Australian Capital Territory

Variation in Sex Characteristics (Restricted Medical Treatment) Assessment Criteria Guidelines 2023 (No 1)*

Disallowable instrument DI2023–331

made under the

***Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023*, s 17 Ministerial guidelines.**

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1 Name of instrument

This instrument is the *Variation in Sex Characteristics (Restricted Medical Treatment) Assessment Criteria Guidelines 2023 (No 1)*.

2 Commencement

This instrument commences on 23 December 2023.

3 Guidelines

I make the Assessment Criteria Guidelines at schedule 1

Rachel Stephen-Smith MLA
Minister for Health
20 December 2023

*Name amended under Legislation Act, s 60

1 Introduction

The *Variations in Sex Characteristics (Restricted Medical Treatment) Act 2023* (ACT) (**Act**) recognises that people with variations in sex characteristics should not be subject to harm through inappropriate medical interventions. It affirms the principle that people, including children, should always be involved in decisions about irreversible and non-urgent medical interventions made to their bodies. The assessment committee's role is to apply the assessment criteria contained in the Act to protect these principles.

As per clause 17 of the Act, these guidelines stipulate certain matters that an assessment committee must or may consider as they assess applications in accordance with sections 13 to 16. These guidelines also provide other guidance to assist an assessment committee or internal review committee to exercise their functions under the Act. In applying the criteria set out under sections 13 to 16, due regard should be placed on the objects of the Act set out in section 6: "to protect rights and ensure the wellbeing of people with a variation in sex characteristics in relation to restricted medical treatment."

2 Factors the assessment committee must or may consider (section 17(1)(a) of the Act)

2.1 Alternative treatment options - matters assessment committees must consider

Under section 13 (1)(b), assessment committees must consider whether there is sufficient evidence that alternative treatment options have been considered.

Section 13(2) further provides that:

> ***alternative treatment option*** *to a proposed treatment is a medical or non medical treatment or procedure, including delayed treatment or procedure, which, taking into account the primary harm and any associated harm of the proposed and alternative treatment options, is as effective as the proposed treatment.*

When considering whether a treatment is 'as effective as the proposed treatment' at section 13(2) of the Act the committee should consider the efficacy of the treatments in mitigating all relevant physical or psychological harm to the prescribed person, rather than any specific subset of physical or psychological harms. This means that in considering whether a treatment meets the definition of an alternative treatment option for the purposes of section 13, a wholistic comparison of the harms associated with the alternative treatments and proposed treatment, and their effectiveness in mitigating the overall harm suffered by the person is required.

2.2 Alternative treatment options - matters assessment committees may consider

In considering the physical or psychological harms of a proposed treatment or an alternative treatment option for section 13, the kinds of harm the assessment committee may take into account include the following factors (or any combination of those factors)—

(a) any harm which might result from the expected or intended medical outcomes and any side effects of the proposed treatment and alternative treatments;

(b) any harm which might result from unintended medical outcomes, or risks of a proposed treatment or alternative treatment option and the likelihood of those risks or unintended outcomes;

(c) psychological impact of any negative outcomes resulting from the particular situation of the prescribed person;

(d) taking into account the prescribed person's cognitive ability, any wishes the prescribed person has communicated in relation to any of the above, including any harm that the prescribed person may suffer from a proposed treatment or alternative treatment option being undertaken otherwise than in accordance with their wishes; and

(e) any other physical or psychological harm that is not covered by sections 14(b) and 15(b) of the Act.

2.3 Section 16(b) whether there is 'sufficient information'? - matters assessment committees must consider

In accordance with section 16(b), an assessment committee is required to consider whether sufficient information has been provided, by reference to the prescribed person's cognitive ability.

Therefore, an assessment committee must consider the prescribed person's cognitive ability in order to determine what will constitute sufficient information in relation to the matters in 16(b)(i)-(iv) in each case.

What is cognitively appropriate, and therefore sufficient information, will vary between prescribed people. For children, what is cognitively appropriate will vary widely with age and development, and the assessment of whether sufficient information has been provided should be consistent with their evolving capacity and development.

The assessment committee may consider any relevant matters in determining whether information is sufficient and cognitively appropriate.

3 Other guidance to assist an assessment committee or internal review committee to exercise their functions under this Act.

3.1 Requesting more information

Sections 13 and 16 of the Act both require that an assessment committee must have "sufficient evidence" of the matters set out in the respecting section, before approving a treatment plan. Section 19 of the Act provides that an assessment committee may, in writing, request an applicant to give the committee information that the committee reasonably needs to decide the application.

This means that where an assessment committee does not have sufficient evidence of a particular matter, it may ask for additional information so as to reach a view in relation to whether the thresholds set in sections 13 and 16 have been met. This gives flexibility to an assessment committee to request additional information before deciding that there is not sufficient evidence under section 13 or section 16, or to clarify any aspect of the proposed treatment plan that the assessment committee does not have sufficient evidence to form a view of.

To achieve this, section 19 allows an assessment committee to request further details about the proposed treatment plan and to assess whether there are any alternative treatment options available, or whether those alternative treatment options have been properly considered.

Section 19 can also be utilised to ask an applicant to provide further where the committee does not have sufficient evidence of whether reasonable steps have been taken to assess a prescribed person's cognitive ability under section 16, and has accordingly not provided them with sufficient information or not taken the prescribed person's views into account.

3.2 Consultants for applications for adults subject to guardianship orders

Under section 34 of the Act, the president may engage a consultant with relevant experience to assist the assessment committee.

One circumstance where such a consultant might be of assistance to the assessment committee would be in respect of the assessment of a prescribed person who is an adult. For such assessments section 34 will allow the president to engage a consultant with specific expertise in the medical care of adults subject to a guardianship order that applies to the medical treatment.

Another circumstance would be to provide expert assessment of the cognitive capacity of a child, where the assessment would be particularly complex due to the particular circumstances and cognitive development of that child and where the application itself does not provide sufficient evidence with regard to section 9, 14(a) and 16(b) of the Act.