

Your Ref:
Our Ref: 827

31 October 2022

Dr Anthony Cidoni
A/g Chief Psychiatrist
Office of the Chief Psychiatrist
Department of Health

By email: chief.psychiatrist@health.tas.gov.au

Dear Dr Cidoni

**Re: Mental Health Act Review Implementation Project – Tranche 1
Draft Mental Health Act Amendment Bill**

Thank you for the opportunity to provide feedback on the draft Mental Health Act Amendment Bill (draft Bill) and for providing an extension of time to enable me to respond.

At the outset, I note that the provisions of the Act relating to children are scattered throughout the Act. The draft Bill does not address this. As I said in my 2019 submission to the review of the Act, the introduction of a discrete Part in the Act relating to children would assist readability and clarify the unique considerations which apply when providing services for or carrying out legislative functions relating to children. In particular, this would facilitate inclusion of a set of guiding principles based on relevant international human rights standards applicable to children, including the *Convention on the Rights of the Child*. I understand this may be a matter for further consideration as part of the Tranche 2 reforms.

Nevertheless, I am very pleased to note the proposal to include specific principles in Schedule 1 (mental health service delivery principles) relating to the promotion of the rights, wellbeing and safety of children, including as recipients of mental health services themselves, and as children of persons receiving mental health services.

The focus of my below feedback is limited to the amendments relating to the definition of parent, informed consent for the assessment or treatment of a child who lacks decision-making capacity, the meaning of treatment, and the role of Official Visitors.

Please note my comments are preliminary in nature and are not intended to be exhaustive. I would welcome the opportunity to discuss these and related issues in more detail.



Background

As you may be aware, under the *Commissioner for Children and Young People Act 2016* ('the CCYP Act'), I have responsibility for advocating for all children and young people in Tasmania generally, and for monitoring and promoting their wellbeing. Importantly, I am also required by the CCYP Act to assist in ensuring the State satisfies its national and international obligations with respect to children and young people generally.¹

In performing a function or exercising a power under the CCYP Act, I must do so according to the principle that the wellbeing and best interests of children and young people are paramount, and I must observe any relevant provisions of the United Nations *Convention on the Rights of the Child* ('the CRC').²

I have used the terms 'child' or 'children' when referring to people who have not attained the age of 18 years - this aligns with the definition of 'child' in s.3 of the Act.

Comment

Currently, s.3 of the Act defines a parent as follows:

parent, of a child, means a person having, for the child, all of the responsibilities which, by law, a parent has in relation to his or her children.

Section 9 of the Act provides that, for a child who lacks decision-making capacity, consent for assessment or treatment of the child may be given by a parent of the child. As I understand it, this approach to consent to assessment and treatment is consistent with the common law – that is, if a child is not 'Gillick competent', decisions about their treatment are generally made by their parent or guardian.^{3,4}

Clause 43 of the draft Bill would broaden the definition of parent as follows:

parent, of a child, includes –

- (a) a person who –
 - (i) in respect of the child, has all of the duties, powers, responsibilities and authority which, by law, parents have in relation to their children; or
 - (ii) is the legal guardian of the child; or
 - (iii) has the legal custody of the child; and
- (b) if there is no person who falls within paragraph (a) in respect of the child, a person who –
 - (i) generally acts as a parent of the child; and

¹ *Commissioner for Children and Young People Act 2016* (Tas) s 8.

² *Commissioner for Children and Young People Act 2016* (Tas), s 3.

³ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (*Gillick*); see also *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 189 (*Marion's case*).

⁴ Pursuant to section 61C of the *Family Law Act 1975* (Cth), subject to any order of the court, each of the parents of a child who is not 18 has the parental responsibility for that child, an aspect of which is the right and obligation to make decisions around medical treatment for the child.



- (ii) has acted as a parent of the child for a significant length of time; and
- (iii) is recognised by the child as a parental figure for the child;

I understand the rationale for this amendment is to protect the rights of children to access timely mental health services by recognising a broader range of carers who the child may lawfully rely on in the provision of consent to treatment and assessment (see p8 of the Amendment Bill Consultation Guide).

As I noted in my November 2019 submission to the review of the Act's operation, I have been advised that in some situations it is not always clear who may provide consent for assessment or treatment for a child who lacks decision-making capacity. Uncertainty may arise where a parent or guardian is unavailable or unwilling to provide consent; where a parent is themselves incapable of providing informed consent; where there is a dispute between parents or between parents and the child about the appropriateness or otherwise of the assessment or treatment proposed; or where the child lives independently and/or is estranged from family. To this I would add, where a child is living with an informal carer.

I am generally supportive of the intention to promote the interests of children by promoting their access to timely mental health services and to clarify the law in respect to consent for children who do not have decision-making capacity. However, I make the following observations which lead me to have concerns regarding the proposed changes:

- The meaning of '*legal custody*' may benefit from clarification - It is not entirely clear to me what the term '*legal custody*' under sub-paragraph (iii) is intended to encompass. For example, how is it intended that the Act as amended will operate if a child is in the custody of a correctional or police officer, or is in the custody of the Secretary under the *Youth Justice Act 1997*?
- The meaning of '*If there is no person who falls within paragraph (a) in respect of the child*' may also benefit from clarification – It is not entirely clear to me what circumstances will lead to a person in paragraph (b) becoming a 'parent' for the purpose of the Act. For example, is it intended that a person in paragraph (b) can provide consent for a child who lacks decision-making capacity, if a person in paragraph (a) cannot be found after reasonable inquiry, or is unwilling or unable to provide consent for the child?

I believe these and related matters would benefit from further consideration to ensure the amendments operate, promote and protect the rights and interests of children. This is particularly the case given that it is proposed to amend s.9 ('*informed consent to assessment or treatment for a child who lacks capacity to decide on own assessment or treatment*') to specifically include '*special psychiatric treatment*' (which may include psychosurgery). This latter amendment, including the potential implications for the treatment of children for mental illness which might arise, is a matter about which I would welcome further discussion before expressing even a preliminary view on.

In this context, I note again that Tasmania does not have legislation which governs consent to medical treatment for children generally. I have raised this as an issue on several previous occasions, as have other Commissioners. Consideration of possible reforms to the Act relating to consent to assessment and treatment for children could appropriately occur in



the context of discussions about whether Tasmania should introduce specific legislation governing consent to medical treatment for children in Tasmania generally. The level of amendment affecting consent to medical treatment for children proposed by this draft Bill serves to highlight the pressing need for a broader consideration of the law relating to consent to medical treatment for children in Tasmania. This is a matter upon which I would welcome further discussion.

Finally, I welcome the proposed amendments to the role of Official Visitors relating to children, which make it clear that:

- a child can make a complaint to an Official Visitor, regardless of whether they have the consent of a parent or guardian to make the complaint; and
- that the functions of an Official Visitor include checking that the additional requirements under the Act in relation to the services provided to a child, including but not limited to the admission, or detention of a child, are complied with.

It is important that the functions of the Official Visitors relating to children are carried out in a developmentally appropriate, child-safe and child-centered manner. I understand from conversations held at officer level that the implementation of these amendments will be supported by training for Official Visitors. I would welcome further discussion around the content of this training and any additional qualifications or resourcing that may be necessary for Official Visitors to appropriately discharge these child-related functions.

Thank you for the opportunity to inform the amendments to the Act. I very much look forward to contributing to the further consideration by Government of aspects of the draft Bill as they relate to children, and to amendments that will be considered as part of Tranche 2.

Yours sincerely

Leanne McLean
Commissioner for Children and Young People

cc *Hon Jeremy Rockliff, Minister for Health, Minister for Mental Health and Wellbeing*
cc *Hon Elise Archer, Attorney-General and Minister for Justice*
cc *Hon Roger Jaensch, Minister for Education, Children and Young People*