

Ethics and the proposed treatment for a 13-year-old with atypical gender identity

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The case of a 13-year-old girl given permission by the Family Court of Australia to begin a sex-change process involves complex issues. Nevertheless, the ethical justification for the decision is not complicated. In this case, it can be argued that the net benefit eclipses concerns about competence, autonomy and the appropriateness of the intervention. The debate this case generated in the media reminds us that one of the essential tasks in ethics debates is to get our facts straight. (MJA 2004; 181: 319-321)

In a landmark judgment, the Chief Justice of the Family Court of Australia has given permission for a 13-year-old girl to begin a sex-change process. The biologically normal girl, referred to in the judgment as “Alex” or “he”, has been diagnosed with a gender-identity disorder and has experienced major depression, self-harming behaviour and suicidal thoughts.^{1*}

Gender-identity disorders, sometimes referred to as “gender dysphoria” (“dysphoria” indicating distress)⁵ or “transsexualism”, are rare and complex conditions in children and adolescents. According to a Royal College of Psychiatrists report,⁶ they are often associated with emotional and behavioural difficulties and involve psychological, biological, family and social issues. In the course of psychosexual development, the young person “experiences their phenotypic sex as incongruous with his or her own sense of gender identity”, and adolescents with this condition often experience intense distress. The majority of affected children eventually develop a homosexual orientation, but the outcome is not easily predicted. Only a small proportion become transsexuals or transvestites.⁶

In the present case, Alex has had a strong, longstanding desire to live as a male and become male in appearance and has gone to distressing lengths to conceal his female body. For example, to avoid having to use the female toilets, he started wearing nappies to school and would not drink liquids.¹ Alex’s past life has been troubled. His father, with whom he was very close, died suddenly when Alex was young, and his mother rejected him. He now lives with an aunt.

* Consent from the patient or the patient’s guardian could not be obtained for use of the information in this case report because the patient is not identifiable. The judgment relies on a pseudonym, and the names of witnesses and the place where “Alex” lives have been suppressed to preserve anonymity. As a landmark case, however, the judgment and details of the case are in the public arena and, in keeping with the Court’s practice in cases of public interest, the Court prepared a media release² and summary of the judgment³ to help explain the decision. To help preserve anonymity, only the information that is necessary to the discussion at hand has been used in this article.⁴

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The proposed treatment

Gender reassignment is a staged process. The proposed treatment for Alex involves, firstly, the continuous administration of a combination of oestrogen and progesterone that is a form of the contraceptive pill. The goal of this stage is solely to suppress menstruation, and the effects are “completely reversible”.¹ The second stage of treatment for Alex involves hormone therapy with a luteinising-hormone-releasing-hormone analogue (to suppress the pituitary–ovarian axis) and testosterone; this can begin in 3 years’ time, at age 16, if Alex still wants to be a boy. Some changes with this stage of the treatment are irreversible. Changes include masculinisation of the voice, muscle growth, increase in facial and body hair, growth of the clitoris and behavioural effects.¹ Surgery would complete the sex-change process; however, surgical intervention was not sought or contemplated in the court application.

The Chief Justice authorised the stages of the proposed treatment as a “single package of reversible and irreversible treatment”, but the only aspect that will take immediate effect is administration of the contraceptive pill.¹ Although Alex and his doctors have authorisation to commence the irreversible hormone therapy, surgical intervention is not part of that “package”. Alex would not be eligible for surgical intervention until he is at least 18 years old.¹ From the age of 18, however, he will be legally entitled to make his own decisions.

The legal basis of the decision

Under the *Family Law Act 1975* (Cwlth), the Family Court is required to “regard the best interests of the child as paramount”.¹ The Chief Justice in this case based his decision on the High Court’s decision in *Marion’s case*.⁷ Matters to be considered include the particular condition of the child; the nature of the proposed treatment; reasons for the proposed treatment; alternative courses of treatment; desirability and effect of the proposed treatment compared with alternatives; physical, psychological and social implications of authorising or not authorising the proposed treatment; the nature and degree of any risk associated with authorising or not authorising the proposed treatment; and the views of the child’s guardian(s) and of the child.¹

The Court was making the decision not because Alex lacked sufficient maturity and understanding or because he was a ward of the state. The permission of the Family Court was required because the proposed treatment was not considered a treatment for a “malfunction” or a “disease”.¹ The “irreversible” element of the intervention, with accompanying “significant risk”, means that it

falls into the legal category of “special medical procedures” — cases requiring court authorisation.^{1,8}

Public debate generated by the decision

The Court’s decision to allow the sex-change process has sparked public debate and provoked strong reactions in the media.

Bioethicist Nicholas Tonti-Filippini has condemned the decision as “unbelievable” and called on the government to intervene. He argues that “all the evidence suggests that gender dysphoria is a form of mental illness and should be treated as a mental illness, not by trying to adjust her biologically to match the delusion”.^{9,10} Another critic claims that allowing the 13-year-old to begin the sex-change process is colluding with the fantasy rather than treating the condition — “like allowing a child who imagines he is a horse to undergo transformative surgery”.¹¹ Some challenge the diagnosis and the proposed treatment by arguing that we should view Alex as a victim of emotional and psychological abuse: “We have a terrible feeling that Alex may have received too much intervention of the wrong kind, too soon.”¹² Others have stated, “It’s her troubled mind we must work on, not her healthy body”,¹³ and “She is much, much too young to make this decision”.¹⁰ Some also worry that Alex will come to regret his decision.^{14,15}

The competence of a 13-year-old to make this kind of decision and the implications of making competence determinations have also been debated. One newspaper editorial has called the Court’s decision “troubling”, because “it is a fair bet that what Alex wants now above all else may not be her heart’s desire in five, let alone 10 years’ time”.¹⁶ Another editorial claims that adolescent unhappiness cannot be measured from an adult’s perspective, and warns that “anyone who must deal with an adolescent’s misery needs to consider very carefully what the consequences of disregarding it may be”.¹⁷

Few commentators have come out in defence of the Court’s decision, but a spokesperson for the Australian and New Zealand College of Psychiatrists has said that the judgment was important “because it acknowledged the severity of Alex’s condition and allowed the appropriate treatment”.¹⁸ A representative of Trans-Gender Victoria commended the decision, because adolescence is “the worst time” for people with gender-identity problems committing suicide.¹⁰

Identifying the issues of concern and assessing the debate

The overriding concern in this debate seems to be the possibility of harm. Some view the proposed medical treatment as inappropriate or premature and fear that Alex may later regret undergoing the treatment. Others think that the treatment offers relief and that withholding it would cause great harm. The competence of a young person to make this kind of decision, the goals of the intervention, and whether the end justifies the means also figure in the debate.

An essential task of ethics

First of all, this case demonstrates one of the essential tasks of ethics — getting our facts straight. Some commentators who oppose the Court’s decision may have concluded that surgery is part of the proposed treatment or that surgery is inevitable. But this is not the case. The Court is not authorising sex-swap surgery. These critics have missed a crucial aspect of the judgment — and

missed some subtleties in the decision. It is significant that the proposed treatment is a staged process that provides time for Alex to further explore the issue of gender identity. During this time, Alex will receive ongoing psychological and psychiatric support, which is an essential part of the proposed treatment authorised by the Court. Alex can elect to discontinue the treatment at any time.¹

Is the treatment inappropriate?

In response to the view that the treatment is inappropriate, it can be argued that treatment designed to reduce gender dysphoria is a “legitimate goal of intervention”, being treatment that reduces the degree of “social ostracism” and “psychiatric comorbidity”.¹⁹ For Alex, there is great benefit in being given permission to begin the first stage of treatment and there is great harm in not having his desire to live as a boy taken seriously. The benefits in commencing treatment are real, immediate and significant. Alex will gain immediate relief from distress, and his developing self-determination will be strengthened by having his preference acknowledged. Moreover, the first stage of treatment is completely reversible. Taking the pill on a continuing basis is not an unusual or bizarre treatment. Alex gains time, during which he will receive counselling and can further explore the issue of his gender identity, before the next stage of treatment goes ahead at age 16. Importantly, the decision allows for the possibility that Alex might change his mind. According to the Royal College of Psychiatrists report, a large element of management is “promoting the young person’s tolerance of uncertainty and resisting pressures for quick solutions”.⁶

Critics who assume that giving credibility to Alex’s preferences means he is set on an irreversible pathway ignore the role of the ongoing counselling support. Alex may decide not to proceed, but, if he does proceed, the counselling he will have received should assist him in having a clearer idea about his identity. The counselling will also help him to be better informed about the procedure and its implications. With this support, he is much more likely to be making an informed, autonomous decision.

The harm of treating versus the harm of not treating

The harms that may occur with the proposed treatment (eg, practical and social difficulties, victimisation, and the possibility of regret) are theoretical, while the harms of not proceeding with the proposed treatment are likely and substantial. According to the Royal College of Psychiatrists report, interventions that recognise and accept the problem of gender-identity disorders and remove the secrecy can bring considerable relief.⁶ In this regard, the Court’s decision, and the process that led to it, could be deemed therapeutic. The evidence presented tells of Alex’s depression and self-harming behaviour during the time when his desire to live as a boy was not taken seriously. Those who know him well are concerned that he may go back to the old behaviour if he is not permitted to commence the proposed treatment.¹ The judge also expressed concern that, if the proposed treatment was not allowed to proceed, Alex’s “education and residential arrangements and his developmental socialisation would be jeopardised to his long term detriment”.¹

It is worth noting that the proposed treatment is practised in The Netherlands and is recommended in the Standards of Care of the Harry Benjamin International Gender Dysphoria Association.²⁰ While the application before the Court in this case did not include surgery, follow-up studies in The Netherlands on the postoperative

success of transsexuals who began the treatment process in adolescence have noted improvement in the main treatment goal — that is, “diminution or resolution of gender dysphoria”.⁵ It was also found that these young people rated better in terms of psychological and social functioning than transsexuals who began treatment later on as adults. Postoperative regret occurs in some adults, but none of those who began the treatment process as adolescents experienced regret.⁵ These studies support the view that early intervention for those who continue on to pursue surgery can be justified by better outcomes.

Competence to decide

Difficult and complex issues also arise because of the questionable competence of a young person to make important decisions — especially decisions involving irreversible changes that could close off future options or be detrimental to long-term interests. We want to know whether the young person is competent and whether the decision is an autonomous one deserving respect (ie, a choice that is freely made “in accordance with a self-chosen plan”).²¹

The main values at stake in competence determinations for children and young people are wellbeing and autonomy (or, more aptly, their developing autonomy). Determining competence in young people involves trying to balance “protecting their wellbeing from the harmful consequences of their choices when their decision-making capacities are defective” with “respecting their interest in deciding for themselves when they are able”.²² Autonomy and making autonomous decisions requires stable values and a conception of the good, but instability is a feature of the values of children and young people. Young people “may give inadequate weight to the effects of decisions on their future interests, and also fail to anticipate future changes” in the things that are important to them.²²

It can be argued that this case is unique in the sense that we do not have to grapple with the difficult issues of whether Alex is competent to make the decision, whether his decision is an autonomous one, and whether treatment of the kind proposed is appropriate only if its purpose is to cure a disease or correct a malfunction. These issues are eclipsed by considerations of benefit and harm. In this case, it is an added bonus that the proposed treatment is “entirely consistent” with what Alex wants, and that what Alex wants also accords with what the expert evidence indicates is in Alex’s best interests.¹ It adds to the overall benefit.

The Court’s decision is not about giving in to the unstable preferences of an immature person. In this case, the ultimate determinant of Alex’s wellbeing is his developmental needs rather than his capacity for deciding or his preferences. Part VII of the Family Law Act requires the Court to regard the child’s best interests when making medical treatment decisions. Rather than seeing the proposed treatment as closing off future options, it can be viewed as fostering Alex’s development and opportunities. Alleviating distress and thoughts of suicide benefit Alex’s mental and emotional health. According to his aunt, since commencement of plans to help Alex in his desire to live as a boy he has been happier, with improved behaviour, and “seems to have some direction and some plan for the future”.¹ This case suggests that there is a point at which a condition that causes distress becomes medically significant.

Conclusion

This case demonstrates the importance of weighing the benefits and harms involved in authorising or not authorising treatment. It highlights the value in respecting the developing autonomy of a young person, even though considerations about self-determination may not be the ultimate determinant of what should be done. In relation to the public debate, I believe that critics need better arguments to denounce the appropriateness of the proposed treatment. Critics have failed to recognise the benefit to Alex of having his wish to live as a boy taken seriously. Finally, the benefit that comes from the relief of distress may make us wonder whether the goals of the intervention really matter.

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Competing interests

None identified.

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