

1999

**THE LEGISLATIVE ASSEMBLY FOR  
THE AUSTRALIAN CAPITAL TERRITORY**

**CHILDREN AND YOUNG PEOPLE BILL 1999**

**EXPLANATORY MEMORANDUM**

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Minister for Education**



## CHILDREN AND YOUNG PEOPLE BILL 1999

### EXPLANATORY MEMORANDUM

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## INTRODUCTION

In this Explanatory Memorandum:

- 'ACT' means Australian Capital Territory  
'CSA' means the *Children's Services Act 1986*, and  
'the Act' means the proposed *Children and Young People Act 1999*.

The purpose of this Bill is to reform the law relating to children and young people in certain key areas. The relevant law was previously contained in the *Children's Services Act 1986* but as a result of this Bill will now be known as the *Children and Young People Act 1999*. Across the Act the concept of 'parental responsibility' has been introduced to replace traditional notions of custody, guardianship and wardship in line with developments in other jurisdictions. The fundamental notion of decision-makers acting with the best interests of the child or young person as their paramount consideration remains entrenched.

In the child protection area there is an emphasis at all points on cooperation with and support for children and young people, from infancy through to adolescence, and their families. To this end a new concept of voluntary 'family group conferencing' is introduced to facilitate agreement amongst families about the alternative ways they can continue to care for children and young people in their midst. Yet the Act also recognises that when the State does have to intervene in the life of a child or young person, the procedures and effects of such intervention should be clear at all stages.

The Bill does not attempt to reform the law relating to young offenders other than in a few minor areas and for the purposes of bringing terminology in that arena of the law up to date or into line with other usage in the Territory. Chapter 6 of the Bill is therefore almost identical to Parts IV and IVA of the CSA. The same applies to what was Part VIII of the CSA in relation to employment of children and young people.

In the area of child care licensing the Bill establishes a new 2-stage process for licensing child care centres and family day care schemes. (People who provide family day care for a small number of children other than under a scheme are not required to be licensed.) In the first phase relevant 'childrens services' will be required to operate under an approval in principle for 2½ years. Service providers who have complied with the terms of approval in principle will be eligible to apply renewable licences for up to 3 years at a time.

The law relating to the establishment of the Childrens Court is not altered by the Bill, but the procedures for making applications to the Court are spelled out in extensive detail.

Paragraph numbers in this explanatory memorandum correspond with clause numbers in the Bill.

## LONG TITLE

The long title of the Act reflects the fact that the Act is applicable to people ranging in age from infancy through to adolescence.

## CHAPTER 1 – PRELIMINARY

This Chapter contains formal provisions concerning commencement of the Act and some definitions aiding in the application of the Act.

### Part 1 - Introductory

1. This clause provides that the Act is to be known as the *Children and Young People Act 1999*.
2. This clause provides for opening clauses of the Act to commence on notification in the *Gazette* with others to commence on days to be fixed being not later than 6 months after gazettal.

### Part 2 - Interpretation

3. For the purposes of the Act this clause enacts definitions by reference to a dictionary contained at the end of the Act.
4. This clause describes what it means for residence, contact and specific issues orders under the Act to be made 'in favour of' a person.

### Part 3 - Application of the Act

5. This clause states that the Act is applicable to people ranging in age from infancy through to adolescence.
6. This clause defines a child as a person under 12.
7. This clause identifies that in most of the Act a child who is aged between 12 and 17 inclusive is referred to as a 'young person', but in Chapter 6 a 'young person' also includes children younger than 12.

8. This clause provides that the nexus of children and young people with the Australian Capital Territory forming the basis for the Act is that they ordinarily live in, or are present in, the Territory or are subject to an event occurring in the Territory which leads to a voluntary or mandatory report about their care and protection. This nexus is varied by the operation of clause 155 in relation to abuse or neglect which occurs interstate.

## CHAPTER 2 - GENERAL OBJECTS, PRINCIPLES AND PARENTAL RESPONSIBILITY

This Chapter sets out the objects and principles underpinning the Act and introduces the concept of 'parental responsibility'.

### Part 1 - General Objects

9. This clause sets out the objects which underpin the legislative structure of the Act in relation to all aspects of the welfare of children and young persons, whether in the wider community, in child care settings or when subject to the criminal law.

### Part 2 - Principles applying to the Act

10. In addition to the operation of the objects, this clause makes clear that all decisions or actions under the Act are to be made or taken in accordance with certain principles.
11. The general principles in this clause are to guide all decisions and actions made or taken under the Act, whether made by the chief executive, the court or otherwise. Other principles and requirements of the Act are not intended to limit the operation of these principles.

The notion that the best interests of the child or young person are the paramount consideration is enshrined in the 'best interests principle', but sub-clause (1) also clearly states that primary responsibility for children and young people



rests with their parents and other family members. By the operation of this clause an emphasis on cooperative and inclusive support for families is made to pervade the Act. Hence where family members are not able to meet their responsibilities to children themselves, the Act recognises that it is the place of the community and government to support them or, if necessary, share or take over their responsibilities. Government intervention is to be by the least intrusive means possible, including by considering and promoting contact and placement of children with relatives or kin if out-of-home care is needed.

Sub-clause (2) requires that in decision-making processes about a child or young person under the Act, information about those processes is to be provided to participants in the processes in a manner they can understand, the views and wishes of child or young person are to be sought and considered in light of their age and maturity, and others are to be given an opportunity for input into the processes. Decision-makers are exhorted to act without delay so as not to prejudice the wellbeing of the child or young person and to strive from the outset for settled and permanent living arrangements for the child or young person. The 'no order principle' in sub-clause (3) reflects the fact that while it may have been appropriate for an action to be brought before a court in the first place, it may be equally appropriate at the end of the case for the court to decide that no order is then needed.

12. This clause clarifies that for the purposes of acting in accordance with the best interests principle, decision-makers are to take into account matters set out in the clause. It also introduces the first of the special requirements of the Act for identifying whether a child or young person is an indigenous child or young person and for recognising the special role to be played for such a child or young person by relevant indigenous organisations.

Sub-clause (1) identifies 'best interests' factors in relation to children and young people under the Act which are not necessarily the same as under other legislation (for example the Commonwealth *Family Law Act 1975*), though it mirrors various similar provisions found in other legislation around the country and around the world. The list of factors is not exhaustive. It refers to

protection from 'harm', a term wider than just 'abuse and neglect', and it requires the child or young person, his or her parents, siblings and other family members, and the importance and practicalities associated with their respective interactions with each other, to be considered.

13. This clause describes how decision-makers can observe the 'indigenous children and young people principle' by taking account of the 'indigenous placement principle' in the next clause and of indigenous traditions and cultural values.
14. Following from the 1997 Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families titled 'Bringing them home', this clause applies the indigenous placement principle in a manner consistent with Territory law concerning the welfare of children and young persons (but does not apply it to disposition of young offenders).

#### Part 3 - Parental responsibility

15. This clause defines 'court order' for this Part to mean orders of the Childrens Court or other courts (e.g. it could include orders of the Family Court under the Family Law Act).
16. This clause formally introduces the concept of 'parental responsibility' to Territory law in line with the *Family Law Act 1975* and the *British Children Act 1989* instead of more traditional concepts of custody and guardianship. In describing parental responsibility as the duties, powers and responsibilities and authority parents ordinarily have by law in relation to their children, it reflects the fact that it is impossible to define precisely what form that responsibility will take as a child grows, but it also recognises that there are certain aspects of the responsibility that relate to day-to-day issues and others that span years.
17. This clause spells out that, in addition to parents having parental responsibility (though note that this Act is not intended to affect who is a 'mother' or a 'father' under the *Birth (Equality of Status Act) 1988*), it can also be vested in a person by a court.
18. While a parent effectively only loses parental responsibility once and for all if his or her child is adopted, this clause provides that that responsibility can

otherwise be shared or effectively suspended. Just as one parent can act independently of another in making decisions for a child, so those who are given parental responsibility by a court order can act independently of each other.

However, this clause provides for the court to make an order as to whose responsibility takes precedence (see also sub-clause 20(3)) and stipulates that no person (for example a parent) can exercise their parental responsibility in a way that is incompatible with the exercise by the chief executive of any parental responsibility he or she might have. A similar provision is found in clause 258 in relation to people who have 'enduring parental responsibility' under a final care and protection order. Other provisions relating to parental responsibility are found in clauses such as 221, 232 and 242.

19. This clause attempts to indicate the range of matters for which a person is responsible (subject to court order) if that person has parental responsibility for the day-to-day care, welfare and development of a child or young person. It is intended to cover all the practical arrangements associated with matters such as bedtime, pocket-money, clothing, hair-cuts, whether make-up may be worn, baby-sitting, short trips away, routine visits to and treatments by doctors and dentists etc., who a child or young person associates with (and how, when and where they do it), providing school lunches and uniforms and consenting for school excursions etc. The list is not intended to be exhaustive.
20. Likewise this clause attempts to indicate the range of matters for which a person is responsible (again subject to court order) if that person has parental responsibility for the long-term care, welfare and development of a child or young person. It is intended to cover matters such as managing financial affairs, determining the religious faith or the type of schooling or employment to be followed by the child or young person, consent to elective medical treatment or surgery (subject to the Act and other laws), and arranging a passport for international travel. If it is not clear whether a person who has day-to-day responsibility under the previous clause can do a certain thing, then at least a person with long-term responsibility may do it.

### CHAPTER 3 - PROCEEDINGS UNDER THIS ACT GENERALLY

This Chapter describes how a child or young person may be represented before the court.

21. This clause is authority for the principle that a child or young person has a right to take part in proceedings concerning him- or herself.
22. This clause anticipates that a child or young person may be represented in court (whether in criminal or child protection matters) by a lawyer or another person or both; but a next friend or litigation guardian may only act with leave of the court. The child or young person, and any person proposed to be appointed to represent a child or young person, are to have a say in the appointment. The clause also provides that whoever the representative is, he or she must put the child's or young person's views or wishes to the court and must indicate to the court whether he or she is acting in the best interests of the child or young person or on their instructions.
23. This clause requires the court not to continue with proceedings (again whether in criminal or child protection matters) unless the child or young person has a lawyer or has had an opportunity to get legal representation. For chapter 6 a child's or young person's lawyer is not required to make a decision about his or her client's best interests. For chapters 7 and 8, in addition to matters in the last clause, a lawyer must act on the instructions of the client/child or young person who is of sufficient age, maturity and level of understanding to give instructions (though this age etc. may vary from child to child); but must otherwise act in the best interests of the child or young person in accordance with the objects and principles of the Act.
24. This clause allows for the court to hear together more than one application under the Act about a child or young person (e.g. if a young person is the subject of criminal and child protection proceedings simultaneously), or applications about more than one child or young person whose cases are related (e.g. child

protection proceedings concerning siblings or criminal proceedings concerning co-offenders).

## CHAPTER 4 - ADMINISTRATION

This Chapter sets out the functions of the chief executive in relation to the Act and describes the roles of other bodies such as the Childrens Services Council and the official visitor.

### Part 1 - Chief Executive

The chief executive for this Act is the chief executive of the administrative unit or department of the Territory public service with administrative responsibility for the Act. The chief executive's position is generally described in Public Sector legislation. Specific functions and powers relating to childrens welfare are in this Act.

25. This clause describes the chief executive's broad functions under the Act. It makes clear that services, supports and assistance for children and young people and their families may be provided directly by the chief executive or indirectly, which might, for example, be by funding of non-government agencies. Those services may cover the broad spectrum of childrens welfare, including before, during and after such time as the chief executive may have parental responsibility for a child or young person, when licensing child care or when young people are dealt with under the criminal law. The chief executive has power to do all things necessary or convenient for his or her functions, for example, appointing directors and staff to implement family, childrens and youth services, arranging transport for children or young people as may be necessary, and issuing licence documentation as required.
26. This clause emphasises the chief executive's duty to operate in the same cooperative, supportive and inclusive manner that the Act describes elsewhere, including by observing objects and principles of the Act and by establishing

methods for coordinating services and input from other stakeholders, providers and people concerned for the welfare of children and young people in the Territory. While the range of matters for which the chief executive may provide is not closed, those matters may include accommodation, financial support, counselling, medical and like assistance, recreational and educational opportunities and clear inclusive ongoing care planning.

27. This clause specifically allows for the chief executive to request any Territory entity (such as police, schools, or hospitals and other medical services, whether or not they are established to provide services specifically for children and young people) to assist him or her in carrying out statutory functions under the Act. Entities are to comply promptly with requests, with compliance in good faith protected as under the next clause.
28. This clause specifically allows for the chief executive to share (by providing or receiving) information concerning the operation of his or her functions relating to children and young people. It is intended to allow for provision, receipt and exchange of information in good faith with people in or outside the Territory, without incurring liability for breach of privacy, defamation or other laws. It is intended to apply especially with respect to people with parental responsibility, carers and any relevant entities (again including police, schools, or hospitals and other medical services, whether or not they are established to provide services specifically for children and young people). The chief executive may give a person information about he or she holds about the person.
29. This clause allows the chief executive to make general arrangements with suitable individuals or bodies - to be known in the Act as 'carers' (and intended to include individuals, organisations, agencies and bodies corporate) - to exercise on behalf of the chief executive his or her parental responsibility for a child or young person. Even under such agreements particular children or young people are only to be cared for on specific authorisation by the chief executive under the next clause.
30. This clause provides for the chief executive to authorise (with written confirmation) a suitable carer who is willing to do so to exercise his or her

parental responsibility for a particular child or young person. While any limit on the way in which that responsibility may be exercised will be set by the chief executive in the authorisation, by way of example it could be by what is commonly known in 1999 as respite care, kinship care, shared care, crisis or temporary care and short, medium or long-term foster care. The provisions of the previous clause concerning agreement and suitability do not operate where a member of a child's or young person's kin is to be authorised.

31. For the purpose of monitoring the wellbeing of a child or young person for whom the chief executive has parental responsibility under the Act, this clause allows for the chief executive to enter premises at any reasonable time and with such assistance as is reasonable or necessary. For example social workers or other staff in the child protection area of the chief executive's department may visit a child at home, with police assistance if necessary. Staff must always produce identification if asked and must stop their actions if they cannot.
32. This clause allows for the chief executive to make arrangements for people when they leave care or cease to be under his or her parental responsibility, even if they are then over 17 years old.
33. This clause allows for valid delegation by the chief executive of any of his or her powers to a public servant.

#### Part 2 - Childrens Services Council

34. This clause establishes the Childrens Services Council. The functions of the Council are left deliberately wide, allowing for the Minister to refer any matter relating to the operation of the Act to the Council. As a statutory body, the Council will be required to comply with the provisions of the *Annual Reports (Government Agencies) Act 1995*.
35. The Council is constituted by 3 - 10 suitably experienced community-based members each appointed by the Minister for term not exceeding 3 years. It is not intended that statutory or government office-holders be appointed, though a person should not be excluded just because he or she happens also to be a public servant.

36. This clause requires the Minister to appoint a chairperson for the Council.
37. Transitional provisions call for the Minister to convene the first meeting of the Council, but subsequent meetings are to be presided over by the chairperson and will be quorate if formed by a simple majority of members, with the chairperson to have a casting vote on matters in the event of deadlock.
38. This clause lists the circumstances in which the Minister may terminate a Council member's appointment.
39. This clause requires the chief executive and community advocate to give reasonable assistance the Council.

Part 3 - Other officials

40. This clause establishes the role of official visitor as a person appointed by the Minister for a period not exceeding 3 years. It also allows for the official visitor to resign and lists the circumstances in which the Minister may terminate a member's appointment. It is intended that, as a statutory body, the official visitor will also be required to comply with the provisions of the *Annual Reports (Government Agencies) Act 1995*.
41. The functions of the official visitor in relation to children and young people in shelters, institutions or in receipt of therapeutic protection are spelled out in this clause. Note that this clause differs from the comparable provision under the CSA by allowing (at paragraph (1)(c)) for the official visitor to receive complaints from any person, not just a child or young person. Having investigated a complaint, the official visitor must provide a report to the chief executive and the community advocate and may give a copy to the Minister or another person subject to privacy laws.
42. Under this clause the official visitor is to be allowed to speak to a child or young person alone about his or her complaint. When reporting on investigation of a complaint the official visitor must give a person the chance to comment on adverse comments.
43. This clause allows for the official visitor and the community advocate to agree as to which of them (or another entity) should investigate a complaint.



44. This clause allows for the sharing of relevant information about a complaint between the official visitor and the community advocate.
45. This clause allows for the community advocate to request Territory entities established under or by a law of the Territory to provide welfare services for children or young people to assist him or her in performing his or her statutory functions. Entities are to comply promptly with requests, with compliance in good faith protected as under clause 28.
46. This clause helps to identify who is to be regarded as an entity suitable for the chief executive to involve or inform in matters relating to services for children and young people. It also operates to determine who is a suitable carer for clause 29. The range of matters (such as offence convictions, good personal and financial reputation etc.) to which the chief executive is to have regard is not intended to be exhaustive. The extent of the influence of any matter on the chief executive's opinion about a person's suitability may depend on the level or type of involvement the person is to have with a child or young person. For example if a person is bankrupt but happens to be the grandfather of a child, the chief executive may decide to allow him to act as a foster carer for that child but not to operate a child care centre.
47. This clause allows for officers to perform the duties of offices created and maintained by the chief executive for the Act.
48. This clause provides for the chief executive to give officers suitable identity cards, which are returnable by them (with penalty for failure) on ceasing to be officers.

## CHAPTER 5 - THE CHILDRENS COURT

This Chapter describes the jurisdiction of the Magistrates Court—known here as the Childrens Court—for the purposes of the Act. The clauses of this Chapter ('new') largely replicate the law as stated in the CSA ('old') in accordance with the following table of corresponding sections. Clauses 49 - 52 relate to amendments to the CSA which commenced on 1 May 1999. Only new or significantly amended provisions are dealt with by this explanatory memorandum.

New	Old	New	Old	New	Old
49	20	53	21	57	101
50	20AA	54	22	58	168
51	20A	55	-	59	169
52	20B	56	-	60	-

56. This clause allows for the court to approve and publish forms for use in relation to this Act.
57. In addition to allowing for orders for dispensing with service, or for substituted service, this clause now extends this power of the court to shortening the time for service.
58. In this clause sub-clause (6) is new in excluding the operation of this section from child protection proceedings. This is because Chapter 7 makes alternate specific provision for those with parental responsibility for children and young people as parties to proceedings.
59. In this clause sub-clause (1)(f) amends the corresponding CSA provision to reflect the different nature of reports which may be prepared for the court; and likewise (1)(g) reflects that child protection proceedings are private matters between children, their parents and the State.
60. This clause allows for the court to excuse parties from attendance at proceedings, and to recall them.

## CHAPTER 6 - YOUNG OFFENDERS

This Chapter describes how children or young people charged with criminal offences are to be dealt with before the Childrens Court. It details dispositional options open to the court, including a new option for community service orders. It also makes provision for the interstate transfer of young offenders.

The clauses of this Chapter ('new') also largely replicate the law as stated in the CSA ('old') in accordance with the following table of corresponding sections. Old sections for which there is only partial correlation in the Bill are marked in brackets. Only new or significantly amended provisions are dealt with by this explanatory memorandum. The term 'young person' replaces 'child' throughout when referring to a person under the age of 18.

New	Old	New	Old	New	Old	New	Old
61	(69A)	84	38A	107	(51)	129	69
62	(69A)	85	39	108	57	130	69A
63	(4)	86	40	109	58	131	69B
64	-	87	41	110	60	132	69C
65	23	88	42	111	59	133	69D
66	-	89	43	112	-	134	69E
67	24	90	44	113	-	135	69F
68	25	91	45	114	61	136	69FA
69	27	92	46	115	62	137	69G
70	28	93	46A	116	49A	138	69GA
71	162	94	47	117	(62A)	139	69H
72	163	95	47A	118	(62A)	140	69J
73	(26)	96	48	119	62B	141	69K
74	(29)	97	49	120	62C	142	69L
75	(29)	98	50	121	63	143	69M
76	(29)	99	52	122	64	144	69N
77	30	100	53	123	65	145	69P
78	32	101	54	124	66	146	69Q
79	33	102	55	125	67	147	69R
80	34	103	56	126	68	148	69S
81	35	104	-	127	(158)		
82	36	105	-	128	-		
83	38	106	-				

Part 1 - Interpretation

61. Some but not all of the definitions from the old s.69A have been brought forward to this clause, while others are found in clauses 62 and 130.

Part 2 - Within the Territory

66. In addition to the operation of the objects of the Act, the general principles in this clause are to guide all decisions and actions made or taken under this Part, whether made by the chief executive, the court or otherwise. The principles do not limit the operation of principles stated in clause 11. Nor are they (or for example the factors listed in clause 87) intended to limit the operation of other laws, such as Victims of Crime legislation.

The principles attempt to balance measures for ensuring that a young person understands the nature of charges against him or her and accepts responsibility for wrong-doing with measures for ensuring he or she is dealt with in the criminal justice system at least as well as an adult is and for providing opportunities to address personal, victim and community interests.

71. Material in this clause and clause 72 was previously contained in s. 162 of the CSA where it related to all matters before the court. This clause restricts its effect to criminal proceedings involving young people (as reports concerning child protection matters for example are covered elsewhere - see clause 217).
73. This clause replaces the provisions previously contained in s. 26 of the CSA. The clause allows for the court to dismiss youth justice proceedings against a young person if it believes he or she could be better dealt with under child care and protection mechanisms under the Act. Alternatively the court may adjourn the matter for no more than 15 days, during which time it is to give notice of the adjournment to the chief executive with a statement of its reasons for taking the action. The chief executive in turn is to report back to the court during the adjournment period on what action, if any, he or she proposes to take concerning the child or young person.

The intention of the detailed provisions of sub-clauses (2) - (8) is that the court should remain seized of the young person's matter until such time as it is satisfied that there has been an appropriate outcome, rather than simply

adjourning the matter indefinitely without regard, or ability to follow, the next steps to be taken for the young person. Sub-clause (3) provides that the chief executive has parental responsibility for young people subject to this section in certain limited circumstances.

94. This clause introduces at paragraph (1)(h) a new dispositional option for young offenders, namely 'community service order'. While community service options were available under previous law by intricate application of other legislation, this clause now addresses the matter specifically. Subsequent clauses reflect minor additions to corresponding sections under the CSA to take account of this extra disposition (e.g. clauses 97, 114). The option is further delineated in clauses 104ff.
104. This and the following 3 clauses provide the detailed mechanism and provisions applicable to community service orders, young people serving community service orders, and breach. Note that a young person is not to serve more than 208 hours, which are to be taken within 1 year at a maximum of 60 hours per week as determined by the chief executive.
105. This clause provides that the young person is subject to the control, direction and supervision of the chief executive while under a community service order. Other matters relating to the duties of the young person, issues for the chief executive's consideration and circumstances amounting to breach (in the next clause) are intended to be similar to the regime applicable to attendance centre orders under this Division.
107. This clause operates to treat breach of a community service order in the same manner as the court has traditionally dealt with breach of a conditional discharge order, for example by requiring (in sub-clause (5)) that certain further orders are not to be imposed on a child or young person in the event of breach unless the court has first recorded a conviction against the child or young person for the offence for which the breached order was originally made.
108. In line with community service orders, sub-clause (2) of this clause amends the CSA provision for maximum hours to be served under an attendance centre order by increasing it to 208.

127. This clause allows for the chief executive to arrange a special assessment of a young person in a Territory institution. Special assessments are described in clause 188. Hence, for example, the chief executive or his or her relevant delegate could authorise medical, psychological or psychiatric examination of a young person at Quamby Youth Detention Centre. By the operation of sub-clause (3), however, the limitations on that power set out in clause 189 (as well as other matters) are imported into this Chapter for this purpose. Thus, except in certain emergencies or by court order, an assessor will not be permitted to carry out a special assessment for a non-consenting young person if he or she believes that young person has sufficient maturity to make a reasoned decision as to consent, despite the fact that a person with parental responsibility (including the chief executive as appropriate) consents to the assessment.

#### Part 3 - Interstate transfer

130. See paragraph 61 above.

### CHAPTER 7 - CHILDREN AND YOUNG PEOPLE IN NEED OF CARE AND PROTECTION

This Chapter describes measures available for the protection of children and young people from abuse and neglect. It provides for a voluntary family group conference scheme as well as for the reporting of suspected abuse. It sets out the orders the chief executive may seek from the Childrens Court by way of Short or Final Care and Protection Orders and the procedure to be followed once such applications are made.

Part 1 - General

*Division 1 - Preliminary*

- 149 This clause defines terms for use in this Chapter. The term ‘abuse’ is defined to mean physical abuse, sexual abuse or emotional abuse. When combined with the term ‘neglect’, this four-part categorisation reflects nationally accepted delineation of ‘abuse types’. ‘Emotional abuse’ is a term intended by this clause to be wider than abuse of a strictly psychological nature, but linked also to the concept of significant harm ensuing for the child or young person. While that concept is not in turn defined in the Act, it is intended to allow for the possibility that some things, though probably emotionally challenging to a child or young person in strict terms, may result in a level of harm to the child or young person which is not sufficiently significant to warrant ongoing intervention by the State.

Paragraph (ii) of the description of ‘emotional abuse’ formally introduces for the first time in Territory law the notion that exposure of a child or young person to domestic violence (as described in the *Domestic Violence Act 1986*) may be of such psycho-social impact that it causes him or her significant harm.

This clause also links the concept of ‘neglect’ to failure to provide necessities of life such as food, shelter, clothing or medical care (though these categories are deliberately not closed).

- 150 This clause has the effect of introducing the term ‘contact’ to Territory law, to describe the interaction a child or young person may have with others. It is intended to focus on the right of the child or young person to have contact with those others, rather than on any apparent right of the others to have ‘access’ to the child or young person.
- 151 For the purposes of this Chapter the term ‘former caregiver’ is introduced. Where parental responsibility has shifted as a result of the operation of the Act (e.g. by court order or the taking of ‘emergency action’), the former caregiver is the person who was providing care for the child or young person prior to that shift. Where a voluntary care agreement is to be entered into (see clause 180),

the former caregiver is the person caring for the child or young person at the time the agreement is being proposed. In both cases the term is not intended to cover a person such as a day carer or baby-sitter.

- 152 This clause allows the application of the provisions of this Chapter to all people reasonably believed by a court or other decision-maker to be under 18 years old, but requires that those provisions cease to operate as soon as the court or decision-maker becomes aware that the person is actually an adult.
- 153 As a counterpart to the previous provision this clause states that this Chapter ceases to have effect for people once they turn 18, with the exception that the clause does not operate to direct that a person serving a criminal sentence is to be released from that sentence by virtue only of the fact he or she has turned 18.

*Division 2 - Abuse and neglect*

- 154 This clause outlines the circumstances in which a child or young person may be considered to be in need of care and protection. It links this concept to the 2 critical strands of (a) abuse or neglect having occurred in the past, occurring in the present, or being likely to occur in the future and (b) there being no person with parental responsibility being willing or able to do something to prevent it.
- The circumstances described in sub-clause (2) are not intended to be an exhaustive list of the matters which will satisfy both strands, but at the time of enactment it is anticipated they will cover the great majority of such matters. Hence for example they cover a range of circumstances: from there simply being no person with parental responsibility to provide adequate care and protection for the child or young person (whether because such people have died or disappeared or for any other reason); to there being a serious or persistent conflict between the child or young person and those with parental responsibility for him or her; to there having been sexual exploitation of the child or young person or threats to his or her life.
- 155 This clause allows for the event amounting to a child or young person being in need of care and protection under the previous clause to be one which occurs outside the Territory - the critical nexus remains that given in clause 8.



- 156 This clause allows for any person (whether in or outside the Territory) to report to the chief executive their reasonable belief or suspicion about a child or young person being in need of care and protection.
- 157 This clause requires certain people listed in sub-clause (1) to report to the chief executive their reasonable work-related suspicions of sexual abuse or non-accidental physical injury to a child or young person. In relation to the range of people mandated, note: the definition of 'school' in the dictionary (for paragraph (1)(d)); that only coordinators of family day care schemes are covered (not individual family day carers - for paragraph (1)(h)); and that paragraph (1)(i) only requires the duties of the relevant public servants to be 'related to' not solely or even predominantly for the wellbeing of children, young people or families.
- 158 This clause creates an offence for reports in bad faith.
- 159 This clause describes the action the chief executive may take on receiving a report, ranging from no action, to child protection appraisal (see also clause 187), to emergency or court action. It includes the provision of voluntary support for families and assisting with kinship placement arrangements.
- 160 In addition to any other requirement of public sector legislation, this clause requires the chief executive to keep a record of reports of suspected abuse etc. made under clauses 156 or 157 and of any ensuing child protection appraisal. In relation to the chief executive, disclosure of that record and the report is prohibited by the operation of clause 401.
- 161 This clause protects those making reports in good faith under clauses 156 or 157 in that it renders reports valid exercises of professional or ethical conduct and immunizes 'reporters' from civil or criminal liability. In addition reports and their contents are neither admissible nor compellable in court or tribunal proceedings, except in child protection proceedings under the Act or through the reporter personally. The only other time reports are not protected in this way is in relation to charges or allegations in proceedings about the proper exercise of powers etc. by a person (whether the chief executive, the reporter or other) under the Act.

- 162 If a person reasonably suspects or believes that a child or young person is in need of care and protection, but reports that information to the community advocate who in turn forwards it to the chief executive, this clause has the effect of treating the forwarded information as if it were a report under clause 156 and protecting the person and the community advocate in the same manner as it would have done if the person had reported direct to the chief executive. In relation to the chief executive, disclosure of such a report is also prohibited under clause 401.

### Part 2 - Voluntary action

This part groups together a range of functions of the chief executive which are intended to highlight the Act's emphasis on cooperative and inclusive support that the government can give to children, young people and their families. It is not intended to limit the range of ways that the chief executive and families may combine to further the wellbeing of children and young people.

#### *Division 1 - Family Group Conferences ('FGC')*

- 163 This clause sets out definitions for use in this division.
- 164 This clause provides for the chief executive to appoint facilitators. As it is not intended that appointment be limited to engaging a person as part of the permanent staff of the chief executive's department, the clause is expressed in sufficiently wide terms to allow for the engaging of an external facilitator, even on an *ad hoc* basis if appropriate, for example with skills or attributes which may be suited to the best interests of a particular child or young person, such as in mental health, disability, indigenous or foreign language areas. It is intended that the facilitator act as a neutral catalyst for progressing the conferencing process, and not as representative of the chief executive at the conference.
- 165 This clause requires the chief executive to keep a register of facilitators.
- 166 This clause makes clear that a FGC is a voluntary alternative dispute resolution mechanism designed to give participating family members (and such others as a facilitator may invite) an ongoing opportunity to be involved in and take responsibility for planning for the provision of adequate care and protection for

children and young people in their midst. If the chief executive believes it would be in the best interests of a child or young person to hold a FGC, he or she must appoint a facilitator.

- 167 A facilitator must under this clause decide who to invite to a FGC. As the purpose of the conference is to empower family members to provide care and protection for their children, it is intended that the child or young person (other than one who is very young or immature) will attend conferences concerning him- or herself, as will those with parental responsibility for him or her (unless the facilitator decides their attendance would not be in the best interests of the relevant child or young person). As the conference will only be called if the chief executive believes the child or young person is in need of care and protection, and as the facilitator is not the chief executive's representative at a FGC, a representative of the chief executive will be required to attend to determine whether the chief executive's concerns can be relieved through the conference process.

Sub-clause (4) allows for the facilitator to notify the chief executive that he or she will not be holding a FGC due to it becoming apparent in the set-up phase for the conference that meaningful agreement will not be reached by the intended participants for the purposes of securing adequate care and protection for the relevant child or young person.

- 168 This clause allows for, but does not require, the chief executive to provide financial assistance to people for participation in a FGC. It is not intended that the chief executive be responsible for paying for any or all relevant family members to attend FGCs.
- 169 This clause makes clear that FGCs are to be informal processes at which the views of absent invitees are to be put if at all possible. In the spirit of cooperation it is intended that family members participate as family members, not as combatants or litigants. Hence the clause requires that conferences are to be conducted in the absence of lawyers. When read in conjunction with clause 165, it would be open to a facilitator to allow a person to attend with a support person or spokesperson if appropriate, for example where a person has a

disability of some sort or is at a disadvantage relative to real or apparent influence of another person.

- 170 While there may be a range of other people at a FGC too, this clause provides that if the facilitator is satisfied that the chief executive's representative and the people with existing parental responsibility for a child or young person have reached agreement as to a proposed outcome, he or she is to record the agreement in writing signed by those people after they have had an opportunity to get their own legal advice about it. Consenting capable young people the subject of the agreement are to sign if over the school-leaving age. Other participants in agreement may also sign.
- 171 Whether a FGC reaches an agreement as in the last clause or not, this clause requires the facilitator to report at least brief details of the conference to the chief executive. If there was such agreement, a summary of arrangements and a copy of the signed agreement is to be attached. While disclosure of information discussed at the FGC generally is prohibited under clause 401, it is intended that that clause will not cover this report (which could, for example, then possibly be accessed under Freedom of Information laws).
- 172 This clause requires the chief executive to provide feedback to FGC invitees and participants through the provision of a copy of the facilitator's report, and to take necessary steps to give effect to the conference outcome. Such steps may include registration of the agreement under the next clause, or for example as a 'parenting plan' in the Family Court under the *Family Law Act 1975*. However, neither requirement stops the chief executive from taking any other action under the Act he or she may believe is appropriate.
- 173 To give effect to a conference outcome involving a shift in parental responsibility for a child or young person, this clause allows for the chief executive (only) to apply to a court to register a signed agreement. The chief executive is to serve a copy of the application on the community advocate (in the same way as he or she would for an application for an order).
- It may be that a FGC will have been held concerning a child or young person who has been in foster care as a result of a court order for more than two years.

If this happens and the participants at the conference agree that the child or young person should remain with his or her foster carer/s until aged 18, it is intended by sub-clause (2) that the chief executive may apply to the court for an order to this effect (for example by seeking variation to an existing final care and protection order under clause 260), rather than by registering the FGC agreement.

- 174 This clause allows for the court to register a FGC agreement, or to refuse registration, but in line with sub-clause 173(2) the court may not register an agreement to create an enduring parental responsibility order.
- 175 This clause provides that registration gives effect to an agreement as if the court had made an order in the terms of the agreement.
- 176 This clause requires the chief executive to arrange at least one (but not necessarily more than one) review conference where the FGC results in a signed agreement, *and* the agreement requires the review or a participating child or young person or a person with parental responsibility requests it. The chief executive may also arrange a review conference at other times, including if the court has refused to register a FGC agreement.
- 177 This clause provides that FGC steps can be taken even if a person, who would otherwise be involved, cannot reasonably be found.
- 178 This clause provides for the confidentiality of FGC information by prohibiting (with penalty) its publication and rendering anything said at the conference inadmissible in evidence in proceedings other than for the purpose of establishing in child protection proceedings under the Act that an agreement was or was not reached. In relation to the chief executive, disclosure of the content of a document produced for a FGC (other than a report under clause 171) is prohibited by the operation of clause 401.

*Division 2 - Voluntary care agreements*

- 179 This clause describes the chief executive and signatories to voluntary care agreements who have parental responsibility for the relevant child or young

person as 'parties'. The subject child or young person is not a party as such, though may be required to consent to the agreement (see clause 180).

- 180 This clause provides for voluntary care agreements by which people with parental responsibility (at their own instigation or otherwise) agree to share that responsibility in relation to a child or young person with the chief executive for up to 6 months. The chief executive's parental responsibility commences once the agreement is signed, or later as agreed. In line with the principle of State intervention by the least intrusive means consistent with the child's or young person's best interests, the clause requires the chief executive to consider whether other options, such as arranging for kinship care, would be better options than entering an agreement. If the child or young person is sufficiently mature, the chief executive is to consider his or her views of, and if he or she is of or over school-leaving age the chief executive may generally not enter the agreement without his or her consent.
- 181 This clause allows for the chief executive to agree in writing to extensions of voluntary care agreements, again only if satisfied of the appropriateness of the agreement, and only if the aggregate of extensions is not more than 6 months (or 6 months in the 12 month period preceding the end date of any proposed extension).
- 182 Despite the effect of clauses 180 and 181, this clause recognises the possibility of growing maturity and emerging independence of young people of or over the school leaving age by allowing for longer voluntary care agreements than 6 months to be made concerning them with their consent.
- 183 This clause validates voluntary care agreements made by people who are parents though they may be under 18 themselves.
- 184 This clause allows for parties to voluntary care agreements to terminate them earlier than they first agreed.
- 185 This clause provides that when a voluntary care agreement ends, the chief executive must, unless emergency action or child protection proceedings have commenced, restore the subject child or young person to a former caregiver, or

other person as agreed, thereby ending the chief executive's parental responsibility. Parental responsibility also ceases if the court refuses to make an order for it in the child protection proceedings.

- 186 This clause provides that people with parental responsibility who are parties to a voluntary care agreement can make a binding agreement to pay, or contribute to, the chief executive's costs in looking after a child or young person under the agreement.

*Division 3 - Appraisal and assessment*

- 187 This clause describes as a 'child protection appraisal' what is likely to be a major part of the day-to-day work of the chief executive and his or her delegates in supporting families and children. Hence if the chief executive reasonably believes a child or young person is in need of care and protection at any time, he or she may arrange to: see, meet, talk with or visually examine a child or young person; interview people; give, request and receive information; and request special assessments (described in the next clause).

As was laid down in the principles to the Act, the clause calls again for cooperative child protection activity, but recognises that it may be necessary for the chief executive to request specific matters (which if not met may become the trigger for the chief executive to seek an assessment order under clause 212).

- 188 This clause outlines the classes of assessment which may form a special assessment as part of the chief executive's child protection appraisal process or for an assessment order (see clause 212), or for the purposes of assessment of young offenders under clause 127. As the range of specific matters which may amount to a child being in need of care and protection is impossible to describe in advance, the list of assessment types is deliberately broad, ranging from general medical and social assessment to psychological and psychiatric testing and even surgery in limited circumstances; with possible assessors including social workers, psychologists, doctors (general or specialist) or other appropriately qualified people.

- 189 This clause precludes special assessment in certain circumstances, namely: where a child or young person, who is sufficiently mature to make a reasoned decision as to consent to the assessment, does not consent; where penetration of the skin or certain body cavities is intended and a person with parental responsibility has not consented; or where the chief executive with parental responsibility has not consented. However assessments may go ahead in the absence of otherwise relevant consents under a court's order or if they are primarily for saving life, preventing serious damage to health, relieving significant pain or setting broken or dislocated bones.
- 190 This clause allows for the chief executive to seek, and the police to provide, assistance with assessments, for example in entering and searching a place, seizing things or taking photographs etc., or requesting information. The clause creates penalties (and defences) for certain non-compliance as well as immunity from liability for certain compliance.
- 191 This clause requires (with penalty for failure) those assessing people under this Division to provide a report of their assessment to the chief executive unless the court orders otherwise.

### Part 3 - Care and Protection Orders and Emergency Action

This Part describes orders that may be sought from the court for the care and protection of children and young people. Orders are divided into 'short' and 'final'. Short orders are intended to be available quickly and in an uncomplicated manner, and may be for one-off events (such as assessment) or last in the short term (generally to a maximum of 18 weeks). Final orders may require more intense deliberation and may be long-term (even until a young person turns 18).

#### *Division 1 - General*

- 192 This clause defines the type of short care and protection orders (i.e. assessment, specific issues, therapeutic protection, residence and contact orders) and final care and protection orders for which application may be made under this Chapter.



- 193 This clause clarifies that the basis for an application under this Chapter by the chief executive is his or her reasonable belief, or in the case of assessment — reasonable suspicion, that a child or young person is in need of care and protection.
- 194 This clause makes clear that the civil burden of proof applies to care and protection proceedings.
- 195 This clause allows for information to be withheld on the basis of legal professional privilege or self-incrimination.
- 196 This clause applies the cooperative, inclusive principles of the Act to the courtroom situation by requiring the court to give a person a reasonable opportunity to be heard before imposing an obligation on him or her.
- 197 This clause makes clear the role of the State in court in child protection matters by stipulating that only the chief executive may initiate proceedings for care and protection orders and it renders the State accountable from the outset by requiring particulars of the order sought and the grounds relied on by the chief executive in his or her applications.
- 198 This clause makes clear that once proceedings are on foot other parties who seek an order should cross-apply on the chief executive's application/s, again stating particulars of the order sought and the grounds relied on by the cross-applicant. Orders which may be sought on cross-application are further detailed in clauses 213, 235, 243 and 246. In the ordinary course of events the onus will lie on the cross-applicant to make the case for the order sought on any cross-application.
- 199 This clause provides that the court is not to give leave for a cross-application unless satisfied that there are reasonable grounds for believing that the child or young person in question would be in need of care and protection if an order was not made on the cross-application.
- 200 This clause allows for interim care and protection orders to be made during adjournment of proceedings for short or final care and protection orders. The court need not make a full determination of whether the child or young person is in need of care and protection before making such an interim order, but rather

need only be satisfied that the chief executive reasonably believes that the child or young person would be in need of care and protection if an order was not made. (A similar test applies for the making of assessment orders - see clause 215.)

- 201 Once an application for a care and protection order of any type has been made, this clause allows for the court to make whatever care and protection order it considers is in the best interests of the child or young person, provided the prerequisites for the relevant order have been made out.
- 202 If an application for a care and protection order of any type has been made, this clause allows for the court to exercise its powers under other legislation to make a domestic violence or restraining order, or both, in addition to or in substitution for any order sought or any interim order the court makes.
- 203 This clause provides for the making of contact orders whenever there are care and protection proceedings on foot (or where orders are already in place). There is a rebuttable presumption in favour of people with parental responsibility having contact, and siblings do not need leave to be joined as parties if appropriate, but other people seeking contact will have the onus of proving that the contact they seek is in the best interests of the child or young person. As contact is seen as a positive focus on the right of the child or young person to interact with others (rather than a right of adults, for example, to have access to him or her), contact orders are to be reserved for allowing contact, with disallowance of contact achieved by specific issues order (or as a final care and protection order).
- 204 Likewise where proceedings are on foot (or where orders are already in place) this clause allows for the court to make orders about the people with whom a child or young person is to reside. This clause also provides that (in addition to any day-to-day or long-term parental responsibility) the way for the court to give a person authority to determine where a child or young person is to live is by making a residence order in favour of that person.

- 205 This clause provides that a person who has a residence order concerning a child or young person can allow him or her to be away temporarily, for example on holiday, whether in or outside the Territory.
- 206 This clause makes clear that a supervision order concerning a child or young person may require a person to report to, present the child or young person to, or hold discussions with, the named supervisor, and in any event allows the supervisor to meet or speak to the child or young person alone if necessary.
- 207 Where a person has been served with, or knows (or ought reasonably to know) about a short or final care and protection order having been made, this clause creates offences and penalties for non-compliance with the order/s (whether in or outside the Territory), especially orders requiring a person not to live with a child or young person.

*Division 2 - Short care and protection orders*

- 208 This clause provides that the court is to give initial consideration to applications and cross-applications within 2 days of them being filed, but may then adjourn the proceedings for up to 7 days at a time subject to the next clause.
- 209 In line with the notion that short care and protection orders are intended to be available quickly and in an uncomplicated manner, this clause requires the court to commence the final hearing of a short care and protection application (i.e. both the main application and any cross-application which may have been made on it) within 14 days of the main application having been filed. (Note that clause 237 provides that a therapeutic protection order application is to be dealt with within 2 working days.)
- 210 This clause provides for the maximum length of short care and protection orders. Assessment orders are to last for 4 weeks maximum (or, with extensions, up to an aggregate of 8 weeks maximum - see next clause); therapeutic protection orders for up to an aggregate of 8 weeks; other short care and protection orders are to last for 18 weeks maximum. Exceptions to these limits are where an assessment order or specific issues order is continued during adjournment of proceedings for a final care and protection order (see clause

247), or where a therapeutic protection order is made as a final care and protection order (in which case it may still only be made for 8 weeks at a time maximum, but that period may be renewed on application to vary the order).

- 211 This clause allows for parties to short care and protection order proceedings, or people named in short care and protection orders, to apply to extend, vary or revoke the order/s. Extension orders may only take maximum aggregates to, for assessment orders and therapeutic protection orders—8 weeks, and for other orders—18 weeks. If an order would otherwise have expired after an application is filed but before it is determined, the court may adjourn the matter (and thereby extend the order) for up to 7 days only.

*Division 3 - Assessment orders*

- 212 This clause provides for the chief executive's applications for assessment orders where voluntary cooperation with assessments cannot be achieved, including by telephone etc. in urgent cases.
- 213 This clause makes clear that cross-applications on the chief executive's assessment order application may only be for orders for special assessment.
- 214 This clause outlines the type of orders the court may make for the purposes of child protection appraisal or special assessment, including authorising the chief executive to arrange assessment, requiring a person (not just a child or young person) to be assessed or to present another person for assessment, and providing for information and documents to be gathered.
- 215 This clause provides that the court need not make a full determination of whether the child or young person is in need of care and protection before making an assessment order, but rather it must at least be satisfied that the chief executive reasonably believes that the child or young person would be in need of care and protection if an order was not made. The court is also required to pay close attention to the capacity of a child or young person to consent (or withhold consent) to any assessment proposed to be ordered.

- 216 This clause allows for the chief executive to call on the same assistance as is referred to in clause 190 when carrying out an assessment under an assessment order.
- 217 This clause requires an assessor under an assessment order to provide a report about his or her assessments to a person named in the order and to the court if the court orders it.
- 218 This clause allows for the court, even of its own motion, to make any care and protection order it considers appropriate to implement a recommendation arising from an ordered assessment.

*Division 4 - Emergency action*

- 219 This clause allows the chief executive or a police officer to take action (including by force and with assistance as reasonably necessary) for the immediate care and protection of a child or young person in an emergency, whether by keeping the child or young person at a place (e.g. a hospital) or by moving him or her to another place (e.g. a kinship or foster placement).
- 220 Where a police officer has taken emergency action under the last clause, this clause provides that he or she must inform the chief executive and people with parental responsibility as soon as practicable, and take the child or young person to such place as the chief executive nominates.
- 221 By this clause parental responsibility following emergency action vests in the chief executive (if he or she, or his or her delegate or officer, took the action) or, in a police officer if he or she took the action. When the police officer tells the chief executive about his or her action under the last clause, his or her parental responsibility shifts to the chief executive, but the chief executive may authorise the police officer to continue taking steps relating to the child or young person.
- 222 This clause provides that the parental responsibility gained under the last clause (whether by the chief executive or a police officer or a combination of them) may only be exercised to cater for the immediate care and protection of the child or young person and only lasts for an aggregated maximum of 2 working days following the day on which the action was taken, unless those 2 working days

are separated by a Saturday, a Sunday and a public holiday. In the latter case the matter is to be brought before the court (if necessary) on the next sitting day of the court following the day the action was taken. For example if the action is taken on the Thursday before Easter, and the following Friday and Monday are public holidays but the court sits on Saturday, the matter will come before the court on the Saturday.

- 223 This clause provides for the chief executive to notify people with parental responsibility for the child or young person about the emergency action (if the police officer has not already done so under clause 220), as well as notifying the community advocate and the court.
- 224 This clause provides for the action the chief executive may take if he or she has parental responsibility following emergency action, including arrangements for child protection appraisal and placing the child or young person with an appropriate carer.
- 225 While there is no requirement for the chief executive to apply to the court for an order following every emergency action (for example there may be no need if the issue which led to the action being taken can be resolved in the best interests of the child or young person on a voluntary basis), this clause provides that if the chief executive does apply for an order the court is to give initial consideration to the application on the day of application.
- 226 This clause requires the person in whom parental responsibility has vested following emergency action to allow the child or young person reasonable contact with siblings and those with parental responsibility for him or her, provided that contact need not be arranged if not in the best interests of the child or young person.
- 227 This clause requires the chief executive to keep written records of emergency actions.
- 228 This clause allows for the child or young person, or a person with parental responsibility for him or her, or his or her former caregiver, or the community advocate to apply in the period immediately following emergency action for the

release of the child or young person from the parental responsibility of the chief executive or a police officer. However the court may not make an order to this effect unless satisfied that proper arrangements exist for the care and protection of the child or young person.

*Division 5 - Therapeutic protection orders*

- 229 This clause states that common law or statutory powers of the chief executive are not limited by this Division, but that to the extent that this Division is contrary to the law creating those powers this Division prevails (where permissible at law).
- 230 This clause describes ‘therapeutic protection’ as care provided at a place for a child or young person by the chief executive, where the child or young person is confined in an appropriate way to protect him- or herself from serious harm.
- 231 This clause stipulates that therapeutic protection may only be provided under a therapeutic protection order (whether for the purposes of a short or final care and protection order).
- 232 This clause requires the court to be satisfied that the child or young person is in need of care and protection (or would be so in need if no order was made) before making a therapeutic protection order. Such an order may have conditions attached and operates as a residence order and a specific issues order in favour of the chief executive giving the chief executive responsibility for the day-to-day care, welfare and development of the child or young person.
- 233 This clause sets out the prerequisites of which the court must be satisfied before making a therapeutic protection order, including matters pertaining to: why the child’s or young person’s needs are said to require the order; the therapy or program that is to be put in place for him or her; and the time, date and duration for which the therapeutic protection is expected to be provided (and in the case of extensions—has been provided). Sub-clause (3) provides that the court is not required to rehear a matter completely where variation of a therapeutic protection order is sought, for example to extend the period of the order. Instead the court may take previous findings of fact into consideration.

- 234 This clause describes some of the types of action the chief executive may take when providing therapeutic protection for a child or young person, including restricting exit from a place, using reasonable force, personal searches, close or constant supervision and restriction on contact (subject to clause 238).
- 235 This clause limits the matters for which cross-application on a therapeutic protection application may be made to orders for special assessment, specific issues or residence.
- 236 This clause allows for the child or young person, or a person with parental responsibility for him or her, or his or her former caregiver, or the community advocate to apply for variation or revocation of a therapeutic protection order, and requires the chief executive, once served with such an application, to file particulars of therapeutic protection already provided.
- 237 This clause provides that the court must hear and determine applications for therapeutic protection orders within 2 working days of their filing, but allows for cross-applications to be dealt with (including adjourned) in accordance with clause 208.
- 238 This clause provides that if the chief executive limits contact by a child or young person with others, that limit must not: unreasonably restrict contact with siblings or those with parental responsibility; or prevent the child or young person from seeing the community advocate or official visitor for the purposes of the Act; and if amounting to isolation from people other than his or her supervisor, the community advocate and the official visitor, may only be under constant supervision, and even then only for a limited time each day with reasonable access to the open air.
- 239 While there is no requirement for where therapeutic protection may be provided, this clause provides that it may *not* be provided in premises used mainly for remandees or to confine criminal offenders.
- 240 This clause requires the chief executive promptly to respond to a request by the community advocate or the official visitor to provide a schedule detailing how



and when therapeutic protection has been provided for a child or young person subject to a therapeutic protection order.

- 241 This clause links to clause 210 by providing that where a therapeutic protection order is made as a final care and protection order, it may still only be made for 8 weeks at a time maximum, but that period may be renewed on application to vary the order under Division 7.

*Division 6 - Specific issues orders*

- 242 This clause allows for the court to make specific issues orders (being orders, other than assessment or therapeutic protection orders, relating to the care and protection of a child or young person) if the court is satisfied that there are reasonable grounds for believing that the child or young person is in need of care and protection (or would be so in need if no order was made). The types of matter on which the court may make orders include matters relating to parental responsibility, the provision of information, the absence or removal of a person from a place where a child or young person lives, the requirement for no contact with the child or young person, referral to the Mental Health Tribunal, supervision or other matters.
- 243 This clause limits the matters for which cross-application on a specific issues application may be made to orders for other specific issues, special assessment or residence.
- 244 This clause requires the court, when making, varying or extending certain specific issues orders (namely those about the absence or removal of a person from a place where a child or young person lives, about the requirement for no contact with the child or young person, or directing a person as to certain stated things) to be served on the relevant person, the community advocate and the police amongst others. The clause makes specific provision for personal, substituted or assisted service in certain circumstances (for example when a person is believed to be particularly violent).

*Division 7 - Final care and protection orders*

- 245 This clause provides that the court is to give initial consideration to applications and cross-applications for final care and protection orders within 5 working days of them being filed, but may then adjourn the proceedings. Adjournments may only be made on the proviso that the court commences the final hearing of the application (i.e. both the main application and any cross-application which may have been made on it) within 10 weeks of the main application having been filed. If this 10 week deadline is not met for any reason, orders or directions in force at the time continue to apply until the matter is determined.
- 246 This clause limits the matters for which cross-application on a final care and protection application may be made to orders for special assessment, specific issues or residence.
- 247 This clause provides that before adjourning an application under this Division: the court must define matters in dispute, consider the length of the hearing required in the matter, and give directions; and the court may extend or revoke specific issues or assessment orders then in place, order that a meeting take place, and make certain 'interim orders' relating to the care and protection of the child or young person. (Note that these orders are considered to be interim to the extent that they only apply during the adjournment period, even though they may be fully-fledged as orders in themselves (e.g. for assessment).)
- 248 This clause provides that a court-ordered meeting referred to in the last clause must be presided over by a court nominee (who is to report to the court on the outcome of the meeting), and attended by the chief executive and people with parental responsibility for the child or young person (with optional attendance by their representatives, other parties and their representatives, and certain other people). Strict confidentiality attaches to meeting proceedings except as may be allowed for by consent of the parties or order of the court.
- 249 This clause relates to variation of the interim orders the court may make under clause 247 by providing that application for variation is to be heard and determined within 5 working days of filing, with an order made for variation, dismissal or such other matter as is open to the court under clause 247. If the

variation application is not determined before the subject order would otherwise have expired, the order continues in force until the matter is determined.

250 This clause provides that assessment and specific issues orders made as ‘interim orders’ on final care and protection applications may be appealed from as if they had been short care and protection orders (i.e. despite the fact that the court cannot make an ‘interim assessment order’ under clause 200, and see also the note to clause 247 above).

251 This clause provides that the court may determine an application for a final care and protection order by declaring that the child or young person is in need of care and protection and making a final care and protection order. Such a *declaration* will be a matter for the court’s decision and may not be admitted to by a party; such an *order* may be for a set period and made to create arrangements for the proper care and protection of the child or young person, or to preserve arrangements already in place, and may include an order that the chief executive supervise the child or young person, an order for parental responsibility (including an order for enduring parental responsibility to last until the child or young person turns 18—see clause 256), referral to the Mental Health Tribunal or another order.

In line with the ‘no order principle’ in clause 11, the court would not be required to make a declaration, or having made a declaration would not be required to make an order, if it did not consider it to be in the best interests of the child or young person to do so; but the court is not to make an order without first having made a declaration (except if the order is a domestic violence, restraining or contact order).

252 This clause links to clause 241 in relation to the renewal of the period of a therapeutic protection order made as a final care and protection order.

253 This clause allows for the court, when making a parental responsibility order under clause 251, whether in favour of one or more people, to state limits on the various responsibilities that may apply under the order.

- 254 This clause requires the court to consider a 'care plan' filed by the chief executive before making a final care and protection order.
- 255 This clause describes a care plan as the chief executive's written plan (generally to be served on all parties if filed in court) for proposals concerning the care and protection of the child or young person, including as to allocation of parental responsibility, type of proposed placement for the child or young person, restoration to and contact with his or her family, and the services and supports to be provided to him or her by the chief executive or other agencies.
- 256 This clause relates to enduring parental responsibility orders. It defines 'proposed carer' as a person who has cared for the child or young person under a care and protection order for at least 2 of the 3 years preceding the application, and 'previous carer' as a person who has had parental responsibility for the child or young person other than under a care and protection order.

Where the court is satisfied that no previous carer has cared for the child or young person for at least 2 of the 3 years preceding the application, and no such person can or will do so in future (or it is not in the best interests of the child or young person for them to do so), the court may make an enduring parental responsibility order in favour of a proposed carer whom it believes is appropriate, willing and able to exercise day-to-day and long-term responsibility for the child or young person. The court may not make an order concerning an indigenous child or young person unless it has given a relevant indigenous organisation reasonable opportunity to comment on the proposed order.

An enduring parental responsibility order operates as a residence order in favour of the named carer and confers on him or her (or them) day-to-day and long-term responsibility for the child or young person until he or she turns 18. (Note that unlike adoption, it is not intended that an enduring parental responsibility order operate to change the status of parentage of the child or young person.)

- 257 This clause makes clear that an enduring parental responsibility order cannot be made in favour of the chief executive, though it does not preclude the making of an order under another clause which confers parental responsibility on the chief executive which happens to last until the child or young person turns 18. (A

practical distinction between the two is that there is no requirement for the chief executive to provide annual reports under clause 263 in relation to a child or young person under an enduring parental responsibility order, whereas he or she would have to do so if he or she retained parental responsibility for the child or young person.).

- 258 This clause gives the person who has an enduring parental responsibility order priority in the exercise of that responsibility over others who may also have parental responsibility.
- 259 In relation to enduring parental responsibility orders, this clause allows for the chief executive in his or her discretion to arrange for financial or other assistance to the person with parental responsibility under the order. In other cases the clause also allows for the court to order that a person with parental responsibility contribute financially (giving rise to a recoverable debt due to the Territory) to the cost of care for a child or young person for whom the chief executive has parental responsibility. Otherwise a court order imposing a financial cost on a person is to be borne by the person.
- 260 This clause allows for parties to proceedings in which a final care and protection order was made, or other people, to seek leave of the court to apply to vary or revoke the order in a manner stated in the application. While leave may be given to previous parties more readily under this clause than to other people, no person may apply, other than in exceptional circumstances, more than once in any 12 month period. The onus of proof that the variation or revocation sought is in the best interests of the child or young person will rest on each applicant.
- 261 As to the orders available on an application for variation or revocation of a final care and protection order, this clause provides that the court may substitute or add any order open to it as a final care and protection order, or change the period or vary a term or condition of the subject order.
- 262 If the variation application under clause 260 is not determined before the subject order would otherwise have expired, the order continues in force until the matter is determined.

263 While the Act does not require court-based annual review of final care and protection orders, this clause directs that, for children or young people for whom the chief executive has parental or supervisory responsibility, the chief executive is to prepare and distribute annual reports on the circumstances of the child or young person, on the chief executive's fulfilment of terms of the order and on whether the arrangements in place at the time of reporting continue to be in the best interests of the child or young person.

Copies of the report are to be provided to the child or young person, people with parental responsibility for him or her, his or her carer, the community advocate and the court; and to be provided in the tenth month following the making, and each anniversary of the making, of any ongoing order (and/or the second-last month of orders lasting 6 -12 months, or of orders made for a period which is less than 6 months short of a multiple of 12 months). The clause also makes provision for the chief executive to give a report to a person such as an interpreter or doctor to assist in bringing the contents of the report to the attention of one of the people mentioned above, and for the chief executive to make minor adjustments to the report before distribution to protect privacy and confidentiality of people named in it as required.

264 This clause describes the circumstances in which the chief executive is not required to provide a report to a person under the last clause, being where he or she considers that to do so would not be in the best interests of the child or young person or where a relevant person cannot reasonably be found.

In those circumstances the chief executive is required to apply to the court for an order waiving the obligation to provide the report. While service of that application will not be required on a person who cannot be found, service of the application at least will still be required on people otherwise entitled to the report. The court may hear an application *ex parte* if necessary and may refuse waiver, or may make any appropriate orders including to waive the obligation in whole or in part.

265 Where the chief executive is due to provide a report about a child or young person subject to a final care and protection order under clause 263, but has not

done so or obtained an order waiving compliance, the community advocate may apply to the court for an order for production within 14 days and the court may extend the order for up to 1 month in the meantime.

*Division 8 - Safe custody*

- 266 This clause provides for the issue of warrants on application by the chief executive, a police officer or an officer in situations where a child or young person is placed in danger by the breach of an order of the court or where he or she is unlawfully absent or has unlawfully been removed from the place where he or she is supposed to be under an order. Note that, in the interests of increasing the likelihood of locating and recovering a child or young person (especially if it is necessary for a warrant to be executed interstate under the *Commonwealth Service and Execution of Process Act 1992*), there is no requirement for the magistrate issuing the warrant to specify the address at which the warrant must be executed.

Those executing warrants may use necessary reasonable force and assistance, and having taken the child or young person into safe custody must place him or her in the place stated in the warrant (or where the chief executive directs) and arrange for the matter to be brought back before the court within 1 working day.

- 267 This clause gives the court power, when a matter is brought back before it after execution of a warrant under the last clause, to make or vary care and protection orders (including assessment orders) or other orders as appropriate.

*Division 9 - Representation of child or young person*

- 268 In line with the entitlement of a child or young person to take part in proceedings relating to him- or herself (as expressed in clause 12), this clause requires the court to give him or her reasonable opportunity to give the court his or her views or wishes personally if desired.
- 269 In addition to receiving a child's or young person's in person, this clause also allows the court to receive those views or wishes through a representative, a report or other means.

270 This clause stipulates that the court cannot force a child or young person to express his or her views or wishes.

*Division 10 - Procedures*

271 This clause provides a link to a schedule to the Act for the purposes of determining the people on whom applications under the Act are to be served and the time for service.

272 This clause provides for applications to be accompanied by supporting statements or reports the applicant intends to rely on.

273 This clause provides for documentation prepared specifically for use in applications to be in affidavit form or at least signed, dated and bearing a statement that its provider knows it may be placed before the court.

274 This clause allows the court to give leave for oral applications and requires the court to make directions as to preparation and service of documentation, if any, relating to the oral application.

275 This clause allows for the court to grant leave for an application to be heard *ex parte*.

276 This clause describes the parties to proceedings under this Chapter as the applicant, the child or young person, any person served with the application in accordance with the schedule referred to in clause 271 (and who participates in the proceedings other than as a witness or representative) and a person required or allowed by the court to attend and be joined as a party. However the community advocate, though served with all applications, is not to be considered as a party to applications unless he or she applies to be joined (see also clause 279).

277 This clause provides that where a person required to attend proceedings has been served with notice of the proceedings but fails to attend, the court must adjourn the proceedings to allow that person's attendance or make orders as it thinks fit (which may bind the person).

278 This clause provides that if the court is about to make an order binding a person who is not a party it may join the person as a party or must at least give the



person the opportunity to make submissions about the order (even if the urgency of the case requires the court to make the order prior to hearing the submissions).

- 279 This clause allows for people to apply to be joined in proceedings, including by oral application. It requires the court to join the community advocate if he or she applies and creates a rebuttable presumption in favour of joining people who have been caring for the child or young person for 2 or more years.
- 280 Where a person has been joined in proceedings, this clause requires the court to give a direction as to what documentation is to be provided to him or her.
- 281 This clause allows for the court, of its own motion or on application (and having given the parties an opportunity to be heard), to remove a previously joined party if it is no longer appropriate for him or her to be joined.
- 282 This clause requires parties to file and serve notices of address for service.
- 283 This clause allows for parties to appear in court in person or by a legal representative or by another person with leave of the court. The chief executive may appear through his or her delegate or an authorised person. Legal representatives must also file a notice of address for service (and notice of ceasing to act as appropriate).
- 284 In line with the principle (in clause 11) of acting without delay so as not to prejudice the wellbeing of the child or young person, this clause exhorts the court to act with as little formality, technicality and delay as it can in matters relating to children or young people, and allows for the court to exclude even the child or young person or a person with parental responsibility for him or her if it considers it in the best interests of the child or young person to do so.
- 285 This clause allows parties to request written reasons for court decisions within 28 days of the decision and requires the court to give those reasons within 28 days of the request.
- 286 This clause requires the court to serve its orders on the chief executive and the community advocate, and a party (or his or her lawyer) who has filed a notice of address for service.

- 287 This clause allows for the court to inform itself of matters before it in any manner it considers appropriate, and in so doing not necessarily to be bound by the rules of evidence (including the rule against hearsay).
- 288 In addition to any action the court may take under clause 277, this clause allows for the court to issue summonses and warrants as necessary to compel a person's attendance before the court.
- 289 This clause provides that a child or young person may not be called as a witness in child protection proceedings without the court's leave, and if called allows for the court to regulate the way in which evidence may be taken from him or her.
- 290 In addition to regulating a child's or young person's evidence under the last clause, the court may also regulate the way in which other witnesses are examined etc. if necessary or convenient to the proceedings to do so.
- 291 This clause allows for parties to withdraw from or discontinue care and protection proceedings by filing and serving a notice to that effect endorsed appropriately by any party who consents to the course of action.
- 292 This clause allows for parties to file draft minutes of consent orders endorsed appropriately by the parties and any person intended to be bound by the proposed order.
- 293 This clause presumes that parties to care and protection proceedings will usually bear their own costs of the proceedings, but also allows for costs orders to be made: where a person fails to attend a hearing or comply with an order or direction of a court; in proceedings that are frivolous, vexatious or made in bad faith; or in exceptional circumstances. The Childrens Court may only make orders for costs at a rate of up to 50% of the Supreme Court scale.

## CHAPTER 8 - TRANSFER OF CHILD CARE AND PROTECTION ORDERS AND PROCEEDINGS

This Chapter mirrors model legislation developed nationally in conjunction with all other Australian jurisdictions and New Zealand for the transfer of child care and protection orders and proceedings between participating States (including New Zealand).

### Part 1 - Preliminary

- 294 This clause describes the object of this Chapter in terms of it being desirable to arrange transfers of orders and proceedings for the best and most timely protection of children or young people who move or propose to move between jurisdictions.
- 295 This clause defines certain terms to encompass courts and proceedings in the different jurisdictions to which transfers under the Chapter may relate, and allows for the Minister to declare for the purposes of the Chapter that certain laws are 'child welfare' or 'interstate' laws and certain people are 'interstate officers'.

### Part 2 - Transfer of certain child care and protection orders

Transfers of orders to participating States under this Part may be effected by administrative officers (such as the chief executive in the ACT) in certain circumstances or otherwise by the courts.

#### *Division 1 - Administrative transfers*

- 296 This clause allows for the chief executive to transfer 'home' (i.e. ACT) orders (with conditions as appropriate) if similar orders (and conditions) exist in the destination jurisdiction, but only if the orders are not subject to appeal and consents by relevant interstate officers and the people described in the next clause are in place. When considering whether a similar order could be made in the other jurisdiction, the chief executive is to disregard the period for which such an order may be made; but, on transferring, the chief executive is to set the

period of the order as the period remaining to run on the order in the ACT or as close a period to that period as could be made in that jurisdiction.

- 297 This clause requires people who have parental responsibility, residence orders or contact orders in relation to a child or young person (as well as the young person him- or herself if over the school-leaving age) to give consent to transfer before orders can be transferred administratively, provided that if the child or young person (or a person with parental responsibility for him or her) already lives in the proposed destination jurisdiction, it will be sufficient if the relevant people simply consent to the child or young person living there.
- 298 This clause requires the chief executive to give a young person (i.e. 12 or more years old), those people who can reasonably be found with parental responsibility for any child who is the subject of the transfer (i.e. not just if the subject person is 12 or over), and the community advocate, any relevant notice of the decision to transfer within 3 working days of that decision.
- 299 This clause restricts to 10 working days the time within which a person may apply for judicial review of the chief executive's transfer decision, with such application to operate as a stay of the decision.

*Division 2 - Judicial transfers*

- 300 This clause allows for the court to order transfers of orders on the application of the chief executive if the orders are not subject to appeal and the relevant interstate officers have consented.
- 301 This clause describes the people on whom applications for transfer of orders are to be served by reference back to Chapter 6.
- 302 This clause allows for the court to transfer 'home' (i.e. ACT) orders (with conditions as appropriate) if similar orders (and conditions) exist in the destination jurisdiction. Unlike administrative transfers, however, the court may also order transfer by making another type of order available in the other jurisdiction if it considers it in the best interests of the child or young person to do so. When considering whether a similar order could be made in the other jurisdiction, the court is to disregard the period for which such an order may be

made; but, on transferring, the court is to set the period of the order as a period that could be made in that jurisdiction.

- 303 When considering transfer, this clause provides that the court is to have regard to whether the chief executive or an interstate officer is better able to provide for the care and protection of the child or young person, and to the desirability of the order operating under the law of the jurisdiction in which the child or young person is.
- 304 This clause requires the court to consider a care plan filed and served by the chief executive before making a transfer order.
- 305 This clause restricts to 10 working days the time within which a person may appeal to the Supreme Court (on a point of law) against a transfer order of the court, with such application to operate as a stay of the decision. The Supreme Court is empowered under this clause to make short care and protection orders pending its determination of an appeal, which determination may include remitting the matter to the court for rehearing.

Part 3 - Transfer of child care and protection proceedings

- 306 This clause allows for the court to order transfers of child care and protection proceedings on the application of the chief executive if the relevant interstate officers have consented, with such proceedings being discontinued in the court in the ACT when the transfer order is registered in the relevant interstate court.
- 307 This clause requires the chief executive as soon as possible to give a young person (i.e. 12 or more years old), those people with parental responsibility for any child who is the subject of the transfer (i.e. not just if the subject person is 12 or over), and the community advocate a copy of the application for transfer of proceedings.
- 308 When considering transfer, this clause provides that the court is to have regard to whether there are or have been child care and protection proceedings concerning the child or young person in the proposed destination jurisdiction, the place where matters giving rise to the proceedings arose and the place where

the child or young person, a person with parental responsibility for him or her or certain other people are living or likely to live.

- 309 This clause requires the court to make interim orders for up to 30 days duration for the care and protection of the child or young person when making a transfer of proceedings order. Such orders may confer parental or supervisory responsibility on a person (including a person in the other relevant jurisdiction), and may subsequently be varied, extended or revoked by a relevant court in the other jurisdiction.
- 310 This clause restricts to 3 working days the time within which a person may appeal to the Supreme Court (on a point of law) against a transfer of proceedings order of the court, with such application to operate as a stay of the decision but not of the interim order made under the last clause. The Supreme Court is empowered under this clause to make interim orders pending its determination of an appeal (or to stay, vary, extend or revoke existing interim orders). Final determination on appeal may include remitting the matter to the court for rehearing.

#### Part 4 - Registration

- 311 This clause provides for the chief executive to file in the court orders from other participating jurisdictions for the transfer of care and protection orders or proceedings, together with any interim orders made on transfer, as long as the time for appeal, review or stay of those orders has passed and they are not subject to such appeal, review or stay.
- 312 Under this clause registrars of courts in which transferred orders are registered under this Chapter must notify relevant interstate courts and officers of the registration, or of the revocation of any such registration. The registrar of the court in the Territory is to notify the chief executive, who in turn is to notify certain people.
- 313 By this clause registered orders are to be treated as if they were orders made by the court on the day of registration and as orders which may be varied, revoked, extended or enforced accordingly. Interim orders made on transfer are to be

treated on registration in the ACT as short care and protection orders under the Act, which may also be varied, revoked, extended or enforced accordingly. Proceedings transferred under this Chapter are to be treated on registration as having commenced in the Territory on the day of registration.

- 314 This clause limits the circumstances in which revocation of registration of interstate orders may be sought to situations where the transfer order was subject to appeal, review or stay or the time for such appeal, review or stay had not expired in the 'sending State'. Such applications may be made by the chief executive, the child or young person concerned, a person with parental responsibility for him or her or a person who was a party to the proceedings in the sending State. Revocation does not prevent later re-registration (for example when the time for appeal, review or stay has expired or when any such action has been dismissed).

#### Part 5 - Miscellaneous

- 315 Where registration of an order is revoked under the last clause, this clause provides that the order in the sending State revives and runs for the remainder of the period for which it would have run if there had been no transfer. (One practical effect of revival would be that the chief executive's reporting obligations under clause 263 would apply as from the date of the original order.) Otherwise registration is to have the effect of causing the order in the sending State to cease to have effect.
- 316 On transfer, and after the time for any appeal, review or stay or determination of such action, this clause requires the registrar of a transferring court to send to the relevant court in the 'receiving State' any documents on the sending court's file about the order or the proceedings from that court.
- 317 When an order concerning a Maori child or young person is transferred from New Zealand to the Territory, this clause requires the court in the Territory to have regard to maintaining and strengthening relationships between the child or young person and his or her family, cultural and community ties.

318 This clause states that the court is not bound by a finding of fact made in a court from which an order or proceeding was transferred, but allows for the court to have regard to the transcript of, or evidence led in, that other court.

319 This clause allows for the chief executive to give to an interstate officer such information concerning the care and protection of a child or young person as the chief executive considers is necessary for the interstate officer to perform his or her child welfare duties.

The clause also deals with disclosure by the chief executive of any information received by the chief executive from an interstate officer under a corresponding interstate law, which is equivalent to a report made to the chief executive under clauses 156 and 157 of this Act. But for this clause such disclosure would be prohibited by clause 401 in the same way that disclosure of a report under clauses 156 and 157 is prohibited.

## CHAPTER 9 - CHILDRENS SERVICES

This Chapter is about the mechanism for licensing of child care centres and family day care schemes in line with a nationally agreed licensing framework.

### Part 1 - General

320 This clause defines who is a 'controlling person' and a 'proprietor' of a childrens service, and what are 'premises' for the purposes of an approval in principle or a licence. 'Controlling person' is intended to be a very wide term relating to the exercise of direct or indirect control over a service, but is not intended to cover, for example, the directors of an international or multinational company whose decisions may not directly affect the service.

321 This clause states that the objects of this Chapter are to provide for licensing of child care centres and family day care schemes (as distinct from individual



family day care providers) and for the imposition of standards to facilitate quality child care.

- 322 This clause describes the principles that are to apply to decision-makers under this Chapter, being the ‘best interests principle’ and principles in relation to safe, positive and nurturing care and the educational, social and developmental wellbeing of children.
- 323 This clause clarifies that a ‘childrens service’ is one under which child care is provided (or proposed to be provided) at a child care centre or as part of a family day care scheme.
- 324 The definition of what is a ‘child care centre’ is defined in this clause by reference to the number of children cared for at the centre for monetary or other consideration, being more than 4 children who are not yet attending primary school as students, or more than 7 children up to any 4 of whom are not yet attending primary school as students. A person’s own children are to be counted if other children are also being cared for (for monetary or other consideration), but any children cared for in emergency, unexpected or exceptional circumstances for less than 2 consecutive days are not to be counted.

Subject to a range of exemptions described in clause 326, and by way of example only, a place where the following numbers of children (who are not all siblings) are being cared for would be likely to be classified as a child care centre: 10 children of any age; 5 children aged 2; 5 children at primary school plus 3 babies; twin one-year olds plus 3 other 2-year olds in the care of the twins’ mother. And care for the following children at a place would not cause it to be classified as a child care centre: 3 babies; 6 children at primary school; twin one-year olds plus 3 children at primary school in the care of the twins’ mother.

- 325 The definition of what is a ‘family day care scheme’ is defined in this clause by reference to the organisation, coordination and monitoring of family day care (other than care provided to children for monetary or other consideration in their own homes or under home-based arrangements such as ‘nanny schemes’). It is

not intended to apply to individual family day care providers. The number of children who may be cared for by any provider under the scheme will be specified in approval or licence conditions in accordance with national standards.

- 326 This clause automatically exempts certain situations from the licensing operation of this Chapter, including care provided for children by a relative or foster carer, in playgroups, in 'adjunct' (sub-clause (b)) or other incidental situations, by the ACT Schools Authority or in the course of conducting a registered school, or in a hospital or place where the relevant children are to receive medical care or treatment.
- 327 In addition to exemptions under the last clause, the Minister may by disallowable notice in the *Gazette* exempt other classes of childrens service from the operation of the Chapter for such period and subject to such terms and conditions as the Minister states.

#### Part 2 - Approvals in principle and Licences

Childrens services are only to be operated under this Chapter where first an 'approval in principle' and later a 'licence' is in force.

##### *Division 1 - General*

- 328 This clause outlines the types of factors the chief executive may take into account when deciding whether a person is suitable to hold an approval in principle or a licence. It allows for the chief executive to require a person to submit to testing or provide information as to suitability. This clause is not intended to limit any operation of Territory discrimination law.
- The factors include whether the person has been found guilty of offences concerning children or dishonesty, the financial and personal character of the person, previous non-compliance with licensing conditions, experience or capacity to provide childrens services, and information, reports or results of tests required under this Chapter.
- 329 This clause requires a childrens service proprietor and controlling person to disclose (with penalty for failure) certain information about themselves to the

chief executive as soon as practicable, being information about any offence concerning a child or dishonesty, and about any offence, failure to comply with a requirement or licence refusal concerning provision of a childrens service.

330 This clause requires the chief executive to keep a register of people with an approval in principle or a licence under this Part.

*Division 2 - Approval in principle*

331 This clause provides for how would-be applicants for an approval in principle to operate a childrens service are to advertise their intention to apply.

332 This clause requires an application for approval in principle to be made to the chief executive in accordance with a form approved by the chief executive and accompanied by a copy of the advertisement referred to in the last clause plus any relevant fee and further information which may be requested by the chief executive (who may also inspect relevant premises).

333 This clause only allows for the chief executive to grant an approval in principle if satisfied that the applicant, any controlling person and the premises for the proposed service are suitable and that the applicant and controlling people are likely to comply with approval conditions.

334 This clause allows for the chief executive, within 60 days of a completed application having been lodged, to refuse or grant an approval in principle, and in the case of granting to state the type of service and premises from which it may be operated and attach conditions. Conditions may make further provision about the premises concerned and may include matters related to: the number and ages of children to be cared for (including in emergencies etc.); the monitoring regime to be applied by the chief executive; management and record-keeping at the service; the qualifications, numbers and ratios for staffing at the service; insurance and quality standards to be applied, and other prescribed matters.

335 This clause provides for the chief executive to issue a detailed certificate of approval in principle.

336 This clause sets the period of an approval in principle at 2 years 6 months.

337 This clause requires the chief executive in the 10th and 22nd months following the grant of an approval in principle to report to the holder of the approval in principle on that person's compliance with the approval.

*Division 3 - Licences*

338 This clause provides for how would-be applicants for a licence to operate a childrens service are to advertise their intention to apply.

339 This clause requires an application for a licence to be made to the chief executive within 30 days of the second anniversary of holding an approval in principle, in accordance with a form approved by the chief executive, and accompanied by a copy of the advertisement referred to in the last clause plus any relevant fee (and further information which may be requested by the chief executive under clause 328).

340 This clause only allows for the chief executive to grant a licence if satisfied that the applicant, any controlling person and the premises for the proposed service are suitable and that the proprietor is likely to comply with approval conditions. The chief executive is also to be satisfied with the proprietor's compliance with approval in principle prior to the application.

341 This clause allows for the chief executive, within 60 days of a completed application having been lodged, to refuse or grant a licence, and in the case of granting to state the type of service and premises from which it may be operated and attach conditions. Conditions may make further provision about the premises concerned and may include matters related to: the period of the licence (up to 3 years); the number and ages of children to be cared for (including in emergencies etc.); the monitoring regime to be applied by the chief executive; management and record-keeping at the service; the qualifications, numbers and ratios for staffing at the service; insurance and quality standards to be applied, and other prescribed matters.

342 This clause provides for a licensee to apply to the chief executive for renewal of a licence. Application is to be in a proper form, with a relevant fee and made

between 60 and 30 days before the end of the licence (or later with such late fee as may be allowed).

- 343 On an application for renewal under the last clause, this clause allows for the chief executive, within 30 days of a completed application having been lodged, to refuse or grant renewal (for up to a further 3 years) to a licensee who would have been entitled to a licence if the renewal application had been a licence application. Renewal may also be made subject to new or varied conditions.

*Division 4 - Matters common to approvals in principle and licences*

- 344 This clause allows the chief executive to refuse to grant an approval in principle or a licence to a person for 2 or more nearby premises if not satisfied that the services will not operate as a single service.
- 345 This clause allows for variation of approvals in principle and licences generally. On application, or of his or her own initiative after consultation with a service proprietor, the chief executive may vary (including suspend) or cancel a condition, impose a new condition or vary the period of a licence (though not to exceed a total of 3 years). On application by a licensee, the chief executive may vary a licence by removing a licensee (in this regard note that a licence is not regarded as 'transferred' to the remaining licensee/s).

Applications are to be in a proper form with relevant fees and, as with renewals, are only to be granted to a person who would have been entitled to an approval in principle or licence if the variation application had been an application for an approval in principle or licence.

- 346 This clause describes the circumstances under which an approval in principle or licence may be cancelled, namely: where it was obtained improperly; where the proprietor has breached a condition of it, or has committed an offence against this Chapter, or has ceased to be a suitable person, or has operated the service in a manner unsafe for children; or where a controlling person has ceased to be suitable person.

Before cancelling, the chief executive must give the proprietor notice in writing of the intention to cancel and must consider any submission made by the

proprietor about the cancellation in the 21 days following that notice. If after that the chief executive still intends to cancel the approval in principle or licence, he or she must give the proprietor 7 days notice. The clause also allows for the chief executive to inform parents of children at the service about the notices of cancellation.

347 This clause requires an approval in principle holder or licensee to return the certificate of approval or licence to the chief executive within 7 days of the notice to cancel.

348 This clause requires proprietors to notify the chief executive of changes to controlling people in their service.

### Part 3 - Enforcement

349 This clause allows for reporting of reasonable belief about contravention of a condition of an approval in principle or licence in terms that protect reports in good faith and 'reporters' in largely the same way as for reports about suspicion of child abuse etc. in clauses 156 and 157.

350 This clause requires the chief executive to keep written records of reports under the last clause.

351 This clause provides for powers of reasonable entry by an officer, with necessary assistance, to a childrens service (or premises where the officer reasonably believes a service is operating) to ascertain whether the Chapter is being complied with. The officer may inspect, photograph, record, sketch or seize things and may require a person to answer questions or provide information. Notice of things seized is to be provided and the things may only be withheld for up to 48 hours unless required for proceedings under the Act. Entry to a residence is only permitted if the occupier gives written consent, or if an approved or licensed childrens service is being operated from the residence.

352 Despite the last clause, this clause provides that if an officer reasonably suspects there is a thing on premises where a childrens service is operating which may be evidence of an offence against this Chapter, the officer may enter the premises (including with assistance) and inspect, photograph, record, sketch or seize the

thing without warrant if the delay in getting a warrant would allow the thing to be lost, hidden or destroyed. Again notice of things seized is to be provided and the things may only be withheld for up to 48 hours unless required for proceedings under the Act.

- 353 This clause allows for a magistrate to issue a search warrant (which may be subject to detailed conditions as to how it may be executed) to an officer on the officer's evidence of reasonable belief that a childrens service is being operated at premises otherwise than under an approval in principle or licence.
- 354 This clause describes the circumstances under which the chief executive may enforce the requirements of this Chapter in relation to a service, whether or not it is one to which an approval in principle or licence applies, namely: by giving the proprietor notice in writing to comply with the requirement/s within a stated time; and if there is still no compliance after the stated time (or any allowed extension), by order in writing suspending the approval in principle or licence or otherwise directing the proprietor to stop operating and suspend care for children at the premises. Contravention of an order is punishable on conviction by a fine.

Having served an order an order of suspension, the chief executive must consider any submission made by the proprietor about the suspension or otherwise within the 7 days following that order, and may then extend the suspension for a stated period or end it. The clause also allows for the chief executive to inform parents of children at the service about the notices and orders referred to in the clause.

- 355 In addition to any power in the previous clauses, the chief executive may by this clause order in writing that a childrens service stop operating for a stated period if he or she reasonably believes it is necessary to do so because children being cared for at the service are unsafe. Again the clause also allows for the chief executive to inform parents of children at the service about the order and provides that contravention of an order is punishable on conviction by a fine.
- 356 In addition to any power in the previous clause, the chief executive may by this clause remove a child (and any record concerning the child) from a service if he

or she is satisfied there is an immediate danger to the health, welfare or safety of the child. If the chief executive does this, he or she is to take all reasonable steps to inform a parent or person with parental responsibility for the child of the action, and must return the child to the care of such person or arrange for the child to be cared for at another service.

#### Part 4 - Offences

This Part creates various offences and penalties applicable to operation of childrens services otherwise than under this Chapter.

- 357 This clause makes it an offence to care for children under a family day care scheme except where the scheme is operating under a valid approval in principle or licence.
- 358 This clause makes it an offence to own, operate, manage or control a child care centre otherwise than under an approval in principle or licence.
- 359 This clause makes it an offence to advertise a childrens services for which no approval in principle or licence is in force (except for the purpose of advertising an intention to apply for an approval in principle or licence, or as part of a feasibility study).
- 360 This clause makes it an offence for a proprietor to breach a condition of an approval in principle or licence.
- 361 This clause makes it an offence for a person to knowingly amend or deface an approval in principle or licence document.
- 362 This clause requires proprietors of, controlling people for, and workers in a childrens service to take reasonable precautions to ensure that: the service is hazard-free; the premises, furnishings and equipment are safe, clean hygienic and in good repair; and that children at the service are adequately supervised and not subjected to unreasonable discipline.



## CHAPTER 10 - EMPLOYMENT OF CHILDREN AND YOUNG PEOPLE

This Chapter describes the circumstances in which children or young people under the school leaving age may be employed and the role of the chief executive in relation to such employment.

The clauses of this Chapter ('new') repeat the law as stated in Part VIII of the CSA ('old') in accordance with the following table of corresponding sections. References to 'Director' in the old provisions have been replaced by 'chief executive' in the new, with requirements for the Director to provide information to the chief executive consequently being omitted (e.g. from old ss. 132 and 133).

<b>New</b>	<b>Old</b>	<b>New</b>	<b>Old</b>	<b>New</b>	<b>Old</b>	<b>New</b>	<b>Old</b>
363	126	366	128	369	131	372	135
364	126	367	129	370	133	373	136
365	127	368	130	371	134	374	137

## CHAPTER 11 - APPEALS AND REVIEW

This Chapter describes which decisions of the Childrens Court may be appealed to the Supreme Court and which decisions of the chief executive may be reviewed by the Administrative Appeals Tribunal.

Many of the clauses of this Chapter ('new') repeat the law as stated in Part VIII of the CSA ('old') - with adjustments for new section numbering to refer to the clauses of this Bill - in accordance with the following table of corresponding sections. Old sections for which there is only partial correlation in the Bill are marked in brackets. Only new or significantly amended provisions are dealt with by this explanatory memorandum.

New	Old	New	Old	New	Old
375	143	377	145	380	(148)
376(1)	144(1)	378	146	381	-
376(2)	-	379	147		

376. The matters relating to appeals from what was Part V and ss. 111, 114 and 166 of the CSA in paragraph 144(c) of that Act have been deleted, with all child care and protection appeals now contained in sub-clause (2) of this clause.

Sub-clause (2) allows appeal by a party to proceedings under Chapter 6 (or a person named in an order) from child care and protection orders only on points of law or on the ground of substantial miscarriage of justice. Appeal may be made from decisions to make or refuse to make an order, extending or refusing to extend an order, varying or refusing to vary an order and revoking or refusing to revoke an order.

Appeals from domestic violence or restraining orders made in child care and protection proceedings are to be made under legislation governing those orders, and appeals from decisions about interstate transfer of orders and proceedings are to be made in accordance with Chapter 8.

380. This clause lists the decisions under Chapters 9 and 10 for which review may be sought in the Administrative Appeals Tribunal.

381. In relation to a decision to refuse to grant a licence for a childrens service after an approval in principle has been held, this clause limits the operation of other enactments which allow a tribunal or court to stay decisions pending review or appeal.

## CHAPTER 12 - GENERAL OFFENCES

This Chapter makes certain actions concerning children and young people (such as tattooing or concealing) offences.

Many of the clauses of this Chapter ('new') repeat the law as stated in Part IX or XI of the CSA ('old') - with adjustments for new section numbering to refer to the clauses of this Bill - in accordance with the following table of corresponding sections. Old sections for which there is only partial correlation in the Bill are marked in brackets. Only new or significantly amended provisions are dealt with by this explanatory memorandum.

New	Old	New	Old	New	Old
382	138	385	(140)	388	-
383	141	386	-		
384	142	387	154		

385. This clause makes it an offence without lawful authority or reasonable excuse to: contact a child or young person, or enter or lurk or loiter near a place for such contact; remove, or lurk or loiter near a place in order to remove, a child or young person from a person in whose favour a residence order has been made or who is temporarily caring for him or her; assist the child or young person to leave a place where he or she is ordered to live. Prosecution for offences is only to take place after consultation with the chief executive.

386. These offences may be made out whether the relevant conduct occurs wholly or partly in the Territory, but if a person is tried or convicted for an offence relating to that conduct in a State or in New Zealand, he or she cannot also be prosecuted for that conduct in the Territory.

This clause makes it an offence to harbour or conceal a child or young person, or to prevent him or her from returning to a place or care, knowing that he or she is not at the place or with the person he or she should be at or with under a type of care and protection order.

388 This clause makes it an offence to impersonate or attempt to impersonate a person appointed under the Act, or falsely to represent oneself as engaged in the administration of the Act.

#### CHAPTER 13 - POWERS OF ENTRY AND SEARCH

This Chapter sets out powers of entry and search, including under warrant, and describes the procedure to be followed when conducting a personal search of the clothing or body of a child or young person.

Clauses 389 to 394 largely repeat the provisions of Division 1 of Part XI of the CSA - with adjustments for new section numbering to refer to the clauses of this Bill and for the purposes of bringing terminology into line with other usage in the Territory and the Bill.

Clauses 395 to 397 in relation to personal searches of the clothing and surfaces of the body of children or young people (including those under therapeutic protection orders or, for example, detained at or committed to Quamby) largely mirror the provisions of sections 349AA, 349ZM and 349ZN of the *Crimes Act 1900* in relation to searches of people arrested or charged with criminal offences.

Rather than relating to searches for items connected with an offence (as under the Crimes Act), sub-clause 395(4) relates these clauses to searches for items which may cause serious damage to the health of, or threaten the life of, the child or young person or of someone else. By sub-clause 397(4) the same criterion governs the circumstances in which the chief executive is not required to return anything seized during a search to the child or young person.

#### CHAPTER 14 – STANDARDS

This Chapter provides for the chief executive to publish standards to be applied for the purposes of the Act.

- 398 This clause allows for the chief executive to make written standards for matters under the Act, including in relation to the conduct of family group conferences and the care to be provided for children or young people for whom the chief executive has parental responsibility (e.g. ranging from situations following emergency action, to the operations of premises where therapeutic protection is provided, and even to foster care under long-term final care and protection orders).
- 399 This clause requires the chief executive to publish notice of standards in the *Gazette* stating when the standard is to take effect and when and where copies of the standard may be bought or inspected (and requires the chief executive then to make them available at those times and places).

## CHAPTER 15 - CONFIDENTIALITY AND IMMUNITY

This Chapter prohibits certain uses of information relating to children or young people and provides for certain immunities from suit.

- 400 This clause prohibits (with penalty) the disclosure of information acquired under the Act otherwise than for the purposes of the Act or as required by law. Hence, for example, it will be permissible for information to be given to a court in proceedings under the Act or to be shared or exchanged under clauses 27 and 28 (concerning chief executive's powers), 43 and 44 (concerning complaints given to the official visitor), 169 and 172 (concerning family group conferences), 319 (concerning interstate transfer of child care and protection orders), 346 and 354-356 (concerning licensing of childrens services).

This clause does not affect the ability or requirement of the chief executive or another person to withhold or exempt information from disclosure, for example under the provisions of the next clause or the *Freedom of Information Act 1989* or the Commonwealth *Privacy Act 1991*.

- 401 This clause prohibits (with penalty) the chief executive, the community advocate and an officer (or anyone who has held such office) from recording or divulging, otherwise than for this Act or the *Community Advocate Act 1991*, information in records under clauses 156 or 157 (or information of equivalent types received from interstate). One effect of this provision is to render the document/s concerned 'secret' for the purposes of exemption under the *Freedom of Information Act 1989*.
- 402 This clause protects a person acting in good faith from civil liability when disclosing information, answering questions or providing reports for the purposes of the Act.
- 403 Likewise this clause gives the chief executive (or a delegate, officer, authorised person or person with proper authority) immunity from civil proceedings for any actions or omissions made in good faith and without negligence for the purposes of the Act.

## CHAPTER 16 – MISCELLANEOUS

This Chapter contains a variety of miscellaneous provisions relating to material in other chapters of the Act. Many of the clauses of this Chapter ('new') repeat the law as stated in various sections of Parts I, V and XI of the CSA ('old') - with adjustments for new section numbering to refer to the clauses of this Bill and for the purposes of bringing terminology into line with other usage in the Territory and the Bill - in accordance with the following table of corresponding sections. Old sections for which there is only partial correlation in the Bill are marked in brackets. Only new or significantly amended provisions are dealt with by this explanatory memorandum.

New	Old	New	Old	New	Old
404	6	408	157	412	174
405	164	409	(159)	413	177
406	-	410	159A	414	-
407	(102)	411	173		

- 406 This clause ensures that a person who may be caring for a child or young person, but who does not have parental responsibility for him or her, may do what is reasonable in the circumstances for his or her care, welfare and development.
- 407 This clause allows for (but does not require) occupiers or people in charge of hospitals, police stations and refuges to inform parents or others with parental responsibility for children or young people that a child or young person has voluntarily entered their premises. In cases where action such as making a 'missing person report' to police might have occurred, police may be informed that a child or young person has entered a hospital or refuge. (Note that nothing in this clause precludes a person from making a report to the chief executive under clause 156.)

- 409 Sub-clauses (3) - (5) of this clause allow for the registrar of the court to give people certain information for them to use (only) in making applications for criminal injuries compensation.
- 412 This clause provides for the chief executive, not the Minister as previously, to determine fees for the purposes of the Act (for example relating to licensing of child care).
- 414 This clause requires the Minister to review the operation of the Act within 3 years after commencement.

#### CHAPTER 17 - TRANSITIONAL

This Chapter sets out the way that matters such as applications and orders made, or licences granted, under the CSA are to be dealt with after the commencement of this Act.

- 415 This clause sets out definitions for use in this Chapter.
- 416 This clause repeals the CSA.
- 417 This and the following clauses of this chapter, taken together with schedule 2, describe how each of the types of proceedings before the court, orders made by the court, child care licences granted etc, under the CSA, is to be treated as a result of the enactment of this Act. This chapter is given a finite operating life of a maximum of 1 year, though certain clauses may cease to have effect earlier.



## SCHEDULES

Schedule 1 describes for the purposes of clause 271 the people on whom various applications under Chapter 7 must be served and the minimum time for such service.

Schedule 2 describes for the purposes of Chapter 17 how orders and proceedings before the court are to be treated following commencement of the Act.

## DICTIONARY

The dictionary is an interpretation mechanism incorporated as part of the Act by the operation of clause 3. It defines, in some cases directly and in other cases by reference to sections of the Act or other enactments, what is meant by various terms when used in the Act. Terms for which direct definition is provided here include: 'Aboriginal', 'adult', 'decision-maker', 'indigenous', 'indigenous organisation', 'Legislative Assembly Standing Committee' (for the purposes of clause 136), 'reasonably believes', 'reasonably suspects', 'representative', 'school', 'supervision order', 'supervisor', 'Torres Strait Islander' and 'working day'.