EXPOSURE DRAFT

CHILDREN AND YOUNG PEOPLE BILL 2007

SUMMARY EXPLANATORY STATEMENT

Released by

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Overview of the Children and Young People Bill 2007

The Children and Young People Act 1999 (the Act) provided for an operational review within three years of the Act's commencement. The Act commenced on 10 May 2000.

The Act is the responsibility of two ministers, the Minister for Disability and Community Services and the Attorney General. The Attorney General is generally responsible for the Children's Court, the procedures of this court, young offenders, dispositions, appeals and powers of search and entry. The Minister for Disability and Community Services is responsible for all other sections of the Act, including care and protection of children and young people, children's services and youth detention.

The review of the Act commenced in 2002 and has involved consultation with a wide range of community members, community and government agencies (including criminal law agencies), ministerial advisory councils and unions.

The *Children and Young People Bill 2007* has been developed jointly by the Department of Disability, Housing and Community Services and the Department of Justice and Community Safety, in consultation with community, government, legal and advocacy agencies.

The Bill re-writes the *Children and Young People Act 1999* and proposes legislative reform in the areas of:

- Care and protection of children and young people at risk of abuse and neglect;
- The sentencing and sentence management of children and young people who have offended against the law;
- The regulation of childcare services; and
- Employment regulation for children and young people under school leaving age.

To assist consultation on the exposure draft, this summary explanatory statement has been developed to highlight the key policy changes proposed by the Bill. This means that not every clause is explained. A complete explanatory statement will accompany the Bill when it is introduced in the ACT Legislative Assembly in 2007.

Community Consultation

The Bill is released as an exposure draft for community consultation between 12 January 2007 and 9 March 2007.

Interested community members and agencies are invited to make written submissions on the review by 9 March 2007. Submissions should be addressed to:

The CYPA Review Team
Strategic Policy and Community Engagement
Department of Disability, Housing and Community Services
GPO Box 158
Canberra ACT 2601
Email: cypactreview@act.gov.au

Two information sessions on the Bill will be conducted for interested community agencies, businesses and members of the public on Thursday 8 February 2007. To register your interest to attend these sessions, please email cypactreview@act.gov.au or phone 6205 3205.

Electronic copies of the Bill and Explanatory Statement can be found at www.dhcs.act.gov.au/wac. If you would like printed copies or have any questions about the review, please email cypactreview@act.gov.au or phone 6205 3205.

Chapter 1 Preliminary

This chapter incorporates a number of changes to key concepts across the Act, including objects and principles and parental responsibility.

Part 1.1 Introduction

Clause 2 Commencement

The Act will commence on a day fixed by the Minister. It is necessary to displace the default automatic commencement under the Legislation Act after 6 months for detention place and discipline chapters, as it is intended to commence these chapters with the establishment of the new youth detention centre.

Clause 5 Offences against Act – application of Criminal Code etc

The Bill contains a number of offences, including some new offences. Chapter 2 of the *Criminal Code 2002* applies to all offences contained in the Bill. The chapter sets out the general principles of criminal responsibility (including burdens of proof and general defences), and defines terms used for offences to which the Code applies (eg conduct, intention, recklessness and strict liability).

Under section 133 of the *Legislation Act 2001*, the current value of a penalty unit is $100 if the person charged is an individual or $500 if the person charged is a corporation.

Part 1.2 Objects, principles and considerations

Clause 7 Main objects of Act

This clause sets out the objects that underpin the Act in relation to all aspects of the welfare of children and young people.

The objects have been expanded at clauses 7(a),(c) and (f) to provide greater recognition of the importance of a whole of government and community approach to supporting children and young people.

A new object has been added at clause 7(d) to provide greater recognition of the support and care that Indigenous people provide to Indigenous children and young people.

The objects in the Childcare chapter are now included in the main objects of the Act at clause 7(g) to provide an overarching set of objects across the Act. In order to reflect the aims of the employment chapter, a new object has been included at clause 7(h) to prevent the exploitation of children and young people in employment.

At clause 7(e), the Bill expands an existing object to ensure that services provided by, or for, government for the wellbeing, care and protection of children and young people:

- are centred on the needs of children and young people; and
- take into account the views and wishes of children and young people; and
- support the health, education, developmental needs, spirituality, self-respect, self-reliance and dignity of children and young people; and

- respect the individual race, ethnicity, religion, disability, sexuality and culture of children and young people.

Clause 8 Principles applying to the Act

In addition to the operation of the objects, this clause makes clear that all decisions or actions under the Act are to made or taken in accordance with the principles outlined at this clause except when it is, or would be, contrary to the best interests of a child or young person.

This clause re-enacts part of section 12 of the Act which sets out general principles that apply across the Act. Other parts of section 12 that relate specifically to care and protection matters have been relocated to part 14.3 of the Bill. The least intrusive principle set out at section 12(d) of the Act has been removed.

Clause 9 Indigenous children and young people principle

This clause re-enacts the Indigenous children and young people principle at section 14 of the Act. For Indigenous children and young people, decision-makers must take into account submissions made by or on behalf of any relevant Indigenous organisation about the child or young person and Indigenous traditions and cultural values (including kinship rules) as generally stated by the Indigenous community.

Clause 10 Best interests of children and young people paramount consideration

This clause re-enacts section 11 of the Act and enshrines the best interests principle as the paramount consideration for persons making decisions under the Act. This clause also displaces the best interests principle as the paramount consideration in criminal matters chapters where a decision-maker must consider the best interests principle and apply the young offender principles.

For the care and protection chapters, clause 1513 sets out that decision-makers must take the matters listed into account in deciding what is in the best interests of a child or young person.

Part 1.3 Important concepts

Division 1.3.1 Family member and relative

The Bill introduces new definitions of family member and relative to clarify existing concepts.

A family member of a person means a person's:

- father, mother, grandfather, grandmother, stepfather, stepmother, father-in-law or mother-in-law; or
- son, daughter, grandson, granddaughter, stepson, stepdaughter, son-in-law or daughter-in-law; or
- brother, sister, half-brother, half-sister, stepbrother, stepsister, brother-in-law or sister-in-law; or
- uncle, aunt, uncle-in-law or aunt-in-law; or
- nephew, niece or cousin.

A relative of a child or young person refers to:

- a family member of the child or young person;
- a person who is or has been a domestic partner of a parent of the child or young person;
- a person regarded by the child or young person as a relative;
- for an Indigenous child or young person—a person who has responsibility for the child or young person in accordance with the traditions and customs of the child's or young person's Indigenous community.

Division 1.3.2 Parental Responsibility

The Bill includes new provisions relating to parental responsibility in order to clarify what parental responsibility includes and how it can be transferred and shared between people. This chapter establishes the basic conceptual framework for parental responsibility and this is expanded in the care and protection chapters.

Parental responsibility will include responsibility for health care treatment in addition to responsibility for day to day matters and for long-term matters for a child or young person. A person who has responsibility for day to day matters for a child or young person may make decisions about assessment of the child or young person's physical or mental wellbeing (clause 19(1)(d)) and also has responsibility for health care treatment for the child or young person (clause 19(2)). A person who has responsibility for health care treatment for a child or young person has responsibility for deciding whether the child or young person may undergo health care treatment, subject to any Court order in force (either under the *Children and Young People Act 1999* or another law). The Bill clarifies that the rights of a child or young person to consent to their own health care treatment are not affected.

The Bill provides clarity about what specific aspects of parental responsibility are transferred or shared.

Chapter 2 Administration

This chapter establishes the administrative framework for the Act, including the Chief Executive's functions and duties. It also includes provisions relating to Official Visitors and the Childrens Services Council.

Part 2.1 Chief Executive

Clause 100 Chief Executive's Functions

A new function for the Chief Executive is included at clause 100(f) for exercising aspects of parental responsibility for children and young people, as this function is unlike any other administrative function and should be explicitly provided for.

Clause 102 Chief Executive may ask for assistance etc

This clause re-enacts section 29(1)(c) and section 28 of the Act. Sub clause (1) allows the Chief Executive to ask a relevant entity to give the Chief Executive advice or guidance relevant to the safety, welfare or wellbeing. A relevant entity for a child or young person includes a parent, someone else who has an aspect of parental responsibility, an out of home carer for the child or young person, a foster care service, a Minister, a territory entity, a health facility, a police officer or a member of a police service or force of a state, an entity established under a law or a state or the commonwealth, the holder of a position established under a law of a state of the commonwealth and an entity prescribed by regulation for this section. A territory entity means an administrative unit, a territory authority, a statutory office holder, a territory instrumentality, a public employee, and a police officer.

Part 2.2 Childrens Services Council

Clause 108 Appointment of chair and deputy

The Bill allows the Minister to appoint a deputy chair for the Childrens Services Council.

Part 2.3 Official Visitors

This part relates to Official Visitors.

Clause 114 Definitions

This clause creates definitions for the part. An entitled child or young person means a child or young person who is detained in a detention place, confined at a therapeutic protection place or accommodated in a place of care. Entitled children and young people have rights under this part in relation to making complaints to an Official Visitor about their detention, confinement or accommodation.

A new concept of 'operating entity' is also created. An operating entity for a detention place, therapeutic protection place or place of care, means the Chief Executive (if the Territory operates the place) or the entity that operates the place in any other case. A place of care was formerly known as a shelter. There is only one place currently declared as a shelter and the Chief Executive does not directly administer this. Operating entities have certain obligations in relation to facilitating the functions of an Official Visitor.

Clause 115 Official visitors - appointment

This clause requires the Minister to appoint at least one Official Visitor. More than one Official Visitor may be appointed. The Minister must appoint a person who has suitable qualifications or experience and is a suitable entity.

Clause 115(3)(a) excludes public servants from being eligible to be an Official Visitor. A public servant is obliged to follow the direction of a relevant Chief Executive and their Minister. A conflict of interest would be created between the individual's obligations to their Minister, and their obligation to fulfil the functions as an independent officer under clause 116 if the person appointed was a public servant.

An appointment as Official Visitor is no longer than 3 years. This does not prevent the same person being appointed for a subsequent term.

The conditions of remuneration and other terms of appointment are to be agreed between the Minister and the person, subject to any determination under the *Remuneration Tribunal Act 1995*.

Clause 116 Official visitors – functions

This clause outlines the functions of an Official Visitor. An Official Visitor's functions are:

- inspecting detention places, places of care and therapeutic protection places;
- reporting to the Minister and Chief Executive;
- receiving an considering complaints from entitled children and young people; and
- exercising any other function given to an Official Visitor under this Act or another territory law.

Clause 116(2) sets the minimum number of visits the Official Visitor must undertake. The Official Visitor may make visits at reasonable times. An example of a time that would not be reasonable is given.

An operating entity for a detention place, therapeutic protection place or place of care must give an Official Visitor any reasonable help the Official Visitor asks for to exercise the Official Visitor's functions at the place.

Clause 117 Official visitors - reporting to Minister

The Official Visitor must report to the Minister in writing if an Official Visitor believes, on reasonable grounds, that either of the following is not in accordance with this Act:

- the treatment of entitled children or young people at a detention place or therapeutic protection place;
- the living conditions, education or activities of entitled children or young people at a detention place or therapeutic protection place.

Clause 118 Official visitors – reporting to Chief Executive

The Official Visitor must report to the Chief Executive if an Official Visitor believes, on reasonable grounds, that either of the following is not in accordance with this Act:

- the treatment of entitled children or young people at a place of care;
- the living conditions, education or activities of entitled children or young people at a place of care.

Clause 119 Ending appointment of Official Visitors

This clause outlines when the Minister has discretionary power to end an Official Visitor's appointment and when the Minister is required to end an Official Visitor's appointment.

The Minister may end a person's appointment as an Official Visitor for misbehaviour; or if the person does not inspect a detention place, therapeutic protection place or place of care as required under a schedule under subsection (4); and continues to fail to inspect the place as required for 4 consecutive weeks; or if the person is not a suitable entity.

The Minister must end the person's appointment as Official Visitor for physical or mental incapacity, if the incapacity substantially affects the exercise of the person's functions; or (b) if the person fails to take all reasonable steps to avoid being placed in a position where a conflict of interest arises during the exercise of the person's functions.

If the Official Visitor becomes a public servant, the appointment is automatically ceased. By section 210 of the *Legislation Act 2001*, the Official Visitor may also resign their appointment.

As more than one Official Visitor may be appointed, the Minister must prepare a schedule that sets out each detention place, therapeutic protection place and place of care that an Official Visitor must inspect; and how often the Official Visitor must inspect each place.

Clause 120 Complaints to Official Visitors

This clause enables an entitled child or young person, or anyone else, to make a complaint to an Official Visitor. Complaints must be directed to issues about: the detention, confinement or accommodation of an entitled child or young person or how a detention place, therapeutic protection place or place of care is conducted.

The entitled child or young person may make the complaint to the Official Visitor personally or though someone else.

If the entitled child or young person complains to the operating entity under subsection (1), the operating entity may refer the complaint to an Official Visitor.

The entitled child or young person may ask the Official Visitor to hear the complaint with no-one else present and, if so, the Official Visitor must comply.

Clause 121 Requests to see Official Visitor

This clause requires an operating entity to ensure that an Official Visitor is told as soon as practicable about an entitled child or young person who has told the operating entity that the child or young person wants to see an Official Visitor.

An entitled child or young person need not explain to the operating entity why the child or young person wants to see an Official Visitor.

Clause 122 Notice of complaints

In circumstances where the operating entity for a place is not the Chief Executive, it is important that the Chief Executive is aware of any complaints made as the Chief Executive has a duty to ensure the organisation is a suitable entity and operating the service within an agreed contractual framework.

This clause requires the Official Visitor to inform the Chief Executive, in writing, that a complaint has been made about a place and the name of the place to which it relates.

Clause 123 Official visitors must try to resolve complaints

After receiving a complaint in relation to a detention place, therapeutic protection place or place of care, an Official Visitor must take all reasonable steps to resolve the complaint with the operating entity for the place.

The clause enables the Official Visitor to resolve a complaint by making inquiries about the complaint and exercise any other function given under the Act. This section is subject to sections 125 to 130 outlined below.

Clause 124 Withdrawal of complaints

This clause enables a complainant to withdraw a complaint to the Official Visitor at any time.

Clause 125 Complaints may be closed—referral to other entity

This clause enables the Official Visitor to refer the complaint to another investigative entity, if satisfied that the complaint would be better dealt with by the entity. If the complaint is referred, the Official Visitor is enabled to give the entity information about the complaint, is required to tell the complainant and may close the complaint.

Clause 126 Complaints may be closed—other entity investigating

This clause provides that if the Official Visitor is satisfied that a complaint has been, is being or will be investigated by the Public Advocate or other appropriate entity, then the Official Visitor is enabled to give the entity information about the complaint and may close the complaint.

Clause 127 Information about complaints being investigated elsewhere

When complaints are being investigated by another entity, as provided for under clause 125 and 126, this clause allows the Official Visitor to report to the complainant about progress and follow up with the investigating entity about the complaint.

Clause 128 Complaints closed—frivolous, etc

This clause provides that an Official Visitor must close a complaint if an Official Visitor receives a complaint and after considering the complaint, the Official Visitor is satisfied that the complaint is frivolous, vexatious or not made honestly.

Clause 129 Complaint closed—resolved

This clause provides that an Official Visitor must close a complaint when the Official Visitor is satisfied that the complaint is resolved with the operating entity and to the satisfaction of the complainant.

Clause 130 Complaint closed—cannot be resolved

This clause provides that an Official Visitor must refer a complaint to the Human Rights Commission for conciliation (and then close the complaint), if satisfied it cannot be resolved with the operating entity after taking all reasonable steps to resolve the complaint.

Clause 131 Complainant must be told if complaint closed

This clause requires that if a complaint is closed (other than because it was withdrawn) an Official Visitor must tell the complainant that the complaint is closed and the reasons for closing it.

Clause 132 Reopening complaints

This clause enables the Official Visitor to reopen a complaint if the Official Visitor is satisfied that the operating entity did not do something that was previously agreed to resolve the complaint.

Clause 133 Monthly reports by Official Visitors

This clause requires an Official Visitor to give the Minister, the Chief Executive and the Public Advocate a written report for the month, as soon as practicable after the end of each month, summarising:

- the number and kinds of complaints received by the Official Visitor; and
- the action taken on the complaints received.

The monthly report may include comments by the Official Visitor about anything in relation to a complaint to which the report applies. However, an Official Visitor may only include in a monthly report material that may be adverse to, or critical of, a person if the Official Visitor has given the person an opportunity to be heard.

This section applies whether or not the adverse or critical material is express or implicit; or is by way of opinion or otherwise.

Clause 134 Handover of records by Official Visitors

If a person's appointment as an Official Visitor ends, the person must, not later than 7 days after the day the appointment ends, give any Official Visitor record held by the person to the Public Advocate or another Official Visitor.

The intention of this clause is to ensure that the Official Visitor's records are adequately protected, in view of the sensitive nature of the material likely to be contained in the records.

Part 2.4 Suitable entities for purposes under the Act

A suitable entity under the Act is an entity approved by the Chief Executive for the provision of services to children and young people for a stated purpose under the Act. Examples include persons approved as foster carers and kinship carers, residential care services, proprietors and controlling persons for childcare services and researchers undertaking research projects.

Suitability test

This part includes one test for all suitable entities under the Act, including Childcare services. An entity may apply to the Chief Executive for approval as a suitable entity for a stated purpose. In deciding whether an entity is a suitable entity, the Chief Executive must consider suitability information about the entity. Suitability information has been expanded to include the following information about the entity:

- any conviction of, or finding of guilt against, the entity for an offence—
  - relating to the provision of services for children or young people; or
  - against a child or young person; or
  - involving a child or young person; or
  - involving violence; or
  - involving sex; or
  - involving dishonesty or fraud; or
  - involving possession of, or trafficking in, a drug of dependence or controlled drug; or
  - against an animal;
- any proven noncompliance by the entity with a legal obligation in relation to providing services for children or young people;
- any refusal, whether in the ACT or elsewhere, of an application for a licence or other authority (however described) in relation to providing services for children or young people;
- the soundness of the entity's financial reputation and the stability of the entity's financial background;
- the entity's reputation for honesty and integrity;
- whether the entity has proven experience or demonstrated capacity in providing services for children and young people; and
- any other consideration relevant to the entity's ability to provide high quality services for children or young people.

Deciding whether an entity is suitable

In deciding whether an entity is a suitable entity for a purpose under the Act, the Chief Executive may require an entity (by a **suitability information notice**) to give the Chief Executive stated suitability information not later than a set time. If the Chief Executive has given an entity a suitability information notice and the entity does not comply with the notice, the Chief Executive does not need to continue with the suitable entity assessment.

In deciding whether an entity is a suitable entity for a stated purpose, the Chief Executive may require an entity (by a **requirement notice**) to provide a stated reference or report and/undergo a stated test or medical examination within a set time. If the entity does not comply with a

requirement notice, the Chief Executive does not need to continue with the suitable entity assessment.

Duty to disclose changes in certain suitability information

The Bill introduces a new offence for failing to disclose suitability information in certain circumstances. While a similar offence currently applies to Childrens Services at section 333 of the Act, the offence now applies to all entities who are being assessed by the Chief Executive to determine if they are suitable entities and entities who are assessed as suitable entities for a particular purpose and are exercising functions for that purpose.

Clause 145 obliges entities to tell the Chief Executive, within 7 days of the change or finding, if:

- Their suitability information changes under 140(a)(b) and (c) – which prescribe certain offences, non-compliance with legal obligations and refusal of application for a licence or similar authority;
- The entity becomes bankrupt or executes a personal insolvency agreement; or
- A Court, tribunal, or authority with the power to require the production of documents or the answering of questions, makes an adverse finding about the entity. This would include for example, the Commissioner for Fair Trading, the Human Rights Commission and the ACT Ombudsman.

Register of suitable entities

The Bill introduces a new requirement on the Chief Executive to maintain a register of suitable entities.

Chapter 3 Family Group Conferences

Family group conferencing was introduced in the Children and Young People Act 1999 as a form of voluntary action to facilitate agreement between family members and significant persons about alternative ways to continue to care for a child or young person in need of care and protection.

Research and consultation on the review of the Act indicates there is benefit in applying the family group conference model more broadly to include decisions being made at different points of the care and protection continuum and also in working with young people who have offended against the criminal law.

The Bill enables family group conferences to be used as a mechanism for involving extended family members and others with an interest in the welfare or development of the child or young person in decisions affecting any aspect of their welfare. Standards will be established to provide for more flexible delivery of family group conferences, with some of the detail currently existing in legislation to be moved to standards.

This chapter outlines arrangements for family group conferences generally. Chapter 16, part 16.2 deals with the registration of family group conference agreements in care and protection.

Part 3.1 Family group conferences - general

Clause 200 Family group conferences – definitions

This clause includes definitions related to family group conferences for the Act.

Clause 201 Family group conferences – objects

This clause outlines the objects for family group conferences. The objects for a family group conference are to encourage the child or young person, their family members and relatives, to take part in decisions affecting the child or young person; to increase the support for the child or young person by their family members, relatives and other people who are significant in the child or young person's life; and to reduce the likelihood of the child or young person being in need of care and protection in the future.

Clause 202 What is a family group conference?

This clause outlines the meaning of a family group conference. A family group conference is a conference about a child or young person which provides an opportunity for participants to reach an agreement about a matter relating to the welfare of the child or young person and enter into a family group conference agreement detailing the agreed arrangements for the young person. If an agreement is already in force for the child or young person, the family group conference will give participants an opportunity to review an agreement.

Clause 203 What is a family group conference agreement?

This clause provides the meaning of a family group conference agreement.

Clause 204 Offence – publish details of family group conferences

This clause re-enacts the offence at section 180 which prohibits the publication of a family group conference agreement, outcome report or a record or report prepared for and presented to a family group conference. A person commits an offence if the person publishes anything said or done at a family group conference. The maximum penalty is 50 penalty units.

Part 3.2 Family group conferences – facilitators

Clause 205 Family group conference facilitators – appointment

The clause re-enacts section 166 and provides that the Chief Executive may appoint family group conference facilitators by notifiable instrument. The clause also requires the Chief Executive to appoint a person as a family group conference facilitator only if satisfied the person is a suitable entity (see chapter 2, part 2.4 for suitable entities).

Clause 206 Family group conference facilitators – functions

This clause outlines the functions of a family group conference facilitator. A family group conference facilitator has the function of facilitating a family group conference assigned by the Chief Executive under clause 210.

Clause 207 Family group conference facilitators – register

This clause re-enacts section 167 of the Act and requires the Chief Executive to establish a register of family group conference facilitators.

Part 3.3 Family group conferences – arrangement and conduct

Clause 208 Family group conferences – criteria

This clause allows the Chief Executive to arrange a family group conference if satisfied that the conference may help to promote the welfare of a child of young person. This is intended to be broader than the current criteria for arranging a family group conference at section 168 of the Act and will allow the Chief Executive to organise a conference for the purpose of promoting and supporting the welfare of any child or young person and not only those who may be in need of care and protection.

Clause 209 Family group conferences – criteria for review conference

This clause outlines the criteria for a review conference. The Chief Executive is required to review the agreement if the agreement provided for a review; or the child or young person, or a person with an aspect of parental responsibility who was a signatory to the agreement, have requested a review.

Clause 210 Family group conferences – facilitator to organise

This clause requires the Chief Executive to assign a family group conference facilitator to the conference. The clause also outlines actions that a facilitator must take after being assigned to a family group conference, including deciding who should be invited to the conference; informing participants of the arrangements for the conference in writing and conducting the conference.

Clause 211 Family group conferences – who must be invited

This clause requires the family group conference facilitator to invite certain people to a conference, including the Chief Executive, the child or young person if they can understand and participate in the conference, each parent or other person who has an aspect of parental responsibility, unless it would not be in the best interests of the child or young person and any other person with an interest in, or knowledge of, the care, welfare or development of the child or young person.

Clause 212 Family group conferences – compliance with standards

This clause requires the family group conference facilitator to conduct a conference in a way that complies with any family group conference standards in existence.

Clause 213 Family group conferences – parties reach agreement

This clause outlines actions the family group conference facilitator must take when all relevant conference participants have reached an agreement, including giving an opportunity for a person to obtain legal advice about the meaning and effect of the agreement.

Clause 214 Family group conferences – young person does not agree

This clause requires that a family group conference agreement may only be entered into with the agreement of the subject young person who is 15 years or older, unless the young person does not have the capacity to agree (for example, if the young person has impaired decision making capacity for the reason of intellectual disability).

Clause 215 Family group conferences – before family group conference agreement

This clause requires the family group conference facilitator to encourage the parties to put the agreement in writing and seek the signatures of the parties and any other participant who agrees with the arrangements in the agreement.

Clause 216 Family group conferences – outcome report

This clause requires the family group conference facilitator to give the Chief Executive a written report about the outcome of the conference.

Clause 217 Family group conference agreements – copy to people invited

This clause requires the Chief Executive to give a copy of the agreement to each person invited to attend the family group conference.

Clause 218 Family group conference agreements – implementation

This clause requires the Chief Executive to implement the agreement in compliance with the family group conference standards.

Chapter 4 The Childrens Court and other Courts

Chapter 4 deals with the jurisdiction of the Magistrates Court when performing the role of the Childrens Court. It is largely based on the existing Chapter 5 of the *Children and Young People Act 1999*.

Part 4.1 – The Childrens Court

Part 4.1 deals with the Childrens Court.

Clause 300 – Childrens Court

Clause 300 is based on existing sections 53 and 53A (4) and sets out when the Magistrates Court is to be known as the Childrens Court.

Clause 301 – Jurisdiction of Childrens Court

Clause 301 is based on existing section 54 and sets out the jurisdiction of the Magistrates Court when acting as the Childrens Court.

Clause 302 – Jurisdiction and age

Clause 302 is based on existing section 55 and provides that regard must be had to a person's age at the time of the proceedings in determining whether the Childrens Court has jurisdiction.

Clause 303 – Chief Magistrate to arrange business of Childrens Court

Clause 303 is based on existing section 52 and gives the Chief Magistrate the responsibility for the running of the Childrens Court, including appointing a Childrens Court Magistrates and the assignment of other magistrates to act as Childrens Court Magistrate when necessary.

Clause 304 – Childrens Court Magistrate to hear all matters

Clause 304 is based on existing section 53 (2) and provides that it is the responsibility of the specialist Childrens Court Magistrate to deal with all matters within the jurisdiction of the Childrens Court. This is subject to the operation of clauses 307 (Assignment of other magistrates for Childrens Court maters) and 308 (Completion of part-heard matters).

Part 4.2 – Childrens Court Magistrate

Part 4.2 deals with the Childrens Court Magistrate.

Clause 305 – Childrens Court Magistrate

Clause 305 is based on existing section 50 and enables the Chief Magistrate to declare a magistrate (including him or herself) to be the Childrens Court Magistrate for a specified term (and revoke a declaration).

Clause 306 – Acting Childrens Court Magistrate

Clause 306 is based on existing section 51 and allows an acting Childrens Court Magistrate to be assigned if there is no Childrens Court Magistrate, or the Childrens Court Magistrate is not available.

Clause 307 – Assignment of other magistrate for Childrens Court

Clause 307 is based on existing section 53A and allows a magistrate to be assigned to deal with a Childrens Court matter in instances where there is a conflict of interests or the likelihood of a prejudicial delay. The clause sets out criteria which must be satisfied before such an assignment can be made.

Clause 308 – Completion of part-hear matters

Clause 308 is based on existing section 53B and allows a magistrate to continue to hear and finally decide a matter that they have commenced if during the matter they cease to be the Childrens Court Magistrate or to hold an assignment under clauses 306 (Acting Childrens Court Magistrate) or 307 (Assignment of other magistrates for Childrens Court matters).

Part 4.3 – Childrens Court proceedings

Part 4.3 deals with general matters of Childrens Court proceedings.

Clause 309 – Childrens Court procedure

Clause 309 is based on existing section 56 and provides that procedures of the Childrens Court by applying the *Magistrates Court Act 1930* to the Childrens Court in criminal proceedings and the *Court Procedures Act 2004* to the Children Court in any other proceedings under the Act.

Clause 310 – Interaction of people in Childrens Court precincts

Clause 310 is based on existing section 57 and recognises the special nature of the Childrens Court by requiring that sittings be arranged to minimise contact between children and young people involved in proceedings and to limit the exposure of parents and other people to the common waiting rooms.

Clause 311 – Childrens Court may made orders about service

Clause 311 is based on existing section 59 provides that the Childrens Court may make orders dispending with service, orders for substituted service, or for orders shortening the time for service.

Clause 312 – Parents must attend Childrens Court proceedings

Clause 312 is based on existing section 60 and recognises the important role a parent has and requires them to attend Childrens Court proceedings.

Clause 313 – Childrens Court proceedings not open to public

Clause 313 is based on existing section 61 and sets out the people who may be present at a proceeding of the Childrens Court.

Clause 314 – Childrens Court may excuse parties from attending

Clause 314 is based on existing section 62 and allows the Childrens Court to excuse parties from attending a proceeding.

Clause 315 – Related application may be heard together

Clause 315 is based on existing section 25 and allows the Childrens Court to hear two or more applications about a particular child or young person, or related children or young people where that would be in the best interests of each child or young person.

Part 4.4 – Childrens Court and other Courts

Part 4.4 deals with procedural matters and rights of children and young people in proceedings under the Act in any Court, including the Childrens Court.

Clause 316 – Participation of children and young people in proceedings

Clause 316 is based on existing section 22 and provides that a child or young person has the right to take part in proceedings that relate to them under the Bill and requires that the Chief Executive provide appropriate information that will allow a child or young person to fully take part in proceedings.

Clause 317 – Court must ensure children and young people etc understand proceedings

Clause 317 is based on existing section 408 and requires that in any proceeding where a child or young person is a party, the Court must ensure that the child or young person and any other party understand the nature and purpose of the proceeding, any orders made and any rights of appeal that are available to them.

Clause 318 – Chief Executive and Public Advocate may appear at proceedings

Clause 318 is based on existing section 409 and recognises that it may be in the best interests of a child or young person for the Chief Executive and Public Advocate to be involved. The provision allows the Chief Executive or Public Advocate (or an authorised person or somebody authorised by the Public Advocate for the section) to appear, be hears or call witnesses where there is an information r complaint against a child or young person or where there is an application or proceeding under the Act or where the Act applies.

The Chief Executive or Public Advocate is not entitled to exercise these rights in an application, proceeding or matter under Chapter 18 (Care and protection – care and protection orders).

Clause 319 – Court may order report about guilty people

Clause 319 is based on existing section 73 and allows the Court to order the Chief Executive to give the Court a report about a child or young person. The Court must be hearing a proceeding

in relation to or against a child or young person and the Chief Executive must be responsible for the welfare of children and young people in the ACT.

The clause provides that the Chief Executive may do a number of things in order to comply with the order, including to visit and interview a child, parent, school teacher etc.

Clause 320 – Report may be given to parties

Clause 320 is based on existing section 74 and provides that unless the Court orders a report provided under clause 226 must be made available to parties in a proceeding.
Also, the provision makes clear that the person who provides the report may be called as a witness.

Clause 321 – Children and young people may have legal and other representative

Clause 321 is based on existing section 23 and provides that a child or young person may be represented by a lawyer or litigation representative (or both) in proceedings of the Court. The lawyer or litigation representative must insure the view and wishes of the child or young person are put to the Court and that they inform the Court whether they are acting on the child or young person's instructions or in the best interests of the child or young person, or both.

Clause 322 – Leave needed for litigation representative

Clause 219 is also based on existing section 23 and provides that the leave of the Court is required for a person to act as a litigation representative for a child or young person. In granting leave the Court must give the person and the child or young person the opportunity to put their views.

Clause 323 – Legal representative of children and young people

Clause 323 is based on existing section 24 (1) and provides a level of protection to children and young people before the Court by requiring that an application in relation to a children or young person may only be heard if the child or young person has a lawyer or has a reasonable opportunity to get legal representation. The Court must also be satisfied that the best interest of the child or young person will be adequately represented in a proceeding.

Clause 324 – Orders about legal representation of children and young people

Clause 324 is based on existing section 24 (2), section 275 and Schedule 1 and provides a level of protection to children and young people before the Courts. If a child or young person does not have a lawyer and the Court is not satisfied that their interests will be adequately represented, or that the child or young person has not or is not capable of making the decision to be represented, the Court may make any order, or give any direction that is necessary or desirable to allow a child or young person a reasonable opportunity to get a lawyer.

Clause 325 – Lawyer to act on instructions of children and young people

Clause 325 is based on existing section 24 (4) and provides that if a child or young person is capable of giving their lawyer instructions, that the lawyer must act in accordance with those instructions. Where a child or young person is not capable of giving instructions act and make representations in the best interests of the child or young person.

Clause 326 – Offence – publish identity of children and young people

Clause 326 is an offence provision based on existing section 61A. The offence provision applies in relation to proceedings under the Act, to which the Act relates or under a law of a state that relates to the welfare of children or young people. A person commits an offence in these circumstances if the person publishes an account or report of a proceeding and the account or report discloses the identity, or allows the identity to be figured out, of a child or young person or a relative of a child or young person.

The offence is a fault element offence, the default fault elements in section 22 of the Criminal Code 2002 would provide that intention applies to the element of publishing the account or report, and recklessness would apply to the element of whether the account or report discloses the identity, or allows the identity to be figured out, of a child or young person or a relative of a child or young person.

A prosecution for an offence may only be started by or with the written agreement of, the Attorney General or Director of Public Prosecution.

Chapter 5 Children and young people and criminal matters

Chapter 5 deals with children and young people and criminal matters. It is largely based on existing provisions in the *Children and Young People Act 1999.*

Clause 400 – Overview of criminal matters chapters

Clause 400 is a new provision and provides an overview of the criminal matters chapters in the Bill.

Clause 401 – Principles applying to criminal matters chapters

Clause 401 is based on existing sections 11 and 15 (4) and provides that in making a decision under the criminal matters chapter in relation to a child or young person a decision-maker must consider the best interests of the child or young person and apply the young persons principles set out in clause 403.

Clause 402 – Young offender principles

Clause 402 is based on existing section 68 and sets out the young offender principles, which along with the best interests of a child or young person, must be considered by a person making a decision under a criminal matters chapter.

Clause 403 – Definitions – criminal matters chapters

Clause 403 sets out definitions for the criminal matters chapters.

Clause 404 – Who is a young offender?

Clause 404 is based on existing section 64 and defines a young offender for the purposes of the Bill.

Clause 405 – Other rights and freedoms not affected

Clause 405 is based on existing section 130 and makes clear that the protections in the criminal matters chapters are in addition to any other protections provided by law and do not limit the operation of other laws unless there is a conflict.

Chapter 6 Criminal matters – proceedings

Chapter 6 deals with criminal proceedings relating to children and young people. It is largely based on existing provisions in the *Children and Young People Act 1999*

Part 6.1 – Children and young people and criminal proceedings - preliminary

Part 6.1 deals with interpretation matters for criminal proceedings relating to children and young people.

Clause 500 – Definitions – chapter 6

Clause 500 is based on existing section 63 and sets out the definitions for chapter 6 of the Bill.

Clause 501 – When are children and young people under restraint*?*

Clause 501 is based on existing section 77 and sets out the circumstances in which a child or young person is to be considered under restraint. The clause also includes a broadened definition of police officer to cover other circumstances where children and young people might benefit from the protections applying to children and young people under restraint. The clause is intentionally broad to recognise the vulnerable nature of children and young people.

Clause 502 – when are children and young people in the company of a police officer?

Clause 502 is also based on existing section 77 adds to clause 408 by detailing when a child or young person is deemed to be in the company of a police officer. It excludes specific instances of contact between police officers and children and young people from being classed as under restraint, as these instances are not considered to necessitate extra protection for children and young people.

Part 6.2 – Children, young people and young adults – criminal proceedings in ACT

Part 6.2 deals with criminal proceedings in the ACT relating to children, young people and young adults.

Division 6.2.1 – General

Division 6.2.1 deals with general matters.

Clause 503 – Saving of other laws

Clause 410 is based on existing section 130 and provides the chapter does not effect the operation of other laws except where expressly provided for.

Clause 504 – Childrens Court jurisdiction and age – criminal matters

Clause 504 is based on existing section 130 and provides that the regard should be had to an individual's age at the time of an alleged offence when determining if the Childrens Court should deal with a matter.

Sub clause (2) provides that if an individual was under 18 at the time of an alleged offence, and between the age of 18 years and 18 years and 6 months at the time of the first Court appearance the individual must be deal with under the Bill until the offence is proved. If the offence is proved, the offender must be deal with as an adult. This sub clause is intended to recognise that an individual in these circumstances may benefit from the provisions specially designed for children and young people.

Sub clauses (3) and (4) provide that if an individual was under 18 at the time of an alleged offence, and over the age of 18 years and 6 months at the time of the first Court appearance the individual must be deal with as an adult unless the Court considered it appropriate to deal with them as a young person. If the individual is dealt with as a young person and the offence is proved the individual must be dealt with as an adult. These sub clauses are designed to recognise that in limited circumstances it might be appropriate to deal with an individual in these circumstances under the provisions specially designed for children and young people.

Clause 505 – Proceedings where children and young people jointly charged with adults

Clause 505 is based on existing section 70 and provides that where an adult and a child or young person are jointly charged with an offence the Childrens Court may deal with the charge as if the child or young person was charged separately.

Sub clause (2) provides that the Chief Magistrate may allow a preliminary examination to be jointly conducted for an indictable offence alleged to have been committed jointly by a child or young person and an adult in the interests of saving time and expense.

Clause 506 – Power to apprehend children younger than 10 years old

Clause 506 is based on existing section 72 the rationale behind the provision is that a child under the age of 10 cannot commit an offence, as they are deemed unable to satisfy the mental element. This clause allows a police officer to enter premises and apprehend a child under 10 years of age were the police officer believes on reasonable grounds that the child has carried out or is carrying out conduct that makes up the physical elements of an offence.

Sub clause (3) allows a police officer to enter premises and apprehend a child under 10 years of age.

Sub clause (4) allows a police officer to use necessary and reasonable force when apprehending a child under sub clauses (2) or (3).

Sub clause (5) provides that if a police officer apprehends a child under sub clause (2) or (3) the police officer must take the child to a parent or person with parental responsibility, or in the alternative place the child with a suitable person and inform the Chief Executive.

Division 6.2.2 – Preliminary procedures

Division 6.2.2 deals with preliminary procedures.

Clause 507 – Interviewing children and young people about offences

Clause 507 is based on existing section 79 and deals with police interviews with children and young people in circumstances where a police officer reasonably suspects that a children and

young people may have committed certain offences or where a police officer reasonably believes that a child or young person may be implicated in the commission of certain offences. The threshold for a children and young people being implicated in the commission of the listed offences is higher than the threshold for a child actually committing an offence.

The provision makes clear that a police officer must not interview the child or young person or cause the child or young person to do anything in relation to the investigation of an offence (such as participate in a line-up) unless one of the specified adults is present.

Sub clause (3) makes clear that a police officer is not required to allow a person to be present who the officer reasonably believes is an accomplice to the child or young person. Nor is the police officer required to take steps to locate one of the persons if the officer reasonably believes the person is an accomplice to the child or young person.

Sub clause (4) provides for cases of emergency.

Clause 508 – Who must be told if children and young people under restraint?

Clause 508 is based on existing section 80 and provides that a police officer must take all reasonable steps to contact a parent or responsible person of a child or young person if the child or young person is taken under restraint. The requirement applies whether or not the parent or responsible person lived in the ACT.

Clause 509 – Police to summons children and young people unless ineffective

Clause 509 is based on existing section 82 requires police to summons child or young person unless satisfied that it would be ineffective. When making this decision police must have regard to the need to achieve the purpose set out in 212 (1) (b) of the Crimes Act.

Clause 510 – Who must be told if children and young people charged?

Clause 510 is based on existing section 83 and requires the police officer who charges a child or young person to take all reasonable steps to tell the parent or responsible person about the charge. This must be done promptly.

Clause 511 – Detained children and young people to be brought before Childrens Court

Clause 511 is based on existing section 87 and applies when a child has been charged an no released from detention. The clause ensures that a child or young person is brought before the Childrens Court as soon as practicable or else released immediately.

Division 6.2.3 – Escorting children and young people

Clause 512 – Other powers not limited

Clause 512 removes doubt about the application of Division 6.2.3 in that it is additional to and does not limit any other provisions relating to the escorting of young detainees un the Bill, or a law of the territory [such as part 3.3 of the *Crimes (Sentence Administration) Act 2005*], State or Commonwealth Law.

Clause 513 –Escorts to bring arrested children and young people before Court etc.

Clause 513 confers powers on the police to require an escort officer to bring a child or young person before a Court or tribunal in certain circumstances. When the police exercise this power the escort officer is required to comply and is empowered to take the young person into custody and arrange for the young person to be detained until he or she is brought before the Court or tribunal.

Clause 515 – Executing warrants of imprisonment or remand

Clause 515 provides that the Chief Executive may make escort officers available to the Childrens Court to exercise powers in relation to children and young persons. Sub clause 2 makes clear that the Childrens Court order or direction addressed to all escort officers is taken to be addressed to an may be executed by all escorts, it is not necessary to identify individual escorts.

Clause 516 – Custody of escorted person

Clause 516 provides that a child or young person in the custody of an escort officer is taken to be in the Chief Executive's custody and is also taken to be in detention.

Division 6.2.4 – Hearing proceedings against children and young people

Clause 517 – Procedures for hearing indictable offences

Clause 517 is based on existing section 90 and provides for the way in which a child or young person charged with an indictable offence is to be dealt with by the Childrens Court.

Clause 518 – Indictable offences may be dealt with summarily

Clause 518 is based on existing sections 89, 91 and 93 and enables the Childrens Court to deal with indictable matters summarily if it is satisfied that it can be properly disposed of this way, the child or young person agrees and the offence is not punishable by imprisonment for life.

Where this does not occur reasons must be recorded.

Clause 519 – Indictable offences heard summarily – Childrens Court option

Clause 519 is based on existing sections 89 and 91 and lists the matters the Childrens Court must consider in making a decision where a case can be properly disposed of summarily.

Clause 520 – Indictable offences disposed of summarily – agreement of children and young people

Clause 520 is based on existing sections 89 and 91 and outlines the process for obtaining agreement of the child or young person to deal with a matter summarily.

Clause 521 – Court may adjourn hearings to allow access to legal advice

Clause 521 is procedural safeguard that allows the Childrens Court may adjourn a hearing to allow the child or young person, their parent or responsible person to get legal advice.

Clause 522 – Childrens Court to exclude unlawfully obtained evidence

Clause 522 is based on existing section 88 and provides that the Childrens Court must not allow admissibility of evidence obtained in contravention of the Act.

Sub clause (2) creates an exception to the prohibition on unlawfully obtained evidence and gives the Court a discretion to admit such evidence under public interest considerations. The test is a high test and a Court must be satisfied that the public interest would outweigh any prejudice to the rights of a person, including the child or young person.

Sub clause (3) lists the matters the Childrens Court may consider when making a decision to admit unlawfully obtained evidence.

Clause 523 – Adjournment of Proceedings

Clause 523 is based on existing section 124 and requires that an adjournment must not exceed 15 days, except in special circumstances. Where there is an adjournment the Childrens Court may make an order in relation to release of the child or young person.

Clause 524 – Cases may be sent to mental heath tribunal

Clause 524 is based on existing section 95 and empowers the Childrens Court to make an order to dismiss a matter unconditionally or a mental health transfer order where the Court is satisfied that the child or young person is a person with a mental impairment and it would be appropriate to make such an order.

Such orders are not a finding that an offence has or has not been committed. A mental health transfer order operates as a stay of the proceeding.

Clause 525 – Power of Childrens Court to make order to decide whether mental impairment

Clause 525 is based on existing section 95 (6) and empowers the Court to make any order it considers appropriate to assist it to make a decision that a child or young person is a person with a mental impairment. This includes an order that the child or young person submit to the jurisdiction of the mental health tribunal.

Division 6.2.5 – Care and protection considerations in proceedings

Clause 526 – Proceedings dismissed or adjourned for care and protection reasons
Clause 526 is based on existing section 75 (1) and (2) and empowers the Childrens Court to dismiss an information or adjourn proceedings for up to 15 days in circumstances where it is satisfied that the child or young person should be dealt with under a care and protection order.

In these circumstances the Childrens Court must give its statement of reasons to the Chief Executive and Public Advocate within 2 working days. Sub clause (3) outlines the content requirements for the statement of reasons.

A statement of reasons is to be considered a report for the purpose of the offence in section 1602.

Clause 527 – Care of children and young people during detention

Clause 527 is based on existing section 75 (3) and (4) provides for the care of children and young people when the Childrens Court makes an order to adjourn proceedings under section 526 (1) (b). The Court may order the child to be placed in the care of the Chief Executive or a police officer for delivery to the Chief Executive in defined circumstances.

Clause 528 – Chief Executive must report to Court and Public Advocate

Clause 528 continues the oversight role of the Public Advocate. The provision requires the Chief Executive to provide the Public Advocate with a report not later than 15 days after the Childrens Court adjourns the proceedings outlining what action the Chief Executive has taken or proposes to take under a care and protection chapter and, or if the Chief Executive proposes to take no action.

Chapter 7 Sentencing and non-conviction options

Chapter 7 deals with sentencing and non-conviction options for children and young people. Division 6.2.3 of the current Act creates a sentencing scheme for children and young people.

The ACT legislation underpinning the adult sentencing scheme has recently been consolidated and reformed through the *Crimes (Sentencing) Act 2005* and the *Crimes (Sentence Administration) Act 2005*. The legislation was reformed to ensure that offender's rights are compatible with the fundamental rights protected by the ACT's *Human Rights Act 2004*. Limits on these rights are permissible only if the limit is authorised by a Territory law and is reasonable and demonstrably justifiable in a democratic society.

The adult sentencing scheme contains new initiatives and provides for better administration of sentences. The introduction of the new adult sentencing scheme has created a serious disparity between the sentencing of adults and of young persons. The sentencing scheme in the current Act does not provide the same rights and protections before the law, as adults would have in similar circumstances.

Chapter 7 is based on the regimes provided for in the sentencing legislation with necessary modifications and improvements to ensure that appropriate objectives are achieved in the application of the adult sentencing scheme to young persons.

The new initiatives available in the adult sentencing scheme have been adopted through Chapter 7 for the disposition of young persons where those initiatives would provide better outcomes for young people.

Overview of Chapter

The Chapter introduces the concept of combination sentences that allow for greater flexibility in sentencing young persons. Chapter 7 enables Courts to combine penalties for individual convictions, allowing greater flexibility to customise sentences to the offence, the young person and the circumstances of the offence. Combination sentences aim to improve the options available to Courts to maximise the prevention, management and rehabilitation of offending behaviour, depending upon the nature of the offending child or young person.

Other new sentencing options are non-association orders and place restriction orders against young persons who commit offences involving violence against a person. Non-association orders prohibit a young person from associating with a specified person for a specified time. Place restriction orders prohibit a young person from frequenting, or visiting, a specified place or district for a specified time.

The Chapter 7 also formalises and extends the *Griffiths* remand option, under the label of deferred sentence orders. These orders will enable the Court to adjourn proceedings to provide a young person with an opportunity to address their criminal behaviour before sentencing. In this way the Court can assess the young person's prospects for rehabilitation, or the young person's ability to address their criminal behaviour.

While maintaining traditional sentencing options, Chapter 7 also modernises sentencing terminology. For example, the term recognisance has been replaced with good behaviour order.

Chapter 7 also enables victim impact statements to be made by people with parental responsibility for a victim, a close family member of a victim as provisions, a carer of a victim and a person with an intimate personal relationship with the victim. Victim impact statements can be given orally in Court by, or for, a victim and can be made if the trial was for an offence holding a punishment of more than a year's imprisonment.

Part 7.1 – Interpretation

Part 7.1 deals with the interpretation of Chapter 7 and defines commonly used terms.

Clause 600 – Meaning of guilty young person and good behaviour order– criminal matters chapters

Clause 600 defines the meaning of a *guilty young person* as a child or young person who is either found guilty of an offence or convicted of an offence but has not yet been sentences for the offence. 'Found guilty' includes a finding of guilt by a Court after it has found charges proven but has not convicted the child or young person.

Clause 601 – Definitions – Chapter 7

Clause 601 defines commonly used terms.

Part 7.2 – Guilty young people – sentencing Courts

Part 7.2 deals with the sentencing Courts for guilty young people.

Clause 602 – Childrens Court may send cases to Supreme Court for sentencing

Clause 602 applies if the Childrens Court convicts a child or young person of an indictable offence. An indictable offence is an offence is defined in section 190 of the *Legislation Act 2001* and means an offence that is punishable by imprisonment for longer than 1 year; or an offence that is declared by an ACT law to be an indictable offence.

The clause allows the Childrens Court to send a young person to the Supreme Court for sentencing as is that Court had convicted the young person. The Childrens Court must consider any report under clause 319 and may only exercise the power if it is satisfied that the young person should be sentenced because of his or her character or history, and it must also consider.

Clause 605 — Imposition of penalties

Clause 605 is based on section 9 of the Sentencing Act. Clause 540(1) stipulates that a penalty that a Court of the Australian Capital Territory can impose is any penalty set out in the Bill or any existing Australian Capital Territory law.

Clause 605 (2) specifies that the procedure in this Bill for the imposition of penalties applies to all Territory penalties. Note 1 is a useful summary of the sentencing dispositions available to the Childrens Courts. Note 2 indicates that the Bill would authorise a combination of the sentencing dispositions.

Part 7.3. Conviction and non-conviction options generally

Division 7.3.1— Non-conviction orders

Clause 606 – Non-conviction orders – general

This clause is based on section 17 of the Sentencing Act which replaced the commensurate provisions in section 402 of the *Crimes Act 1900* for adult offenders.

Clause 606 (1) authorises non-conviction orders to be made if a child or young person is found guilty but the Childrens Court does not proceed to conviction. In *Properjohn v Gaughan* [1998] SCACT 26 No. SCA 100 of 1997, Justice Gallop discussed non-conviction orders in reference to the High Court's judgement in *Griffiths v The Queen* 137 CLR 293. Justice Gallop concluded that a non-conviction order is an alternative to conviction and punishment.

A non-conviction order is, therefore, not a sentence. However, if a child or young person breaches any conditions set by the non-conviction order the Childrens Court is still empowered to bring the person before the Childrens Court and sentence the child or young person for the offence in question.

Clause 606 (2) authorises the Childrens Court to make a non-conviction order if the Childrens Court considers punishment is not appropriate. The order can dismiss the charge or make a good behaviour order for no longer than three years.

When made in conjunction with a non-conviction order, a good behaviour order cannot include a punishment, as discussed by Justice Gallop in Properjohn. However, the child or young person found guilty can agree to abide by a good behaviour order and conditions of the order — such as probation and rehabilitation, fulfilling a reparation order etc — knowing that a breach of the order may result in a sentence. (A reparation order is not a sentence in the context of a non-conviction order, as reparation involves returning property unlawfully taken or making up for a loss as a direct consequence of an offence.)

Clause 606 (3) and (4) set out the criteria the Childrens Court must consider when contemplating a non-conviction order.

Clause 607 – Limit on good behaviour orders without conviction

Clause 607 limits the types of non- convictions orders that a Court can make by mandating that a non-conviction order that is a good behaviour order must be a basic good behaviour order that does not exceed 3 years.

Clause 608 — Non-conviction orders — ancillary orders

In conjunction with a non-conviction order, clause 544 enables the Childrens Court to impose ancillary orders of: restitution; compensation; costs; forfeiture; destruction; or licence disqualification or suspension.

Clause 609 – Notice of non-conviction orders and ancillary orders

Clause 609 (1) obliges the Childrens Court to provide a written notice of the non-conviction order and a copy of the order to the offender. However, if the Childrens Court does not succeed in doing this, 609 (2) ensures that the order still stands.

Division 7.3.2 – Conviction orders

Clause 610 – Conviction orders general

Clause 610 obliges the Childrens Court to make an order about a convicted child or young person as soon as practicable but within 6 months.

Clause 611 – Limits on making some orders

Clause 611 limits the Childrens Court's power to make a prescribed order in circumstances where, if the convicted was an adult, it wouldn't be able to sentence the adult to a term of imprisonment or that another order may be appropriate. Subclause (c) also has the effect of limiting the term of the order to the maximum period of imprisonment that would have applied to an adult committing the same offence.

Clause 612 – Childrens Court must not order imprisonment

Clause 612 prohibits the Childrens Court from making an order of imprisonment.

Clause 613 – Childrens Court may prevent reduction of commitment

Clause 613 empowers the Childrens Court to order that a period of commitment (or part) imposed on a child or young person may not be reduced.

Part 7.4 Sentencing procedures

Part 7.4.1 Pre-sentence reports

Clause 614 — Application of div 7.4.1

Clause 614 stipulates that div 7.4.1 has effect when the child or young person is found guilty or a child or young person indicates an intention to plead guilty to an offence.

Clause 615 — Pre-sentence reports may be ordered

Clause 615 (1) enables the Childrens Court to adjourn proceedings and order the Chief Executive, of the relevant department to prepare a pre-sentence report. (Part 19.4 of the *Legislation Act 2001* enables the Chief Executive to delegate this function as a matter of course. References to the Chief Executive may be taken to include a person delegated by the Chief Executive to exercise the power or carry out the function.)

Clause 615 (2) requires the Chief Executive to organise a person delegated by the Chief Executive to prepare the pre-sentence report.

Clause 616 — Presentence reports — contents

Clause 616 (1) requires the Chief Executive to take all reasonable steps to ensure that a report includes things as directed by the Childrens Court.

Clause 616 (2) sets out the matters that the Childrens Court may require the Chief Executive to include. Items (i) and (j) intend to provide the Childrens Court with information that will assist the Childrens Court to determine if any orders conducive to managing offending behaviour or rehabilitating the child or young person are of use.

Clause 617 — Pre-sentence reports — powers of Chief Executive

Clause 617 provides clear authority for the Chief Executive to conduct investigations to address a pre-sentence report. The Chief Executive may request information from a broad range of government authorities. Clause 617617 (2) and (3) stipulates that prompt and open cooperation is expected and that any cooperation in good faith is not a breach of professional standards or a ground for civil proceedings.

Clause 617 authorises the Chief Executive to seek information from victims. However, clause 617 (2) ensures that victims are not obliged to provide information or cooperate with an Chief Executive in any way. Clause 617 does not require the Chief Executive to directly approach victims in person. The Chief Executive may determine how, who and when victims may be approached: for example via a victim liaison officer or the Victims of Crime Coordinator.

Clause 617 (5) would authorise the Executive to make regulations governing the preparation and provision of pre-sentence reports and the conduct of assessments in relation to deferred sentence orders.

Clause 618 — Pre-sentence reports — provision to Court

This clause enables reports to be given orally or in writing.

Clause 619 — Pre-sentence reports — availability of written reports
In clause 619, if a pre-sentence report is in writing and a copy has been provided to the Childrens Court more than two days before a sentencing hearing, the Childrens Court must make available a copy of the report two days before the sentencing hearing to the parties mentioned in 619 (2).

If the Childrens Court has not received the report in time, there is no obligation to provide the report.

Clause 620 — Pre-sentence reports — cross-examination

Clause 620 authorises cross-examination of an assessor during sentencing proceedings.

Division 7.4.2 — Victim impact statements

Clause 621 — Definitions for div 7.4.2

Clause 621 provides specific definitions for 'because of', 'harm', 'victim' and 'victim impact statement' for division 7.4.2. The intent of the definitions is to ensure that the ambit of 'victim' intended by the Government is clear.

Clause 622 — Application of div 7.4.2

Clause 622 expands the availability of victim impact statements. Presently victim impact statements can only be tendered if the offence in question holds a penalty of at least five year's gaol. Clause 622 (a) enables victim impact statements to be tendered for any indictable offence, which is an offence punishable by imprisonment for longer than one year. 622 (b) ensures that the summary offence of common assault is also contemplated. (The summary offence of common assault holds a penalty of 6 months imprisonment.) 622 (c) would authorise the Executive to list other offences for which a victim impact statement could be tendered.

Clause 623 — Victim impact statements — who may make

Clause 623 enables victims, parents or persons with responsibility for day to day maters or long term matters of a victim, close family members of victims, people who are carers of victims, and people who are in an intimate relationship with a victim (such as a spouse, life partner, lover, boyfriend, girlfriend etc) to make a victim impact statement.

Clause 624 — Victim impact statements — oral or written

Clause 624 enables victim impact statements to be given orally or in writing.

Clause 625 — Victim impact statements — form and contents

Clause 625 sets out what must be in a victim impact statement, including identifying the status of any person providing a victim impact statement.

Clause 626 — Victim impact statements — use in Court

Clause 626 enables a victim impact statement to be tendered or given orally by the person who makes or made the victim impact statement or someone else on behalf of the person making the statement.

Clause 626 (2) gives the Childrens Court the discretion to consider the report anytime after the child or young person is convicted and before sentencing.

Clause 627 – When written victim impact statement may be given

In clause 627 written victim impact statements can only be tendered to Childrens Court if the statement is consistent with clause 625 and a copy is provided to the defence.

Clause 628 – Cross-examination of people making victim impact statement

Clause 628 (1) authorises cross examination of the person who makes or has made a victim impact statement.

Clause 628 (2) provides protection from potential intimidation to people who make victim impact statements when the child or young person is representing themself in a sentencing hearing. In these circumstances, the child or young person must tell the Childrens Court what the child or young person wants to ask the person who made the victim impact statement and the Childrens Court must give leave to cross-examine.

Clause 628 (3) provides specific definitions of 'defence' and 'given' for clause 53.

Clause 629 — Victim impact statements — effect on sentencing

Clause 629 provides for the effect of a victim impact statement on the sentencing hearing.

Clause 629 (2) requires the Childrens Court to consider a victim impact statement. If an statement is not provided, the Childrens Court cannot inherently infer that the victim suffered no harm.

Division 7.4.3 Taking additional offences into account

Clause 630 — Application of div 7.4.3

Clause 630 sets out the conditions that enliven the application of the provisions that govern the Childrens Court's authority to take additional offences into consideration when sentencing.

The child or young person must be convicted or found guilty of an offence but a sentence not yet passed. The Director of Public Prosecutions must also submit a list of additional offences alleged to have been committed by the child or young person.

Clause 630 (2) stipulates that division 7.4.3 cannot be invoked if the offence contemplated for sentencing holds a penalty of life imprisonment.

Clause 631 — Definitions – div 7.4.3

Clause 631 points to the source of the definitions for particular terms used throughout division 7.4.3.

Clause 632 — List of additional offences

Clause 632 the list of additional offences can only include offences the child or young person wants the Childrens Court to take into account when sentencing. The Director of Public Prosecutions and the child or young person must sign the list, and the child or young person must have a copy.

Clause 633 — Outstanding additional offences taken into account in sentencing

Clause 633 requires the Childrens Court to confirm that the child or young person wants the additional offences taken into account when sentencing.

The Childrens Court can take the additional offences into account if the child or young person admits guilt to the additional offences, the child or young person confirms their want to have the additional offences accounted, and the Director of Public Prosecutions agrees.

Clause 633 (3) makes it clear that taking additional offences into account does not mean the Childrens Court can impose a sentence greater than the maximum penalty attached to the offence the child or young person is being sentenced for. In other words, taking the additional offences into account does not allow additional penalties to be imposed: the additional offences are considered in the context of the penalty allowed for by the original offence.

Clause 633 (4) and (5) clarifies that if the Childrens Court does not have lawful jurisdiction to pass sentence on the additional offences, then the additional offences cannot be accounted for. Clause 633 (6) provides the Supreme Court with the jurisdiction to account for a summary offence.

Clause 634 — Ancillary orders relating to offences taken into account in sentencing

Although clause 633 provides that penalties cannot be imposed for additional offences accounted for in sentencing, clause 634 enables the Childrens Court to impose ancillary orders of: restitution; compensation; costs; forfeiture; destruction; or licence disqualification or suspension.

Clause 635 — Consequences of taking offences into account in sentencing

Clause 635 links the sentence imposed for the principal offence with the additional offences accounted for by the Childrens Court. Proceedings for the additional offences on the list cannot begin or continue unless the outcome for the principal offence is changed.

While the admission of guilt in relation to the additional offence is not admissible in proceedings involving the additional offences, the child or young person is not taken to have been convicted or found guilty of the additional offences.

Clause 636 — Evidence of offences taken into account in sentencing

Clause 636 enables the fact that additional offences had been taken into account during sentencing to be admitted as evidence in subsequent proceedings if the conviction for the principal offence is admissible in the proceedings and the additional offence could have been admitted if a conviction, or a finding of guilt, had been made.

Division 7.4.4 Correction and adjustment of penalties

Clause 637 — Reopening proceedings to correct penalty errors

Sentencing is a skilful task that brings together qualitative determination about the appropriate penalty and a quantitative expression of the penalty itself.

Clause 637 enables the Childrens Court to re-open proceedings on its own initiative or upon application from a party to correct a sentence, or to make a sentence when one should have been made.

If an order is made to correct an error using these provisions, clause 637 (6) provides that the allowable appeal period begins on the day the order is made under clause 637. This does not affect other rights of appeal.

Clause 637 (8) clarifies that the term 'sentence related order' includes an order imposing a penalty, a deferred sentence order, a non-conviction order and any ancillary orders.

Part 7.5 – Particular orders – committal orders

Division 7.5.1 – Committal orders generally

Clause 638 – Meaning of committal order – Act

Clause 638 defined the meaning of a committal order for the Act.

Clause 639 – Commitment of guilty young people

Clause 639 empowers the Childrens Court to make an order committing a young child or young person to an ACT institution. This sentence should only be given if the Childrens Court is satisfied that no other sentence is appropriate. The Childrens Court must give reasons for its decision to commit a young person.

Division 7.5.2 – Commitment – explanation and information

Clause 640 – Application –div 7.5.2

Clause 640 specifies the circumstances in which the part applies, i.e. circumstances where the obligation on the Childrens Court to provide explanations and additional information arises. Specifically, that division 7.5.2 applies to sentences of commitment that are not fully suspended.

Clause 641 – Commitment – explanation to young offences and others

Clause 641 is based on section 82 of the Crimes (Sentencing) Act 2005 that applies to adults with some additional safeguards. It obligates the Childrens Court to explain to the young person and either his or her parent or responsible person specified details around the effect of the commitment order. Subclause (2) proscribes that the explanation must be in a language that the person can readily understand, this may for example, require the Childrens Court to engage a translator to assist in providing the explanation.

It should be noted that clause 576 (1) only requires the Court to take reasonable steps to explain these matters.

Clause Subclause (3) makes clear that failure to comply with the requirement does not undermine a sentence.

Examples are provided with the clause.

Clause 642 – Commitment – written record of explanation

Apart from the requirement to provide a written explanation no later than 10 days, clause 642 is also a restatement of section 83 of the Sentencing Act.

Clause 642 obliges the Childrens Court to provide the explanation, under clause 641, in writing to the child or young person and their lawyer no later than 10 days after the sentencing hearing when the sentence was explained to the offender.

Clause 642 (2) ensures that failure to comply with the requirement does not undermine a sentence.

Clause 643 – Commitment – notice of sentence

Clause 643 ensures that official notice of a sentence of committal is provided to the relevant parties and relevant authorities. The intent of this common notice is to provide the same information to all involved and to maximise accuracy in the administration of the sentence.

Clause 643 (2) sets out what must be in the official notice. A notice can be made by a standard form, as per the *Legislation Act 2001.*

Clause 643(3) ensures that an error in applying clause 643 does not undermine a sentence.

Part 7.6 Particular Orders – suspended sentence orders

Clause 644 — Suspended sentences

A suspended sentence enables the Childrens Court to sentence the child or young person to a term of imprisonment and then suspend the execution of that imprisonment on the basis that the child or young person complies with conditions set by the Childrens Court. The tool for setting conditions in this Bill is the good behaviour order. If the child or young person breaches the good behaviour order made in conjunction with a suspended sentence, the Childrens Court will have authority to execute the sentence or re-sentence the child or young person.

Clause 644 (1) states that a suspended sentence can only be ordered if the child or young person is both convicted of an offence and sentenced to imprisonment.

Clause 644 (2) enables the Childrens Court to suspend all or part of the imprisonment. The child or young person will be imprisoned for the period of time not suspended by the Childrens Court.

Clause 644 (3) requires the Childrens Court to make a good behaviour order for the period of the suspended sentence, and longer if the Childrens Court determines. In making a good behaviour order in conjunction with the suspended sentence the Childrens Court will impose conditions upon the child or young person that the Childrens Court requires the child or young person to meet to prevent the execution of the sentence.

If a sentence is fully suspended, clause 644 (4) requires the Childrens Court to notify the child or young person, a parent of the offender or somebody who has responsibility for day to day matters or long term matters for the offender, and give them a copy of the order. However, if the Childrens Court does not succeed in doing this, 644 (5) ensures that the order still stands.

Clause 644 (6) clarifies that clause 644 is subject to the provisions governing committal orders and good behaviour orders. These are discussed below.

Part 7.7 Particular orders – good behaviour orders

Division 7.7.1 – Good behaviour orders – generally

Clause 645 – Definitions – pt 7.7

Clause 645 sets out the definitions of commonly used terms in part 7.7.

Clause 646 — Good behaviour orders

Clause 646 (1) enables good behaviour orders to be made by the Childrens Court if the young person is convicted or found guilty. Such an agreement must only be made with agreement of the young person.

Clause 646 (2) sets out the overarching conditions that can be imposed by a good behaviour order. In 646 (3)(c) the Childrens Court can impose a condition that the child or young person carries out community service.

In 646 (2)(d) the Childrens Court can impose a condition that the child or young person engages in a rehabilitation program. Rehabilitation programs are discussed at part 6.2.

Clause 646 (2)(g) authorises the Childrens Court to impose a reparation order as part of the good behaviour order.

Clause 646 (2)(h) authorises the Childrens Court to impose any condition prescribed in regulations made by the Executive.

Clause 646 (2)(i) authorises the Childrens Court to impose any conditions the Childrens Court considers appropriate and consistent with this Bill. Examples are provided.

Clause 646 (4) makes it clear that the Childrens Court can make a good behaviour order in lieu of imprisonment, or in combination with imprisonment.

Clause 646 (5) clarifies that clause 646 (4) does not limit the Childrens Court's power to impose sentences.

Clause 647 — Good behaviour orders — explanation to young persons and others

If good behaviour orders are made, clause 647 requires the Childrens Court to explain to the young person and his or her parent or responsible person any conditions imposed under the good behaviour order and the consequences of breaching any conditions imposed or statutory conditions.

Clause 647 (2) ensures that if failure to comply with this requirement a good behaviour order is not undermined.

Clause 648 — Good behaviour orders — official notice of order

Clause 648 ensures that official notice of a good behaviour order is provided to the offender, his or her parent or responsible person and the relevant authority. The intent of this common notice

is to provide the same information to all involved and to maximise accuracy in the administration of the order.

Clause 648 (2) sets out what must be in the official notice. A notice can be made by a standard form, as per the *Legislation Act 2001.*

Clause 648 (3) ensures that failure to comply with the requirement does not undermine a sentence.

Clause 649 – Contravention of good behaviour order

Clause 649 provides that if the young person breaches the good behaviour order the Childrens Court has the power to either impose the suspended committal or re-sentence the young person using any of the dispositions available under the Act.

Division 7.7.2 – Good behaviour orders – non association conditions

Clause 650 – Application – div 7.7.2

Clause 650 establishes that non-association order can be made if a good behaviour order is made.

Clause 651 – Meaning of non-association condition – div 7.7.2

A non-association order is an order prohibiting the child or young person from associating with a specified person for a specified time. A non-association order can be limited (prohibiting the child or young person from being in company with a specified person) or unlimited (prohibiting the child or young person from being in company with or communicating by any means with a specified person).
Clause 652 – Non-association conditions – grounds for making

Clause 652 (1) allows the Childrens Court to include a non-association condition in a good behaviour order if the offence contemplated is a personal violence offence and the Childrens Court considers the order necessary and reasonable to prevent harassment, prevent further offences or assist to manage offending behaviour.

Subclause (2) requires the Childrens Court to make the order proportionate to the purpose of the order.

Subclause (3) makes it clear that the exercise of the power to impose non-association orders not impede or vary any other power the Childrens Court may have in Territory law.

Clause 653 — Non-association conditions — maximum period

Clause 653 limits the length of a non-association condition in a good behaviour order to 12 months from the day the order starts. However, subclause (2) makes it clear that the term of any other sentence does not limit the length of a non-association condition. For example, if a good behaviour order and a non-association order is made at the same time and the good behaviour order only lasts for six months, the Childrens Court is still able to order that the non-association order last 12 months.

Clause 654 - Non-association conditions — disclosure of identifying information

Clause 654 upholds the privacy of people who may benefit from non-association condition. For example, Alice has been stalked by Mary. Mary becomes subject to a non-association order that stipulates Mary cannot attempt to be with or communicate with Alice. Alice benefits from the order and clause 26 protects Alice's privacy despite the fact that Mary's sentencing hearing was in open Court.

Clause 654 (1) creates an offence for publishing the fact that someone, other than an offender, is named by a non-association order. An offence is also created if information that could identify an individual, other than an offender, as being named in a non-association order.

Clause 654 (2) excludes specific classes of people who would not be liable for the offence in clause 654 (1). There are particular people who because of their profession or job would be privy to the information. These people are defined as relevant people in clause 654 (5), namely: the offender; any person named in the order; police; anyone who administers the order or other relevant orders; anyone involved in breaches of the order; any person named in the order as a person who may be told, informed, or written to about the order (as per clause 654 (5)(b)); and anyone else authorised by Australian law.

Clause 654 (2) also exempts from prosecution people named in the order and anyone involved in publishing the Court's proceedings.

Clause 654 (3) obliges the Court not to authorise publication to named people unless the Court is satisfied that the interests of justice will be served.

Clause 654 (4) stipulates that the offence created by clause 27 is a strict liability offence. The *Criminal Code 2002* sets out the nature of a strict liability offence at section 23:

(1) If a law that creates an offence provides that the offence is a strict liability offence—
(a) there are no fault elements for any of the physical elements of the offence; and
(b) the defence of mistake of fact under section 36 (Mistake of fact—strict liability) is available.

(2) If a law that creates an offence provides that strict liability applies to a particular physical element of the offence—
(a) there are no fault elements for the physical element; and
(b) the defence of mistake of fact under section 36 is available in relation to the physical element.
(3) The existence of strict liability does not make any other defence unavailable.

Division 7.7.3 Good behaviour orders – place restriction conditions

Clause 655 – Application – div 7.7.3

Clause 655 establishes that a place restriction condition can be made if a good behaviour order is made.

Clause 656 – Meaning of place restriction condition – div 7.7.3

Clause 656 defines non-association orders and place restriction orders. A place restriction order is an order prohibiting a young person from frequenting, or visiting, a specified place or district for a specified time.

Clause 657 – Place restriction conditions– grounds for making

Clause 657 (1) allows the Childrens Court to include a place restriction condition in a good behaviour order if the offence contemplated is a personal violence offence and the Childrens Court considers the order necessary and reasonable to prevent harassment, prevent further offences or assist to manage offending behaviour.

Subclause (2) requires the Childrens Court to make the order proportionate to the purpose of the order.

Subclause (3) makes it clear that the exercise of the power to impose place restriction orders not impede or vary any other power the Childrens Court may have in Territory law.

Clause 658 — Place restriction conditions— maximum period

Clause 653 limits the length of a non-association condition in a good behaviour order to 12 months from the day the order starts. However, subclause (2) makes it clear that the term of any other sentence does not limit the length of a place restriction condition. For example, if a good behaviour order and a place restriction order is made at the same time and the good behaviour order only lasts for six months, the Childrens Court is still able to order that the place restriction order last 12 months.

Division 7.7.4 – Good behaviour orders – community service conditions

Clause 659 — Application – div 7.7.4

Division 7.7.4 applies if the Childrens Court considers community service could be appropriate as part of a sentence, or as a sentence.

Clause 660 — Meaning of community service condition - Act

A community service condition is a requirement to perform community service for a stated number of hours as part of a good behaviour order.

Clause 661 — Community service — eligibility

Clause 661 stipulates that a child or young person is eligible for community service if the offender is suitable (discussed at clause 662) and it is appropriate that community service is imposed.

In clause 661 (2), if the child or young person does not participate in a medical examination directed by the Childrens Court, the Court may decline to impose community service.

Clause 662 — Community service — suitability

A community service condition cannot be imposed unless a pre-sentence report is provided to the Childrens Court about the child or young person suitability for community service.

Clause 662 (2) lists what the Childrens Court must consider before imposing a community service condition. However, (3) makes it clear that the Childrens Court can consider other matters.

Clause 662 (4) refers to table 90, discussed below, in relation to other issues that may render the child or young person unsuitable for community service.

Clause 662 (5) empowers the Childrens Court to impose, or not, a community service condition despite the recommendation of a pre-sentence report. However, clause 662 (6) requires the Childrens Court to state its reasons why it has acted contrary to the pre-sentence report.

Clause 662 (7) ensures that an error in applying clause 662 (6) does not undermine a community service condition.

Clause 663 — Community service — pre-sentence report matters

Clause 663 augments the matters that must be considered in a pre-sentence report, if the Childrens Court orders that an assessment for a community service condition is included in a pre-sentence report.

Clause 663 provides a table of matters that must be addressed in a pre-sentence report contemplating periodic detention.

Clause 664 — Community service — hours to be performed

Clause 664 sets the maximum and minimum limits on the number of hours of community service that can be imposed.

Clause 665 — Community service — 2 or more good behaviour orders

Clause 665 enables the Childrens Court to impose subsequent community service for another sentence either concurrently, consecutively or overlapping. The total hours of the existing sentence and the new sentence cannot be greater than 200 hours.

Division 7.7.5 — Good behaviour orders — rehabilitation conditions

Clause 666 — Application – div 7.7.5

Division 7.7.5 applies if the Childrens Court considers a rehabilitation condition could be appropriate or of benefit to the child or young person or community as part of a sentence, or as a sentence.

Clause 667 — Meaning of rehabilitation condition – Act

Clause 667 defined the meaning of a rehabilitation condition.

Clause 668— Rehabilitation condition — eligibility

Imposing a rehabilitation condition requires both eligibility and suitability.

Clause 668 (1) requires the Childrens Court to be satisfied that the child or young person is suitable for a rehabilitation program (discussed at clause 669 below), it is appropriate that the offender undertake the program, and that a place is available in the program within reasonable time.

In clause 668 (2), if the child or young person does not participate in a medical examination directed by the Childrens Court, the Court may decline to impose a rehabilitation condition.

Clause 669 — Rehabilitation condition — suitability

A rehabilitation condition cannot be imposed without a pre-sentence report assessing the offender's suitability for the program. Information about the program that justifies a rehabilitation program's suitability for the child or young person must also be provided before a rehabilitation condition can be imposed.

Clause 669 (2) lists what the Childrens Court must consider before imposing a rehabilitation program condition. However, (3) makes it clear that the Childrens Court can consider other matters.

Clause 669 (4) empowers the Childrens Court to impose, or not, a rehabilitation program condition despite the recommendation of a pre-sentence report, or evidence provided by the reporter. However, clause 669 (5) requires the Childrens Court to state its reasons why it has acted contrary to the pre-sentence report.

Clause 669 (6) ensures that an error in applying clause 669 (5) does not undermine a rehabilitation program condition.

Clause 670 — Rehabilitation condition — maximum period

A rehabilitation program condition cannot be imposed for longer than 3 years.

Clause 671 — Rehabilitation programs — 2 or more good behaviour orders

Clause 671 enables the Childrens Court to impose a subsequent rehabilitation communication program for another sentence either concurrently, consecutively or overlapping. The new condition imposed must not be longer than 3 years after the day the order is made.

Division 7.7.6 — Good behaviour orders — education and training conditions

Clause 672 — Application – div 7.7.6

Division 7.7.6 applies if the Childrens Court considers an education and training condition could be appropriate or of benefit to the child or young person or community as part of a sentence, or as a sentence.

Clause 673 — Meaning of education and training condition – Act

Clause 673 defines the meaning of an education and training condition.

Clause 674— Education and training condition — eligibility

Imposing an education and training condition requires both eligibility and suitability.

Clause 674 (1) requires the Childrens Court to be satisfied that the child or young person is suitable for an education and training program, it is appropriate that the offender undertake the program, and that a place is available in the program within reasonable time.

In clause 674 (2), if the offender does not participate in a medical examination directed by the Childrens Court, the Court may decline to impose an education and training condition.

Clause 675 — Education and training condition — suitability

An education and training cannot be imposed without a pre-sentence report assessing the offender's suitability for the program. Information about the program that justifies an education and training program's suitability for the child or young person must also be provided before a rehabilitation condition can be imposed.

Clause 675 (2) lists what the Childrens Court must consider before imposing an education and training program condition. However, (3) makes it clear that the Childrens Court can consider other matters.

Clause 675 (4) empowers the Childrens Court to impose, or not, an education and training program condition despite the recommendation of a pre-sentence report, or evidence provided by the reporter. However, clause 675 (5) requires the Childrens Court to state its reasons why it has acted contrary to the pre-sentence report.

Clause 675 (6) ensures that an error in applying clause 675 (5) does not undermine an education and training program condition.

Clause 676 — Education and training condition — maximum period

An education and training program condition cannot be imposed for longer than 3 years.

Clause 677 — Rehabilitation conditions — 2 or more good behaviour orders

Clause 677 enables the Childrens Court to impose a subsequent education and training communication program for another sentence either concurrently, consecutively or overlapping. The new condition imposed must not be longer than 3 years after the day the order is made.

Division 7.7.7 — Good behaviour orders — supervision conditions

Clause 678 — Application – div 7.7.7

Division 7.7.7 applies if the Childrens Court considers a supervision condition could be appropriate or of benefit to the child or young person or community as part of a sentence, or as a sentence.

Clause 679 — Meaning of supervision condition – Act

Clause 679 defined the meaning of a supervision condition.

Clause 681 — Supervision condition — maximum period

A supervision program condition cannot be imposed for longer than 3 years.

Clause 682 — Supervision programs — 2 or more good behaviour orders

Clause 682 enables the Childrens Court to impose a subsequent supervision communication program for another sentence either concurrently, consecutively or overlapping. The new condition imposed must not be longer than 3 years after the day the order is made.

Part 7.8 – Particular orders — Reparation orders

Clause 683 — Meaning of reparation order – Act

Clause 683 is a signpost definition of a reparation order.

Clause 684 — Reparation orders — losses and expenses generally

Clause 684 (1) allows a reparation order to be made if a child or young person is found guilty of an offence and a victim of the crime suffers a loss or incurs an expense as a direct consequence of the offence.

By reference to the *Criminal Code 2002*, clause 684 (6) defines 'loss' as a loss in property, whether temporary or permanent, and includes not getting what one might get.

Clauses 684 (2) and (3) enables the Director of Public Prosecutions to apply to the Court for a reparation order, or for a Court on its own initiative, to make a reparation order.

Clause 19(5) clarifies that clause 684 is subject to section 731.

Clause 685— Reparation orders — stolen property

If a child or young person is convicted or found guilty of an offence that involves stealing property, clause 685 enables a reparation order to be made.

Clauses 685 (2) and (3) enables the Director of Public Prosecutions to apply to the Childrens Court for a reparation order, or for a Court on its own initiative, to make a reparation order. The order can require the property in question to be returned to the person who has the right to own or possess the property. Alternatively, the order can require the offender to pay an amount equal to the value of the stolen property to the person who had the right to own or possess the property.

Orders under clauses 684 and 685 can be made in conjunction with one another, as clause 684 contemplates loss other than just property stolen. For example, if a plumber's tools are stolen and the plumber is unable to work until alternative tools are obtained, the loss in earnings for that time may be contemplated by a reparation order in clause 19.

The amount recoverable will be an amount not exceeding the value of the stolen property together with the amount of any additional loss suffered, or expense, including any out-of-pocket expenses, incurred as a direct result of the commission of the offence.

Clause 685 (4) contemplates people who have innocently purchased stolen property or people who have borrowed money using the property in question as security for the loan.

Clause 685 (5) clarifies that clause 685 is subject to section 731.

Clause 687 (6) defines stolen property by reference to the *Criminal Code 2002*, being: original stolen property; or previously received property; or tainted property.

Stolen property may include all or any part of a general deficiency in money or other property even though the deficiency is made up of a number of particular amounts of money or items of other property that were appropriated or obtained over a period.

Stolen property does not include land appropriated or obtained in the course of theft or obtaining property by deception.

Property is original stolen property if it is property, or a part of property, that was appropriated in the ACT in the course of theft or a related offence; or in a place outside the ACT in the course of an offence in that place that would have been theft or a related offence if it had happened in the ACT, whether or not the property, or the part of the property, is in the state it was in when it was appropriated; and is in the custody or possession of the person who appropriated it.

Original stolen property is also property, or a part of property, that was obtained in the ACT in the course of obtaining property by deception; or in a place outside the ACT in the course of an offence in that place that would have been obtaining property by deception if it had happened in the ACT whether or not the property, or the part of the property, is in the state it was in when it was obtained; and is in the custody or possession of the person who obtained it or for whom it was obtained.

Property is previously received property if it is property that was received in the ACT in the course of an offence of receiving; or in a place outside the ACT in the course of an offence in that place that would have been receiving if it had happened in the ACT; and is in the custody or possession of the person who received it in the course of that offence.

Property is tainted property if it is, in whole or part, the proceeds of sale of, or property exchanged for: original stolen property; or previously received property; and in the custody in possession of the person who appropriated it or obtained it.

If an amount credited to an account held by a person is property obtained in the ACT in the course of obtaining property by deception (or outside the ACT in the course of an offence that would have been obtaining property by deception if it had happened in the ACT):

- the property is taken to be in the possession of the person while all or any part of the amount remains credited to the account; and

- the person is taken to have received the property if the person fails to take the steps that are reasonable in the circumstances to ensure that the credit is cancelled.

Clause 686— Reparation orders — no agreement about amount of loss

Clause 686 authorises the Childrens Court to settle any dispute about the value of the loss contemplated for a reparation order. Clause 686 (2) puts beyond doubt that the total amount to be paid under the order must not be more than $1000, excluding any amount that goes toward the restoration of stolen property.

Clause 687 — Reparation orders — payment by instalments

Clause 687 enables the Childrens Court to order reparation payments to be paid in instalments and for the child or young person, or a surety, to give security that for the payment in instalments.

Clause 688 — Reparation orders — evidential basis for orders

Clause 688 sets out the types of information the Childrens Court may consider for making a reparation order. Clause 688 (2) defines the meaning of the term 'available documents', which is used in clause 688 (1). An example is provided as part of the clause.

Clause 690 — Reparation orders — power to make other orders etc

Clause 690 clarifies that the Childrens Court has the power to make reparation orders and other orders authorised by Territory law. The making of a reparation order for one type of loss does not prevent making another reparation order for another type of loss as a consequence of a particular offence, a series of offences connected to an event, or additional offences taken into account during sentencing. (See clause 632 above for the imposition of ancillary orders in relation to the account of additional offences.)

The example provided in clause 690 clarifies that a reparation order for stolen property can be made under clause 685 and a concurrent reparation order under clause 684 can be made for the damaged caused by the burglary.

Clause 691 — Reparation orders — Confiscation of Criminal Assets Act

The *Confiscation of Criminal Assets Act 2003* is a scheme to restrain and forfeit property, income, or any form of assets derived from, or used in, the commission of crime.

Clause 691 ensures that property restrained or forfeited under the *Confiscation of Criminal Assets Act 2003* cannot be the subject of a reparation order. If a victim has a claim over the property, the victim can use the proceedings in the *Confiscation of Criminal Assets Act 2003* to have the property returned, or to be compensated for the loss of the property.

Clause 692 — Reparation orders —notice

Clause 692 ensures that official notice of reparation order is provided to the offender and the person who will have the loss restored. The intent of this common notice is to provide the same information to all involved and to maximise accuracy in the administration of the order.

Clause 692 (3) provides that if clause 692 is not followed the reparation order is not undermined.

Part 7.9 – Particular orders — Accommodation orders

Clause 693 — Meaning of accommodation order – Act

Clause 693 defines the meaning of accommodation order.

Clause 696 — Accommodation orders – maximum period

Clause 696 limits the period of an accommodation order to a maximum of 3 years.

Part 7.10 – Particular orders — deferred sentence orders

Division 7.10.1 — Deferred sentence orders generally

Deferred sentence orders are a codification of an existing power available to the Court known as *Griffiths* remands following the High Court's decision in *Griffiths v The Queen* 137 CLR 293.

Deferred sentence orders will enable the Childrens Court to adjourn proceedings to provide an offender with an opportunity to address their criminal behaviour before sentencing. In this way the Childrens Court can assess whether the child or young person demonstrates prospects for rehabilitation, or the offender's ability to address their criminal behaviour.

Clause 698 — Meaning of deferred sentence order – Act

Clause 698 defines the meaning of a deferred sentence order.

Clause 699 — Deferred sentence orders — generally

Clause 699 (1) sets out the criteria that must exist before a deferred sentence order can be made. Clause 699 (1)(a) requires that the child or young person has been convicted or found guilty, while (1)(b) and (c) requires that the child or young person isn't already serving a commitment sentence or liable to serve a commitment sentence.

Clause 699 (1)(d) is the consideration that gives the deferred sentence order its particular quality, namely that the Childrens Court considers the offender should be given an opportunity to address their criminal behaviour.

Clause 699 (1)(e) requires the Court to consider if the offender would be entitled to bail under the *Bail Act 1992.* The *Bail Act 1992* contemplates a presumption against bail for certain offences and circumstances in Division 2.4. Likewise the *Bail Act 1992* also includes a neutral presumption for offences contemplated by Division 2.3.

If a child or young person was not entitled to bail, a deferred sentence order could not be made.

Clause 699 (2) authorises the Childrens Court to make a deferred sentence order and to require the offender to appear before it at a later, stated time. Clause 710 (discussed below) limits the order to a period of 12 months.

Clause 699 (3) requires the Childrens Court to apply the *Bail Act 1992* to the child or young person's release if a deferred sentence order is made.

Clause 699 (4) clarifies that deferred sentence orders are not limited to sentences of imprisonment, but may also be used for other sentences such as good behaviour orders.

Clause 699 (5) enables the Childrens Court to apply any conditions the Childrens Court deems appropriate. These conditions are in addition to any conditions the Childrens Court may set under the *Bail Act 1992.*
Clause 699 (6) clarifies that clause 699 is subject to part 7.10.1.

Clause 700— Deferred sentence orders — automatic cancellation on bail revocation

To carry out a deferred sentence order a child or young person is released on bail under the *Bail Act 1992*. The Bail Act requires the offender to comply with any conditions of bail and any undertakings made by the offender.

Clause 700 stipulates that if a child or young person breaches their bail conditions or undertakings the deferred sentence order is automatically revoked. In these circumstances an offender can be arrested under clauses 712 and 713 above or by the authority of sections 56A and 56B of the *Bail Act 1992*.

Clause 701 — Deferred sentence orders — relationship with Bail Act

Clause 701 governs the relationship between the *Bail Act 1992* and a deferred sentence order.

Clause 701 (1)(a) ensures that the Childrens Court's power to require children and young people to appear before it under the *Bail Act 1992* is not impeded in any way by a deferred sentence order.

Clause 701 (1)(b) clarifies that the entitlement to liberty following bail under the Bail Act is qualified by a deferred sentence order. If a deferred sentence order is breached the child or young person is not entitled to liberty despite not having breached the bail conditions.

Clause 701(2), (3) and (4) ensures that any conditions, varied conditions or power to review under a deferred sentence order does not directly, indirectly, limit the Childrens Court's powers under the Bail Act.

Division 7.10.2 — Deferred sentence orders — making

Clause 702 — Application – div 7.10.2

Division 7.10.2 applies to the making of deferred sentence orders.

Clause 703 — Meaning of deferred sentence obligations

Clause 703 is a definition that relies upon a meaning in clause 710.

Clause 704 — Deferred sentence orders — eligibility

Child and young persons must be both eligible and suitable for a deferred sentence order.

Clause 704 enables a deferred sentence order to be made if the Childrens Court believes the child or offender's release would provide an opportunity for the offender to address their criminal

behaviour and any factors contributing to the behaviour, and consequently encourage the Childrens Court to impose a lesser penalty.

A deferred sentence can be made even if the offence justifies imprisonment.

Clause 705 — Deferred sentence orders — suitability

Clause 705 sets out the matters the Childrens Court must consider when deciding to impose a deferred sentence order. The Childrens Court is not limited to these matters.

Clause 705 (3) empowers the Childrens Court to impose, or not, a deferred sentence order despite the recommendation of a pre-sentence report, or evidence provided by the reporter. However, clause 705 (4) requires the Childrens Court to state its reasons why it has acted contrary to the pre-sentence report.

Clause 705 (5) ensures that an error in applying clause 705 (4) does not undermine an order.

Clause 706 — Deferred sentence orders — indication of penalties

If a deferred sentence order is made, the Childrens Court must provide an overview of the penalty the Childrens Court thinks it might impose if the child or young person complies with the order, and the penalty the Childrens Court thinks it might impose if the child or young person doesn't comply withe order. This will provide the offender with further incentive to comply with the order.

Clause 707 — Deferred sentence orders — review requirements in orders

Clause 707 enables the Childrens Court to set some times for the child or offender to appear before the Childrens Court so the Childrens Court can monitor the child or young person's compliance and progress with the order.

Clause 708 — Deferred sentence orders — obligations

During a deferred sentence order the child or young person is obliged to abide by any conditions in the order itself, any conditions set under the *Bail Act 1992*, and any statutory obligations in this Bill.

Clause 709 — Deferred sentence orders — explanation and official notice

The Childrens Court must explain a deferred sentence order to the child or young person and his or her parent or responsible person, including the conditions and obligations imposed upon the offender and the consequences of failing to meet the conditions and obligations. The explanation must be in a language that the person readily understands.

Clause 709 (3) requires the Court to notify the offender of the order and give the offender a copy of the order. If the Childrens Court fails to do this clause 709 (4) ensures that the order is not invalidated.

Clause 710 — Deferred sentence orders — period of effect

A deferred sentence order cannot last longer than 12 months after the day it is made. At the end of the order, or after the Childrens Court cancels the order, the Childrens Court must sentence the offender.

Division 7.10.3— Deferred sentence orders — supervision

Clause 711 — Application of Division 7.10.3

Division 7.10.3 applies if the Childrens Court makes a deferred sentence order.

Clause 712— Deferred sentence orders — obligations breached

Clause 712 empowers police to arrest a child or young person, who is subject to a deferred sentence order, if the officer believes the child or young person has breached the order or any obligations related to the order or the bail conditions.

After arrest, the police officer must bring the child or young person before the Childrens Court, or a magistrate.

Clause 713 — Deferred sentence orders — arrest warrant

Clause 713 provides for an arrest warrant to be issued and executed if there are reasonable grounds that a child or young person, who is subject to a deferred sentence order, has breached the order or any obligations related to the order or the bail conditions.

After arrest, the police officer must bring the child or young person before the Childrens Court, or a magistrate.

Clause 714 — Deferred sentence orders — notice of review

If the Childrens Court proposed to review a deferred sentence order it must give a notice of the review, which includes reasons and a hearing time, to the child and young person and his or her parent or responsible person, and the Director of Public Prosecutions.

Clause 715 — Deferred sentence orders — review

Clause 715 enables the Childrens Court to review a deferred sentence order on it's own initiate or on application by proscribed persons.

Division 7.10.4 — Deferred sentence orders — change or cancellation

Clause 717 — Deferred sentence orders — Court's powers on review

Clause 717 set out what the Childrens Court can do having reviewed a deferred sentence order.

If the Childrens Court has reviewed a deferred sentence order decides not to cancel the order, the Childrens Court may warn the offender, vary the conditions of the order, or take no action.

Clause 718 — Deferred sentence orders — when amendments take effect

Clause 718 stipulates when a new order following a review takes effect.

The Childrens Court must give notice and a copy of the new order to the child or young person his or her parent or responsible person. However, clause 718(6) ensures that failure to do so does not invalidate the cancellation.

Clause 719 — Deferred sentence orders — when cancellation takes effect

If a deferred sentence order is cancelled it takes effect on the day it is cancelled.

The Childrens Court must give notice of the cancellation and a copy of the order to the child or young person his or her parent or responsible person. However, clause 719 (5) ensures that failure to do so does not invalidate the cancellation.

Clause 720 — Deferred sentence orders — effect of cancellation

If a deferred sentence order is cancelled, bail is automatically revoked on the day the order is cancelled and the Childrens Court must sentence the child or young person.

Part 7.11 – Other orders

Clause 721 — Meaning of fine order — Act

Clause 721 defines the meaning of fine order.

Clause 722 — Fine orders — making

Clause 722 (1) and (2) empowers the Childrens Court to make an order to pay a fine not greater than 50 penalty units (currently $5000) if a child or young person is convicted of an offence.

Clause 723 — Fine orders - notice

Clause 723 obliges the Childrens Court to provide a written notice of the fine order and a copy of the order to the child or young person and his or her parent or responsible person. However, if a Court does not succeed in doing this, subsection (2) ensures that the order still stands.

Clause 725 — Driver licence disqualification orders — motor vehicle theft

Offences involving theft of a motor vehicle or taking a motor vehicle without consent may attract a penalty of licence disqualification. Clause 725 (1) sets out the type of offences that hold this penalty if the child or young person is found guilty or convicted.

Clause 725 (2) authorises the Childrens Court to disqualify an offender's licence for a period set by the Court.

Clause 725 (3) clarifies that the exercise of the power to disqualify licences does not impede or vary any other power the Childrens Court may have in Territory law.

Clause 725 (4) defines certain terms in cause 725. 'Motor vehicle' means a car, car derivative or motorbike. 'Road transport legislation' is the sum of the following Acts: *Road Transport (General) Act 1999*; *Road Transport (Alcohol and Drugs) Act 1977*; *Road Transport (Dimensions and Mass) Act 1990*; *Road Transport (Driver Licensing) Act 1999*; *Road Transport (Public Passenger Services) Act 2001*; *Road Transport (Safety and Traffic Management) Act 1999*; *Road Transport (Vehicle Registration) Act 1999*; and any other Act or any regulations prescribed under the *Road Transport (General) Act 1999*.

Clause 726 — Driver licence disqualification orders — notice

Clause 726 obliges the Childrens Court to provide a written notice of the order and a copy of the order to the child or young person and his or her parent or responsible person. However, if a Court does not succeed in doing this, subsection (2) ensures that the order still stands.

Part 7.12 – Combination sentences

Part 7.12 provides for combination sentences. The Childrens Court will have the flexibility of imposing any number of orders as part of a whole sentence. For example, the Childrens Court may impose a sentence of full-time commitment with a fine, followed by a good behaviour order with a community service conditions.

Clause 727 — Application of part 7.12

Clause 727 stipulates that part 7.12 applies only if a child or young person is convicted of an offence.

Clause 728 — Combination sentences — offences punishable by imprisonment

Clause 728 (1) authorises the Childrens Court to impose a sentence that combines a number of orders.

Item (i) is included to contemplate any type of lawful penalty that has yet to be made or was not contemplated at the time the Bill was made.

Clause 728 (1) provides three examples of how combination sentences are intended to work.

Clause 728 (2) clarifies that combination sentences are intended to only involve orders that the relevant Court has jurisdiction to issue and are issued in a lawful way.

Clause 729— Combination sentences — offences punishable by fine

In the ACT there are a range of offence that hold a punishment of a fine but none of imprisonment. Akin to combination sentences that can be made for offences punishable by imprisonment, clause 729 (1) authorises combination sentences for offences punishable by fine.

Clause 729 (2) clarifies that combination sentences for fines are intended to only involve orders that the relevant Court has jurisdiction to issue and are issued in a lawful way.

Clause 730 — Combination sentences — start and end

Clause 730 provides three triggers for the Childrens Court to use when authorising the start and end dates of sentences and within combination sentences. The Childrens Court is able to name particular days or sentencing events, such as the beginning of parole, to determine when aspects of the sentence will be imposes. An example is provided with the clause.

Part 7.13 – Sentencing – Miscellaneous

Restitution

Australians have legal rights to take civil action to recover property and seek damages for a civil 'wrong' against a person's possession of goods (known in traditional legal language as 'torts' from a French word used in French Law for 'wrong'.) Likewise, Australians have legal rights to make claims on insurance policies covering loss or damage to goods.

Clause 732 clarifies that the Bill would not abolish or impede upon any civil cause of action a person may have to recover goods or property, or to recover damages, or claim insurance for loss or expense.

Clause 732 does not mean, however, that in civil proceedings a Court is barred from considering any amounts paid to a claimant under a restitution order.

Clause 733 stipulates that the Bill would not oust any ability for a Court, in an appeal, to consider a failure to comply with the Bill. Even though the Bill includes provisions that ensure a failure to comply with the Bill does not invalidate a sentence, the Court hearing the appeal would still have jurisdiction to consider the lack of compliance.

Chapter 8 Criminal matters – sentence administration

Part 8.1 Detention of young offenders generally

Clause 800 – Transporting young offenders to and from Court

Consistent with the existing Act clause 800 provides for the ability to transfer a young offender to and from Court. The existing provision provides that young people are not to be transported with adults 'unless impracticable to do so'. The existing provision is contrary to human rights principles and clause 800 prohibits the transportation of a young person with an adult.

Sub clause (3) also puts beyond doubt that a young person must not be placed in a room with an adult, for example in a Magistrates Court cell.

Clause 801 – Detaining young offenders at Court

There is some concern in relation to the existing provisions as to the lack of clarity around the authority to hold a young person in the Magistrates Court and Tribunal and Supreme Court cells. This provision clarifies any concerns and provides clear authority for hold a young offender in a Court cell, with the proviso that a young person must not be held with an adult. This is consistent with established human rights principles.

Clause 802 – Unlawful absence by young offender – extension of sentence

Clause 802 applies to all child and young offenders.

Clause 802 clarifies that any unlawful absence of an offender from a detention place is discounted from time served to complete a sentence of commitment.

Part 8.2 - Commitment

Division 8.2.1 – Commitment – start and end of sentences

Clause 803 — Start and end of sentences — general rule

Clause 803 (1) simply states that a sentence begins on the day it is imposed or when the person is arrested if they are at large. Clause 803 (2) corrals the relevant provisions of the Bill that impact upon the beginning or end of a sentence, or periods within a sentence.

Clause 803 (3) and (4) clarifies the beginning and end of a day. This is consistent with section 151 of the *Legislation Act 2001,* which provides for the reckoning of time.

Clause 803 (5) ensures that sentence of imprisonment for this clause does not include a suspended sentence, as a suspended sentence does not immediately execute the sentence.

Clause 804 — Start of sentence — backdated sentences

Clause 804 authorises the Childrens Court to backdate a sentence to a day named by the Court. If this power is used, the sentence will be regarded as having begun on the named day.

Clause 804(2) requires the Childrens Court to account for any period the offender has already been detained. Clause 804 (3) sets out the exceptions to time in custody that must be accounted for in clause 804 (2).

For simplicity clause 804 (4) enables the Childrens Court to consider all time in custody since the person was arrested, irrespective of the fact that the arrest and remand may be for various offences. Clause 804 (5) clarifies that the period of custody after arrest or remand for other offences is still relevant even though the person was not found guilty or convicted of the other offences.

Division 8.2.2—Effect and operation of committal orders

Clause 805 — Application of div 8.2.2

The note in clause 805 refers to the *Judiciary Act 1903*. Section 68(2) invests Courts of a State or Territory with federal jurisdiction akin to their domestic jurisdiction in relation to federal offences when the State or Territory Courts exercise jurisdiction of summary conviction, examination and commitment for trial on indictment or the trial and conviction on indictment.

Section 68(1) of the Judiciary Act applies State and Territory procedural law to federal prosecutions in state and territory Courts. This includes explicit references to bail, summary conviction etc. Section 79 states that the law of the relevant state or territory is binding on Courts exercising federal jurisdiction — unless Commonwealth exceptions apply.

The High Court has determined that 'conviction' includes the imposition of a sentence. Following *R v Loewenthal* (1974) 131 CLR 338, in *Putland v R* (2004) 204 ALR 455 Justices Gummow and Heydon affirmed that section 68(2) of the Judiciary Act 1903 gave a State or Territory:

. . . like jurisdiction with respect to persons charged with offences against the laws of the Commonwealth to that with respect to 'the trial and conviction on indictment' of persons charged with offences against the laws of the [state or territory]. The expression 'the trial and conviction on indictment' has to be read in the light of the primary meaning of the word 'conviction'. This denotes the judicial determination of a case by a judgement involving two matters, a finding of guilt or acceptance of a plea of guilty followed by sentence. [at 464]

Part 1B of the *Commonwealth Crimes Act 1914* sets out relevant exceptions, but also explicitly incorporates particular State and Territory sentencing and sentencing procedure laws.

Clause 806 — Effect of a committal order

Clause 806 provides the relevant Chief Executive under the administrative orders with the authority and obligation to take custody of the convicted offender and imprison the offender until the operation of the law authorises the offender's release.

The *Australian Capital Territory (Self-Government) Act 1988* (Cth) and the *Public Sector Management Act 1994* authorise the ACT Government of the day to allocate the administration of Territory Acts to Ministers and departments via the administrative orders.

Part 19.4 of the *Legislation Act 2001* enables the function allocated to the Chief Executive to be delegated.

Clause 807 — Warrant for commitment

Clause 807 provides for an official document, a warrant, to be issued by a committing authority, such as a Court. A warrant assists the Chief Executive to determine the validity and terms of the order to imprison an offender and represents a transmission of the offender into the Chief Executive's custody.

Any forms approved by the Court or another committing authority to be used as warrants for imprisonment must be used.

Clause 808 — Custody of sentenced offender

Clause 808 stipulates that it is the Chief Executive's obligation to take custody of the convicted offender under the terms of the foreshadowed Act.

Clause 809 — Commitment not affected by lack of proper warrant

Clause 809 ensures that if there is something incorrect with the warrant issued under clause 807, the commitment is not affected. If there is a discrepancy between the terms of the sentencing order and the warrant, the order prevails as it is the source of authority to imprison.

Division 8.2.3— Remand

Clause 814 — Application of part 8.3

Clause 814(1) groups a number of entities that have the authority to remand a person into the concept of a 'remanding authority'.

Clause 814 (2) clarifies that part 8.3 contemplates any periods of remand ordered by a remanding authority.

Clause 816 — Effect of remand order

Clause 816 provides the Chief Executive responsible for administering the foreshadowed Act to take custody of the young remanded person and keep that person in custody until the remanding authority orders the person back.

Clause 817 — Warrant for remand

To assist the Chief Executive responsible for remand to validate the remanding authority's order, clause 817 provides for the remanding authority to issue a warrant.

Clause 817 (2)(b) enables a person authorised by the remanding authority to sign a remand warrant. For example, a registrar authorised by a Court.

Clause 817 (3) enables the remanding authority to draw any particular considerations to the attention of the Chief Executive. The Chief Executive will be able to take these considerations into account when allocating the remandee to an appropriate facility. The Chief Executive's authority to make this decision, and the factors that might be taken into account, are set out in clause 818 below.

Clause 818 — Custody of remandee

Clause 818 qualifies that the Chief Executive must keep the young remandee in custody in accordance with the terms of the foreshadowed Act.

Clause 818 empowers the Chief Executive to allocate the young remandee to the appropriate facility.

Clause 819 — Remand not affected by want of proper warrant

Clause 819 ensures that the Chief Executive has the authority to carry out the remanding authority's order if there is a discrepancy between the order and the warrant.

Part 8.4 – Committal – miscellaneous

Clause 820 — Directions to escort officers

Clause 820 authorises the Chief Executive responsible for convicted offenders and remandees to direct escort officers to take custody of a person and take the person to a place. The escort officers are provided with the necessary power to give effect to the directions in clause 820 (2).

Consistent with clause 818 above, the Chief Executive and the escort officers directed by the Chief Executive, are authorised to move young remandees between facilities during the period of remand or commitment.

Clause 821 — Orders to bring young persons and young remandees before Court etc

Clause 821 clarifies that the government intends chapter 8 to be interpreted in a way that does not oust or impede any powers of a Court or tribunal to bring a person before the Court or tribunal.

In the context of clause 821 (1), clause 821 (2) affirms that the Chief Executive is legally bound to organise a person to be brought before a tribunal or Court, if the tribunal or Court orders it so. The Chief Executive is only obliged to do so if the person is in the custody of the Chief Executive and the tribunal or Court in question has the legal authority to make such an order.

Part 8.5 – Detention

Division 8.5.1 — General

Clause 822 — Application – pt 8.5

Clause 822 outlines the application of part 8.5

Clause 823 — Definitions for Act and Ch 8

Clause 823 provides the definitions for part 8.5.

'Release date' is the day that the term of a sentence of commitment ends.

Division 8.5.2 — Serving detention

Clause 824 — Detention obligations

Young persons and remandees are still subject to the law while detained: they are both protected by the law and obliged to abide by the law. Detention places do not exist in a legal vacuum.

Consistent with the rule of law applying to young persons and remandees, clause 824 sets out the legal obligations of young persons and remandees as a consequence of serving full-time detention.

Clause 824 (4) requires remandees to abide by the provisions of the Bill during their period of remand.

Clause 825 —Detention — Chief Executive directions

Clause 825 is an overarching power for the Chief Executive to give directions to a young detainee. The directions can be oral or in writing.

Clause 826 — Chief Executive to arrange detention

The Chief Executive will have the power to allocate a child or young person to an appropriate place of detention.

Clause 826 (2) ensures that directions regarding an allocation of a detainee is in writing.

Clause 827 — Guidelines — allocation of young detainees to detention places

Clause 827 enables the Chief Executive to make guidelines about the allocation of young detainees to detention places.

A guideline is a notifiable instrument, meaning that under the *Legislation Act 2001* it must be notified on the ACT's electronic legislation register in order to be lawful.

Clause 828 — Release at end of sentence

Clause 828 requires a young offender to be released on the release date at the end of their sentence. However, an offender can be released at any time on the day of release.

If releases do not occur on weekends, clause 828 (3) enables the Chief Executive to release the person on the last working day before the young person's release date.

Clause 829 — Offender not to be released if serving another sentence etc

Clause 829 stipulates that if a young person is subject to another sentence of commitment under ACT law, the young person must not be released from custody having completed the first sentence.

Clause 829 (2) ensures that any young person subject to a sentence of commitment , or otherwise required to be in custody, under the laws of another Australian jurisdiction must not be released upon the completion of their ACT sentence.

Part 8.6 – Young persons under good behaviour orders

Division 8.6.1 – Serving good behaviour orders generally

Clause 830 — Application – pt 8.6

Part 8.6 applies to good behaviour orders.

Clause 831 — Definitions for Part 8.6

Clause 831 provides definitions for Part 8.6.

An 'additional condition' can be:
(a) a condition for probation, community service, rehabilitation, or other appropriate condition, imposed by the Childrens Court when making a good behaviour order;
(b) a condition imposed as a consequence of division 8.6.7 or 8.6.6; and
(c) an amended condition.

A 'community service condition' is a requirement to perform community service for a stated number of hours as part of a good behaviour order.

Core conditions are set out in clause 831 below.

'Good behaviour obligations' are set out in clause 832 below.

'Good behaviour order' is the authority that the Court would have to impose non-custodial orders with conditions in lieu of a custodial sentence or in lieu of a conviction. Refer to clause 644.

The term 'interested person' is used throughout the chapter to refer to the people and entities listed.

'Rehabilitation condition' is a condition that the offender engages in a rehabilitation program as part of a good behaviour order.

Clause 832 — Good behaviour obligations

Clause 832 sets out the obligations the young person must comply with under a good behaviour order.

The young person must comply with the core conditions set out in the Bill and any additional conditions.

If the offender is subject to a non-association order or place restriction order, the offender is obliged to comply with the order.

Clause 833 — Good behaviour orders — core conditions

The core conditions of a good behaviour order evoke the existing requirement of a recognisance to abide by the law, both inside and outside the Territory. It is a condition that any charge against the young person must be reported to the Chief Executive.

The young person must report any changes to their home or work address, and corresponding phone numbers.

The young person must comply with any direction by the Chief Executive. It is implicit that the exercise of the Chief Executive's powers must be lawful.

If the offender is subject to a supervision provision, the offender must not leave the Territory for more than 24 hours, or another time prescribed in regulations — following the definition in clause 833 (2).

Clause 833 (1)(g) authorises the Executive to make regulations prescribing further conditions of good behaviour orders.

Clause 834 — Good behaviour order – end

Good behaviour orders end when the term of the order set by the Childrens Court is complete or if the order is discharged or cancelled.

Division 8.6.2 — Good behaviour orders — doing community service work

Subdivision 8.6.2.1 Community service work generally

Clause 835 – Definitions – Act and div 8.6.2.1

Clause 835 provides some definitions for use in the Act and division. A regulation can be made to prescribe community service work.

The term 'person involved' is used to encompass anyone, or any entity, that is a third party providing the opportunity for community service work.

Clause 836 – Protection from liability for person involved in community service work

Clause 836 provides third parties involved in community service with protection from civil liability for a young person's actions during community service. Nor is a third party involved in community service liable to the young person in relation to the community service work.

Clause 836 (3) stipulates that any liability arising from a civil action by a young person, or a person affected by the young person's actions during community service, lies with the ACT.

Clause 836 (4) clarifies that if the work was not approved or the conduct of the third party was intended to injure, then the protection does not apply.

Clause 837— Community service work not to displace employees

Clause 837 ensures that community service work is not abused as a means to substitute regular paid employment for free labour. The Chief Executive must not allow the progress of community service work if the Chief Executive believes the young person would be taking the place of a regular employee.

Clause 838 — No employment contract for community service work

In *Pullen v Prison Commissioners [1957]* 3 All ER 470, Lord Goddard, Chief Justice of the Queen's Bench Court of the United Kingdom, determined that a prison workshop was not a factory for the purposes of the *Factories Act 1937*. The *Factories Act 1937* was an antecedent to modern workers compensation legislation.

Lord Goddard, stated that the *Factories Act 1937* was designed to place obligations upon employers of labour in factories and other places of people working under contract and not to prisoners employed on labour as part of penal discipline.

The Chief Justice noted that the relationship was not an employment relationship. Prisoners were obliged to work as a consequence of their sentence. A prison was also not a workplace for people imprisoned there. The general line of this case was followed and applied to other forms of sentence in: *Hall v Whatmore [1961*] VR 225; *Morgan v Attorney-General [1965]* NZLR 134; *Zappia v Department of Correctional Services (SA) (1993)* WCATR 30; *Palmer v The Salvation Army*, NSW Compensation Court, No. 6224/95, (unreported) 22 February 1996; *Helmers v Dept of Corrective Services* (1997) 14 NSWCCR 256; and *Calin v Dept of Corrective Services* (1997) 14 NSWCCR 559.

Clause 838 explicitly stipulates that work under a sentence, including community service, is not a contract of employment or an employment relationship in any form.

Clause 839— Community service work — occupational health and safety

Given that work under an order is not an employment relationship, the Government is aware that offenders engaged in community service work would not attract the protections of health and safety afforded to employees.

To ensure offenders engaged in community service work are able to work safely, the clause requires the Chief Executive to make sure that a work place complies with the *Occupational Health and Safety Act 1989*.

Clause 839 does not directly apply the *Occupational Health and Safety Act 1989* to a community service workplace. However, clause 838 (3) provides the Executive with a power to apply relevant parts of the *Occupational Health and Safety Act 1989* to community service.

Subdivision 8.6.2.2 Doing community service work

Clause 840 — Application – sdiv 8.6.2.2

Subdivision 8.6.2.2 applies to community service conditions of good behaviour orders.

Clause 841 — Definitions – sdiv 8.6.2.2

Clause 841 provides the definitions for the division.

Clause 842 — Compliance with community service condition

To remove any doubt, clause 842 stipulates that to comply with a community service condition the offender must comply with division 8.6.2.2 of this Bill.

Clause 843 — Community service work — Chief Executive directions

Clause 843 provides the Chief Executive with the authority to give the young offender directions about the instances of work the offender must do to fulfil the obligation to do community service work.

The direction can be in writing or given orally. Flexibility in this regard is necessary as the frequency, type and availability of community service varies. In most cases it is not logistically possible to schedule community service well in advance. It is envisaged that most offenders would be notified by phone of the requirements the day before work.

In clause 843 (2) the young offender must be told what work is to be done, where the offender must report, who the work supervisor is and who the supervisor is.

Clause 843 (2) distinguishes between a work supervisor and a reporting officer. Community service relies heavily on the availability of third parties (volunteer organisations, community associations, non-government organisations etc) to facilitate community service. In each instance of work, clause 843 envisages that a work supervisor might be a person associated with a third party who would direct what work should be done. The reporting officer would be the

relevant officer overseeing the community service and if necessary supervising young offender's compliance with community service work.

Under clause 843 (4) the community service work must be scheduled around school hours.

Clause 844 — Community service work — failure to report etc

Clause 844 (1) stipulates that the young offender must report to the place of work with the appropriate attire etc as required and do the work required.

Clause 844 (2) authorises the Chief Executive to direct the young offender to leave the place, if the offender is failing to do the work as directed.

Clause 846 — Community service work — maximum daily hours

Clause 846 prohibits any more than eight hours of community service work per day. The prohibition applies to the Chief Executive and the young offender alike. A young offender cannot be credited with more than eight hours of work, even if the offender upon their own volition works beyond the eight hours for the day. This prohibition does not prevent less than eight hours work being completed in a day.

Clause 846 (2) stipulates that only actual work time and approved breaks can be counted towards community service. 846 (2)(b) provides a simple way of calculating the value of any portion of an hour's work: any portion is counted as one hour.

Clause 847 — Community service work — health disclosures

Clause 847 obliges the young offender to tell the Chief Executive about any health conditions that affects the ability of the offender to work safely.

If the offender fails to do this when they could have reasonably known about the condition, the offender could be in breach of their obligations. However, if the young offender could not have reasonably known about the condition or the impact of the condition upon work, the offender would not be in breach of their obligations.

Clause 848— Reports by entities

As noted above community service relies heavily on third parties. Clause 848 ensures that any agreement with a third party, or indeed another entity of the Territory, must include a requirement to report to the Chief Executive about offenders' participation in work.

Division 8.6.3 – Good behaviour orders – complying with rehabilitation conditions

Clause 849 — Application of division 8.6.3

Division 8.6.3 applies to any condition of good behaviour orders that includes a rehabilitation condition.

Clause 850 — Compliance with rehabilitation condition

To remove any doubt, clause 850 stipulates that to comply with a rehabilitation condition, the offender must comply with division 8.6.3 of this Bill.

Clause 851 — Rehabilitation programs — Chief Executive directions
Clause 851 authorises the Chief Executive to give the young offender directions about the rehabilitation program the offender must attend.

In clause 851 (2) the young offender must be told what program to attend, where to attend the program, when to attend the program and who the offender must report to.

Clause 852 — Reports by rehabilitation program providers

Clause 852 ensures that any agreement with a provider of rehabilitation programs must include a requirement to report to the Chief Executive about young offenders' participation in the program.

Division 8.6.4 — Good behaviour orders— complying with supervision condition

Clause 853 — Authorised officers to report breach of good behaviour obligations
If an authorised person reasonably believes that a young offender is in breach of the good behaviour obligations, the officer must report the alleged breach to the relevant Court. The obligations are discussed above.

Clause 854 — Good behaviour orders —good behaviour obligations breached
Clause 854 provides police with an explicit authority to arrest a person, without warrant, on reasonable grounds that the person has breached their good behaviour obligations.

Following arrest, clause 854 (3) requires the police officer to bring the person before the Childrens Court or a magistrate if the Childrens Court is not sitting. If the person is taken before a Court the person may apply for bail under the *Bail Act 1992*.

Clause 855 — Good behaviour orders — warrants for breach of good behaviour obligations etc
Clause 855 authorises the issue of a warrant to arrest a young offender suspected of breaching their good behaviour obligations, or it is suspected that the young person will breach their obligations.

The warrant must contain the details in clause 855 (2).

Following arrest, clause 855 (3) requires the police officer to bring the person before the Childrens Court or a magistrate if the Childrens Court is not sitting. If the young person is taken before a Court the young person may apply for bail under the *Bail Act 1*992.

Clause 856 — Good behaviour — summons to attend Court

Clause 856 provides for a summons to be issued to a young offender to secure the young offender's attendance at Court in relation to a breach of good behaviour obligations.

Division 8.6.5 — Good behaviour order – breach

Clause 857 — Offence committed while under good behaviour order

Committing an offence while on a good behaviour order is a breach of the good behaviour obligations. Clause 857 (1) and (2) specifies which forum must address the breach of the good behaviour order if a particular Court finds a young person subject to a good behaviour order guilty of another offence.

Clause 857 empowers the Magistrates Court to remand an offender who is to appear before the Childrens Court for adjudication on the breach of good behaviour. Under these circumstances the offender may apply for bail under the *Bail Act 1992*.

Clause 858 — Court powers — breach of good behaviour obligations

Clause 858 provides Childrens Court with the powers to impose appropriate sanctions or make appropriate directions if the Court finds the young offender has breached their good behaviour obligations.

Clause 858 (2) enables the Childrens Court to take no action, to warn the offender, to direct the Chief Executive to supervise the offender in a particular way, to change or add a condition to the order, to enforce any security made as part of the order or cancel the order.

Cancelling the order requires the Childrens Court to re-sentence the offender under clause 858 (3). The terms of the Crimes (Sentencing) Act would be enlivened by clause and the Court would determine the sentence that should be applied to the offender.
Clause 858(5) is a direction to clause 862, which sets out the limitations in relation to amending orders.

Clause 858(6) clarifies that a re-sentenced young offender retains any rights of appeal.

Clause 859— Cancellation of good behaviour order made as non-conviction order

In *Properjohn v Gaughan* [1998] SCACT 26 No. SCA 100 of 1997, Justice Gallop discussed non-conviction orders in reference to the High Court's judgement in *Griffiths v The Queen* 137 CLR 293. Justice Gallop concluded that a non-conviction order is an alternative to conviction and punishment.

When made in conjunction with a non-conviction order, a good behaviour order cannot include a punishment, as discussed by Justice Gallop in Properjohn. However, the person found guilty can agree to abide by a good behaviour order and conditions of the order — such as probation and rehabilitation, fulfilling a reparation order etc — knowing that a breach of the order may result in a sentence. (A reparation order is not a sentence in the context of a non-conviction order, as reparation involves returning property unlawfully taken or making up for a loss as a direct consequence of an offence.)

A non-conviction order is, therefore, not a sentence. However, if a young person breaches any conditions set by the non-conviction order the Childrens Court is still empowered to bring the person before the Childrens Court and sentence the person for the offence in question.

If a young person's good behaviour order was made as a non-conviction order, and the order is cancelled, clause 859 empowers the Court to convict and sentence the offender for the original offence.

Clause 860 — Cancellation of good behaviour order with suspended sentence order

A suspended sentence enables the Childrens Court to sentence an offender to a term of imprisonment and then suspend the execution of that imprisonment on the basis that the offender complies with conditions set by the Court. If the offender breaches the good behaviour order made in conjunction with a suspended sentence, clause 860 provides the Court with the authority to execute the sentence or re-sentence the offender.
Clause 860 (5) clarifies that a re-sentenced young offender retains any rights of appeal.

Division 8.6.6 — Good behaviour orders — amendment and discharge

Clause 861 — Court's powers — amendment or discharge of good behaviour order

Division 8.6.6 contemplates alteration or discharge of good behaviour orders under circumstances other than a Court's consideration and determination of an alleged breach of good behaviour obligations.

Clause 861 empowers the Childrens Court to amend or discharge a good behaviour order. The Childrens Court can initiate the amendment or discharge, or the offender, the Chief Executive or the Director of Public Prosecutions may apply to amend or discharge the order.

Clause 861 (4) is a direction to clause 862 (below), which sets out the limitations in relation to amending orders.

Clause 862 — Good Behaviour Order — Limits on amendment or discharge

Clause 862 sets out the limitations upon amending good behaviour orders.

In (1) the Childrens Court cannot increase the number of hours of community service work under a good behaviour order, nor can the Court extend a good behaviour order beyond a term of three years.

In (2) the Childrens Court cannot amend a core condition of this Bill. Likewise, in (3) the Childrens Court cannot amend an order in a way that is inconsistent with a condition set by the Supreme Court.

Clause 862 (4) is an exception to 862 (3) where the Childrens Court needs to engage an amendment of a good behaviour order to carry out its responsibilities in relation to a proceeding before it. For example, if the Childrens Court is hearing a protection order application for a full order against an offender subject to a good behaviour order made by the Supreme Court, the Childrens Court may alter the good behaviour order to give effect to the protection order.

Clause 862(5) ensures that the Childrens Court may not discharge an order made or amended by the Supreme Court.

Division 8.6.7 — Good behaviour — miscellaneous

Clause 863 — Good behaviour proceedings — rights of interested people

An 'interested person', as defined in clause 831 above, includes the offender, any sureties under the good behaviour order, the Chief Executive and the Director of Public Prosecutions. These people have a right to appear before the Childrens Court in proceedings to address breaches, discharge, and amendment of good behaviour orders.

These parties must also be given copies of any decision, order or direction by the Court.

Clause 864 — Good Behaviour Order — Court power after end

Clause 864 ensures that the Childrens Court retains the power to address a matter that arose during the term of a good behaviour order, even though the order had finished when the Childrens Court dealt with the matter.

Part 8.8 — Victim and young offender information

Clause 867 — Definitions for part 8.8

Clause 867 provides definitions for terms used in part 8.8.

Clause 868 — Meaning of victim

Clause 868 provides a definition for victim. A victim is a person who suffers harm because of the conduct of the offence committed by the young offender. If the victim dies as a consequence of the offence, the people who are closest to the victim are also victims.

Clause 869 — Victims register

Throughout this Bill there are references to registered victims. In the main these references are about obtaining victims' views during relevant deliberations about an offender's release or informing registered victims about the release of offenders or other relevant matters.

Clause 869 obliges the Chief Executive responsible for administering the foreshadowed Act to establish a victim's register.

If a victim, or an advocate on the victim's behalf, requests to be registered on the register, the Chief Executive must register that person.

Once registered the victim must be told about the rights they have to information about offenders under clause 870.

Clause 870 — Disclosures to registered victims about sentenced offenders

Clause 870 provides explicit authority for the Chief Executive to disclose information about sentenced offenders to victims of the young offender in question. The Chief Executive must be satisfied that the disclosure is appropriate.

Examples of disclosures are provided to remove any doubt.

Clause 870 (2) ensures that parents of victims who are under 15 years-old are privy to the information that can be disclosed.

Part 8.9 – Remissions and pardons

The Act currently enables the Chief Executive to reduce the period of a young person's committal to an institution (place of detention) by up to one third of the period. The Human Rights Commissioner's *Human Rights Audit of Quamby* recommended that an independent body should deal with decisions concerning remissions.

To increase transparency and accountability in decisions regarding remissions, this part:

- re-enacts section 127 to allow the chief executive to remit up to one third of a period of commitment.
- establishes a remissions advisory board to provide advice to the chief executive about whether a period of commitment should be remitted and if so, by how much. The board is constituted of 3 members appointed by the Minister with skills and experience relevant to the health and welfare of children and young people.
- requires the Chief Executive, in making a decision about a young person's remissions, to consider the recommendations of the board and if the recommendations are not accepted, the Chief Executive must provide written reasons to the board, the affected child or young person, their legal representative (if any) and a person with parental responsibility.

Part 8.9 re-makes the existing provisions in the *Crimes Act 1900* that enable the Executive to grant a remission of a sentence of commitment, a fine or other penalty and a forfeiture of property.

Part 8.9 also re-makes the existing provision in the *Crimes Act 1900* that empowers the Executive to grant pardons. A pardon discharges a person from the consequences of a conviction or finding of guilt but does not quash the conviction or finding of guilt. The record of conviction or finding of guilt would remain.

Chapter 9 Criminal matters —transfers

Part 9.1 Transfers within ACT

Division 9.1.1 Important concepts—pt 9.1

This divisions sets out the authority of the Chief Executive to transfer the children and young people who are in the Chief Executive's custody or detained by the Chief Executive.

Clause 900 sets out definitions for this part.

Clause 901 establishes the authority for the Chief Executive to direct that a young detainee be transferred from one place to another. The transfer direction can only be made if the young detainee agrees or the direction specifically authorised under this part. A direction is sufficient authority for any person authorised by the Chief Executive to take a young person to the authorised place

Clause 902 authorises the Chief Executive to give directions to an escort officer in relation to a young detainee, including directions to take them to custody or another place.

Clause 903 requires the Chief Executive to arrange for a child or young person (in the Chief Executive's custody or young detainee), to be brought before a Court or other an entity in accordance with a direction or order of the Court or other entity. This is does not limit any other power of the Court or other entity.

Division 9.1.2 Escorting young detainees

Clause 904 provides that this division does not limit any other provision relating to the escorting of young detainees under a territory law or a law of the Commonwealth or a State.

Clause 905 authorises a police officer to require that an escort officer bring an arrested child (released on bail and in police custody) or young person to a Court or tribunal. This clause further allows the escort officer to take the child or young person into custody and arrange for their detention until they are brought before a Court or tribunal.

Clause 906 sets out requirements on the escort officer during proceedings : to ensure the safe custody and welfare of the child or young person for the purposes of the proceeding; and to ensure that the child or young person does not obstruct or
hinder the proceeding.

Clause 907 authorises the Chief Executive to make escort officers available to take a child or young person into custody, arrange for a child or young person to be kept in custody; or transfer or otherwise deal with a child or young person. A Court order or direction addressed to all escorts is taken to be addressed to each escort; and may be executed by any escort.

Clause 908 clarifies that for this part, a child or young person in the custody of an escort officer is also in the Chief Executive's custody and in detention.

Division 9.1.3 Transfers between detention places

This division continues to have the effect of section 120 of the Act and allows for the transfer between ACT detention places for young people by:

- Allowing for transfer applications from a young detainee or person responsible for them.
- Allowing for transfers which the Chief Executive believes is appropriate having regards to all the circumstances, including those listed at 909 (a) to (d).
- In making a decision about transfer, the Chief Executive can ask the detainee or person responsible for them for necessary information and the Chief Executive may refuse the application if the information is not supplied.
- Allowing the Chief Executive to make a transfer direction if the young persons behaviour at the detention place causes risk to the safety, health and welfare of others at the place.

Division 9.1.4 Transfers to health facilities

This division sets out a way of providing health care in an ACT Health facility while accounting for the need to continue the secure custody of a young detainee as follows:

- The Chief Executive has the power to transfer a detainee to a health facility upon the advice of a health professional.
- In transferring a detainee, escort officers may be directed to escort the detainee to the facility.
- A detainee may only be discharged from the health facility if the health care provider believes the person is fit enough to be discharged, or circumstances warrant the Chief Executive directing the person be removed.
- All of the matters in the clause are entitlements and not to be regarded as privileges for the purposes of disciplinary action.

Division 9.1.5 Transfers of young offenders who become adults

There are instances where a detainee has attained the age of 18 and it would be more appropriate for them to serve their remaining sentence in an adult facility, for example where their behaviour places at risk the welfare or safety of others within the centre, including children as young as 10 years. It is necessary to ensure there are mechanisms that allow such a person to be transferred to a more appropriate facility.

There are human rights implications once a detainee has attained the age of 18 years. The *Human Rights Act 2004* provides that an accused child must be segregated from accused adults and international standards provide that regardless of status (remand or sentenced), juvenile detainees should be separated from adult detainees.

Division 9.1.5 establishes a new scheme for the transfer of young offenders who are 18 years and over to adult correctional centres as follows:

Clause 913 provides the Chief Executive (on own initiative or on application to the Chief Executive) with the power to direct the transfer of adult young offenders to an adult correctional centre. When considering whether it is appropriate to direct a transfer, the Chief Executive should consider: the young offender's maturity, apparent mental capacity, and vulnerability; the availability of appropriate services or programs, whether the young offender is more likely to be rehabilitated in the detention place or correctional centre; and the behaviour of the young offender, particularly if it presents a risk to the safety of young detainees and staff at the detention place.

Clause 914 provides that a young person serving a sentence of commitment cannot continue to serve that sentence in an detention place once they reach 21 years of age. The Chief Executive is required to make the necessary directions to transfer the young person to the correctional centre. Clause 915 enables the Chief Executive to direct an escort officer to escort the young offender to the correctional centre and once there, the young offender must be dealt with as an adult.

Part 9.2 Interstate transfers

Division 9.2.1 Interstate transfer generally

Clause 916 sets out definitions for this part and continues to have the effect of section 132 of the Act.

Clause 917 continues to have the effect of section 133 of the Act and provides the authority for the Minister to enter an agreement with a Minister of a State providing generally for the transfer of young detainees from or to the ACT; or through the ACT from a State to another State.

Clause 918 continues to have the effect of section 134 of the Act and provides for the interstate transfer of a particular young detainee, if a transfer agreement under 917 is in force.

Clause 919 continues to have the effect of section 135 of the Act and provides for the interstate transfer of a young detainee. This can be at the request of the young detainees or a person responsible for the young detainee, in which case the Chief Executive would make a decision having regard to all the relevant circumstances. A transfer can also be arranged if the Chief Executive reasonably believes that the behaviour of the young offender in the institution places at risk the safety, health or welfare of other people in the detention place.

Clause 920 continues to have the effect of section 136 of the Act and provides that an interstate transfer arrangement can only be made if there are adequate facilities to deal with the detainee as per the transfer arrangement.

Clause 921 continues to have the effect of section 137 of the Act and outlines provisions to be contained in each transfer arrangement.

Clause 922 continues to have the effect of section 138 of the Act and outlines the timeframe and entities who should be given notice about the transfer arrangement.

Clause 923 continues to have the effect of section 139 of the Act and provides for the temporary control and transfer of the young detainee by a transfer escort.

Clause 924 continues to have the effect of part of section 140 of the Act and provides for the temporary custody of a young person in a detention place before they are delivered to the transfer escort. Currently the Act allows for temporary custody within a remand centre, however the Bill limits this to a detention place, in order to avoid the placement of children and young people with adults.

Clause 925 continues to have the effect of section 141 of the Act and provides for the temporary custody of a young detainee who is being transferred from another state to the ACT.

Clause 926 continues to have the effect of section 142 of the Act and provides an offence if the young person escapes from temporary custody of while they are being transferred.

Clause 927 provides an overarching power for the Chief Executive to give directions to a person under the Chief Executive's custody. The direction can be verbal or written. The direction can be to one detainee, or all detainees. The items in (2) provide for the most likely rationale that would inform a direction from the Chief Executive. However, the power is not limited to the three purposes in (a), (b) and (c).

Clause 928 enables the Chief Executive to issue an evidentiary certificate addressing any of the matters in 928(1)(a) to (k). The certificate is taken to be evidence of the matters stated in the certificate. Clause 928(3) enables a certificate setting out the results of an analysis performed for the purposes of this Bill and signed by an analyst to be taken as evidence of the analysis and the facts drawn from the analysis.

Division 9.2.2 Transfer of sentence or order

This division continues to have the effect of division 6.3.2 in the Act.

Clause 929 sets out the meaning of sentence for this division. The Bill clarifies that this related to community based sentences.

Clause 930 continues to have the effect of section 143 of the Act and provides for the transfer of sentences or orders that apply to young detainees transferred from another State to the ACT. The sentence or order ceases to have effect in the ACT except for appeals or reviews of a conviction, judgment, sentence or order made, imposed or fixed by a Territory Court; and a period of detention served or a reduction of the period of detention granted before that time; anything done before that time in carrying out the order; and allowing for a remittance of money that is or has been paid in discharge or partial discharge of the sentence or order.
Clause 931 continues to have the effect of section 144 of the Act and provides for the transfer of sentences and orders that apply to young detainees transferred from another State to the ACT.

Division 9.2.3 Transit through ACT

Clause 932 continues to have the effect of section 145(1) of the Act and enables the authorisation of a person in a detention place to receive detainees transferred from another state.

Clause 933 continues to have the effect of section 145(2) of the Act and allows a person in charge of a detention place to temporarily detain a detainee who is temporarily brought into the ACT, at the request of an officer escorting the detainee.

Clause 934 enables young detainees who escape temporary control of a transfer escort (while being transferred through the ACT from a State to another State) to be apprehended by a person without a warrant.

Clause 935 enables young detainees who escape (or attempt to escape) temporary control of a transfer escort (while being transferred through the ACT from a State to another State) to be before a magistrate who may, by warrant, order the young detainee to be detained in temporary control at a detention place.

Clause 936 continues to have the effect of section 146(5)-(8) of the Act and provides that a young detainee who is apprehended under a warrant under clause 935 must be brought before a Court who can order the transfer of the detainee to the sending State and their temporary control by an escort officer.

Clause 937 continues to have the effect of section 147 of the Act and provides for the granting of search warrants for young detainees who escape temporary custody while being transferred through the ACT from a State to another State.

Division 9.2.4 Revocation of transfer orders

Clause 938 continues to have the effect of section 148 of the Act and provides for the revocation of a transfer order if the detainee has, while being transferred interstate, committed the offence of escaping or another offence.

Clause 939 continues to have the effect of section 149 of the Act and provides for the revocation of a transfer order by the Chief Executive at any time before the young detainee is delivered in the receiving State into temporary control. If revoked, the Chief Executive is able to make a further transfer arrangement with the receiving State for the return of the young detainee to the ACT.

Clause 940 continues to have the effect of section 150 of the Act and provides that the Chief Executive, in forming an opinion or exercising a discretion under this part, may be informed as they considers appropriate; and consider reports from those listed.

Chapter 10 Criminal matters – detention places

Part 10.1 Objects, principles and interpretation

This part sets out the following:

Clause 1000 sets out who the chapter applies to - a child or young person remanded into custody; a child or young person committed to a detention place; and any other child or young person required to be held in custody or detention under a territory law or a law of the Commonwealth or a State.

Clause 1001 sets out definitions for the chapter.

The Bill introduces a new object and set of principles to guide decision making about young detainees at clause 1002. These were necessary to differentiate from the principles that apply to the sentencing of young people.

Clauses 1003 and 1004 provides that the Bill's functions in relation to young detainees and remandees are to be implemented in a manner that upholds human rights. Consistent with section 28 of the *Human Rights Act 2004*, the Bill sets out reasonable limitations upon a young detainee's human rights.

Clause 1005 establishes minimum living conditions that must apply at the detention place.

Clauses 1006, 1007 and 1008 sets out further minimum rights for young people – the right to information about the administration of the place, the right to education and training and the right to plans which support the young detainees transition to community.

Part 10.2 Administration

The Bill is drafted with the intent of clearly setting the boundaries of any power allocated to the Territory's youth detention centre. This aims to assist any Court reviewing a decision to ascertain the extent of the powers the Assembly intended to give the Minister, the Chief Executive or youth detention officers.

By clearly setting out the limitations of any discretions to be exercised by youth detention officers, the Bill aims to leave no doubt as to what is intended to be lawful, and what is not.

In her review of Quamby Youth Detention Centre, the ACT Human Rights Commissioner noted that there were important matters that were not in the substance of the *Children and Young People Act 1999* relating to detention, for example, the use of force. The Commissioner wrote that the substance of matters like these should be in the principal legislation, not in regulations or standing orders.

This part outlines administration for the detention place, including:

Clause 1009 enables the Minister to declare a place to be a detention place by Notifiable Instrument. The examples provided are to demonstrate that the declaration may be made in broad terms and can include land around a building. There is a new requirement that the detention place be a non-smoking area, with the Bill providing that it is considered a public place under the *Smoking (Prohibition in Enclosed Public Spaces) Act 2003*.

Rather than allocate various open-ended powers to standing orders, as is currently the case, the Bill provides a context for how the powers are to be exercised. Consequently the Bill at Clause 1010 authorises the Chief Executive to make youth detention policies and operating procedures that are within the boundaries set by the Bill. These documents together with the Act and records of disciplinary hearings, must be available for inspection by young detainees at clause 1012. Clause 1011 enables those policies and procedures that relate to the security of the detention place, or may endanger public safety etc, to be exempt from notification or availability for perusal. Clause 1011(2) ensures that the documents are still open to accountability by requiring them to be available for inspection by the officials listed.

Clause 1013 provides for the Chief Executive to give directions to a young detainee in relation to any matter.

Clause 1014 – enables the Chief Executive to declare prohibited areas in the detention place. The Chief Executive must ensure that each detainee at the detention place is told about the prohibited area promptly after the area is declared.

Clause 1015 authorises the Chief Executive to declare an emergency (for a maximum of three days) at a youth detention centre on the basis of a threat to the order or security of a facility, or the safety of anyone at the centre or elsewhere. An emergency can be declared for a maximum of three days however the Chief Executive can make any number of subsequent emergency declarations in relation to the same emergency.

A declaration of emergency triggers the emergency powers in clause 1016. These powers further restrict the young detainee's liberty and rights to communicate. Consequently, they can only be exercised if an emergency is declared and the action taken is necessary and reasonable. During circumstances of an emergency the power in clause 1016(1)(d) enables the Chief Executive to delegate powers under the Act to police and other public servants.

Clauses 1017 and 1018 enable the Chief Executive to ask the chief police officer or another Chief Executive for assistance in relation to the exercise of functions under this chapter and they must comply with the request.

Part 10.3 Inspection at detention places

Rule 55 of the United Nations *Standard Minimum Rules for the Treatment of Prisoners* (1957) states that:

> *There shall be a regular inspection of penal institutions and services by qualified and experienced inspectors appointed by a competent authority. Their task shall be in particular to ensure that these institutions are administered in accordance with existing laws and regulations and with a view to bringing about the objectives of penal and correctional services.*

This part outlines that certain persons (judge, magistrate, member of the Legislative Assembly, human rights commissioner, ombudsman) may, at any reasonable time, enter and inspect a detention place or a place outside a detention place where a detainee is, or has been, directed to work or participate in an activity. This would include, for example, a community service program.

Part 10.4 Admission to detention places

This part outlines admission processes for a young person to a detention place, including:

The meaning of admission is set out at clause 1020.

Clause 1021 provides that admission must not occur unless the detention is authorised by a warrant or other authority and the Chief Executive must be given the warrant or other authority before a young person is admitted to a detention place.

Clause 1022 requires the Chief Executive to take reasonable steps to tell a person with parental responsibility about the young person's admission and any future Court appearance. If the Chief Executive has parental responsibility, the Chief Executive must take reasonable steps to inform another person with parental responsibility.

Clause 1023 enables the Chief Executive to take identifying material from a detainee, including: prints of the young detainee's hands or fingers; a photograph or video recording; a buccal swab or saliva sample; anything else prescribed by regulation.

Clause 1024 requires the Chief Executive to take reasonable steps to explain the following to a young detainee:

- The detainee's entitlements and obligations under the Act;
- The case management plan arrangements;
- The role of Official Visitors;
- The procedures for seeking information and making complaints to Official Visitors;
- The areas of the detention place which are prohibited.

Principle 24 of the United Nation's *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (1988) states:

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after [their] admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

Clauses 1025 and 1026 provide that the Chief Executive must ensure that each detainee admitted to a youth detention centre is assessed for any risks and needs associated with the detainee's health, safety or security. The Chief Executive must respond to any risks or needs identified. The health assessments must occur within 24 hours of a detainee's admission; must be made by a doctor or nurse, and must include an assessment of the detainee's risk of self-harm (which can be made by a health professional other than the doctor or nurse).

Clause 1027 enables the Chief Executive to arrange a security classification for a detainee on or after admission.

Clause 1028 requires the Chief Executive to prepare a case management plan for a detainee as soon as practicable after admission.

Clause 1029 requires the Chief Executive to ensure that details of each detainee admitted to the detention place are entered in the register on admission.

Clause 1030 entitles a detainee to make one telephone call on admission to a detention place.

Clause 1031 provides guidance to the Chief Executive about making placement decisions within a youth detention place.

Part 10.5 Living conditions at detention places

This part establishes minimum living conditions for detainees, including food and drink, clothing, personal hygiene, sleeping areas, access to open air and exercise, telephone calls, mail, news and education, visits by family members, visits by accredited people, health care, and religious observance.

Part 10.6 Management and security

The prime operational task of a youth detention centre is to provide secure custody of young people committed to detention. The management of that custody must be humane and attend to the common human needs of detainees.

Division 10.6.1 Management and security - general

This division sets out general powers and obligations on the Chief Executive to manage secure custody.

Clause 1046 provides an overarching power for the Chief Executive to give directions to a detainee.

At clause 1047, an obligation on the Chief Executive to keep a register of detainees to ensure the lawfulness of a person's detention and enable continuity of management by providing a record of the person's identity, relevant health matters, case management plans, and any specific needs of the detainee.

Clause 1048 provides an explicit authority for the Chief Executive administering the Act to require health information from other Chief Executives and an obligation on the relevant Chief Executive to promptly comply with that request. It is intended that this clause will provide lawful authority for health agencies to provide health records about detainees without having to decide compliance with the privacy principles in the *Health Records (Privacy and Access) Act 1997*.

Clause 1049 provides the Chief Executive with authority to approve the use of a medicine, other than prescription medicine, and the Chief Executive must record details of the approval in the register. It is intended that this would include medicines bought over the counter.

Clause 1050 obliges the Chief Executive to develop a case management plan for each young detainee (not remandees). The rehabilitation of young offenders committed to a detention place needs to start at the earliest point in their sentence. It is intended that case management plans for young detainees will be an important part of their rehabilitation and preparation for release. The plans incorporate issues relevant to the management of the young detainee as well as long-term rehabilitation goals.

The sexual identity of a young person has a critical impact upon the young person's placement within the detention place and how intimate searches are conducted. Clause 1051 sets out how the sexual identity of a transgender or intersex young detainee should be ascertained. The

clause provides a decision-making choice for the detainee and the Chief Executive if the detainee does not or refuses to nominate an identity.

Clause 1052 sets out factors that must be considered when deciding the class of security risk the detainee poses. The factors contemplate the risk the young person may pose within the youth detention centre, as well as the risk they pose if they escape. The security measures imposed must be only that which is necessary.

Clause 1053 provides for the detainees property to be stored at a detention centre. The property is subject to any conditions set by the Chief Executive. Property may be secured away from the detainee, or the Chief Executive may conditionally allow the property to be in the possession of the detainee.

Clause 1054 requires the Chief Executive to establish trust accounts to deposit money belonging to detainees. Any fines incurred as a consequence of discipline can be deducted from a detainee's account. A regulation may be made about the management of trust accounts.

Division 10.6.2 Monitoring

Section 12 of the *Human Rights Act 2004*, provides that everyone has the right not to have their privacy, family, home or correspondence interfered with unlawfully or arbitrarily.

A consequence of lawful detention is the inevitable displacement of that right to a degree necessary to secure the person in custody and run a safe detention place.

Monitoring the activities and whereabouts of detainees is a way to prevent violence, possession of drugs or other contraband and escape.

Clause 1055 displaces the *Listening Devices Act 1992*.

Clause 1056 sets out the factors the Chief Executive must balance when establishing systems to monitor detainees, or exercising the powers to monitor individual detainees. This clause requires the application of the human rights principle of proportionality.

Clause 1057 requires the Chief Executive to make people who enter a detention centre aware that the person may be monitored.

Clause 1058 provides the authority for the Chief Executive to monitor any part, any activity and movement of anyone at the detention place.

Clause 1059 provides the authority for the Chief Executive to monitor detainee's phone calls, and other electronic communication, to detect for the matters mentioned above and for any other criminal activity. The parties to a communication must be informed that the communication is open to monitoring. If evidence of a criminal offence is gleaned from monitoring, the police must be advised. Investigations of offences are a function of the police. The Chief Executive is not authorised to monitor protected communication with certain listed persons acting in a professional capacity.

Clause 1060 provides the authority for the Chief Executive to monitor open and inspect a detainee's mail. Protected mail may be opened in the presence of a detainee if it is suspected

that the mail is dangerous or contains contraband. Protected mail cannot be read by the Chief Executive without the consent of the detainee.

Division 10.6.3 Segregation

The segregation of detainees is a fundamental way of managing the safety and health of detainees. A breach of human rights would occur if the powers in this division were exercised for a purpose other than health and safety. The exercise of any power in this division therefore must apply the human rights principle of proportionality.

Clause 1061 sets out definitions for this division. 'Segregation' has a wide meaning. It can mean anything from restricting a detainee from being in certain parts of a centre at certain times, through to restricting a detainee to a particular cell.

Clause 1062 clarifies that segregation powers under this division must not be used for punishment or disciplinary purposes.

Clauses 1063, 1064 and 1065 empowers the Chief Executive to segregate detainees if the Chief Executive believes on reasonable grounds that segregation is necessary and prudent to:

- protect the safety of anyone else at the detention place – 1063(1)(a)
- protect the security or good order at a detention place – 1063(1)(b)
- protect the safety of the detainee - 1064(1)
- assess the detainee's physical or mental health – 1065(1)(a)
- protect anyone (including the detainee) from harm because of the detainee's physical or mental health – 1065(1)(b)
- prevent the spread of disease – 1065(1)(c).

These clauses further require that the Chief Executive notify the detainee of the direction and give reasons for the direction. The Chief Executive is required to revoke the direction if the situation requiring segregation has changed. Further safeguards in relation to these clauses include:

- Clause 1063 – for safety and security segregation directions, this requires the Chief Executive to have regard to relevant cultural considerations and the likely impact of segregation on the health and wellbeing of the detainee.
- Clause 1064 – for protective custody segregation directions, this enables the Chief Executive to give a direction on the Chief Executive's own initiative or on request by the detainee.
- Clause 1065 - requires the Chief Executive to have regard to advice by a doctor for health related segregation directions.

Clause 1066 sets out the contents of notice of segregation directions and to whom the notice should be given.

Clause 1067 enables the Chief Executive to review segregation at any time upon their own initiative or upon a request from the detainee. This clause also requires the Chief Executive to review a segregation direction if a transfer to another centre is imminent. As a matter of course, the Chief Executive must review a segregation direction every 21 days. The Chief Executive must review a health segregation direction on request by a doctor.

This clause further requires the Chief Executive to make an active decision about segregation after a review. This ensures that each decision made to continue segregation is accountable and can be verified by any authority reviewing the decision or inspecting the youth detention centre. Directions to segregate may be made consecutively.

Clause 1068 clarifies that, unless revoked sooner, a segregation ends 28 days after the day it is given or 90 days after further segregation directions.

Clause 1069 ensures that the minimum living conditions prescribed by clause 1005 of the Bill are not affected by segregation directions. However, 1069(2) ensures that the application of the standards does not set aside the effect of the segregation direction. In some cases the circumstances may require a temporary suspension of the conditions. For example, if a detainee is segregated because they have a contagious disease, a weekly visit, as prescribed by clause 1040, may not be possible.

Clause 1070 enables a detainee to apply for a review of a segregation decision under this part of the Bill. An application is made to an adjudicator, and it must be made within 7 days of the detainee being notified of a segregation decision. An 'adjudicator' is a magistrate appointed to review disciplinary matters and segregation decisions. The segregation decision remains in force unless an adjudicator makes another decision in its place or revokes the decision.

Clause 1071 empowers an adjudicator to review a segregation direction or refuse to do so. If an adjudicator decides to review a segregation direction the inquiry procedure in Chapter 13 must be used. If an adjudicator refuses to review the segregation clause, 1072(3) requires the adjudicator to provide reasons for the refusal.

Under clause 1071 (3) after an inquiry, the adjudicator may confirm the segregation direction; or make a decision that the Chief Executive has the power to make, which substitutes for the existing decision. The adjudicator can vary the existing direction, or set it aside. The clause enables the adjudicator to lift segregation. Clause 1072 requires the adjudicator to give prompt written notice to the detainee and a person with parental responsibility for the detainee about the decision.

Clause 1073 empowers the Chief Executive to make policies or operating procedures that provide for the general separation of detainees. For example, an operating procedure may separate classes of detainees from using particular facilities at the same time.

Division 10.6.4 Use of force

The *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (Rules 63-65) provides that instruments of restraint and force:

- can only be used in exceptional cases, where all other control methods have been exhausted and failed, and only as explicitly authorised and specified by law and regulation;
- may be resorted to prevent self-injury, injuries to others or serious destruction of property;
- should not cause humiliation and degradation, should be used restrictively and for the shortest possible period of time;
- if used, medical and other relevant personnel should be consulted and its use reported to a higher administrative authority; and
- carrying and use of weapons by personnel is prohibited in any facility where juveniles are detained.

The *Standard Minimum Rules for the Treatment of Prisoners* (Rules 33-34 and 54) provides that:

- use of force can be used in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations;
- force can be used no more than is strictly necessary and incident must be reported immediately to director;
- officers shall be given special physical training to enable them to restrain aggressive prisoners; and
- restraint as a punishment is prohibited.

This division authorises the use of force and prescribes for the proportionate use of force. The inappropriate use of force could potentially cause injury to the detainee, limits the ability of individuals to move freely and is inherently degrading. It therefore engages principles of human rights, in particular sections 9(1) (right to life), 10(1)(b) (cruel, inhuman or degrading treatment), 11(2) (protection of the child), 13 (freedom of movement) and 19(1) (humane treatment) of the *Human Rights Act 2004.* The division includes:

Clause 1074 includes:

- A requirement on the Chief Executive to make arrangements to ensure that force is always used as a last resort and lawful;
- A requirement on the Chief Executive to ensure those using force first consider the individual's characteristics and capacities, except in urgent circumstances;
- A requirement on the Chief Executive to ensure the young detainee receives any appropriate health assessment or treatment because of force used against them.

Clause 1075 sets out the grounds by which an authorised person may use force.

Clause 1076 sets out how force may be used, when required. An authorised person can only use force (except in urgent circumstances) if they believe the purpose cannot be achieved another way, give a warning about the use of force and allows time for it to be observed, and uses it in a way that reduces the risk of causing death or grievous bodily harm. This clause authorises the use of body contact or a restraining device.

Division 10.6.5 Access to detention places

Clause 1077 empowers the Chief Executive to declare conditions that apply to visitors and visits at a place of detention through a disallowable instrument.

Clause 1078 requires the Chief Executive to make reasonable efforts to alert visitors to any conditions in force. A notice must be put up and copies of the conditions made available.

Clause 1079 creates a strict liability offence for taking, giving or removing a prohibited thing from a youth detention centre. The offence applies to any person. 'Prohibited things' are those declared and notified by the Chief Executive to be prohibited.

Clause 1080 authorises the Chief Executive to give visitors directions to ensure the visitor complies with any conditions in force or to uphold the security or good order of a centre. Non-compliance with the direction is a strict liability offence.

Clause 1081 empowers the Chief Executive to refuse a person entry to a detention place and to direct a person to leave a centre. Non-compliance with the direction is a strict liability offence.

Clause 1082 authorises the use of force to remove a person from a centre, or prevent a person entering a centre, following non-compliance with a direction under clause 1081. The use of force must be commensurate to the necessary aim.

Division 10.6.6 Maintenance of Family Relationships

The Standing Committee on Community Services and Social Equity's report, *The Forgotten Victims of Crime: Families of Offenders and their Silent Sentence* recommended that young people, whether on remand or sentenced, who are primary caregivers for their children should be allowed to maintain their children up to pre-school age with them in a place of detention, where that is assessed as being in the child's best interests. The ACT Human Rights Commissioner in the Human Rights Audit of Quamby endorsed this recommendation.

In response to these recommendations, the Bill at Division 10.6.6 provides that where a detainee is a primary caregiver for their child aged up to 6 years old, the Chief Executive may allow the detainee to have contact with, or care for their child, in a detention place subject to an appraisal by the Chief Executive (responsible for care and protection matters) that this would be in the child's best interests. The Chief Executive is enabled to give directions about the arrangements for a young child being kept with the detainee.

Part 10.7 Alcohol and drug testing

This part provides the requisite powers to test detainees and authorised people (relevant delegates of the Chief Executive) for drugs and alcohol. Testing for drugs and alcohol, and taking action on positive tests are critical ways of neutralising any drug market within a youth detention centre and managing detainees with drug and alcohol problems.

Clause 1086 sets out definitions for the chapter. 'Drug' is defined in a way that excludes drugs that are authorised to be taken by a detainee.

Clause 1087 defines what a 'positive test sample' means and includes: a detainee who refuses to provide a sample, or intentionally fails to provide a sample, substitution or masking of a sample and a positive presence of drugs or alcohol. Failing to provide a sample does not extend to detainees who have a reasonable excuse for not being able to provide a sample. The Chief Executive is able to decide a drug should be exempt from being a prohibited drug under this part of the Bill. Any exemptions must be notified.

Clause 1088 empowers the Chief Executive to direct a detainee to provide a test sample, and state what type of sample is required. The Chief Executive or a relevant doctor or nurse can direct how the detainee must provide the sample. Any sampling method must be taken in accordance with any operating procedures made by the Chief Executive. However, only doctors and nurses can take blood. Samples are required to be given to an authorised person for identification and recording, prior to analysis. After analysis the Chief Executive must notify the detainee and a person with parental responsibility for the detainee of the results as soon as practicable.

Clause 1089 enables the Chief Executive to consider a positive test sample in making any decisions about the management of the detainee under the Act, including for example case management plans, security classification or disciplinary breaches.

Clause 1090 enables the Chief Executive to issue an evidentiary certificate addressing any of the matters in 1090 (2)(a) to (e). The certificate is taken to be evidence of the matters stated in the certificate. This clause enables a certificate setting out the results of an analysis performed for the purposes of this Bill and signed by an analyst to be taken as evidence of the analysis and the facts drawn from the analysis, for example, the results of a drug test. A Court is obliged to accept these certificates as proof of the facts stated, unless there is contrary evidence. There is an imperative for evidentiary certificates to be provided to detainees affected by the evidentiary effect of the certificate.

Clause 1091 authorises the development of regulations to test, for alcohol and drugs, authorised people whose duties bring them into contact with detainees, and may include circumstances for testing and the conduct of the tests. An authorised person is a person who has been delegated functions under the Act by the Chief Executive as outlined at clause 103.

Part 10.8 Young detainees – leave

Division 10.8.1 Local Leave

Clause 1092 enables the Chief Executive to give a detainee leave of absence from a detention place for a relevant purpose. The Chief Executive may also set conditions upon the leave. Any time spent on leave is counted as time spent in detention.

Clause 1093 requires the Chief Executive to give the detainee a written authority for the leave that must state the purpose, period and conditions of the leave. Leave cannot be granted for longer than seven days. The detainee must carry the leave authority at all times.

Clause 1094 provides that if the detainee contravenes a condition of leave, then the leave of absence is revoked and the Chief Executive must notify the chief police officer about the contravention.

Division 10.8.2 Interstate leave

Subdivision 10.8.2.1 General

Clause 1095 provides definitions used for this division.

Clause 1096 enables the Minister to declare the law of another State or Territory to be a corresponding leave law (by notifiable instrument). In this way this Bill will recognise the laws that substantially give effect to the same purpose as this part of the Bill. Likewise, States or Territories that declare the Bill to be corresponding will recognise the substance of this Bill.

Subdivision 10.8.2.2 ACT permits for interstate leave

Clause 1097 authorises the Chief Executive to grant a detainee leave to travel to a State or Territory with corresponding law and stay in that State or Territory. A permit issued under this power must include the destination state, the purpose of the leave and the period of leave approved. Interstate leave is limited to less than 7 days.

Clause 1098 establishes that a detainee with a leave permit is authorised to leave a detention place, escorted or unescorted. If an escort is required as a condition of the leave, the escort is authorised to carry out their duty in the relevant State.

Clause 1099 requires the Chief Executive to give relevant officers notice that the detainee is authorised to travel to their State, or through their state.

Clause 1100 empowers an escort officer to give the detainee on interstate leave directions and to use force, when necessary, to prevent escape. An escort officer is also authorised to conduct a scanning, frisk or ordinary search of the detainee in accordance with Chapter 11, with any necessary changes.

Clause 1101 clarifies that the ACT is liable for damage or loss caused by a Territory detainee on leave in another State or Territory. The Territory retains the right of an action against an escort officer or detainee if warranted.

Subdivision 10.8.2.3 Interstate leave under corresponding leave laws

This subdivision enables detainees and escorts from other States and Territories to visit the ACT or travel through the ACT. The authority to do so is dependent upon the other State being recognised as corresponding law, and a permit for leave issued by that State.

Clause 1102 authorises interstate escort officers to carry out their duties in the ACT while escorting an interstate detainee in the ACT.

Clause 1103 authorises interstate escort officers to use force to keep the detainee on leave in their custody, or to arrest the detainee on leave who is unlawfully out of custody. The use of force is only permitted if the home jurisdiction of the officer also permits the use of force.

Clause 1104 authorises the arrest without warrant of an interstate detainee unlawfully out of custody by an ACT police officer or the detainee's interstate escort officer. An arresting police officer is enabled to pass the interstate detainee into the custody of the interstate escort officer.

Clause 1105 contemplates what can happen after an escape or an attempted escape. The interstate detainee can be taken before a Magistrate to over-ride the interstate leave permit. The Magistrate can issue a return warrant and to order the return of the interstate detainee and to have the police or the interstate officer hold the detainee in custody.

The Territory can hold the detainee for 14 days to facilitate the return of the interstate detainee to their home jurisdiction.

Division 10.8.3 Leave - Miscellaneous

Clause 1106 clarifies that any detainee who is lawfully absent from a youth detention centre is still in the legal custody of the Chief Executive.

Clause 1107 provides a means to manage any injuries sustained by detainees in the course of detention, and if necessary compensate detainees for permanent injury and their families for death. Clause 1107(2) authorises the Chief Executive to make regulations to manage injuries, establish a system for compensation for a permanent injury and payments of death benefits.

It is envisaged that the scheme will set out scheduled amounts for levels of permanent impairment endured by injured detainees and a standard payment for a death caused by injury as a consequence of an injury arising because of detention or community service.

Clause 1108 enables the Minister to declare corresponding law for the purpose of provisions in the Bill that contemplate, or coordinate with, the laws of other jurisdictions.

Chapter 11 Criminal Matters - search and seizure at detention places

Overview of chapter

The provisions in this chapter (with the exception of part 11.6) are currently before the ACT Legislative Assembly as part of the *Children and Young People Amendment Bill 2006 (No.2)*.

Searches of children and young people who are remanded or committed to a youth detention centre, are necessary to prevent the entry of unauthorised items that may harm any person within a youth detention centre, including the detained child or young person. The Human Rights Act provides at section 9 that everyone has the right to life. Public authorities have a positive duty to protect the life of a person in care or custody of the Territory. This search and seizure scheme, involving the use of force in certain circumstances, will protect against the unlawful admittance of contraband which could threaten the safety of children and young people detained at the youth detention centre.

Strip searches and searches of body-cavities are inherently degrading, and therefore engage human rights law, in particular sections 10(1)(b) (inhuman or degrading treatment), 11(2) (protection of the child), 12 (privacy), and 19(1) (humane treatment) of the Human Rights Act.

To ensure that searches of young detainees are proportionate to the necessary aim of the searches, the chapter introduces a number of obligations on persons conducting or assisting with a search. These obligations (outlined below) are introduced to ensure that children and young people who are searched are treated humanely and with respect for their inherent dignity, and are protected from unlawful or arbitrary interferences with their privacy.

Some of the primary obligations include:

- Searches must be conducted in an area providing reasonable privacy;
- The degree of visual inspection is limited to that which is strictly necessary;
- A requirement to consider any information known about the young detainee's individual characteristics such as age, maturity and history (for example - history of abuse, impairment and sexuality) in deciding whether an invasive search is necessary and in how that search is conducted; and
- A requirement to consider the individual circumstances of the young detainee to determine if it is necessary and prudent for a person with parental responsibility to be present during a strip search on admission or a body search.

Part 11.1 Preliminary

This part sets out whom the chapter applies to and key definitions.

Clause 1200 Definitions – Chapter 11

This clause sets out the definitions of the types of searches and related terms contemplated by chapter 11.

The definitions are aligned with the *Crimes Act 1900*, part 10.

Clause 1201 Relationship with other laws

This clause provides that this chapter is additional to, and does not limit, any other Territory, State or Commonwealth laws related to searches of young detainees.

Clause 1202 Prohibited things

Preventing contraband from being kept, or smuggled into, a youth detention centre is a key way of keeping every person in a youth detention centre safe.

This clause enables the Chief Executive to declare things, or classes of things, to be prohibited, where the Chief Executive believes that the declaration is necessary or prudent to ensure security and good orders at the youth detention centre. Section 145(b) of the *Legislation Act 2001* interprets words in Acts as meaning both singular and plural unless explicitly stated otherwise. Any prohibited thing under this clause would apply to the whole class of things. For example, if scissors were prohibited then all types of scissors would be prohibited.

Any declaration is a notifiable instrument and must be notified on the ACT Legislation Register in accordance with the *Legislation Act 2001*.

Clause 1203 Authorised health professionals

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1992) stated that:

> *73. A prison doctor acts as a patient's personal doctor. Consequently, in the interests of safeguarding the doctor/patient relationship, he should not be asked to certify that a prisoner is fit to undergo punishment. Nor should he carry out any body searches or examinations requested by an authority, except in an emergency when no other doctor can be called in.*

Sub clause (1) enables the Chief Executive to authorise a health professional to exercise search functions under this Chapter. Sub clauses (2) and (3) require the Chief Executive to ensure that a young detainee's treating health professional is not asked to exercise search functions under this chapter in relation to the young detainee, except in an emergency where there is an imminent and serious threat to safety and compliance with the requirement would exacerbate that threat. A treating health professional is someone who has a professional relationship with the young detainee for the provision of health services.

Part 11.2 Searches generally

This part provides the powers and procedures for personal searches of children and young people who are detained at a youth detention centre.

Clause 1204 Intrusiveness of searches

This clause obliges the person conducting a search under this chapter to undertake the type of search that is commensurate with, and proportionate to, the circumstances.

This clause also invokes the principle of proportionality. The exercise of power must be: necessary and rationally connected to the objective, the least intrusive in order to accomplish the object, and not have a disproportionately severe effect on the person to whom it applies.

For this chapter, frisk, scanning and ordinary searches are less intrusive searches than strip searches or body searches.

Clause 1205 Register of searches

This clause obliges the Chief Executive to keep a register of strip searches (including on admission), body searches, searches of premises and property and searches of young detainee's cells. The register must include the information set out in subsection (2) and may include anything else the Chief Executive considers relevant as per subsection (3). Sub clause (2)(b) requires the Chief Executive to record the reasons for the search – it is intended this would include (when relevant) details of a particular prohibited thing being searched for and the basis for the Chief Executive's suspicion that the young detainee was concealing the thing.

This clause does not prescribe that the register must be a hard-copy book. The register may be electronic.

The register must be available for inspection on request by certain listed persons and agencies set out at subsection (4). The register must be inspected by the Public Advocate at least once every three months.

Clause 1206 Searches of transgender and intersex young detainees

A number of clauses in this chapter require that a person conducting a search, or is present at a search, to be the same sex as the young detainee being searched. These provisions would have an ambiguous and potentially discriminatory application where the child or young person being searched is an intersex person or transgender person.

This clause provides guidance on how the Chief Executive should determine the young detainee's sex for the purpose of conducting a search under this chapter. This clause allows an intersex or transgender young detainee to require that a search be conducted by a person of the same sex as the sex with which the young detainee identifies.

Clause 1207 Notice of strip and body searches – person with parental responsibility for young detainee

This clause requires the Chief Executive to notify a person with parental responsibility for the young detainee that a strip search (including on admission) or a body search will take place. If the person with parental responsibility cannot be contacted before the search is conducted, they must be notified after the search is conducted.

Part 11.3 Scanning, Frisk and Ordinary Searches

This part provides the powers and obligations for scanning, frisk and ordinary searches of children and young people who are detained at a youth detention centre.

Clause 1208 Directions for scanning, frisk and ordinary searches

This clause enables the Chief Executive to direct a authorised person to conduct a scanning search, frisk search or ordinary search of a young detainee at any time that the Chief Executive believes is prudent for security or good order at a youth detention centre.

Sub clause (2) enables a authorised person to conduct a scanning, frisk or ordinary search of a young detainee if they suspect the young detainee is carrying a prohibited thing or something that is a risk to the safety of the young detainee or others, may involve an offence or is a risk to security or good order of the youth detention centre.

Clause 1209 Requirements for scanning, frisk and ordinary searches

This clause sets out the procedure required for scanning, frisk and ordinary searches.

This clause obliges the authorised person conducting a search under this clause to:

- tell the young detainee about the search and the reasons for the search and ask for their cooperation;
- ensure the young detainee searched is left with or given reasonably appropriate clothing, if clothing is seized because of the search;
- for frisk and ordinary searches - conduct the search in an area that provides reasonable privacy and ensure that the search is not carried out in the presence or sight of someone whose presence is not necessary for the search, including another young detainee; and
- for frisk searches – ensure that the officer conducting the search is the same sex as the young detainee, unless there is an imminent and serious threat to the personal safety of young detainee or someone else and compliance would exacerbate the threat.

Part 11.4 Strip Searches

This part provides the powers and obligations for strip searches of children and young people who are detained at a youth detention centre.

Clause 1210 Strip searches on admission to youth detention centre

Preventing contraband finding its way into a youth detention centre, particularly weapons and drugs, is an important method of keeping every person in a youth detention centre safe.

This clause enables the Chief Executive to direct a strip search upon admission without the need to decide if a search is warranted by any evidence of a young detainee concealing something. Admission to a youth detention centre is a high risk time for the entry of contraband. This clause intends to enable a strip search to occur where it is considered to be necessary as part of the admission process.

Clause 1237 enables any contraband, or suspected contraband, to be seized by the Chief Executive.

Sub clauses (1) and (3) of clause 1210 require the Chief Executive to first ascertain whether a strip search is necessary, after considering any information known about the young detainee's age, maturity and known history (for example - history of abuse, impairment and sexuality).

Sub clauses (2) and (3) of clause 1210 require the Chief Executive to then ascertain if it is necessary and prudent for the strip search to be undertaken in the presence of a person with parental responsibility, after considering the young detainee's age, maturity and known history (for example - history of abuse, impairment and sexuality). Prudent, in this context, would include whether the Chief Executive considered the person with parental responsibility to be acceptable to attend the search. For example, the Chief Executive may be aware that the

person with parental responsibility has posed a risk to security and good order of the centre in the past by attempting to bring contraband into the youth detention centre. The young detainee must also agree to the presence of the person with parental responsibility.

Clause 1211 Strip search if no-one with parental responsibility for young detainee available

Where it has been determined by the Chief Executive that it is necessary and prudent for a person with parental responsibility to attend under clause 1210, this clause requires that if that person cannot be contacted or is unavailable to attend the search or the young detainee does not agree with their presence, then the search must be conducted in the presence of someone else who can support and represent the young detainee's interests and is acceptable to the young detainee. This may include a delegate of the Chief Executive who is capable of fulfilling this function.

Sub clause (3) provides that if the young detainee does not agree to the presence of a support person, or if the Chief Executive directs the person to leave under 1212(2), then the search can continue in their absence.

Clause 1212 Strip search on admission - directing person to leave

This clause allows the Chief Executive to direct a person present for a strip search to leave if they are acting in a way that prevents or hinders the search from being undertaken effectively. 1211 (3) allows the search to continue in this circumstance.

Clause 1213 Removing people from search area

This clause allows the Chief Executive to direct a authorised person to use force which is necessary and reasonable to ensure compliance with a direction to leave a strip search under clause 1212(2).

Clause 1214 Strip searches directed by Chief Executive

This clause enables the Chief Executive to direct an authorised person to conduct a strip search if the Chief Executive suspects that the young detainee may be carrying a prohibited thing, something that may be used in a way that may involve an offence, something that could injure anyone at the youth detention centre or elsewhere, or be a risk to the security or good order of the youth detention centre.

This clause provides that a strip search must not be conducted unless a scanning, frisk or ordinary search has already been carried out for that purpose.

This clause does not apply to strip searches on admission to the youth detention centre.

Clause 1215 Obligations of authorised person before strip search

This clause sets out the rules that the authorised person must comply with before a strip search is conducted, including telling a young detainee whether they will be required to remove any clothing, and the reasons for this if a young detainee seeks an explanation; and seeking the cooperation of the young detainee.

Clause 1216 Authorised persons at strip searches

Sub clause (1)(a) requires that a strip search must be conducted by an authorised person who is the same sex as the young detainee.

Sub clause (1)(b) requires that the strip search must be conducted in the presence of one or more authorised persons who are the same sex as the young detainee, and subsection (2) requires the number of officers present during the search to be no more than is necessary and reasonable to ensure the search is carried out safely and as effectively as possible. Sub clause (3) enables officers to assist in the search, if the officer conducting the search reasonably believes it is necessary and reasonable for the search. Sub clause (4) allows officers present at the search to be the opposite sex, if the Chief Executive reasonably believes there is an imminent and serious threat to personal safety and also reasonably believes that compliance with the same-sex requirement would exacerbate that threat.

Clause 1217 Strip searches – general rules

This clause sets out the general rules that the authorised person must comply with during the conduct of a strip search:

- the search must be conducted as quickly as possible and in a way that provides reasonable privacy and is appropriate to the young detainee's sexuality, impairment or history (for example - history of abuse);
- a search must not be conducted in the presence of anyone who is of the opposite sex, except if they are a doctor or nurse who is acceptable to the young detainee, or a person with parental responsibility or a support person, or a authorised person present at the search;
- a search must not be conducted in the presence or sight of anyone whose presence is not necessary for the search or for the safety of anyone present; and
- the touching of a young detainee's body is not permitted.

Clause 1218 Strip searches – rules about visual inspection of young detainee's body

This clause sets out the rules about the visual inspection of a young detainee's body during a strip search which the authorised person must comply with:

- The young detainee's genital area (or female young detainee's breasts) must not be searched unless it is necessary to do so; and
- The search must not involve more visual inspection of the young detainee's body than is reasonably necessary. Visual inspection of the young detainee's genital area, anal area, buttock and breasts must be kept to a minimum.

Clause 1219 Strip searches – rules about young detainees' clothing

This clause sets out the rules about the young detainee's clothing during a strip search that the authorised person must comply with:

- A search must not involve the removal of more clothes, or the removal of more clothes at any time, than is reasonably necessary. A person must not be more than half undressed at one time;
- The person must be allowed to dress in private as soon as the whole search process is finished; and
- If clothing is seized, the person must be offered adequate replacements.

Part 11.5 Body Searches – young detainees

Clause 1220 Body searches directed by Chief Executive

Body searches are the most intrusive search possible. This clause authorises contact with a young detainee's orifices to enable a physical search of the young detainee's orifices, known as a body search.

Sub clause (1) enables the Chief Executive to authorise a doctor to conduct a body search of a young detainee if the Chief Executive reasonably suspects: the young detainee has ingested or inserted something that may be harmful to themselves; or the young detainee has a prohibited thing concealed in their body that may be used in a way that may pose a substantial risk to security or good order at a youth detention centre. Sub clause (2) requires the Chief Executive, in deciding to authorise a body search, to give consideration to the young detainee's age, maturity and known history (for example - history of abuse, impairment and sexuality).

An authorised doctor acting under this clause is immune from liability under clause 3203 of the Bill.

Clause 1221 Obligations of Chief Executive before body searches

This clause sets out the rules that the Chief Executive must comply with before a doctor is authorised to conduct a body search, including telling a young detainee whether they will be required to remove any clothing, and the reasons for this if a young detainee seeks an explanation; and seeking the cooperation of the young detainee.

Clause 1222 People present at body searches

This clause sets out who can be present at a search.

Sub clause (2) ensures a nurse is also present at the search and that of the two medical people present at the search, at least one must be the same sex as the young detainee.

Sub clause (3) allows the Chief Executive to direct one or more authorised persons to be present at the search. Sub clause (4) requires the number of officers present during the search to be no more than is necessary and reasonable to ensure the search is carried out safely and as effectively as possible. Sub clause (5) allows officers present at the search to be the opposite sex, if the Chief Executive reasonably believes there is an imminent and serious threat to personal safety and also reasonably believes that compliance with the same -sex requirement would exacerbate that threat.

Sub clauses (6) and (7) requires that the search be conducted in the presence of a person with parental responsibility if their presence is necessary and prudent, after the Chief Executive considers the young detainee's age, maturity and history (for example - history of abuse, impairment and sexuality). The young detainee must agree for them to be present. Prudent, in this context, would include whether the Chief Executive considered the person with parental responsibility to be acceptable to attend the search and if the search was not required in an emergency.

Clause 1223 Body searches if no-one with parental responsibility available

Where it has been determined by the Chief Executive that it is necessary and prudent for a person with parental responsibility to attend under clause 1222(6), this clause requires that if that person cannot be contacted or is unavailable to attend the search or the young detainee does not agree with their presence, then the search must be conducted in the presence of someone else who can support and represent the young detainee's interests and is acceptable to the young detainee. This may include an authorised person who is capable of fulfilling this function.

Sub clause (3) provides that if the young detainee does not agree to the presence of a support person, or if the Chief Executive directs the person to leave under 1224(2), then the search can continue in their absence.

Clause 1224 Body search - directing people to leave

This clause allows the Chief Executive to direct a person present for a search to leave if they are acting in a way that prevents or hinders the search from being undertaken effectively. Sub clause 1223(3) allows the search to continue in this circumstance.

Clause 1225 Removing people from search area

This clause allows the Chief Executive to direct an authorised person to use force which is necessary and reasonable to ensure compliance with a direction to leave a body search under clause 1224 (2).

Clause 1226 Help for body searches

This clause allows a doctor conducting a body search to ask the Chief Executive for assistance that the doctor believes is reasonable and necessary for the search. The Chief Executive is enabled to direct or authorise a authorised person or someone else present for the search to assist in its conduct. The person providing the assistance must be of the same sex, except if the Chief Executive reasonably believes there is an imminent and serious threat to personal safety and also reasonably believes that compliance with the same-sex requirement would exacerbate that threat.

A person assisting under this clause is immune from liability under clause 3203 of the Bill.

Clause 1227 Body searches – rules about young detainees' clothing

This clause sets out the rules about the young detainee's clothing during a body search that must be complied with:

- A search must not involve the removal of more clothes, or the removal of more clothes at any time, than is reasonably necessary. A person must not be more than half undressed at one time;
- The person must be allowed to dress in private as soon as the whole search process is finished; and
- If clothing is seized, the person must be offered adequate replacements.

Clause 1228 Body searches – rules about touching young detainees

This clause allows a doctor who is authorised by the Chief Executive to conduct the body search by the Chief Executive may touch and examine the young detainee's body orifices for the search. The nurse, who is present but not conducting the search, may touch and examine the young detainee's orifices.

Clause 1229 Seizing things discovered during body search

Sub clause (1) allows anything discovered during the search to be seized by the doctor, unless seizing the thing would cause injury to the young detainee or someone else. Sub clause (2) requires anything seized to be passed on to the relevant authorised person as soon as practicable.

Part 11.6 Searching people other than detainees

Clause 1230 Searches of people other than detainees

This clause empowers the Chief Executive to direct a scanning search, frisk search or ordinary search of anyone working at or visiting a detention place. The discretion to order a search by the Chief Executive must be based upon the need to uphold the safety and security of the detention place. The exercise of this discretion is not based upon individualised suspicion.

Directions and requirements for scanning, frisk and ordinary searches outlined at part 11.3 apply to the conduct of a search under this part. Force cannot be used to ensure compliance with a search under this part.

Part 11.7 Searches of premises and property

This part provides the powers and obligations for searches of premises and property at a youth detention centre.

Clause 1231 Searches—premises and property generally

This clause enables the Chief Executive to search any part of a youth detention centre; anything at a centre; and any vehicle used to transport a young detainee. The examples provided clarify the intended extent of the powers. The power extends to any possessions in a young detainee's cell or carried by a young detainee, but not to the extent of the young detainee's clothing.

The power does not extend to searches of young detainees or other persons in the youth detention centre.

Searches of premises and property may be conducted physically or with the aid of an electronic device or other technology.

Clause 1232 Searches of young detainee cells – privileged material

This clause allows an authorised person to search a cell in the absence of a young detainee, provided that the young detainee removes any privileged material from the cell or the material is stored in accordance with arrangements for secure storage made by the Chief Executive.

Clause 1233 Searches of young detainee cells – suspected privileged material

This clause provides obligations for the authorised person in searching a cell if they suspect the young detainee's cell contains privileged information.

The following rules apply:

- The young detainee must be present for the search, except if it is urgent and the officer believes that complying with this rule would create a risk of injury to any person.
- The search may include an examination of any privileged material found in the cell.
- The officer must not read the privileged material, except if it is urgent and the officer believes that complying with this rule would create a risk of injury to any person.

Part 11.8 Searches – Use of force

This part provides the powers and obligations for using force to carry out a search under this chapter.

Clause 1234 Searches—managing use of force

The *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (Rules 63-65) provides that instruments of restraint and force:

- can only be used in exceptional cases, where all other control methods have been exhausted and failed, and only as explicitly authorised and specified by law and regulation;
- may be resorted to prevent self-injury, injuries to others or serious destruction of property ;
- should not cause humiliation and degradation, should be used restrictively and for the shortest possible period of time ;
- if used, medical and other relevant personnel should be consulted and its use reported to a higher administrative authority; and
- carrying and use of weapons by personnel is prohibited in any facility where juveniles are detained.

The *Standard Minimum Rules for the Treatment of Prisoners* (Rules 33-34 and 54) provides that:

- use of force can be used in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations;
- force can be used no more than is strictly necessary and incident must be reported immediately to director;
- officers shall be given special physical training to enable them to restrain aggressive prisoners; and
- restraint as a punishment is prohibited.

This clause explicitly enables the use of force to carry out a search or secure anything seized, or that needs to be seized, in a search. The effect of this clause is that reasonable force can be used to secure a young detainee's compliance with the search.

The inappropriate use of force could potentially cause injury to the young detainee, limits the ability of individuals to move freely and is inherently degrading. It therefore engages principles of human rights, in particular sections 9(1) (right to life), 10(1)(b) (cruel, inhuman or degrading treatment), 11(2) (protection of the child), 13 (freedom of movement) and 19(1) (humane treatment) of the Human Rights Act.

Under this clause, the Chief Executive is required to make arrangements to ensure as far as practicable that force used in relation to a search is always a last resort, no more than is necessary, by an officer of the same sex as the young detainee, and in accordance with this clause and the standing orders. Sub clause (2) sets out matters that may be addressed by the standing orders in relation to the use of force.

Clause 1235 Searches - authorised use of force

This clause allows an authorised person to use force that is reasonable and necessary to conduct a search under this chapter or to preserve anything seized or that may be seized during the search. This clause requires the officer to give a warning about the intended use of force and give sufficient time for the warning to be observed, except where doing so would create a risk of injury to someone. The officer can use no more force than is necessary and reasonable and must ensure as far as practicable, force is used in a way that reduces the risk of injury or death.

Part 11.9 Seizing property

This part provides the powers and procedures for seizing property at the youth detention centre.

Clause 1236 Seizing mail etc

Sub clause (1) enables the Chief Executive to seize prohibited things in a young detainee's mail, or any other thing in the mail that may harm someone. Clause 1202 enables the Chief Executive to declare things, or classes of things, to be prohibited.

An example of something that may be suspected of causing harm is a substance that is or resembles explosive material, biological agents or poisons.

Sub clause (2) enables the Chief Executive to seize a young detainee's mail if the Chief Executive believes that doing so would stop the transmission or entry of a prohibited thing. It also enables the Chief Executive to seize mail if the correspondence itself will cause harm of any nature or is a means of making an unauthorised purchase.

Sub clause (3) enables the Chief Executive to seize a document, provided that the Chief Executive can reasonably ascertain that the document is not privileged. Sub clause (4) provides for the immediate return of material to the young detainee which, though reasonably believed not to be privileged, turns out to be privileged. See dictionary for the meaning of privileged material.

Clause 1237 Seizing property—general

This clause enables the Chief Executive to seize a young detainee's property if the Chief Executive believes that the property would jeopardise the security or good order of the centre or the safety of anyone at the centre or elsewhere.

This clause also enables the Chief Executive to seize property that is intended for the commission of an offence.

Any prohibited thing found during a search may also be seized unless written approval exists for the young detainee to possess the thing.

This clause further enables the Chief Executive to seize a document, provided that the Chief Executive can reasonably ascertain that the document is not privileged. Sub clause (4) provides for the immediate return of material to the young detainee which, though reasonably believed not to be privileged, turns out to be privileged. See dictionary for the meaning of privileged material.

Clause 1238 Notice of seizure

This clause obliges the Chief Executive to notify the young detainee in writing of anything seized.

The owner, or the person in possession of the thing, must be notified in writing within 7 days.

Sub clause (3) sets out what must be in the notice.

Sub clause (4) clarifies that an owner of an item may be a person who is entitled to possession, but not in possession of the item. For example, a young detainee may be the owner of something mailed to them, intended as a gift.

Clause 1239 Forfeiture of things seized

This clause provides an explicit power for things seized to be forfeited to the Territory.

If an item is allowed to be possessed by a young detainee but the owner cannot be found, or the thing cannot be returned to the owner, the item may be forfeited to the Territory.

If an item is prohibited, or may be used to commit an offence, or is unsafe, the item may be forfeited to the Territory.

Sub clause (2) enables the Chief Executive to make a decision about what to do with the forfeited item. For example, weapons or drugs may be passed on to the police for destruction; other items may be passed to the public trustee for sale; other items may be kept for the general use of the youth detention centre.

The *Uncollected Goods Act 1996* provides for the disposal of abandoned goods.

Clause 1240 Return of things seized but not forfeited

If something is seized under clause 1236 or 1237, but not forfeited under clause 1239, the Chief Executive is obliged to return the thing to its owner at the end of 6 months after it was seized, or if a proceeding for an offence involving the thing has commenced within that 6 months, then at the end of that proceeding and any appeal.

If an item is no longer required to be retained as evidence, the Chief Executive must return it immediately to the owner.

Chapter 12 Criminal matters - discipline at detention places

The United Nations Rules for the Protection of Juveniles Deprived of the Liberty states that:

> *Rule 68 - Legislation or regulations adopted by the competent administrative authority should establish norms concerning the following, taking full account of the fundamental characteristics, needs and rights of juveniles:*
> *1. Conduct constituting a disciplinary offence;*
> *2. Type and duration of disciplinary sanctions that may be inflicted;*
> *3. The authority competent to impose such sanctions;*
> *4. The authority competent to consider appeals.*
>
> *Rule 69. A report of misconduct should be presented promptly to the competent authority, which should decide on it without undue delay. The competent authority should conduct a thorough examination of the case.*
>
> *Rule 70. No juvenile should be disciplinarily sanctioned except in strict accordance with the terms of the law and regulations in force. No juvenile should be sanctioned unless he or she has been informed of the alleged infraction in a manner appropriate to the full understanding of the juvenile, and given a proper opportunity of presenting his or her defence, including the right of appeal to a competent impartial authority. Complete records should be kept of all disciplinary proceedings.*

Part 12.1 General

Clause 1300 states that the chapter applies to disciplinary breaches and allegations of disciplinary breaches.

Clause 1301 outlines definitions for the chapter

Clause 1302 lists the disciplinary breaches that may be alleged and proven under this chapter.

Clause 1303 stipulates that the term 'investigator' denotes the functions associated with the investigation of disciplinary breaches that are delegated to an authorised person by the Chief Executive. The clause enables a person other than an authorised person to be engaged to investigate disciplinary breaches. Should a major incident occur within the youth detention centre, it may be necessary to engage an external person to conduct investigations to either manage the work load or ensure objectivity.

Clause 1304 clarifies that a 'privilege' is any benefit a detainee may have, material or otherwise, beyond the minimum entitlements set out in chapter 10.

Clause 1305 sets out the rules for when a disciplinary process must stop, or may continue, if a criminal process is in progress, where:

- a criminal prosecution cannot commence or continue if disciplinary action has been taken to address the behaviour, incident or act.
- disciplinary process cannot commence or continue if a criminal prosecution has commenced.
- disciplinary action cannot be imposed upon a detainee if the detainee has been convicted of a criminal offence relating to the same behaviour, incident or act.
- if a criminal prosecution acquits a detainee on a criminal charge, a disciplinary process may begin or continue for the same behaviour, incident or act.

Part 12.2 Disciplinary investigations

This part sets out the powers and functions of authorised persons involved in the discipline process. There are three primary roles – the officer who reports an alleged breach, the authorised person who investigates the breach, and the administrator who makes a disciplinary charge. At each stage in the process, the officers can take immediate, informal action that does not involve a sanction. In relation to any one breach, the tasks of reporter, investigator or administrator must be done by different officers.

Division 12.2.1 Investigation of disciplinary breaches

Clause 1306 contains two powers: one power for the youth detention officer to take immediate, informal action that does not involve a sanction (enabling the officer to deal with incidents as they happen without having to resort to a formal disciplinary process for every infraction). The second power is to report an alleged breach of discipline to an investigating officer. The clause sets out what should be in an allegation report.

Clause 1307 provides that the young detainee must be given notice about the allegation report in a language and way the detainee can understand.

Clause 1308 provides that the detainee has a right to contact someone to respond to the allegation report on their behalf.

Clause 1309 sets out the investigating officer's powers in response to an allegation report - the officer can (a) do nothing, (b), (c), (d) discuss the behaviour with the detainee in the form of counselling, warning or reprimand, or (e) refer the matter to the police. The investigating officer gives the administrator a report about the action they have taken under clause 1310.

Clause 1311 sets out the administrator's powers in response to an investigators report - the officer can (a) do nothing, (b), (c), (d) discuss the behaviour with the detainee in the form of counselling, warning or reprimand, (e) refer the matter to the police or the director of public prosecutions, or (f) charge the detainee with a breach.

Clause 1312 stipulates that a detainee must be informed in writing of a disciplinary breach. The administrator must include the actual charge; a statement of the conduct that gave rise to the charge; the option of accepting the charge and consenting to a sanction proposed by the administrator in relation to the charge; and listing the sanction the administrator considers appropriate to account for the breach.

Part 12.3 Discipline on breach

Division 12.3.1 Disciplinary action with accused detainee's consent

This division enables a detainee to accept the disciplinary charges laid by the administrator and the disciplinary sanctions proposed by the administrator.

Clause 1314 enables an accused detainee to accept a disciplinary charge laid by an administrator and to accept the disciplinary action proposed by the administrator as the sanction for the charge. A detainee must make the election within 48 hours of receiving the notice of charges. The time for election can be extended.

Clause 1315 sets out the presiding officer's powers if a detainee has accepted disciplinary charges and the corresponding sanction. The presiding officer may counsel the detainee. In relation to sanctions, the presiding officer may only impose the administrative penalty that was written along with the original charge. The detainee must be informed in writing of the imposition of disciplinary action.

Division 12.3.2 — Internal disciplinary inquiry

A person can be a presiding officer for both this division and division 12.3.1.

Clause 1317 provides that if a detainee has been notified of a disciplinary charge and has not elected to accept the charge and corresponding sanction, the clause obliges the presiding officer to conduct an inquiry. For one incident, the presiding officer for an inquiry cannot be an officer who laid a charge or made an allegation report or investigators report in division 12.2.1. The inquiry process in chapter 13 must be used by the presiding officer to conduct inquiries.

Clause 1318 empowers the presiding officer to impose disciplinary action if an inquiry into a charge is complete. If the charges are proven on the balance of probabilities, then the presiding officer may impose disciplinary action set out in division 12.3.5. The presiding officer must dismiss the charge if the evidence does not prove the detainee committed a breach on the basis of the balance of probabilities. The presiding officer can refer a matter to the chief police officer or the director of public prosecutions if the presiding officer believes that the evidence revealed at an inquiry warrants criminal proceedings. The detainee must be informed in writing of the presiding officers' decision.

Division 12.3.3 External review of inquiry decisions

This division provides for the creation of an independent authority to review particular decisions that would be authorised by the Bill.

Clause 1320 empowers the Minister to appoint adjudicators. Nominees for appointment must be magistrates.

Clause 1321 enables the detainee to contact an advocate who can apply for a review of the decision on the detainee's behalf.

Clause 1322 allows a detainee who has had charges proven by a presiding officer and the decision reviewed by a review officer may apply to the adjudicator for an external review of the decision. The application must be made within 7 days after the detainee is notified by the reviewing officer of any disciplinary action in clause 1318.

Clause 1323 empowers an adjudicator to review a disciplinary decision or refuse to review the decision. The adjudicator must use the process set out in chapter 13 to review a disciplinary decision.

Clause 1324 specified that the detainee is entitled to a written notice if the adjudicator refuses to review the disciplinary decision which set out the reasons why the application was refused. Decisions made by adjudicators are subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1989*.

Clause 1325 empowers the adjudicator to confirm the decision; vary the direction; or set aside the decision and make a new decision. The detainee must be informed in writing of the adjudicator's decision following the review.

Division 12.3.4 — Disciplinary action generally

This division provides the action that can be taken if a disciplinary charge is proven. The action includes a series of penalties. The Government considers these penalties to be consistent with the administrative nature of the discipline process and are consistent with current human rights jurisprudence.

Clause 1327 ensures that all of the decision-makers in the disciplinary process who can impose sanctions are contemplated by this part.

Clause 1328 provides that any officer who has the authority to impose disciplinary action may take any of the actions in (1)(a) to (c), or any combination of actions in (1)(a) to (c). If the breach does not warrant a penalty, the officer may simply warn or reprimand the detainee by way of (a) and (b). The officer is required to exercise disciplinary action proportionately.

Clause 1329 lists the penalties that can be imposed upon a detainee who has proven to have breached discipline. The maximum fine that can be imposed is $500 as the majority of detainees will not be in a position to earn, or retain, large sums of money. The clause enables the withdrawal of privileges for up to 180 days - any condition in chapter 10 that is not prescribed to be an entitlement can be regarded as a privilege.

A 'privilege' is defined in clause 1331 as any benefit a detainee may have, material or otherwise, beyond the minimum entitlements set out in chapter 10.

Clause 1330 sets a limit on the maximum penalties that can be imposed for one incident. If the same conduct leads to two or more charges being proven, the relevant presiding officer cannot impose a penalty beyond the maximum that can be imposed for one breach.

Clause 1332 obliges the Chief Executive to keep a record of disciplinary action taken against a detainee.

Chapter 13 Conduct of disciplinary inquiries

Disciplinary proceedings fall within the ambit of administrative decisions that require procedural fairness.

It is now orthodox for Australian Courts to review disciplinary proceedings on the basis of a breach of procedural fairness, namely the right to a fair hearing, the right to an unbiased hearing and a decision based on logically probative material.

Chapter 13 intends to provide for a procedure which is fair and prompt.

While the process in chapter 13 is envisaged to be used predominantly for disciplinary purposes, the process is also suitable for inquiries and hearings conducted to review other prescribed decisions in this Bill. Review of segregation in chapter 10 also uses the inquiry and hearing procedures in chapter 13.

Part 13.1 — Conduct of disciplinary inquiries — general

Clause 1400 clarifies that the chapter applies to inquiries mentioned in the divisions listed.

Clause 1401 provides an abbreviated definition of decision-makers in the disciplinary process who can impose sanctions. The definition labels any presiding officer, review officer or adjudicator as the ‘presiding officer’.

Part 13.2 — Disciplinary inquiry procedures

Clause 1402 — Nature of disciplinary inquiries

Clause 1402 (1) explicitly stipulates that disciplinary inquiries are administrative procedures.

Clause 1402(2)(a) affirms that the common law principle of natural justice applies.

Clause 1402(2)(b) clarifies that being a quasi-judicial process, but not a judicial process, the statute law and common law on evidence relevant to Court hearings do not apply to these proceedings. It should be noted, however, that consistent with the principles of natural justice, a decision cannot be based upon no evidence, nor speculation or suspicion: there must be logically probative material informing the decision.

Akin to the above sub-clause, clause 1402(2)(c) clarifies that the procedure for deciding if a disciplinary breach has occurred is not a Court proceeding. Consequently, evidence on oath or affidavit is not appropriate.

Clause 1402(2)(d) stipulates that when deciding if a charge is proven, or not proven, the relevant officer must apply a standard of balance of probabilities. The balance of probabilities is a standard of proof associated with civil and administrative proceedings. This standard has a lower threshold than the criminal standard of beyond reasonable doubt. Proving a fact on the standard of the balance of probabilities means that the existence of the fact is more probable than not, or the fact is established by a preponderance of probability.

Clause 1403 — Notice of disciplinary inquiry etc

Clause 1403 requires that a presiding officer notify a detainee of an inquiry. The detainee should already be informed of charges laid, and already have had the opportunity to elect to consent to the charges as a consequence of division 12.3.1 above.

Clause 1403(2) lists the matters that must be in the notice.

Clause 1403 (3) enables the detainee to make written submissions to the presiding officer for the inquiry and the detainee is entitled to receive assistance from an advocate for this purpose.

Clause 1403 (4) creates an entitlement to assistance from the Chief Executive to write the submission.

Clause 1403 (5) obliges the presiding officer to consider submissions made by the detainee prior to any deadline set in the notice of the inquiry.

Clause 1404 — Conduct of disciplinary inquiries

Clause 1404 allows inquiries to be conducted prudently and expediently. The provision enables the procedure to be exercised in a manner commensurate to the circumstances.

Clause 1404(2) enables the presiding officer to hold a hearing. 1404(3) requires the procedure in part 13.3 to be used for hearings. In some cases a hearing may be unnecessary if, for example, the detainee makes a submission to the effect that they concede the breach.

Clause 1404(4) stipulates that inquiries are not open to the public unless the presiding officer decides positively that the inquiry should be open.

Clause 1404(5) ensures that a decision is not rendered inoperable because of a lack of form rather than substance. For example, if a notice in clause 193 does not have a deadline for submissions, yet a submission is made, any decision made as a consequence is not invalid. However, if no notice was given at all and the detainee had no opportunity to make submissions, this would be a matter of substance and the decision may be invalid.

Clause 1405 — Presiding officer may require official reports

Clause 1405 authorises the presiding officer to seek reports from the Chief Executive, the Director of Public Prosecutions, or a public servant. The person asked for a report must provide a report.

Clause 1406 — Presiding officer may require information and documents

Clause 1406 authorises the presiding officer to seek information from people with a relevant connection to the alleged disciplinary breach being decided.

The clause enables the presiding officer to ask for particular information or particular documents.

Clause 1406(2) provides an exception to the provision of information or documents if the Minister certifies that disclosing the document or information may endanger someone or is not in the public interest.

The power in clause 1406 does not override a person's privilege against self-incrimination nor exposure to civil penalty. The clause also retains client legal privilege.

Clause 1407 — Possession of inquiry documents etc

Clause 1407 enables the presiding officer to have possession of documents, or other things obtained, for the duration of the inquiry. However, the presiding officer may return the documents, or things, prior to the completion of the inquiry.

Clause 1408 — Record of inquiry

The presiding officer is obliged to keep a record of the inquiry.

Part 13.3 — Disciplinary hearing procedures

Clause 1409 — Notice of disciplinary hearing

Clause 1409 requires the presiding officer to notify the accused detainee of a hearing and the Chief Executive. The detainee should already be informed of charges laid, and already have had the opportunity to elect to consent to the charges as a consequence of division 12.3.1 above.

Clause 1409(2) stipulates that the notice must say when and where the hearing will take place and state the detainee's rights and obligations in clauses 1410,1411,1412 and 1413.

Clause 1409(3) clarifies that the hearing may be held at a youth detention centre. It is envisaged that most hearings will take place at the youth detention centre where the detainee is detained.

Clause 1410 — Presiding officer's powers at inquiry

Clause 1410(1) authorises the presiding officer to direct witnesses to attend the hearing to answer questions or produce relevant documents or things for the hearing.

Clause 1410(2) clarifies that compliance with providing documents or other things is achieved if they are provided before the deadline in the notice issued by the presiding officer.

Clause 1410(3) provides the presiding officer with explicit authority to require an accused detainee or a witness to answer questions, produce documents, or produce other things.

Clause 1410(4) enables the presiding officer to disallow questions that are unfair, prejudicial, vexatious or are an attempt to abuse the inquiry procedure.

Clause 1410(5) gives the presiding officer the power to allow an authorised person and other people to be heard at a hearing.

The power in clause 1410 does not override a person's privilege against self-incrimination nor exposure to civil penalty. The clause also retains client legal privilege.

Clause 1411 — Rights of accused at disciplinary hearing

Clause 1411(1) entitles the detainee accused of breaching discipline to be present at the hearing.

Clause 1411(2)(a) establishes a detainee's right to be heard, to examine witnesses, to cross-examine witnesses and to make submissions to an inquiry.

Clause 1411(2)(b) establishes that a detainee has a right to an advocate or lawyer at a disciplinary hearing.

Clause 1412 — Exclusion of accused detainee from hearing

Clause 1412 empowers the presiding officer to exclude a detainee from a hearing if the detainee is disruptive or contravenes a direction made by the presiding officer.

Clause 1413 — Hearing in accused detainee's absence

Clause 1413 clarifies that the detainee's presence is not inherently required for the presiding officer to determine if a charge is proven. However, this does not set aside the presiding officer's obligation to see that natural justice is applied. The presiding officer should consider why the detainee failed to attend and consider whether making a decision in the detainee's absence would not offend natural justice.

For example, if the detainee's refused to attend, the detainee may have waived their detainee's right to question witnesses etc. However, if the detainee was physically unable to attend due to circumstances out of the detainee's control, the presiding officer may consider whether a hearing should be re-convened.

Clause 1414 — Appearance at disciplinary hearing by audiovisual or audio link

Clause 1414 enables the use of technology to conduct hearings. This clause enables appearances by relevant parties and witnesses to take place via audiovisual or audio links. The individuals do not have to be physically before the presiding officer.

The clause draws upon relevant provisions of the *Evidence (Miscellaneous Provisions) Act 1991*. A presiding officer will be authorised to draw upon these powers by a consequential amendment to the *Evidence (Miscellaneous Provisions) Act 1991* including the presiding officer as a quasi-judicial entity.

Chapter 14 Care and Protection - general

This chapter includes general matters relating to care and protection such as principles and considerations and overarching concepts.

Part 14.1 Application of care and protection chapters

This part outlines the application of the care and protection chapters. Care and protection is dealt with in chapters 14 to 23 inclusive.

Part 14.2 Important concepts for care and protection chapters

This part includes definitions for the care and protection chapters and re-enacts the meaning of key concepts such as abuse, neglect, at risk, in need of care and protection, former caregiver and contact.

Part 14.3 Principles and considerations for care and protection chapters

Clause 1513 What is in best interests of child or young person?

This clause outlines the matters that decision-makers must take into account in deciding what is in the best interests of a child or young person for the care and protection chapters.

Clause 1514 Care and protection principles

This clause outlines care and protection principles. These principles are currently contained in the general principles at section 12 of the Act and are relocated to this chapter as they do not have general application and relate only to care and protection matters.

These principles are additional to the general principles applying across the Act at clause 8.

Clause 1515 Helping families understand care and protection procedures

This clause re-enacts section 155A of the Act. This principle was introduced to guide decision-makers actions regarding consultation with, and participation of, children and young people and people with parental responsibility in decision-making.

For any care and protection decision, the decision-maker must attempt to ensure that the child or young person (or their legal representative) and people with parental responsibility understand the nature of the decision, the decision-making process, that they may participate in the decision-making process having their views and wishes heard and understand the final decision after it is communicated to them. The clause is intended to apply to all decisions made about a child by all decision makers in the care and protection chapters, including Courts.

Clause 1516 Views and wishes of children and young people

This is a new principle for decision-makers making a decision under the care and protection chapters in eliciting the views and wishes of children and young people. This clause provides that a decision-maker may find out the views and wishes of a child or young person in a number of ways, including through a representative of the child or young person or through a report containing the child or young person's views or wishes.

Chapter 15 Care and protection – reporting, investigating and appraising abuse and neglect

This chapter establishes the reporting and investigative/appraisal framework for children and young people at risk of abuse and neglect. The reporting framework now includes pre-natal reporting to allow the Chief Executive to receive and respond to reports on unborn children. Pre-natal reporting provisions are contained in the *Children and Young People Amendment Bill 2006 (No 2)*, currently before the ACT Legislative Assembly.

Part 15.1 Care and protection – reporting abuse or neglect

Division 15.1.1 Definitions

This division includes definitions for the Act of abuse or neglect report, mandatory report, pre-natal report and voluntary report.

Division 15.1.2 Reporting abuse or neglect of children and young people

This division re-enacts existing provisions related to voluntary and mandatory reporting of abuse and neglect of children and young people with the following amendments:

At clause 1602, The list of mandated reporters obliged to report non-accidental physical injury and sexual abuse of a child or young person has been expanded to include a person providing education to a child or young person who is registered, or provisionally registered, for home education under the *Education Act 2004*.

Division 15.1.3 Prenatal reporting of anticipated abuse or neglect

Pre-natal reporting is necessary for the Chief Executive to respond to reports made during a pregnancy that a child who may be born as a result of the pregnancy may be in need of care and protection. Community members are currently reporting to the Chief Executive their concerns of the risk of future abuse or neglect to children who may be born and consequently there is legal ambiguity about the status of this information. There was also strong support for the introduction of pre-natal reporting at law, in community consultation undertaken as part of the Review of the Children and Young People Act.

Other Australian jurisdictions have enacted similar pre-natal reporting provisions (see for example, section 21A, *Child Protection Act 1999* (Qld) and section 25, *Children And Young Persons (Care And Protection) Act 1998* (NSW)). A number of reviews of child deaths have highlighted the imperative for pre-natal reporting provisions to allow statutory child protection agencies to intervene early to prevent serious injury or death to vulnerable, at risk infants (see for example, Queensland Ombudsman, 2003, *An investigation into the adequacy of the actions of certain government agencies in relation to the safety, well being and care of the late baby Kate, who died aged 10 weeks*).

The pre-natal reporting provisions engage human rights law. Section 9(2) of the *Human Rights Act 2004* provides that the right to life applies from the time of birth. The provisions will not affect the law in relation to the legal status of the unborn child.

The pre-natal reporting provisions will allow the Chief Executive to undertake a voluntary assessment of whether the child is likely to be in need of care and protection after the child is born. The provisions will also enable the Chief Executive to provide, or arrange the provision of, voluntary support services to the pregnant woman and other family members who may be involved in the care of the child after birth, including for example the child's father.

The pre-natal reporting provisions may be considered to encroach upon the pregnant woman's rights and liberties, in particular, the right not to have her privacy (and family) interfered with unlawfully or arbitrarily (section 12, *Human Rights Act 2004*) and the right of the family to protection (section 11, *Human Rights Act 2004*). Section 28 of the *Human Rights Act 2004* provides that human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

In considering the reasonableness of the intrusion on these rights, the following factors have been considered:

- Child death reviews across Australia have consistently identified the need for legislative provisions that allow concerns about unborn children to be reported and responded to, in order to provide early support.
- The objective of these provisions is to reduce the likelihood the child will be in need of care and protection when born. This will be achieved through the Chief Executive providing or arranging the provision of appropriate support services to the pregnant woman with her consent.
- To ensure that intervention by the Chief Executive is proportionate and least restrictive, the Bill does not enable the Chief Executive to take action to compel a pregnant woman to do or not do something.

It is considered that this engagement of rights is a justifiable limit on the right to privacy for the pregnant woman and is proportionate to the objective served by the provisions in reducing the likelihood of future abuse or neglect of children.

Part 15.2 Care and protection – preliminary investigation

This part introduces preliminary investigative powers for the Chief Executive in response to a report of abuse or neglect of a child or young person. It is intended to provide clarity regarding the Chief Executive's powers in responding to an abuse or neglect report.

In order to visually examine or interview a child or young person as part of an appraisal, the Chief Executive must seek the agreement of a person who has responsibility for day to day matters for a child or young person unless satisfied that doing so would be likely to:

- place the child or young person at risk of abuse or neglect; or
- jeopardise the appraisal; or
- jeopardise a criminal investigation.

In these circumstances the Chief Executive may visually examine or interview a child or young person without the agreement of the person who has responsibility for day to day matters for a child or young person.

After doing so the Chief Executive must tell a person who has responsibility for day to day matters for a child or young person that the examination or interview has occurred, unless satisfied that it is likely to:

- place the child or young person at risk of abuse or neglect; or
- jeopardise the appraisal; or
- jeopardise a criminal investigation.

If the Chief Executive intends to visually examine or interview a child or young person without the agreement of a person who has responsibility for day to day matters, the Chief Executive may enter a school, health facility or childcare service for that purpose. The Chief Executive is required to produce an identity card and inform the person in charge of the place the purpose of entry.

Part 15.3 Care and protection – appraisals

This part outlines appraisals. An appraisal is an assessment by the Chief Executive of a child or young person's circumstances undertaken in response to an abuse or neglect report.

A professional assessment means a medical, dental, social, paediatric, developmental, psychological or psychiatric assessment, examination or test. A professional assessment may be required to provide further information to the Chief Executive or a Court about a person's circumstances.

Division 15.3.2 Appraisal with agreement or order

The Chief Executive may undertake an appraisal only with the agreement of a child or young person (if the child or young person has the capacity to agree) and a person with responsibility for day to day matters for the child or young person or an appraisal order is in force.

The agreement of a person with responsibility for day to day matters for the child or young person is not required if the Chief Executive is satisfied that it would be likely to:

- place the child or young person at risk of abuse or neglect; or
- jeopardise the appraisal; or
- jeopardise a criminal investigation.

Clause 1619 places obligations on the Chief Executive in seeking a person's agreement for an appraisal and requires a written acknowledgement.

Division 15.3.3 Appraisal orders

This division introduces appraisal orders. These orders are broadly similar to Temporary Assessment orders in Queensland (see *Child Protection Act 1999*, Chapter 2, Part 2). An appraisal order authorises the Chief Executive to undertake an appraisal and may include requirements about the conduct of the appraisal, including:

- that a person attend, alone or with someone, at a stated place and time for the appraisal;
- that a person or entity comply with arrangements made by the Chief Executive for the appraisal;
- that a person or entity give the Chief Executive information about the care, welfare or development of a child or young person; and
- that something be produced to the Court or given to the Chief Executive or someone else.

The order may also include a temporary custody provision which transfers responsibility for day to day matters of a child or young person to the Chief Executive and authorises search and entry to premises to find a child or young person. The purpose of the order is to authorise an appraisal and transfer of responsibility for day to day matters to the Chief Executive in circumstances where there is an unacceptable risk to the child or young person remaining in the same care arrangements during the assessment period.

The order is intended to be available in urgent circumstances with the Bill providing for the Chief Executive to make an application by telephone, fax or other electronic means (clause 1625).

The Chief Executive may apply for an appraisal order if satisfied that an appraisal is necessary to assess whether the child or young person is in need of care and protection, and the appraisal cannot be effectively undertaken unless the order is made and consent has not been given, where necessary, by the child or young person or a person with responsibility for day to day matters.

The division also sets out procedural matters relating to an application for an appraisal order including:

- Clause 1626 Application must state grounds
- Clause 1627 Who must be given application
- Clause 1628 Court must consider application promptly

Clause 1631 outlines the criteria for making an appraisal order.

The length of an appraisal order is up to 2 weeks with a temporary custody provision no longer than 3 days.

There is an offence for contravening an appraisal order (clause 1622). A person may contravene an order by engaging in conduct that contravenes a provision of the order or fails to comply with a requirement made of the person under the order. The maximum penalty is 50 penalty units, imprisonment for 6 months or both.

Division 15.3.4 Chief Executive's action after appraisal

This division requires the Chief Executive to keep a written record of each appraisal (clause 1640). This clause re-enacts section 162(b).

This division also requires the Chief Executive to report appraisal information to the Public Advocate in certain circumstances (clause 1641). This clause re-enacts section 189A.

Chapter 16 Care and protection – voluntary agreements to transfer or share parental responsibility

This chapter outlines the ways in which parental responsibility can be voluntarily transferred or shared between persons with responsibility for a child or young person and someone else – registration of family group conference agreements and voluntary care agreements.

Part 16.2 Registration of family group conference agreements that transfer or share parental responsibility

This part contains provisions regarding registration of a family group conference agreement. Following a family group conference, if an agreement is reached between the parties that an aspect of parental responsibility should be transferred or shared between persons, the Chief Executive may apply to the Childrens Court to register the agreement. An agreement may not transfer to, or share with, the Chief Executive parental responsibility for the child or young person (see clause 203).

A registered family group conference agreement has effect as if it were an order of the Childrens Court and may be enforced accordingly.

Part 16.3 Voluntary agreement to share parental responsibility with Chief Executive

This part re-enacts existing provisions regarding voluntary care agreements. A voluntary care agreement is a written agreement between the Chief Executive and a parent or someone else who has responsibility for day to day matters, long term matters or health care treatment to share one or more aspects of parental responsibility.

Chapter 17 Care and protection – emergency situations

Part 17.1 Emergency medical treatment

Currently emergency medical treatment for children and young people may be authorised by way of a special assessment as part of an appraisal. This part separates this power from the assessment framework.

This part outlines when a child of young person is in need of emergency medical treatment for a care and protection chapter. This may arise because of a medical condition or circumstance in which the child or young person's life is at risk or their health is at risk of serious damage; the child or young person is in significant pain or the child or young person has a broken or dislocated bone.

Clause 1801 provides that the Chief Executive must seek the agreement of a person with responsibility for health care treatment for a child or young person to emergency medical treatment if the child or young person does not have capacity to agree to the emergency medical treatment and no-one with responsibility for health care treatment has agreed.

This is not required in circumstances where the Chief Executive is satisfied that doing so would be likely to increase the risk to the child or young person's life or health or pain or would be impracticable.

Clause 1802 provides for responsibility for health care treatment for the child or young person to be transferred to the Chief Executive to allow the Chief Executive to agree to emergency medical treatment in circumstances where the agreement of a person with responsibility for health care treatment has been sought but not given or the Chief Executive has not sought their agreement. The responsibility is transferred only for as long as necessary for the emergency medical treatment of the child or young person.

Part 17.2 Emergency care and protection

This part re-enacts provisions at Division 7.3.4 relating to emergency action.

Chapter 18 Care and protection – care and protection orders

This chapter introduces a number of changes to care and protection orders. Care and protection orders may contain provisions necessary to authorise certain action or responsibility by the Chief Executive or address specific matters related to a child or young person's care and protection (for example, drug use provisions).

Part 18.1 Preliminary

This part includes the definitions for chapter 18 and outlines what a care and protection order is. A care and protection order may include provisions such as a parental responsibility provision (see part 18.6), contact provision (see part 18.7), drug use provision (see part 18.8), supervision provision (see part 18.9), mental health tribunal provision (see part 18.10) or a specific issues provision (see part 18.11).

The offence at clause 1902 of contravening a care and protection order re-enacts an existing offence at section 210(3).

Part 18.2 Application for care and protection orders

This part outlines applications for care and protection orders and includes requirements for service of applications for care and protection orders currently contained in Schedule 1 of the Act. For example, clause 1906 provides that an application must be served on the listed persons at least 3 working days before the application is heard by the Court.

Part 18.3 Interim care and protection matters

Division 18.3.1 General

This division outlines action the Childrens Court may take before adjourning an application or cross application. Clause 1911 re-enacts section 252 related to Court ordered meetings.

Division 18.3.2 Interim care and protection orders

This division includes interim care and protection orders and contains a new strict liability offence at clause 1914 of contravening an interim care and protection order. The maximum penalty for this offence mirrors the penalty for contravening a final care and protection order – 100 penalty units, imprisonment for 1 year or both.

Division 18.3.3 Professional assessment orders

This division outlines professional assessment orders. A professional assessment order is an order authorising the Chief Executive to arrange a professional assessment of a child or young person and may include requirements in relation to the conduct of the assessment. The order can be no longer than 8 weeks (clause 1929), however it may be extended if the assessment cannot be effectively undertaken if the order is not extended.

This division also includes procedures for making an application for a professional assessment order. An application or an application for extension may be made by phone, fax or other means in urgent or special circumstances.

Division 18.3.4 Care plans

Clause 1936 of this division re-enacts section 259 of the Act related to care plans. Clause 1936(b)(iii) extends the existing section by including proposals regarding stability planning for the child or young person in the care plan.

Clause 1937 is new and requires the Chief Executive to consult about the care plan with a child or young person, parents or others with responsibility for day to day matters and anyone else involved with implementing matters in the care plan.

Division 18.3.5 Orders under the Domestic Violence and Protection Orders Act

This division relates to orders made by the Childrens Court under the Domestic Violence and Protection Orders Act.

Currently under the Act, the Childrens Court may make an interim or final Domestic Violence and Protection Order in relation to a child or young person while an application for a care and protection order is before the Court. A protection order made by the Childrens Court in these circumstances is taken to have been made under the *Domestic Violence and Protection Orders Act 2001*.

The criteria for making a final protection order has been expanded to include psychological abuse within the meaning of domestic violence. This addresses concerns raised that children and young people need to be appropriately and adequately protected from exposure to domestic violence and its associated detrimental effects on the child or young person's emotional and psychological wellbeing.

For this division, psychological abuse of a child or young person means a person causing or allowing the child or young person to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship; or putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.

The definition of psychological abuse is based on the New Zealand *Domestic Violence Act 1995.*

Part 18.4 Making care and protection orders

This part includes the criteria for making a care and protection order. Clause 1945 requires the Childrens Court to state the length of the order when making a care and protection order.

Part 18.5 Extending, amending and revoking care and protection orders

This part includes the procedures for extending, amending and revoking care and protection orders.

Part 18.6 Parental responsibility provisions

This part includes parental responsibility provisions. A parental responsibility provision must be short-term (see division 18.6.2), long-term (see division 18.6.3) or enduring (see division 18.6.4).

Division 18.6.2 Short-term parental responsibility provisions

A short-term parental responsibility provision is not longer than 2 years. This division contains the criteria for making or extending a short-term parental responsibility provision.

Division 18.6.3 Long-term parental responsibility provisions

A long-term parental responsibility provision is in force until a child or young person is 18 years old and transfers responsibility for the child or young person to the Chief Executive or another stated person. This division contains the criteria for making a long-term parental responsibility provision.

Division 18.6.4 Enduring responsibility provisions

This division re-enacts existing provisions in Chapter 7 related to enduring parental responsibility orders. An enduring parental responsibility provision transfers responsibility for day-to-day matters, long term matters and health care treatment for the child or young person to a stated person and is in force until the child or young person is 18 years old. It may not be made in favour of the Chief Executive.

Part 18.7 Contact provisions

This part expands section 260 of the Act in relation to contact. Currently the Act provides that only a specific issues order, not a contact order, may prohibit contact between a child or young person and someone else (section 206(5)). It is intended to consolidate all matters relating to contact arrangements for a child or young person, including a direction that a third party not have contact with a child or young person, in contact provisions of care and protection orders.

This part therefore provides that a contact provision in a care and protection order may include a direction that a stated person not have contact with the child or young person, a direction that a stated person be allowed to have contact with the child or young person and the conditions on which a stated person may have contact with the child or young person.

Part 18.8 Drug use provisions

The recent Murray-Mackie study that investigated the deaths and near-deaths of five children known to Care and Protection Services in the ACT recommended that more emphasis be placed by care and protection workers on the assessment of illicit drug use by primary caregivers for children through objective medical testing such as urine screening and Court orders where necessary. This is currently given effect through an application by the Chief Executive to the Childrens Court for a specific issues order authorising drug testing.

This part introduces new clauses related to drug use provisions in a care and protection order. Clause 1978 provides the meaning of a drug use provision in a care and protection order as a provision about usage of drugs by a stated person. It may include directions that the person not use a stated drug; that the person use a stated drug only in accordance with certain stated conditions and that the person undergo drug testing in accordance with drug testing standards.

Under clause 3212, the Minister may make drug testing standards by way of disallowable instrument. The standards will be developed in consultation with relevant stakeholders. It is intended to improve transparency through standards detailing what a test sample is,

arrangements for sample collection, invalidation of samples (eg through tampering), provision of results to persons tested and when a test sample is considered positive.

Clause 1979 includes the criteria for making a drug use provision. The Childrens Court must be satisfied that the person about whom the order is to be made has an aspect of parental responsibility for the child or young person or may have contact with them; the child or young person would be in need of care and protection if the provision was not included; the Chief Executive has tried less intrusive ways to provide care and protection for the child or young person but they have not been successful, or they have been considered and are not appropriate; there are no less intrusive ways to provide care and protection for the child or young person and including the provision is in the best interests of the child or young person.

The Childrens Court may make a drug use provision on application or its own initiative. A drug use provision may be extended, amended or revoked under Part 18.5. A drug use provision can only be made if the person agrees to it, has been given an opportunity to be heard about it or cannot be found (clause 2523).

Part 18.9 Supervision provisions

This part re-enacts sections in chapter 7 relating to supervision orders. A supervision provision in a care and protection order means a provision placing a child or young person under the supervision of the Chief Executive or another stated person.

Part 18.10 Mental health tribunal provisions

This part provides the meaning of a mental health tribunal provision in a care and protection order. A mental health tribunal provision directs a child or young person to submit to the jurisdiction of the mental health tribunal to allow the tribunal to decide whether the child or young person has a mental impairment and to make recommendations to the Childrens Court about how the child or young person should be dealt with.

Part 18.11 Specific issues provisions

This part details specific issues provisions. A specific issues provision in a care and protection order means a provision about the care and protection of the child or young person and may include a direction that a stated person do or not do a stated thing or comply with a stated condition.

It is an offence to engage in conduct that contravenes a direction of a specific issues provision.

Part 18.12 Annual review reports – parental responsibility and supervision provisions

This part introduces a new term of 'annual review report' to describe the Chief Executive's annual progress report for a child or young person subject to supervision or for whom the Chief Executive has parental responsibility.

The Bill re-enacts existing provisions relating to annual review reports. A new clause (1990) requires the Chief Executive to arrange a meeting with the child or young person, parents, out of home carers and foster care service to discuss the matters that the Chief Executive proposes to include in the report before the report is finalised

This clause addresses a recommendation of the ACT Legislative Assembly Standing Committee on Community Services and Social Equity's 2003 report, *Inquiry Into the Rights, Wellbeing and Interests of Children and Young People*.

Chapter 19 Care and protection – Chief Executive has aspect of parental responsibility

This chapter outlines arrangements for the Chief Executive's exercise of parental responsibility. The Chief Executive may have responsibility for day-to-day matters, health care treatment and/or long-term matters for a child or young person.

Part 19.1 General

This part provides definitions for this chapter and the Act.

Clause 2001 Chief Executive must encourage family relationships

This clause re-enacts section 27(1)(b) and requires the Chief Executive to encourage the maintenance and development of a child or young person's family, cultural and other significant relationships.

Clause 2002 Chief Executive may provide assistance

This clause re-enacts section 27(2). The Chief Executive may provide assistance and support as listed at (1)(a) to (h) to a child or young person for whom the Chief Executive has an aspect of parental responsibility.

Part 19.2 Chief Executive has responsibility for health care treatment

Clause 2003 Chief Executive sharing responsibility for health care treatment

This clause provides that if the Chief Executive shares parental responsibility for health care treatment for a child or young person, that responsibility may not be discharged by a person in a way that would be incompatible with the Chief Executive's discharge of the responsibility.

Part 19.3 Chief Executive has responsibility for long-term matters

Clause 2004 Chief Executive must not authorise anyone else to exercise responsibility

This clause provides that if the Chief Executive has responsibility for long-term matters for a child or young person, the Chief Executive must not authorise anyone else to exercise the responsibility for the Chief Executive.

Clause 2005 Chief Executive sharing responsibility for long-term matters

This clause provides that, if the Chief Executive shares responsibility with another person for long-term matters for a child or young person, the Chief Executive is obliged to consult with any other person exercising parental responsibility before making a decision. To the extent of any disagreement between the Chief Executive and the other person about how an aspect of long-term parental responsibility should be exercised, then the disagreement is to be resolved by order of the Childrens Court.

For example, if the Chief Executive proposes to make a decision about the issuing of a passport for a young person to allow the young person to travel overseas with their carers, the Chief

Executive must consult with each of the child's parents who retain responsibility for long-term matters. If one of the child's parents opposes the issuing of a passport, the Chief Executive may apply to the Childrens Court seeking a care and protection order with a specific issues provision for the passport's issue.

Clause 2006 Chief Executive must consult about long-term matters

This clause provides that if the Chief Executive has responsibility for long-term matters for a child or young person, the Chief Executive must consider the views and wishes of any person who previously had responsibility for long-term matters, as far as practicable.

Part 19.4 Chief Executive has responsibility for day-to-day matters

Under clause 3212, the Minister may make out of home care standards. These standards will be developed in consultation with the out-of-home care agencies and other relevant stakeholders.

Clause 2007 Part 19.4 applies to care and protection chapters

This clause outlines the application of this part, Part 19.4. Part 19.4 applies if the Chief Executive has responsibility for day to day matters for a child or young person under a care and protection chapter (for example, a child subject to a voluntary care agreement or a care and protection order including a parental responsibility provision).

Part 19.4 does not apply if the Chief Executive has responsibility for day to day matters for a child or young person under an interim or final therapeutic protection order.

Division 19.4.2 Sharing responsibility for day to day matters

Clause 2008 Chief Executive sharing responsibility for day-to-day matters

This clause provides that if the Chief Executive shares responsibility for day to day matters for a child or young person with another person, no-one may discharge the responsibility in a way that would be incompatible with the Chief Executive's discharge of the responsibility.

Division 19.4.3 Placement with out-of-home carer

Clause 2009 Who is an out-of-home carer?

This clause provides the meaning of out of home carer for a child or young person as a kinship carer, a foster carer or a residential care service for the child or young person.

Clause 2010 Who is a kinship carer?

This clause provides the meaning of kinship carer for a child or young person as a person authorised by the Chief Executive under clause 2018 and with whom the Chief Executive has placed the child or young person under clause 2013.

Clause 2011 Who is a foster carer?

This clause provides the meaning of foster carer for a child or young person as a person authorised by the Chief Executive under clause 2019 and 2020 and with whom the Chief Executive has placed the child or young person under clause 2013.

Clause 2012 What is a residential care service?

This clause provides the meaning of residential care service as an entity authorised by the Chief Executive under clause 2021 and 2022 and with whom the Chief Executive has placed the child or young person under clause 2013.

Clause 2013 Chief Executive must place child or young person with out-of-home carer

This clause requires the Chief Executive to place the child or young person with an out of home carer if the Chief Executive has responsibility for day to day matters for a child or young person.

If the Chief Executive is placing an Indigenous child or young person with an out of home carer, the placement must be in accordance with clause 2014.

Clause 2014 Priorities for placement with out-of-home carer - indigenous child or young person

This clause re-enacts the Indigenous child placement principle at section 15 of the Act.

Clause 2015 Chief Executive shares responsibility with out-of-home carer

This clause specifies that if the Chief Executive places a child with an out of home carer, the Chief Executive shares responsibility for day to day matters for the child or young person with the out of home carer.

Clause 2016 Residential care service may accommodate child or young person at place of care

This clause provides that a residential care service may accommodate a child or young person at a place of care.

Division 19.4.4 Authorisation of out-of-home carers and approval of places of care

This division intends to bring the legislation more closely into line with current practices for approval of out of home carers (kinship carers, foster carers and residential cares services) and places of care.

Clause 2017 Definitions

This clause includes definitions for the Act of foster care service, general parental authority, out of home care authorisation, specific parental authority and support.

Clause 2018 Authorisation of kinship carer—particular child or young person

This clause allows the Chief Executive with responsibility for day to day matters for a child or young person to authorise a relative or significant person for the child or young person to exercise the responsibility for the Chief Executive. In urgent circumstances, the Chief Executive

may need to orally authorise a kinship carer. Under clause 2023, the Chief Executive is required to provide a written authorisation as soon as practicable after the verbal authorisation. The authorisation may occur only if the Chief Executive is satisfied the person agrees to exercise the responsibility for the Chief Executive and is a suitable entity to have responsibility for day to day matters for the child or young person.

Clause 2019 Authorisation of foster carer—particular child or young person

This clause allows the Chief Executive with responsibility for day to day matters for a child or young person to authorise a person to exercise the responsibility for the Chief Executive as a foster carer. In urgent circumstances, the Chief Executive may need to orally authorise a foster carer. Under clause 2023, the Chief Executive is required to provide a written authorisation as soon as practicable after the verbal authorisation. The authorisation may occur only if the Chief Executive is satisfied the person agrees to exercise the responsibility for the Chief Executive; is a suitable entity to have responsibility for day to day matters for the child or young person and the foster care service supporting the person is a suitable entity to facilitate foster care services and complies with, and is likely to continue to comply with, the out of home care standards.

Clause 2020 Authorisation of foster carer—any child or young person

This clause allows the Chief Executive to authorise a person to exercise the responsibility for the Chief Executive as a foster carer for any child or young person for whom the Chief Executive has responsibility for day to day matters.

In urgent circumstances, the Chief Executive may need to orally authorise a foster carer. Under clause 2023, the Chief Executive is required to provide a written authorisation as soon as practicable after the verbal authorisation. The authorisation may occur only if the Chief Executive is satisfied the person agrees to exercise the responsibility for the Chief Executive for any child or young person; is a suitable entity to have responsibility for day to day matters for any child or young person and the foster care service supporting the person is a suitable entity to facilitate foster care services and complies with, and is likely to continue to comply with, the out of home care standards.

Clause 2021 Authorisation of residential care service—particular child or young person

This clause allows the Chief Executive to authorise an entity, orally or in writing, to exercise the responsibility for the Chief Executive for a child or young person for whom the Chief Executive has responsibility for day to day matters.

This authorisation may occur only if the Chief Executive is satisfied that the entity agrees to exercise the responsibility for the Chief Executive; is a suitable entity to have responsibility for day to day matters for the child or young person and the entity complies with, and is likely to continue to comply with, the out of home care standards.

Clause 2022 Authorisation of residential care service—any child or young person

This clause allows the Chief Executive to authorise an entity, in writing, to exercise the responsibility for the Chief Executive for a child or young person for whom the Chief Executive has responsibility for day to day matters.

This authorisation may occur only if the Chief Executive is satisfied that the entity agrees to exercise the responsibility for the Chief Executive; is a suitable entity to have responsibility for day to day matters for the child or young person and the entity complies with, and is likely to continue to comply with, the out of home care standards.

Clause 2023 Out-of-home carer must be given copy of authorisation

This clause requires the Chief Executive to provide a written authorisation as soon as practicable after a verbal authorisation to a person or entity as an out of home carer. The Chief Executive must provide a written authorisation to the person or entity.

Clause 2024 Revocation of kinship carer's authorisation

This clause outlines the grounds by which the Chief Executive may revoke a person's authorisation as a kinship carer and is additional to the power conferred by section 180 of the Legislation Act.

Clause 2025 Revocation of foster carer's authorisation

This clause outlines the grounds by which the Chief Executive may revoke a person's authorisation as a foster carer and is additional to the power conferred by section 180 of the Legislation Act.

Clause 2026 Revocation of residential care service's authorisation

This clause outlines the grounds by which the Chief Executive may revoke an entity's authorisation as a residential care service and is additional to the power conferred by section 180 of the Legislation Act.

Clause 2027 Approval of places of care

This clause allows the Minister to approve a place of care if satisfied that the residential care service and the place complies with, and is likely to continue to comply with, the out-of-home care standards.

Division 19.4.5 Information to be kept by foster carers and residential care services

This division seeks to ensure that children and young people have access to their personal information during or after leaving foster or residential care.

Clause 2028 Definitions—Division 19.4.5

This clause creates definitions for this division. Care entities means a child or young person's foster care and foster care service (if placed in foster care) or a residential care service. Personal information means all information about a child or young person, including person documents such as a birth certificate, school reports, medical reports and photographs.

Clause 2029 Information must be kept during placement

This clause requires care entities to keep personal information about the child or young person that the entity possesses, and records made by the care entity about the child or young person, because of the placement.

Clause 2030 Information must be kept after placement ends

This clause requires the care entity to keep the personal information or records until the information is given to the Chief Executive. This information must be given by the care entity to the Chief Executive if the care entity ceases to operate; 7 years after the placement has ended or at the Chief Executive's request.

Clause 2031 Child or young person must have access to information

This clause provides that the care entity must give a child or young person access to their personal information and records if they retain the information.

Chapter 20 Therapeutic protection orders

Therapeutic protection orders enable the Chief Executive to confine a child or young person at a place declared by the Minister as a therapeutic protection place. The existing provisions for therapeutic protection orders in the Act raise significant human rights implications. The Bill seeks to build in additional safeguards that protect against unlawful and arbitrary interferences with rights contained in the *Human Rights Act 2004* and to ensure the child or young person is deprived of their liberty for the least amount of time as necessary.

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

Part 20.1 Preliminary

Clause 2100 sets out definitions for the chapter,

Clause 2101enables the Chief Executive to confine a child or young person under a therapeutic protection order. This clause re-enacts section 234 of the Act.

Part 20.2 Therapeutic protection orders

Clause 2102 clarifies that a therapeutic protection order authorises the confinement of a child or young person for a particular period at a therapeutic protection place for implementation of a therapeutic protection plan; and transfers responsibility for day-to-day matters for the child or young person to the Chief Executive for the period of confinement. This clause re-enacts section 235(b) of the Act and continues to have the effect of transferring an aspect of parental responsibility under a therapeutic protection order and enabling the Court to include conditions it considers necessary.

Clause 2103 introduces the concept of harmful conduct engaged in by a child or young person, which means conduct which leads to a significant risk of significant harm to the child or young person or someone else. This concept is used by the Court to examine the grounds for making, amending or extending a therapeutic protection order and narrows the previous concept of 'serious harm' to ensure that therapeutic protection orders are only considered for those children and young people most at risk of harm to themselves or others.

Clause 2104 introduces the concept of a risk assessment that is used in the application for a therapeutic protection order to assess the level of risk of harm to the child or young person. The clause enables the Chief Executive to make guidelines about the risk assessment by way of notifiable instrument.

Clause 2104 establishes the concept of a therapeutic protection place declared by the Minister under section 2195.

Clause 2106 establishes the concept of a therapeutic protection plan which replaces and extends the meaning of a schedule at section 243 of the Act. The plan is developed by the Chief Executive as part of the application, and approved by the Court as part of making a therapeutic protection order under clause 2110. The purpose of the plan is to reduce the likelihood of the child or young person engaging in harmful conduct in the future. The plan

outlines the period of confinement, the proposed therapy, counselling or other services and its expected results, the proposed education, supervision and contact arrangements for the child and young person. Previously contact arrangements were at the discretion of the Chief Executive but now are overseen by the Court through this clause.

Clause 2107 establishes the concept of therapeutic protection history that outlines how the plan referred to in clause 2106 was implemented for the child. The history is considered by the Court as part of the application to amend or extend a therapeutic protection order.

Clause 2108 introduces the concept of a transition plan, which is a plan developed by the Chief Executive to assist the child or young person integrate into the community and stop engaging in harmful conduct when they leave the therapeutic place.

Division 20.2.2 Applications for therapeutic protection orders

Clause 2109 enables the Chief Executive only to apply for a therapeutic protection order if satisfied that the criteria for making the order in clause 2118 are met.

Clause 2110 introduces new requirements that must be included in applications for therapeutic protection orders including a risk assessment, previous therapeutic protection orders, any therapeutic protection history, less restrictive interventions that the Chief Executive has tried or considered but were not appropriate, a therapeutic protection plan, a transition plan and how the therapeutic protection order is part of the overall care plan for the child or young person.

Clause 2111 outlines who must be given the application for a therapeutic protection order. This re-enact s.275 Schedule 1 of the Act.

Clause 2112 continues to have the effect that a Court must list an application for a therapeutic protection order for hearing not later than 2 working days after the day the application is filed. There is a new requirement on the Court to hear and decide an order within 2 weeks of the application being filed or served.

Division 20.2.3 Interim therapeutic protection orders

The Bill introduces interim therapeutic protection orders.

Clause 2113 establishes that an interim therapeutic protection order authorises a period of confinement for up to 2 weeks.

Clause 2114 clarifies that the Court can make an interim order, if an application for a therapeutic protection order has been made but not decided and the Court is satisfied that the criteria for making the order are met.

Children and young people being considered for a therapeutic protection order may have an undiagnosed mental illness that would otherwise be considered by the Mental Health Tribunal. Clause 2115 introduces a new requirement on the Court to refer children and young people who it reasonably suspects may have a mental illness for assessment by the Mental Health Tribunal, to decide whether they are suffering from a mental illness and if so, make recommendations to the Court about how the child or young person should be dealt with.

Clause 2116 establishes that an interim therapeutic protection order can be made for up to 2 weeks or remains in force until the application for the therapeutic protection order is decided.

Clause 2117 establishes that interim therapeutic protection orders can not be extended, amended, revoked or appealed.

Division 20.2.4 Making a therapeutic protection order

Clause 2118 introduces new criteria for making a therapeutic protection order to ensure that they are used as a last resort and only for those children and young people most at risk of harm to themselves or others.

Before making an order the Court must be satisfied that:

- if the order is not made—there will be a significant risk of significant harm to the child or young person or someone else, where the risk of harm arises from the child's or young person's conduct, and the risk of harm would be imminent;
- the Chief Executive has tried less restrictive ways without success; or considered less restrictive ways but were inappropriate; and there are no less restrictive ways for the Chief Executive to prevent the child or young person from engaging in harmful conduct;
- the child or young person is at least 10 years old (and the Public Advocate agrees to the order for those children aged under 12);
- the child or young person is not suffering from a mental illness; or is suffering from a mental illness but the Court is satisfied that making a therapeutic protection order is the best way to deal with the child or young person;
- no-one who has an aspect of parental responsibility for the child or young person (other than the Chief Executive) is able and willing to prevent the child or young person from engaging in harmful conduct;
- confinement of the child or young person is necessary to prevent the child or young person from engaging in harmful conduct;
- the Chief Executive has developed a therapeutic protection plan for the child or young person, which is more likely than not to reduce the likelihood of the child or young person engaging in harmful conduct in the future; and
- making the order is in the best interests of the child or young person.

Clause 2119 continues to have the effect of section 244 of the Act that a therapeutic protection order can be made for up to 8 weeks. The length must be stated in the order.

Clause 2120 introduces a new requirement on the Court to provide a statement of reasons when deciding an application for a therapeutic protection order.

Division 20.2.5 Review of therapeutic protection orders

It is critical that children and young people are only confined for the minimum necessary period to address risks. This division introduces an obligation on the Chief Executive to review therapeutic protection orders that are in force. Clause 2121 introduces a new obligation on the Chief Executive to review the operation of a therapeutic protection order within 4 weeks of it being made, and then every 8 weeks thereafter while the order is in place as set out at clause 2122.

Clause 2123 requires the Chief Executive to ask a therapeutic protection review panel (established in Division 20.4.3) for recommendations about the operation of the order. Clause 2124 requires the panel, in preparing recommendations, to consider the views of the child or young person and persons listed at 2124(2)(b) to (e). The panel is required to make a recommendation about whether the order, or a condition of the order, should be extended, amended or revoked. At clause 2125 the Chief Executive is required to consider the panel's recommendations and decide whether the order should be unchanged, extended, amended or revoked.

Clause 2126 requires the Chief Executive to prepare a report about the review including the panel's recommendations; reasons why the Chief Executive does not propose to implement a recommendation, and the Chief Executive's decision about whether the order should be varied or revoked.

The review report must be given to certain people outlined at clause 2127. After considering the review report, if the Chief Executive decides the order should be extended, amended or revoked then the Chief Executive is obliged to apply to the Court for extension, amendment or revocation.

Division 20.2.6 Extending a therapeutic protection order

This division introduces a maximum limit (6 months) on the number of consecutive therapeutic protection orders that can be made by the Children's Court. The Bill proposes that the Supreme Court would have oversight of orders exceeding 6 months.

Clause 2129 enables the Chief Executive to apply to the Children's Court to extend the total length of the order (from the date the order was made) up to 6 months, if the Chief Executive reasonably believes the criteria for extending the order are met. Currently there is no maximum time frame for consecutive orders made by the Childrens Court.

Clause 2130 enables the Chief Executive to apply to the Supreme Court to extend the total length of the order for a period which exceeds 6 months, if the Chief Executive reasonably believes the criteria for extending the order are met and the Public Advocate agrees to the extension.

Clause 2131 sets out what must be included in an application for extending a therapeutic protection order, including the grounds for extension, the therapeutic protection history, a further therapeutic protection plan and a further risk assessment. Clause 2132 provides the application must be given to listed persons at least 1 working day before the application is to be heard by the Court. Clause 2133 provides the Court must hear and decide the application not later than 2 weeks after the day the application is filed.

Clause 2134 outlines criteria for extension up to 6 months for the Childrens Court, which mirror the grounds for making the original order at clause 2118. The Childrens Court may only extend the order for a further 8 weeks each time and extend the total length of the order (from the date the order was made) up to 6 months.

Clause 2135 outlines the criteria for extension up to 12 months by the Supreme Court, which mirror the grounds for making the original order at clause 2118. The Supreme Court may only extend the order for a further 12 months each time. There is no upper limit on the number of times the Supreme Court can extend an order.

Clause 2136 requires the Childrens Court and Supreme Court to record reasons about its decision on an application to extend a therapeutic protection order.

Division 20.2.7 Amending or revoking a therapeutic protection order

Clause 2137 lists persons who can apply for amendment, or revocation, of a therapeutic protection order if the person reasonably believes that the criteria for amending, or revoking, the order are met. The application must be made to the Childrens Court (for orders less than 6 months) and the Supreme Court (for orders more than 6 months).

Clauses 2138 and 2139 set out what must be included in an application for amendment or revocation. Clause 2140 provides that the application must be given to listed persons at least 1 working day before the application is to be heard by the Court. Clause 2141 provides the Court must hear and decide the application not later than 2 weeks after the day the application is filed.

Clause 2142 provides the criteria for amending a therapeutic protection order. The Court must be satisfied that:

- if the order is not amended there will be a significant risk of significant harm to the child or young person; or someone else; and the risk of harm arises from the child's or young person's conduct; and the risk of harm will be imminent;
- the Chief Executive has developed a further therapeutic protection plan for the child or young person;
- the further therapeutic protection plan is more likely than not to reduce the likelihood of the child or young person engaging in harmful conduct in the future; and
- amending the order is in the best interests of the child or young person.

Clause 2143 provides that in order to revoke the therapeutic protection order, the Court must be satisfied that:

- if the order is revoked, there will be no imminent, significant risk of significant harm to the child or young person or someone else arising from the child's or young person's conduct; and
- revoking the order is in the best interests of the child or young person.

Clause 2144 requires the Childrens Court and Supreme Court to record reasons about its decision on an application to extend a therapeutic protection order.

Part 20.3 Children and young people in therapeutic protection

Division 20.3.1 Preliminary

Clause 2145 establishes that a child or young person is taken to be in therapeutic protection if the child or young person is confined at a therapeutic protection place under a therapeutic protection order.

Clause 2146 establishes that a therapeutic protection order requires the Chief Executive to take the child or young person into therapeutic protection at a therapeutic protection place; and keep the child or young person confined at the place until the order is revoked or otherwise ceases to have effect.

Clause 2147 enables the Chief Executive to closely or constantly supervise a child or young person in therapeutic protection. This clause requires the application of the human rights principle of proportionality, where the supervision must be limited to that which is reasonably necessary to safeguard the child's or young person's wellbeing.

Clause 2148 enables a child or young person in therapeutic protection to leave a therapeutic protection place if they are escorted by the Chief Executive. This leave may be for any reason including, but not limited to, visits to a doctor, for compassionate reasons or approved contact arrangements.

Division 20.3.3 Visits by accredited people

Clause 2149 lists persons considered to be accredited persons for a child or young person in therapeutic protection.

Clause 2150 requires the Chief Executive to ensure that children and young people in therapeutic protection have reasonable opportunities to receive visits from accredited people, in order to protect their human rights. Clause 2151 allows these visits to occur.

Division 20.3.4 Use of force

The *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (Rules 63-65) provides that instruments of restraint and force:

- can only be used in exceptional cases, where all other control methods have been exhausted and failed, and only as explicitly authorised and specified by law and regulation;
- may be resorted to prevent self-injury, injuries to others or serious destruction of property;
- should not cause humiliation and degradation, should be used restrictively and for the shortest possible period of time;
- if used, medical and other relevant personnel should be consulted and its use reported to a higher administrative authority; and
- carrying and use of weapons by personnel is prohibited in any facility where juveniles are detained.

This division authorises the use of force and prescribes for the proportionate use of force. The inappropriate use of force could potentially cause injury to the child or young person, limits the ability of individuals to move freely and is inherently degrading. It therefore engages principles of human rights, in particular sections 9(1) (right to life), 10(1)(b) (cruel, inhuman or degrading treatment), 11(2) (protection of the child), 13 (freedom of movement) and 19(1) (humane treatment) of the Human Rights Act.

Clause 2152 includes:

- A requirement on the Chief Executive to make arrangements to ensure that force is always used as a last resort and lawful;
- A requirement on the Chief Executive to make a policy or procedure in relation to the circumstances and by whom force can be used and the kinds of force allowed.

Clause 2153 sets out the grounds by which the Chief Executive may use force.

Clause 2154 sets out how force may be used, when required. The Chief Executive can only use force (except in urgent circumstances) if they believe the purpose cannot be achieved another way, must give a warning about the use of force and allow time for it to be observed, and use it in a way that reduces the risk of causing death or grievous bodily harm.

Clause 2155 requires the Chief Executive to ensure the child or young person receives any appropriate health assessment or treatment if they are injured by the use of force.

Division 20.3.5 Searches

This divisions continues to have the effect of the current search scheme outlined at sections 399 to 401 of the current Act with key amendments relating to least restrictive approaches, the introduction of body searches, and rules to preserve the dignity and privacy of the child or young person being searched.

Subdivision 20.3.5.1 sets out the meaning of different types of searches that can be used under this division.

Subdivision 20.3.5.2 sets out general requirements for all searches including:

- A requirement for the person conducting a search to ensure it is the least intrusive kind of search that is necessary and reasonable in the circumstances; and carried out in the least intrusive way that is necessary and reasonable in the circumstances.
- A rule to determine same sex requirements for this Chapter if the child or young person is transgender or intersex.
- An authority to use force to carry out a search under the chapter.

Subdivision 20.3.5.3 authorises and sets out requirements for scanning, frisk and ordinary searches of children and young people in therapeutic protection, including to:

- Tell the child or young person about the search, the reasons for the search and ask for their cooperation.
- Frisk and ordinary searches may only be carried out in an area that provides reasonable privacy.
- Frisk and ordinary searches must not be carried out in the presence or sight of another child or young person or someone whose presence is not necessary for the search or for the safety of anyone present.
- If clothing from a child or young person is seized the child or young person must be left with, or given, reasonably appropriate clothing to wear.
- Ensure frisk searches are conducted by someone who is the same sex as the child or young person.

Subdivision 20.3.5.4 authorises and sets out requirements for strip searches of children and young people in therapeutic protection, including to:

- Tell the child or young person about the search, the reasons for the search and ask for their cooperation.
- Ensure strip searches are conducted by someone who is the same sex as the child or young person.
- Allow searches to be carried out in the presence of one or more persons who must be the same sex as the child or young person.

- Ensure that the strip search is carried out in the presence of a person who can support and represent the interests of the child or young person; and whose presence is agreed to. The Chief Executive can direct the person to leave if they are preventing or hindering the search.
- The Chief Executive must conduct the search in a way that is appropriate to the child's or young person's sexuality and any known impairment, condition or history; and quickly.
- The search must be carried out in an area that provides reasonable privacy and not in the presence of a child or young person or someone of the opposite sex (except for certain listed persons).
- A strip search must not involve touching the child's or young person's body.
- The visual inspection of the genital area, anal area, buttocks and breasts, and the removal of clothes is limited to that which is strictly necessary and reasonable for the search.

Subdivision 20.3.5.5 authorises and sets out requirements for body searches of children and young people in therapeutic protection, including to:

- Tell the child or young person about the search, the reasons for the search and ask for their cooperation.
- Ensure body searches are conducted by a doctor or nurse who is the same sex as the child or young person.
- Allow searches to be carried out in the presence of one or more persons who must be the same sex as the child or young person.
- Ensure that the body search is carried out in the presence of a person who can support and represent the interests of the child or young person; and whose presence is agreed to. The Chief Executive can direct the person to leave if they are preventing or hindering the search.
- The removal of clothes is limited to that which is strictly necessary and reasonable for the search.
- An authority for the doctor to seize things (provided removing the thing would not cause injury to the child or young person) and give the thing to the Chief Executive.

Division 20.3.6 Seizing dangerous things

- Clause 2191 authorises the Chief Executive to seize a dangerous thing found during a search, unless the child or young person has written approval to possess the thing.
- Clause 2192 requires the Chief Executive to tell the owner of a thing seized within a week of the thing being seized.
- Clause 2193 allows a thing seized to be forfeited to the Territory in certain circumstances.
- Clause 2194 requires the Chief Executive to return an item not forfeited in certain circumstances.

Part 20.4 Therapeutic protection— administration

Division 20.4.1 Therapeutic protection places

Clause 2195 enables the Minister to declare a therapeutic protection place for this Act. The place cannot be used to accommodate detainees; and must comply with therapeutic protection place standards. Clause 2196 enables the Chief Executive to exclude from a declaration any matter that would disclose the location of a therapeutic protection place to ensure the privacy of children and young people confined there.

Clause 2197 enables the Chief Executive to make therapeutic protection place policies and operating procedures, consistent with this Act, to facilitate the effective and efficient management of therapeutic protection places (by way of notifiable instrument).

Clause 2198 requires the Chief Executive to promptly give the Public Advocate or Official Visitor a copy of the therapeutic protection plan if they request it.

Division 20.4.3 Therapeutic protection review panel

Division 20.4.3 establishes a therapeutic protection review panel which:

- has the functions of reviewing the operation of therapeutic protection orders; making recommendations to the Chief Executive about the operation of the orders; and providing advice to the Chief Executive about therapeutic protection orders.
- is made up of at least 3 members appointed by the Chief Executive, of whom at least one member is not the Chief Executive or a statutory office holder.

The Chief Executive may make guidelines (by notifiable instrument) about the appointment of members, how the panel may exercise its functions, and anything else the Chief Executive considers appropriate.

Division 20.4.4 Authorised Health Professionals

Division 20.4.4 provides for authorised health professionals to exercise search functions under this Chapter. The Chief Executive must ensure that a child or young person's treating health professional is not asked to exercise search functions under this chapter in relation to the child or young person, except in an emergency where there is an imminent and serious threat to safety and compliance with the requirement would exacerbate that threat. A treating health professional is someone who has a professional relationship with the child or young person for the provision of health services.

Division 20.4.5 Therapeutic Protection Register

Division 20.4.5 creates an obligation on the Chief Executive to establish a therapeutic protection register of children and young people for whom the Court makes an interim therapeutic protection order or a therapeutic protection order. Clause 2205 sets out what should be in the register and clause 2206 sets out who may have access. The Public Advocate is required to inspect the therapeutic protection register at least once every 3 months under clause 2207. The Chief Executive is obliged to report monthly on the register to the Minister, the Public Advocate and the Human Rights Commissioner.

Chapter 21 Care and protection—interstate transfer of orders and proceedings

This chapter provides for the interstate transfer of care and protection orders and proceedings. It re-enacts and continues to have the effect of chapter 8 in the Act.

Part 21.1 Preliminary

This part continues to have the effect of section 299 of the Act and defines certain terms to encompass Courts and proceedings in the different jurisdictions to which transfers under the Chapter may relate. This part also 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 21.2 Interstate transfer of ACT child welfare orders

This part provides for administrative and judicial transfer of ACT child welfare orders.

Division 21.2.1 Transfer of orders by Chief Executive

This division re-enacts and continues to have the effect of sections 300 to 303 of the Act and enables the Chief Executive to transfer ACT orders (with conditions as appropriate) to a participating State, if similar orders (and conditions) exist in the destination jurisdiction, but only if the orders are not subject to appeal and where interstate officers and certain people, including those with responsibility for day to day matters (clause 2308), consent to the transfer. 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.

The Chief Executive is required to give certain persons notice of the decision to transfer within 3 days working days of the decision (clause 2309). A person may apply for judicial review of the decision within 10 days.

Division 21.2.2 Transfer of orders by Childrens Court

This division re-enacts and continues to have the effect of sections 304 to 309 of the Act and enables the Childrens Court to transfer 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 where interstate officers consent to the transfer. Unlike administrative transfers, the Court may also transfer a child welfare order to another jurisdiction if it is considered in the best interests of the child or young person and if the order could be made in the participating State.

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.

Clause 2314 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 the desirability of the order operating under the law of the jurisdiction in which the child or young person lives.

Clause 2315 requires the Court to consider a care plan filed and served by the Chief Executive before making a transfer order.

Clause 2316 restricts the time a person can appeal to the Supreme Court against a transfer order of the Court within 10 working days, with such application to operate as a stay of the decision.

Clause 2317 empowers the Supreme Court to make an interim care and protection order pending the determination of an appeal, which may include remitting the matter to the Childrens Court for rehearing.

Division 21.2.3 Interstate registration of ACT orders

This division continues to have the effect of sections 318 to 320 of the Act.

Clause 2318 provides that where registration of an order is revoked under the next 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 the Chief Executive's reporting obligations 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.

Clause 2319 requires the registrar of the Court to tell the Chief Executive when the registration of a child welfare order transfer order has been revoked. The Chief Executive is also required to inform other listed persons.

Clause 2320 - On transfer, and after the time for any appeal, review or stay 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 Courts file about the order or proceedings from that Court.

Part 21.3 Interstate transfer of ACT child welfare proceedings

This part re-enacts and continues to have the effect of part 8.3 of the Act.

Clause 2321 allows for the Court to order transfers of child care and protection proceedings on the application of the Chief Executive. It requires the Chief Executive to give certain persons listed a copy of the application for transfer of proceedings.

Clause 2322 allows for the Court to transfer proceedings in 2321 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.

Clause 2323 provides that, in considering a transfer, 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, the person with responsibility for day to day matters or certain other people are living or likely to live.

Clause 2324 requires the Court to make interim orders for up to 30 days 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.

Clause 2325 restricts the time a person can appeal to the Supreme Court (on a point of law) against a transfer of proceedings of the Court within 3 working days, with such application to operate as a stay of the decision.

Clause 2326 empowers the Supreme Court to make interim orders pending the determination of an appeal. Final determination on appeal may include remitting the matter to the Children's Court for rehearing.

Clause 2327 requires the registrar of the Court to tell the Chief Executive when the registration of a child welfare proceeding transfer order has been revoked. The Chief Executive is required to tell persons listed.

On transfer, and after the time for any appeal, review or stay of such action, clause 2328 requires the registrar of a transferring Court to send to the relevant Court in the receiving state, any documents on the sending Courts file about the proceedings from that Court.

Part 21.4 ACT registration of interstate child welfare orders

This part continues to have the effect of part 8.4 as it relates to the registration of interstate child welfare orders in the ACT.

Clause 2329 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 not passed and subject to appeal, review or stay.

Under clause 2330 registrar of Courts (in which transferred orders are registered under this Chapter) must notify relevant interstate Courts and officers of the registration. The registrar of the Court in the Territory is to notify the Chief Executive who in turn is to notify certain people.

Clause 2331 provides that registered orders are to be treated as if they are 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 an interim care and protection order under the Act that 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.

Clause 2332 allows the Chief Executive, the child or young person concerned, a person with responsibility for day to day matters for the child or young person or a person who was a party to the proceedings in the sending State to make an application to revoke the registration of an interstate child welfare order.

Clause 2333 limits the circumstances in which the 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'. 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).

Under clause 2334 registrar of Courts (in which transferred orders are registered under this Chapter) must notify relevant interstate Courts and officers of the revocation of any such registration.

Part 21.5 ACT registration of interstate child welfare proceedings

This part continues to have the effect of part 8.4 in the Act as it relates to the registration of interstate child welfare orders in the ACT.

Part 21.6 Interstate transfer of child welfare orders and proceedings—miscellaneous

Clause 2341 re-enacts section 321 of the Act. When an order concerning a Maori child or young person is transferred, clause 2341 requires the Childrens Court to have regard to maintaining and strengthening relationships between the child or young person and his or her family, cultural and community ties.

Clause 2342 re-enacts section 323 of the Act and allows the Chief Executive to give protected information and sensitive information to an interstate officer which the Chief Executive considers is necessary for the interstate officer to perform his or her child welfare duties.

Part 21.7 Interstate transfer of child welfare orders and proceedings—non-participating States

This part continues to have the effect of part 8.6 in the Act.

Chapter 22 Care and protection – police assistance

This chapter outlines police assistance in care and protection matters.

Part 22.1 Assistance in carrying out orders etc

Clause 2400 outlines when the Chief Executive may request police assistance and requires the chief police officer to comply with the request.

Clause 2401 outlines powers conferred on police when assisting the Chief Executive.

Clause 2403 creates an offence for failing to answer a question asked by a police officer to give relevant information. The maximum penalty is 50 penalty units.

Part 22.2 Safe custody

This part re-enacts division 7.3.8 of the Act relating to safe custody. The Chief Executive or a police officer may seek a safe custody warrant for a child or young person if satisfied that someone has contravened a certain order (appraisal order, interim care and protection order, professional assessment order, care and protection order, therapeutic protection order, interim therapeutic protection order) and as a consequence the child or young person is in danger and the child or young person is at the premises or may be within 14 days.

A safe custody warrant may also be issued if a therapeutic protection order or interim therapeutic protection order is in force and there are reasonable grounds for suspecting that the child or young is absent without lawful authority from the therapeutic protection place and the child or young person is at the premises or may be within 14 days.

Clause 2408 outlines the content of a safe custody warrant.

Clause 2409 provides for an application for a warrant by phone, fax or other means in urgent or special circumstances.

Clauses 2410-2412 provide procedures for executing a warrant under this part.

Clause 2413 creates a strict liability offence for removing a child or young person from a safe custody placement. The maximum penalty is 50 penalty units, imprisonment for 6 months or both.

Clause 2414 requires the Chief Executive to bring the matter before the Childrens Court as soon as practicable following a child or young person being taken into safe custody under a warrant.

Chapter 23 Care and protection - provisions applying to all care and protection chapter proceedings

This chapter outlines Court procedures applying to all care and protection chapters and includes re-enacted provisions from division 7.3.10 of the Act.

Part 23.1 Applications

This part outlines the form and content of applications, including cross applications.

Part 23.2 Parties

This part outlines who the parties to an application are, procedures for joining and removing parties, hearings in a party's absence, and representation and service of material.

Part 23.3 Burden of proof

This part outlines the burden of proof for a care and protection chapters as the balance of probabilities.

Part 23.4 Witnesses and evidence

This part outlines procedures for summonsing witnesses to give evidence in a proceeding under a care and protection chapter.

The part also establishes that the Childrens Court is not bound by the rules of evidence for proceedings under care and protection chapters.

Part 23.5 Orders

This part outlines making of orders, service of orders and when the Court is required to provide a statement of reasons for its decision.

Part 23.6 Costs

This part includes clauses about costs.

Clause 2527 provides that parties to a proceeding under a care and protection chapter must bear their own costs unless a Court exercising jurisdiction under the Act orders otherwise.

Clause 2528 provides that costs may be ordered in a proceeding for frivolous, vexatious or dishonest applications or exceptional circumstances.

Clause 2529 provides that a Court exercising jurisdiction under the Act may order costs if a hearing is adjourned because a person failed to attend when required or contravened a direction or order of the Court.

Clause 2530 allows a Court that has made an order under clauses 2528 or 2529 to order that costs may be paid or shared between the parties.

Chapter 24 Childcare services

The Bill introduces a number of significant policy changes in the regulation of services providing care for children in order to increase transparency and consistency, reduce administrative burden, and improve quality of services provided. Major key changes include removal of the approval in principle requirement prior to obtaining a childcare service licence, replacement of licence conditions with standards, and more information for parents and interested persons with the public reporting of compliance with standards.

The term 'childrens services' has been replaced by 'childcare services'. This change is necessary to provide clarity regarding the nature of the services being provided to children and to delineate from other types of services provided to children under the Act.

Licensing Framework

The Bill introduces a number of changes to the licensing framework which aim to streamline and reduce the administrative burden on childcare services, reduce duplication and provide for more equitable and consistent grounds by which licences are granted, suspended or cancelled. These changes include:

Removing the requirement for childcare services to obtain an Approval In Principle before holding a licence. It is intended that holders of an approval in principle (at the time the Act commences) will automatically be taken to operate under a licence.

This means that new providers of child care services will not be required to obtain an Approval In Principle before holding a licence.

Key changes to the application process for new licences are as follows:

- Clauses 2618 and 2629 clarify that if the Chief Executive's request for information or access to inspect premises is not met by the proprietor, then the Chief Executive does not need to decide eligibility for a new licence or renew an existing licence.
- Clause 2622 outlines a more limited range of things that must be stated on the licence than is currently required. Other things stated on the licence outlined in the Act at section 345 will be covered in standards (see below).

Standards

The Act currently requires childcare services to be operated in a way that meets certain conditions stated on the service's licence. Currently the conditions are set out in policy documents that include guidelines to assist with their implementation. In order to increase transparency and accountability, the Bill removes conditions and requires services to be operated in way that complies with childcare service standards.

The Bill proposes that the new standards framework will operate as follows:

- At clause 3211, there is a new power for the Minister to make standards about the operation of childcare services (by way of a disallowable instrument) which a childcare service must comply with at clause 2623. In contrast to the current Act, which allows the Chief Executive to exercise discretion to vary licence conditions, there is no proposed power to vary standards on a case by case basis.

- At clause 2619, a proposed proprietor must comply, and be likely to comply, with the standards, in order to be eligible for a childcare licence. Premises where the service will operate must also comply with standards. At clause 2630, a licensed proprietor's compliance with the child care standards is part of the Chief Executive's decision to renew a licence.
- At clause 2647, there is a new requirement on the Chief Executive to assess service compliance with standards at least once during the period of a licence, using an assessment tool (made by the Minister through a disallowable instrument).
- At clause 2648, there is a new requirement on the Chief Executive to publish an annual report about compliance assessments made under 2647 during the financial year, and any comments from licensed proprietors about assessments of non-compliance.
- At clause 2650, information about an assessment of non-compliance will be provided to the licensed proprietor before it is published in the report. The proprietor will have 30 days to make a submission about the information, which the Chief Executive must include in the annual report. The annual report must not identify any individual childcare workers.

It is intended there will be a period for childcare services to transition from standards to conditions. The content of the standards and the transition period is to be determined in consultation with services.

Enforcement

The Bill introduces new requirements on the Chief Executive to inform persons with parental responsibility about non-compliance with the chapter or childcare services standards as follows:

- Currently if the Chief Executive is satisfied that a proprietor is not operating in accordance with a provision of the children's services chapter, the Act (s. 358) currently enables the Chief Executive to direct a proprietor, by written notice, to take steps to comply with the provision. The Act also enables the Chief Executive to inform parents, or other people with parental responsibility about the direction. At clause 2633, the Bill allows the Chief Executive to issue notices for non-compliance with the chapter or a childcare service standard. It also requires the Chief Executive to inform persons with parental responsibility about non-compliance (this is currently a discretionary power). The Bill introduces a mechanism by which the proprietors can appeal the notice, before parents are informed. The Chief Executive may confirm, amend or revoke the notice in response to a proprietor's submission.
- At clause 2634, there is a new requirement on the Chief Executive to tell persons with parental responsibility about a suspension notice given for non-compliance. This is currently a discretionary power.
- At clause 2641, there is a new requirement on the Chief Executive to protect the identity of an individual child care worker when the Chief Executive is required to tell persons with parental responsibility about non-compliance, suspension and cancellation matters.

Offences

Part 24.3 sets out offences in childcare services which re-enact existing offences at section 366 of the current Act. The Bill clarifies that the offences relate to a proprietor, a controlling person and a person caring for a child for the childcare service.

Chapter 25 Employment of Children and Young People

This chapter regulates employment for children and young people under the school leaving age of 15 years old. The key policy changes in this chapter are outlined below.

Meaning of Employment

At clause 2702, the Bill clarifies the meaning of employment for the chapter – and includes performance of work under contract; apprenticeship, traineeship or other work related training and work experience programs (unless exempted) and includes paid and unpaid work. The definition of employment applies across all sectors including non-profit, private and public sectors, whereas the Act currently relates only to a business, trade, calling or occupation carried on for private profit.

At clause 2711, circus work is removed from the meaning of light work as some circus activities present a risk of physical injury.

Work Experience

The Bill introduces a legislative basis for regulating work experience programs for children and young people aged under school leaving age. The Bill:

- includes work experience arrangements in the definition of employment at clause 2702;
- enables the Minister responsible for the Act to make standards to apply to work experience programs (by a notifiable instrument) at clause 3211(2)(g); and
- enables the Chief Executive responsible for the Act to exempt those work experience programs from the employment chapter, whose guidelines meet the standards at clause 3211(2)(g).

It is intended that the Department of Education and Training will develop the standards for work experience programs in consultation with education bodies and unions prior to the commencement of this Act.

Dangerous Employment

The Act currently prohibits the employment of a child or young person under school leaving age in activities dangerous to the health or safety of the child without the consent of the Chief Executive, however the Act is silent on what dangerous activities are.

The Bill replaces the existing concept of 'dangerous employment' with 'employment in high risk occupations', which is an occupation where there is a higher than usual risk of a child or young person being exposed to the risk of significant physical injury (clause 2716).

Clause 2716 provides that high risk occupations are declared by the Chief Executive responsible for the Act by notifiable instrument. It is intended that this will be developed in consultation with relevant stakeholders.

Chapter 26 Research involving children and young people

The Bill introduces new requirements on the Chief Executive to approve new research projects which involve children or young people or require the Chief Executive to give the researcher access to protected information about children and young people. It is intended that this will apply to children and young people subject to action under the Act in the areas of care and protection and youth justice.

Clause 2801 sets out the scope of research projects for this chapter which are projects that involve children or young people or require the Chief Executive to give access to protected information about children and young people. The Chief Executive cannot give researchers sensitive information, in order to protect the identity of persons who report suspected abuse and neglect.

Clause 2802 authorises the Chief Executive to approve a research project and enables the Chief Executive to consider a recommendation made by an ethics committee approved by the Chief Executive.

Clause 2803 enables the Chief Executive to approve procedures for carrying out a research project by way of disallowable instrument. The procedures are to be established in consultation with relevant stakeholders.

If the project involves children and young people taking part, then the procedures must meet the criteria prescribed at clause 2803(2) that seek to protect the child's welfare, health, safety and privacy. If the project involves the Chief Executive giving the researcher protected information, then the procedures must protect the secrecy of the information.

Clause 2804 provides that if a child or young person is to take part in the project, the Chief Executive must be satisfied:

- the researcher and any other person to have contact with children and young people in the project is a suitable entity to have contact with children or young people in the way proposed in the project; and
- a person who has responsibility for day-to-day matters for the child or young person has agreed to the child or young person taking part in the project. Clause 2805 sets out how the agreement should be sought and what constitutes lawful agreement.

Clause 2806 provides that if the Chief Executive is to give the researcher protected information, then the Chief Executive must be satisfied that:

- the researcher or any other person to have access to the information for the project is a suitable entity to have access to the information; and
- the project could not otherwise be carried out without access to the information.

Clause 2807 enables the Minister to approve an ethics committee for the chapter by way of a notifiable instrument.

Clause 2808 provides that a researcher may carry out an approved research project in accordance with the approved research project procedures for the project and clause 2809 introduces an offence if the researcher carries out the approved research project in a way that does not comply with the approved research project procedures.

Chapter 27 Enforcement

This chapter outlines enforcement powers, including powers of entry and search warrants. The Bill retains the current powers of entry and search for care and protection (including therapeutic protection) and childcare services.

Part 27.1 General

This part includes definitions for the chapter.

Part 27.2 Authorised people

This part provides for appointment of authorised people and the provision of identity cards by the Chief Executive to authorised people for the Act.

Part 27.3 Powers of authorised people

This part outlines the powers of authorised persons.

Clause 2903 Power to enter premises—general

This clause provides that an authorised person may at any reasonable time, enter premises that the public is entitled to use or that are open to the public; or at any time, enter premises with the occupier's consent; or enter premises in accordance with a search warrant.

An authorised person may, without the consent of the occupier of premises, enter land around the premises to ask for consent to enter the premises.

An authorised person is not required to provide payment or an entry fee or other charge to enter premises.

This does not authorise entry into a part of premises that is being used only for residential purposes.

Clause 2904 Power to enter premises—Chapter 17 (Emergency care and protection)

This clause provides for entry to premises by an authorised person or police officer if it is reasonably believed that a child or young person at the premises is in need of emergency care and protection.

This clause is additional to clause 2903 (power to enter premises – general).

Clause 2905 Power to enter premises—Chapter 19 (Care and Protection—Chief Executive has aspect of parental responsibility)

This clause provides that an authorised person may, at any reasonable time, enter premises where a child or young person is living if

- the Chief Executive has placed the child or young person with an out-of-home carer; and
- the purpose of the entry is to ensure that the child or young person is being properly cared for.

This clause also provides for entry by authorised persons if the Minister is deciding whether to approve the place as a place of care and the residential care service has agreed to allow the Minister to inspect the place.

This clause is additional to clause 2903 (power to enter premises – general).

Clause 2906 Power to enter premises—Chapter 20 (Therapeutic protection of children and young people)

This clause provides that an authorised person may, at any reasonable time, enter a therapeutic protection place if the Chief Executive is deciding whether to declare the place as a therapeutic protection place. The clause authorises entry into a part of premises used for residential purposes only if the part of the premises is used to operate the therapeutic protection place.

This clause is additional to clause 2903 (power to enter premises – general).

Clause 2907 Power to enter premises—Chapter 24 (Childcare services)

This clause provides that an authorised person may, at any reasonable time, enter childcare service premises, with the agreement of the proposed proprietor, for assessing an application for a license or renewal of a license. An authorised person may at any time enter with the occupier's consent into part of premises operating a childcare service.

This clause is additional to clause 2903 (power to enter premises – general).

Clause 2908 Production of identity card

This clause provides that an authorised person must produce his or her identity card when asked by the occupier or must leave the entered premises.

Clause 2909 Consent to entry

The clause provides requirements for an authorised person in seeking the consent of an occupier for entry to premises.

An authorised person must produce their identity card and tell the occupier the purpose of the entry and that anything found and seized under this chapter may be used in evidence in Court and that consent may be refused.

If the occupier consents, the authorised person must ask the occupier to sign a written acknowledgment (an acknowledgement of consent). This acknowledgement evidences that the occupier was told the purpose of the entry; and that anything found and seized under this chapter may be used in evidence in Court; and that consent may be refused; that the occupier consented to the entry; and the time and date when consent was given.

If the occupier signs an acknowledgment of consent, the authorised person must immediately give a copy to the occupier.

A Court is required to find that the occupier did not consent to entry to the premises by the authorised person under this chapter if the question arises in a proceeding; and an

acknowledgment of consent is not produced in evidence; and it is not proved that the occupier consented to the entry.

Clause 2910 General powers on entry to premises

This clause provides that an authorised person may undertake certain activities while on premises under this chapter, including:

- inspecting or examining;
- taking measurements or conduct tests;
- taking samples;
- taking photographs, films, or audio, video or other recordings;
- making copies of, or take extracts from, a document kept at the premises; and
- requiring the occupier, or anyone at the premises, to give the authorised person reasonable help to exercise a power under this chapter.

An offence is created for a person to take all reasonable steps to comply with a requirement made of the person in relation to making copies of, or taking extracts from, a document kept at the premises. The maximum penalty is 50 penalty units.

Clause 2911 Power to require name and address

An authorised person may require a person to state the person's name and home address if the authorised person believes, on reasonable grounds, that the person is committing or has just committed an offence against this Act.

The authorised person must tell the person the reason for the requirement and, as soon as practicable, record the reason. The person may ask the authorised person to produce his or her identity card for inspection by the person.

The clause creates a strict liability offence for a person to comply with a requirement made of the person to state their name and home address if the authorised person tells the person the reason for the requirement; and complies with any request made by the person to produce his or her identity care for inspection. The maximum penalty is 10 penalty units.

Clause 2912 Power to seize things

This clause provides that an authorised person who enters premises under this chapter with the occupier's consent may seize anything at the premises if—

- the authorised person is satisfied, on reasonable grounds, that the thing is connected with an offence against this Act; and
- seizure of the thing is consistent with the purpose of the entry told to the occupier when seeking the occupier's consent.

An authorised person who enters premises under a warrant under this chapter may seize anything at the premises that the authorised person is authorised to seize under the warrant.

An authorised person who enters premises under this chapter (whether with the occupier's consent, under a warrant or otherwise) may seize anything at the premises if satisfied, on reasonable grounds, that—

- the thing is connected with an offence against this Act; and
- the seizure is necessary to prevent the thing from being concealed, lost or destroyed; or used to commit, continue or repeat the offence.

Following seizure of a thing, an authorised person may remove it from the place of seizure to another place; or leave the thing at the place of seizure but restrict access to it.

A strict liability offence is created if a person interferes with a seized thing, or anything containing a seized thing, to which access has been restricted and the person does not have an authorised person's approval to interfere with the thing. The maximum penalty is 50 penalty units.

Part 27.4 Search warrants

This part outlines search warrants and the obligations on persons executing warrants.

Clause 2913 Warrants generally

This clause allows an authorised person to apply to a magistrate for a warrant. The application must be sworn and state the grounds on which the warrant is sought. The magistrate may refuse to consider the application until the authorised person provides all information that is required by the magistrate. The warrant may only be issued if there is a thing or activity connected with an offence against the Act and it is being engaged in at the premises or may be within 14 days. This clause outlines the details that must be included on the warrant.

Clause 2914 Warrants – application made other than in person

This clause outlines how applications for warrants may be made other than in person. It provides for applications by electronic communications by authorised persons in urgent or special circumstances. An application for a warrant may be made before the application is sworn.

After issuing the warrant, the magistrate must fax a copy of the warrant to the authorised person if practicable to do so. If not practicable, the magistrate must tell the authorised person the terms and date and time the warrant was issued. The authorised person must then complete a warrant form with details of the magistrate's name, the terms of the warrant and the date and time of issue. The faxed copy of the warrant or the warrant form authorise entry and the exercise of powers by the authorised person.

Clause 2915 Search warrants – announcement before entry

This clause outlines obligations on authorised persons before entry to premises under a search warrant. Prior to entry to premises under a search warrant, an authorised person must:

- Announce that the authorised person is authorised to enter;
- Give anyone at the premises an opportunity to allow entry to the premises;
- Identify himself or herself to an occupier or a representative of the occupier.

These obligations for authorised persons are waived if entry is required to ensure the safety of anyone or the effective execution of the warrant is not frustrated.

Clause 2916 Details of search warrant to be given to occupier etc

This clause provides that a copy of the warrant and a document setting out the rights and obligations must be made available to an occupier, or representative of the occupier, if they are present while a search warrant is being executed.

Clause 2917 Occupier entitled to be present during search etc

This clause provides that an occupier of premises, or representative of the occupier, present while a search warrant is being executed may observe the search being conducted, unless it would impede the search or the person is under arrest and it would interfere with the objectives of the search.

Part 27.5 Return and forfeiture of things seized

This part provides for the return and forfeiture of seized things.

Clause 2918 Receipt for things seized

This clause provides that an authorised person who seizes a thing under the chapter must give a receipt for the item to the person from whom it was seized as soon as practicable after the seizure.

An authorised person who is unable to comply with this requirement if, for any reason, it is not practicable, must leave the receipt secured conspicuously at the place of seizure.

This clause also contains details of what must be included on the receipt.

Clause 2919 Moving things to another place for examination or processing under search warrant

This clause allows a thing found at premises entered under a search warrant to be moved to another place for examination or processing to decide whether it may be seized under the warrant if the occupier of the premises agrees in writing; or there are reasonable grounds for believing that the thing is or contains something to which the warrant relates and it is significantly more practicable to do so having regard to the timeliness and cost of examining or processing the thing at another place and the availability of expert assistance.

Clause 2920 Access to things seized

This clause provides that a person who, apart from the seizure, would be entitled to inspect a thing seized under the chapter may inspect it and if it is a document, take extracts or make copies.

Clause 2921 Return of things seized

This clause requires that a seized thing must be returned to its owner or compensation must be paid by the Territory to the owner for the loss if a prosecution for an offence relating to the thing

is not commenced within 90 days after the seizure or the prosecution is commenced within 90 days but the Court does not find the offence proved.

If the seized thing is not required to be returned or compensation is not required to be paid, the thing is forfeited to the Territory and it may be sold, destroyed or otherwise disposed of as the Chief Executive directs.

Part 27.6 Miscellaneous

Clause 2922 Damage etc to be minimised

This clause requires an authorised person must take all reasonable steps to ensure that the authorised person, and any person assisting the authorised person, causes as little inconvenience, detriment and damage as practicable.

If an authorised person, or a person assisting an authorised person, damages anything in the exercise or purported exercise of a function under this chapter, the authorised person must give written notice of the particulars of the damage to the person the authorised person believes, on reasonable grounds, is the owner of the thing.

If the damage happens at premises entered under this chapter in the absence of the occupier, the notice may be given by leaving it, secured conspicuously, at the premises.

Clause 2923 Compensation for exercise of enforcement powers

This clause provides that a person may claim compensation from the Territory if the person suffers loss or expense because of the exercise, or purported exercise, of a function under this chapter by an authorised person or a person assisting an authorised person.

Compensation may be claimed and ordered in a proceeding for compensation brought in a Court of competent jurisdiction; or an offence against this Act brought against the person making the claim for compensation.

A Court may order the payment of reasonable compensation for the loss or expense only if it is satisfied it is just to make the order in the circumstances of the particular case.

Chapter 28 Appeals and review

Chapter 28 deals with appeals and reviews under the Bill. Chapter 11 of the existing Act deals with appeals and review. Chapter 11 has been reviewed with the view to ensure compliance with the *Human Rights Act 2004*, particularly to ensure the juridical to appeal decisions is not unfairly restricted.

The right to appeal orders and decisions of the Childrens Court made under existing chapter 6 (Young offenders) to the Supreme Court has been retained. The restriction on appeals under existing chapter 7 (Children and young people in need of care and protection) has been removed and the Bill has been drafted to allow appeals in accordance with the rules of the Magistrates Court Act.

Under the existing Act, application may be made to the Administrative Appeals Tribunal (AAT) for a review of a decision of the Chief Executive. This has been retained. In addition, under the Bill new powers to administrative decision are also reviewable by the AAT.

The note to Chapter 28 makes clear that in making a decision under this chapter for a child or young person, the decision-maker must regard the best interests of the child or young person as the paramount consideration in accordance with clause 10. Also, in making a decision under this chapter otherwise than for a particular child or young person, the decision-maker must consider the best interests of children and young people in accordance with clause 10.

Part 28.1 Appeals

Division 28.1.1 Appeals generally

3000 Appeals to Supreme Court—generally

Clause 3000 limits the appellate jurisdiction of the Supreme Court.

Division 28.1.2 Appeals—criminal matters chapters

Clause 3001 – Appeals to Supreme Court—criminal matters chapters

Clause 3001 sets out the appellate jurisdiction of the Supreme Court.

Clause 3002 - Application of Magistrates Court Act

Clause 3002 appeals in accordance with the rules of the Magistrates Court Act.

Clause 3003 – Barring of appeal if order to review made

Clause 3003 limits the right of appeal to the Supreme Court against an order nisi to review a decision under clause 3001 (1) (d) or (e).

Clause 3004 – Orders that Supreme Court may make

Clause 3004 outlines the decisions that the Supreme Court may make when hearing an appeal.

Division 28.1.3 Appeals—Care and protection chapters

Clause 3005 – Appeals to Supreme Court—care and protection chapters

Clause 3005 lists the types of appeals the Supreme Court can hear under care and protection chapters of the Bill and who is entitled to make the appeal.

Clause 3006 – Application of Magistrates Court Act

Clause 3006 ensures the *Magistrates Court Act 1930*, part 4.5 (Civil appeals) applies in relation to a care and protection chapter appeal.

Clause 3007 Orders that Supreme Court may make

Clause 2007 limits the types of orders that may be made by the Supreme Court under a care and protection chapter appeal to those orders that were available to the Childrens Court in the initial proceeding.

Division 28.1.4 AAT review

Clause 3008 – Review of decisions—Chapter 19 (Care and Protection—Chief Executive has aspect of parental responsibility)

The table in clause 3008 outlines what decisions are reviewable decisions in Chapter 19 and who may apply to the AAT for a review. It also provides that Chief Executive must give written notice of such decisions to specified persons and in accordance with the code of practice in force under the Administrative Appeals Tribunal Act 1989, section 25B (1).

Clause 3009 - Review of decisions—Chapter 21 (Care and protection—interstate transfer of orders and proceedings)

The table in clause 3009 outlines what decisions are reviewable decisions in Chapter 21 and who may apply to the AAT for a review. It also provides that Chief Executive must give written notice of such decisions to specified persons and in accordance with the code of practice in force under the Administrative Appeals Tribunal Act 1989, section 25B (1).

Clause 3010 – Review of decisions—Chapter 24 (Childcare services)

The table in clause 3010 outlines what decisions are reviewable decisions in Chapter 24 and who may apply to the AAT for a review. It also provides that Chief Executive must give written notice of such decisions to specified persons and in accordance with the code of practice in force under the Administrative Appeals Tribunal Act 1989, section 25B (1).

Clause 3011 – Decision to refuse to give childcare service licence must not be stayed or otherwise affected pending outcome of review

Clause 3010 provides that a decision under clause 2620 (1) (b) (Childcare service licence—decision on application) to refuse to give a childcare service licence is not a reviewable decision under the AAT Act or the *Administrative Decisions (Judicial Review) Act 1989*.

Clause 3012 –Review of decisions—Chapter 25 (Employment of children and young people)

The table in clause 3012 outlines what decisions are reviewable decisions in Chapter 25 and who may apply to the AAT for a review. It also provides that Chief Executive must give written notice of such decisions to specified persons and in accordance with the code of practice in force under the Administrative Appeals Tribunal Act 1989, section 25B (1).

Chapter 29 Information secrecy and sharing

Chapter overview

Consultation on the review of the Act supported measures to enhance the delivery of coordinated and integrated services to provide more effective and timely support to children, young people and their families.

Reviews into child deaths in other jurisdictions have also highlighted the need for increased collaboration through information sharing in order to protect children from serious harm and death through abuse and neglect.

The *Children and Young People Amendment Act 2006* amended the secrecy provisions and established a tiered framework for the protection and release of information.

The Bill extends the current prohibition on protecting children's identity who are subject to proceedings under the Act, to prohibit the publication or broadcasting of children and young people's identity who are subject to a care and protection appraisal, in the parental responsibility of the Chief Executive or if an order is in force under the Act.

This Bill establishes criteria where protected information can be shared between agencies in particular circumstances without a person's consent. The framework will allow the Chief Executive to release protected information (including sensitive information) with, and request information from, relevant persons about children and young people who are subject to actions under the Act including children and young people who are (or may be) in need of care and protection, young offenders and children who use child care services.

Parts 29.1 and 29.2 continue to have the effect of the information protection framework that was introduced as part of the *Children and Young People Amendment Act 2006*. An overview of the scheme is as follows:

Clause 3102 outlines information holders for the chapter - the Chief Executive, Official Visitors, persons exercising a function under the Act, persons engaged in the administration of the Act or persons previously occupying these roles. Information holders also include anyone else given information by one of these persons.

Information is categorised into protected and sensitive information. In clause 3104 sensitive information includes child abuse information, child abuse appraisal information, interstate child abuse information, family group conference information or information prescribed by regulation. In clause 3103, protected information is information about a person that is disclosed to, or obtained by, an information holder because the person is, or has been, an information holder. Protected information includes sensitive information.

Offences are created in certain circumstances where information holders make or divulge a record of protected information about someone else. Clause 3105 reenacts the offence at section 405C of the Act if a person makes a record and is reckless about the record being protected information. Recklessness can be proven by intention, knowledge or recklessness (see section 20(4) of the *Criminal Code 2002*). If a person makes the record knowing it to be protected information, they are liable for prosecution unless an exception applies. It is an offence if an information holder divulges protected information and is reckless about the information being protected and the action resulting in the information being divulged.

Exceptions to these offences include if the record is made or the information is divulged under this Act; or in the exercise of a function, as an information holder, under this Act – clause 3106.

Another exception to the offence is if the protected information is not sensitive information and the record is made or the information is divulged under another territory law or in the exercise of a function, as an information holder, under another territory law – clause 3107.

Another exception to the offence is if the information is not sensitive information and is divulged with the person's agreement – clause 3108.

Part 29.3 Offence to publish identifying information

The Act currently provides (s. 61A) that it is an offence for a person to publish an account or report of a proceeding of the Childrens Court if the account or report discloses the identity of a child, young person or family or allows their identity to be worked out.

This part clarifies that it is an offence to publish information that identifies a child or young person as being someone who is the subject of a proceeding under this Act, for whom a care and protection order is in force; for whom the Chief Executive has an aspect of parental responsibility or would allow their identity to be worked out.

The Bill includes examples of information that would allow identity to be worked out.

Part 29.4 Sharing protected information

Division 29.4.1 Generally

This division enables:

- The Minister or Chief Executive to give protected (not sensitive) information to a person about themselves - clause 3111;
- The Chief Executive to give protected (including sensitive) about a child or young person to any person if the Chief Executive considers giving the information would be in the best interests of the child or young person – clause 3112;
- A Family group conference facilitator to give the Chief Executive protected (including sensitive) information about a child or young person if the facilitator considers giving the information would be in best interests of the child or young person – clause 3113;
- The Chief Executive may give a researcher protected (not sensitive) information, for an approved research project - clause 3114.

Division 29.4.2 Safety and welfare information

The Act currently provides (s.29) the Chief Executive with the power to ask a defined entity for information relevant to the safety, welfare and wellbeing of a child or young person.

This division establishes an information sharing framework to allow the sharing of information about a child or young person's safety and welfare between certain persons and agencies. It is intended that the information could be exchanged without the person's consent, but only as a last resort and where necessary to protect the safety, welfare and wellbeing of a child or young person. It is intended that this framework will better support collaborative, mutli-agency responses to children and young people who are (or may be) in need of care and protection or detained under this Act.

Section 12(a) of the *Human Rights Act 2004* provides that everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily. The proposed framework displaces the right to privacy to a degree necessary to protect the safety, welfare and wellbeing of children and young people, in recognition of their vulnerability because of their status.

Clause 3115 sets out what is safety and welfare information. This continues to have the effect of s.29(1) of the Act and new examples are included for guidance.

Clause 3116 sets out an information sharing entity. This continues to have the effect of s.29(5) of the Act. It is intended that subsection 3316(o) will allow regulations to be developed that allow information exchange with entities (for example non-government entities) that have an information security regime in place, approved by the Chief Executive.

Clause 3117 enables the Minister or Chief Executive to give an information sharing entity, protected (but not sensitive) information about a person (which is relevant to the safety and welfare of a child or young person), if the person agrees to the information being given or the Chief Executive has taken reasonable steps to obtain their agreement but was unable to do so. However the Chief Executive is prohibited from giving the protected information if satisfied that doing so would put the child or young person at risk of abuse or neglect. The Chief Executive is obliged to make a record of information given. Clause 3118 sets out how the person's agreement should be obtained.

Clause 3119 enables the Chief Executive to request and receive information about a person from an information sharing entity. The entity is enabled to give the Chief Executive info about a person – if it is not sensitive information if it is safety and welfare information for a child or young person and the person agrees to its release or the entity took reasonable steps to seek their agreement but was unable to.

Clause 3119(5) continues to have the effect of section 28 (2) where a territory entity must comply with a request promptly. The Bill introduces a new requirement on the territory entity to comply with the request not later than 24 hours after the entity receives the request if the Chief Executive tells the territory entity that the situation is an emergency.

Clauses 3120 and 3121 respectively provide that if an entity gives information under this division, the giving of the information does not contravene the *Health Records (Privacy and Access) Act 1997* or the *Privacy Act 1988 (Cwlth)*.

Part 29.5 Giving protected or sensitive information to a Court

This part continues to have the effect of section 405G where an information holder does not need to divulge sensitive information to a Court, unless it is necessary to do so for this Act and does not need to divulge protected information (that is not sensitive information) to a Court, unless it is necessary to do so for this Act or another Territory law.

Clause 3125 introduces a new power for the Court to order an information holder to divulge sensitive information where it is satisfied that—

- the information is materially relevant to the proceeding; and
- it is in the public interest for the information to be divulged or produced to the Court; and
- if the information is about a person—the best interests of the person are protected.

To enable the Court to make a decision about the disclosure of the information, the person must disclose the information to the Court. In deciding whether or not the information should be disclosed, the Court must deal with the information in a way that ensures it is not disclosed to anyone else. If the Court refuses to order its disclosure, the Court must return any document containing the information produced to them.

Division 29.5.1 Admissibility of evidence

Clause 3126 is a re-enactment and continues to have the effect of section 163 in the Act. It sets out how abuse or neglect reports may be used in evidence.

Clause 3127 continues to have the effect of section 353(2)(c) in the Act. It provides that confidential reports are not admissible as evidence in any proceeding in any Court or tribunal.

Clause 3128 continues to have the effect of section 353(3) in the Act. It enables a confidential reporter to give evidence about their belief about a contravention of the Act under section 3200, and the reasons for the belief.

Clause 3129 continues to have the effect of section 353(4) and (7). It enables information in a confidential report or which identifies a confidential reporter, to be admissible in a Court proceeding if the confidential reporter agrees, in writing, to the admission of the evidence; or the Court gives leave for the evidence to be given. To give leave, the Court must be satisfied that it is necessary to ensure the safety and wellbeing of a child or young person or be in relation to a charge or allegation made against someone about the exercise of the person's functions under this Act; or to decide whether the report was made honestly and without recklessness.

Clause 3130 continues to have the effect of section 180 and provides that evidence of anything said at a family group conference is not admissible in proceedings, except for a conference outcome report.

Clause 3131 continues to have the effect of section 180 and provides that evidence of anything said or done at a pre-orders conference is admissible in the proceeding to which it relates only if the parties to the proceeding agree or the Childrens Court gives leave for the evidence to be admitted.

Part 29.6 Protection of people who give information

Clause 3132 provides that certain listed persons who give information honestly and without recklessness do not (by giving the information) breach confidence, breach professional etiquette or ethics; breach a rule of professional conduct; and do not incur civil or criminal liability. Listed persons include those who have provided information to the chief executive in response to a request, have made a report about suspected abuse or neglect, or have reported a contravention of the Act.

Chapter 30 Miscellaneous

This chapter contains miscellaneous provisions.

Clause 3200 Confidential report of contravention of Act

This clause provides for a person to make a confidential report of a provision of the Act being contravened. The Chief Executive is obliged to keep a written record of each report.

Clause 3201 Offence – tattoo child or young person without agreement

This clause re-enacts the offence at section 388 of the Act for tattooing a child or young person without the agreement of a person with responsibility for day-to-day matters or long term matters. The maximum penalty is 50 penalty units.

Clause 3202 Presumption of age in proceedings

This clause re-enacts section 386 of the Act. It provides for a rebuttable presumption that a child or young person is under the stated age if the child or young person appears to the Court to be under the stated age.

Clause 3203 Protection of officials from liability

This clause re-enacts section 407 of the Act. It provides for protection of certain people from civil liability in the exercise of functions under the Act. Any civil liability is displaced from the person to the Territory.

Clause 3204 ACT child welfare services must assist Public Advocate

This clause re-enacts section 45 of the Act. The clause provides that the Public Advocate may make a request of an ACT child welfare service for information or assistance and the child welfare service must comply promptly with the request. An ACT child welfare service is an administrative unit, a territory authority, a statutory office holder, a territory instrumentality, a public employee or a police officer.

Clause 3205 Notification of location of child or young person

This clause re-enacts section 411 of the Act. It provides that a person in charge, or occupier, of a hospital, police station or refuge may tell a parent or someone else with parental responsibility for a child or young person their location, or tell a police officer that the child or young person is at a hospital or refuge.

Clause 3206 Evidentiary certificates – Chief Executive – parental responsibility

This clause provides that a certificate signed by the Chief Executive stating that the Chief Executive had or shared parental responsibility is evidence of the contents of the certificate.

Clause 3207 Evidentiary certificates – Chief Executive – detention

This clause provides that a certificate signed by the Chief Executive stating the following is evidence of the contents of the certificate:

- that a person was committed to a detention centre on a particular date and the person's committal had not ended on a stated date;
- that a person was given, or not given, a leave of absence on a stated date or during a stated period.

Clause 3208 Appointment of analyst for Act

This is a new clause to provide for the Chief Executive to appoint analysts for the Act by notifiable instrument.

Clause 3209 Determination of fees

This clause re-enacts section 416 of the Act and allows the Chief Executive to determine fees by way of disallowable instrument.

Clause 3210 Approved forms

This clause re-enacts section 416A of the Act. It allows the Chief Executive to approve forms for the Act (other than forms for the Childrens Court) by way of notifiable instrument.

Clause 3211 Standard making power

This clause provides that the Minister may make the following standards for the Act through disallowable instruments:

- family group conference standards;
- family group conference agreement standards;
- drug testing standards;
- out-of-home care standards;
- therapeutic protection place standards;
- childcare services standards;
- work experience standards.

Clause 3212 Regulation-making power

This clause provides that the Executive may make regulations for the Act in relation to:

- the duties of people in charge of places of detention; and
- the health and safety (including medical examinations) of children or young people, and other people, at places of detention; and
- travel and transport arrangements for children or young people performing community service; and
- the discipline and security (including the use of force, inspection of mail, and the use of video surveillance and other monitoring devices) at or for places of detention; and
- the safety, management and good order of places of detention.