for the child. Parental responsibility exists for the benefit of the child.

Parental power to make decisions for a child diminishes as the child gets older and develops a capacity to make decisions for himself or herself: Lord Scarman (House of

Lords) in *Gillick v West Norfolk and Wisbech Area Health Authority and Others* [1986] AC 112 at 186, followed by the High Court of Australia in *Secretary, Department of Health and Community Services v JWB and SMB* ('Marion's case') (1992) 175 CLR 218.

There is no fixed age at which a child becomes competent to make decisions. It depends on the child and the nature of the decision to be made. To be fully 'Gillick competent', the child must understand not only the nature of the decision but also the consequences of making (or not making) the decision.

### When is the welfare jurisdiction used today?

There are some decisions which even a 'Gillick competent' child is not competent to make. Likewise, there are some decisions which even parents are not empowered to make, particularly those involving irreversible, special medical procedures where the primary aim of the procedure is non-therapeutic (that is, not being the 'treatment of some malfunction or disease': *Re Jane* (1989) FLC 92-007 at 77,260). In such cases, the child, the parent or another adult must seek the Family Court's permission to make the decision. One reason for requiring the Court's authorisation is that parents or carers may not necessarily be able to determine objectively if the decision is best for the child (that is, they may act in their own self-interests).

Some recent decisions of Australian courts involving the welfare jurisdiction include:

- *Marion's case*, where the High Court authorised the performance of a hysterectomy on an intellectually disabled, 14-year-old girl who was unable to care for herself<sup>2</sup>
- *In the matter of the welfare of A (a child)* (1993) FLC 92-402, where the Family Court granted an application for a female child

with an extreme degree of masculinisation (because of an adrenal gland abnormality) to undergo female to male sex reassignment surgery

- *In the matter of P and P* (1995) FLC 92-615, where the Full Court of the Family Court permitted the parents of an intellectually disabled child (who also suffered from epilepsy) to consent to a hysterectomy being performed on the child—however, the Court was of the view that neither sterilisation to prevent pregnancy nor the issue of menstrual management would (by itself) provide sufficient ground to authorise sterilisation, but were relevant considerations among many, and
- *In the matter of GWW and CMW* (Hannon J, 21 January 1997), where the Family Court authorised the harvest of bone marrow cells and/or blood from a child for transplant to the child's aunt.

However, the decision in *Re Alex* extended the operation of section 67ZC because the Family Court authorised reversible medical treatment as a pre-cursor to irreversible treatment.

### Are there limits on what the Family Court can do?

While the welfare jurisdiction may be invoked to protect a child from actions or decisions taken by the child's parents, the High Court has determined that the Family Court's powers are not 'at large'.<sup>3</sup>

Last year, for example, the majority of the Full Court of the Family Court found that if (on a re-trial of a case involving five children held in immigration detention) the Family Court considered the continued detention of the children to be unlawful, the Family Court could use its welfare jurisdiction to order the Minister for Immigration to release the children: *B & B & Minister for Immigration &*

*Multicultural & Indigenous Affairs* (2003) FLC 93-141.

However, when the Minister for Immigration appealed that decision, Gleeson CJ and McHugh J (who comprised part of the majority of the High Court) concluded that section 67ZC does not give the Family Court any jurisdiction to determine 'the validity of the detention of an unlawful non-citizen child (who was the child of a marriage)' under the *Migration Act 1958* (at [54]). Their Honours found that while an order made under section 67ZC is binding on the child's parents:

... [nothing] in s 67ZC, or in Pt VII generally, imposes—expressly or inferentially—any duty or liability on third parties to act in the best interests of or to advance the welfare of a child.<sup>4</sup>

1. See, for example, Andrew Bolt, 'Why I think sex-change 'Alex' is a profoundly betrayed young woman', *The Sunday Mail*, 18 April 2004, p. 14 (criticism) and Editorials: 'The court, a child and a change of gender', *The Age*, 15 April 2004, p. 12 (in support).
2. The Court's authorisation was required to avoid committing an unlawful assault under state law.
3. *Northern Territory of Australia v GPAO* (1999) 196 CLR 553 per Gaudron J at [142].
4. *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20 per Gleeson CJ and McHugh J at [52].

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