

Our Ref: 701

18 December 2017

Fae Robinson Futures
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Dear Ms Robinson

Re: Review of the *Disability Services Act 2011*

Thank you for the opportunity to provide comment in response to the review of the *Tasmanian Disability Services Act 2011* ('the Act').

Background

As you may be aware, a major focus of my role is to advocate for and promote the rights and wellbeing of all children and young people in Tasmania giving special regard and serious consideration to the interests and needs of children and young people who are disadvantaged for any reason or vulnerable.

In performing my functions, I must do so according the principle that the wellbeing and best interests of children and young people are paramount, and I must observe any relevant provisions under the United Nations' *Convention on the Rights of the Child* (the CRC).

The Review

I commend the Tasmanian Government for taking steps to ascertain the extent to which funding and service delivery arrangements under the Act are effective in responding to and promoting the needs and best interests of people with disability, including children and young people, with a view to strengthening and improving the legislative framework.

At the outset, however, I note that in the limited time available to respond to the Review it has not been possible for me to prepare a comprehensive submission in response to the questions it seeks to answer.

I understand that there will be a further review of the legislative requirements necessary to be in place when the National Disability Insurance Scheme is fully rolled out. I therefore look forward to engaging in relevant discussions as the opportunity arises.

Comment

I have briefly identified below some areas which I consider to be of particular importance for children and young people in the context of the Review of the Act, noting that these matters are by no means intended to be exhaustive.



1. Principles

While children and young people enjoy all of the rights contained in the United Nations' *Convention on the Rights of Persons with Disabilities* (CRPD), it is clear that they should be accorded special protections and that in all actions concerning them their best interests should be the primary consideration. The CRPD recognises the fundamental importance of ensuring that children and young people with a disability are encouraged and permitted to express their views on matters affecting them and that they are provided with assistance to realise that right.

Article 7 of the CRPD articulates the fundamental principles relevant to the rights and well-being of children and young people with disability:

Article 7 - Children with disabilities

1. *States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.*
2. *In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.*
3. *States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.*

The principles elaborated in Section 5 of the Act should more properly align with the fundamental principles pertaining to children and young people in Article 7 of the CRPD which I have set out above. Further, these principles should be incorporated in an operational manner into other provisions of the Act which have the potential to impact upon children and young people with disability (eg the preparation of Individual Plans, the Regulation of Restrictive Interventions).

I note that the *National Disability Insurance Scheme Act 2013* (Cth) ('NDIS Act') includes general guiding principles which require, so far as practicable, the promotion of a child's best interests to be a paramount consideration. The relevant section provides as follows:

5. General principles guiding actions of people who may do acts or things on behalf of others

It is the intention of the Parliament that, if this Act requires or permits an act or thing to be done by or in relation to a person with disability by another person, the act or thing is to be done, so far as practicable, in accordance with both the general principles set out in section 4 and the following principles:

.....

- (f) *if the person with disability is a child—the best interests of the child are paramount, and full consideration should be given to the need to:*
 - (i) *protect the child from harm; and*



- (ii) *promote the child's development; and*
- (iii) *strengthen, preserve and promote positive relationships between the child and the child's parents, family members and other people who are significant in the life of the child.*

The above provides a significantly stronger statement than is currently the case under section 5(2)(a) of the Act which does not refer to the paramountcy to be attached to the promotion of a child's best interests.

I note also that the NDIS Act imposes a duty on child representatives to ascertain the wishes of the child concerned and to act in their best interests:

76. Duty to children

- (1) *It is the duty of a person who may do a thing because of section 74 to ascertain the wishes of the child concerned and to act in the best interests of the child.*

The NDIS Act acknowledges that a child's ability to undertake acts and to make decisions on their own behalf increases as they develop. The Act sets out the circumstances in which a child may be able to act and make decisions and will not require a child representative (see section 74(5) of the NDIS Act and Part 5 of the National Disability Insurance Scheme (Children) Rules 2013).

2. Use of Restrictive Interventions and meaning of 'therapeutic purposes'

The meaning of 'therapeutic purposes' under the Act is clearly a matter for consideration as part of this Review, particularly following the decision of Brett J in *Foss v Guardianship and Administration Board* [2017] TASSC 4. In saying this I acknowledge that in responding to the "infinite variety of circumstances" and the wide variety of therapeutic and non-therapeutic purposes which might be required in any particular situation,

[c]ertainty, consistency and an appropriate response are achieved, not by a narrow statutory definition, but by using that definition to set out the broad parameters of the decision-making process, and then leaving the actual decision in the hands of specialist office holders and, ultimately, a specialist tribunal.¹

I note that the use of chemical restraint is not included as a restrictive intervention for the purposes of the Act.² While I am aware of the inherent challenges involved, regulation of chemical restraint (complemented by education and guidelines for disability service providers) is, in my view, desirable to promote the reduction and elimination of its use and to uphold the rights of children with disability. The *Mental Health Act 2013* (Tas) provides an example of a legislative framework for regulating the use of chemical restraint for involuntary patients with mental illness (see in particular sections 3, 6(3), 57 and 58).

I understand that the issue of parental consent in the context of restrictive practices arose as a key issue during 2016-2017 for the Senior Practitioner and that, contrary to previous advice to the sector, parents and guardians cannot consent or authorise the

¹ *Foss v Guardianship and Administration Board* [2017] TASSC 4, per Brett J at para 36.

² [Senior Practitioner Annual Report – 1 July 2016 to 30 June 2017](#), page 14.



use of a restrictive intervention on their child by a disability services provider.³ While I acknowledge the inherent complexity and sensitivity of this particular issue and the fundamental importance of providing education to those providing supports for children with disability, consideration could be given to providing legislative clarification of this issue to further promote children's best interests.

3. Better alignment with other legislation

It is clear that there is work to be done to better align the Act with a number of other pieces of legislation which intersect with it, and to ensure clarity around which piece of legislation applies in particular circumstances (eg relevant pieces of legislation include the *Education Act 2016*, the *Children, Young Persons and Their Families Act 1997*, the *Youth Justice Act 1997* and the *Mental Health Act 2013*).

Conclusion

I trust the comments I have made above, albeit brief, are of assistance to this important Review of the Act and the extent to which it responds to and promotes the needs and best interests of children and young people with disability.

I am, of course, available to discuss my comments and the outcome of the Review with you. Please contact Isabelle Crompton (Senior Policy & Programs Officer) in the first instance on 6166 1368 or isabelle.crompton@childcomm.tas.gov.au.

Yours sincerely

David Clements
Interim Commissioner for Children and Young People

³ [Senior Practitioner Annual Report – 1 July 2016 to 30 June 2017](#), page 11.