



Secretary

Department of Health & Human Services

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COR 2008 000297

Ms Nicole D'Rozario
Coroners Registrar
Coroner's Court of Victoria
Level 11, 22 Exhibition Street
MELBOURNE VIC 3000

Dear Ms D'Rozario

Investigation into the death of Krisinda Smart
Court reference: COR 2008 000297

I write in response to your letter to the Honourable Jenny Mikakos, Minister for Families and Children, dated 11 May 2015, received 15 May 2015, enclosing the inquest findings and recommendations made under the *Coroners Act 2008* in relation to the death of Krisinda Smart. I also refer to your request for a written response to the recommendations.

The Department of Health and Human Services has considered the recommendations addressed to it, being recommendations one, two and four, and provides the following response.

Recommendation One

That the Department of Health and Human Services ensure all of their workers, including Residential Care Workers, who have management and supervision of high-risk children be given Protective Intervener powers to detain them when it is considered that they are at risk of immediate and extreme risk of harm.

Department response:

Under section 181 of the *Children, Youth and Families Act 2005* ('the Act') a protective intervener is defined as the Secretary (which includes specified child protection practitioners, as delegates of the Secretary) and all police officers.

A protective intervener is responsible for receiving reports that a child is in need of protection. Section 205 of the Act provides that a protective intervener must, as soon as practicable after receiving a report, investigate, or cause another protective intervener to investigate, the report in a way that will be in the best interests of the child.

Protective interveners have powers under section 240 and 241 of the Act. Section 240 empowers protective interveners to take certain actions to ensure the safety of a child, including issuing a protection application. Under section 241 a protective intervener may place a child in emergency care, either with or without a warrant, pending the hearing of a protection application, or apply to a magistrate to obtain a search warrant for the purpose of placing a child in emergency care.

In addition to exercising the Secretary's responsibilities and powers as a protective intervener, specified child protection practitioners are delegated the Secretary's responsibilities and powers with respect to children who are under the guardianship or custody of the Secretary. Section 172(3) provides that a child protection practitioner may detain without warrant a child who is under the guardianship or custody of the Secretary. A child may only be detained under section 173(2)(b) by being placed in a secure welfare service, and only 'if there is a substantial and immediate risk of harm to the child'. It is important to note that the authority to place a child in a secure welfare service does not include the power to physically restrain a child for the purpose of ensuring the child's admission to a secure welfare service.

Residential care workers perform a different role from that of protective interveners. In particular, they provide daily care and support to children in a home environment. Residential care workers liaise closely with child protection practitioners and provide vital information to them to inform their decision making when they, as delegates of the Secretary, exercise the Secretary's responsibilities and powers as a protective intervener, guardian and custodian.

Detaining, in the sense of physically restraining, a child raises complex legal and human rights issues concerning the deprivation of liberty, potential for physical injury to the child and concerns in respect to the occupational health and safety of residential care workers.

It should be noted that amendments to the Act were made in 2014 to support and strengthen the security measures that out of home carers, including residential care workers, may use to protect children. Specifically, section 161B was introduced, which allows out of home carers to use reasonable physical force on a child if the use of such force is necessary to prevent the child from harming himself, herself or anyone else, or from damaging property.

This amendment may address, in part, the considerations underlying this recommendation. However, the department emphasises that the use of such reasonable physical force on an adolescent does not negate the aforementioned concerns regarding the use of physical restraint.

Recommendation Two

That the Chief Commissioner of Police and the Department of Health and Human Services, if they have not already done so, establish a 'working party' between the two organisations to undertake a feasibility study to determine whether a warning flag for 'high risk' children under the care of the Department of Health and Human Services can be included on the LEAP database

Department response:

The department considers there is merit in exploring the feasibility of a 'high risk' young person flag in the LEAP database.

There is currently a working group between the department, Victoria Police, Ambulance Victoria, and the Emergency Services Telecommunication Authority regarding information sharing between emergency services in relation to high risk infants. This working group was founded to address a recommendation from the former State Services Authority Special Review of Government Agencies in Relation to an Incident in Yarraville.

In principle, this project could be expanded to include high risk young people.

The department will consult with working group members and the Privacy Commissioner regarding this proposal and, if agreement is reached, will prioritise resolving the complex technical and information technology implications for implementing this recommendation.

Recommendation Four

That the Minister for Health complete a legislative review of section 162 of the Act with the view to the inclusion of 'child has suffered, or is likely to suffer, significant harm as a result of drug taking, self harm or other high risk behaviours'. Such a review should include circumstances where a child is classified by the Department of Health and Human Services as a High Risk Youth. Consequences of this amendment would expand the mandatory reporting requirements under section 184 of the Children Youth and Families Act 2005 and would have 'caught' the situation which confronted officers Mr Naisbitt and Constable Anderson on 16 January 2008.

Department response:

The Coroner has recommended that the Minister for Health review section 162 of the Act, which outlines when a child is in need of protection. As the Attorney General and the Minister for Families and Children share administrative responsibility for the Act, it is appropriate that they consider the need for any amendments to it.

The Coroner recommends the inclusion in section 162 of a 'drug taking, self harm or other high risk behaviours' ground on which a child may be found to be in need of protection. The Coroner states that this would expand the mandatory reporting requirements under section 184 of the Act and would, therefore, have caught the situation which confronted police on 17 January 2008 (when they encountered Krisinda heavily drug affected, in the company of an older male, in possession of a wallet that was not hers, and did not identify her age).

The recommendation attempts to address a perceived deficiency in the Act that does not exist. The police response with respect to Krisinda on 17 January 2008 was not due to a shortcoming in the legislation, but police not recognising Krisinda as a child (see paragraphs 41 to 44 of the findings). The recommendation assumes that Krisinda would not have been subject to a mandatory report or found in need of protection under any of the grounds that currently exist under section 162(1) had police exercised their protective intervener powers to place her in emergency care. However, drug taking or self harm is a form of physical abuse, and physical abuse is a ground which already exists under section 162(1)(c). The department is of the view there were sufficient powers within the Act for the police to make a mandatory report regarding Krisinda and to lawfully detain her given their responsibilities and powers as protective interveners.

While this recommendation is unable to be implemented, the department is committed to working with Victoria Police to assist in the delivery of training to officers in relation to engaging high risk children and understanding their responsibilities and powers as protective interveners.

Yours sincerely



Dr Pradeep Philip
Secretary