

FAMILY COURT OF AUSTRALIA

RE: ALEX

[2009] FamCA 1292

FAMILY LAW – CHILDREN – Special medical procedure – where young person born biologically female diagnosed with gender identity dysphoria – application for permission to perform bilateral mastectomies – application to issue official documentation reflecting the young person’s gender as male – applications granted

B and B: Family Law Reform Act 1995 (1997) FLC ¶92-755

Gillick v West Norfolk and Wisbech Area Health Authority [1986] 1 AC 112

Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273

Minister for Immigration & Multicultural & Indigenous Affairs and B (No. 3) (2004) FLC ¶ 93-174

Re: Baby A [2008] FamCA 417

Re: Brodie (Special Medical Procedures: Jurisdiction) [2007] FamCA 776

Re: Brodie (Special Medical Procedure) [2008] FamCA 334

Re: Inaya (2007) 213 FLR 278

Secretary, Department of Health and Community Services v JWB and SMB (Re: Marion) (1992) 175 CLR 218

APPLICANT: Government Department

1st RESPONDENT: Mother

2nd RESPONDENT: Relative

INDEPENDENT CHILDREN’S LAWYER:

INTERVENOR: Public Advocate

FILE NUMBER: By Court order the file number is suppressed

DATE DELIVERED: 6 May 2009

PLACE DELIVERED: Melbourne

PLACE HEARD: Melbourne

JUDGMENT OF: Bryant CJ

HEARING DATE:

29 and 31 October 2007

REPRESENTATION

By Court order the names of counsel and solicitors have been suppressed

ORDERS

1. There be a declaration made pursuant to section 67ZC(1) and (2) of the *Family Law Act 1975* (Cth), that the Secretary of the Department as the legal guardian of the child 'Alex' pursuant to a guardianship order...be and is authorised to consent to the child undergoing bilateral mastectomies.
2. That the child be addressed as and accommodated by the name 'Alex' and it is requested that as far as is practicable all relevant Government departments and/or agencies and/or educational institutions ... give effect to this order and it is further ordered that any requirements for parental consent for any purposes associated with the use of the name of 'Alex' as far as practicable be dispensed with and that the consent of a signature of a duly authorised officer of the Department be the sole authorisation required including but not limited to the following purposes:
 - (a) Any application for the issue of a passport and/or travel documentation in respect of 'Alex';
 - (b) Any application and/or request for the issue of a Medicare card in respect of 'Alex';
 - (c) Any application to any authority for identification and/or Learner's Permit...; and
 - (d) Without binding the Children's Court it is requested that in any future applications and/or orders the Court consider referring to the child by the name 'Alex' – and it is requested that a duly authorised officer of the Department keep the Independent Children's Lawyer informed of all applications and processes undertaken pursuant to this paragraph.

3. That either or both of a duly authorised officer of the Department and the Independent Children’s Lawyer be duly authorised to communicate with, attend appointments with or without ‘Alex’ and generally facilitate the process of issuing appropriate identifying material referred to in the previous paragraph and to explain these orders to any person or persons considered appropriate and for the purposes of assisting in such matter the duly authorised officer and/or the Independent Children’s Lawyer is at liberty to provide any one or more of the following in support such facilitation:
 - (a) A copy of this order;
 - (b) A copy of the edited Reasons for Judgment of this Court;
 - (c) A copy of any expert report filed in these proceedings.
4. That the appointment of the Independent Children’s Lawyer be extended until 7 days following the attainment of the age of majority by Alex and it is requested that Legal Aid continue to fund the Independent Children’s Lawyer for the purposes of assisting Alex in the specific circumstances of the matter.
5. It is certified that pursuant to Rule 19.50 of the *Family Law Rules 2004* this matter reasonably required the attendance of Counsel and Solicitor appearing as Counsel.

IT IS NOTED:

- A That the Court requests the Applicant through its lawyers and the Independent Children’s Lawyer to raise issues of concern expressed by either or both of them with the Law Reform Commission and the Public Advocate.

IT IS NOTED that publication of this judgment under the pseudonym *Re Alex* is approved pursuant to s 121(9)(g) of the *Family Law Act 1975*

FAMILY COURT OF AUSTRALIA
By Court order the file number is suppressed.

Government Department
Applicant

and

Mother
1st Respondent

and

Relative
2nd Respondent

and

Independent Children's Lawyer

and

Public Advocate
Intervenor

REASONS FOR JUDGMENT

INTRODUCTION

1. This is an application brought by a government department (“the Department”) regarding the performance of a surgical procedure on Alex, a 16 year old person at the date of hearing who was born biologically female but whose core identity is male. The Secretary of the Department who is Alex’s legal guardian sought a declaration from the Court that the Secretary have permission to consent to Alex undergoing bilateral mastectomies. Orders are also sought with respect to official documents so that they may reflect Alex’s gender as male.
2. The application is brought pursuant to a liberty reserved to all parties in earlier orders in this matter made by Nicholson CJ (as he then was) on 13 April 2004 (“the 2004 orders”). The 2004 orders authorised the Department to consent to Alex, who was then aged 13 years of age, undertaking continuous medical treatment for gender dysphoria, including the administration of hormones,

ongoing psychiatric treatment and “any further treatment as deemed necessary by the child’s treating medical clinicians.” However, Nicholson CJ’s reasons for judgment record that at that time the parties did not contemplate Alex undergoing any surgical intervention until he was at least 18 years old. The Department has now brought a further application seeking surgical intervention notwithstanding that Alex is not yet 18 years of age.

3. I made orders on 31 October 2007 granting the application brought by the Department as amended at final hearing. I now deliver the reasons for my decision.

FACTUAL BACKGROUND

4. Pursuant to the 2004 orders, Alex’s full name is [...]. He was born an anatomical female in another county and given his birth name. However, he was subsequently diagnosed with gender identity dysphoria and wished to become male in appearance. An application was consequently brought in this Court culminating in the 2004 orders which provided, inter alia, that the child be known as and referred to as Alex. I shall therefore refer to Alex throughout this judgment by his name or using the masculine pronoun.
5. Alex’s family background is described in the 2004 reasons for judgment and I will provide only a brief summary here. Alex felt rejected by his mother from a very young age. Alex’s father died when Alex was 5 or 6 years old. Alex’s mother subsequently re-married and Alex, his mother and her new husband moved to Australia in 2000. The following year a child protection alert was made and the Department found that Alex’s mother had rejected Alex and did not want to see Alex again. The Department also reported Alex’s wish to be male. In 2001 the Department was granted guardianship of Alex by the Children’s Court and Alex began living with his relative. In 2002 Alex lived in foster care for three months, but then returned to live with his relative and was still living with her at the time of the hearing before me. Alex’s mother continues to refuse to be involved in Alex’s life and did not participate in the 2004 hearing or in the hearing before me. The Department remains Alex’s guardian.
6. At the time of hearing Alex was almost 17 years of age. He began hormone therapy to suppress the development of secondary female characteristics in 2004. Sometime around or after his 16th birthday, Alex commenced treatment with testosterone. At the time of hearing Alex was enrolled in Year 10. Alex is keen to complete his Victorian Certificate of Education and pursue a career. He will be undertaking a training course in 2008 to further his career goals. Alex continues to live with his relative.

HISTORY OF PROCEEDINGS

7. These proceedings were initiated on 12 December 2003 by way of an application by the Department seeking final orders in the following terms:
- (1) That the Family Court of Australia make a declaration pursuant to sections 67ZC(1) and (2) [of the *Family Law Act 1975* (Cth)] that the Secretary of the Department as legal guardian of the child 'Alex' is authorised to consent to the following medical procedure on behalf of the child:
 - (a) that the child be administered a combination of oestrogen and progestogen on a continuous basis until the child turns 16;
 - (b) ongoing psychiatric assessment;
 - (c) that the further hearing of this matter be adjourned to 6 months before the child's 16th birthday to consider authorisation to consent to the child being treated with an LHRH analogue and testosterone administered either in oral form, by monthly injection or by 6 monthly subcutaneous implant; and
 - (d) any other order that this Honourable Court deems met (sic).

8. Nicholson CJ described the effect of the treatment sought as follows:

20. Oestrogen and progestogen are female hormones. The effect of continuously administering a combination, which is in effect a contraceptive pill without the usual one week break, would be to suppress [Alex's] menses.

21. LRHR analogue is a drug which would suppress the release of gonadotrophins from the pituitary gland. All ovarian menstruation would be suppressed for as long as [Alex] continued the treatment. Testosterone is a male sex hormone which would begin the process of masculinisation. It would have certain irreversible effects such as deepening of [Alex's] voice, the promotion of facial and body hair, muscular development and enlargement of the clitoris.

9. The application also sought various interim orders including that service upon the child's mother be deemed to be effected by posting documents to her last known address. An order to this effect was made and the documents were duly sent but the documents were then returned indicating that the mother was not known at that address. Service on the mother was later dispensed with and the mother did not participate in the proceedings.
10. Directions were made in December 2003 including that the Court be closed during proceedings pursuant to s 97(2) of the *Family Law Act 1975* (Cth) ("the Act") and for the appointment of a Child Representative. A copy of the documents was also sent to the Human Rights and Equal Opportunity

Commission (“HREOC”) which was invited to consider intervening in the proceedings. HREOC subsequently sought, and was granted, leave to intervene.

11. The participants at the hearing in early 2004 were thus as follows:
 - a) the Department as applicant;
 - b) Alex’s mother named as first respondent although she did not attend or participate;
 - c) Alex’s relative as second respondent;
 - d) HREOC as intervenor; and
 - e) the Child Representative.
12. A representative of the Public Advocate also attended as an observer at his Honour’s invitation. That Office did not seek to intervene in the proceedings.
13. Evidence was adduced from:
 - a) Alex’s caseworker at the Department;
 - b) an Associate Professor at a university Department of Psychiatry;
 - c) an Associate Professor at a university Department of Paediatrics;
 - d) an Australian consultant psychiatrist;
 - e) an English consultant child and adolescent psychiatrist;
 - f) the Head of a university Department of Paediatric and Adolescent Gynaecology;
 - g) the principals of Alex’s primary school and intended secondary school; and
 - h) a probationary psychologist in a counselling relationship with Alex.
14. The evidence confirmed that although Alex had no ambiguity in sexual characteristics, normal female chromosomes, hormone levels typical of an adolescent female and female reproductive organs, Alex nevertheless had a “long-standing, unwavering and present identification as male.” Alex identified himself using a male name, dressed in boy’s clothing and adopted a male hairstyle. Alex refused to use female toilets or line up in the girls’ line at school. Alex played in boys’ sporting teams and responded angrily when referred to as a girl. Alex had reported being distressed about being trapped in a girl’s body and having suicidal thoughts.
15. All of the medical experts supported a graduated treatment regime commencing with the administration of oestrogen and progestogen and progressing to an analogue. There was some disagreement between experts whether testosterone should be administered at the same time as the analogue or at some later time.

16. In final submissions Nicholson CJ was urged to make orders providing for all of Alex’s proposed treatment, rather than to adjourn the proceedings for further consideration as sought in paragraph 1(c) of the initiating application. His Honour concluded that all of the evidence before him supported such an intervention. His Honour found the evidence indicated that hormonal treatment would be in Alex’s best interests and would benefit Alex’s mental and emotional health. His Honour consequently made the following relevant orders:

- (1) That pursuant to Section 67ZC (1) and (2) of the *Family Law Act 1975* the Secretary of the Department as legal guardian of the child Alex (“the child”)...is authorised to consent to the child undertaking continuous medical treatment for his diagnosed gender dysphoria under direct supervision of his treating medical clinicians and in consultation with the child; including but not limited to the following procedures:
 - (a) the administration of a combination of oestrogen and progestogen on a continuous basis for a length of time;
 - (b) ongoing psychiatric treatment;
 - (c) treatment with an LHRH analogue and/or testosterone in a form and sequence as determined by his treating medical clinicians and the child; and
 - (d) any further treatment as deemed necessary by the child’s treating medical clinicians.

- (2) That the child born ... be known as, addressed as and accommodated by the name Alex and it is requested that all relevant Government departments and/or agencies give effect to this order and it is further ordered that any requirements for parental consent for any purpose associated with the use of the name of the child be dispensed with and that the consent of signature of a duly authorised officer of the Department be the sole authorisation required including but not limited to the following purposes:-
 - (a) Any application to register a change of name.
 - (b) Any application for the issue of passport in respect of Alex.
 - (c) Any application and/or request for the issue of a Medicare card in respect of Alex.
 - (d) Any application to any authority for identification and/or Learner’s Permit.
 - (e) Without binding the Children’s Court it is requested that in any future applications and/or orders the Court consider referring to the child by the name Alex– and it is requested that a duly authorised

officer of the Department keep the Child Representative informed of all applications and process undertaken pursuant to this paragraph (2).

- (3) That as and when requested by a duly authorised officer of the Department, the Child Representative be duly authorised to communicate with, attend and generally facilitate the issue of the identifying material referred to the previous paragraph and to explain these orders to appropriate persons.
- (4) All extant applications be adjourned to the Chief Justice of this Court for the purpose of an appointment of a Judge Case Manager should any further application be made.
- (5) Reserve liberty to apply to any party and further reserve liberty to apply on an urgent basis to intervene in these proceedings to:-
 - (a) the Education Authority.
 - (b) the Principal of the School from time to time currently attended by the child.
 - (c) the Public Advocate.

17. Although no party sought that Alex be able to change his gender as recorded on his birth certificate, his Honour noted that many State laws required a person to have undergone surgery before making any such change. His Honour urged those legislatures to reconsider their position on the basis of submissions made by HREOC and his Honour's own research regarding human rights and discrimination instruments.

THE CURRENT APPLICATION

18. The current proceedings were initiated by a facsimile request from the Department (in its capacity as Alex's guardian) to my associate on 11 July 2007, seeking the Court's leave on behalf of Alex for a further special medical procedure. The Department advised that the former Chief Justice had granted all parties liberty to apply to re-list the matter on reasonable notice, pursuant to paragraph 5 of the 2004 orders. The application came before me for mention pursuant to paragraph 4 of those orders, which provided that all extant applications be adjourned to the Chief Justice of the Family Court for the purpose of the appointment of a Judge Case Manager, should any further application be made.
19. A mention hearing was held on 13 August 2007 with the Department, the Independent Children's Lawyer ("ICL") and HREOC in attendance. There was no appearance by Alex's mother or relative. However, counsel for the Department handed up a typewritten, signed letter, purportedly from Alex's relative and addressed to me. It read:

I have been informed by Legal Services, the Department that a mention hearing regarding my nephew will be heard before you on Monday 13 August. I regret that I am unable to attend.

However, I wanted to indicate to the Court my support of [Alex's] request for bilateral mastectomies and his application for a change of gender on his birth certificate. I am very concerned for [Alex's] wellbeing and only want to see him happy.

20. At the commencement of proceedings I inquired of the ICL whether he wished Alex to sit with him at the bar table. Alex subsequently joined the ICL at the bar table and remained there for the duration of the hearing.
21. Counsel for the Department handed up a short minute of orders sought in the following terms:
 - (1) A declaration pursuant to section 67ZC of the Family Law Act that the Secretary of the Department as the legal guardian of 'Alex' ... is authorised to consent to the following medical procedure on behalf of the child:
 - (a) Bilateral mastectomies
 - (b) Ongoing psychiatric assessment.
 - (2) The signature of a duly authorised officer of the Department be the sole authorisation required for an application for the issue of a recognised details certificate from the Registry of Births, Deaths and Marriages.
 - (3) Reserve liberty to apply to any party.
 - (4) Any other order this Honourable Court deems fit.
22. I sought the views of the applicant and the ICL as to the evidence to be called. It was agreed between them that evidence should be adduced from the medical specialists responsible for Alex's treatment, namely Professor W, Associate Professor P and the surgeon who would undertake the procedure if the application to perform a bilateral mastectomy was granted. They also, appropriately, proposed to call evidence from Alex's school, his case manager and the Departmental officer responsible for Alex's care pursuant to the guardianship order.
23. After discussion with applicant and the ICL, I identified three issues to be addressed in the expert evidence. They were:
 - Why surgical intervention is now proposed, given that Alex is less than 18 years of age when in any event he could make his own decision without needing the consent of the Court in a year's time;
 - The urgency associated with the proposed surgical procedure; and

- Alex's views and level of understanding about the nature and effect of the proposed procedure.

24. I also record that the ICL was formally instructed by Alex to convey his views to the Court. The ICL informed me that Alex wished to tell me: "I know what I'm doing. I won't change my mind." The ICL further said:

There was one other issue. Alex is also wanting your Honour to understand that his current intentions and research are, as he put it, he will have the top done, but he will never have the genitalia and the lower region subject to surgery. He did ask me to specifically convey that to the court this morning.

...

He has just asked me if I would draw to your Honour's attention...that he has widely researched matters himself and has also entered into many professional discussions, but it's an ongoing process. He is researching, has researched and will research.

I took careful note of both statements.

25. The orders I made at the conclusion of the hearing relevantly included:

- That the Court be closed for the duration of the proceedings to persons other than those connected with the case, including but not limited to the parties, their legal representatives and witnesses.
- That an account of the proceedings, including the names of counsel, whether in an anonymised form or otherwise, not be published unless in a form authorised by the Chief Justice.
- That the Department file and serve an application in a case setting out with particularity the orders sought within seven days.
- That service of the application on Alex's mother be dispensed with.
- That the Public Advocate be invited to participate in the proceedings and to make submissions in support of the application or otherwise to act as contradictor.
- That the application be listed for a directions hearing on 27 September and for final hearing on 29 and 30 October 2007.

26. In accordance with those orders the Department filed an application in a case on 20 August 2007 seeking orders in the same terms as those sought in the minutes handed up on 13 August.

27. Correspondence was sent to the Public Advocate on 16 August 2007 inviting her to participate in the proceedings and this invitation was accepted.

28. Thus, at the directions hearing on 27 September there was in attendance: counsel instructed by the Department, appearing on behalf of Alex, Alex's relative and the second respondent appearing in person, the ICL, a representative of HREOC, appearing as intervenor, and a representative from the Public Advocate, also appearing as intervenor. The Court was also assisted by a staff member from the Children's Hospital and by Alex himself, who sat next to the ICL at the bar table for the duration of the directions hearing.

29. I made orders that the following witnesses give evidence in the proceedings:

- Mr C
- Professor W
- Associate Professor P
- Ms C
- Ms M
- Ms A

Mr C is a surgeon to a Gender Dysphoria Clinic at a major hospital. Professor W is a Senior Endocrinologist with a children's hospital. Associate Professor P is a Consultant Psychiatrist at a children's hospital mental health service. Professor W and Associate Professor P gave evidence in the proceedings in 2004 and have an ongoing treatment role with Alex. Ms C is a Child Protection Practitioner with the Department. Ms M is a Case Manager with a youth services provider. Ms A is the Student Wellbeing Coordinator at Alex's school.

30. I ordered that witnesses file and serve any affidavits or reports on which they sought to rely by 10 October 2007, such reports or affidavits to be filed in my chambers as a further safeguard of Alex's privacy. The Deputy Principal Students from the secondary school Alex attends and a representative from the Education Authority were granted leave to attend the hearing to support Alex and participate in the hearing as required.

31. I also granted HREOC's application to withdraw from the proceedings. In so doing I noted that HREOC had placed written submissions before the Court in 2004, when the application for the administration of oestrogen and progesterone to Alex was first before the Court. I otherwise listed the matter for hearing on 29 and 31 October 2007. I also requested that an interpreter be made available to Alex's relative for the duration of the hearing.

ARRANGEMENTS FOR THE FINAL HEARING

32. The application is a highly sensitive one and I was concerned to safeguard Alex's privacy, as well as ensure that the evidence was elicited in a way that would best assist me in reaching a decision. I approached the final hearing as a continuation of a Less Adversarial Trial and adopted the principles contained in

Division 12A of the Act for the hearing of the application, with additional features.

33. Alex was invited to sit next to the ICL, and did so. I told Alex at the commencement of the proceedings that he had liberty to speak directly to me if he wished. In general however, Alex chose to communicate his views through the ICL.
34. The hearing proceeded as a dialogue rather than an adversarial contest and I often intervened to ask questions of witnesses and to clarify particular matters to my own satisfaction. I also asked the three medical witnesses to give their evidence concurrently rather than sequentially, to assist me to obtain a more complete picture of the issues involved from the perspective of a surgeon, an endocrinologist and a child and family psychiatrist. I found this approach to be most beneficial.

THE EVIDENCE IN THE PROCEEDINGS

The medical evidence

35. The Department requested reports from Mr C, Professor W and Associate Professor P. The three medical specialists were asked to consider and respond to the following questions:
 - (1) Is it appropriate that the proposed surgery take place before Alex turns 18?
 - (2) What is your understanding of Alex's views and level of knowledge of the surgery and its repercussions?
 - (3) To what extent, if any, is your opinion influenced by Alex's current view that he will not be seeking surgical alteration of his genitalia to reflect his chosen gender identity?
36. Mr C prepared a report dated 24 September 2007. Mr C reported that following the decision to permit the administration of oestrogen and testosterone, Alex has been prescribed the drug Reandron every three months with excellent results. Mr C stated that, prior to treatment being commenced, Alex had developed a moderate amount of breast tissue, which caused him great embarrassment. Mr C said that Alex was hiding his breasts by use of a compression garment and wished to undertake a mastectomy to give his chest a male appearance. Mr C supported Alex's position on the basis that it would put Alex at ease in social interactions and enable him to wear appropriate male clothing. Further, Mr C opined that it would be "cruel" to delay breast reduction surgery until Alex turned 18 years of age, as this could result in further breast development and increase the possibility that Alex would require more extensive surgery. Mr C's evidence was that, in the absence of any further breast development, the surgery contemplated for Alex would use a

peri-areola approach, which would produce only minimal scarring. Mr C said that Alex understood both the limitations of the surgery and the fact that minor adjustment surgery may be required in the future “very well.” Mr C summarised his position as follows: “I have strong feelings that it would be cruel to Alex to refuse him breast surgery at this stage in his life as a refusal can only have a negative outcome on his personal development, social interactions and relationships.”

37. Associate Professor P’s report was dated 27 September 2007. In that report, Associate Professor P said that he has known Alex since December 2002. Associate Professor P described Alex as a “large, well built person who is pleasant, engaging and cooperative”, with no evidence of major depressive or psychotic symptoms and as a person who is respected and well-liked in his peer group. Associate Professor P compared Alex’s current state of mind with that before Alex started living as a male, when Alex suffered from mood fluctuations; became sad and depressed and on occasion contemplated self-harm at the prospect of having to live as a female. Associate Professor P stated that Alex attends regularly at a gym and has built up his chest muscles, which has minimised the appearance of breasts, to the extent that it is not obvious when Alex is clothed that he has breasts. However, Associate Professor P said Alex found the presence of female breasts to be a “major and distressing preoccupation”. Associate Professor P’s view was that Alex found his breasts to be “very inhibiting” of his ability to develop and maintain platonic and romantic relationships with girls, due to Alex’s fear that they would find out his body is “not as it seems”. Associate Professor P described Alex as feeling that his life is extremely inhibited by his breasts, in that he cannot go swimming or undertake sport because of them and that his social life is restricted. Alex is described as having been “persistent and consistent” in his wish over the past two years to have his breasts removed, a wish Associate Professor P describes as not having wavered. In concluding his general discussion, Associate Professor P described Alex as “a young man with considerable strength and maturity of insight” who has made “a very positive adjustment to his life as a male.”
38. Associate Professor P then turned to the specific questions posed by the Department. In summary, his response was:
 - (1) Alex would experience significant advantages by having a bilateral mastectomy as soon as possible. His sense of identity and self is very much a part of his capacity to develop relationships with girls. For Alex, the removal of breast tissue would allow him to confidently develop his identity as a male and have critical social interactions with girls. The disadvantage to Alex is minimal. The likelihood of Alex changing his mind is “extremely remote.” Even were Alex to change his mind, the disadvantages would be minimal as Alex could have

reconstructive breast surgery and use means other than breastfeeding to feed a baby. Alex has considered the potential feeling of loss arising from a bilateral mastectomy in a way that is as compatibly as possible with how Alex anticipates he will feel as an adult.

- (2) Alex has had meetings with numerous medical specialists and health professionals. Alex has had extensive discussion with Mr C about the bilateral mastectomy process and implications. Alex “clearly understands the implications of the sort of plastic surgery proposed.” Alex has a realistic understanding of the risks and benefits of genital surgery. Alex remains committed to having “mild” genitalia constructed at a later stage, should the technique available be improved, but can also imagine living as a male and having a relationship with a female partner without genital surgery. Alex’s decision not to have genital surgery in the foreseeable future does not detract from his understanding of and commitment to having a “male like” chest and bilateral mastectomies.

Associate Professor P concluded his report with the following statement:

Although Alex is not yet 18 years old I believe he does understand the process of bilateral mastectomy and the advantages and disadvantages of this procedure at this time. I believe it will enable him to have improved social relationships and a high level of self esteem and confidence. I believe he understands the nature of the surgery itself and has remained consistent in his desire to have his breasts fashioned into male breasts.

39. Professor W prepared a report dated 21 September 2007. Professor W structured his report around the three questions posed by the Department. In response, he stated:

- (1) Alex will go into Year 11 at school and will be at school for two more years. His situation will be no different in 2009, when he turns 18, than it will be in 2008. Alex sees the benefits of having breast reduction surgery at the age of 17, rather than waiting until turning 18, as:

- Being able to participate in school sporting activities without the fear that his breasts will be able to be seen under light clothing
- Being able to fraternise with his friends and wearing the same clothes as them, without the worry that his breasts will be discovered during accidental physical contact
- Being able to have physical contact with girls (ie. hugging) without his breasts being accidentally discovered
- Being able to dress in similar casual clothes to other students when attending vocational training
- Being less distracted and having his choice of gender confirmed

- Being confident and secure in seeking part-time employment
- (2) Alex understands that the surgery involves the permanent removal of all breast tissue. He understands that the operation will involve 1-2 days' hospitalisation, that drainage tubes may be inserted after the operation, and that he will have to wear a pressure vest for some days after the operation. Alex knows the surgery will make it impossible for him to breast feed and that his breasts could be restored with implants, but does not see either option as relevant to his situation.
 - (3) Alex distinguishes between breast surgery and genital surgery. Breasts are visible through clothing but genital appearance is not. Alex has no wish to undergo genital surgery at the present time but considers breast tissue removal to be essential to his feeling like a "complete man".

Professor W concluded:

From my dealings with Alex he remains unwavering in his male gender identity and in his desire to have breast surgery.... I fully support him in his desire to have surgery when he is 17 rather than 18. He needs to have the surgery as early as possible in the summer, after school has finished, to allow privacy and a good period for wounds to heal.

40. All three experts gave evidence at the final hearing. As earlier recorded, I agreed with the sensible proposal put forward by counsel for the applicant and the ICL that the evidence proceed in the form of a round table discussion, with witnesses conjointly giving evidence on specific issues, rather than a more formal series of questions posed to witnesses individually. I found this approach to be constructive and informative.
41. I first sought clarification from the witnesses as to nature of the procedure proposed to be performed on Alex. Mr C, who told the Court he has extensive experience in gender reassignment surgery over a 30 year period, described the operation as very similar to that which would be performed on a male who has, with the aid of steroids or otherwise, developed excess breast tissue. The procedure involves a small incision around the aureole, of approximately half its circumference, from which breast tissue is removed by a combination of surgery and liposuction. Mr C told the Court that the wounds may have to be drained overnight, although this would probably not be required, and would then be dressed. Sutures would be removed in around a week's time. Alex would need to wear a firm compression vest for three to four weeks following surgery. Mr C described the procedure as involving "a very straightforward recovery most of time" and, in response to a question from the ICL, confirmed that domiciliary nursing would not be required during the recovery period. Mr C further confirmed that breast tissue, once removed, does not grow back. He also informed me that the time Alex has already spent in building up his upper body would assist the post-operative appearance of his chest.

42. The witnesses reaffirmed in their oral testimony that Alex has an appropriate understanding of the procedure. Associate Professor P responded to a question from the ICL as to research Alex has undertaken into the proposed surgical procedure in the following terms:

I don't know of Alex having looked on the web regarding the details of the surgery, but I know he gave a very good account – at least as I would have thought it had been given to him – of his discussion with Mr C about what was involved in the surgery. We, too, have had discussions about, from a psychiatrist's perspective, the physiology and anatomy of things, not always as expert as a surgeon might have, but he's always been informed, and I thought well able to grasp the concepts involved in how the body works and what would be involved in changes that were proposed.

Associate Professor P explained that Alex has examined books written by female to male transgender people, including photographs of breast surgery. Alex has also seen a photo essay of ten women who have become men and from this, has a sense of how he will look after surgery.

43. Mr C confirmed that his impression of Alex is that he is “very realistic” about things and that he has “a good understanding” of the procedure. Professor W said that, if the Court gives its approval for a bilateral mastectomy to be performed, Alex will have the opportunity to speak to a person who has undergone the procedure before having the surgery.
44. I then articulated my main concern, that being the benefit to Alex of the surgery being performed before he turns 18 years of age. I sought evidence from Associate Professor P on this issue. Associate Professor P responded:

As I said in my report, I believe that Alex will benefit significantly from it at the moment. I've known him for some years now, and at no time have I experienced him to waiver really from conviction that he has a male identity, and for the last two or three years, the issue of breast reduction has been a major one, and usually precipitated by issues around mixing with peers, going swimming, “I want to go swimming, and I can't. That's been a persistent sustained thing.

Associate Professor P was asked by the ICL to speculate about the effect on Alex if the Court decided not to grant permission for the surgery to be performed and consequently Alex had to wait until he turned 18 for a bilateral mastectomy. Associate Professor P stated that in his view, Alex is “quite a strong character” and although a delay in surgery would represent a major developmental setback for Alex, he would “probably” be able to cope with it. However, Associate Professor P emphasised that delaying surgery until Alex turned 18 years old would be “very distressing” for him. Associate Professor P said that Alex was very distressed when he was in primary school and was preoccupied with thoughts of self-harm and suicidal ideation. Associate

Professor P told the Court that Alex has had periods of despondency since he was 11 years of age and it is conceivable that, were surgery to be postponed until he turned 18, he could return to that level of depression and thoughts of self-harm.

45. Associate Professor P's evidence was that one of Alex's difficulties is feeling that he has to "live a sort of lie", in that his friends do not know his situation. Associate Professor P told the Court that he thought the breast surgery would be a further step in assisting Alex to reduce feelings of alienation from his peers, which Associate Professor P said he felt underlies Alex's feelings of sadness and depression. Professor W further told the Court that in discussions with Alex, it is apparent that Alex feels that the longer he has to "pretend to be someone else", the more likely it is that someone will find out and make a "disastrous" revelation.
46. Associate Professor P was directly asked by counsel for the Department whether he thought that having the surgery now, as opposed to in twelve months' time, would make an appreciable difference to Alex in terms of his development of relationships. Associate Professor P responded affirmatively. He said:

Yes, I think it will, because the last years at high school are ones where you have quite a close and intimate set of relationships with peers, that at the same time is relatively well structured. Once you leave school, you're sort of on your own in terms of forming relationships, and building up a peer network. So I would think there'd be advantage over this next period of time over deferring it further.

...

...although I'm not an expert on current literature, there's been a lot of general psychological emotional studies looking intensely at peer relationships in school, and we know that that process continues from late middle childhood, from 11, 12, 13, and continues on after when people leave school, but I think there is evidence that that last two years of secondary school are very intense ones in terms of forming identity and practising relationships.

47. A relevant matter to whether or not the Court should authorise the performance of a bilateral mastectomy on Alex prior to his turning 18 is the possibility or likelihood of Alex changing his mind about wanting his breasts removed. This issue was also canvassed with the three medical experts. I specifically asked Associate Professor P to comment on the question of whether Alex would be likely to change his mind about the procedure in the next 12 months. Associate Professor P responded:

I can see no evidence that that's likely, that he would change his mind in the next 12 months. As I say, we've had very detailed discussions about his body and his gender, and at no time have I seen any vacillation from his belief that he should live his life as a male, and he's done so throughout all of his secondary schooling which requires considerable commitment and effort. As I say, I've not seen anything that would indicate that he would change his mind. But having said that, I can't say that he absolutely won't.

Associate Professor P confirmed that Alex's perception of himself as unequivocally male is consistent with other cases of gender identity dysphoria of which he is aware.

48. Professor W told the Court that he has spoken to a Dutch professor of gender development and psychopathology who has considerable experience in assisting young people presenting with gender identity dysphoria. Professor W said he had been informed by the Dutch professor that if a young person presents with gender dysphoria after puberty is well under way, as Alex did, they "literally" never change their mind. Professor W explained that although vacillation may occur in younger children who have not reached puberty, that is not the case for those who present during or after puberty.
49. Associate Professor P informed the Court that Alex has reflected, hypothetically, on what might happen if a person who had had a double mastectomy performed subsequently changed their mind. Alex concluded on this hypothetical basis that the issue of breast surgery would not necessarily be a significant one because a person could have breast implants and some form of restorative surgery. Associate Professor P said that he considered this to be a mature approach by Alex towards a significant and difficult decision.

Evidence of welfare, teaching and support staff

50. At the hearing on 29 October 2007, counsel for the applicant sought leave to call evidence from Ms P, Alex's new protective worker, as to the proposal to apply to the Children's Court for an extension of the guardianship order and funding arrangements for the surgery if the Court consented to it being undertaken. I granted leave for Ms P to give evidence. The witnesses gave evidence in the following order:

Ms C

51. Ms C, a Child Protection Practitioner with the Department, swore an affidavit on 9 October 2007. Ms C deposed to the fact that the Secretary of the Department is Alex's legal guardian.
52. Ms C's affidavit states that Alex's daily case management is contracted to a youth services provider and a Community Care Team meets on a regular basis to provide the Department with direction as to the issues that arise with Alex's care.

53. Ms C was advised by the youth services provider in 2007 that Alex had requested bilateral mastectomies “because his current condition is impinging on his daily life.” Ms C’s affidavit states that Dr W, Alex’s treating endocrinologist, had prepared a letter in support of the procedure, which was forwarded to Ms C. The letter is not annexed to Ms C’s affidavit.
54. Ms C states that she sent an e-mail to Dr W advising that the Department required the opinion of the Children’s Hospital Ethics Committee and all medical professionals involved with Alex’s care, prior to making any application for a declaration that the Department be permitted to consent to the operation on Alex’s behalf.
55. Ms C deposes to having received a letter from the Chair of the Children’s Hospital Clinical Ethics Committee stating that it was the view of the Committee that it was in Alex’s interests to have surgery at age 17 rather than age 18. A copy of that letter is not annexed to Ms C’s affidavit.
56. Ms C gave oral evidence by telephone, in which she confirmed the contents of her affidavit. She further confirmed that she has been employed by the Department since 2004 and worked in the capacity as liaison worker for the contracted case management agency, the youth services provider, from March 2006 to August 2007. During that period she met Alex “on a couple of occasions only” and Alex’s relative “on one occasion only.” Ms C also told the court that did not attend the meetings of Alex’s community care team, although she received notes or minutes of the care team meetings.

Ms P

57. Ms P, a child protection worker employed by the Department and Alex’s current liaison worker, then gave evidence. Ms P had not prepared a report nor sworn an affidavit in the proceedings.
58. Ms P informed the Court that she liaises directly with Ms M, the case manager with the youth services provider, about Alex’s progress. Meetings take place by telephone or in person on a weekly basis.
59. Ms P was asked by the Department’s counsel about Alex’s annual best interest plan review meeting. Ms P advised that the purpose of the meeting is to decide whether or not the Department needs to stay involved in a young person’s life as a guardian or custodian. Ms P described the meeting as “the most significant meeting for the young person in relation to ongoing the Department involvement.”
60. Ms P informed the Court that Alex’s current guardianship order was due to expire. Ms P then told the Court “it was agreed at the meeting that it was in the best interests of Alex to extend the guardianship order up until the end of his 18th birthday.” Ms P advised that the application had not been filed with the

Children's Court but that it would be made prior to the expiry of the current order.

61. The Department's counsel asked Ms P whether there had been any discussion about how the surgery was to be funded, should the Court give permission for it to be performed. Ms P replied:

Yes, it was agreed that the department – we received a quote of approximately \$8000 for the surgery and associated costs, and it was agreed at that meeting that the department would pay that amount, and that Alex would contribute \$500 to the cost of the surgery.

62. The ICL asked Ms P whether Alex would be provided with support by the Department after he turns the age of 18 in 2009, as Alex will be undertaking Year 12 studies during that year. Ms P indicated she was not sure but that the matter could be discussed with the case planner to assess whether it would be in Alex's best interests for the Department to continue to support him in 2009, after he attains his majority.
63. The ICL then turned to the matter of obtaining supporting identification for Alex's identity as a male, such as a learner driver's permit and an ID card. Ms P replied that that "would probably be the role of the case manager. As the liaison person, I could also assist." Ms P also replied affirmatively to the question of whether she would be able to assist in facilitating the issue of a passport to Alex reflecting his gender as male.

Ms M

64. Ms M swore an affidavit on 9 October 2007. In her affidavit, Ms M stated she is employed as a case manager with the youth services provider and has been working as Alex's case manager since April 2007. The relevant clauses of Ms M's affidavit are as follows:

4. [In] May 2007 I accompanied Alex and his [relative]...to meet with Professor W. The reason for our meeting was to discuss Alex's decision to have bilateral mastectomies ("the surgery"). This was the first occasion when I became aware of Alex's intention to undergo this surgery. There have been subsequent occasions when I have had the opportunity to discuss with Alex his motivations for the surgery.

5. On 8 June 2007 I received an email from Alex who informed me that he was upset with his [relative] as she had told Alex that he could not have the operation without her permission. I emailed my response to Alex that the Department ("the Department") is his legal guardian; that in my opinion his [relative] may be finding the situation difficult to deal with; and that [the youth services provider] continued to support him and his [relative].

6. On 10 July 2007 Alex and myself met with (insert name) from the Department at the [youth services provider] office. We were informed by (the Department rep) that the Department had made an application to the Family Court regarding the surgery; were willing to support Alex's decision by having the surgery and, if approved, would pay for the surgery. Further discussion included comments by Alex about the importance of the operation on his life as a 16 year old male. He spoke of his desire to live a 'normal' life as a male including going to the beach and playing sport; and to be able to have a girlfriend.
7. On 25 July 2007 (the Department rep) and myself met with Alex and his relative to discuss the Family Court application for the surgery. During this meeting [Alex's relative] indicated her support for the surgery and her desire to have Alex live a fulfilled life as a male. I am of the opinion that [Alex's relative] provides a stable and safe environment for Alex.
8. On 31 July 2007 Alex and myself met with the director of a speciality gender dysphoria agency. During this conversation the Clinic offered to support Alex and his family before and after the operation.
9. On 22 August 2007 Alex and myself met with Dr C, plastic surgeon. The conversation focused on the procedural details of the surgery. I believe that Alex fully understood the contents of this conversation and the consequences of the surgery.
10. As a result of my lengthy and numerous conversations with Alex, I am of the view that Alex is serious and committed about his decision to have the surgery.

Ms M confirmed in oral evidence that "the Department rep" she and Alex met with on 10 July and 25 July 2007 was Ms C.

65. In examination, Ms M was asked what type of assistance she provides to Alex. Ms M described it as "a little bit of everything", including medical needs, transporting Alex to appointments, financial and educational assistance, recreational support, and general emotional and practical needs. She described Alex as "very cooperative. With regard to attending any appointments, anything that needs to be done, Alex is there."
66. Ms M confirmed that if surgery were to be approved, she would assist Alex with practical arrangements for the surgery and with post-operative care. This would include taking necessary steps with the hospital and hospital staff to ensure Alex's situation was not disclosed to third parties and his privacy protected.

67. Ms M stated she would be available to assist Alex with enrolling in the vocational course in 2008 and settling in to a new routine.
68. She further stated that the youth services provider will continue to be involved in providing case management for Alex if his guardianship by the Department is extended to his 18th birthday and that she would assist Alex in making representations to various authorities regarding the issue of appropriate identification as male and support Alex in that process.
69. Ms M advised that the youth services provider normally provides three month after-support when a young person ceases to be subject to the custody or guardianship of the Department. In Alex's case however, she said "...being in year 12, should he require longer than three months, we'd be able to pursue that."
70. The ICL asked Ms M whether Alex confided in her when travelling to medical or other appointments. Ms M replied that "it depends on the day Alex has...had" but she did recall certain occasions upon which Alex had discussed issues arising from his particular situation with her. When asked to relate any specific instances to the Court, Ms M said:

I guess we've spoken about Alex's frustration at not being able to do certain things that I guess his friends can with regard to sport...

...

I guess in regard to recreation at school and getting involved in team sports. That's something that he's unable to participate in, and I guess it's more outside of school socially when the question of girls coming in and possible relationships with girls, that's sort of been the general nature of the conversation.

71. Ms M was asked to reflect upon Alex's likely response if permission to perform bilateral mastectomies was not forthcoming. Ms M's response was unequivocal:

In my opinion, I think he would be devastated. He would be devastated because he has expressed his desires to have the surgery, and I guess like I said in my report, he wants to live a normal life as a male. So I think he would be devastated.

72. Ms M was asked by the representative of the Public Advocate whether Alex had ever expressed any reservations about having the surgery. She replied "To me he hasn't."
73. Alex's relative was asked whether she had any questions of Ms M. Alex's relative made her response through her interpreter in the form of a statement rather than a question. She said "In the past times, you've helped the family

out and Alex greatly, and I hope that the court can help out with the operation, because it makes him unable to sleep.”

Ms A

74. Ms A, the Student Wellbeing Coordinator at Alex’s school, prepared a helpful report for these proceedings. Ms A described her role as a “support person and confidante” for Alex, a role she has filled since the beginning of the 2005 school year.
75. Ms A’s evidence was that she holds weekly or twice weekly meetings with Alex to:
 - monitor his emotional and academic needs;
 - provide support with any social issues that may arise to avoid disclosure of his birth gender and to assist in respecting Alex’s privacy; and
 - provide an outlet for Alex to discuss the progression of his gender change.
76. Ms A’s report states that Alex’s case has required regular consultation with the Deputy Principal to support his involvement in normal school activities. Ms A has also liaised with Alex’s case manager at the youth services provider and attended meetings with Alex’s specialist medical team at the Children’s Hospital.
77. Ms A’s report includes comments from Alex’s teachers, gleaned from Alex’s most recent interim academic report. In these, Alex is variously described as “positive”, “highly motivated”, “cooperative”, “punctual” and “polite”.
78. Ms A’s assessment of Alex’s social presentation is that he is a bright, cheerful boy who is comfortable amongst his male and female peers. Ms A reports that Alex attends a gymnasium, where he lifts weights to make the appearance of his breasts less obvious. Alex also wears a singlet under his school shirt to disguise his breasts and wears shirts in larger sizes. Ms A reported that Alex has a small core group of male friends with whom he spends time with out of school hours. Alex is developing an interest in girls and, according to Ms A, he has stated feeling some pressure from friends to ask a girl out. Alex has told Ms A this may be possible after he has undertaken chest surgery. Ms A reports that Alex is keen to participate in school social events but that he is aware of the risk of being ‘discovered’ without breast surgery.
79. Ms A’s report states that Alex commenced taking testosterone in 2007, which has caused observable changes to Alex’s appearance including the deepening of his voice, the growth of facial hair and muscular development. The report goes on to state that Alex has been excited by these changes, which have assisted him to feel more comfortable with his peers and has given him a “strong sense of masculinity.” Ms A observed that there has been a general improvement in

Alex's mood since commencing hormone treatment and that he is more positive about his future and his academic and career goals.

80. Ms A's report then goes on to relate an account of a meeting between Alex and the ICL, at which she and the representative from the Education Authority were present. Ms A's report records that the ICL raised with Alex what he thought he would achieve as a consequence of having breast reduction surgery. Alex indicated that he hoped to improve his social life and obtain the necessary paperwork identifying his gender as male. He is reported by Ms A as saying "I don't want to live in the middle, do you know what that's like?" Alex told the ICL that he wanted to be able to take his top off at the beach and to have stay-overs at friends' homes, neither of which he is able to do at present.
81. Ms A's report states that Alex wishes to pursue a hospitality career and is hoping to work in the field of customer service. Alex's view is that he will need a male birth certificate to achieve this.
82. Ms A's report details the discussion between the ICL and Alex as to his understanding of the surgery and the consequences of the operation. The report states that Alex has given thought to coping strategies.
83. Alex's expectation is that he will be able to "get out and be with his friends" after surgery. Ms A's report states that, without being bad mannered, Alex asked the ICL if he understood what it was like going around in "friggin' 37 degree heat and having to wear my singlet and a blazer". Alex indicated he will not need to wear the undergarment after the operation.
84. According to Ms A, Alex told the ICL that he might feel angry at the Court for a short time if the application for breast surgery was rejected but he informed the ICL that ultimately "I am the one who makes these things happen." Ms A's report states that Alex was at all times respectful of the Court.
85. Ms A's report then turns to her opinion as to whether or not the proposed surgical procedure should be assented to. Ms A clearly states in her report that she is not in a position to render an opinion as to the medical/surgical interventions sought and that her understanding of the proposed interventions is limited.
86. Nevertheless, Ms A stated that Alex has reflected at length on the proposed medical/surgical procedures, has listened carefully to the experts advising him and has undertaken his own research. In Ms A's opinion, Alex is "enthusiastically" seeking the proposed interventions and believes the benefits to him that will accrue are:
 - Improved socialisation with his peers, to allow Alex to feel less self conscious about his appearance and affirm his male identity.
 - Wearing his school uniform without undergarments and in greater comfort.

- Playing sport and participating in school athletics carnivals and inter-school sporting competitions.
- Participating comfortably in school social events.
- Interacting with girls in a developmentally and age appropriate way, such as engaging in hugging, which is currently very awkward for Alex.
- Managing the adjustment to the next stage in his gender change process within existing and familiar support structures.

87. Ms A's report states that Alex seeks the regularisation of official paperwork for "valid and important reasons", including but not limited to:

- Access to part-time employment opportunities through being issued with a tax file number.
- The ability to obtain a learner driver permit with a view to obtaining a drivers' licence.
- General identification purposes.

Ms A attested to the fact that Alex is undertaking driving lessons organised by one of his support team members and that Alex is also interested in obtaining a passport.

88. Ms A also makes the important point that having Alex's gender recognised as male on official paperwork, such as that which may be required for his enrolment in a vocational training course would relieve the school of the necessity to inform others of Alex's situation and assist in preserving Alex's privacy and confidentiality.

89. Ms A's report affirms that Alex will continue to be supported by the school to achieve all his goals, particularly his academic goals, regardless of the outcome of these proceedings. She is of the view however that Alex's views are carefully expressed and warrant having "considerable weight" afforded to them.

90. The Principal and the Deputy Principal Students have included a notation on the last page of the report. The Deputy Principal Students certified that "I have read the above report prepared by Ms A. I concur with the contents of the report." The Principal certified that "...I am aware of Alex's situation and have a less detailed knowledge of his situation than Ms A and the Deputy Principal. I have read the report of Ms A and in relation to all matters that are within my knowledge I concur with the contents of the report."

91. Ms A was called as a witness by the ICL. She confirmed the truthfulness and accuracy of the contents of her report. Ms A was then asked by the ICL whether she had any further professional observations or views she wished to inform the Court about. Ms A replied:

Only that perhaps Alex has really stressed that he really wants the surgery to take place. We've had a number of discussions since the report was filed, and Alex has indicated that his life at school would be made much easier if the surgery was able to take place.

92. Ms A was asked to describe the life of a Year 11 male at Alex's school. Ms A informed the Court that all Year 11 students are invited to attend a debutante ball, which she described as "a big part of their school year." Ms A attested to the fact that weekly dancing lessons are offered in preparation for the ball and "around 98%" of students would participate in the dancing lessons and attend the ball. Ms A predicted that Alex's peers would attend all events. Ms A, in response to a question from the ICL, confirmed that she has witnessed Alex wearing his school blazer in summer, with a shirt and undershirt beneath it. Ms A informed the Court that Alex had told her he wore the clothing to conceal the size of his breasts.

93. The following exchange then took place between counsel for the Department and Ms A:

COUNSEL: In terms of Alex's physical contact with other students, both male and female, it would seem that his current physical presentation leads him to be vigilant about the extent of contact he has. Is that your understanding?

MS A: Yes, it is.

COUNSEL: Does Alex talk about that with you, the vigilance he needs to undertake to ensure that other students don't become aware of his breasts accidentally?

MS A: He does, and he recently disclosed to me that he was feeling quite uncomfortable about female students wanting to hug him, and he was becoming more aware of his breasts, and had indicated that the surgery would really overcome that discomfort and anxiety around females.

COUNSEL: In reading your report and the lengths to which the school and Alex go to make sure his breasts are not discovered, so to speak, by other students, it, I suggest to you, would seem there must be a fair degree of tension – no matter how well meaning the school staff are and the other students are, a great deal of tension that Alex must suffer from at school just having to be careful the whole time about his physical presentation and about what other students may discover. Is that something that you've been aware of?

MS A: Not really. I think Alex copes remarkably well, although he is aware of it. I guess he takes preventative measures, for example by wearing an undergarment under his uniform. If there are any – perhaps things like a camp that are [sic] upcoming, he'll come and discuss those first. So I don't get the sense that he's living with this discomfort every day, but it is difficult for him, and he does have to take measures.

During re-examination, Ms A confirmed that “discomfort” experienced by Alex included physical discomfort arising from having breasts and emotional discomfort resulting from wanting to have chest surgery performed.

94. Ms A was asked by counsel for the Department to reflect upon Alex's proposed attendance at a vocational training course and the problems he may experience if the Court does not authorise chest surgery to be performed. Ms A said that she thought it would be “difficult” for Alex having to meet a new set of peers who have not attended his current school. Ms A agreed with the statement put to her that Alex's secondary school has offered careful and sustained pastoral care to Alex at level beyond which would be expected at a larger facility.

Evidence of Alex's relative

95. Alex's relative gave evidence through an interpreter. The following exchange occurred between me and Alex's relative.

THE CHIEF JUSTICE: Do you understand what the operation is that he wants to have at this stage?

ALEX'S RELATIVE: Yes, I understand that it's a gender matter, and must do the operation on the top first.

THE CHIEF JUSTICE: Has Alex talked to you about how he feels about that?

ALEX'S RELATIVE: Yes, he has.

THE CHIEF JUSTICE: What's your understanding of what Alex feels about it and wants?

ALEX'S RELATIVE: Alex really wants to change early.

THE CHIEF JUSTICE: Has he told you or have you seen why he wants to change it early?

ALEX'S RELATIVE: Because I think it would give him more confidence, more self-esteem.

THE CHIEF JUSTICE: Today we've heard about Alex's concerns about not being able to go to the beach and take his top off. Have you seen that sort of concern that he has?

ALEX'S RELATIVE: In the hot weather I see it if he goes outside. Even inside he'll wear a couple of layers of clothing to protect finding out.

THE CHIEF JUSTICE: Do you support him having the operation soon? Are you in favour of him having the operation soon?

ALEX'S RELATIVE: Yes, this is a matter I really want.

96. I also inquired of Alex's relative whether Alex's family accepts that he is male and treats him as male. Alex's relative told me that "In the recent times, they've viewed him as a man, even my family, and even in the shop and in the ...community view him as well. Even recently a lady asked me if my son has got a wife."
97. Alex's relative agreed with the proposition put to her by the ICL that Alex would go out more with friends if he had the operation. Alex's relative was also asked about sleeping over at friends' homes or friends staying the night at Alex's home and whether the operation would assist Alex in having sleepovers. She replied "It is good, because he can be himself with his friends, and at least have peace of mind while he studies year 12."
98. Alex's relative was asked by counsel for the Department about the possible extension of Alex's guardianship by the Department to his 18th birthday. Specifically, Alex's relative was asked whether she saw any advantages to the guardianship order being extended. She replied "If he's happy with that, I approve of it. I just go by what he wants really."

Discussion with Alex

99. At the conclusion of proceedings on Monday 29 October 2007, at his request, Alex, accompanied by the ICL, met with me in my chambers. When the matter came back on before me on Wednesday 31 October 2007 I noted for the record that I had spoken to Alex in my chambers and that the ICL also been present at the meeting. I stated:

In summary, he [Alex] confirmed the strong view that he has that he wishes to have the surgery, and he also confirmed the view which certainly I inferred from [the ICL's] questions to some of the witnesses that he felt some discomfort about his relative being too involved in the surgery and recovery itself.

The ICL agreed with my summary of the meeting.

SUBMISSIONS

100. Prior to making her submissions, counsel for the Department informed the Court that the applicant, the Department, was not pursuing an order for ongoing psychiatric assessment for Alex, as that would be part of the ordinary decision making powers possessed by the Department as legal guardian for Alex. I accepted the revised minute handed up by counsel as an amendment to the Department's application, which was made by consent.
101. Counsel for the Department further sought no orders with respect to the issue of documents relating to Alex's identification, as that matter was covered in a proposed minute of orders handed up by the ICL. I accepted the ICL's minute as the orders finally sought by the ICL.
102. The ICL confirmed he was satisfied that an application to register a change of name had been made on Alex's behalf and thus it was unnecessary to seek an order to that effect in these proceedings.
103. The consolidated orders thereby ultimately sought by the applicant and the ICL were:
 - (1) There be a declaration pursuant to section 67ZC(1) and (2) of the Family Law Act 1975, that the Secretary of the Department as the legal guardian of the child Alex ...be and is authorised to consent to the child undergoing bilateral mastectomies.
 - (2) That the child Alex be known as, addressed as and accommodated by the name Alex (hereinafter referred to as "Alex") and it is requested that as far as is practicable all relevant Government departments and/or agencies and/or educational institutions ... give effect to this order and it is further ordered that any requirements for parental consent for any purposes associated with the use of the name of Alex as far as practicable be dispensed with and that the consent of a signature of a duly authorised officer of the Department be the sole authorisation required including but not limited to the following purposes:
 - (a) Any application for the issue of a passport and/or travel documentation in respect of Alex;
 - (b) Any application and/or request for the issue of a Medicare card in respect of Alex;
 - (c) Any application to any authority for identification and/or Learner's Permit...; and
 - (d) Without binding the Children's Court ... it is requested that in any future applications and/or orders the Court consider referring to the child by the name Alex – and it is requested that a duly authorised officer of the Department keep the Independent Children's Lawyer informed of all applications and processes undertaken pursuant to this paragraph.

- (3) That either or both of a duly authorised officer of the Department and the Independent Children’s Lawyer... be duly authorised to communicate with, attend appointments with or without Alex and generally facilitate the process of issuing appropriate identifying material referred to in the previous paragraph and to explain these orders to any person or persons considered appropriate and for the purposes of assisting in such matter the duly authorised officer and/or the Independent Children’s Lawyer is at liberty to provide any one or more of the following in support such facilitation:
 - (a) A copy of this order;
 - (b) A copy of the edited Reasons for Judgment of this Court;
 - (c) A copy of any expert report filed in these proceedings.
- (4) That the appointment of the Independent Children’s Lawyer be extended until 7 days following the attainment of the age of majority by Alex and it is requested that Victoria Legal Aid continue to fund the Independent Children’s Lawyer for the purposes of assisting Alex in the specific circumstances of the matter.
- (5) Certify for Counsel and Solicitor appearing as Counsel.

Notation:

The Court requests the Applicant through its lawyers and the Independent Children’s Lawyer to raise issues of concern expressed by either or both of them with the Law Reform Commission and the Public Advocate.

104. Counsel for the Department submitted that the surgical procedure sought to be performed on Alex is a special medical procedure and that the Court has jurisdiction to authorise the procedure pursuant to section 67ZC of the Act. Counsel submitted that I am required to make an order in Alex’s best interests and proceeded to turn to the ‘best interest’ factors contained in section 60CC of the Act. Counsel emphasised the following factors as of particular relevance in this matter:
 - Alex’s age, level of education and maturity;
 - Alex’s understanding of his condition, his current treatment and the proposed surgical procedure;
 - The strength of Alex’s views that he wishes to have the surgery performed prior to turning 18 years of age;
 - Alex’s “sustained and serious” identification as male and his demonstrated commitment to living his life as a male;
 - The low level of risk associated with the procedure, including the risk that Alex will change his mind prior to turning 18 years of age;
 - Alex’s loving and secure home life;

- The availability of excellent medical, psychological and educational support, to assist Alex in the post-surgery transitional period and in the process of developing and nurturing supportive relationships at school;
 - The psychological benefit to Alex in having the surgery now, including feeling more comfortable with his peer group, being able to engage in age-appropriate contact with male and female friends, the ability to participate in sporting and social activities at school, and a minimisation of tension for Alex in maintaining constant vigilance to ensure his breast growth is not accidentally discovered;
 - The possibility of further breast development over the next 12 months and the associated risk of further scarring if Alex is required to wait until he turns 18 years of age to have the surgery performed.
105. In his well-crafted submissions, the ICL expressed unreserved support for the surgery. The ICL contrasted this with his position in 2004, when he neither supported nor opposed the application for the administration of hormone therapy to Alex.
106. The ICL highlighted similar matters to those raised by counsel for the Department. The ICL first discussed the ‘primary factors’ contained in section 60CC(2) of the Act and particularly the need to protect Alex from psychological harm. The ICL reminded the Court of Alex’s troubled history – including depression, the risk of self-harm and possible suicidal ideation – and the exemplary progress Alex has made since childhood. The ICL averted to the medical evidence that Alex would be “devastated” were permission not to be granted for the bilateral mastectomies to proceed and that to deny Alex access to the surgery would be “cruel”.
107. As far as the additional factors contained in section 60CC(3) were concerned, the ICL emphasised Alex’s strong wish to have the surgery and his expressed views, including those made to me, as to the effect the surgery would have on his identification as male, his career choices and his spirituality. The ICL’s submissions were also directed to the importance of the availability of structured support networks for Alex, particularly those made available through the auspices of the Department and provided by Alex’s school, which would not necessarily be available to Alex if he were required to wait until he attains his majority to undergo the breast reduction surgery. The ICL referred also to Alex’s maturity and insight and his consistency in establishing himself as of the male gender.
108. I believe the ICL’s closing comments reward repetition. The ICL submitted:
- In my respectful submission, the care and the financial assistance and the attention given to Alex by the department to date needs to be continued and affirmed and available to Alex during his minority. In my respectful

submission, the minority of Alex serves as an advantage to his surgery, to his decision-making processes and to his post-operative concerns.

In my closing submission, your Honour, the major comfort for your Honour in my respectful submission is that to such extent as you can find that Alex is informed and consistent on this topic, I...encourage you to so find and I submit to your Honour that for the reasons advanced in these submissions, that Alex is entitled to significant community support and those surrounding Alex are entitled to the affirmation from this court that their support is recognised, affirmed and encouraged.

109. For reasons which I will shortly set out, I adopt the preponderance of counsel for the Department and the ICL's submissions.

110. The representative of the Public Advocate did not lead any evidence, her role essentially being confined to that of contradictor. She made short closing submissions in which she told the Court:

...I can find nothing to suggest that it would be contrary to the best interests of Alex to have this procedure. I also note that the evidence appears strongly to suggest that it is indeed in his best interests to have the surgery now rather than in 12 months' time. I would also note that it is clearly in keeping with his express wish to have the surgery.

111. One further matter requires brief mention. As discussed earlier, I granted leave from HREOC to withdraw from the current proceedings. In so doing, I noted that HREOC had placed submissions before the Court when the matter was first before Nicholson CJ. In the interests of completeness I record that the submissions dated 4 March 2004 dealt with:

- Whether a child can give informed consent to the contemplated medical procedures.
- If the Court's authorisation is required or sought for medical treatment, what considerations should the Court take into account in determining what is in the best interests of the child for the purposes of s 67ZC(2) and in applying the criteria set out in s 68F of the Act.

I have read the submissions and had regard to them in deciding whether or not to make a declaration that the Department be authorised to consent to Alex undergoing bilateral mastectomies, although given the abundance of evidence available to me I have accorded them relatively little weight.

THE LAW TO BE APPLIED

112. The former Chief Justice, in determining the 2004 application, adopted an approach whereby he first discussed jurisdiction to make the orders sought (including the founding of jurisdiction through s 67ZC) and then turned to

specific additional factors, in particular those identified in *Re Marion (No 2)* and the ‘best interests’ factors then found in section 68F(2) (now contained in section 60CC). In the interests of consistency I will generally follow this approach although, as I discuss later in the judgment, I consider there is little utility in analysing the ‘*Re: Marion (No 2)* factors’ in any detail.

Jurisdiction

113. The Family Court of Australia’s jurisdiction to make orders for the welfare of children is founded in the ‘welfare power’ contained in section 67ZC of the *Family Law Act 1975* (Cth). Section 67ZC provides:

67ZC(1) [Child welfare orders]

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 AA (International protection of children) may affect the jurisdiction of a court to make an order relating to the welfare of a child.

67ZC(2) [Best interests of child are paramount consideration]

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.

114. In the 2004 proceedings, Nicholson CJ found that there are three factual issues which determine the Court’s capacity to exercise the welfare jurisdiction granted by s 67ZC of the Act. These are:
- whether a child or young person is currently under a care order
 - whether a child or young person can themselves consent to the procedure sought to be undertaken
 - whether the subject matter of the application is such that it requires the consent of the Court.
115. However, Nicholson CJ’s findings may require reconsideration. The High Court handed down its decision in *Minister for Immigration & Multicultural & Indigenous Affairs and B (No. 3)* (2004) FLC ¶ 93-174 some three weeks after Nicholson CJ delivered judgment in the first *Re: Alex* case. The members of the High Court, in four separate judgments, gave detailed consideration to the jurisdiction of the Family Court and particularly to the nature and scope of section 67ZC. Their Honours’ discussion is conveniently recorded in the decision of Carter J in *Re: Brodie*

(Special Medical Procedures: Jurisdiction) [2007] FamCA 776 in paragraphs 9 to 24.

116. I note particularly the following passages from the joint judgment of Gleeson CJ and McHugh J. Their Honours said at paragraph 13:

... s 67ZC does not itself impose any substantive liabilities or duties or confer rights or privileges on any person. Standing alone, therefore, s 67ZC does not confer jurisdiction in respect of a “matter” arising under a law of the parliament because it does not confer rights or impose duties on anyone.

Their Honours added at paragraph 22 that:

... the failure of s 67ZC, standing alone, to define the Family Court’s jurisdiction with respect to a ss 75 or 76 matter is not itself decisive against the respondents’ contention that the Family Court had jurisdiction in the present matter. Other provisions of the Act may supply the elements of a “matter”. The ultimate question then is whether, read as a whole, the Act defines the jurisdiction of and thereby – for constitutional purposes – confers jurisdiction on the Family Court to determine the present dispute between the respondent children and the minister.

117. At paragraph 23 their Honours said:

The valid application of s 67ZC, therefore, is dependent upon some other provision in Pt VII of the Act creating a “matter” within the meaning of ss 75 or 76 of the Constitution to which the jurisdiction conferred by s 67ZC can attach. Consequently, it is necessary to turn to other provisions in the Act — particularly Pt VII — to determine the jurisdiction, if any, that s 67ZC validly confers. This step is required in order to ascertain whether one or more provisions enacts substantive rights or privileges or imposes substantive duties which constitute a “matter” under ss 75 or 76 of the Constitution and which can be inferentially linked to s 67ZC. **If this step is not taken, it is impossible to identify the “matters” concerning “the welfare of children” which arise under a law of the Parliament for the purpose of s 76(ii) of the Constitution and the jurisdiction of the Family Court that the Parliament has defined in respect of those matters for the purpose of s 77(i) of the Constitution.** (emphasis added).

118. At paragraph 51 their Honours said:

By necessary implication, the parents of a child may seek an order under s 67ZC whether the operation of that section is confined by s 69ZH(2) and (3) or whether it has an operation independently of those subsections. The right to seek that order arises from various provisions in Pt VII, but particularly from ss 60B, 61B and 61C. Section 60B(1) declares that the object of Pt VII:

“is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.”

Section 61C(1) declares that “[e]ach of the parents of a child who is not 18 has parental responsibility for the child”. Section 61B defines this parental responsibility in Pt VII to mean “all the duties, powers, responsibilities and authority which, by law, parents have in relation to children”. **The provisions of these three sections provide ample support for an application by a parent for an order under s 67ZC, whether the source of the jurisdiction is Div 12 generally or s 69H in particular.** (emphasis added)

119. At paragraph 74, Gummow, Hayne and Heydon JJ said:

It is desirable to approach consideration of the text and structure of what is now Pt VII by first referring to some earlier decisions of this Court about the Family Law Act. Those decisions illustrate how that Act, in its earlier forms, has been held to operate in identifying matters and in conferring jurisdiction with respect to them. From there it is convenient to go to the examination of a number of the provisions of Pt VII in order to reveal the place occupied by the particular provisions which are in issue in this appeal. That examination will reveal that the Minister’s submission is correct. It is Div 12 which provides the relevant conferral of jurisdiction on the Family Court. The jurisdiction conferred is limited. Neither s 69ZE nor s 69ZH conferred jurisdiction to decide either of the applications which gave rise to this appeal. Section 69ZE confers jurisdiction on the Family Court in matters the subject of a reference by a state of power, and matters incidental to the execution of a power vested by the *Constitution* in the federal Parliament in relation to those matters. Neither of the applications which give rise to this appeal was such a matter, the reference by South Australia being limited to matters of maintenance, custody, guardianship and access. Section 69ZH confines the operation of s 67ZC to the parental responsibilities of the parties to a marriage for a child of the marriage.

120. At paragraph 105 their Honours said:

The second potential application was in the combination of ss 69ZH and 67ZC. However, in its terms, s 69ZH confines the operation of s 67ZC to the parental responsibilities of the parties to a marriage for a child of the marriage. The result, the Minister submits, is that neither of these potential applications of Div 12 of Pt VII could be supported in the present litigation. That submission should be accepted. The same is to be said of reliance upon the injunction provision in s 68B in conjunction with s 69ZH.

121. Carter J, who in *Re: Brodie (special medical procedure: jurisdiction)* (supra) was herself determining an application for the administration of hormonal

treatment to a 12 year old diagnosed with gender identity dysphoria, in her discussion of whether the procedure sought to be performed was a special medical procedure, had cause to comment that “some parts of his [Nicholson CJ’s] judgment, and especially those dealing with s 67ZC as forming the basis of jurisdiction must be looked at in the light of the High Court’s decision.” I take her Honour to be referring in particular to the finding by the High Court that the welfare jurisdiction of the Court is not at large and is dependent upon its attachment to a provision in Part VII of the Act to create a ‘matter’ within the meaning of section 75 or 76 of the *Constitution*.

122. Most commonly, special medical procedure applications are brought by a parent and thus the Part VII ‘matter’ to which the section 67ZC jurisdiction is attached is section 61C; namely the exercise of parental responsibility. In this case however, the application has been brought by the Department as Alex’s legal guardian.
123. The operative guardianship with respect to Alex was made in 2001 and extended in 2005. The order was made under sections 107 and 108 of the *Children and Young Persons Act 1989* (Vic) (“the old Act”), which are contained in Division 6 of Part 3 of the Act. That Act has now been repealed and the effective legislative instrument is now the *Children, Youth and Families Act 2005* (Vic), (“the new Act”) which commenced on 23 April 2007. The transitional and savings provisions are found in Schedule 4. Item 5 of Schedule 4 states:

5 Re-enacted provisions

A provision or provisions of the old Act specified in Column 1 of the Table are deemed to be re-enacted (with modifications) by the provision or provisions of the new Act appearing opposite in Column 2 of the Table.

124. Division 6 of Part 3 of the Act appears in column 1 of the Table. The new provision is identified as being Part 4.9. Part 4.9 of the new Act contains 13 Divisions. Division 7 contains one section only, section 289, which states:
 - (1) A guardianship to Secretary order—
 - (a) grants custody and guardianship of the child to the Secretary to the exclusion of all other persons; and
 - (b) subject to this Division, remains in force for the period (not exceeding 2 years) specified in the order; and
 - (c) ceases to be in force—
 - (i) when the child attains the age of 18 years; or
 - (ii) when the child marries— whichever happens first.

I find that by operation of the transitional and savings provisions, the order in force with respect to Alex is made under section 289 of the new Act.

125. Section 4 of the new Act is the definitional section. It defines ‘guardianship’ as:

4 Guardianship

A person (including the Secretary) who has, or under this Act is granted, guardianship of a child, has responsibility for the long-term welfare of the child and has, in relation to the child, all the powers, rights and duties that are, apart from this Act, vested by law or custom in the guardian of a child, other than—

- (a) the right to have the daily care and control of the child; and
- (b) the right and responsibility to make decisions concerning the daily care and control of the child.

I interpret ‘guardianship’ as defined in the new Act to include the right to make decisions about the long-term welfare of a child subject to a Guardianship to Secretary order under section 289, including decisions as to medical treatment.

126. The powers of the Secretary of the Department as guardian are contained in section 172. It states:

172 Powers of Secretary as guardian or custodian

(1) The Secretary, in relation to a child who is under his or her guardianship—

- (a) is the guardian of the person and estate of the child to the exclusion of all other persons; and
- (b) has the same rights, powers, duties, obligations and liabilities as a natural parent of the child would have.

(2) The Secretary, in relation to a child who is in the custody or under the guardianship of the Secretary—

- (a) has the sole right to the custody of the child; and
- (b) may demand, sue for and recover any money due to the child; and
- (c) in the name and on behalf of the child may commence and prosecute any proceeding relating to any property or rights of the child.

127. Section 172(1)(b) effectively places the Secretary ‘in the shoes’ of the natural parent of a child for whom the Secretary is a guardian. I find that the Secretary is therefore Alex’s legal ‘parent’ by force of section 172(1)(b) of the new Act.

In so doing I note the similarity between the wording in section 172(1)(b) and the meaning of “parental responsibility” as found in section 61B of the Family Law Act, which is:

61B Meaning of parental responsibility

In this Part, parental responsibility, in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.

128. Parents have defined rights, responsibilities, duties and powers under the Family Law Act. The term ‘parent’ is defined in section 4 of the Act as “when used in Part VI in relation to a child who has been adopted, means an adoptive parent of the child.” There is no conflict between this definition and the view I have formed that the Secretary is effectively Alex’s legal ‘parent’.

129. Under section 61C, each parent has parental responsibility for a child (subject to court orders). Section 61C states:

61C Each parent has parental responsibility (subject to court orders)

(1) Each of the parents of a child who is not 18 has parental responsibility for the child.

Note 1: This section states the legal position that prevails in relation to parental responsibility to the extent to which it is not displaced by a parenting order made by the court. See subsection (3) of this section and subsection 61D(2) for the effect of a parenting order.

Note 2: This section does not establish a presumption to be applied by the court when making a parenting order. See section 61DA for the presumption that the court does apply when making a parenting order.

Note 3: Under section 63C, the parents of a child may make a parenting plan that deals with the allocation of parental responsibility for the child.

(2) Subsection (1) has effect despite any changes in the nature of the relationships of the child’s parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying.

(3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).

Note: Section 111CS may affect the attribution of parental responsibility for a child.

130. Parental responsibility is a ‘matter’ concerning the welfare of a child under section 76(ii) of the *Constitution* and it provides a sufficient basis upon which

to make orders pursuant to section 67ZC (*Minister for Immigration & Multicultural & Indigenous Affairs and B (No. 3)* (supra); *Re: Brodie (special medical procedure: jurisdiction)* (supra); *Re: Inaya* (2007) 213 FLR 278 and *Re: Baby A* [2008] FamCA 417).

131. I therefore find I have jurisdiction to hear the application brought by the Department, as the guardian and legal ‘parent’ of Alex, for a declaration that the Secretary is authorised to consent to Alex undergoing a bilateral mastectomy. In so doing, I note there was no challenge by the applicant, the ICL or the intervenor to the Court’s ability to hear the application and it was submitted to me by the applicant that I had the jurisdiction to do so (albeit on a basis that did not take account of the complexities introduced by the High Court’s decision in *Minister for Immigration and Multicultural and Indigenous Affairs v B and B (No. 3)* (supra)). I leave open the possibility that had the matter been fully argued, as it was not in this case, a different conclusion might have been reached.
132. One further matter with respect to jurisdiction needs to be addressed and that is the effect of section 69ZK. Section 69ZK affects the ability of the Court to make an order in respect of a child who is under the care of a child welfare authority. Section 69ZK of the Act provides:

69ZK Child welfare laws not affected

(1) A court having jurisdiction under this Act must not make an order under this Act (other than an order under Division 7) in relation to a child who is under the care (however described) of a person under a child welfare law unless:

- (a) the order is expressed to come into effect when the child ceases to be under that care; or
- (b) the order is made in proceedings relating to the child in respect of the institution or continuation of which the written consent of a child welfare officer of the relevant State or Territory has been obtained.

133. Section 69ZF of the Act provides for the Governor-General, by proclamation, to declare that all child welfare provisions of Part VII of the Act extend to a specified State. Section 69ZK thus operates in its entirety only in the Territories and in those states in relation to which a proclamation has been made under section 69ZF. Acting under sub-section 69ZF(1) of the Act, the Governor-General issued a proclamation with respect to Victoria on 9 December 1998, that proclamation having been gazetted on 8 February 1999. Accordingly, the provisions of section 69ZK apply in respect of Victoria.

134. “Child welfare law” is defined in section 4 of the Act as “a law of a State or Territory prescribed, or included in a class of laws of a State or Territory prescribed, for the purpose of this definition.” Regulation 12B(2) of the *Family Law Regulations 1984* (Cth) states that “For the purposes of the definition of child welfare law in subsection 4 (1) of the Act, each law specified in Column 2 of an item in Schedule 5, being a law of the State or Territory specified in Column 3 of that item, is prescribed.” The *Children and Young Persons Act 1989* (Vic), under which a Guardianship to Secretary order is made, is included in that Schedule as a prescribed law. As discussed above, the *Children and Young Persons Act 1989* (Vic) has been repealed and the *Children, Youth and Families Act 2005* (Vic) is in operation.
135. Item 4 of Schedule 2 of the *Children, Youth and Families Act 2005* (Vic) states:

4 Superseded reference

On and from the commencement day unless the context otherwise requires, in any Act (other than the new Act), or in any instrument made under any Act or in any other document of any kind, a reference to the old Act must be read as a reference to the new Act.

The ‘commencement day’ for the purpose of this item is 23 April 2007. I must therefore read the reference to the *Children and Young Persons Act 1989* (Vic) in regulation 12B(2) as a reference to the *Children, Youth and Families Act 2005* (Vic). Accordingly, I am satisfied that section 69ZK applies in the present case.

136. These proceedings, like those instituted in 2004, were commenced with the written consent of a child welfare officer. This was confirmed by counsel for the Department, who said in her submissions that “My client has provided, certainly by way of application to this court, consent for the order to be made by the court if the court has any concern about the provisions of section 69ZK of the Act.” Accordingly, I am satisfied that the requirements of section 69ZK(1)(b) are met and there is no statutory impediment to me making the orders sought.

Whether the child can consent to the procedure

137. Even though the Court has the jurisdiction to make the orders sought, it is incumbent upon me to consider whether or not Alex himself can consent to the procedure, which would obviate the need to obtain the Court’s permission to undergo surgery. It is clear that particular powers and authority that come within the scope of a person’s parental responsibility for a child cease when the child acquires sufficient maturity and understanding to make a decision about a particular matter for him or her self (*Secretary, Department of Health and Community Services v JWB and SMB (Re: Marion)* (1992) 175 CLR 218).

138. It is a matter of special importance in the circumstances of this case and in light of Alex's age, the strength of his views and the greater recognition that is being accorded in the international law community to the right of children to exercise agency in decisions affecting them. No submissions were addressed to me on this issue. In recording this, I am not being critical of counsel as it was not an issue identified and thus not one upon which I sought evidence to be adduced.
139. The question of whether or not a young person is capable of providing consent for a particular medical procedure to be performed is considered by reference to the test enunciated by the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112. There, Lord Scarman said at paragraph 186:

The underlying principle of the law was exposed by Blackstone and can be seen to have been acknowledged in the case law. It is that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision. Lord Denning M.R. captured the spirit and principle of the law when he said in *Hewer v. Bryant* [1970] 1 Q.B. 357, 369:

'I would get rid of the rule in *In re Agar-Ellis*, 24 Ch.D. 317 and of the suggested exceptions to it. That case was decided in the year 1883. It reflects the attitude of a Victorian parent towards his children. He expected unquestioning obedience to his commands. If a son disobeyed, his father would cut him off without a shilling. If a daughter had an illegitimate child, he would turn her out of the house. His power only ceased when the child became 21. I decline to accept a view so much out of date. The common law can, and should, keep pace with the times. It should declare, in conformity with the recent *Report of the Committee on the Age of Majority* [Cmnd. 3342, 1967], that the legal right of a parent to the custody of a child ends at the 18th birthday: and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice.'

This approach was described by the High Court in *Re: Marion* (supra) (at 226) as one that "though lacking the certainty of a fixed age rule accords with experience and with psychology. It should be followed in this country as part of the common law." The High Court in that case formulated the test as a "threshold question of consent; whether a child, intellectually disabled or not, is capable, in law or in fact, of consenting to medical treatment on his or her own behalf".

140. Nicholson CJ in 2004 received submissions from expert witnesses on the issue of Alex's *Gillick* competence. The comments of one of the experts, in

Nicholson CJ's view, suggested that Alex had the capacity to consent to treatment that would commence the "sex change process" or, if not then in possession of *Gillick* competence, would obtain that state in a relatively short period of time. Nicholson CJ reached the conclusion that the evidence before him was such that it did not establish that Alex had the capacity to consent to the proposed procedure. However, in his final comments on the issue he said:

Much will depend upon what it is that is proposed in each individual case. It seems to me that there is a considerable difference between a child or young person deciding to use contraceptives as in *Gillick* and a child or young person determining upon a course that will "change" his/her sex. It is highly questionable whether a 13 year old could ever be regarded as having the capacity for the latter, and this situation may well continue until the young person reaches maturity.

141. In the present case, Alex has had the benefit of hormonal therapy since 2004, which has suppressed his menses and physical development as a female. As I understand the evidence and the terms of the 2004 order, Alex commenced receiving testosterone on or after his 16th birthday. Dr C reported that Alex has received Reandron 1000 injections every three months, which enables testosterone to be slowly released into the body. On the basis of Ms A's report, testosterone has caused Alex's facial hair to grow, his voice to deepen and muscular development. Dr C described Alex's masculine development as "excellent" and Associate Professor P similarly described Alex as presenting as a "well built young man". Alex attends a gym regularly and has built up his chest and shoulders to give himself a more muscular appearance, as well as to minimise the appearance of his breasts. Associate Professor P gave evidence that the treatment has "most definitely" made a difference to Alex's emotional wellbeing. As discussed earlier, Ms A reports that Alex's mood has improved since beginning hormonal treatment and that he is more positive about his future, his career and academic goals. Ms A further reports that Alex is excited by the changes to his body and that they have assisted him in fraternising with his peers and in giving him a strong sense of masculinity.
142. In the intervening three and a half years since the last application, Alex has presented and behaved as male in all aspects of his lived existence. As he has matured, he has had sexual fantasies and those fantasies, without exception, involve him as a male engaged in sexual activity with a female.
143. Alex was 13 years old at the time of the first application. He is now 16 years old. Counsel for the Department submitted that Alex has made significant advances in age and level of maturity since Nicholson CJ made orders in 2004. In my view it is abundantly clear that Alex is an extremely mature and considered young man, with the capacity for sophisticated reflection upon the implications of undertaking chest surgery. The evidence of the medical witnesses is that Alex has a good understanding of the process of bilateral

mastectomy and the advantages and disadvantages of the procedure. Alex has shown initiative in undertaking independent research into the procedure and into gender reassignment/sex affirmation surgery more broadly and, as he has told me through the ICL, Alex will continue to research his condition.

144. All witnesses, medical and otherwise, are ad idem that Alex has a consistent, unwavering, fixed and unchanging view that he is male and Alex has given expression to that view in all the ways available to him and at no small personal cost (including his non participation in sport and limiting physical contact with friends and avoiding developing romantic relationships with girls). He has, as put to me by counsel for the Department, made “a sustained and serious commitment to living life as a male”. The totality of the evidence I have considered, including that of Alex himself, is that it is Alex’s deeply held and profound wish to have a double mastectomy performed. Alex has articulated what he sees as the benefits that will accrue from having chest surgery, none of which are trifling or frivolous and all of which would appear to advance his physical, psychological, emotional and relational development.
145. Chapter 3 of *Children’s Rights and the Developing Law* by Jane Fortin (2nd ed, LexisNexis Butterworths, London, 2003) is entitled ‘Adult decision-making, *Gillick* and parents’. The second section of that chapter discusses the research evidence as to children and adolescent developmental capacity for decision making. It states at page 72:

Researchers broadly agree that there are fundamental differences between childhood thought, preoccupied as it is with practical issues to do with the here and now, and adolescent thinking which is much more sophisticated. Adolescents are increasingly able to deal with abstractions and to distinguish between the real and concrete and the abstract or possible. They can test hypothesis and think and plan about the future. They become aware of their own thought processes and become self-reflective, even introspective. Their thinking is multi-dimensional, with a greater use of relative, rather than absolute, concepts. This material suggests that the intellectual competence of young children aged up to about 11 and 12 is far less sophisticated than that of adolescents between the ages of 12 and 18. (footnotes deleted).

The author then goes on to review research exploring changes in the cognitive and social development of adolescents as they grow older. She concludes:

According to this research, there are important and subtle differences between the approach of a 12-year old to political dilemmas, from that of the 14- or 15-year-old, again from that of a 16-year-old. It shows that the typical adolescent of 12 to 13 years of age cannot appreciate that there may be more than one solution to a problem or that individual acts are political solutions are not necessarily right or wrong. Whereas the concept of moral relativism is not yet available for the 12-year-old, by the age of 14 or 15, the adolescent is able to think in a more critical and pragmatic way.

Interestingly, the growth in competence which takes place at around the age of 15 is an appropriate age for gaining the right to make major personal decisions.

...

Indeed, in summary, it is the older adolescents' ability to conceptualise, to think about themselves as distinctive persons that marks out adolescence from the earlier years of life.

146. The position, in summary, is as follows: since mid-2004, when hormone therapy commenced, the development of secondary female characteristics in Alex has been suppressed. This year Alex commenced taking testosterone and that has caused the development of male physical features. Essentially therefore, Alex has lived as a male for three and a half years. The evidence is that there have been significant improvements in major facets of Alex's life following the commencement of hormonal treatment and that Alex has responded positively to the physical changes arising from the administration of testosterone. Alex has neither exhibited nor verbalised anything other than an enduring wish to continue to live as a man. Alex believes, fervently, that breast surgery will be of great assistance to him in achieving this end. Alex is an intelligent, thoughtful, reflective and creative young person with well developed adaptive skills.
147. Taking all of these matters into account, I am not satisfied that Alex is not *Gillick* competent and therefore unable to himself consent to the surgery. However, as the parties, the ICL and the intervenor have not led evidence nor made submissions on this matter, I am reluctant to make a positive finding to that effect. The most appropriate course of action, it seems to me, is for me to adopt the same approach as that of Nicholson CJ in the earlier proceedings, which is to take the view that the issue of *Gillick* competence is academic unless I intend to make orders not permitting the procedure. Alex's maturity and likely *Gillick* competence however provide further support for the orders I made.

The subject matter of the application

148. This issue arises because, if the subject matter of the application is such that it falls within the normal exercise of parental responsibility, permission from the Court is not required.
149. Nicholson CJ traversed this issue in his judgment of 13 April 2004. In essence, his Honour treated the two stages of the proposed treatment regime – one entirely reversible and one with irreversible effects – as part of a single package. On that basis, his Honour concluded that it was appropriate for the applicant to seek the Court's permission for the treatment in its entirety.

150. I have formed the same view with respect to the present application. I have done so on the basis that it was submitted to the Court in 2004 that no form of gender assignment surgery would be performed on Alex prior to him turning 18 years of age. Nicholson CJ so recorded this fact in his judgment. The application now before the Court is for surgery to be performed before Alex reaches his majority. In light of that fact, the interventionist nature of the procedure, its irreversibility, the risks that attend any form of surgery (however minor), I am of the view that it is appropriate for the Court's permission to be sought for a bilateral mastectomy to be performed.

151. As to the issue of whether the procedure is being sought to correct a 'disease or malfunction', I am content to adopt Nicholson CJ's findings in this regard. There is no suggestion that Alex's diagnosis of gender identity dysphoria has changed in the intervening period and thus the earlier findings remain apposite. Nicholson CJ said at paragraphs 195 and 197:

The current state of knowledge would not, in my view, enable a finding that the treatment would clearly be for a "malfunction" or "disease" and thereby not within the jurisdiction of this Court as explained by the majority in *Marion's* case. To my mind, their Honours were seeking in that case to distinguish medical treatment which seeks to address disease in or malfunctioning of organs. In the context of sterilisation for example, they would seem to have had in mind a malignant cancer of the reproductive system which required an intervention that was medically indicated for directly referable health reasons. The present case does not lend itself to such a comparison.

...

...I would add that I can imagine that Alex and other people who have longed for transition to the opposite sex may find it offensive to find the incompatibility between their sense of self and the sex of their body being categorised as a "disease" or a "malfunction". It is perhaps relevant that the diagnoses of Associate Professor P and Dr N do not use this language.

152. *Re: Brodie (Special Medical Procedure)* [2008] FamCA 334 involved an application on behalf of a 12-year old girl to commence treatment with a gonadotrophin-releasing hormone analogue as the first step in a process which, if continued, would enable the child to pursue life as a boy. As in this case, the child's core identity was male. Carter J found "I am not satisfied that the treatment plan is a procedure "for the purpose of treating a bodily malfunction or disease"."

153. I appreciate there are differing views on whether gender identity dysphoria is a 'disease' or a 'malfunction' and the contrary views to those of Nicholson CJ and Carter J may ultimately succeed on full hearing and determination. However, as it was not argued before me I propose to follow Nicholson CJ and Carter J in finding that it is not a matter requiring a decision.

Additional matters to be considered

Re: Marion(2) factors

154. In the first *Re: Alex* judgment Nicholson CJ said:

In *Re Marion (No. 2)* (1994) FLC ¶92-448 I proposed a number of particular matters to be considered when the Court is faced with a special medical procedure application, in that case, a sterilisation procedure. These are:

- (i) the particular condition of the child which requires the procedure or treatment;*
 - (ii) the nature of the procedure or treatment proposed;*
 - (iii) the reasons for which it is proposed that the procedure or treatment be carried out;*
 - (iv) the alternative courses of treatment that are available in relation to that condition;*
 - (v) the desirability of and effect of authorising the procedure for treatment proposed rather than available alternatives;*
 - (vi) the physical effects on the child and the psychological and social implications for the child of:*
 - (a) authorising the proposed procedure or treatment*
 - (b) not authorising the proposed procedure or treatment*
 - (vii) the nature and degree of any risk to the child of:*
 - (a) authorising the proposed procedure or treatment*
 - (b) not authorising the proposed procedure or treatment*
 - (viii) the views (if any) expressed by:*
 - (a) the guardian(s) of the child;*
 - (b) a person who is entitled to the custody of the child;*
 - (c) person who is responsible for the daily care and control of the child;*
 - (d) the child;*
- to the proposed procedure or treatment and to any alternative procedure or treatment.”*

Subsequently in *P and P* (1995) FLC ¶92 615, another sterilisation case, the Full Court said that the matters I suggested “should prove of practical use to those considering problems of this nature” (at 82,151).

155. I observe that the judgments in special medical procedure applications handed down by Family Court judges after *Re: Alex*, namely *Re: Brodie (Special Medical Procedure)* (supra), *Re: Inaya* (supra) and *Re: Baby A* (supra), do not contain a discrete analysis of the ‘*Re: Marion (2)* factors’. From my reading of these judgments, all of the issues captured by the ‘*Re: Marion (2)* factors’ are

encompassed by a consideration of the matters contained in section 60CC of the Act.

156. I propose to adopt a similar approach. My interrogation of the primary and additional considerations in section 60CC(2) and (3) has been undertaken so as to ensure that the relevant matters from *Re: Marion (2)* are accommodated. I note that not all of the above factors are relevant to the present application: for example, no alternative ‘course of treatment’ to surgery is being proposed.

Section 60CA, 60B, 60CC

157. The relevant statutory provisions for proceedings relating to children, including special medical procedure applications, are contained in Pt VII of the Act.

158. Section 60B of the Act contains the objects and principles of Pt VII. The objects are to ensure that the best interests of children are met by:

“(a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and

(b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

(c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and

(d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.”

159. The principles underlying those objects are set out in s 60B(2). Those principles apply except when it is or would be contrary to a child’s best interests. The principles are that:

(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

(b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and

(c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and

(d) parents should agree about the future parenting of their children; and

(e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

160. Section 60CA of the Act states that when deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of

the child as a the paramount consideration. The ‘paramountcy principle’ applies with equal force to applications made under section 67ZC by virtue of section 67ZC(2).

161. Section 60CC provides guidance as to how the Court determines what is in a child’s best interests. ‘Primary considerations’ are contained in section 60CC(2) and ‘additional considerations’ are contained in section 60CC(3). There are two primary considerations. They are:

- (a) the benefit to the child of having a meaningful relationship with both of the child’s parents; and
- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

As the note to section 60CC(2) states, the primary considerations are consistent with the objects of Part VII.

162. Neither of the two primary considerations has particular application to the application before me. Alex’s father died when he was a young child. Sadly, Alex’s mother has chosen to have no involvement in his life. Alex’s relative is the person most involved in his care and, as recorded earlier, Alex’s relative supports the application that has been brought on his behalf by his legal guardian, the Secretary of the Department. Although it was submitted to me by the ICL that section 60CC(2)(b) is relevant to this case, I do not agree. The ICL referred to the psychological harm that could be occasioned to Alex if his application for breast surgery is denied, including the possibility that Alex’s documented bouts of depression and suicidal thoughts could reoccur. I agree with the ICL that there is undoubtedly a need to consider protecting Alex from harm, and in particular psychological harm, but section 60CC(2)(a) explicitly links that harm to “being subjected to, or exposed to, abuse, neglect or family violence”. That happily does not arise in this case. I will consider matters pertaining to psychological harm under the ‘additional considerations’.

163. The additional considerations that I must take into account are:

- (a) any views expressed by the child and any factors (such as the child’s maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child’s views;
- (b) the nature of the relationship of the child with:
 - (i) each of the child’s parents; and
 - (ii) other persons (including any grandparent or other relative of the child);

- (c) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;
- (d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
 - (i) either of his or her parents; or
 - (ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;
- (e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
- (f) the capacity of:
 - (i) each of the child's parents; and
 - (ii) any other person (including any grandparent or other relative of the child);
 to provide for the needs of the child, including emotional and intellectual needs;
- (g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;
- (h) if the child is an Aboriginal child or a Torres Strait Islander child:
 - (i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and
 - (ii) the likely impact any proposed parenting order under this Part will have on that right;
- (i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
- (j) any family violence involving the child or a member of the child's family;
- (k) any family violence order that applies to the child or a member of the child's family, if:
 - (i) the order is a final order; or

- (ii) the making of the order was contested by a person;
- (l) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
- (m) any other fact or circumstance that the court thinks is relevant.

Some of these matters, in particular sub-sections 60CC(3)(c), (e), (h), (i), (j) and (k), are not relevant to the determination of the application before me.

164. I turn now to the relevant additional considerations, which I will discuss in turn.

- (a) **any views expressed by the child and any factors (such as the child’s maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child’s views**

165. In my view this is a very important factor in the present application.

166. The ICL urged upon me to take account of the terminology used when this matter was first before the Court in 2004, which was expressed in terms of the “wishes” of the child, and the current nomenclature which is that of the child’s “views”. The ICL submitted that was a meaningful distinction. He said:

When your Honour takes into account Alex’s expression of himself and his word, the wishes include a very strong wish of Alex to have the surgery.

But in my submission, your Honour is entitled to take into account the views of Alex expressed in the report of Ms A in relation to a range of issues. It is not merely wishes that he have the surgery, that he be able to go to the beach, but this young person, his views on issues such as transgender, such as spirituality, such as choice of career, such as in relation to significant persons in his life are now entitled to be taken into account by the Court in the widening of terminology from wishes to views. I make the strongest possible submission to your Honour that very considerable weight be given to those views and to a finding of insight and maturity in the way those views have been expressed by Alex to Ms A, to the ICL, to the Department, to Prof. P, to Prof. W, and to Mr C; and it should form part of your reasons, your Honour – and indeed to your Honour.

167. I have no hesitation in adopting the above statement as incorporating it into my reasons. In addition to my findings at paragraphs 137 to 147 in my discussion of Alex’s ‘*Gillick* competence’, I observe that Alex has consistently, firmly and unwaveringly expressed the view that he wishes a bilateral mastectomy to be performed and indeed the application for permission for surgery to be undertaken was made to give effect to Alex’s wishes. Alex turned 17 years of

age in 2008. The evidence of his support team, including medical personnel, is that Alex is a mature, thoughtful and considered young man who has demonstrated a high degree of insight into his condition and possesses a sound grasp of the proposed surgical procedure. Significantly, in my view, Alex has undertaken his own research into gender identity dysmorphia and has evinced a willingness to continue to learn about the process of transitioning from female to male, as evidenced by his eagerness to have a discussion with a person who has undertaken sex reassignment surgery. The evidence is unanimous that Alex has reflected on the procedure at length and has demonstrated maturity and insight in considering various scenarios, including what options might be available to him if he changed his mind about having his breasts removed. As submitted to me by the ICL, Alex is informed and consistent on the topic of wanting to have breast surgery performed and I give Alex's views considerable weight.

(b) the nature of the relationship of the child with:

(i) each of the child's parents; and

(ii) other persons (including any grandparent or other relative of the child);

168. As recorded earlier, Alex's father is deceased and Alex does not have a relationship with his mother, her new husband or his siblings. Alex lives with his closest living relative and I consider that Alex has a loving, secure and respectful relationship with her. Alex also appears to have a good relationship with other family members. Alex is fortunate to have been provided with exemplary advice, assistance and support from the Department of Human Services and his care team, including the youth services provider. The Student Wellbeing Coordinator at Alex's school and indeed, from what can be gleaned from the evidence before me, those members of the teaching staff of his school who are involved or have contact with Alex are committed to supporting him in living as male. Alex has a positive relationship with those who are dedicated to his care. It also appears to me that Alex has an open and meaningful relationship with the relevant medical personnel involved in his life, and it would appear particularly with Professor W and Associate Professor P, both of whom have been assisting Alex for many years. It is also apparent to me that Alex has a trusting relationship with the ICL, who again has been representing Alex's interests for many years.
169. The availability of these supports to Alex will continue until he turns 18 years of age and indeed beyond that, as the evidence is that Alex will be assisted throughout his final year at school. I place considerable weight on the availability of this assistance to Alex in what is clearly a difficult and challenging task of living life as a young man.

(d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:

(i) either of his or her parents; or

(ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;

170. The ICL submitted that this is not a factor in the current proceedings but I am not satisfied that is in fact the case. It appears to me self evident that there will be a change to Alex's circumstances if permission to grant the surgery is given and the bilateral mastectomy is performed. On his own evidence, Alex will be able to participate in a range of activities with his peers, such as going to the beach, without the risk of his breasts being discovered. Alex will no longer have to wear a constricting undergarment or hot, uncomfortable clothing to obscure the appearance of his breasts. He will be more confident in physical interplay with his friends, male and female, and will also be emboldened to explore romantic relationships with girls. The medical evidence is that undertaking the surgery will have a positive psychological effect for Alex. It would not only reduce his anxiety at the prospect of his breasts being accidentally discovered and reduce the likelihood that he will suffer a return of his depressive thoughts and ideas of self-harm, it would also be affirmatory of his gender as male.
171. If the surgery is performed, its effects will be irreversible. Alex's breasts will be removed and he will not be able to breastfeed a child, should he decide some time in the future that he wishes to give birth. Alex has given this matter some thought and has devised alternatives in the event that he had a child. Alex has also made mention of the possibility of having some form of reconstructive breast surgery in the event he decides to live as a woman. I consider however, on the basis of Alex's own views and his demonstrated commitment to a life as a male, that there is only a very small risk that Alex will change his mind about wanting to have his breasts removed. I particularly take account of Professor W's evidence was that young people who present with gender dysphoria when puberty is well under way, as Alex did, "literally never change their mind." In any event, that risk was only relevant for a 12 month period, as Alex could have the surgery performed of his own accord once he turned 18.
172. I take account of the fact that in the post-operative period, drainage tubes may be required to be inserted (although this is not likely) and that Alex will be required to wear a compression vest. As Alex presently wears a constrictive undergarment to minimise the appearance of his breasts, I find he will be untroubled by this. Physically, the surgery will leave a small scar around half the circumference of both areolas, of minimal appearance. Ms A's report states that this matter has been raised with Alex and that he is untroubled by it. If the

surgery is not performed, the evidence is that there is a risk of further breast growth, meaning that a larger excision would be required if surgery were to be performed when Alex was 18 years or older with the concomitant risk of a longer recovery period and more extensive scarring.

(f) the capacity of:

(i) each of the child's parents; and

(ii) any other person (including any grandparent or other relative of the child);

to provide for the needs of the child, including emotional and intellectual needs;

173. Alex has only one living parent and that parent is unable to provide for his needs, as evidenced by her denunciation of Alex and her decision to remove herself and her new family from Alex's life. Alex's relative has cared for Alex for many years in his mother's absence and shown herself to be considerate and supportive, in what for her must be difficult circumstances. Alex's relative is well able to meet Alex's physical, financial, emotional and intellectual needs. I take note of the fact that Alex's relative, to her very considerable credit, works very hard and has saved somewhere in the vicinity of \$20,000 to \$30,000 to assist with the costs of the operation or for Alex's other future needs. In caring for Alex and meeting the challenges associated with his condition, Alex's relative has been ably and skilfully assisted by the Department, the youth services provider, the members of Alex's care assessment team, personnel from Alex's school and the Education Authority, amongst others. Alex is able to confide in members of his support network if there are matters he does not wish to discuss, or are not appropriate to discuss, with his relative. The availability of support for Alex, which is so critical to his health and well-being, will continue until he finishes his final year of school. The evidence before me is that one of the significant advantages associated with Alex undergoing breast surgery at the age of 17, rather than waiting until he turns 18, is that Alex will have the benefit of these support networks in the post-operative period and in the transition to adulthood as a man. I accept this evidence. The ICL has exhorted me to find that Alex is entitled to a significant level of community support and that those surrounding Alex are entitled to have that support acknowledged and affirmed. I do so, unconditionally.

(g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;

174. Alex is an intelligent, sensitive, thoughtful and good-humoured young man of considerable maturity and perception. Alex identified himself as male from a

very young age and has shown great determination, and no little ingenuity, in maintaining his commitment to living as a man. There is no evidence that Alex has been anything other than constant in his view that he is male and that he wishes to have his breasts removed to affirm his acquired gender. Currently, Alex is forced to resort to a degree of subterfuge to avoid having his biological gender revealed and that Alex describes himself as a “good liar”. Associate Professor P told the Court he interpreted this comment to mean:

...he’s had to develop ways of explaining the situation to others, which he calls lying, and other people would say would be a creative way of avoiding revealing things that need not be revealed. So I would have thought that was a way a young man with a fairly high sense of right and wrong and morality would express what he’s had to do to get by day to day.

The tension this causes for Alex is revealed in his comment, as recorded by Ms A, that “I don’t want to live in the middle, do you know what that’s like?”

175. I am satisfied that Alex’s lifestyle, including but not limited to a cessation of vigilance by Alex in ensuring his breasts are not discernible, would be improved by a double mastectomy being performed. I also take account of the fact that Alex is of a culturally and linguistically diverse background. The evidence of Alex’s relative is that he is accepted as male in his family and in his community.

(l) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

176. I have accorded this matter little weight in my decision. Given Alex’s age and his stated intention not to have genital surgery performed prior to turning 18, if indeed at all, it is highly unlikely that the Court will be called upon to determine any further applications with respect to Alex.

(m) Any Other Relevant Factor or Circumstance

177. There are no other relevant factors or circumstances requiring my consideration.

Human rights law

178. In reaching my decision, I have also been mindful of the various human rights instruments that may be specifically relevant to people who are sex and gender diverse. In this, I have been assisted by the Human Rights and Equal Opportunity Commission’s *Sex and Gender Diversity Issues Paper*, which conveniently sets out relevant provisions.

179. The *International Covenant on Civil and Political Rights* (ICCPR), which Australia ratified in 1980 (with some reservations) contains a number of human

rights which may have special application for people who are sex and gender diverse. I intend to set out in detail only those articles of particular relevance to this case.

Article 19: Freedom of expression

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 26: The right to non-discrimination

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 17: The right to privacy

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 16: The right to recognition before the law

Everyone shall have the right to recognition everywhere as a person before the law.

180. The *United Nations Convention on the Rights of the Child* (UNCROC) is, as HREOC observe, broader than the ICCPR and includes civil, political, economic, social and cultural rights. Australia ratified UNCROC in 1990. It is a 'declared instrument' under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) and the *Family Law Act 1975* (Cth). The human rights contained in UNCROC have provided the impetus for significant

amendments to the Family Law Act, particularly the reforms made in 1995 (for further discussion see *B and B: Family Law Reform Act 1995* (1997) FLC ¶92-755). Those articles that appear to me to be particularly apposite are reproduced below:

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Article 12: The right of children to express views and have those views respected

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 8: The right to preservation of identity

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 6: The right of survival and development

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 13: The right to freedom of expression

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others; or
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 16: the right to privacy

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
 2. The child has the right to the protection of the law against such interference or attacks.
181. At the time UNCROC was ratified, the then Minister for Foreign Affairs and Trade, Senator Gareth Evans, and the then Attorney-General, Michael Duffy, announced that ratification of UNCROC “represented an important new development in the protection of the rights of children” and indicated the concern of the Australian Government to assist to the greatest extent possible in the improvement of human rights throughout the world (*Australia’s First Report Under Article 44(1)(A) of the Convention on the Rights of the Child, CRC/C/8/Add.31, Office of the United Nations High Commissioner for Human Rights, Geneva, Switzerland, 1 February 1996, para 3*).
182. In *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, the majority of the High Court (Mason CJ and Deane J), in discussing the significance of UNCROC in domestic law, said at pages 286-7:
- ...the fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia’s obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia’s obligations under international law.
183. The HREOC discussion paper also makes reference to the *Yogyakarta Principles*. These principles were developed by a group of human rights experts in 2006. They address the broad range of human rights standards and their application to issues of sexual orientation and gender identity. In essence, the *Yogyakarta Principles* confirm that all international human rights laws apply to people who are sex and gender diverse and affirm the primary obligation of States to implement human rights.
184. As far as domestic human rights instruments are concerned, Australia has not enacted a bill or charter of rights, or a human rights act, to enshrine the fundamental rights and freedoms of Australians in domestic law. Australia’s *Human Rights and Equal Opportunity Act 1986* (Cth), administered by HREOC, is confined to providing people with a mechanism to lodge a complaint about breaches of human rights. HREOC only has jurisdiction with respect to complaints of racial discrimination, sex discrimination, disability discrimination and age discrimination. However, it can also investigate

complaints about breaches of ‘declared instruments’ which, as mentioned above, includes UNCROC.

185. Each Australian State and Territory has anti-discrimination legislation in place. In Victoria, it is a breach of the *Equal Opportunity Act 1995* (Vic) to discriminate against a person on the basis of their actual or assumed gender identity. The ACT and Victoria have enacted their own human rights statutes. The *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) requires a statement of compatibility with the charter to be prepared for each new bill. Where a provision in a bill is incompatible with the charter, the relevant minister is required to explain to Parliament why the incompatibility exists. Charter rights do not create a cause of action per se but that can be raised in legal proceedings and in appropriate cases the Supreme Court can issue a Declaration of Incompatibility requiring the Victorian government to reconsider the offending legislation. Freedom of thought, protection of privacy and the right to participate in public life without discrimination are rights recognised under the Charter. Additionally, “children have the right to protection according to their best interests, without discrimination.”
186. While no submissions were directed to me on this point the decision arrived at is consistent with international human rights instruments.

DOCUMENTARY MATERIAL LISTING ALEX’S GENDER AS MALE

187. In the Human Rights and Equal Opportunity Commission’s report *Sex and Gender Diversity: Report arising from initial consultation*, released in July 2008, the Commission said: “Having documents that contain accurate information about sex and gender is crucial for the full participation in society of people who are sex and gender diverse.” I endorse that view.
188. Some jurisdictions have enacted legislation or developed specific processes to enable applicants to obtain documentation confirming their gender. In Victoria the *Births, Deaths and Marriages Registration Act 1996* (Vic) makes provision for the issuing of a ‘Recognised Details Certificate’. Section 30E of that Act applies to people born other than in Victoria as is applicable in the instant case as Alex was born overseas. It provides:

30E Application for document acknowledging identity

- (1) An unmarried person—
- (a) who is 18 years or over; and
 - (b) whose principal place of residence is, and has been for at least 12 months, in Victoria; and
 - (c) whose birth is registered in a place other than Victoria; and

(d) who has undergone sex affirmation surgery—

may apply to the Registrar for a document that acknowledges the person's name and sex.

(2) An application must include statutory declarations as described in section 30B or an interstate recognition certificate issued to the applicant.

(3) An application must be in the form approved by the Registrar and must be accompanied by the prescribed fee (if any).

‘Sex affirmation surgery’ is defined in section 4 of the Act as “a surgical procedure involving the alteration of a person's reproductive organs carried out for the purpose of assisting the person to be considered to be a member of the opposite sex”.

189. I have before me a letter authored by the Principal Solicitor in the Legal Services branch of the Department, addressed to the ICL. I have admitted the letter into evidence. The letter describes the import of discussions between the Principal Solicitor, the solicitor for the applicant, and the Registrar of Births, Deaths and Marriages. The purpose of those discussions was to establish whether Alex could be issued with a proof of identity document reflecting his chosen gender. The letter states:

In short, the Registrar informed us that the *Births, Deaths and Marriages Registration Act 1996* did not enable any such document to be issued to Alex in the current circumstances.

Alex is ineligible to apply for a Recognised Details Certificate pursuant to section 30E of the Act as he is not yet 18 years old and, more significantly, has not undergone sex affirmation surgery. Sex affirmation surgery is defined under the Act as “a surgical procedure involving the alteration of a person’s reproductive organs carried out for the purpose of assisting the person to be considered to be a member of the opposite sex.” The Registrar confirmed that bilateral mastectomies did not come within this definition.

Furthermore, she added that there was no provision under the Act enabling her to exercise a general discretion to issue any other proof of identity document that could record Alex’s gender as male.

190. The letter goes on to discuss the likelihood of Alex being issued with a passport identifying him as male. The Principal Solicitor states:

The Registrar commented that she thought it unlikely the Commonwealth would be able to facilitate the issue of a passport to Alex reflecting his chosen gender identity in the current circumstances given similar

requirements under the *Australian Passports Act 2005*. This is a view we also adopt.

191. The letter does however indicate that Alex may be able to obtain a Victorian driver's licence reflecting his gender as male, as the relevant authority only requires an individual to supply a medical report indicating that course of treatment is being undertaken in preparation for gender reassignment. The Principal Solicitor posits that the course of hormonal treatment already received by Alex may be sufficient to satisfy this requirement.
192. The Principal Solicitor concludes by expressing regret that Alex's opportunity to apply for proof of identity documents seems limited to an application for a driver's licence. I share the sentiment expressed by the Principal Solicitor. In so doing I note that other jurisdictions have put processes in place that enable a person's acquired gender to be legally recognised without the precondition that gender reassignment surgery first be undertaken. In the United Kingdom, for example, the *Gender Recognition Act 2004* (UK) only requires that a person (who must be aged over 18 years of age) have gender dysphoria and has lived in the acquired gender for two years. Provided that the evidentiary and other provisions of the Act are satisfied, a person may then be issued with a gender recognition certificate which has the effect that the person's acquired gender becomes their recognised gender for all purposes. I believe this approach has much to recommend it.
193. Unfortunately however that is not the current position in the State in which Alex lives and in light of the advice received by the Department, the application for an order with respect to the issue of a birth certificate was not pressed and no orders were ultimately sought in regard to a birth certificate.
194. It is consistent with my finding that it is in Alex's best interests to have a double mastectomy performed to make the orders as sought by the applicant, with the concurrence of the ICL, that will facilitate certain documents being issued to reflect Alex's gender as male.

I certify that the preceding one hundred and ninety-four (194) paragraphs are a true copy of the reasons for judgment of the Honourable Chief Justice Bryant

Associate: ...

Date: 6 May 2009