

**SUBMISSION
TO THE
NSW LAW REFORM COMMISSION**

**ON THE REVIEW OF LAWS RELATING
TO THE CONSENT OF MINORS IN NSW
TO
MEDICAL TREATMENT**

NSW Commission for Children and Young People
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1. THE COMMISSION FOR CHILDREN AND YOUNG PEOPLE

- 1.1 The NSW Commission for Children and Young People ('the Commission') promotes the safety, welfare and well-being of children and young people in NSW.
- 1.2 The Commission was established by the *Commission for Children and Young People Act 1998* (NSW) ('the Act'). Section 10 of the Commission's Act lays down three statutory principles which govern the work of the Commission:
 - a) the safety, welfare and well-being of children are the paramount considerations;
 - b) the views of children are to be given serious consideration and taken into account; and
 - c) a co-operative relationship between children and their families and community is important to the safety, welfare and well-being of children.
- 1.3 Section 12 of the Commission's Act requires the Commission to give priority to the interests and needs of vulnerable children. Children are defined in the Act as all people under the age of 18 years.
- 1.4 Section 11(d) of the Act provides that one of the principal functions of the Commission is to make recommendations to government and non-government agencies on legislation, policies, practices and services affecting children.

2. GENERAL COMMENTS

- 2.1 The Commission is pleased to make a submission to the NSW Law Reform Commission on the review of laws relating to the consent of minors in NSW to medical treatment.
- 2.2 Where possible, the Commission has addressed its comments to particular sections of the NSW Law Reform Commission's Issues Paper.
- 2.3 In preparing this submission the Commission has sought the views of children and young people.
- 2.4 The Commission agrees with the NSW Law Reform Commission that current NSW law relating to the consent of minors to medical treatment is uncertain, complex and inadequate.
- 2.5 The central view of this submission is that reform should take place to the laws regarding minors' consent to medical treatment in NSW. Any law reform and the development of related guidelines regarding the consent of minors to medical treatment should reach a balance between recognising

the autonomous rights of children and young people, the need to safeguard and promote their best interests and the interests of parents or guardians.

- 2.6 In addition, any laws or guidelines should clearly set out the rights of children, young people and their parents to make decisions about medical treatment, or at least be involved in such decisions, as well as the obligations and rights of medical practitioners.

3. DEFINITION OF “MEDICAL TREATMENT” AND “MEDICAL PRACTITIONER”

- 3.1 The Commission considers that the definition of medical treatment should be broad to include the types of health care provided by all those in the business of health care, not just that provided by doctors and dentists. This broad definition may include services such as naturopathy, psychology, physiotherapy, dentistry, nutritionists, etc. While many of these services may not typically be considered medical treatment, a young person’s right to make decisions about their body is still at issue as any such treatment will impact on a young person’s health and well-being.

- 3.2 The Commission supports the following broad definition of medical treatment recommended by the Queensland Law Reform Commission:¹

any assessment, care, treatment, service or procedure to maintain, diagnose or treat the young person’s physical or mental condition.

- 3.3 The Commission is also of the view that the definition of medical practitioner should be expanded to include all those who provide health care, consistent with the broad definition of medical treatment above.

- 3.4 The Commission agrees with the NSW Law Reform Commission’s broad definition of types of treatment, which includes those types of treatment requiring no physical contact, such as the provision of advice or information, but excludes medical experimentation.

4. CHILDREN AND YOUNG PEOPLE’S CAPACITY TO MAKE MEDICAL DECISIONS

- 4.1 A fundamental human right is the right to bodily integrity and to make decisions on matters affecting our own bodies. This right applies as equally to children and young people as it does to adults. For example, it has long been recognised in international, common and statute law that a person who touches or uses force against another without the other’s consent commits assault or trespass.

- 4.2 It is also commonly recognised in international law that children and young people have a right to a good standard of health, access to health care and

¹ Queensland Law Reform Commission, *Consent to Health Care of Young People* (Report 51, 1996) at 17-18

to participate in decisions affecting them.² Providing children and young people with access to necessary health care and treatment is essential to provide an adequate standard of living for children and young people. While allowing children and young people to participate in decisions affecting them provides them with some control over their own bodies and health care.

- 4.3 However, the extent to which children and young people can make such decisions is often relative to their level of maturity. Children and young people mature and develop gradually. They do not suddenly achieve full competence and understanding on all matters at a specific age. A child or young person may be competent to make autonomous decisions in some areas but not others. For example, children and young people who have already experienced illness and medical treatment often have maturity in these matters beyond that normally expected for their age, but not in other matters.
- 4.4 It is the Commission's view that any law reform regarding minors' consent to medical treatment should recognise the capacity of children and young people at differing ages to make decisions about their own health care.
- 4.5 Allowing children and young people to take an active role in decisions about their health care will help them to take responsibility for their health. This allows for an incremental learning process, rather than giving responsibility on reaching a specific legal age. Studies have also shown that where children and young people are given an active role in decision-making, the treatment is more likely to be effective.³
- 4.6 However, the right of children and young people to make autonomous decisions must be balanced against their vulnerability. It is widely accepted that society has a responsibility to protect children and young people from the negative consequences of their own misjudgement and to assist them get the medical treatment they need. Society has legal and moral obligations for the welfare of children and young people and a duty to intervene if children and young people are put at risk of harm. In NSW this obligation is demonstrated through legislation such as the *Children and Young Persons (Care and Protection) Act 1998* (NSW).

5. THE ROLE OF PARENTS AND GUARDIANS IN MEDICAL DECISIONS

- 5.1 Parents usually know their child best, including their medical history and their capacity to understand and make decisions. In most cases parents are the best and most appropriate people to make decisions for their children. The Commission is of the view that where appropriate a practitioner should involve a child or young person's parents in discussing and making decisions regarding treatment.

² Articles 24(1) and 12(1) United Nations *Convention on the Rights of the Child*

³ Redding, R., "Children's Competence to Provide Informed Consent for Mental Health Treatment" [1993] *Washington and Lee Law Review* 695, pp. 708 -709

5.2 However, as a child grows older and develops capacity and understanding, so they should develop a greater role in decisions about medical treatment, to the point where a young person can exclude their parents from decision making. In some cases it is best for the child or young person's well-being not to require parental involvement in treatment decisions. For example, young people are often reluctant to talk to their parents about sexual matters, such as contraception or STDs. If parents are required to be involved in such treatment decisions, some young people may not seek medical assistance at all, exposing them to risk of pregnancy and STDs.

6. A MODEL FOR LAW REFORM

6.1 The Commission supports the creation of new legislation related specifically to minors consent to medical treatment. This would involve consolidation of the provisions relating to medical consent in the *Minors (Property and Contracts) Act 1970* (NSW), which seem out of place in legislation that is essentially about the powers of children and young people to consent to contracts of a commercial nature.

6.2 Despite the creation of new legislation on this matter, the Commission considers it is appropriate for provisions relating to medical consent in existing legislation, such as the *Guardianship Act 1987* (NSW), *Mental Health Act 1990* (NSW) and *Children and Young Persons (Care and Protection) Act 1998* (NSW) to remain, with some amendment to provide consistency. These provisions relate directly to children and young people affected by those pieces of legislation, such as children in out of home care or with mental illness, and the newly created minors consent legislation could contain references to such existing legislation, rather than attempting to codify the law.

6.3 Guidelines and principles can also be included in the legislation to assist children, young people, parents and practitioners understand and apply the law.

6.4 The Commission is of the view that principles similar to those in section 9 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should be included in any legislation relating to minors' consent to medical treatment. These principles establish a framework for the legislation and guide an interpretation of the legislation that gives paramount consideration to the best interests of children and young people. Such principles may include the following:

- a) In all actions and decisions made under this Act (whether by legal or administrative process) concerning a child or young person, the health and well-being of the child or young person must be the paramount consideration.
- b) A practitioner has a duty to provide information regarding treatment to the child or young person in language appropriate to their age.

This is regardless of whether or not a child or young person is deemed competent to consent to treatment.

- c) Where a child or young person is deemed competent by a practitioner under this Act to form his or her own views on a matter concerning his or her health and well-being, he or she must be given an opportunity to express those views freely and those views are to be given due weight in accordance with the developmental capacity of the child or young person and the circumstances.
- d) In all actions and decisions made by a practitioner under this Act, he or she should discuss with a child or young person the involvement of those with parental responsibility in any actions and decisions before commencing treatment.
- e) In all actions and decisions made under this Act (whether by legal or administrative process) that significantly affect a child or young person, account must be taken of the culture, disability, language, religion and sexuality of the child or young person and, if relevant, those with parental responsibility for the child or young person.

6.5 It is the Commission's view that legislation which establishes a transitional period during which doctors can treat on the basis of consent from the child, young person or parent is favourable. Having concurrent powers to give and refuse consent may encourage children, young people and parents to discuss the proposed treatment and reach an agreed position. This option reaches a sensible balance between recognising a child or young person's autonomy and protecting their welfare.

6.6 The Commission suggests a model for reform as follows:

6.7 Young people aged 16 years and over

6.7.1 It is the Commission's view that young people aged 16 years and over should be able to refuse and consent to medical treatment.

6.7.2 This is consistent with provisions under the *Guardianship Act 1987* (NSW) and *Children and Young Persons (Care and Protection) Act 1998* (NSW), which distinguish between "children" as those under 16 years and "young people" as those over 16 years. It is also consistent with other statutory provisions in NSW, such as the age of sexual consent and the age a young person can apply for their learner's permit to drive.

6.7.3 The Commission considers that where a young person is considered not competent to consent or refuse medical treatment, the existing provisions of the *Guardianship Act 1987* (NSW) relating to people over 16 years incapable of giving consent should apply.

6.8 Young people between 13 and 15 years

- 6.8.1 In regard to young people between the ages of 13 and 15 years, the Commission suggests that a medical practitioner may provide medical treatment if:
- a) the young person consents and the practitioner is of the opinion that the young person is capable of understanding the nature, consequences and risks of the treatment or
 - b) the person responsible for the young person consents, and
 - c) the treatment is in the best interest of the young person's health and well-being.
- 6.8.2 This model provides a concurrent system where either the young person or the parent can consent, depending on the young person's capacity or the type of treatment as considered by the practitioner. For example, a young person who may be considered competent to consent to a minor procedure, such as a blood test, may not be competent to consent to a major procedure, such as chemotherapy. However, special medical treatment should be an exception to this provision, as discussed below.
- 6.8.3 The Commission considers that 13 years is an appropriate age as it is the age that young people often move on to high school in NSW. This transition to high school often brings with it more responsibility for young people, such as being able to choose their subjects at school. Upon reaching this age many young people also develop new health concerns, including depression, a focus on body image and physical changes to their body. In addition, young people's awareness of their sexuality is increased and they may begin to experiment with drugs and alcohol. Having access to health care can minimise harm for young people faced with such issues.
- 6.8.4 The Commission is of the view that where a young person between 13 and 15 years is considered capable of consent under this model, they are also deemed capable of refusing treatment.
- 6.8.5 Where a young person between 13 and 15 years is considered incapable of consent or refusal, but nonetheless refuses treatment, the consent of the person responsible will remain valid. However, although consent has been given by the person responsible and can legally override a young person's consent or refusal, it may not necessarily be in the best interests of the young person for treatment to proceed. It is the Commission's view that the practitioner still has an obligation to make a decision whether the treatment is in the young person's best interests before proceeding. This is consistent with current common law principles in Australia that parental authority is limited to a child or young person's best interests.⁴
- 6.8.6 It is the Commission's view that practitioners should be protected from liability where they act on the consent or refusal of only one person

⁴ *Department of Health and Community Services (NT) v JWB (Marion's case)* (1992) 175 CLR 218

responsible. Statutory law states that both parents of a child or young person have responsibility for their welfare⁵ and in most cases where a child or young person has two parents or guardians it is likely that they would have discussed the treatment and made a decision together. However, in practice it may be difficult for a practitioner to seek advice from both persons responsible, particularly in minor or routine treatments.

- 6.8.7 Where parents cannot agree about whether to consent or refuse major medical treatment the Commission suggests that the matter be dealt with by an independent authority. The most appropriate definition of major medical treatment to use may be similar to the definition in section 8 of the Guardianship Regulation 2000 (NSW). This includes treatment that involves the administration of a drug of addiction, a general anaesthetic or other sedation and treatment that involves a substantial risk of death, permanent loss of function of any organ or limb or an unusually prolonged period of recovery.
- 6.8.8 While the Family Court has a jurisdiction to deal with such issues under its power to make orders about the welfare of a child,⁶ it may be more appropriate for such matters to be dealt with by the Guardianship Tribunal under the *Guardianship Act 1987* (NSW). The role and appropriateness of the Guardianship Tribunal to consider such matters is further discussed below in the section on special medical treatment.

6.9 Children under 13 years

- 6.9.1 The Commission is of the view that children under the age of 13 years should be required to have the consent of a person responsible before undergoing medical treatment.
- 6.9.2 The Commission considers 13 years an appropriate age for requiring parental consent as children under this age, who have typically not yet reached high school, are less likely to be involved in activities and behaviour that might result in the need for health care in matters such as sexual health or substance use. Therefore, it is less likely that parental involvement would deter the child from seeking medical treatment.

7. TYPES OF MEDICAL TREATMENT

- 7.1 The Commission is of the view that the legislation should contain specific provisions relating to emergency and special medical treatment.

7.2 Emergency medical treatment

- 7.2.1 Section 174 of the *Children and Young Persons (Care and Protection) Act 1988* (NSW) allows medical practitioners to provide emergency medical treatment to children and young people under the age of 18 years without

⁵ *Family Law Act 1975* (Cth) sections 61B and 61C

⁶ *Family Law Act 1975* (Cth) sections 67ZC and 68B

their consent where treatment is necessary as a matter of urgency to save the patient's life or to prevent serious damage to his/her health.

- 7.2.2 The Commission supports this provision as it is in the best interests of children and young people. However, as this section appears in Part 1 of Chapter 9 of the Act, headed *Medical examination of children and young persons in need of care and protection*, it is unclear whether this provision applies to all children and young people or only those in need of care and protection. The Commission is of the view that section 174 of the *Children and Young Persons (Care and Protection) Act 1988* (NSW) should be clarified in this regard.
- 7.2.3 In addition, the Commission supports the inclusion of a provision relating to emergency medical treatment being included in any new legislation relating specifically to minors' consent to medical treatment. The content of section 174 of the *Children and Young Persons (Care and Protection) Act 1988* (NSW) provides a clear legislative guide to practitioners and it is suggested that any new provision be drafted in a similar way to section 174.
- 7.2.4 Such a provision may include the following:

A medical practitioner may carry out medical treatment on a child or young person without the consent of the child or young person or their parent if the medical practitioner is of the opinion that it is necessary, as a matter of urgency, to carry out the treatment on the child or young person in order to save his or her life or to prevent serious damage to his or her health.

7.3 Special medical treatment

- 7.3.1 It is the Commission's view that treatment constituting special medical treatment, such as sterilisation, should be treated differently to minor or routine types of treatment. Consistent with existing provisions under the *Guardianship Act 1987* (NSW) and the *Children and Young Persons (Care and Protection) Act 1998* (NSW) medical practitioners should be prohibited from carrying out special medical treatment unless it is an emergency, as above, or they have approval of an independent authority, such as a court or tribunal.
- 7.3.2 The definition of special medical treatment should include the following types of treatment:
- a) medical treatment that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out,
 - b) new treatment that has not yet gained the support of a substantial number of medical practitioners or dentists specialising in the area of practice concerned,
 - c) medical treatment that involves the administration of a long-acting injectable hormonal substance for the purpose of contraception or menstrual regulation, and

d) non therapeutic cosmetic surgery.

This is a combination of the definitions of special medical treatment from section 33 of the *Guardianship Act 1987* (NSW) and section 175 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW)

- 7.3.3 The Commission considers it important that non-therapeutic treatment, such as cosmetic surgery, be included in the definition of special medical treatment. However, this should not include cosmetic surgery for therapeutic reasons, such as remedying a deformity. Children and young people's bodies are still developing and having cosmetic surgery may not be in the best interests of their health. In addition, children and young people are often pressured by society and their peers to achieve a certain body shape or look, which they may turn to cosmetic surgery to help achieve.
- 7.3.4 In circumstances of special medical treatment, court approval should be sought as there is a need for an objective third party to consider the consequences of such treatment on the long term health and well-being of the child or young person.
- 7.3.5 In addition, there may be occasions where court intervention may be warranted to preserve a doctor patient relationship. Court intervention can assist to ease the burden on the practitioner of having to make an often difficult decision where they may be life long effects on the child or young person. Court intervention can also assist parents or guardians in making such a decision.
- 7.3.6 The Commission recognises that court intervention does take away the right of children, young people and parents to make a decision regarding medical treatment. However, the suggested provisions are limited to serious and irreversible treatments that will potentially impact on the child or young person for the remainder of their life.
- 7.3.7 The Commission considers the Guardianship Tribunal the appropriate body to consider special medical treatment. The Guardianship Tribunal is a specialist body which already has expertise and jurisdiction in these matters in respect of adults and children who are not competent to make decisions. The Tribunal is non adversarial and more accessible than the Family Court in terms of cost to applicants. It also has well established links, and the capacity to develop such links, with government and non-government service providers to children, young people and their families in NSW.
- 7.3.8 To assist in its determination the Guardianship Tribunal should be provided with specific criteria in legislation which set out the matters for the Tribunal to consider in deciding whether to authorise certain treatments, similar to those which currently exist under the *Guardianship Act 1987* (NSW).
- 7.3.9 The Commission is also of the view that the definition of special medical treatment within existing legislation such as the *Guardianship Act 1987* (NSW) and *Children and Young Persons (Care and Protection) Act 1998*

(NSW) should be consistent with any reform to the law in this area. It is suggested that amendment of these Acts take place to achieve this consistency.

7.4 Donation of body parts

7.4.1 As the Commission has previously submitted, sections 10 and 11 of the *Human Tissue Act 1983* (NSW) are unsatisfactory as parents can give consent on behalf of a child or young person without any safeguards to protect the child or young person's health and well-being.⁷ In addition, the provisions do not recognise the capacity of a child or young person to consent to the procedure.

7.4.2 The Commission is of the view that the *Human Tissue Act 1983* (NSW) should be amended to limit the age at which children can donate body parts to 13 years and over. For children and young people 13 years and over the provisions should be consistent with the Commission's proposal above. This would require either the young person or parent's permission while the young person is between the ages of 13 and 15 years, and the young person's permission only when they are 16 years and over.

8. MEDICAL RESEARCH

8.1 It is a concern that in NSW there are no express protections or rights for children and young people regarding medical research or experimentation. The types of treatments included in the commonly used definition of medical research are broad and many forms of medical research, such as questionnaires or blood tests, involve procedures that are carried out routinely by practitioners. The Commission does not consider that these should be treated any differently to other forms of medical treatment.

9. MEDICAL EXPERIMENTATION

9.1 However, the Commission is of the view that highly experimental or unproven procedures or interventions where the risks are unknown should be treated separately within the law. Medical experiments are a separate issue to treatment, as they often do not relate specifically to the treatment of the child.

9.2 It is the Commission's view that the law regarding medical experiments should be consistent with the model proposed above relating to routine medical treatments with the addition of consideration by an ethics committee. This would provide young people 16 years and over with the right to consent or refuse medical experiments. Young people 13 years and over would be able to consent or refuse if deemed competent. While children under 13 years would require the consent of a person responsible. Any child or young person's involvement in experimentation would then be subject to consideration by an ethics committee.

⁷ NSW Commissioner for Children and Young People, August 2001.

- 9.3 As with other medical treatments, a practitioner undertaking medical experimentation on a child or young person should be required to explain the procedures involved, the short and long term consequences and encourage the young person to discuss the procedure with a person responsible before consenting or refusing.
- 9.4 The Commission supports further consideration of the issue of medical experimentation by the NSW Law Reform Commission. It is essential that laws related to medical experiments on children and young people be considered as many medications and procedures that may benefit children and young people can not be properly tested on children without their participation in medical research. In addition, children and young people may be more susceptible than adults to some types of harm that may arise from medical experimentation.

10. SPECIFIC GROUPS OF CHILDREN AND YOUNG PEOPLE

10.1 *Children and young people in need of care and protection and in out of home care*

- 10.1.1 It is the Commission's view that any law reform regarding minors' consent to medical treatment should be consistent with legislation relating to children and young people in need of care and protection and in out of home care. Under section 157 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) young people aged 16 years and over in out of home care do not currently have the same rights as other young people. The Commission suggests that this section be amended, so that young people in out of home care enjoy the same rights as other young people, and to provide consistency between the laws relating to medical treatment.
- 10.1.2 The Commission supports the current provisions under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) related to medical examinations for children in need of care and protection. Such provisions are necessary in emergency situations to protect the best interests of children and young people.
- 10.1.3 The Commission considers that sections 53 and 54 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) related to Children's Court assessments should be amended to provide for consistency with any law reform regarding minors' consent to medical treatment. These provisions state that an assessment should only be carried out with the consent of the child or young person who is of sufficient understanding to make a decision. However, there is no requirement for parental involvement where a child or young person is considered not competent to make decision, which in some cases may be in the child or young person's best interests.

10.2 Children and young people in juvenile detention centres

- 10.2.1 The Commission is concerned about the lack of clear legislation regarding the medical treatment of young people in detention. The *Children (Detention Centres) Act 1987* (NSW) do not expressly recognise the rights of a young person, or their parents, to consent or refuse medical treatment while in detention.
- 10.2.2 The Commission is of the view that any law reform regarding minors' consent to medical treatment should also apply to children and young people in juvenile detention and this should be clearly specified in legislation.

10.3 Children and young people with mental health issues

- 10.3.1 While the *Mental Health Act 1990* (NSW) gives young people aged 14 and 15 years a right to override their parent's decision to receive voluntary psychiatric care, it limits the decisions a child or young person under 14 years can make about their health care. In addition, the Act does not consider a child or young person's competence to make decisions at any age.
- 10.3.2 The Commission is of the view that the *Mental Health Act 1990* (NSW) should be amended to recognise the competency of children and young people and to provide consistency with any law reform regarding minors' consent to medical treatment.

10.4 Aboriginal and Torres Strait Islander children and young people

- 10.4.1 The current law regarding minors' consent to medical treatment does not take into account Aboriginal and Torres Strait Islander cultural traditions whereby members of the child's extended family and kinship group are often involved in the care of children and young people and in decision making. These cultural factors are increasingly being recognised in NSW legislation, for example Part 2 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) and sections 32 to 39 of the *Adoption Act 2000* (NSW).
- 10.4.2 Any reform to the law regarding minors consent to medical treatment should contain provisions that expressly recognise these relationships. This may be through an expanded definition of "person responsible" for the child or young person, as suggested above, or other specific provisions.

11. DETERMINING CHILDREN AND YOUNG PEOPLE'S COMPETENCE

- 11.1 A model which proposes the assessment of competence to be made by a practitioner acting alone may attract criticism for giving too much power to practitioners. A concern is often raised that practitioners may be more likely to find a child or young person competent when they agree to the proposed treatment and decide they are incompetent if the child or young person

disagrees. There may also be inconsistency amongst practitioners due to personal views and beliefs, particularly regarding treatments that raise social, religious or moral issues such as contraception and vaccinations.

- 11.2 However, it is part of the role of a practitioner to make judgments about their patient's capacity, not just the capacity of children and young people. Such decisions are nothing new for practitioners, who make difficult moral decisions regularly. Ultimately, it is the practitioner giving, or refraining from, treatment and therefore they should be the one who is satisfied they are justified in doing so.
- 11.3 The Commission is not supportive of the suggested option of having a practitioner provide a second opinion on the matter, similar to the South Australian *Consent to Medical Treatment and Palliative Care Act 1995* (SA). While this may provide an additional safeguard for the child or young person, finding a second opinion may be difficult in rural areas and may involve an additional cost for the practitioner, which might then be passed to the patient. In addition, it would seem excessive in the situation of a minor treatment, such as a filling at the dentist, to require a second medical opinion.
- 11.4 There are a number of matters which medical practitioners should take into account to assist them judge whether a child or young person has the capacity to consent or refuse medical treatment. The Commission is of the view that these matters should form part of guidelines for practitioners included in legislation or regulations regarding minors' consent to medical treatment. The purpose of such guidelines is not only to guide practitioners in assessing a child or young person's capacity, but also to encourage them to provide appropriate information to the child or young person regarding the treatment.
- 11.5 Some of the matters practitioners should consider when deciding whether a child or young person has the capacity to consent or refuse medical treatment include:
 - a) age and developmental maturity of the child or young person in so far as it affects their ability to understand and weigh the implications of the proposed treatment,
 - b) nature of the proposed treatment and the likely medical and social consequences of treatment or not having treatment,
 - c) urgency of the proposed treatment and the likely consequences for the child if treatment is delayed,
 - d) information the child or young person has been given about the proposed treatment and its likely consequences, and
 - e) reasons for the child or young person agreeing to or refusing treatment.
- 11.6 It is important that practitioners are not assessing a child or young person's intelligence or maturity, but rather their understanding of:

- a) what the treatment is for and why the treatment is necessary,
- b) treatment options,
- c) what the treatment involves,
- d) likely effects and possible side effects/risks, and
- e) the consequences of not being treated.

- 11.7 It should also be noted that as children and young people constantly develop and change, a practitioner should assess their competency each time a different treatment is required. The changing nature and development of children and young people makes it misleading to rely only on previous assessments of competence.
- 11.8 Whether children and young people are competent to provide consent or not, they require information about what is happening to them while being medically treated. In non-emergency situations children and young people may require time and/or extra visits to become comfortable and develop a willingness to proceed with treatment. Practitioners need to not only explain the proposed treatment, but all procedures and steps within any treatment program.
- 11.9 The issue of consent should be seen as a process involving a number of steps, rather than a simple act of signing a form. Children and young people should have the proposed treatment explained in a manner and language they can understand. They should be given the opportunity to ask questions and have them answered in an honest and easily understood manner.
- 11.10 Wherever possible, children and young people should not have to make decisions alone, but should be given the opportunity to make them with the support of people they trust, such as parents, friends, teachers or youth workers.

12. COMMUNICATING WITH CHILDREN AND YOUNG PEOPLE

- 12.1 In 2001 the Commission spoke with over 70 children and young people about their views and use of prescription and over the counter medication. These views informed the Commission's submission to the NSW Parliament Committee on Children and Young People's *Inquiry into the Use of Prescription Drugs and Medication by Children and Young People*.⁸
- 12.2 Many of the young people we spoke with voiced their concerns about doctors. Young people spoke of being embarrassed or uncomfortable speaking with doctors, particularly where they had to speak about personal details. However, young people said it was important that doctors establish a personal rapport with them. This can help to build trust and allow for more effective treatment.

⁸ NSW Commission for Children and Young People, *Submission to the Committee on Children and Young People Inquiry into the Prescription and Use of Drugs and Medications in Children and Young People*, July 2001

- 12.3 Medical jargon and other technical terms they said turned them off, but a friendly approach, using appropriate language helped to engage them in their treatment. One young person had this to say about how doctors should speak with young people:

I want the doctor to talk to me normally, like a friend in the playground.

And, another young person had this advice for doctors:

Be friendly. Not lecture or look down upon young people. Avoid moralising and embarrassing young people.

- 12.4 From our discussions with children and young people as part of the Commission's *Inquiry into Children and Young People With No-one To Turn To*⁹ we found that children and young people generally do not nominate doctors as people from whom they could get help, advice or even medical treatment. As one young person said:

I don't trust doctors. I wouldn't go to one if I was sick, I'd just stay at home.

- 12.5 Young women who are parents talked about the negative attitudes of doctors towards them. The young women said that doctors were disapproving, didn't talk to them directly, didn't think they should make their own decisions and gave them "second class" treatment.

- 12.6 One young person the Commission spoke with had this experience while visiting a doctor.

The first time I went to the doctor all by myself I was asking for the pill. She kept saying 'And how old are you? You are too young. Does your mother know you are here?' I was 16 – that's over the legal age and really can't be incredibly young to be on the pill.

- 12.7 As stated above, the Commission recommends that any legislation regarding minors' consent to medical treatment should include a duty on practitioners to communicate with children and young people in a language appropriate to their age. The Commission is also supportive of the need for strategies to educate health professionals on communicating with young people and education on any reforms to the law regarding minors' consent to medical treatment.

13. CONFIDENTIALITY, DISCLOSURE AND ACCESS TO CHILDREN AND YOUNG PEOPLE'S HEALTH INFORMATION

- 13.1 Young people the Commission has spoken with have said that it is important they are assured that their confidentiality is respected in their relationship with their doctor. This is especially important in country towns

⁹ *Report of an Inquiry into the best means of assisting children and young people with no-one to turn to*, NSW Commission for Children and Young People, October 2002

and smaller communities. Children and young people's concerns about confidentiality are reflected in the popularity of services such as Kids Help Line, Reachout! and other anonymous sources of advice.

- 13.2 Confidentiality is both legally and ethically part of the general duty of care of a practitioner to their client, including children and young people. A child or young person who seeks medical treatment should have the right to confidentiality with respect to that treatment. This includes the right to not have information about their visit, regardless of whether it is to a private hospital or local doctor's clinic, disclosed to their parents where the child or young person does not agree to such disclosure.
- 13.3 A child or young person between the ages of 13 to 15 years who has been deemed incompetent to consent to or refuse treatment should have the right to keep the information the practitioner has gained confidential if the child or young person chooses. The child or young person has an expectation of confidentiality when they disclosed the information, despite subsequently being deemed incompetent to consent to treatment. Where a practitioner can not assure the child or young person's confidentiality, the child or young person should be clearly informed of this before the consultation.
- 13.4 The right of parents to access information about their child's visit to a practitioner from the Health Insurance Commission without the child or young person's consent up to the age of 14 years is contrary to the right to confidentiality. While a parent or guardian has a valid interest in their child's health, a suitable balance between this interest and a child or young person's confidentiality should be reached.
- 13.5 If we are to give children and young people the right to consent to treatment, it should follow that they also have the right to decide whether or not they inform their parents about their treatment. This is not to say that the practitioner cannot talk with the child or young person to encourage them to share any health issues with their parents or guardians. Providing children and young people with an assurance of confidentiality is likely to give them greater confidence to seek medical assistance.
- 13.6 At the same time, however, some things can not be kept confidential, such as cases of child abuse or neglect. The Commission is of the view that current statutory disclosure provisions, such as those under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) and the *Health Records and Information Privacy Act 2002* (NSW), are in the best interests of children and young people and are sufficient to allow practitioners to disclose information where necessary.

14. LIABILITY AND PROTECTION OF MEDICAL PRACTITIONERS

- 14.1 It is important that medical treatment is administered as efficiently as possible and those who administer the treatment in good faith have a defence against criminal or civil proceedings. There is a danger in medical practitioners becoming too cautious and weighed down by legal procedure

when treating children and young people, which may act as a deterrent to practitioners treating them.

- 14.2 The Commission supports clear legislation that provides protection for practitioners, against both criminal and civil proceedings, who have acted in good faith and in accordance with the law.

15. MEDICARE

- 15.1 Any reform to the law in NSW that allows young people under the age of 15 years easier access to medical treatment may be undermined by the Health Insurance Commission's policy that a young person under the age of 15 years must have parental permission before applying for their own Medicare card.
- 15.2 The Commission understands that a patient is not required to present their Medicare card when visiting a practitioner in order to be bulk billed. However, young people are almost completely unaware of this and many practices have a policy of not bulk billing patients without viewing their Medicare card. This can exclude many young people from basic medical services. In addition, for many young people under the age of 14 years the knowledge that their parents can access their Medicare information, as discussed above, will be a deterrent to accessing medical treatment.
- 15.3 The Commission understands that these issues are beyond the scope of the NSW Law Reform Commission's role. However, the review of medical consent laws in NSW provides an opportunity for further discussion between the NSW and Federal Governments on this issue. The Commission believes that the Federal Government should better promote young people's access to Medicare cards.

16. CONCLUSION

- 16.1 The Commission welcomes the review of the law relating to minors consent to medical treatment as an opportunity to clarify the rights of children, young people, parents and medical practitioners on this matter.
- 16.2 In preparing our submission the Commission has spoken with children and young people and our submission reflects their views on this issue. The Commission encourages the NSW Law Reform Commission to consult with children and young people as part of any further community consultation on this issue.