

Director of Child Protection Litigation Practice Note

Guidance on an order made under s68(1)(b) of the *Child Protection Act 1999* authorising a *medical examination* or treatment of a child

1. This Practice Note provides guidance to Director of Child Protection Litigation (DCPL) Lawyers on when the DCPL should make an application in a *child protection proceeding* for an order by the Childrens Court authorising a medical examination or treatment of a child on an adjournment of a *proceeding* under s68(1)(b) of the *Child Protection Act 1999* (the Act).

Summary

2. The Act provides the authority to obtain a *medical examination* or treatment of a child either when:
 - a. the child is in the custody of the chief executive or another person, or
 - b. in the guardianship of the chief executive, or
 - c. as part of an *assessment order* or temporary custody order for the child, or
 - d. by an order made under s68(1)(b) of the Act on the adjournment of a *proceeding* for a child protection order, authorising the *medical examination* or treatment of the child and requiring a report of the examination or treatment be filed in the court. If the court makes this order under s68(1)(b), it must state the particular issues that the report must address.¹
3. An order may be made under s68(1)(b) of the Act authorising a *medical examination* or treatment of a child on an adjournment of a *proceeding*, when the purpose of the *medical examination* or treatment of the child is to assist the court with the clarification and resolution of an issue related to a child's protection, with the resulting report to be used by the court in deciding the *child protection application*.
4. It is important to note that the *medical examination* or treatment of a child authorised by an order under s68(1)(b) of the Act, is subject to the common law rights that a competent child has to make their own decisions in relation to the *medical examination* or treatment (Gillick competent).² It is for the *health practitioner* to assess if the child has capacity to consent to the *medical examination* or treatment.
5. Determining when a *medical examination* or treatment is required in a *proceeding* will need to be considered on a case by case basis, which should be the subject of consultation between the DCPL and Child Safety.

¹ Section 68(2) of the CP Act.

² Section 97(4) of the Act and see paragraph 11 of this Practice Note.

6. In circumstances where a medical issue is determined to be beyond daily care for a child³ who is not competent and the chief executive does not have guardianship of the child, consent should be sought from the child's parents. If consent for the *medical examination* and or treatment is unable to be obtained, whether due to a parent's absence or a parent not providing it, this should be considered by Child Safety as part of an ongoing review of their assessment as to what order is appropriate and desirable for the child's protection. Further, this should also result in the DCPL undertaking a corresponding review of the originating *child protection application* to consider if it should be amended to seek guardianship, and or whether an application in a *proceeding* should be made for an order under s68(1)(b) of the Act authorising the *medical examination* or treatment of the child.
7. If a DCPL Lawyer determines that an application for an order should be made, this should be done through the preparation of a written application in the *proceeding* in the approved form, supported by evidence exhibited to an affidavit outlining the necessary *medical examination* or treatment to enable the court to make an informed decision.

Provisions of the Act that provide for the medical examination or treatment of a child

8. A *medical examination* is defined by the Act⁴ to mean a physical, psychiatric, psychological or dental examination, assessment or procedure, and includes forensic examination and an examination or assessment normally carried out by a *health practitioner*. The only guidance that the Act provides in relation to treatment is that it includes vaccination.⁵
9. The Act provides the authority to obtain a *medical examination* or treatment of a child in the following circumstances:
 - a. when the chief executive or another person has custody of a child under the Act,⁶ they have the right to provide for the child's daily care, and the right and responsibility to make decisions about the child's daily care,⁷ which includes making a decision to obtain a medical examination or treatment of the child relating to necessary medical care,⁸
 - b. when the chief executive or another person has guardianship of a child under the Act,⁹ they have the right to provide for the child's daily care, the right and responsibility to make decisions about the child's daily care, and all the powers, rights and responsibilities in relation to the child that would otherwise have been vested in the person having parental responsibility for making decisions about the long-term care, wellbeing and development of the child.¹⁰ This includes

³ As per paragraph 9.a. when the chief executive or another person has custody of a child under the Act, they have the right to provide for the child's daily care, and the right and responsibility to make decisions about the child's daily care, which includes making a decision to obtain a medical examination or treatment of the child relating to necessary medical care.

⁴ Section 3 (dictionary in schedule 3) of the Act.

⁵ Section 97(8) of the Act

⁶ Either as a result of a child being taken into the chief executive's custody under s18(2), or the chief executive has custody of a child under a *care agreement* (s51ZG) or the chief executive or someone else is granted custody of a child under an *order*.

⁷ Section 12(2) of the Act.

⁸ Page 12 of the *Child Protection Bill 1998* Explanatory Notes – notes on clause 12 which became s12 'What is the effect of custody'

⁹ Under an *order* granting either short-term guardianship (s61(e)), long-term guardianship (s61(f)) or a permanent care order (s61(g)).

¹⁰ Section 13 of the Act.

making a decision to obtain medical examination or treatment of the child, including necessary medical care, immunisations, invasive medical examinations and surgical procedures,

- c. as part of an *assessment order*¹¹ or temporary custody order¹² for a child made under the Act, which if appropriate in the circumstances, can authorise the child's *medical examination or treatment*, or
- d. on an adjournment of a *proceeding*, the court may make an order under s68(1)(b) of the Act authorising a *medical examination* or treatment of a child and require a report of the examination or treatment be filed in the court.

Carrying out medical examination or treatment

10. Where a *medical examination* or treatment of a child is sought on the basis that the child is either in the chief executive's custody¹³ or as a result of an order under the Act, under s97(1) of the Act, which is a general provision, a *health practitioner* may medically examine or treat a child, even though the child's parents have not consented to the examination or treatment.¹⁴ It is important to note that the *medical examination* or treatment is subject to the common law rights that a competent child has to make their own decisions in relation to the examination or treatment¹⁵, and the *health practitioner* may only carry out medical treatment that is reasonable in the circumstances.¹⁶
11. Unlike an adult, there is a presumption that a child is not competent to give their consent to an examination or treatment unless they have capacity. To establish if a child has capacity to consent (Gillick competent)¹⁷, the *health practitioner* will "carry out an assessment to show the patient has sufficient understanding, intelligence and maturity to appreciate the nature, consequences and risks of the proposed health care, and the alternatives, including the consequences of not receiving the health care".¹⁸ If a child has capacity, they may decline to participate in a *medical examination* or treatment, and in this case, DCPL Lawyers should consult with either their Assistant Director or the Director in order to determine how the issue should be managed.
12. It is noted that Queensland Health has provided a 'Guide for Informed Consent of Children & Young People for COVID-19 Vaccinations', which includes the following in respect of Queensland:

¹¹ Sections 28(1)(b) and 45(1)(b) of the Act provide that an *assessment order* for a child may authorise the child's medical examination or treatment.

¹² Section 51AF(1)(b) of the Act provides that a temporary custody order for a child may authorise the child's medical examination or treatment.

¹³ Includes a child taken into the chief executive's custody under s18(2) of the Act or a child the subject of a *care agreement* (s51ZG of the Act) or a child the subject of an *order* granting custody to the chief executive, which includes a temporary assessment order (s28(1)(a)(ii) of the Act), a court assessment order (s45(1)(c)(i) of the Act), temporary custody order (s51AH(a)(ii) of the Act), a child protection order granting custody (s61(d)(ii) of the Act) or an interim child protection order (s67(1) of the Act).

¹⁴ Section 97(3), with s97(7) providing that for the purposes of deciding any liability in relation to the carrying out of the examination or treatment, the health practitioner is taken to have the consent of the child's parents to the examination or treatment.

¹⁵ Section 97(4) of the Act.

¹⁶ Section 97(5) of the Act.

¹⁷ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 (HL).

¹⁸ Page 46 Queensland Health's [Guide to Informed Decision-making in Healthcare: 2nd Edition](#) accessed on 24 January 2022.

- individuals under the age of 18 years can consent to health care where they have been assessed as having sufficient capacity to do so (i.e., when the child or young person is Gillick competent)
- there is no fixed lower limit below 18 years of age at which children or young persons are deemed to be able to consent to health care (i.e., Gillick Competent)
- individuals aged under 11 years will require a parent/legal guardian/other person to provide consent
- individuals aged 12 to 15 years will generally require a parent/legal guardian/other person to provide consent
- in most cases, individuals over 16 years of age would likely be assessed to have capacity to consent for vaccination. However, this will depend on the understanding, intelligence and maturity of the young person.¹⁹

13. Further, in the context of COVID-19 and vaccinations, as referred to above at paragraph 8, s97(8) of the Act provides that in relation to treatment, it includes vaccination. This was inserted into the Act as clarification through the *Child Protection Reform Amendment Act 2017*, with the explanatory notes of the *Child Protection Reform Amendment Bill 2017* stating:

The amendments also clarify that, in situations where vaccination is sought to comply with a routine vaccination schedule, the department will be able to seek vaccination in the absence of parental consent, even if parents retain guardianship. In recognition that vaccination is usually considered a guardianship decision, departmental policy will continue to require officers to determine the parents' views regarding vaccination in cases where parents retain guardianship. This will provide the opportunity for parents to explain why they would not consent to vaccination and advise of any relevant medical information, such as past allergic reactions which can then be included in the information provided to a medical practitioner. If parents indicate they would not consent to vaccination of their child or their views cannot be obtained despite reasonable efforts to do so, section 97 will still allow a health practitioner to administer vaccination, where sought by the chief executive, under the new definition of medical treatment in section 97(8).

14. It is noted that considering children aged five and over are now eligible for a COVID-19 vaccine, Child Safety see it as a priority that it does all it can to keep children in care safe and well, and so it is crucial that they are vaccinated. For children that are in the chief executive's custody and their parents do not consent to a COVID-19 vaccination, Child Safety will be asking a health practitioner to assess the suitability of these children receiving the vaccine and to administer the vaccine using the authority of s97(3) of the Act if this is assessed to be in their best interests.²⁰
15. When a *health practitioner* conducts a *medical examination* or treatment of a child that is either in the chief executive's custody or as a result of an assessment order under the Act, s97(6) of the Act requires that the health practitioner must give the chief executive or police commissioner a report about the medical examination or treatment.²¹

¹⁹ Pages 1 & 2 of Queensland Health's [Guide for Informed Consent of Young People for Covid-19 Vaccinations | Queensland Health](#) (V.1.07 7 January 2022) accessed on 24 January 2022.

²⁰ Child Safety's [Chief Practitioner's message to foster and kinship carers \(cyjma.qld.gov.au\)](#) issued on 10 January 2022 accessed on 24 January 2022. Further, information about Queensland's immunisation schedule and Australia's COVID-19 vaccination program can be located [here](#).

²¹ Section 97(6) of the Act.

When the court may make an order under s68(1)(b) of the Act authorising a medical examination or treatment of a child

16. Section 68 of the Act provides the court with procedural powers to make a number of orders on the adjournment of a *proceeding*, which are supported in practice by the court case management rules within the *Childrens Court Rules 2016* (the Rules). These procedural orders it must be noted are separate to any interim child protection orders that the court may make under s67 of the Act, which can include the granting of temporary custody of a child. That is, on the adjournment of a *proceeding*, the making of procedural orders under s68 is not conditional on the court making an interim child protection order granting temporary custody of a child to either the chief executive or another person.
17. The Rules provide that the court may when managing a *proceeding*, identify the issues in the *proceeding* and decide the issues that need to be investigated²², which includes the court needing to consider whether an order needs to be made under s68(1)(b) authorising a *medical examination* or treatment of the child and requiring a report of the examination or treatment be filed in the court.²³
18. A procedural order made under s68(1)(b) of the Act authorising a *medical examination* or treatment of a child is distinguishable from the other provisions referred to above in paragraph 9 that provide authority to obtain a *medical examination* or treatment of a child. This is on the basis that when the court makes an order under s68(1)(b), in addition to authorising the *medical examination* or treatment of a child, it is the only provision that requires a report of the *medical examination* or treatment be filed in the court, which must address the particular issues the court has stated.²⁴ To the extent that the reasoning of this additional requirement is ambiguous,²⁵ noting that there is no published case law in Queensland that considers the operation of this provision, resort can be had to the explanatory notes with a view to ensuring the interpretation adopted is the one most consistent with the intent of Parliament.
19. The explanatory notes of the *Child Protection Bill 1998* state the following in reference to clause 65 (which is now s68 of the Act):
- Clause 65* enables the court to make procedural orders about actions to be carried out during a period of adjournment. These are actions to assist with the clarification and resolution where possible of issues related to the child's protection, and may result in reports for the information of the court in deciding the application.²⁶
20. From the notes, it is clear that an order made under s68(1)(b) of the Act authorising a *medical examination* or treatment of a child, is for the purpose of authorising actions to assist the court with the clarification and resolution of an issue related to a child's protection, with the resulting report to be used by the court in deciding the *child protection application*.

²² Rule 64(2)(c) and (d) of the Rules.

²³ Rule 69(c) of the Rules.

²⁴ Section 67(2) of the Act.

²⁵ Section 14B(1)(a) and (3)(e) *Acts Interpretation Act 1954*.

²⁶ Page 29 of the *Child Protection Bill 1998* Explanatory Notes

21. In practical terms, this limits the operation of s68(1)(b) of the Act to circumstances where the purpose of the *medical examination* or treatment is to assist the court to determine whether the child is a child in need of protection and what, if any, child protection order is appropriate and desirable. This will need to be considered on a case by case basis, and noting that the child protection jurisdiction is protective in nature, determining whether a particular issue or need should be dealt with by an application in the *proceeding* under s68(1)(b) of the Act, will require consultation between the DCPL and Child Safety. When considering the purpose of the *medical examination* or treatment, a relevant consideration for DCPL Lawyers is that a child who is in the custody of the chief executive has a right to have access to dental, medical and therapeutic services, necessary to meet the child's needs,²⁷ and the chief executive must take reasonable steps to ensure child receives these services.²⁸
22. Examples of a *medical examination* would include DNA parentage testing, a forensic paediatric assessment, or a child or adolescent psychiatric assessment, and an example of treatment would be that it relates to an acute or chronic condition that a parent has not accessed or authorised necessary medical treatment, which has then resulted in it being a child protection concern.
23. If a DCPL Lawyer determines that an application authorising a *medical examination* or treatment of a child on an adjournment of a *proceeding* should be made under s68(1)(b) of the Act, noting the DCPL's model litigant obligations and principles about exercising powers and making decisions,²⁹ this should be done through the preparation of a written application in the *proceeding* in the approved form. This will result in notice to the respondents and the child in appropriate circumstances, supported by evidence exhibited to an affidavit outlining the necessary medical examination or treatment to enable the court to make an informed decision.
24. If a DCPL Lawyer on review of the circumstances of the case is uncertain as to whether the purpose of any proposed *medical examination* or treatment of the child is to assist the court with the clarification and resolution of an issue related to a child's protection, the DCPL Lawyer should consult with either their Assistant Director or the Director in order to determine how the issue should be managed.
25. When the purpose of a *medical examination* or treatment of a child is not to assist the court with the clarification and resolution of an issue related to the child's protection, as per paragraph 9 above, depending on the issue, it will be for Child Safety or another person that has custody of the child, to work with the child's parents to determine in the circumstances, who is able to provide consent to the *medical examination* or treatment.
26. In circumstances where a medical issue is beyond daily care for a child³⁰ and the chief executive does not have guardianship of the child, if consent is unable to be obtained, whether due to a parent's absence or a parent not providing it, this should be considered by Child Safety as part of an ongoing review of their assessment as to what order is appropriate and desirable for the child's protection.

²⁷ Section 74 (Charter of rights for a child in care in schedule 3) of the Act

²⁸ Section 122(1)(h) of the Act.

²⁹ Section 6(2) of the *Director of Child Protection Litigation Act 2016* and s 5D of the Act.

³⁰ As per paragraph 9.a., when the chief executive or another person has custody of a child under the Act, they have the right to provide for the child's daily care, and the right and responsibility to make decisions about the child's daily care, which includes making a decision to obtain a medical examination or treatment of the child relating to routine medical care.

Further, this should also result in the DCPL undertaking a corresponding review of the originating *child protection application* to consider if it should be amended to seek guardianship, and also whether an application in a *proceeding* should be made for an order under s68(1)(b) of the Act authorising the *medical examination* or treatment of the child. DCPL's review of the issue should be undertaken as soon as practicable and where possible within 5 business days.

27. If the issue does not warrant the amendment of the *child protection application* or an application in a *proceeding* under s68(1)(b) of the Act, then it will be for Child Safety, with the assistance the Office of the Child and Family Official Solicitor (OCFOS), to consider whether an application to the Supreme Court should be made for the authority to undertake the medical examination or treatment of the child.

Definitions of terms used in the practice note

28. The definition of terms used within the practice note are as follows:

- a. *Assessment order* as per s 3 of the Act (dictionary in schedule 3) means a temporary or court assessment order
- b. *Child protection application* as per r 4 of the Rules (dictionary in schedule 1) means an application under the Act for the making, extension, amendment or revocation of a court assessment order or child protection order
- c. *Child protection proceeding* as per s 3 of the Act (dictionary in schedule 3) means a proceeding under the Act for the making, extension, amendment or revocation of a child protection order
- d. Child Safety means the chief executive of the Department of Children, Youth Justice and Multicultural Affairs
- e. *Health practitioner* as per s 3 of the Act (dictionary in schedule 3) means:
 - (a) a person registered under the Health Practitioner Regulation National Law to practise, other than as a student, in any of the following—
 - (i) the dental profession as any of the following—
 - (A) dentist
 - (B) dental therapist
 - (C) dental hygienist
 - (D) oral health therapist
 - (ii) the nursing and midwifery profession as a nurse
 - (iii) the medical profession
 - (iv) the occupational therapy profession
 - (v) the optometry profession
 - (vi) the physiotherapy profession
 - (vii) the psychology profession, or
 - (b) a person who is eligible for practising membership of The Speech Pathology Association of Australia Limited ACN 008 393 440, or

- (c) a person who is eligible for membership of the Australian Association of Social Workers.
- f. *A medical examination* as per s 3 of the Act (dictionary in schedule 3) means a physical, psychiatric, psychological or dental examination, assessment or procedure, and includes forensic examination and an examination or assessment normally carried out by a *health practitioner*.
- g. *Order* as per s 3 of the Act (dictionary in schedule 3) means an assessment order, temporary custody order or child protection order
- h. *Proceeding* – see *child protection proceeding*

Date effective	Application	Approved by
27/1/2022	All employees of the Office of Director of Child Protection Litigation	Nigel A. Miller

Version	Notes	Author	Date of change
1.0	Initial version	Nigel A. Miller	
2.0	Reissued to incorporate: <ul style="list-style-type: none"> information about Child Safety’s approach to COVID-19 vaccination additional content in respect to the 2017 amendment to the Act that clarified that the treatment referred to in s97 includes vaccination, and references to Queensland Health’s Guide for Informed Consent of Children & Young People for COVID-19 Vaccinations. 	Nigel A. Miller	27/1/2022