

# 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, Section 17 (Ministerial guidelines).**

## EXPLANATORY STATEMENT

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This explanatory statement relates to the *Variation in Sex Characteristics (Restricted Medical Treatment) Assessment Criteria Guidelines 2023 (No 1)* as presented to the Legislative Assembly.

Section 17 of the *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023* (ACT) (the Act) provides that the Minister may, by disallowable instrument, make guidelines with respect to –

- (a) the matters that an assessment committee must or may consider under sections 13 to 16 of the Act; and
- (b) other guidance to assist an assessment committee or internal review committee to exercise their functions under the Act.

The instrument provides for these guidelines. It stipulates the matters that an assessment committee must consider under sections 13 to 16 as well as matters an assessment committee may consider under these sections. It also provides for additional guidance which may assist assessment committees and internal review committees in exercising their functions under the Act.

### Clause notes

#### Clause 1 Name of instrument

Clause 1 sets out the name of the disallowable instrument - Variation in Sex Characteristics (Restricted Medical Treatment) Assessment Criteria Guidelines 2023 (No 1).

#### Clause 2 Commencement

Clause 2 provides that the instrument commences on 23 December 2023.

## **Clause 3      Guidelines**

Clause 3 states that the Minister makes the guidelines in Schedule 1 as described below.

### **Schedule 1**

#### *Part 1 Introduction*

Part 1 affirms the purpose and principles which undergird the Act, namely that people with variations in sex characteristics should not be harmed by inappropriate medical interventions, and that they should be involved in decisions about irreversible and non-urgent medical interventions made to their bodies.

It outlines the legislative authority for the guidelines in section 17 of the Act and re-emphasises that the assessment criteria should be applied in accordance with the objects of the Act.

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

Part 2 highlights certain concepts and issues that are required to be considered under sections 13 to 16 of the Act – such as alternative treatment options and whether a prescribed person has been given sufficient information in relations to the matters listed in section 16(b) – and separately specifies the matters which an assessment committee must consider and may consider with respect to these concepts and issues.

##### *Part 2.1 – Alternative treatment options – matters assessment committees must consider*

Part 2.1 provides that an assessment committee must consider all relevant physical or psychological harm to the prescribed persons when considering alternative treatment options, and undertake a wholistic comparison of the harms associated with the alternative treatments and the proposed treatment when comparing their effectiveness in mitigating the overall harm suffered by the prescribed person under section 13(2).

##### *Part 2.2 – Alternative treatment options – matters assessment committees may consider*

Part 2.2 specifies the types of harms which may be relevant in relation to a particular application when considering alternative treatment options and in comparing the effectiveness of the alternative treatment options with the proposed treatment in mitigating the overall harm suffered by the prescribed person under section 13(2).

##### *Part 2.3 – Section 16(b) whether there is ‘sufficient information’? – matters assessment committees must consider*

Part 2.3 provides that an assessment committee must consider the prescribed person’s cognitive ability when providing the information outlined in section 16(b). It provides that what is sufficient information with respect to 16(b) will depend on an assessment committee’s consideration of the prescribed person’s cognitive ability. This ensures that information provided to an individual is tailored to their cognitive abilities. This is consistent with the Act’s principles to support individuals to be involved in decisions about medical interventions with respect to their bodies.

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

Part 3 provides some additional guidance for assessment committees in relation to assessment committee functions that do not directly relate to the assessment criteria in sections 13 to 16, such as the ability to request more information from the applicant and the power to engage a consultant with relevant experience to assist the assessment committee. This part encourages assessment committees to use certain powers they have under the Act to ensure they are able to come to the best possible decision in certain situations.

*Part 3.1 – Requesting more information.*

Part 3.1 provides additional guidance to encourage assessment committees to utilise section 19 and request further information from an applicant where an application is deficient at first instance in providing sufficient evidence of particular matters required under the assessment criteria.

*Part 3.2 – Consultants for applications for adults subject to guardianship orders*

Part 3.2 provides additional guidance to encourage assessment committees to engage a consultant in circumstances where the prescribed person is an adult or where the cognitive capacity of a child is difficult to determine. This is in recognition that such circumstances are particularly complex and could benefit from the expertise of a consultant with relevant experience.

## **CONSISTENCY WITH HUMAN RIGHTS**

The guidelines engage the following rights under the Human Rights Act 2004 (HR Act):

- Section 8 – Recognition and equality before the law
- Section 10 – Protection from torture and cruel, inhuman or degrading treatment (promoted)
- Section 11 – Right to protection of the family and children (promoted).

The guidelines do not result in any further limitations of rights under the HR Act.

### ***Rights Promoted***

#### **Section 8 – Recognition and equality before the law**

The guidelines promote the right to recognition and equality before the law by providing specifically for people with cognitive abilities which differ from the norm to ensure that such persons can enjoy equal protection under the law.

Part 2.3 of the guidelines require assessment committees to consider the cognitive ability of the prescribed person and ensure that any information provided to the prescribed person is appropriately tailored to their cognitive abilities. This has the effect of ensuring that those with a cognitive impairment are provided with as much support as possible to participate in decision-making in relation to treatment for their variation.

## Section 10 – Protection from torture and cruel, inhuman or degrading treatment

No-one may be subjected to medical or scientific experimentation or treatment without their free consent.

Section 13(1) of the Act promotes the right to protection from torture and cruel, inhuman or degrading treatment by requiring the statutory decision-maker to satisfy themselves that there is sufficient evidence that:

- (a) a person to whom a plan applies would suffer significant harm if the proposed treatment were not undertaken in accordance with the plan;
- (b) alternative treatment options have been sufficiently considered;
- (c) the proposed treatment is no more restrictive of the ability to make a decision about a prescribed person's sex characteristics in the future than any alternative treatment option.

The guidelines require that a wholistic consideration of all relevant harms is required for alternative treatment options to have been sufficiently considered and provides that the comparison of the harms in section 13(2) of the Act, must be done in such a way as to ensure that the alternative treatment options considered are as effective at mitigating the overall harm done to the prescribed person as the proposed treatment option. Embedded in this process is the recognition that physical harms are not the only harms that may be considered, and that psychological and other harms specified in the guidelines may be just as relevant.

In so doing, the guidelines promote prescribed persons' right to protection from torture and cruel, inhuman or degrading treatment by requiring a process for decision making which is directed towards minimising, as much as is possible, the harms associated with such non-consensual treatment.

## Section 11 – Right to protection of the family and children

The family is the natural and basic group unit of society and is entitled to be protected by society. This right has its origins in Article 17 of the *International Covenant on Civil and Political Rights*, which refers to people not being “subjected to arbitrary or unlawful interference with [their] privacy, family, home or correspondence...”<sup>1</sup>

Children, due to their particular vulnerabilities, have special rights under human rights law. This right to protection is in addition to all other rights, which children enjoy as individuals.

The guidelines promote this right in two separate ways. First, the guidelines promote the special protection of the rights of children with variations in sex characteristics by ensuring that they are given information which is tailored to their cognitive abilities under section

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<sup>1</sup> ACT Government Justice and Community Safety Directorate, Human Rights Fact Sheet, *Right to protection of the family and children*; [https://www.justice.act.gov.au/\\_data/assets/pdf\\_file/0006/2072409/Fact-Sheet-D-s-11-Right-to-Protection-of-Family-and-Children-Human-Rights-Education.pdf](https://www.justice.act.gov.au/_data/assets/pdf_file/0006/2072409/Fact-Sheet-D-s-11-Right-to-Protection-of-Family-and-Children-Human-Rights-Education.pdf); United Nations International Covenant on Civil and Political Rights, Article 23(1).

16(b) of the Act. Secondly, the guidelines help to reduce the potential for arbitrariness in the interventions made to the family concerning decisions related to the health of children.

### Promoting the rights of children

Section 16(b) and (c) of the Act requires committees to consider whether sufficient information has been provided to a prescribed person in relation to the proposed treatment and that the prescribed person has been given, or had access to, appropriate support to assist them in understanding such information.

The guidelines require the decision maker to ensure that they have considered the prescribed person's cognitive ability when determining whether sufficient information has been provided. It requires the assessment committee to ensure that the information provided to the prescribed person is tailored to the person's cognitive ability. In so doing the guidelines further support the requirement in the Act that the prescribed person must be given or have had access to appropriate support to assist the prescribed person in understanding the information.

By ensuring that such information is tailored to a prescribed person's cognitive ability, prescribed persons will be better placed to participate in decision-making about the treatment plan and to communicate their wishes freely. Accordingly, the guidelines ensure that the rights of the child are protected.

### Reducing the potential for arbitrariness

It is recognised in the Explanatory Statement for the *Variation in Sex Characteristics (Restricted Medical Treatment) Bill* that the right to protection of the family and child from arbitrary interference may be limited if the decision-making criteria followed by assessment committees are not in accordance with the provisions, aims and objects of the *International Covenant on Civil and Political Rights*.<sup>2</sup>

For a justification for the limitation of this right in the Act please see the explanatory statement for the Bill.

The guidelines serve to reduce the potential for arbitrariness.

The definition of "arbitrary" in this context is broader than its ordinary meaning. The UN Human Rights Committee describes it extending to actions consistent with laws:

"arbitrary interference" can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant.<sup>3</sup>

The UN Human Rights Committee also state that:

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<sup>2</sup> [https://www.legislation.act.gov.au/View/es/db\\_67375/20230322-80617/html/db\\_67375.html](https://www.legislation.act.gov.au/View/es/db_67375/20230322-80617/html/db_67375.html)

<sup>3</sup> United Nations Human Rights Committee, 1988, *General Comment 16*: Article 17 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation), para. 4.

... article 17 of the Covenant deals with protection against both unlawful and arbitrary interference. That means that it is precisely in State legislation above all that provision must be made for the protection of the right set forth in that article.

The guidelines provide a degree of legislative protection against such arbitrary decision making by providing for the factors that assessment committees must consider and the relevant factors an assessment committee may consider when applying the assessment criteria under the Act. These factors are consistent with the other provisions and objectives of the Covenant as they further promote the rights of the child and right to protection from torture and cruel, inhuman and degrading treatment as mentioned above. Accordingly, the guidelines help to prevent and mitigate any potential limitation to this right which might arise from the Act.