

Australian Capital Territory

Children and Young People (Therapeutic Protection Place) Declaration 2023 (No 1)

Notifiable instrument NI2023–732

made under the

Children and Young People Act 2008, section 625 (Therapeutic protection place - declaration)

EXPLANATORY STATEMENT

Introduction

This explanatory statement relates to the *Children and Young People (Therapeutic Protection Place) Declaration 2023 (No 1)* as notified to the Legislative Assembly. It has been prepared in order to assist the reader of the Notifiable Instrument and to help inform debate on it. It does not form part of the Notifiable Instrument and has not been endorsed by the Assembly.

The Statement must be read in conjunction with the Notifiable Instrument. It is not, and is not meant to be, a comprehensive description of the Notifiable Instrument.

Purpose

This notifiable instrument declares a therapeutic protection place under section 625 of the *Children and Young People Act 2008* (CYP Act) at a location excluded from this declaration under section 626 so as not disclose its location.

Overview

The CYP Act contains provisions that allow for support for highly complex children or young people to be facilitated by seeking a therapeutic protection order from the Childrens Court.

In these circumstances support would be provided through a therapeutic protection order, which is an order that:

- (a) directs that the child or young person be confined—
 - (i) for a period of time (the **period of confinement**) starting on a stated day (the **start day**); and
 - (ii) at a therapeutic protection place; and

(iii) for implementation of a stated therapeutic protection plan;
and

(b) transfers daily care responsibility for the child or young person to the Director-General for the period of confinement; and

(c) includes any conditions the Childrens Court considers necessary to prevent the child or young person from engaging in harmful conduct.

Note: The Director-General or a police officer may apply to a magistrate for a safe custody warrant if a therapeutic protection order or interim therapeutic protection order is in force for a child or young person and the Director-General or police officer believes on reasonable grounds that—

(a) someone has contravened the order and, because of the contravention, the child or young person is in danger; or

(b) the child or young person is absent, without lawful authority or excuse, from the therapeutic protection place where the child or young person has been directed to be confined under the therapeutic protection order (see s 685).

Under the CYP Act, a therapeutic protection place must be declared prior to seeking a therapeutic protection order and only if the place:

(a) is not used to accommodate young detainees; and

(b) complies with the therapeutic protection standards.

The Director-General will disclose the location of the therapeutic protection place to the people entitled under section 634 (1) to have access to the therapeutic protection register.

The Senior Practitioner and the Public Advocate will be advised of the location as they are persons prescribed by regulation or legislation.

Context

The ACT has not previously declared a therapeutic protection place under the CYP Act, as therapeutic protection orders have not been required.

The Director-General recognises that an application for a Therapeutic Protection Order is a last resort as it limits the rights of a young person.

To date none of the attempts to keep a particular young person safe in the community have been successful. Outside of a Therapeutic Protection Order, there is no legal mechanism to enable Child and Youth Protection Services to remove this young person from an unsafe situation. This means that the young person cannot currently be protected from individuals that pose the greatest risk to them in the community, as they do not currently have the capacity to keep themselves safe and out of harmful situations.

The Director-General considers that if a Therapeutic Protection Order is not made, this young person will remain at risk of significant harm. This young person has continuously engaged in significant high risk and life-threatening

behaviours for some months and shows no insight into the harm caused to them by their own behaviour and that of others they engage with.

The Director-General holds the belief that there are no less restrictive ways available or that have not already been tested to ensure the young person's safety. It is considered in this young person's best interest to be removed from their current circumstances.

The Community Service Directorate Director-General may apply to the Childrens Court for a therapeutic protection order, being satisfied that the criteria for making the order are met. This includes being satisfied that there has been a risk assessment for the child or young person, less restrictive ways have been tried and were unsuccessful in preventing the young person from engaging in harmful conduct, and consideration has been given to why these less restrictive ways were not appropriate.

Engagement with Human Rights

Broadly, this notifiable instrument relates to the therapeutic protection of children and young people that may engage and limit the following rights:

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

Section 12 – privacy and reputation

Section 13 – freedom of movement

The CYP Act builds in safeguards that protect against unlawful and arbitrary interferences with rights contained in the Human Rights Act 2004 and to ensure the child or young person is confined at a therapeutic protection place for the shortest necessary time to reduce the risk to the child or young person.

The use of the therapeutic protection place instrument requires the application of the human rights principle of proportionality, where the period of confinement and exercise of powers in the place of therapeutic protection must be limited to that which is reasonably necessary to safeguard the child's or young person's wellbeing and interests.

An Oversight Group will be established to monitor and ensure all therapeutic work and activity is in place to provide safety and security proportionate to the needs of the young people to respond to the significant risk posed.

Right to protection from torture and cruel, inhuman or degrading treatment (s10)

1. Nature of the right and the limitation (s 28(2)(a) and (c))

Section 10(2) of the HR Act protects a person against medical treatment without consent. The expression "medical treatment" has a broad meaning and is able to encompass assessments and treatments which respond to matters including but not limited to medical conditions, psychological conditions or behavioural issues. This right, whether exercisable by the child or young person or by a person with parental responsibility, is limited by the fact that the Childrens Court can order that a child or young person be

confined for the purpose of undergoing assessment and/or treatment, without the relevant consent, pursuant to a therapeutic protection order.

2. *Legitimate purposes (s 28(2)(b)) and rational connection between the limitation and the purpose (s 28(2)(d))*

The purpose of giving this power to the Childrens Court is to address the harmful behaviours of a child or young person through assessment and treatment (where possible) to prevent significant harm to themselves or others in the future.

This power (and resulting limitation on the right to protection from torture and cruel, inhuman or degrading treatment) will be effective to achieve this purpose as it means that the Court can authorise the involuntary treatment of a child or young person to prevent harm to themselves or to others.

Specifically, where the Court is satisfied that if the order for treatment is not made there will be a significant risk of significant harm to the child or young person or someone else arising from the child or young person's conduct and the risk is imminent, then the Court can make that order for treatment.

3. *Proportionality (s 28(2)(e))*

These orders are only made in circumstances where the Childrens Court is satisfied that, without the order, the young person's situation poses a 'significant risk of significant harm'.

The Court must be satisfied that the Director-General has tried less restrictive measures, and these have not been successful, or has considered other less restrictive measures and these were not appropriate. The Court must also be satisfied that measures included in a therapeutic protection plan will assist in reducing the likelihood that the child or young person will engage in this harmful conduct. Finally, it must be satisfied that the making of the order is otherwise in the best interests of the child or young person.

Critically, these orders are only made after a hearing before the Childrens Court. The conferral of the power on the Childrens Court means the decision is made by a body that is required to act judicially and that each of the steps in the decision-making process is regulated by the practice and procedure of the Court.

The requirement that the application be served on parents, carers, the Public Advocate and (where relevant) the Aboriginal and Torres Strait Islander Children and Young People Commissioner (section 541) also means that those persons with a direct interest in the safety and wellbeing of the young person have notice of the application and may exercise their right to appear before and be heard by the Childrens Court.

The limitations on the right to consent to medical treatment are proportionate in the sense that they represent "reasonable limits" that can be "demonstrably justified in a free and democratic society" for the purposes of section 28 of the HR Act.

Confinement at a Therapeutic Protection Place – Restriction of liberty of a child or young person

Right to privacy and reputation (s 12)

1. Nature of the right and the limitation (s 28(2)(a) and (c))

Section 12 of the HR Act protects persons from ‘unlawful’ interference with their privacy. Under international law, the right to privacy has been interpreted as applying in a variety of different circumstances. It has been defined widely as ‘the right to be left alone’, and so includes the right to non-interference by government, the right to personal autonomy and the right to be free from unreasonable search and seizure.

It includes the right to not have personal information collected, stored, used or disclosed unless it is for legitimate purposes and in accordance with the law.

The therapeutic protection measures of the notifiable instrument require that the Director-General obtain and share personal information, require the child or young person to engage in therapy and allow confinement and restraint in that context, thus limiting the right in section 12.

2. Legitimate purposes (s 28(2)(b)) and rational connection between the limitation and the purpose (s 28(2)(d))

The purpose of the information sharing is to allow the needs of the child or young person to be identified and the supports and services to be designed appropriately. The purposes of the involuntary treatment, and any confinement, is to prevent the child or young person from engaging in harmful conduct that poses a risk to themselves or others, and to ensure the young person undergoes the assessment and any therapeutic treatment deemed necessary as part of the therapy protection plan.

3. Proportionality (s 28(2)(e))

Where personal information is collected, stored, used or disclosed, the clarity of the purpose, the tight connection between the purpose and the underlying purposes of the therapeutic protection order and the strict provisions on use and disclosure in Chapter 25 of the CYP Act, serve to ensure that the privacy of the child or young person and others is protected.

Where there is a need to exercise the powers of confinement or restraint, it is likely that a young person will need to be searched in order to find any item or substance that may pose a risk to themselves or others, or otherwise limit the ability of the Director-General to maintain the therapeutic value of an intensive therapy place.

As a general principle, reasonable expectations of privacy may be low in some settings compared with others.¹ While a person in custody is entitled to

¹ *Hunter v Southam* [1984] 2 SCR 145 at 159; *R v Grayson and Taylor* [1997] 1 NZLR 399.

enjoy all the rights that are held by ordinary citizens,² and will only lose that entitlement to the extent that is necessary to secure their safe custody, a person who is in lawful custody will have a lower expectation of privacy, particularly in relation to searches.³

The nature and limitation of the right to privacy in this respect is attributed to the implementation of the therapeutic protection order in a therapeutic protection place. The searches include all measures that are necessary to protect the young person from harming themselves or any other person.

The limitations on the right to privacy are proportionate in the sense that they represent “reasonable limits” that can be “demonstrably justified in a free and democratic society” for the purposes of section 28 of the HR Act.

Right to freedom of movement (s 13)

1. Nature of the right and the limitation (s 28(2)(a) and (c))

Section 13 of the HR Act protects the right to move freely within the limits of the Australian Capital Territory (ACT) and the right to freely enter and leave the ACT.

The power of a Court to order, under a therapeutic protection order, that the Director-General may authorise a child or young person be confined for a period at a stated place limits this right.

2. Legitimate purposes (s 28(2)(b)) and rational connection between the limitation and the purpose (s 28(2)(d))

The purpose of the limitation is, firstly, to ensure that the assessment or treatment can proceed and, secondly, to prevent significant harm to the child or young person or to others (where necessary) during the period of the order.

The grounds for the granting of authority to confine by the Childrens Court, the criteria for the decision to confine by the Director-General and the manner and degree of confinement by the Director-General and their delegates ensure that there is a rational connection between the limitation and the purpose identified above.

The therapeutic protection order is only granted where the Childrens Court is satisfied there is a significant risk of significant harm and the authority to confine is only granted to ensure the assessment or treatment in accordance with the order. Moreover, the order and the authorisation are only granted where the Court and the Director-General are satisfied that less restrictive measures have been tried, and were unsuccessful, or are inappropriate and

² *Raymond v Honey* [1983] 1 AC 1; *R v Lobban* (1988) 35 A Crim R 68; *Kuczynski v R* (1994) 72 A Crim R 568; *Solosky v The Queen* [1980] 1 SCR 821; *Hirst v United Kingdom* (2006) 42 EHRR 41 at [69]; *Dickson v United Kingdom* (2008) 46 EHRR 41 at [68].

³ *Conway v Canada* [1993] 2 SCR 872; *R v Kennedy* 1996 3 C.R. (5th) 170 and *Fieldhouse v Canada* 1995 40 C.R. (4th) 263.

that the order is likely to reduce the risk of harmful conduct and the risks posed by the child or young person to themselves or others.

The authority to confine is only exercised where the Director-General believes that it is necessary in the circumstances to implement the therapeutic protection plan.

Accordingly, the purpose serves a legitimate objective and there is a rational connection between the limitation on the right and the achievement of that objective.

3. Proportionality (s 28(2)(e))

While the prohibition on medical treatment without consent (section 10(2)) is addressed to a different set of interests than the right to move freely (section 13), the considerations that go to the proportionality of the restrictions on the right to consent to treatment will also go to the proportionality of the restrictions on the right to move freely.

The limitations on the right to privacy are proportionate in the sense that they represent “reasonable limits” that can be “demonstrably justified in a free and democratic society” for the purposes of section 28 of the HR Act.

1. Section 11(2) of the Human Rights Act states that every child, by virtue of age, has the right to the protection needed without distinction or discrimination of any kind. Likewise, the child's right to protection aligns with Australia's commitment to the Convention on the Rights of the Child (the Convention), imposing a clear obligation on the Government to implement measures aimed at ensuring the protection of children where necessary.
2. Consideration must be given to whether there are no less restrictive and reasonably available ways of achieving the legitimate purpose for the use of the therapeutic protection plan.
3. While use of the therapeutic protection plan does not align with section 11(1) and cannot support the importance of family unity, its use acknowledges that this principle can be subject to qualification by the right to protect children under section 11(2).
4. The need to protect children while minimising disruption to family life is not a one-size-fits-all process. It necessitates a nuanced approach considering a child's context, situation and needs. Only if the evidence-based risk assessment suggests a significant risk to the child's safety are more intensive measures considered.

Summary

There is an obligation on the Territory to act when it receives information about a child's risk of significant harm. Under the CYP Act, statutory services are positively obligated to assess a child's circumstances and, where necessary, take appropriate action to protect the child.

Given this, it is considered the proposed limitations on a child and young person set out through an order to reside in a therapeutic protection place

under a therapeutic protection order are reasonable and proportionate and show rational connection to the rights that are limited to prevent the child or young person in engaging in harmful conduct.

Appropriate safeguards and measures to ensure human rights are upheld will be in place under the arrangements set out in this notifiable instrument and, if limited, that those limitations are commensurate with the risk to the safety, welfare and wellbeing of the young person and the community.

A regular weekly oversight meeting will be established as part of the Therapeutic Protection Plan and will include oversight agencies such as the Public Advocate, Official Visitor, ACT Senior Practitioner, OPCAT representative member and an independent advocate.

If the Public Advocate, an Official Visitor or the Aboriginal and Torres Strait Islander Children and Young People Commissioner ask the Director-General for a therapeutic protection plan, one must be made available promptly.