

Submission to the Review of the *Mental Health Act 2009* (SA)

September 2022



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Introduction

As South Australia's Commissioner for Children and Young People, I welcome the Review of the *Mental Health Act 2009 (SA)* (the Act). Thank you for the opportunity to attend the roundtable discussion on 24 August 2022 and to provide a submission to the Review.

As you are aware, my mandate is to promote the rights, interests and wellbeing of all children and young people in South Australia, particularly those whose voices are not often heard.

This Review presents an opportunity for the law to embed a public health approach and a human rights-based approach to mental health and wellbeing in South Australia, with particular regard to the children and young people's rights and access to services.

As per your invitation, this submission addresses:

- The application of the Mental Health Act on children and young people, including any specific barriers the law imposes that impact access to mental health services.
- The ways in which the Mental Health Act could better align with human rights, particularly the United Nations Convention on the Rights of the Child.

With regard to the above, I make the following specific recommendations:

1. **The Review considers extending the Act to embed a broader, public health approach that supports early intervention and prevention with the aim to improve services and access to services, particularly for children and young people.**
2. **The principles in any new Act should explicitly recognise the United Nations Convention on the Rights of the Child (UNCRC) as well as the United Nations Convention on the Rights of Persons with a Disability (UNCRPD).**
3. **Any new Act should embed a requirement to develop strategic plans and report on data and outcomes of mental health services and demand for these services, including data specific to children and young people.**

The interactions between this Act and other legislation and plans should also be mapped to avoid the duplication of efforts and actions or to avoid actions being rolled out in silos, and ensure actions undertaken in line with one do not undermine those taken in line with any other.

I hope that these insights inform your recommendations regarding the future of this Act. If you would like to discuss anything further, please do not hesitate to contact my office.

Yours sincerely,



Helen Connolly

Commissioner for Children and Young People, South Australia

1. **The Review considers extending the Act to embed a broader, public health approach that supports early intervention and prevention with the aim to improve services and access to services, particularly for children and young people.**

While the provision and delivery of mental health services in South Australia is beyond the scope of this Review, there is an opportunity to consider amendments to the Act that will improve access to high-quality, timely, safe and appropriate mental health services, especially for children and young people where there is a dearth of services.

Currently, the Act has a narrow focus, largely on the ‘pointy end’ of the service system insofar as it makes provisions for the treatment, care and rehabilitation of ‘persons with severe mental illness’.

There is an opportunity for the Act to embed a broader public health approach, with a clause to provide resources to develop and support the delivery of services at all levels, from early intervention and prevention through to acute services. The wider scope of legislation in other Australian jurisdictions, including Victoria and New South Wales, provide useful examples for consideration.

For example, the Objectives of Victoria’s *Mental Health and Wellbeing Act 2022*ⁱ extend far beyond the medical treatment of ‘persons with severe mental illness’ and include:

- ‘to promote conditions in which people can experience good mental health and wellbeing’;
- ‘to reduce inequities in access to, and delivery of mental health and wellbeing services’;
- ‘to provide for comprehensive, compassionate, safe and high-quality mental health and wellbeing services’ that are accessible, timely, available early, culturally safe, and include a range of voluntary options to enable a reduction in the use of seclusion and restraint;
- to protect and promote the human rights and dignity of people living with mental illness.

Such an approach aligns with evidence that 50% of mental illnesses among adults have their onset in childhood or adolescence, and that early intervention, prevention and community mental health care is key to preventing and reducing severe mental illness.ⁱⁱ

Currently, young people have told this office they often only receive support when things reach a ‘critical level’. While they are told to ‘ask for help’ and to check in with others to see if they ‘are okay’, the right support is not always available when people do ask for help.ⁱⁱⁱ

Mental health services provided specifically for children and young people in South Australia are thin on the ground. There are particular gaps for children younger under 12 years old and for those living in regional and remote areas.

Although headspace was designed for young people aged 12 to 25 years experiencing mild-to-moderate mental health, the service is reporting increasing numbers of complex

presentations. In the absence of service offerings at the secondary level, the next level of care is the tertiary system.

Resetting the legislative foundations in a way that addresses the divide between primary and tertiary services may result in improved services for children and young people. This is particularly important in reducing the proportion of children and young people in the ‘missing middle’, whose needs are not being met by current services because they are too unwell for primary care but not unwell enough for state-based services.^{iv}

“It’s also about working on the system of help in place because asking for help is one thing but to receive help poses a whole other scenario”
– 16 year old

There is also scope for the Act to promote equity of access to services. This could be achieved through amendments to the Objectives of the Act to include an explicit objective similar to that set out in s12(b) of Victoria’s new Act: ‘to reduce inequities in access to, and delivery of, mental health and wellbeing services’.

The Guiding Principles in South Australia’s current Act do state that mental health services should (among other considerations) account for ‘different developmental stages’ and diverse cultural and linguistic backgrounds. In practice under the current Act, decision-making regarding safety and treatment is considered through a child-focused clinical or medical lens rather than a social or cultural lens. As such, diverse understandings of appropriate treatment options for children and young people may not be prioritised.

It is important that any new legislation provides clear definitions and provisions that support this objective. Such clarification would go some way in addressing the disproportionate barriers that currently impact access to mental health services for Aboriginal and Torres Strait Islander children and families, and culturally and linguistically diverse children and families, particularly those from refugee, migrant or asylum seeker backgrounds.

For example, Victoria’s Act provides definitions and explicit examples of what constitutes ‘appropriate support’ that is age-appropriate and culturally appropriate. Victorian legislation also includes a principle that promotes the wellbeing of children and young people as follows:

The health, wellbeing and autonomy of children and young people receiving mental health and wellbeing services are to be promoted and supported, including by providing treatment and support in age and developmentally appropriate settings and ways. It is recognised that their lived experience makes them valuable leaders and active partners in the mental health and wellbeing service system.

Alongside implementing the new Act, Victoria is developing a new child and family health and wellbeing system for children aged 0–11 years. This includes expanding infant, child and family mental health and wellbeing services, and establishing wellbeing hubs with psychologists, psychiatrists, family support, paediatricians. This aligns with recommendations from Victoria’s Mental Health Royal Commission, which found that the current system was focussing too much on young people and adults.

2. The principles in any new Act should explicitly recognise the United Nations Convention on the Rights of the Child (UNCRC) as well as the United Nations Convention on the Rights of Persons with a Disability (UNCRPD).

It is recommended that the principles of any new Act not only include the CRPD, but the CRC to ensure that it is recognised that children require additional rights and protections in light of their inherent vulnerability. This will reframe legislation to promote and protect children and young people's rights. It should be recognised that the primary consideration of any decisions and actions in relation to the services and treatment of children should be in their "best interests".

In the operationalising of an Act there is an opportunity to embed a different approach for children and young people. This includes but need not be limited to:

- Making decisions that are child-centred, child-safe and in the best interests of the child;
- Ensuring children have a voice to make decisions if they have the competency and capacity to do so;
- Recognising that there are certain restrictive practices and restraints that should not be practised on children;
- Providing children with individual advocates who can provide them with information and support, especially when they do not have a parent or guardian to advocate on their behalf; and
- Ensuring there are opportunities for children and young people to provide feedback on services and be included in any stakeholder engagement. i.

In the current Act, the Guiding Principles provide that mental health services should be provided 'in the least restrictive way and in the least restrictive environment' and that restrictive practices should 'be used only as a last resort'. The Act also already acknowledges that 'children and young persons should be cared for and treated separately from other patients as necessary to enable the care and treatment to be tailored to their different developmental stages'.

To better align with human rights principles, the Act should set goals to reduce restrictive practices with the view to eliminate restrictive practises within a certain timeframe, similar to the new Victorian Bill.

There is also scope to clarify with particular consideration for children and young people when a person has capacity to give consent and when a person gives consent. This includes whether the person has:

- been provided with adequate information, including about:
 - the purpose of the treatment, the type, method and duration of the treatment;
 - the advantages and disadvantages of the treatment and of not undergoing the treatment; and
 - any alternative treatments that are available;
- been given reasonable opportunity to consent and to consent freely without coercion;
- been provided with appropriate supports.

3. Any new Act should embed a requirement to develop strategic plans and report on data and outcomes of mental health services and demand for these services, including data specific to children and young people.

A recent audit by South Australia's Auditor-General of the management of access to mental health services in South Australia concluded that 'SA Health is not able to demonstrate how well it is performing in providing the public with access to the right mental health services at the right time' due to significant gaps in planning, monitoring and reporting processes.^v

South Australia's Mental Health Services Plan sets out commendable goals, especially in relation to children and young people, but the audit report found that there was no funding for any actions of the plan. Further, its measures of success lack specific targets, it does not describe current capacity or demand for services, and is not funded from the outset, supported by implementation plans or updated over its life.

To ensure that better mental health outcomes and services are implemented in line with a new Act's principles and outcomes, it should include provisions that require:

- The development of a strategic plan that aligns with the principles and objectives of the Act;
- That the plan's outcomes and measures align with the recommendations made in the Auditor-General's latest report;
- That the relevant Department report on the deliverables of the plan on an annual basis, preferably within the annual report.

Embedding these types of provisions would not only ensure that any future strategies or plans align with the principles and outcomes of the Act, but would also promote greater accountability, identify gaps and provide evidence base for budget bids and sufficient funding.

There should also be annual reporting on services, demand for services, outcomes and other measures with regard to children and young people. This could include where the service is located and who accessed the services, number of practitioners in these services, the demand for different types of service and treatment, number of beds or ability to service children, and the average time it took to treat a child.

ⁱ Act not yet commenced.

ⁱⁱ Australian Government, The National Children's Mental Health and Wellbeing Strategy. Available at <https://www.mentalhealthcommission.gov.au/getmedia/5b7112be-6402-4b23-919d-8fb9b6027506/National-Children%E2%80%99s-Mental-Health-and-Wellbeing-Strategy-%E2%80%93-Report>.

ⁱⁱⁱ See Connolly, Helen. Commissioner for Children and Young People SA, 2021. Feedback on South Australia's next Suicide Prevention Plan 2022-2025. Available at <https://www.ccyp.com.au/wp-content/uploads/2021/06/22-4-2021-Feedback-on-South-Australias-next-Suicide-Prevention-Plan-2022-25-A7288697.pdf>.

^{iv} Orygen, 2021. Defining the Missing Middle. Available at <https://www.orygen.org.au/Orygen-Institute/Policy-Areas/Government-policy-service-delivery-and-workforce/Service-delivery/Defining-the-missing-middle/orygen-defining-the-missing-middle-pdf>.

^v Government of South Australia, Report of the Auditor-General. Report 6 of 2022: Managing access to mental health services. Available at <https://www.audit.sa.gov.au/Portals/0/Documents/Audit%20Reports/2021-22/Report%206%20of%202022%20-%20Access%20to%20mental%20health%20services.pdf>,