2008

LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

CHILDREN AND YOUNG PEOPLE BILL 2008

EXPLANATORY STATEMENT

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Children and Young People Bill 2008
Explanatory Statement

Table of Contents

Outline

The Children and Young People Bill 2008 once enacted will become the primary law in the ACT which provides for the protection, care and wellbeing of children and young people in the Australian Capital Territory. The Bill addresses a range of areas that impact upon the daily lives of children and young people in the Territory, such as children and young people using childcare services, children and young people in employment, children and young people involved in the criminal justice system and children and young people for whom there are care and protection concerns.

The ACT Government intends that the Bill will replace the *Children and Young People Act 1999*. The Children and Young People Act provided for an operational review within three years of the Act's commencement. The review commenced in 2002 and has involved extensive community consultation, leading to the development of amendments to the Act as follows:

Children and Young People Amendment Act 2005 – This Act, which was passed by the ACT Legislative Assembly on 2 July 2005, provided for the making of Standing Orders for places of detention, expanded the regulation making power under the Act, and gave retrospective statutory effect for a number of instruments made under the Act.

Children and Young People Amendment Act 2006 – This Act, which was passed by the ACT Legislative Assembly on 9 March 2006, introduced a new principle to help families understand care and protection procedures; cultural plans for Aboriginal and Torres Strait Islander children and young people; an exception for mandated reporters in the same setting to report identical concerns for a child or young person; the introduction of a new concept of a child or young person being at risk of abuse or neglect; clarification of persons required by law to report child abuse; and a new framework for the protection and release of information under the Act.

Children and Young People Amendment Act 2006 (No.2) – This Act, which was passed by the ACT Legislative Assembly in November 2006, removed two sunset clauses relating to the exemption of work experience from the employment chapter and the power to make standing orders for the Quamby Youth Detention Centre.

Children and Young People Amendment Act 2007 – This Act, which was passed on 8 March 2007, introduced prenatal reporting and a revised search and seizure scheme for the Quamby Youth Detention Centre.

The development of the Bill has been influenced by a number of factors, including the *Human Rights Act 2004*, extensive community consultation and government responses to reviews and inquiries during this time, including:

- *Inquiry into the Rights, Interests and Wellbeing of Children and Young People*, by the Standing Committee on Community Services and Social Equity, reported in August 2003;
- *The Territory as Parent: Review of the Safety of Children in Care in the ACT and of ACT Child Protection Management*, by the Commissioner for Public Administration, reported in May 2004 (The Vardon Report);
- *The Forgotten Victims Of Crime: Families Of Offenders And Their Silent Sentence*, by the Standing Committee On Community Services And Social Equity, reported in June 2004;
- *The Territory's Children: Ensuring safety and quality care for children and young people, Report on the Audit and Case Review*, by the Independent Review for the Commissioner for Public Administration, reported in July 2004 (The Murray Report);
- *The Rights System for Rights Protection – An ACT Government Position Paper on the System of Statutory Oversight in the ACT*, by the ACT Government, released August 2004;
- *One Way Roads out of Quamby: Transition Options for Young People Exiting Juvenile Detention in the ACT*, by the Standing Committee on Community Services and Social Equity, reported in August 2004;
- *Human Rights Audit of Quamby Youth Detention Centre*, by the Human Rights and Discrimination Commissioner, reported in June 2005 (the Human Rights Audit).

An overview of the Bill, including key changes, is as follows:

Chapter 1 Preliminary

Chapter 1 outlines the objects, principles and considerations for the Bill. The best interests of the child or young person must be regarded as the paramount consideration for decisions and action taken under the Act. The general principles applying across the Bill are also included in this chapter and these principles emphasise individual consideration of a child or young person's age, maturity, developmental capacity, sex, background and other relevant characteristics. An additional principle applying to Aboriginal and Torres Strait Islander children and young people is included to recognise the connection of the child or young person to their community and the need to involve their community in decisions being made. This chapter also introduces a new requirement that decision-makers exercising functions under the Bill have qualifications, experience or skills to apply the principles, where practicable and appropriate.

Important concepts outlined in this chapter include new definitions of family member and significant person for a child or young person.

New terms to describe daily care responsibility and long-term care responsibility are outlined in this chapter.

Chapter 2 Administration

Chapter 2 establishes the administrative framework for the Bill, including the Chief Executive's functions. The chapter introduces a new power allowing the Chief Executive to make instructions for administrative functions being exercised under the new Act and allows the Chief Executive to ask for assistance, facilities or services relevant to the physical or emotional wellbeing of a child or young person. The Bill enables the Minister to give written directions to the Chief Executive about the exercise of functions under the new Act. It also describes the roles of other entities created by the Bill such as the Official Visitor and the Children and Youth Services Council (formerly the Childrens Services Council in the 1999 Act) which is a body that advises the Minister responsible for administering the Act on issues relating to the Act and services for children and young people in the Territory.

Official Visitors have oversight and inspectorate functions conferred by this chapter in relation to detention places, therapeutic protection places and places of care. The Bill contemplates the Minister making guidelines (by way of notifiable instrument) that outline complaints handling by the Official Visitor. The chapter creates a clear pathway for the referral of a complaint by the Official Visitor to an investigative entity and resolution of a complaint by the Official Visitor with the operating entity for the place (which may be the Chief Executive or an entity administering the place).

This chapter also includes an expanded suitability test for people providing services or exercising functions under the Act. The test will consider information about the conviction or finding of guilt of a person for a sexual offence, an offence involving violence or an offence against an animal. It will also consider whether a child concern report has been received about the entity and any action taken in response. Suitable entities will have a new ongoing duty to report certain changes to suitability information.

Chapter 3 Family Group Conferences

Chapter 3 expands the family group conferencing model to enable a family group conference to be arranged to promote the wellbeing and best interests of a child or young person who is subject to care and protection or youth justice interventions under the new Act, not only those children and young people who are in need of care and protection. The chapter introduces new mechanisms that strengthen the participation of children and young people in family group conferences, particularly those under school leaving age.

Family group conference 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.

Chapters 4 to 9 Criminal Matters – Youth Justice

Chapter 4 provides a conceptual overview of the criminal matters chapters which are chapters 4 to 9 inclusive. Chapter 4 also includes the youth justice principles to guide decision-makers in deciding what is in the best interests of a child or young person for these chapters. The youth justice principles give greater recognition to involving children and young people and Aboriginal and Torres Strait Islander communities in decision making, timely access to legal assistance and expeditious legal proceedings, ensuring detention is used only as a measure of last resort and for the shortest appropriate period of time, and promoting the young offender's rehabilitation, while balancing the rights of victims and the community's interests. The principles are intended to be interpreted consistently with relevant human rights instruments and jurisprudence, including for example the *Convention on the Rights of the Child*. The chapter also includes important definitions for the Act and schedule 1, such as young detainee and youth detention officer. The dictionary includes a definition of young offender as a person who has been convicted or found guilty of an offence by a Court and who was under 18 years old when the offence was committed, and additionally for the interstate transfer scheme, the person must have been sentenced for the offence to facilitate the interstate transfer of sentences.

Chapter 5 deals with transfers within the ACT of young detainees, including to and from health facilities and from the detention place to a correctional centre after a young detainee becomes an adult. This chapter also provides for escorts of children and young people in custody between places in the Territory, for example, between Courts and the detention place. Part 5.2 provides for a nationally consistent interstate transfer scheme for the transfer of community-based sentences and custodial sentences between jurisdictions.

Chapter 6 relates to the Chief Executive's powers and responsibilities in administering a place of detention for young detainees. Powers and obligations currently existing in standing orders have been elevated to this chapter of the Bill. The chapter is modelled on the *Corrections Management Act 2007* for adult detainees in a correctional centre with appropriate modifications for young detainees. The chapter includes minimum standards and entitlements for young detainees, in addition to necessary measures to ensure safety, security and good order at the detention place, such as the use of force, segregation (including safe room segregation directions) and monitoring certain communications within the detention place. The chapter also introduces new offences in the youth detention context for a young detainee to possess a prohibited thing and for a person to take a prohibited thing into a detention place. It also includes a new requirement that adults who work or provide services in the detention place must report to the Chief Executive any significant threats to security or good order. The chapter provides for young detainees who are parents to continue caring for or having contact with their young child (under 6 years old and not enrolled in school) in the detention place, where this is in the best interests of the young child.

Chapter 7 relates to powers of search and seizure at the detention place in order to ensure a safe detention place. It provides for low-level personal searches (scanning, frisk and ordinary searches) and high-level personal searches of young detainees (strip and body searches), including the use of force in exceptional circumstances. Premises and property may also be searched. The chapter also provides for scanning, frisk or ordinary searches of other persons at the detention place in certain circumstances.

Chapters 8 and 9 outline a framework for responding to behaviour breaches by young detainees in the detention place. The chapter creates a distinction between low-level breaches (minor behaviour breaches) and breaches which are of a persistent or serious nature (behaviour breaches). Minor behaviour breaches may be dealt with through the behaviour management framework and this could lead to the imposition of behaviour management consequences prescribed by the Bill. Behaviour breaches may be dealt with through the discipline process of administrative charging and hearing, leading to the imposition of behaviour management consequences. The Bill also contemplates a behaviour

management framework being established to promote positive behaviour in reflection of the age and developmental maturity of young detainees, and not only respond to negative, undesirable behaviour.

Schedule 1 of the Bill provides for modern criminal justice laws that apply to children and young people. The amendments focus on rehabilitation, flexibility and consistency in sentencing. Further detail is provided in the outline to Schedule 1.

Chapters 10 to 19 Care and Protection

Chapter 10 includes general matters relating to care and protection such as principles, considerations and overarching concepts. The chapter contains a new principle for decision-makers making a decision under the care and protection chapters to address how decision-makers inform themselves of views expressed by children and young people. The test of what is in a child or young person's best interests for decisions made under the care and protection chapters includes a greater emphasis on stability for children and young people in out of home care through early decision-making for a safe, supportive and stable placement, and protecting and promoting the cultural and spiritual identity of Aboriginal or Torres Strait Islander children and young people through connections to family and community. A new principle for the care and protection chapters has been included to emphasise that the safety and wellbeing of children and young people who have been removed from their parents is paramount over the interests of their parents.

Chapter 11 outlines the reporting and assessing of abuse and neglect of children and young people at risk. The chapter provides for voluntary reporting of a person's suspicion or belief that a child or young person is being abused or neglected or is at risk of abuse or neglect. It also requires certain persons to report to the Chief Executive their reasonable work-related belief of sexual abuse or non-accidental physical injury to a child or young person. A new exception to the requirement to report is included in this chapter, namely if the mandated reporter reasonably believes that the child or young person has experienced, or is experiencing, non-accidental physical injury caused by another child or young person and the subject child or young person has a person with parental responsibility who is willing and able to protect them from further injury.

The chapter introduces new concepts of a child concern report (which includes both mandatory and voluntary reports) and a child protection report (where the Chief Executive suspects a child or young person is in need of care and protection and deems that a child concern report should be treated as a child protection report). The chapter also introduces a requirement for the Chief Executive to undertake an initial assessment of matters raised in a child concern report to assess whether the child or young person may be in need of care and protection and take action considered appropriate in response to the report.

This chapter also allows a person to report to the Chief Executive if they suspect or believe, during a woman's pregnancy, that a child who may be born as a result of the pregnancy could be in need of care and protection. The chapter allows the Chief Executive to take any action considered appropriate with the consent of the pregnant woman to reduce the future risk to a child who may be born as a result of the pregnancy, including referrals to support services or information sharing with relevant persons and agencies. The chapter also allows prenatal information to be shared between the Chief Executive and prenatal information sharing entities in certain circumstances where the consent of the pregnant woman has been sought, but not obtained.

In response to a child protection report, the chapter introduces new powers for the Chief Executive to undertake an appraisal involving a visual examination or interview of a child or young person if seeking the agreement of a parent or other person with daily care responsibility would put the child or young person at significant risk of abuse or neglect or jeopardise a criminal investigation. Otherwise the Chief Executive may conduct an appraisal of a child or young person by making reasonable endeavours to seek the agreement of each person with daily care responsibility for the child or young person to the appraisal (unless it is not practicable or not in the best interests of the child or young person to do so) and where

the agreement of at least one parent or person with parental responsibility has been obtained; or by seeking and obtaining an appraisal order.

This chapter also introduces appraisal orders that authorise the Chief Executive to undertake an appraisal of a child or young person. An appraisal order may also authorise the Chief Executive having daily care responsibility for the child or young person, if the child or young person is at an unacceptable level of risk remaining in their usual care arrangements during the period of the appraisal. The length of an appraisal order is 4 weeks, with the possibility of an extension to 8 weeks if the extension is necessary for the appraisal to be completed.

Chapter 12 outlines the ways in which parental responsibility can be voluntarily transferred or shared between a person or persons with parental responsibility for a child or young person and another person or persons through the registration of family group conference agreements and voluntary care agreements.

Chapter 13 provides when a child or young person is in need of emergency care and protection or emergency therapeutic protection and confers powers on the Chief Executive and police officers to take action to ensure the child or young person's safety in emergency circumstances. A child (over 10 years) or young person in need of emergency therapeutic protection may be placed in a therapeutic protection place pending the making of an interim or final therapeutic protection order by the Childrens Court.

Chapter 14 outlines assessment orders and care and protection orders, including interim care and protection orders to protect children and young people who are, or who may be, in need of care and protection. Assessment orders authorise the Chief Executive to arrange a care and protection assessment of a person (for example, a parent) in relation to a child or young person's care and protection. The Bill introduces new procedures in order to streamline the process for arranging assessments through the Chief Executive deciding terms of reference for the assessment and arranging for an authorised assessor to undertake the assessment, unless otherwise ordered by the Court. The Bill also introduces new criteria for the making of an assessment order to ensure that children and young people are not subjected to repeated assessments that are not in their best interests.

The chapter also outlines care plans for a child or young person who is, or is proposed to be, subject to a care and protection order. A care plan is a written document outlining the Chief Executive's proposals for the care and protection of the child or young person. In order to improve stability for children and young people, the chapter allows the Chief Executive to include a proposal in a care plan about how the Chief Executive proposes to ensure the living arrangements for the child or young person are as stable as possible over the longer term in a safe, nurturing and secure environment. The chapter also introduces proposals in care plans which address planning and services for when a child or young person leaves out of home care, for example, to transition to independent living arrangements when approaching or attaining adulthood. For children and young people who are Aboriginal or Torres Strait Islander, the chapter introduces proposals in care plans that address the preservation and enhancement of the identity of the child or young person as an Aboriginal or Torres Strait Islander person.

A care and protection order may include provisions such as an enduring parental responsibility provision, short-term parental responsibility provision, long-term parental responsibility provision, residence provision, contact provision, drug use provision, supervision provision, mental health tribunal provision or a specific issues provision. Drug use provisions in care and protection orders are introduced in the Bill. These provisions are intended to address a child or young person's protective needs while the child or young person remains in the care of, or having contact with, a parent or primary caregiver whose parenting capacity is impacted by their use of a substance.

Again, in order to emphasise stability for children and young people, this chapter introduces short-term parental responsibility provisions (not longer than 2 years) and long-term parental responsibility provisions (until the child or young person is 18 years). The Bill includes a rebuttable presumption in favour of the child or young person being subject to a long-term

parental responsibility provision after being in out of home care for the 2 year period of a short term parental responsibility provision when an application is made to extend the order.

The Bill introduces new provisions to allow the Childrens Court to make interim and final DVPO protection orders for children and young people who are exposed to domestic violence in their home when care and protection proceedings are also before the Court for the child or young person.

This chapter includes requirements for the Chief Executive to report annually on the progress of a child or young person subject to the parental or supervisory responsibility of the Chief Executive. It introduces a new obligation for the Chief Executive to consult with the child or young person and other relevant people, such as the child or young person's carer, to discuss the report prior to its finalisation.

Chapter 15 outlines arrangements for the Chief Executive's exercise of parental responsibility for a child or young person under an order (for example, a care and protection order with a parental responsibility provision) or other authority (for example, voluntary care agreement) under the Bill. This chapter provides for the authorisation of foster carers, foster care services, and residential care services to provide care for children and young people and revocation of these authorisations in certain circumstances. It also allows a family member or significant person for a child or young person to be authorised as a kinship carer. The term 'place of care' replaces the former terminology of 'shelter' under the 1999 Act and this chapter enables the Minister to approve places of care for the placement of children and young people under the care and protection chapters. Out-of-home care standards will also be developed. This chapter also requires personal history information for children and young people in out-of-home care to be kept by foster carers, foster care services and residential care services and for this information to be given to the child or young person where it is in their best interests. The chapter also requires the Chief Executive to report to the Public Advocate on actions taken following a child protection report resulting in an appraisal for children and young people in out-of-home care or on approved contact visits. The placement principle for Aboriginal and Torres Strait Islander children and young people in out-of-home care is also included in this chapter.

Chapter 16 addresses therapeutic protection orders which enable the Chief Executive to confine a child or young person at a place declared by the Minister as a therapeutic protection place in circumstances where the child or young person poses a significant risk of significant harm to themselves or others. This chapter introduces new criteria for the making of these orders, requires regular reviews of any orders in force by the Chief Executive and sets an absolute upper limit of 6 months for extensions of orders. It introduces a revised search and seizure scheme for children and young people in therapeutic protection and authorises the use of force in certain limited circumstances. It also allows the Minister to declare a place as a therapeutic protection place and allows the Chief Executive to authorise an entity to be an operating entity for the place, including the power to suspend or revoke the authorisation. The Bill contemplates the development of therapeutic protection standards. The chapter provides for increased oversight of therapeutic protection, through access to the therapeutic protection place by accredited persons, a requirement for the operating entity to maintain a register of intrusive action such as certain searches and provision of a therapeutic protection plan to the Official Visitor or Public Advocate at their request. The register must be available for inspection by accredited persons and must be inspected regularly by the Public Advocate.

Chapter 17 gives effect to a uniform national scheme for the transfer of care and protection orders and proceedings between participating states (including the Northern Territory and New Zealand). It includes a new object and criterion for the administrative and judicial transfer of care and protection orders to recognise the desirability of orders relating to the care and protection of a child or young person having effect, and being enforced, in the jurisdiction where the child or young person lives. This chapter no longer contains provisions relating to the transfer of care and protection orders and proceedings to non-participating states to reflect that all states are now participating in the uniform national scheme.

Chapter 18 confers powers on police officers to provide assistance to the Chief Executive for certain actions under the care and protection chapters. The chapter also includes provisions

for a safe custody warrant to be issued by a Magistrate in circumstances where a child or young person is in danger as a result of a person contravening an order in force for the child or young person under the care and protection chapters.

Chapter 19 outlines procedures applying to proceedings arising under the care and protection chapters. The chapter outlines the form and content of applications, including cross applications and the burden of proof for proceedings under the care and protection chapters. It also outlines who the parties to an application are, procedures for joining and removing parties, hearing applications in a party's absence, service of material and representation of parties. It includes procedures for summonsing witnesses to give evidence in a proceeding under the care and protection chapters and provides for orders about costs.

Chapter 20 Childcare Services

Chapter 20 provides a regulatory framework for childcare centres and family day care schemes in the Territory. Childcare service proprietors will no longer be required to hold an approval in principle prior to holding a childcare service licence. Childcare services standards will be established to replace licence conditions and these will be enforceable through an offence for non-compliance. Compliance with standards will be assessed at a minimum of once during the period of a licence for each service. For each financial year, the Chief Executive is required to prepare a report regarding compliance of services with the childcare services standards. This will be publicly notified on the Legislation Register by way of notifiable instrument, excluding information identifying a child, a childcare worker or a reporter.

Chapter 21 Employment of children and young people

Chapter 21 regulates employment for children and young people aged under 18 years in the Territory. The Bill provides for the establishment of standards aimed at protecting children and young people in employment and children and young people in work experience under school leaving age.

The chapter includes a new definition of light work, to ensure that children and young people under school leaving age can engage in and benefit from light work that is deemed by employers (within the meaning set out by the Bill) to be in the child or young person's best interests.

There will also be a new power for the Minister to declare an industry, occupation or activity to be high risk employment, if it is likely to harm the health, safety, personal or social development of a child or young person under school leaving age.

This chapter also establishes a framework to exempt a work experience program for under school leaving age children and young people arranged by an educational institution from the operation of chapter 21 if the program complies with work experience standards.

Chapter 22 Research involving children and young people

Chapter 22 introduces new provisions for the Chief Executive to approve certain research projects. The Bill contemplates the development of research standards and these will be enforceable through an offence for non-compliance. Research projects that require the approval of the Chief Executive are those that involve the participation of certain children and young people in the research project (including those in the custody and care of the Chief Executive) or require the Chief Executive to give the researcher access to protected or sensitive information about children and young people. They also include projects that involve the participation of a person who exercises a function under the Act and those that involve research being conducted at a place of care, detention place, or therapeutic protection place.

Chapter 23 Enforcement

Chapter 23 outlines enforcement powers for functions exercised under the new Act. The chapter allows entry to premises with the consent of the occupier of the premises or with a search warrant issued by a Magistrate. The chapter also authorises entry to premises without the consent of the occupier and without a warrant in certain limited circumstances, namely to ensure the protection of a child or young person at risk of immediate and significant harm or to fulfil the Chief Executive's duty of care to children and young people for whom the Chief Executive has parental responsibility or to fulfil an inspectorate role for licensed childcare services.

Chapter 24 Appeals and review

Chapter 24 deals with appeals and reviews of decisions under the Bill. Restrictions in the 1999 Act on the right to appeal decisions under the care and protection chapters have been removed and the Bill has been drafted to allow appeals in accordance with the rules of the *Magistrates Court Act 1930*. Certain new administrative decisions being made by the Chief Executive under the Bill are also reviewable by the Administrative Appeals Tribunal.

Chapter 25 Information Secrecy and Sharing

Chapter 25 outlines an information secrecy and sharing framework for the Bill. The framework includes new powers for members of a child or young person's care team, who are persons and entities declared by the Chief Executive, to share information with each other relevant to the safety and wellbeing of the child or young person. It also expands section 29 of the 1999 Act to allow the sharing of information about a child or young person's health, safety and wellbeing between certain persons and agencies to better support collaborative, multi-agency responses to children and young people. The chapter includes an expanded power for the Chief Executive to give information to a person who is exercising a function under, or administering, a corresponding law of another State. It also includes explicit authorisation for out-of-home carers and foster care services to release certain information about a child or young person if this is necessary for the exercise of their care responsibilities for the child or young person. It also enables the Chief Executive to give a researcher certain information for an approved research project. It includes new rules for information holders giving information to Courts and investigative entities.

Chapter 26 Miscellaneous

Chapter 26 contains miscellaneous provisions. The chapter allows for a person to make a confidential report of their suspicion that a provision of the Act is being contravened or has been contravened. It remakes the offence for tattooing a child or young person without the written agreement of a person with parental responsibility for the child or young person. It also includes a power for the Minister to make standards for the Act and a power for the Executive to make regulations for the Act.

DETAIL

Chapter 1 — Preliminary

This chapter sets out general objects, principles, considerations and concepts (including the concept of parental responsibility), which apply across the Bill.

Part 1.1 — Introduction

This part sets out the technical clauses of the Bill.

Clause 1 — Name of Act

This is a technical clause and sets out the name of the new Act as the Children and Young People Act 2008.

Clause 2 — Commencement

This clause enables the new Act to commence on a day nominated by the Minister in a commencement notice.

The default 6 month commencement under the *Legislation Act 2001* is displaced, however, if the Act is not commenced within 12 months, it will commence automatically the next day after that period.

Clause 3 — Dictionary

This is a technical clause identifying the dictionary and explaining conventions used to define words and terms for the purposes of the Act.

Clause 4 — Notes

This is a technical clause explaining the status of notes in the Act.

Clause 5 — Offences against Act – application of Criminal Code etc

This clause makes it clear that the *Criminal Code 2002* applies to all offences against the Act. The Act should also be read in conjunction with the *Legislation Act 2001*, which provides for interpretation, common definitions, and legislative machinery for the Act.

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.

Clause 6 — Application of Act to children and young people etc

This clause specifies that the Act will apply to children, young people, young offenders and young detainees who ordinarily live in, or are present in, the ACT or are subject to an event occurring in the ACT that leads to a voluntary or mandatory report about their care and protection. It also specifies that the Act will apply to prenatal reports about a child's future care and protection.

The Act applies to young offenders and young detainees, which includes adults aged under 21 years who are alleged to, or have committed an offence under the age of 18 years. See chapter 4 and the dictionary for definitions relating to young offenders and young detainees.

Part 1.2 — Objects, principles and considerations

This part specifies the objects and principles of the Act, including the Aboriginal and Torres Strait Islander principle. The objects and principles are underpinned by the paramount consideration of the best interests of children and young people.

Clause 7 — Main objects of Act

This clause sets out the objects that underpin the Bill in relation to all aspects of the protection and wellbeing of children and young people. The objects summarise the overarching tasks of the relevant Minister and Chief Executive when administering the new Act.

The objects provide greater recognition of:

- the importance of a whole of government and community approach to supporting children and young people (sub-clauses (a), (c) and (f));
- the right to inclusion and participation of Aboriginal or Torres Strait Islander people in providing support and care to Aboriginal or Torres Strait Islander children and young people and young offenders (sub-clause (d)).

Sub-clause (e) expands an existing object from the 1999 Act 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
- foster and promote 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.

In order to reflect the aims of the employment chapter, a new object has been included at sub-clause (h) to reflect the objective of protecting children and young people in employment.

Clause 8 — Best interests of children and young people paramount consideration

This clause enshrines the best interests principle as the paramount consideration for persons making decisions or taking action under the Act.

For the care and protection chapters, clause 348 sets out the matters decision-makers must take into account in deciding what is in the best interests of a child or young person.

For the criminal matters, clause 94 sets out the matters decision-makers must take into account in deciding what is in the best interests of a young offender or young detainee.

This best interests principle as a paramount consideration reflects the *Convention on the Rights of the Child* (Article 3) which states:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

Clause 9 — Principles applying to Act

This clause sets out the general principles and provides that they are to be considered where relevant to the decision being made in relation to a child or young person, except when this would be in conflict with the best interests of the child or young person. The general principles in this clause are to guide all decisions and actions made or taken under the Act, whether by the Chief Executive, a Court, an authorised person or someone else. The best interests principle will limit the operation of these principles to the extent of any inconsistency.

Other principles and requirements of the Act are additional to these principles and are not intended to limit the operation of these principles.

Sub-clause (1) clause re-enacts parts of section 12 of the 1999 Act which set out general principles that applied across the Act. Other parts of section 12 from the 1999 Act that related specifically to care and protection matters have been relocated to part 10.3 of the Bill that outlines principles and considerations for the care and protection chapters.

Sub-clause (2) introduces a new requirement for a decision-maker exercising a function under the new Act to, where practicable and appropriate, have qualifications, experience or skills

suitable to apply the principles in sub-clause (1) in making decisions in relation to children and young people. This requirement reflects the need for persons working with children and young people to have professionalism or appropriate training or skills reflected in international human rights law (see Committee on the Rights of the Child General Comment No. 5 (2003) General measures of implementation of the *Convention on the Rights of the Child* (commentary 53 – 55) and the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("The Beijing Rules") rule 22).

Clause 10 — Aboriginal and Torres Strait Islander children and young people principle

The clause re-enacts and expands the Indigenous children and young people principle at section 14 of the 1999 Act. This clause outlines the additional matters that decision makers must consider when making decisions or taking action under the Act in relation to Aboriginal or Torres Strait Islander children and young people:

- the need for the child or young person to maintain a connection with the lifestyle, culture and traditions of the child's or young person's Aboriginal or Torres Strait Islander community;
- submissions about the child or young person, made by or on behalf of any Aboriginal or Torres Strait Islander people or organisations identified by the Chief Executive as providing ongoing support services to the child or young person or their family; and
- Aboriginal or Torres Strait Islander traditions and cultural values (including kinship rules) as identified by reference to the child or young person's family, kinship relationships and the community with which the child or young person has the strongest affiliation.

This principle recognises that the ACT Aboriginal and Torres Strait Islander community is diverse and there is no single set of traditions and/or culture.

The Indigenous Placement Principle at section 15 of the 1999 Act has been relocated to chapter 15 of the Bill as it relates to when the Chief Executive has daily care or long-term care responsibility for an Aboriginal or Torres Strait Islander child or young person.

This principle engages the right to equal protection of the law without discrimination, at section 8(3) of the *Human Rights Act 2004*. However it is justifiable under section 28 of the *Human Rights Act 2004* because the proposed positive discriminatory measures recognise the needs of Aboriginal and Torres Strait Islander children, their families and their communities in the light of their history as Indigenous Australians and their over-representation in the child protection and criminal justice systems.

Part 1.3 — Important concepts

This part sets out concepts that apply across the Bill.

Division 1.3.1 — Definitions

This division sets out definitions of the terms 'child', 'young person', 'family member of a child or young person' and 'significant person for a child or young person'.

Clause 11 — Who is a child?

This clause defines a child for the Act as a person aged under 12 years old.

Clause 12 — Who is a young person?

This clause defines a young person for the Act as a person who is aged 12 years to 18 years. A person becomes an adult when they turn 18 years.

Clause 13 — Who is a family member of a child or young person?

This clause introduces a new definition of a family member of a child or young person to clarify concepts and references to family members across the Bill.

A family member of a child or young person means the child or young person's:

- parent, grandparent or stepparent; or

- son, daughter, stepson, stepdaughter; or
- sibling; or
- uncle, aunt; or
- nephew, niece or cousin.

The meaning of parent in the *Legislation Act 2001* applies to define parent in this Bill and includes the child or young person's mother, father or someone else who is presumed under the *Parentage Act 2004*, part 2 to be a parent of the child.

A definition of sibling is included in the dictionary and includes a stepbrother, stepsister, half brother or half sister of a child or young person.

The definition of family member also incorporates Aboriginal or Torres Strait Islander customary parenting practices to include a person who has responsibility for the child or young person in accordances with those practices.

Clause 14 — Who is a significant person for a child or young person?

This clause introduces a new definition of a significant person for a child or young person. The concept of a significant person for a child or young person was included in the 1999 Act, but was not defined.

This clause clarifies that a significant person for a child or young person is a person that the child or young person identifies as significant to them. For most children and young people, it is not intended that the Chief Executive needs to be satisfied there is a significant relationship between the child or young person and the significant person. It will be sufficient that the child or young person identifies the person as a significant person in their lives.

However, in cases of very young children who are not sufficiently mature to identify a person as a significant person, or in cases of children and young people who are not able to do this for other reasons (for example, intellectual disability), this clause also allows the Chief Executive or a family member to identify a person as a significant person in the child or young person's life.

As family members for a child or young person are now defined in clause 13, it is not intended that a significant person would include any of the family members identified in that clause.

Examples of significant persons are included in this clause to give guidance about who is considered to be a significant person for a child or young person. One example of a significant person is "a person who has responsibility for the child or young person in accordance with the cultural traditions and customs of the child's or young person's community". This example is intended to reflect the needs of children and young people from culturally diverse communities.

An example of a significant person is as follows. Billy is 14 months old and is subject to care and protection intervention under the Act. The Chief Executive undertakes a comprehensive family assessment and identifies that Billy's mother was in a relationship before Billy's birth with Henry and that Henry has cared for Billy intermittently since his birth. The Chief Executive consults with Billy's mother and Billy's mother states that Henry has been a parental figure to Billy and Billy seems happy to see and spend time with Henry. The Chief Executive forms the view that Henry is a significant person for Billy.

Division 1.3.2 — Parental responsibility

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

Clause 15 — What is parental responsibility?

This clause provides that parental responsibility means all the duties, powers, responsibilities and authority that parents have by law in relation to their children. Parental responsibility includes the following two aspects:

- Daily care responsibility – this was formerly called parental responsibility for day-to-day care, welfare and development of a child or young person under the 1999 Act; and
- Long-term care responsibility – this was formerly called parental responsibility for long-term care, welfare and development of a child or young person under the 1999 Act.

The concept of parental responsibility was introduced in the 1999 Act at section 17 in line with the *Family Law Act 1975* and the *Children Act 1989* (UK), replacing traditional concepts of custody and guardianship.

Clause 16 — Parents have parental responsibility

This clause codifies the common law position that each parent of a child or young person has all aspects of parental responsibility for the child or young person. However, aspects of parental responsibility may be transferred or shared as outlined at clauses 17 and 18 respectively. Sub-clause (2) clarifies that a parent who is not yet 18 years has parental responsibility.

The Bill does not intend to affect who is a parent under the *Parentage Act 2004*.

Clause 17 — Aspects of parental responsibility may be transferred

This clause clarifies that aspects of parental responsibility may be transferred to a person under this Act in certain ways such as through a family group conference agreement, an appraisal order with a temporary parental responsibility provision, emergency action or a care and protection order with a parental responsibility provision.

Further, aspects of parental responsibility may be transferred by way of a Court order under another law in force in the Territory (for example, the *Family Law Act 1975* (Cth)), or a provision of another law in force in the Territory.

The clause makes clear that a person's parental responsibility is not diminished except for those aspects of parental responsibility that are explicitly transferred in one of the ways outlined above. For example, if daily care responsibility for a child or young person is transferred from a parent to another person, then the parent retains long-term care responsibility for that child or young person. If daily care responsibility and long-term care responsibility for a child or young person are transferred from a parent to another person under a Court order, then the parent does not have any aspect of parental responsibility for the child or young person while the order remains in force. While the parent may not have parental responsibility, it does not extinguish their status as parent.

Clause 18 — Aspects of parental responsibility may be shared

This clause clarifies that aspects of parental responsibility may be shared under the Act between two or more people in certain ways such as through a family group conference agreement, a voluntary care agreement or a care and protection order with a parental responsibility provision.

Further, aspects of parental responsibility may be shared by way of a Court order under this Act or another law in force in the Territory, or a provision of another law in force in the Territory (for example, the *Family Law Act 1975* (Cth)).

Just as one parent can act independently of another in making decisions for a child or young person, this clause clarifies that those who are given shared parental responsibility by a Court order or an agreement under the new Act can act independently of each other. The exercise of this responsibility is subject to part 14.6 and part 15.2 which outlines when one person's responsibility takes precedence and when those persons who share responsibility must consult with each other.

Clause 19 — Daily care responsibility for children and young people

This clause introduces a new term of 'daily care responsibility' to describe what was formerly called parental responsibility for day-to-day care, welfare and development of a child or young person under the 1999 Act.

A person with daily care responsibility for a child or young person has authority to make decisions about matters concerning a child or young person's daily care, wellbeing and development.

This clause includes examples to indicate the range of matters (subject to a Court order and care plan) that comprise daily care responsibility. It is intended to include all the practical arrangements associated with matters such as bedtime, pocket-money, clothing, hair-cuts, whether make-up may be worn, baby-sitting, short trips away, routine visits to and treatment by health professionals or services, who a child associates with (and how, when and where they do it), providing school lunches and uniforms and consenting to school excursions. The list is not intended to be exhaustive.

A person who has daily care responsibility for a child or young person also has authority for making decisions about:

- assessment of the child or young person's physical or mental wellbeing; and
- whether the child or young person may undergo health care treatment (that does not involve surgery) on the advice of a health professional, or dental treatment (including minor dental surgery).

Sub-clause (5) clarifies that the rights of a child or young person at common law or by statute to consent to their own health care treatment are not affected by the operation of this clause.

A person's daily care responsibility for a child or young person is subject to order in force or the child or young person's care plan.

The daily care responsibility of an out-of-home carer, who is authorised to have daily care responsibility by the Chief Executive, is also subject to any authorisation and directions of the Chief Executive under Division 15.4.2. Under that division, the Chief Executive may authorise the out-of-home carer to exercise all or part of the Chief Executive's daily care responsibilities for a child or young person.

The formulation of parental responsibility in this clause is intended to reflect the position at common law. Sub-clause (4) provides that the matters for which a person with daily care responsibility has authority to make decisions is subject to any Court order in force. A care and protection order with a residence provision would be an example of an order which would limit the decision making authority of a person with daily care responsibility. For example, Adam is subject to a care and protection order that includes a parental responsibility provision (which transfers daily care responsibility to his aunt) and a residence provision (which gives authority for decisions about Adam's residence to the Chief Executive). In this circumstance, the Chief Executive (not Adam's aunt) has the authority to make decisions about Adam's residence.

Clause 20 — Long-term care responsibility for children and young people

This clause introduces a new term of long-term care responsibility to describe what was formerly called parental responsibility for long-term care, welfare and development of a child or young person under the 1999 Act.

A person with long-term care responsibility has authority to make decisions about the long-term care, protection and development of the child, including (but not limited to) matters relating to managing financial affairs, determining the religious faith or the type of schooling or employment to be followed by the child or young person and arranging a passport for international travel.

Subject to a Court order or care plan, a person who has long-term care responsibility also has authority to make decisions about whether the child or young person should undergo health

care treatment involving surgery. The rights of a child or young person to consent to their own health care treatment at common law or under statute are not affected by the operation of this clause.

A person's long-term care responsibility for a child or young person is subject to any order in force or the child or young person's care plan.

Under Division 15.4.2, the Chief Executive may authorise an out-of-home carer to exercise all or part of the Chief Executive's long-term care responsibilities for a child or young person. The exercise of long-term care responsibilities by the out-of-home carer is also subject to any directions of the Chief Executive under Division 15.4.2.

Clause 21 — Parents or people with parental responsibility who cannot be found

The Bill requires certain persons such as the Chief Executive or a Court, to act in relation to a parent or person with parental responsibility. Actions include serving notices, seeking consent or inviting parents or people with parental responsibility to family group conferences. If the person cannot be found after reasonable inquiry, this clause allows the action to be taken.

This clause applied to persons with parental responsibility in relation to Family Group Conferences under section 179 of the 1999 Act, but has been extended to apply to all relevant actions under the Bill.

Chapter 2 — Administration

This chapter establishes the administrative framework for the new Act, including the Chief Executive's functions. It also describes the roles of other entities constituted under the Bill, such as the Official Visitor and the Children and Youth Services Council (formerly the Childrens Services Council under the 1999 Act).

Part 2.1 — Chief Executive

Clause 22 — Chief Executive's functions

The Chief Executive for the new Act is the Chief Executive responsible for the administrative unit of the ACT Public Service with administrative responsibility under the Administrative Arrangements issued under the *Public Sector Management Act 1994*, from time to time.

This clause outlines the broad functions of the Chief Executive responsible for administering the new Act. These functions include:

- the provision of services, supports and assistance for children and young people and their families, which may be provided directly by the Chief Executive or indirectly (for example, by funding non-government agencies);
- providing community education and assistance to persons who report abuse and neglect of children and young people, as mandatory or voluntary reporters;
- promoting a whole of government and whole of community approach to supporting the care, protection and well-being of children and young people in the Territory;
- providing support to children and young people who have left the Chief Executive's care.

A new function for the Chief Executive is included at sub-clause(1)(f) for exercising aspects of parental responsibility for children and young people. As this function is unlike any other administrative function, it is now explicitly detailed.

Sub-clause (2) clarifies that any functions explicitly conferred on authorised persons throughout the Bill are conferred also on the Chief Executive. The note clarifies that this includes the power to exercise the function.

Clause 23 — Chief Executive instructions

This clause allows the Chief Executive to make instructions, consistent with the new Act, for the management or operation of any function under the new Act.

This clause requires persons exercising administrative functions under the new Act to comply with the instructions.

Clause 24 — Ministerial directions to Chief Executive

This clause allows the Minister to give written directions to the Chief Exercise about the exercise of functions under the Act.

This new power is included to enable the Government to act without delay to, for example, decisions of the Supreme Court, or recommendations from any inquiry or royal commission.

Any direction must be publicly notified in accord with the *Legislation Act 2001*.

Clause 25 — Chief Executive may ask for assistance, etc

This clause allows the Chief Executive to ask a Territory entity or an ACT Education provider to give the Chief Executive assistance, facilities or services relevant to the physical or emotional wellbeing of a child or young person.

Physical and emotional wellbeing is intended to be construed broadly to encompass all aspects of the health, development, protection and care of a child or young person. It is intended to apply to a child or young person, or children or young people. Section 145 of the

Legislation Act 2001 provides that in an Act or instrument words in the singular number include the plural and words in the plural number include the singular.

A Territory entity means an administrative unit, a Territory authority, a Territory instrumentality, a public employee, or police officer. It does not include the Legal Aid Commission, the Human Rights Commission or a Judge or Magistrate as this could give rise to a conflict of interest.

Public employee is defined under the *Legislation Act 2001* as a public servant, a person employed by a Territory instrumentality or a statutory office-holder or a person employed by a statutory office-holder.

Sub-clause (2) requires a Territory entity or government school or school related institution to comply with the request in a timely manner.

A school related institution under the *Education Act 2004* means school-related educational institutions and services established by the Minister.

This requirement to comply with the Chief Executive's request for assistance does not apply to a non-government or private school.

This clause re-enacts part of section 28 of the 1999 Act relating to assistance, facilities or services, but extends the ability of the Chief Executive to request assistance from non-government or private schools and school related institutions. Section 28 of the 1999 Act also provided the Chief Executive with the power to request information, advice and guidance. This power has been expanded and is located at clause 861.

Clause 26 — Chief Executive must give identity cards

This clause clarifies that a person is an authorised person for the new Act if the Chief Executive delegates a power under the Act or another Territory law, to the person. An example of another Territory law is the *Crimes (Sentence Administration) Act 2005*.

This clause requires the Chief Executive to provide an identity card for authorised persons exercising functions under the Act or another Territory law. It is an offence for an authorised person to fail to return their identity card to the Chief Executive after they stop being an authorised person.

The identity card must show a reasonably recent photograph of the person (for example, a photograph of the person that is up to 5 years old), the card's date of issue and expiry and anything else prescribed by regulation.

Part 2.2 — Children and Youth Services Council

This part relates to the Children and Youth Services Council ('the Council'), formerly the Childrens Services Council under the 1999 Act, which is a body that advises the Minister responsible for administering the Act on issues relating to the Act, and services for children and young people in the Territory.

Clause 27 — Establishment of council

This clause establishes the Children and Youth Services Council.

This replaces the Childrens Services Council established under the 1999 Act. The change reflects a broadened membership base that represents the interests of children and young people.

Clause 28 — Functions of council

This clause outlines the functions of the Council. These functions include reporting to the Minister on anything relating to the operation of the Act at the Minister's request and making recommendations to the Minister about services for children and young people in the ACT.

Clause 29 — Council members

This clause provides that the Council has at least 5, but no more than 10, members.

Clause 30 — Appointment of council members

This clause allows the Minister to appoint the members of the Council.

Sub-clause (2) sets out the criteria for appointing Council members and sub-clause (3) outlines interests that must be represented by the membership. This clause expands the Council's members to include at least one member who represents the interests of young people and at least one member who represents the interests of children.

Clause 31 — Appointment of chair and deputy

The Bill requires the Minister to appoint a chair and deputy chair for the Council.

Clause 32 — Ending member appointments

This clause outlines when the Minister may end the appointment of a member of the Council.

By clause 210 of the *Legislation Act 2001* the member may also resign their appointment thereby ceasing their appointment.

Clause 33 — Presiding member at meetings

This clause provides for presiding members at meetings of the Council, being the chair or deputy chair in the chair's absence.

Clause 34 — Quorum at meetings

This clause provides that business of the Council can be conducted if at least half of the appointed members are present at the meeting.

Clause 35 — Voting at meetings

This clause outlines the voting arrangements for the Council.

Clause 36 — Advice and assistance by Chief Executive and Public Advocate

This clause provides an obligation for the Chief Executive and the Public Advocate to give the Council the advice and assistance that is reasonably asked for by the Council.

Part 2.3 — Official visitors

This part relates to Official Visitors. Official Visitors have oversight and inspectorate functions conferred by this part in relation to detention places (see chapter 6), therapeutic protection places (see chapter 16) and places of care (see chapter 15).

Clause 37 — Meaning of entitled child or young person – pt 2.3

This clause creates definitions for part 2.3. 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 the conditions of their detention, confinement or accommodation.

Investigative entity is defined in the dictionary as an entity with power to require the production of documents or the answering of questions. Examples include the Chief Police Officer, the Human Rights Commission, the Public Advocate and the Ombudsman.

A new concept of 'operating entity' is also created in the Bill and is defined in the dictionary. 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. In the 1999 Act, a place of care was formerly known as a shelter. Operating entities have certain obligations in relation to facilitating the functions of an Official Visitor.

Clause 38 — 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.

Sub-clause (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 39 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 39 — Official visitors – functions

This clause outlines the functions of an Official Visitor which are:

- inspecting detention places, places outside of the detention place where detainees are, or have been, directed to work or participate in an activity, places of care and therapeutic protection places;
- reporting to the Minister and Chief Executive;
- receiving and considering complaints from entitled children and young people and others on their behalf; and
- exercising any other function given to an Official Visitor under this Act or another Territory law.

Sub-clause (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. Examples of reasonable help are included in the Bill to provide guidance.

This clause introduces a new requirement for the Official Visitor to consider whether a complaint is more appropriately referred to another investigative entity under clause 49 if sensitive information needs to be accessed from the operating entity. This is because investigative entities may receive sensitive information through the Act or another Territory law, for example, clause 878 relating to the Public Advocate.

Clause 40 — Official visitors - reporting to Minister

This clause requires the Official Visitor to report to the Minister in writing if they reasonably believe that either of the following is not in accordance with the new Act:

- the care provided to 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;
- the detention of a detainee (including any aspect of the treatment, living conditions, work or activities of the detainee).

Clause 41 — Official visitors – reporting to Chief Executive

This clause requires the Official Visitor to report to the Chief Executive in writing if they reasonably believe that either of the following is not in accordance with the new Act or the out of home care standards:

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

Clause 42 — Ending appointment of Official Visitors

This clause outlines when the Minister has discretion or 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 the complaints guidelines 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 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.

Clause 43 — Complaints guidelines

This clause allows the Minister to make guidelines (by way of notifiable instrument) that outline complaints handling by the Official Visitor.

As more than one Official Visitor may be appointed, the guidelines must include 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 44 — Complaints to Official Visitors

This clause enables an entitled child or young person, or anyone else on the child or young person's behalf to make a complaint to an Official Visitor. Complaints must be directed to issues about: the conditions of detention, confinement or accommodation, any aspect of the entitled child or young person's care at the place or how the place is conducted. The entitled child or young person may make the complaint to the Official Visitor personally or though someone else.

Under sub-clause (3), the entitled child or young person has a right to ask the Official Visitor to hear the complaint with no-one else present and the Official Visitor is obliged to comply with such a request. In these circumstances, the operating entity is required to provide reasonably private facilities for the Official Visitor to hear the complaint, for example, a private room to talk to the child or young person.

Clause 45 — Requests to see Official Visitor

This clause requires an operating entity to ensure that an Official Visitor is told as soon as practicable (and no later than 12 hours after a request) 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 46 — 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 to the Official Visitor as the Chief Executive has a duty to ensure the organisation is a suitable entity and is operating

the service in accordance with relevant standards and 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. The Official Visitor is not required to tell the Chief Executive about the identity of the child or young person who is the complainant.

Clause 47 — 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 promptly and efficiently 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 exercising any other function given under the Act. This clause is subject to clauses 49 to 55 which outline when a complaint must be referred to another entity or must be closed.

This clause allows the Official Visitor to make a recommendation about the complaint to the operating entity; or if the Official Visitor considers it appropriate, give the Chief Executive and the Minister a report about any complaint or inquiry.

Clause 48 — Withdrawal of complaints

This clause enables a complainant to withdraw their complaint to the Official Visitor at any time. Given the vulnerability of entitled children and young people and the potential for them to be intimidated to withdraw a complaint, this clause introduces a requirement for the Official Visitor, before closing a complaint, to be satisfied that:

- the matter has been appropriately resolved; or
- the complaint concerns a minor issue; or
- the complaint has lapsed (because the young person is no longer detained in a detention place or confined at a therapeutic protection place).

Where a complaint has been withdrawn for any reason and the Official Visitor reasonably suspects it is in the public interest to consider the complaint, the Bill requires the Official Visitor to refer the complaint to the Human Rights Commission to consider whether it should be investigated under its own motion powers at 48(3) of the *Human Rights Commission Act 2005*. If the complaint is referred, the Official Visitor is required to give the Commission information about the complaint.

Clause 49 — 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 required to give the entity information about the complaint;
- is required to tell the complainant about the referral; and
- may close the complaint.

A definition of investigative entity is outlined in the dictionary and means an entity with power to require the production of documents or the answering of questions including, for example, the Chief Police Officer, the Human Rights Commission, the Public Advocate and the Ombudsman. The Public Advocate is empowered through clause 878 to require information, advice and guidance from child welfare entities that must be complied with.

Clause 50 — 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 another investigative entity, then the Official Visitor is enabled to give the entity information about the complaint and may close the complaint.

Clause 51 — 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 52 — Complaints 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, for example, through verbal indication they are happy with the outcome.

If a complaint cannot be resolved with the operating entity, the Official Visitor may refer the complaint to an investigative entity under clause 49.

Clause 53 — Complaints closed—complainant left detention etc

This clause requires the Official Visitor to close a complaint if satisfied that the complainant has left the detention place, therapeutic protection place or place of care and they cannot be found after reasonable enquiry.

Clause 54 — 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 55 — Information about complaints being investigated elsewhere

When complaints are being investigated by another entity, as provided for under clause 49 and 50, this clause allows the Official Visitor to report to the complainant about progress and follow up with the investigating entity about the complaint.

Clause 56 — 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. The Official Visitor must try to resolve a re-opened complaint under clause 47.

Clause 57 — Other matters of concern—referral to other entity

If the Official Visitor becomes aware of a matter that would be the subject of a complaint under clause 44 (but no complaint is made), this clause enables the Official Visitor to refer the matter of concern to an investigative entity (and requires information to be given about the matter); or refer to the Chief Executive.

Clause 58 — Monthly reports by Official Visitors

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

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

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

Clause 59 — 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 Act

This part includes one test for all suitable entities under the Act, including for example, foster carers, kinship carers, residential care services, proprietors and controlling persons for childcare services and researchers undertaking research projects approved under chapter 22.

Clause 60 — Definitions – Act and pt 2.4

This clause outlines definitions for this part and for the Act.

Clause 61 — Who is a suitable entity?

A suitable entity is a person or 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, therapeutic protection services, proprietors and controlling persons for childcare services and researchers undertaking research projects.

Clause 62 — Entity may apply to be suitable entity for purpose

This clause allows an entity to apply to the Chief Executive for approval as a suitable entity. The application must be in writing.

Clause 63 — Chief Executive may approve suitable entity for purpose

This clause allows the Chief Executive to authorise an entity in writing as a suitable entity for a stated purpose, for example the provision of foster care to a child or young person.

This clause also allows the Chief Executive to orally approve an entity as suitable when orally authorising a person or entity under clause 515 as a kinship carer, or clauses 517 and 518 as a foster carer. As soon as practicable thereafter, the Chief Executive must approve the person or entity in writing.

Clause 64 — Chief Executive must consider suitability information, etc

An entity may apply to the Chief Executive for approval as a suitable entity for a stated purpose. This clause enables the Chief Executive to consider suitability information about the entity and references, reports, or the results of tests or medical examinations required by the Chief Executive.

Sub-clause (1) provides that in deciding whether an entity is suitable for a stated purpose, the Chief Executive:

- must consider suitability information outlined at 65(1)(a), (b) and (c). These are core considerations that will apply to the assessment of all types of entities; and
- may consider suitability information outlined at 65(1)(d), (e), (f), (g) and (h). These considerations will be assessed where relevant to the purpose for which the entity is being assessed.

Sub-clause (2) requires the Chief Executive to give written notice to the entity when considering suitability information at 65(1)(d) or (e), as the entity once approved has a legal duty under clause 70 to advise the Chief Executive of changes to this type of suitability information.

Clause 65 — What is suitability information?

Suitability information includes 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
  - an offence against a child or young person; or
  - an offence involving a child or young person; or
  - an offence involving violence; or
  - a sex offence; or
  - an offence involving dishonesty or fraud; or
  - an offence involving possession of, or trafficking in, a drug of dependence or controlled drug; or
  - an offence against an animal;
- any proven non-compliance by the entity with a legal obligation in relation to providing services for children or young people;
- any refusal, whether in the ACT or another State or Territory, 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;
- whether a child concern report has been received by the Chief Executive about the entity and any action that has been taken in response to the report by the Chief Executive or a Court or Tribunal; and·
- any other consideration relevant to the entity's ability to provide high quality services for children or young people.

This clause is not intended to limit any operation of Territory discrimination law.

The 1999 Act contained two suitable entity tests – applying generally and to children services (which included a broader range of considerations than the test which applied across the Act). In order to provide greater consistency and equity between these tests, this clause provides for one suitable entity test (based on the test in the Childrens Services chapter of the 1999 Act).

The suitable entity test is expanded to include whether the person has -

- been convicted or found guilty of an offence against an animal;
- been convicted or found guilty of a sex offence; or
- whether a child concern report has been received by the Chief Executive about the entity and any action that has been taken in response to the report by the Chief Executive or a Court or Tribunal.

This is based on international research that indicates there is a strong relationship between animal abuse and other forms of family violence, including child abuse.

Clause 66 — Chief Executive may require suitability information

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.

Clause 67 — Chief Executive need not decide suitability if information not provided

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.

Clause 68 — Chief Executive may require test etc

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/or undergo a stated test or medical examination within a set time.

Clause 69 — Chief Executive need not decide suitability if test not taken, etc

If the entity does not comply with a requirement notice given under clause 68, the Chief Executive does not need to continue with the suitable entity assessment.

Clause 70 — Offence – ongoing duty to update suitability information

The Bill introduces a new offence for failing to disclose suitability information in certain circumstances. While a similar offence applied to Childrens Services at section 333 of the 1999 Act, the offence has been expanded to apply 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.

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

- Their suitability information changes under 65(1)(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 Discrimination Commissioner.

Clause 71 — Chief Executive may employ etc suitable entity

This clause provides that the Chief Executive may appoint, engage, employ or authorise a suitable entity for a purpose under the new Act.

This clause contemplates that in addition to the circumstances outlined in the Bill where a person or entity must be a suitable entity for a stated purpose (for example, a foster carer), the Chief Executive may engage other persons for functions under the new Act if they are a suitable entity.

This clause re-enacts section 47(1)(a) of the 1999 Act.

Clause 72 — Suitable entities register

The Bill introduces a new requirement for the Chief Executive to maintain a register of suitable entities containing the entity's name and the purpose for which the entity is approved.

Information that the Chief Executive could place in the register is not limited to these details and may include any other information the Chief Executive considers relevant, for example, the assessment of the suitable entity, including references or reports obtained.

The note to this clause indicates that under the Legislation Act, the power to make a statutory instrument includes power to make different provision for different categories. This enables for example, multiple suitable entity registers to be established for different types of suitable entities, such as out-of-home carers or childcare services.

Chapter 3 — Family group conferences

Part 3.1 — Family group conferences - general

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

Research and consultation on the review of the 1999 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 children and young people involved in the criminal justice system.

The Bill enables family group conferences to be used as a mechanism for involving extended family members and others with an interest in the wellbeing or development of the child or young person in decisions affecting any aspect of their wellbeing. 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 12, part 12.2 deals with the registration of family group conference agreements in care and protection.

Clause 73 — Definitions - Act

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

Clause 74 — Family group conferences – objects

This clause outlines the objects for family group conferences which reflect the broadened scope of family group conferences. The objects for a family group conference are to encourage the child or young person, their family members and significant people, 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, significant people and other people who are significant in the child or young person's life; and to make arrangements for care of the child or young person to reduce the likelihood of the child or young person being in need of care and protection in the future.

Clause 75 — What is a family group conference?

This clause outlines the meaning of a family group conference. A family group conference is a meeting 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 child or 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 76 — What is a family group conference agreement?

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

A family group conference agreement requires the agreement of a person over school leaving age, however clause 87(3) allows a child or young person under school leaving age to sign an agreement arising from a family group conference.

Sub-clause (2) provides that an agreement cannot have the effect of transferring or sharing parental responsibility with the Chief Executive. This is because the agreement is intended to be limited to family arrangements. Subsequently, it is intended that agreements that have the effect of a care and protection order with an enduring parental responsibility provision may be registered (as an enduring parental responsibility provision does not transfer parental responsibility to the Chief Executive).

Clause 77 — Offence – publish details of family group conferences

This clause re-enacts the offence at section 180 of the 1999 Act 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. The offence does not apply if the publication is authorised under a Territory law or this Act.

Part 3.2 — Family group conferences – facilitators

This part sets out the appointment and functions of Family Group Conferencing facilitators.

Clause 78 — Family group conference facilitators – appointment

This clause provides that the Chief Executive may appoint family group conference facilitators by notifiable instrument.

It is not intended that the appointment of a family group conference facilitator be limited to engaging a public employee. A public employee is defined under the *Legislation Act 2001* and means a public servant, a person employed by a Territory instrumentality, a statutory office-holder or a person employed by a statutory office-holder.

However, the Chief Executive may appoint a person as a family group conference facilitator only if satisfied that the person has suitable qualifications and experience and if the person is not a public employee, that the person is a suitable entity (see chapter 2, part 2.4 for suitable entities).

It is intended that the facilitator act as a neutral catalyst for progressing the conference process, and not as a representative of the Chief Executive. A representative of the Chief Executive, however, is invited to the family group conference.

Clause 79 — 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 82.

Part 3.3 — Family group conferences – arrangement and conduct

This part sets out the administrative arrangements and processes for conducting Family Group Conferencing.

Clause 80 — Family group conferences – criteria

Sub-clause (1) allows for 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 1999 Act and will allow the Chief Executive to organise a conference for the purpose of promoting and supporting the wellbeing of any child or young person and not only those who may be in need of care and protection.

Sub-clause (2) allows the Chief Executive to arrange a family group conference for a child or young person if the Chief Executive reasonably believes that:

- the child or young person is in need of care and protection; and
- arrangements should be made to secure the child or young person's care and protection.

There are a number of provisions throughout the Bill that apply only to family group conferences arranged under sub-clause (2) but do not apply to conferences arranged under sub-clause (1). These provisions include:

- Clause 85(3)(b) requires the Chief Executive to be satisfied that the proposed family group conference agreement is in the best interests of the child or young person.

- Clause 389 enables the Chief Executive to apply to register a family group conference agreement with the Childrens Court;
- Clause 844 provides that sensitive information includes anything said or done to facilitate, or anything said or done at, a family group conference; or information in a family group conference agreement, or in a family group conference outcome report;
- Clause 871 provides that evidence of anything said or done at a family group conference is not admissible in a proceeding under the care and protection chapters. However, a conference outcome report is admissible in a proceeding under the care and protection chapters to prove whether an agreement was or was not reached.

Clause 81 — 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 participants for the original family group conference at which agreement was reached, have requested a review. However, the Chief Executive is not compelled to arrange the conference if one has already been arranged at the request of a party to the original agreement or if the Chief Executive considers that it is not in the best interests of the child or young person to do so.

Clause 82 — 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 83 — 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.

As the purpose of the conference is to provide for a child or young person's wellbeing, it is intended that the child or young person will attend and participate in conferences according to their developmental capacity.

It is also intended that each parent or other person who has daily care or long-term care responsibility will attend the conference, unless it would not be in the best interests of the child or young person.

To reflect the purpose of the conference, it is intended that any other person with an interest in, or knowledge of, the care, wellbeing or development of the child or young person will also attend. This could include, for example, a health professional who has been providing counselling to the child or young person, or other professionals who may be from support services engaged as part of the family group conference agreement.

Sub-clause (2) requires the family group conference facilitator to find out and express the views and wishes of children and young people who are invited but do not take part in the conference. This requirement does not however create an obligation on the child or young person to express a view.

Sub-clause (4) provides a prohibition on lawyers representing participants at a family group conference, which re-enacts section 171(3) of the 1999 Act. The prohibition on representation by lawyers is necessary to ensure family group conferences are conducted with as little formality as possible.

However, sub-clause (5) enables a conference participant to nominate a support person to assist them to participate in the conference. A support person means a person the conference participant chooses, and the facilitator considers appropriate and capable, to assist the conference participant at the conference. Examples of assistance include assisting the conference participant to express their views.

Clause 84 — 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.

It is intended that standards will be developed which will include procedures outlining certain aspects of the family group conference process, including how they are conducted and implementation of agreements.

Clause 85 — 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.

In relation to conferences organised to secure a child or young person's care and protection under clause 80(2), this clause requires the Chief Executive, as a relevant conference participant to be satisfied that a proposed agreement is in the best interests of the child or young person, before reaching agreement.

Clause 86 — Family group conferences—agreement of young person

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 sufficient maturity or developmental capacity to agree (for example, if the young person has impaired decision making capacity by reason of severe intellectual disability).

Clause 87 — 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.

Under clause 78, a family group conference agreement requires the agreement of a person over school leaving age, however 87(3) allows a child or young person under school leaving age to sign an agreement arising from a family group conference.

Clause 88 — 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 (and any family group conference agreement) to each person invited to attend the family group conference, the child or young person to whom it relates and the Chief Executive.

Sub-clause (4) provides that the facilitator must not give a copy of the agreement to a child or young person if they believe, on reasonable grounds:

- that information contained in the report or agreement is not in the child or young person's best interests (for example, information that would cause significant distress); or
- the child or young person would be unable to understand the agreement (for example, if they were very young).

Clause 89 — Family group conference agreement—when takes effect

This clause outlines when the family group conference agreement takes effect.

Clause 90 — Family group conference agreements—implementation

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

It is intended that the standards will include procedures to be followed in implementing a family group conference agreement, for example, arranging support services to assist with the agreement's implementation.

Chapter 4 — Children and young people and criminal matters – general

This chapter sets out the principles (the youth justice principles) that apply in the criminal matters chapters, general rules about keeping young detainees separate from adult detainees and defines some important concepts.

Clause 91 — What are the criminal matters chapters?

This clause sets out the meaning of the criminal matters chapters. The criminal matters chapters are chapters 4 to 9 inclusive.

Clause 92 — Overview of the criminal matters chapters

This clause provides an overview of the criminal matters chapters.

This clause notes other laws relevant to children and young people and criminal matters, including:

- the *Crimes Act 1900*, pt 10 (Criminal investigation) and the *Crimes Act 1914* (Cwlth), pt 1C (which applies in relation to the investigation of certain ACT offences)
- the *Bail Act 1992*
- the *Magistrates Court Act 1930* (in particular ch 4A (The Childrens Court))
- the *Supreme Court Act 1933*
- the *Court Procedures Act 2004* (in particular pt 7A (Procedural provisions—proceedings involving children or young people))
- the *Crimes (Sentencing) Act 2005* (in particular ch 8A (Sentencing young offenders))
- the *Crimes (Sentence Administration) Act 2005* (in particular ch 14A (Sentence administration—young offenders))
- the *Crimes (Restorative Justice) Act 2004*.

Clause 93 — Application of criminal matters chapters generally

Young offenders and young detainees who are adults up to the age of 21 years can be under the supervision or in the custody of the Chief Executive responsible for the administration of the Children and Young People Act.

The primary purpose of this clause is to clarify which aspects of the criminal matters chapters apply to young offenders and young detainees aged 18 years to 21 years.

Sub-clause (2) clarifies certain clauses do not apply to young detainees aged 18 years and over.

Sub-clause (3) outlines clauses that are different in their application to young detainees aged 18 years and over. For young detainees aged under 18 years, a person with parental responsibility for the young detainee is required to be notified of certain actions or in some circumstances, required to be present at strip searches on admission and body searches. In recognition of their status as an adult, young detainees aged 18 years and over can nominate a support person to be notified of certain actions, and where necessary due to their vulnerability, to have a nominated support person present at a strip search on admission or body searches.

Clause 94 — Youth justice principles

This clause sets out the principles (the youth justice principles) that apply to all decision makers in the criminal matters chapters, in deciding what is in the best interests of a child or young person. At clause 8, the best interests of a child or young person is the paramount consideration for all persons making decisions under the Act.

This clause re-enacts the young offender principles at section 68 of the 1999 Act with the following modifications.

Three new principles have been added that recognise the need:

- to involve children and young people in making decisions that affect their lives – sub-clause (1)(c);
- to make decisions about children and young people in a way that involves Aboriginal and Torres Strait Islander communities – sub-clause (1)(d); and
- for timely access to legal assistance and expeditious legal proceedings – sub-clause (1)(e).

The principle outlined at sub-clause(1)(f) has been strengthened to reflect the principle of the *Convention on the Rights of the Child*, article 37(b) "The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time".

The principle outlined at sub-clause (1)(i) has been strengthened to recognise the importance of promoting the young offender's rehabilitation, while balancing the rights of victims and the community's interests.

The principles have also been expanded at sub-clause (2) to allow the decision maker to consider any other relevant matter, in deciding what is in the best interests of a child or young person for the criminal matters chapters.

Sub-clause (3) provides that the youth justice principles are intended to be interpreted consistently with relevant human rights instruments and jurisprudence, including for example the *Convention on the Rights of the Child*.

Sub-clause (4) clarifies that a reference to a child or young person in sub-clause (1) also applies to people aged at least 18 years who are being dealt with for an offence committed or alleged to have been committed, when they were under 18 years old. This is intended to include decisions about breaches or alleged breaches of a sentencing order related to an offence committed when they were under 18 years old.

Clause 95 — Who is a young detainee?

This clause sets out a definition of a young detainee for the criminal matters chapters. It encompasses all children and young people and people aged 18 to 21 years who are required to be held in the custody of the Chief Executive responsible for the administration of the *Children and Young People Act 2008*, following their arrest, remand, detention or other custody.

Sub-clauses (1)(a)(iv) and (2)(c) envisage people who are required to be held in the custody or detention of the Chief Executive under this Act, another Territory law or a law of the Commonwealth or a State. This would include, for example:

- Young detainees who are transferred from one State to another and in detention while transiting through the ACT, under clause 126 of this Bill;
- Young detainees who are in the custody of the Chief Executive responsible for the *Children and Young People Act 2008* and who are in custody at a place other than the detention place as allowed under section 34 of the *Corrections Management Act 2007*; and
- Young detainees who are transferred from the custody of the police to the custody of the Chief Executive responsible for the *Children and Young People Act 2008* under section 30 of the *Corrections Management Act 2007*.

Clause 96 — Who is a youth detention officer?

This clause sets out a definition of a youth detention officer, which is an authorised person who has been delegated functions under the criminal matters chapters by the Chief Executive.

Clause 97 — Treating doctors – health service appointments

This clause requires the Chief Executive responsible for the administration of the *Health Act 1993* to appoint a treating doctor for the provision of health services at the detention place.

While appointment of a treating doctor would normally be progressed in consultation with the Chief Executive responsible for the administration of the detention place, ultimately the authority to appoint the doctor is vested with the Chief Executive responsible for the *Health Act 1993*. This is intended to minimise interference with therapeutic decisions: it is intended to enable doctors, nurses and other health professionals to act as they normally would in any other health setting.

The statutory functions of the treating doctor are to provide preventative and remedial health services to young detainees.

Clause 98 below creates an authority for the Chief Executive of the Children and Young People Act to authorise other health professionals, including doctors, to exercise non-treating functions under the criminal matters chapters, for example drug and alcohol testing, reports regarding the identity of people who identify as being transgender or intersex and body searches

The Bill relies upon the *Legislation Act 2001* definition of 'doctor':

> (a) means a person unconditionally registered as a medical practitioner under the *Health Professionals Act 2004*; and
> (b) for an activity, includes a person conditionally registered as a medical practitioner under the *Health Professionals Act 2004* to the extent that the person is allowed to do the activity under the person's conditional registration.

Sub-clause (2) requires appointed doctors to provide health care to young detainees and to take steps to prevent health problems at the detention place.

Sub-clause (3) sets a statutory minimum level of service to be made available to young detainees each week.

To ensure any medical decisions to prevent the spread of disease are implemented, sub-clause (4) empowers appointed doctors to give written directions to the Chief Executive. However, sub-clause (5) ensures that any direction of this nature would not compromise security or order at the detention place.

The power in sub-clause (5) is provided only to be used when absolutely necessary. The government envisages that ACT Health and the Department of Disability, Housing and Community Services will establish the relevant agreements and protocols to foster a close working relationship between health service providers and youth detention officers and others involved in the administration of the youth detention place.

Clause 98 — Health professionals – non-treating functions

This clause allows the Chief Executive to authorise a health professional to exercise non-treating functions under the criminal matters chapters in relation to drug and alcohol testing, reports regarding the identity of people who identify as being transgender or intersex and body searches. The authorisation may be oral or written.

The clause contemplates health professionals as set out in the *Health Professionals Act 2004*, as some functions could be performed by health professionals other than doctors, for example, a psychological assessment.

The purpose of creating two sets of health professionals (treating and non-treating) is to prevent treating doctors and other health professionals from having to engage in medical functions that are related to the security of the detention place. This is necessary to protect young detainees' trust and confidence in any doctor or other health professional who provides treatment.

International instruments set out the principle that doctors and other people providing therapeutic services cannot be involved in any custodial matters that are not directly therapeutic. [*Principles of Medical Ethics relevant to the Role of Health Personnel,*

particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly resolution 37/194 of 18 December 1982.]

Clause 99 — Transporting young detainees to and from Court—young detainee to be kept separate from adult detainees

This clause includes a prohibition on transporting young detainees who are under 18 years old with adults under detention. This is consistrent with the requirement under the *Human Rights Act 2004* that an accused child is segregated from accused adults and international standards which provide that regardless of status (remand or sentenced) juvenile detainees should be separated from adult detainees. It re-enacts section 85A of the 1999 Act.

Clause 100 — Detaining young detainees at Court—young detainees to be kept separate from adult detainees

This clause includes a prohibition on placing young detainees who are under 18 years old with adults under detention in a Court cell. This is consistent with the requirement under the *Human Rights Act 2004* that an accused child is segregated from accused adults and international standards which provide that regardless of status (remand or sentenced), juvenile detainees should be separated from adult detainees. It re-enacts section 85A of the 1999 Act.

Chapter 5 — Criminal matters - transfers

This chapter sets out the framework to escort and transfer young detainees to places within the ACT, including health facilities and correctional centres.

The chapter also provides for a nationally consistent interstate transfer scheme for young offenders to and from the ACT and through the ACT from one State to another.

Part 5.1 — Transfers within ACT

This part sets out the authority and obligations for the Chief Executive in relation to transfers to places within the ACT. It also confers authorities and obligations on escorts who escort young detainees to places within the ACT. These authorities and obligations apply to escort officers who escort a young detainee under division 6.8.1 (Local Leave).

Division 5.1.1 — Transfers within ACT - general

This division sets out the authority of the Chief Executive and escort officers to transfer and escort young detainees who are in the Chief Executive's custody, within the ACT.

Clause 101 — Directions to escort officers

This clause authorises the Chief Executive responsible for young detainees to direct escort officers (a police officer, a corrections officer or a youth detention officer) 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 sub-clause (2).

Clause 102 — Orders to bring young detainee before Court etc

This clause requires the Chief Executive to arrange for a young detainee to be brought before a Court or other entity in accordance with a direction or order of the Court or other entity (such as a Tribunal). This does not limit any other power of the Court or other entity to bring a person before the Court or the entity.

Sub-clause (2) clarifies that the Chief Executive is legally bound to organise a person to be brought before Court or entity, if ordered to. The Chief Executive is only obliged to do so if the person is in the custody of the Chief Executive and the entity (including a Tribunal) or Court in question has the legal authority to make such an order.

Division 5.1.2 — Escorting young detainees etc

An escort officer is defined in the dictionary as a police officer, a corrections officer or a youth detention officer. The escorting of young detainees to and from police cells, Court, health facilities and correctional centres is currently undertaken by ACT Corrections (Court Transport Unit), Australian Federal Police – ACT Policing and the Department of Disability, Housing and Community Services (Youth Justice). While this division outlines the overall legal authority for the chain of custody between these entities and minimum safeguards for young detainees who are being escorted, it is expected that relevant agreements will guide which agency performs the escort role at any point in time.

An escort officer is different to a transfer escort for the purposes of the interstate transfer scheme in part 5.2 (who has different powers, purposes and authority and includes interstate escort officers). This division does not apply to the interstate transfer scheme in part 5.2. It does however apply to escort officers for the purpose of escorting young detainees for local leave under division 6.8.1 (Local Leave).

Clause 103 — Escort officer functions etc

Sub-clause (1) authorises an escort officer (a police officer, a corrections officer or a youth detention officer) to escort any young detainee in the custody of the Chief Executive, irrespective of the purpose of the escort.

Sub-clauses (2)(a) and (b) stipulate the escort officer has the authority to escort the young detainee and that the young detainee is deemed to be in the custody of the Chief Executive.

Sub-clause (2)(c) clarifies that escort officers are able to exercise any functions allocated to youth detention officers in this Bill and any functions delegated to the officers by the Chief Executive under this Bill. The performances of these functions in relation to young detainees are limited by the powers and obligations set out in the Bill. However, other powers and obligations relating to detainees generally in other Territory law or a law of the Commonwealth or State, is not limited by this clause, as provided for by clause 107.

Clause 104 — Escorting arrested person to Court etc

This clause authorises a police officer to require that an escort officer bring an arrested person (not released on bail and in police custody) to a Court or Tribunal. An arrested person in this context means an arrested child or young person or people aged 18 to under 21 who are arrested in relation to an offence alleged to have been committed while the person was aged under 18 years.

This clause further allows the escort officer to take the person into custody and arrange for their detention in a detention place until they are brought before a Court or Tribunal.

Clause 105 — Custody etc during proceedings

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

Clause 106 — Executing warrants of commitment or remand etc

This clause authorises the Chief Executive to make escort officers available to take a child or young person into custody, arrange for a young detainee to be kept in custody; or transfer or otherwise deal with a young detainee. 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 107 — Other powers not limited

This clause 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.

Division 5.1.3 — Transfers to health facilities

This division sets out a way of providing health care in a health facility while accounting for the need to continue the secure custody of a young detainee.

Clause 108 — Transfers to health facilities

This clause provides that:

- The Chief Executive has the power to transfer a detainee to a health facility upon the advice of a treating doctor.
- In transferring a detainee, escort officers may be directed by the Chief Executive to escort the detainee to or from the facility, or remain within the health facility.
- A detainee may only be discharged from the health facility if the health care provider in charge of their care believes the young detainee is fit enough to be discharged, or circumstances warrant the Chief Executive directing the young detainee be removed from the health facility. In making this decision, the Chief Executive is required to have regard to the young detainee's health needs. For example, if a young detainee is a danger to the safety of the people at the facility but still requires medical care, the Chief Executive would be responsible for making alterative arrangements for that care.
- All of the matters in the clause are entitlements and not to be regarded as privileges for the purposes of disciplinary or behaviour management action under chapter 8.

Division 5.1.4 — Transfers of young detainees who become adults

This division allows for the transfer of young detainees who are 18 years and over to correctional centres.

There are instances where a detainee has attained the age of 18 years and it would be more appropriate for them to continue their remand or serve their remaining sentence in a correctional centre, for example where their behaviour places at risk the welfare or safety of others within the detention place, including children as young as 10 years who may be detained. 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 rules which give a young detainee who has attained the age of 18 years to remain in a juvenile facility. 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.

The United Nations Committee On The Rights Of The Child, Forty-fourth session, 2007, General Comment No. 10 (2007), Children's rights in Juvenile Justice (UN Commentary), has stated that:

> "A child deprived of his/her liberty shall not be placed in an adult prison or other facility for adults. There is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate. This rule does not mean that a child placed in a facility for children has to be moved to a facility for adults immediately after he/she turns 18. Continuation of his/her stay in the facility for children should be possible if that is in his/her best interest and not contrary to the best interests of the younger children in the facility".

Clause 109 — Application—div 5.1.4

This clause sets out the application of this division.

Clause 110 — Transfers to correctional centres – under 21 years old

This clause provides the Chief Executive (on own initiative or on application by anyone to the Chief Executive) with the power to direct the transfer of adult young detainees to a correctional centre. Before making the transfer direction, sub-clause (2) requires the Chief Executive to be satisfied that the transfer is in the best interests of the adult young detainee or the best interests of other young detainees.

When considering whether it is appropriate to direct a transfer, sub-clause (3) requires the Chief Executive to consider: the young detainee's views and wishes, maturity and known history, developmental capacity, and vulnerability; the availability of appropriate services or programs, whether the adult young detainee is more likely to be rehabilitated in the detention place or correctional centre, the time left to be served; and the behaviour of the adult young detainee, particularly if it presents a risk to the safety of young detainees and staff at the detention place. Sub-clause (4) allows the Chief Executive to consider any other matter that is relevant to ascertaining whether the transfer is in the best interests of the adult young detainee or other young detainees.

Sub-clause (5) enables the Chief Executive to direct an escort officer to escort the young detainee to the correctional centre and once there, sub-clause (6) requires the young detainee to be dealt with as a detainee under the *Corrections Management Act 2007*.

Clause 111 — Transfers to correctional centres – 21 year olds

This clause provides that an adult young detainee detained at a youth detention place under any authority cannot continue to be detained in a detention place once they reach 21 years of age. The Chief Executive is required to make the necessary directions to transfer the adult young detainee to the correctional centre.

Division 5.1.5 — Notifying people of transfers

This division gives effect to Rule 23 of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* which provides that information about a transfer of a young detainee should be provided without delay to the parents and guardians or closest relative of the juvenile concerned.

Clause 112 — Transfer – notifying people responsible for or nominated by young detainees

This clause introduces a new requirement for the Chief Executive to take reasonable steps to notify relevant persons of transfers to a health facility or correctional centre. For young detainees aged under 18 years, the person to be notified is a person with parental responsibility for the young detainee. For young detainees aged over 18 years, the person to be notified is their nominated support person, details of whom are required to be included at the register at clause 184(2)(n).

Part 5.2 — Interstate transfers

This part sets out a nationally consistent scheme for the transfer of young offenders. It provides for the transfer of sentences and orders (including custodial or non-custodial sentences and orders) and provides for the escorted transfers of young offenders who are required to be in the custody of the Chief Executive.

Within this part, clauses 113 to 118 and Division 5.2.2 relate to all young offenders, while clauses 119 to 123 and Divisions 5.2.3 and 5.2.4 relate to young offenders who are required to be in the Chief Executive's custody. Nothing in this part authorises the transfer of persons who are arrested or are on remand.

Division 5.2.1 — Interstate transfer generally

Within this division, clauses 113 to 118 relate to all young offenders (who have custodial and non-custodial sentences), while clauses 119 to 123 relate to young offenders who are required to be in the Chief Executive's custody under a sentence.

Clause 113 — Definitions—pt 5.2

This clause sets out definitions for this part and continues to have the effect of section 132 of the 1999 Act. This part relies upon the *Legislation Act 2001* definition of State which means a State of the Commonwealth, and includes the Northern Territory. The definition of young offender differs for this part from the Bill as it relates only to those young offenders who have been sentenced.

Clause 114 — General agreements with other jurisdictions

This clause provides the authority for the Minister to enter an agreement with a Minister of a State providing generally for the transfer of young offender from or to the ACT; or through the ACT from a State to another State.

The Minister must first declare that a State has a corresponding law dealing with interstate transfers of young offenders (by way of notifiable instrument) and then the Minister may enter an agreement with the relevant State Minister.

Clause 115 — Transfer arrangements—general

This clause provides for the interstate transfer of a particular young offender, if a transfer agreement under clause 114 is in force and the criteria in clause 116 are met. It continues to have the effect of section 134 of the 1999 Act.

Clause 116 — Power to arrange for transfers

This clause provides for the transfer of a young offender from the ACT to another state. This can be at the request of the young offender or a person responsible for the young offender, 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 would place the safety, health or wellbeing of other people at risk in the detention place. It continues to have the effect of section 135 of the 1999 Act.

Clause 117 — Transfer arrangements—facilities must be adequate

This clause provides that a transfer arrangement for a young offender from another State to the ACT, can only be made if there are adequate facilities to deal with the offender as per the transfer arrangement. It continues to have the effect of section 136 of the 1999 Act.

Clause 118 — Transfer arrangements—content

This clause outlines provisions to be contained in each transfer arrangement. It continues to have the effect of section 137 of the 1999 Act.

Clause 119 — Custody of person on transfer order

This clause provides for the custody and transfer of the young offender by a transfer escort. A transfer escort for this part is a a police officer, a corrections officer, a youth detention officer or another person acting as a transfer escort with the approval of the Chief Executive. The definition of a transfer escort for this part is intentionally different to the definition of an escort officer as set out in the dictionary. This is necessary to ensure consistency with the national scheme, allow flexibility to authorise persons other than an escort officer (such as an interstate officer) and clarify the extent of their powers and obligations while transferring a young offender from the ACT to another State (outlined at clause 122). This clause continues to have the effect of section 139 of the 1999 Act.

Clause 120 — Custody pending interstate transfer

This clause provides for the custody of a young person in a detention place before they are delivered to the transfer escort. Section 140 of the 1999 Act provided for temporary custody within a remand centre, however this clause limits this to a detention place which is necessary to ensure that an accused child is segregated from accused adults as required under the *Human Rights Act 2004*.

Clause 121 — Transfer to ACT in custody of transfer escort

This clause continues to have the effect of section 141 of the 1999 Act and provides for the custody of a young offender who is being transferred from another state to the ACT, and while they are in the ACT but before they are delivered to the place stated in the transfer arrangement.

A transfer escort authorised under an arrangement, as provided for in sub-clause (1), would include orders made in another State that correspond to transfer orders in this part.

Clause 122 — Powers to transfer escorts

This clause confers new powers on transfer escorts who transfer a young offender under a transfer order from the ACT to another State. It does not confer powers on a transfer escort transferring a young offender from another State to the ACT, under a transfer order made in that jurisdiction.

The powers conferred on transfer escorts by this clause include authority to give the young offender necessary and reasonable directions, use force when necessary in accordance with division 6.6.4 (Use of force), and conduct a scanning search, frisk search or ordinary search in accordance with parts 7.2 (searches generally), 7.3 (scanning, frisk and ordinary searches) and 7.9 (seizing property).

Clause 123 — Offence—escapes during transfer

This clause makes an offence if the young person escapes from custody while they are being transferred, and the escape occurs in a State other than the ACT or a receiving State.

If a young offender, who is being transferred from the ACT to another state, escapes from custody while they are in ACT then they would also be liable for the offence of escaping under the *Crimes Act 1900*. If they escape while they are in the receiving State, they would be liable for the offence of escape under a corresponding law in that jurisdiction.

Transfer orders for young offenders who escape or attempt to escape during a transfer can be revoked under division 5.2.4.

This clause continues to have the effect of section 142 of the 1999 Act.

Division 5.2.2 — Transfer of sentence or order

This division continues to have the effect of division 6.3.2 in the 1999 Act. Sentences or orders that can be transferred under this division can be custodial or non-custodial.

Clause 124 — Transfer from ACT of sentence or order

This clause provides for the transfer of sentences or orders that apply to young offenders 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. This clause continues to have the effect of section 143 of the 1999 Act

Clause 125 — Transfer to ACT of sentence or order

This clause provides for the transfer of sentences and orders that apply to young offenders transferred from another State to the ACT. This clause continues to have the effect of section 144 of the 1999 Act.

Division 5.2.3 — Transit through ACT

This division outlines arrangements for young offenders who are being transferred through the ACT, from a State to another State under a transfer agreement.

Clause 126 — Chief Executive may receive young offenders

This clause enables the authorisation of a person in a detention place to receive young offenders transferred between other States, but who is transiting or moving through the ACT. This clause continues to have the effect of section 145(1) of the 1999 Act.

Clause 127 — Lawful custody for transit through ACT

This clause continues to have the effect of section 145(2) of the 1999 Act and allows a person in charge of a detention place to temporarily detain a young offender who is brought into the ACT, at the request of the transfer escort who is escorting the young offender.

A transfer escort authorised under an agreement, as provided for in sub-clause (1), would include a transfer escort authorised under orders made in another State that correspond to transfer orders in this part.

Clause 128 — Escapees may be apprehended without warrant

This clause enables young offenders who escape custody of a transfer escort (while being transferred through the ACT from a State to another State) to be apprehended by a transfer escort or police officer without a warrant.

Clause 129 — Escapees to be brought before Magistrate

This clause enables young offenders who escape (or attempt to escape) custody of a transfer escort (while being transferred through the ACT from a State to another State) to be brought

before a Magistrate who may, by warrant, order the young offender to be detained in custody at a detention place.

Clause 130 — Court may arrange transfer of apprehended escapees

This clause provides that a young offender who is apprehended under a warrant under clause 129 must be brought before a Court who can order that the young offender be delivered to the custody of a transfer escort or be detained for up to 7 days. This clause continues to have the effect of section 146(5) to (8) of the 1999 Act.

Clause 131 — Search warrants for escapees

This clause provides for the granting of search warrants for young offenders who escape custody while being transferred through the ACT from a State to another State. This clause continues to have the effect of section 147 of the 1999 Act.

Division 5.2.4 — Revocation of transfer orders

This division sets out powers to revoke transfer orders.

Clause 132 — Revocation of transfer order—offence during transfer

This clause provides for the revocation of a transfer order if the young offender has, while being transferred interstate, committed the offence of escaping, attempting to escape or another offence. This section applies whether an information has been laid for the offence or a conviction has been recorded for the offence or not. This clause continues to have the effect of section 148 of the 1999 Act.

Clause 133 — Revocation of transfer order by Chief Executive

This clause provides for the revocation of a transfer order by the Chief Executive at any time before the young offender is delivered in the receiving State into the custody outlined in the transfer arrangement. If revoked, the Chief Executive is able to make a further transfer arrangement with the receiving State for the return of the young offender to the ACT. This clause continues to have the effect of section 149 of the 1999 Act.

Clause 134 — Chief Executive may consider reports etc

This clause provides that the Chief Executive, in forming an opinion or exercising a discretion under this part, may be informed as they consider appropriate; and consider reports from those persons listed in subclause (1)(b). This clause continues to have the effect of section 150 of the 1999 Act.

Chapter 6 — Criminal Matters – detention places

In this chapter, the Bill seeks to address the recommendations of the *Human Rights Audit of Quamby Youth Detention Centre*. The Bill also seeks to elevate administrative powers relating to youth detention from their current existence in standing orders established by disallowable instrument to legislation.

The Bill also seeks to embody and express relevant international human rights standards for children and young people deprived of their liberty, including:

- The *Convention on the Rights of the Child*;
- The *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*;
- The *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*; and
- The *United Nations Standard Minimum Rules for the Treatment of Prisoners*.

This chapter is modelled on the *Corrections Management Act 2007* with appropriate modifications for young detainees.

Part 6.1 — Detention places - general

This part sets out the application, definitions and treatment of young detainees under this chapter.

Clause 135 — Application—ch 6

This clause clarifies that the chapter applies to young detainees.

Clause 136 — Definitions—ch 6

This clause sets out definitions for terms used in this chapter, including accredited person, case management plan, prohibited things, register of young detainees, security classification, segregation, visiting conditions, visitor, young detainee and youth detention policy.

Clause 137 — Treatment of young detainees generally

This clause provides that the Bill's functions in relation to young detainees 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 in order to ensure the safety of everyone in the detention place.

Clause 138 — Treatment of young remandees

This clause ensures that the Bill's functions in relation to young remandees are consistent with human rights. It ensures that a young remandee's right to be presumed innocent is upheld and that the circumstance of detention is not a punishment of the person.

Clause 139 — Treatment of certain young detainees

This clause ensures that anyone held in custody is recognised and that any of the Bill's functions applicable to this category of person are to be implemented in a manner that upholds human rights.

It is possible that young detainees may be held in custody at a detention place by another law that applies in the ACT, for example, a child or young person detained under the *Migration Act 1958* (Cth).

Sub-clause (3) enables the Executive to make regulations to resolve any inconsistency between another law authorising detention and how that detention is to be exercised, and the Bill. The aim of the clause is to authorise necessary modifications to reconcile conflicting laws. For example, a Commonwealth law may be more restrictive about the rights of certain young detainees to communicate with the community. In this instance there may be a conflict with the Bill. Generally, where an ACT law is found to be inconsistent with Commonwealth

law, Commonwealth law has the right of way. Under these circumstances the ACT Executive may make regulations to resolve the inconsistency.

Clause 140 — Detention places—minimum living conditions

This clause establishes minimum living conditions that must apply at the detention place. The detail of each standard is outlined at part 6.5.

Part 6.2 — Administration

The Bill is drafted with the intent of clearly setting the boundaries of any power allocated to people administering the Territory's youth detention place. 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, youth detention officers or other authorised persons.

By clearly setting out the limitations of any discretion 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 the *Human Rights Audit of Quamby*, it was 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 Audit considered that the substance of matters like these should be in the principal legislation, not in regulations or standing orders. 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.

Division 6.2.1 — Administration—general

Clause 141 — Detention places—declaration

This clause 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.

The Bill introduces 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 Places) Act 2003*.

This requirement is necessary to:

- safeguard the health and well-being of all young detainees, the majority of whom will be under the age of 18 years;
- reduce the risk that cigarettes will be brought into the detention place and accessed by young detainees under 18 years; and
- reduce the risk of potential intimidation among young detainees regarding access to cigarettes.

Under clause 110, the Chief Executive may transfer a young detainee who is an adult from the detention place to a correctional centre if the Chief Executive considers the transfer to be in the adult young detainee's best interests or other young detainee's best interests, having regard to a range of factors, including the adult young detainee's views and wishes. This provides scope for an adult young detainee, who is of the view that they wish to move to the correctional centre for any reason, to apply for a transfer.

Clause 142 — Youth detention policies and operating procedures

This clause authorises the Chief Executive to make youth detention policies and operating procedures that are within the boundaries set by the Bill. In order to promote and ensure accountability and transparency, the policies will be publicly notified on the Legislation Register and must be available for inspection by anyone at the detention place. The exception to this requirement for the youth detention policies and operating procedures to be publicly available is contained in clause 143.

The Chief Executive may also decide to make the policies available for inspection at another place.

Clause 143 — Exclusion of matters from notified youth detention policies etc

This clause enables those policies and procedures that could pose a risk to public safety, security and good order at a detention place to be exempt from notification or availability for perusal.

Sub-clause (2) ensures that the documents remain subject to oversight by requiring them to be available for inspection by the officials listed.

Clause 144 — Copies of Act, policies etc to be available for inspection at detention place

This clause provides that copies of the Act and publicly available policies and procedures (which are those not excluded from notification under clause 143) must be available for inspection by young detainees.

This clause does not oblige the Chief Executive to make, or give, each and every young detainee a copy of these documents, nor does it prevent the Chief Executive from giving a copy of a document to a young detainee upon request.

Clause 145 — Chief Executive directions

This clause provides for the Chief Executive to give reasonable directions, orally or in writing, to a young detainee in relation to any matter under the criminal matters chapters.

Sub-clause (1) outlines a general authority for the Chief Executive to give reasonable directions to a young detainee about anything related to the criminal matters chapters. This power however is not limitless. It is not intended to over-ride a specific function, obligation or specific power prescribed by the Bill. The power may be exercised if no other power in the Bill can be exercised to address something unexpected in a detention place. Sub-clause (2) outlines specific criteria by which the Chief Executive can give a young detainee directions.

Contravening a direction by the Chief Executive under this Act by a young detainee is a behaviour breach and may be dealt with under chapters 8 and 9.

Clause 146 — Prohibited areas

This clause enables the Chief Executive to declare prohibited areas in the detention place in writing, where the Chief Executive believes it is necessary to ensure safety, security or good order and to protect the best interests of young detainees.

The areas may be prohibited to young detainees, visitors, or youth detention officers.

The Chief Executive must ensure that each young detainee at the detention place is told about the prohibited area promptly after the area is declared.

The clause does not create an offence in its own right. However, a behaviour breach would apply to young detainees and an offence for visitors would apply at clause 230 if they disobeyed a direction not to enter a prohibited area. Likewise for youth detention officers and other staff, entering a prohibited area would be a behaviour breach under the *Public Sector Management Act 1994* or of their relevant contract.

Clause 147 — Prohibited things

Preventing contraband from being kept, or smuggled into, a youth detention place is a key way of keeping every person in a youth detention place 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 order at the youth detention place. 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 148 — Declaration of emergency

This clause authorises the Chief Executive to declare an emergency (for a maximum of three days) at a youth detention place on the basis of a threat to the security or good order of a facility, or the safety of anyone at the detention place 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 notifiable instrument is required for first declaration and any subsequent declaration is required to be a disallowable instrument.

Clause 149 — Emergency powers

A declaration of emergency triggers the emergency powers in this clause. 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 sub-clause (1)(d) enables the Chief Executive to delegate powers under the Act to police officers and public servants.

The minimum living conditions outlined at clause 140 continue to apply during the declaration of emergency.

Clause 150 — Arrangements with police

This clause enables the Chief Executive to ask the Chief Police Officer for assistance in relation to the exercise of functions under this chapter and the Chief Police Officer must comply with the request. Under clause 883, the Chief Police Officer may delegate any of the Chief Police Officer's functions under the Bill to a police officer.

Clause 151 — Assistance from other Chief Executives

This clause enables the Chief Executive to ask another Chief Executive for assistance in relation to the exercise of functions under this chapter which must be complied with as far as practicable.

Part 6.3 — Inspection at detention places

This part authorises inspections at a detention place by external persons and agencies and addresses the interaction of inspection laws applying in the ACT with the criminal matters chapters.

Clause 152 — Inspections by judicial officers, Assembly members etc

Rule 72 of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* states that:

> "Qualified inspectors or an equivalent duly constituted authority not belonging to the administration of the facility should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative, and should enjoy full guarantees of independence in the exercise of this function. Inspectors should have unrestricted access to all persons employed by or working in any facility where juveniles are or may be deprived of their liberty, to all juveniles and to all records of such facilities".

This clause provides an inspectorate role for certain persons (Judges, Magistrates, Members of the Legislative Assembly, a commissioner exercising functions under the *Human Rights Act 2004*, the Public Advocate, the Ombudsman) who may enter and inspect a detention place or a place outside a detention place where a young detainee is, or has been, directed to work or participate in an activity. This would include, for example, a community service program.

Clause 153 — Relationship with other inspection laws

This clause clarifies that any existing Act in force in the Territory that authorises inspections (called an inspection law) applies to a detention place. Sub-clause (5) provides a definition of inspection law as an Act that provides for the entry and inspection of premises or the search of people or premises. The criminal matters chapters must be read to be consistent with an inspection law unless the Bill or the inspection law sets out a contrary intention.

The clause qualifies any open-ended inspection power by enabling the Chief Executive to make arrangements for the safety of inspectors carrying out their duty. The clause also obliges any inspectors or police to abide by any reasonable direction given by the Chief Executive that is relevant to safety or security.

Part 6.4 — Admission to detention places

This part outlines admission processes for a young detainee to a detention place, including requirements for the Chief Executive to notify a person with parental responsibility about the young detainee's admission (if the young detainee is under 18 years of age, or a nominated person if the young detainee is an adult), to provide information to a young detainee and to undertake initial assessments in order to ensure the young detainee's safe transition into custody.

Clause 154 — Meaning of admission—pt 6.4

The meaning of admission is set out at this clause.

Clause 155 — Authority for detention

This clause 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. Examples are included of authorities authorising detention.

Sub-clause (3) clarifies that a person may be detained even if there is a defect in the warrant or other authority, provided that the authority for detention is demonstrable.

Clause 156 — Detention—notifying people responsible for or nominated by young detainees

This clause requires the Chief Executive to take reasonable steps to tell a person responsible for or nominated by the young detainee of their admission and any future Court appearance. For young detainees under 18 years, a person with parental responsibility for them should be notified. If the Chief Executive has parental responsibility for the young detainee, the Chief Executive must take reasonable steps to inform another person with parental responsibility. For young detainees who are adults, the Chief Executive must notify their nominated support person, listed in the register at clause 184(2)(n).

This clause gives effect to rule 23 of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*:

> "The information on admission, place, and release should be provided without delay to the parents and guardians or closest relative of the juvenile concerned".

Clause 157 — Identification of young detainees

In order to ensure the identity of a young detainee is confirmed and maintained throughout detention, this clause enables the Chief Executive to take identifying material from a young detainee, including: prints of the young detainee's hands or fingers; a photograph or video recording; a buccal swab or saliva sample; or anything else prescribed by regulation.

These things must be destroyed if the person is acquitted (apart from special verdicts relating to mental states of mind) or the offence is no longer prosecuted.

Sub-clause (3) clarifies that things taken of, or from, the young detainee's body to identify the young detainee should not be destroyed if the person is acquitted of one offence but convicted of another or a prosecution for another offence remains on foot.

Clause 158 — Information—entitlements and obligations

This clause requires the Chief Executive to take reasonable steps to explain the following to a young detainee:

- The young detainee's entitlements and obligations under the Bill;
- 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; and
- If the young detainee is a national of a foreign country—the right to have a diplomatic or consular representative of the country told about the detention.

The information that the Chief Executive may provide is not limited to these matters and the Chief Executive may provide any other information considered necessary or helpful.

Sub-clause (2) allows the explanation to be in general terms through the use of plain language. The explanation must be in a language that is easily understood by the young detainee as far as possible.

Sub-clause (5) obliges the Chief Executive to contact diplomatic or consular representatives upon the request of a foreign national being admitted to a detention place or if the Chief Executive considers it to be in the best interests of the young detainee to do so.

Sub-clauses (3) and (4) require the Chief Executive to arrange for the assistance of an interpreter if the Chief Executive believes, on reasonable grounds, that the young detainee is unable, because of inadequate knowledge of the English language or a disability, to communicate with reasonable fluency in English. The assistance of the interpreter may be provided by telephone.

Clause 159 — Initial assessment

Principle 24 of the *United Nations 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".

This clause requires the Chief Executive to ensure that each young detainee admitted to a youth detention place is assessed for any immediate risks or needs associated with the young detainee's health, safety or security. The Chief Executive must respond to any immediate risks or needs identified. Ongoing risks and needs must be addressed in the young detainee's case management plan if one exists.

The assessments must occur as soon as practicable after admission but any event within 24 hours after a young detainee's admission.

Clause 160 — Health assessment

This clause sets out rules for who may conduct parts of the initial assessment outlined in clause 159. A young detainee's physical health needs and risks must be assessed by a treating doctor or nurse. A young detainee's mental health needs and risks may be assessed by a treating doctor, nurse or another suitable health professional.

If the assessment under clause 159(2) is made by a nurse or health professional, the treating doctor must review the assessment.

This clause gives effect to rule 50 of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* which states:

> "Every juvenile has a right to be examined by a physician immediately upon admission to a detention facility, for the purpose of recording any evidence of prior ill-treatment and identifying any physical or mental condition requiring medical attention".

A report of an assessment undertaken or reviewed by a treating doctor must be given to the Chief Executive in order for the Chief Executive to respond to any issues identified.

Clause 161 — Alcohol and drug tests on admission

In order to ensure the young detainee's safe transition into custody, this clause allows the Chief Executive, as part of an initial assessment under clause 159, to direct the young detainee to provide a test sample for the purpose of a drug or alcohol test. The direction may be oral or written.

For example, if a young detainee appears to be under the influence of a drug upon admission, the Chief Executive may direct the young detainee to provide a sample for the purpose of assessing whether the young detainee is affected by a substance and should therefore be responded to in a particular way.

Division 6.7.2 (Alcohol and drug testing—detainees) applies in relation to the direction and any sample given under the direction.

Clause 162 — Security classification

This clause requires the Chief Executive to arrange a security classification for a young detainee on, or soon after, admission.

The Chief Executive may take into account any relevant consideration in determining a young detainee's security classification. This may include, for example, the age of the young detainee, the reason for the detention, including the nature of any offence for which the young detainee is detained, the risks posed by the young detainee if the person was to escape, the risk of the young detainee escaping, the risks posed by the young detainee while at a detention place and the risks to the young detainee of being accommodated with particular young detainees or in particular areas at a detention place.

The young detainee's security classification may affect their placement in the detention place (see clause 165).

Clause 163 — Case management plan

Preparation for the young detainee's successful transition back into the community upon release needs to start as soon as possible after admission. This clause requires the Chief Executive to prepare a case management plan for a young detainee as soon as practicable after admission.

To reflect the legal status of remandees as presumed innocent, there is discretion for the Chief Executive to develop a case management plan for remandees. The criteria for exercising this discretion are outlined at clause 187.

Clause 164 — Entries in register of young detainees

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

Clause 184 establishes the register and is discussed below.

Clause 165 — Requirements and considerations about placement and separation of young detainees

This clause outlines requirements and considerations for the Chief Executive in making decisions about placement and separation of young detainees within a detention place.

Sub-clause (1) enables the Chief Executive to make a youth detention policy or operating procedure in relation to the placement and separation of young detainees including separation for the use of facilities and participation in education and other activities.

Sub-clause (2) sets out the human rights requirements regarding segregation of categories of young detainees. These are that young remandees must be segregated from other young detainees, male young detainees must be segregated from female young detainees and young detainees who are under 18 years old must be segregated from any young detainees who are adults.

Sub-clause (3) enables the Chief Executive to displace the requirements of sub-clause (2) if the Chief Executive reasonably believes that another placement is in the best interests of all affected young detainees. This power engages the rights outlined in the *Human Rights Act 2004* at section 19(2) which provides that an accused person must be segregated from convicted people, except in exceptional circumstances, and at section 20(1) which provides that an accused child must also be segregated from accused adults. However, this is a proportionate limitation on these rights as the Chief Executive must have a reasonable belief that the placement is in the best interests of all affected young detainees. This limitation is consistent with rule 28 of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* provides that:

> "The detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations. The principal criterion for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being".

Sub–clause (4) obliges the Chief Executive to consider, when deciding where to place young detainees, their needs and special requirements, including age, sex, emotional or psychological state, physical health, cultural background, vulnerability or any other relevant matter. The Chief Executive must also consider whether isolation is in the best interests of the young detainee, whether the care provided protects the young detainee's physical and emotional wellbeing and that it is in the best interests of the young detainee to be separated from co-offenders.

Sub-clause (5) enables the Chief Executive to consider the security classification given to the young detainee in deciding where to place the young detainee.

Part 6.5 — Living conditions at detention places

This part establishes minimum living conditions for young 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. It gives effect to the human rights standards outlined in the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*.

Clause 166 — Food and drink

Rule 37 of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* provides that:

> "Every detention facility shall ensure that every juvenile receives food that is suitably prepared and presented at normal meal times and of a quality and quantity to satisfy the standards of dietetics, hygiene and health and, as far as possible, religious and cultural requirements. Clean drinking water should be available to every juvenile at any time".

This clause gives effect to this requirement. It requires the Chief Executive to ensure that adequate and nutritional food and drink are provided for young detainees, meal times are consistent with Australian cultural norms and clean drinking water is provided.

Sub-clause (2) recognises that food and drink also play an important part of religious, spiritual and cultural practices. The clause is not prescriptive about what is to be regarded as practical, or impractical, as the needs and requests for particular food and drink will be varied. The Chief Executive must exercise a discretion in deciding whether provision of particular foods at particular times is practically possible.

Sub-clause (3) requires the Chief Executive to provide a young detainee with food and drink that satisfies a diet prescribed by a doctor. The clause is not absolute in the obligation, as it may not be logistically possible to meet the provision of all of the specific food required. For example, because of seasonal reasons, availability etc.

Sub-clause (4) allows a youth detention policy or operating procedure to address nutritional standards of the food and drink given to young detainees, the provision of nutritional advice about the diet of young detainees and the appointment of a nutritionist.

Sub-clause (5) stipulates that these matters (and anything expressed to be an entitlement in a youth detention policy or operating procedure in sub-clause (4) are entitlements and not to be regarded as privileges for the purposes of disciplinary and behaviour management action under chapter 8.

Clause 167 — Clothing

This clause obliges the Chief Executive to provide adequate and appropriate clothing for young detainees. Any particular or uniform clothing must not be likely to degrade or humiliate young detainees.

Sub-clause (2) obliges the Chief Executive to ensure the clothing is clean and hygienic as far as practicable.

Sub-clause (3) stipulates that these matters are entitlements and not to be regarded as privileges for the purposes of disciplinary and behaviour management action under chapter 8.

Clause 168 — Personal hygiene

Rule 34 of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* states:

> "Sanitary installations should be so located and of a sufficient standard to enable every juvenile to comply, as required, with their physical needs in privacy and in a clean and decent manner".

This clause gives effect to the rule by requiring the Chief Executive to ensure that young detainees have access to clean, hygienic and private toileting and showering facilities.

Sub-clause (2) stipulates that these matters are entitlements and not to be regarded as privileges for the purposes of disciplinary and behaviour management action under chapter 8.

Clause 169 — Sleeping areas

Rule 33 of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* states:

> "Sleeping accommodation should normally consist of small group dormitories or individual bedrooms, while bearing in mind local standards. During sleeping hours there should be regular, unobtrusive supervision of all sleeping areas, including individual rooms and group dormitories, in order to ensure the protection of each juvenile. Every juvenile should, in accordance with local or national standards, be provided with separate and sufficient bedding, which should be clean when issued, kept in good order and changed often enough to ensure cleanliness".

This clause gives effect to this rule by requiring the Chief Executive to ensure that young detainees have appropriate sleeping facilities including beds and bedding which are private, clean, hygienic and designed for reasonable comfort.

Sub-clause (2) stipulates that these matters are entitlements and not to be regarded as privileges for the purposes of disciplinary and behaviour management action under chapter 8.

Clause 170 — Treatment of convicted and non-convicted young detainees

This clause obliges the Chief Executive to make a policy or operating procedure to give effect to differential treatment of non-convicted young detainees. The operating procedure must address the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, rule 18, which provides non-convicted young detainees opportunities to:

- pursue work, with remuneration, and continue education or training;
- receive and retain materials for their leisure and recreation that are compatible with the interests of the administration of justice.

This clause gives effect to section 19(3) of the *Human Rights Act 2004* which provides that an accused person must be treated in a way that is appropriate for a person who has not been convicted.

Clause 171 — Access to open air and exercise

Rule 47 of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* provides that:

> "Every juvenile should have the right to a suitable amount of time for daily free exercise, in the open air whenever weather permits, during which time appropriate recreational and physical training should normally be provided".

This clause gives effect to this rule by requiring the Chief Executive to ensure that young detainees have access to open air and exercise for at least 2 hours each day. Access to open air and exercise may be combined in the same two hours for each young detainee.

The entitlement is not absolute, as there may be practical reasons why the entitlement cannot be implemented every day, for example, a state of emergency, or a natural disaster etc.

Sub-clause (3) stipulates that these matters are entitlements and not to be regarded as privileges for the purposes of disciplinary and behaviour management action under chapter 8.

Clause 172 — Communication with family and others

This clause places an obligation upon the Chief Executive to be proactive in providing opportunities for young detainees to maintain contact with the community. All young detainees will return to the community. Positive changes in behaviour will be greatly influenced by relationships with family members, significant persons and friends. Maintaining these relationships during detention is an important factor in successful rehabilitation and release of young detainees.

Sub-clause (2) follows human rights jurisprudence that requires consideration of the non-convicted status of a young detainee when the Chief Executive makes a decision that affects the young detainee's opportunity to communicate. This does not mean that the non-convicted status of the young detainee outweighs all other considerations.

Sub-clause (3) and (4) are a prohibition on constructive incommunicado. Incommunicado is the State unlawfully preventing a person from communicating with all facets of civil society: institutions and family.

Sub-clause (5) ensures that any discipline process does not create an authority to impose constructive incommunicado upon a young detainee.

Sub-clause (6) clarifies that the prohibition on incommunicado does not limit the Chief Executive from preventing communication, providing it is lawful, reasonable and proportionate.

Clause 173 — Telephone calls

Rule 61 of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* provides that:

> "Every juvenile should have the right to communicate in writing or by telephone at least twice a week with the person of his or her choice, unless legally restricted, and should be assisted as necessary in order effectively to enjoy this right".

Sub-clause (1) obliges the Chief Executive to ensure that a detention place has telephone facilities for use by young detainees.

Sub-clause (2) provides a statutory entitlement to make minimum telephone calls to a family member or a significant person, with the minimum being at least 1 telephone call on admission to a detention place and 2 telephone calls each week.

Family member is defined at clause 13 to mean the child's or young person's—
- parent, grandparent or stepparent; or
- son, daughter, stepson or stepdaughter; or
- sibling; or
- uncle or aunt; or
- nephew, niece or cousin; and
- for an Aboriginal or Torres Strait Islander child or young person—includes 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 Aboriginal or Torres Strait Islander community.

Significant person is defined at clause 14 to mean a person, other than a family member who the child or young person, a family member of the child or young person or the Chief Executive considers is significant in the child's or young person's life.

Sub-clause (3) clarifies that the minimum calls are not the only calls a young detainee is entitled to make or receive. Further calls can be made.

Sub-clause (4) requires the Chief Executive to pay for the calls mentioned above unless the Chief Executive believes, on reasonable grounds, that it is appropriate for the young detainee to pay for the calls.

Sub-clause (5) stipulates that these matters are entitlements and not to be regarded as privileges for the purposes of disciplinary and behaviour management action under chapter 8.

Sub-clause (6) empowers the Chief Executive to deny or limit a young detainee's phone calls if the Chief Executive suspects the call may undermine security and good order, revictimise a victim, circumvent any process for investigating complaints, cause community distress or cause harm to the young detainee. The Chief Executive may also give directions if it is necessary and reasonable to safeguard the young detainee's best interests. This is to ensure

that the young detainee is adequately protected from harmful, inappropriate or abusive behaviour by the person they are seeking to contact. For example, if the young detainee wanted to contact a person and the Chief Executive had information that the person had been convicted of sex offences against children, then the Chief Executive would not approve the young detainee's contact with the person.

Sub-clause (7) clarifies that phone calls are subject to security monitoring set out in clause 199 and to any operating procedures that apply to phone calls.

Sub-clause (8) authorises the Chief Executive to make operating procedures about what times during the day phone calls may be made; the maximum time allowed for phone calls; and what charges should be applied for phone calls.

Clause 174 — Mail

This clause requires the Chief Executive to allow, as far as practicable, young detainees to send and receive as much mail as they want. However, this should not be regarded as an absolute entitlement if the amount of mail exceeds the ability of the detention place to properly process and move the mail.

A young detainee may nominate family members, significant persons and other people in writing to the Chief Executive who they wish to correspond with.

Sub-clause (3) stipulates that these matters are entitlements and not to be regarded as privileges for the purposes of disciplinary and behaviour management action under chapter 8.

Sub-clause (4) empowers the Chief Executive to restrict the sending or receiving of mail by a young detainee if it is reasonably suspected that mail may undermine security and good order, revictimise a victim, circumvent any process for investigating complaints, cause community distress or cause harm to the young detainee. The Chief Executive may also give directions if it is necessary and reasonable to safeguard the young detainee's best interests. This is to ensure that the young detainee is adequately protected from harmful, inappropriate or abusive behaviour by the person they are seeking to contact.

Sub-clause (5) clarifies that mail is subject to security monitoring set out in clauses 200 and 201 and to any operating procedures that apply to mail.

Sub-clause (6) authorises the Chief Executive to make operating procedures about how mail is sent or received, the provision of writing and other material for sending mail (such as postage) and the storage and return of mail to the young detainee which is denied or limited under sub-clause (4).

Clause 175 — News and education

Rule 62 of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* provides that:

> "Juveniles should have the opportunity to keep themselves informed regularly of the news by reading newspapers, periodicals and other publications, through access to radio and television programmes and motion pictures, and through the visits of the representatives of any lawful club or organization in which the juvenile is interested".

This clause gives effect to this rule by requiring the Chief Executive to ensure that young detainees have access to information through the media and library services.

Rule 26.1 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("The Beijing Rules") provides that:

> "The objective of training and treatment of juveniles placed in institutions is to provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society".

This clause gives effect to this rule by requiring the Chief Executive to ensure that each young detainee is provided with education or training that meets his or her needs.

Sub-clause (3) stipulates that participation in education and training approved under sub-clause (2) is an entitlement and not to be regarded as a privilege for the purposes of disciplinary and behaviour management action under chapter 8.

Clause 176 — Visits by family members etc

Rule 60 of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* provides that:

> "Every juvenile should have the right to receive regular and frequent visits, in principle once a week and not less than once a month, in circumstances that respect the need of the juvenile for privacy, contact and unrestricted communication with the family and the defence counsel.

This clause gives effect to this rule by requiring the Chief Executive to provide a visit each week for one family member or significant person of at least 1 hour in duration.

Family member is defined at clause 13 to mean the child's or young person's—
- parent, grandparent or stepparent; or
- son, daughter, stepson or stepdaughter; or
- sibling; or
- uncle or aunt; or
- nephew, niece or cousin; and
- for an Aboriginal or Torres Strait Islander child or young person—includes 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 Aboriginal or Torres Strait Islander community.

Significant person is defined at clause 14 to mean a person, other than a family member, who the child or young person, a family member of the child or young person or the Chief Executive considers is significant in the child's or young person's life.

Sub-clause (3) stipulates that the visit mentioned in sub-clause (1) is an entitlement and not to be regarded as a privilege for the purposes of disciplinary and behaviour management action under chapter 8.

Sub-clause (4) empowers the Chief Executive to deny or limit visits if it is reasonably suspected that the visit may undermine security and good order, revictimise a victim, circumvent any process for investigating complaints, cause community distress or cause harm to the young detainee. The Chief Executive may also give directions if it is necessary and reasonable to safeguard the young detainee's best interests. This is to ensure that the young detainee is adequately protected from harmful, inappropriate or abusive behaviour by the person who visits or proposes to visit.

Sub-clause (5) provides that this clause is subject to division 6.6.5 (Access to detention places).

Clause 177 — Contact with accredited people

This clause requires the Chief Executive to ensure that a young detainee has adequate opportunities for contact with an accredited person through telephone or mail or personal contact with an accredited person. Accredited person is defined at clause 136 as a:
- A lawyer representing the young detainee;
- An Official Visitor;
- A commissioner exercising functions under the *Human Rights Commission Act 2005*;
- The Public Advocate;
- The Ombudsman;
- The Chief Executive if the Chief Executive has daily care or long-term care responsibility for the young detainee;

- a representative, approved by the Chief Executive, of an entity providing a service or program to the young detainee at a detention place.

Sub-clause (2) stipulates that these matters are entitlements and not to be regarded as privileges for the purposes of disciplinary and behaviour management action under chapter 8.

Sub-clause (3) allows the Chief Executive to give directions to deny or limit a young detainee's contact with an accredited person if it is reasonably suspected that it may undermine security or good order or circumvent any process for investigating complaints or reviewing decisions under the Act.

Visits are conditional on visitors abiding by the detention place's laws and procedures. Consequently, sub-clause (4) stipulates that visits are subject to visiting conditions set out in division 6.6.5.

Clause 178 — Visits—protected communications

This clause provides that the Chief Executive is not authorised to monitor communication at a visit between a young detainee and with the people mentioned in (a) to (f) who are acting in an official capacity.

Clause 179 — Health care

This clause relates to the standards of health care provided to young detainees.

Sub-clause (1) provides an entitlement to health services which are of at least the same standard as the young detainee would have access to in the general community.

Sub-clause (2) prescribes the duties the Chief Executive must exercise to meet the standard of health care.

Sub-clause (3) stipulates that the matters outlined in sub-clause (1) and (2) are entitlements and not to be regarded as privileges for the purposes of disciplinary and behaviour management action under chapter 8.

Sub-clause (4) authorises the Executive to make regulations to provide for the matters listed in (4)(a) to (d). Sub-clause (c) contemplates medical rehabilitation after an accident or other medical trauma, for example, after a burn injury or a stroke.

Sub-clause (5) stipulates that the matters outlined in any regulation made under sub-clause (4) are entitlements and not to be regarded as privileges for the purposes of disciplinary and behaviour management action under chapter 8.

Clause 180 — Chief Executive's consent to medical treatment for young detainees

In some circumstances, a detained child or young person will be assessed by a medical practitioner as not being able to consent to their own medical treatment in accordance with the common law principle of Gillick (*Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112*). This principle is that a parent's right to determine whether or not a child or young person below the age of 16 years will or will not have medical treatment terminates if and when the child or young person achieves sufficient understanding and intelligence to enable the child or young person to understand fully what is proposed.

The consent of a person with daily care responsibility is required therefore in these circumstances for the medical treatment to be given to the young detainee. In these circumstances, if the Chief Executive is unable to locate a person with parental responsibility to provide this consent, the young detainee's health may be significantly negatively affected by the inability to contact a person with this legal responsibility for consent.

This clause allows the Chief Executive to consent to the medical treatment in these circumstances if delaying the treatment would be detrimental to the child or young person's

health. This upholds the child or young person's right to protection under section 11(2) and the right to life under section 9 of the *Human Rights Act 2004*.

Clause 181 — Injury etc - notifying people responsible for or nominated by young detainee

Rule 56 of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* provides that:

> "The family or guardian of a juvenile and any other person designated by the juvenile have the right to be informed of the state of health of the juvenile on request and in the event of any important changes in the health of the juvenile. The director of the detention facility should notify immediately the family or guardian of the juvenile concerned, or other designated person, in case of death, illness requiring transfer of the juvenile to an outside medical facility, or a condition requiring clinical care within the detention facility for more than 48 hours".

This clause gives effect to this human rights requirement and provides that if the young detainee requires clinical care for any reason for more than 24 hours, a person must be notified of the young detainee's condition. The person to be notified for young detainees under the age of 18 years is the person with daily care responsibility. For young detainees who are adults, this is the person nominated by the young detainee who is listed at 184(2)(n) of the register for young detainees.

Clause 182 — Religious spiritual and cultural needs

Rule 48 of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* provides that:

> "Every juvenile should be allowed to satisfy the needs of his or her religious and spiritual life, in particular by attending the services or meetings provided in the detention facility or by conducting his or her own services and having possession of the necessary books or items of religious observance and instruction of his or her denomination. If a detention facility contains a sufficient number of juveniles of a given religion, one or more qualified representatives of that religion should be appointed or approved and allowed to hold regular services and to pay pastoral visits in private to juveniles at their request. Every juvenile should have the right to receive visits from a qualified representative of any religion of his or her choice, as well as the right not to participate in religious services and freely to decline religious education, counselling or indoctrination".

This clause gives effect to this rule by obliging the Chief Executive to provide for the religious, spiritual and cultural needs of young detainees as far as practicable.

Sub-clause (2) stipulates that where practical, young detainees must have access to religious, cultural and spiritual Ministers and leaders (such as priests, lamas, rabbis, imams, elders or other people who lead spiritual or religious activity).

Services, texts and relevant artifacts should also be provided to young detainees, where practical. The practicality of providing for religious worship or exercise of spirituality will depend upon the logistics required to meet the needs of the young detainee, or young detainees.

Sub-clause (3) empowers the Chief Executive to deny or limit a young detainee's access to religious services and articles if the Chief Executive suspects the young detainee will engage in any of the behaviour listed in (a) to (d).

Sub-clause (4) upholds the right of a young detainee not to participate in any religious, spiritual or cultural practices.

Sub-clause (5) stipulates that the matters outlined in sub-clauses (1) and (2) are entitlements and not to be regarded as privileges for the purposes of disciplinary and behaviour management action under chapters 8 and 9.

Part 6.6 — Management and security

The prime operational task of a youth detention place is to provide safe and secure custody of young detainees. This part sets out general powers and obligations for the Chief Executive to provide and manage safe and secure custody.

Division 6.6.1 — Management and security—general

Clause 183 — Compliance with Chief Executive's directions

This clause requires young detainees to comply with directions from the Chief Executive. Directions can be given by the Chief Executive as prescribed under the criminal matters chapters and clause 145 generally allows the Chief Executive to give reasonable directions. Non-compliance with a direction of the Chief Executive by a young detainee is a behavioural breach under chapter 8.

Clause 184 — Register of young detainees

This clause creates an obligation for the Chief Executive to keep a register of young 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 young detainee.

Clause 185 — Health reports

This clause provides an explicit authority for the Chief Executive administering the Act to require health information from other Chief Executives and an obligation for 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 young detainees without having to decide compliance with the privacy principles in the *Health Records (Privacy and Access) Act 1997*.

This clause does not oust any existing or future obligations upon the Chief Executive, or authorised persons or youth detention officers, to treat any information about young detainees as confidential. Section 9(m) of the *Public Sector Management Act 1994* obliges public servants to not disclose, without lawful authority—

- any information acquired by him or her as a consequence of his or her employment; or
- any information acquired by him or her from any document to which he or she has access as a consequence of his or her employment.

Any youth detention officers who are authorised access to health information of young detainees as part of their duties would be obliged to keep that information confidential outside of their duties.

Sub-clause (4) obliges the Chief Executive to organise a treating doctor to assess the reports and prepare a health schedule for each young detainee's case management plan.

The health schedule is a summary of the young detainee's medical conditions, medical risks, potential symptoms, and treatment for the young detainee. The health schedule will be able to be accessed in a medical crisis to facilitate quick assessment of the situation and organise any necessary assistance or treatment for a young detainee.

Sub-clause (6) enables an operating procedure to be made to set out the detail to be included in a health schedule. The procedure would be able to also specify who may access the schedule.

Sub-clause (7) is an obligation upon the Chief Executive to ensure access to medical information is only available to those who have authority to access the information.

Clause 186 — Use of medicines

This clause 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, such as asprin, cough medicine etc. In making a decision to approve the use of a non-prescription medicine, the Chief Executive is enabled to seek the advice of a treating health professional. In some circumstances the advice of a health professional may be needed, for example to confirm that a young detainee is not allergic to a non-prescription medicine.

Clause 187 — Case management plans—scope etc

This clause obliges the Chief Executive to develop a case management plan for each young detainee.

To reflect the legal status of remandees as presumed innocent, there is discretion for the Chief Executive to develop a case management plan for remandees. In deciding whether a case management plan should be developed, the Chief Executive must consider:

- the period of remand;
- the young remandee's age and development;
- the young remandee's educational needs;
- any special needs that the young remandee has; and
- any other relevant consideration.

The rehabilitation of sentenced young offenders 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.

Sub-clause (3) outlines the minimum requirements for case management plans, and includes education activities, transition planning to support the young detainee's return to the community and includes requirements that case management plans are based on the needs, capacities and disposition of the young detainee and consistent with resources available to the Chief Executive.

It is not intended that case management plans will be limited to the minimum matters set out at sub-clause (3). It is intended that plans will address relevant matters relating to the young detainee's health, wellbeing and development needs.

Clause 188 — Transgender and intersex young detainees—sexual identity

The sexual identity of a young detainee has a critical impact upon their placement within the detention place and how intimate searches are conducted. This clause 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 young detainee and the Chief Executive if the young detainee does not or refuses to nominate an identity. In choosing the sex of a young detainee, the Chief Executive must obtain a report by a non-treating health professional.

In making decisions about whether to place a transgender or intersex young detainee with females or males, in some circumstances the sex chosen by the young detainee and subsequent placement decision may put the young detainee or other young detainees at risk of intimidation or harm. It may also be necessary to include in the case management plan, supports for a transgender or intersex young detainee who may be ambivalent about their sexual identity.

Sub-clause (5) therefore introduces a power for the Chief Executive to obtain a report by a health professional about the young detainee's sexual identity, if the Chief Executive reasonably believes the report is in the best interests of the young detainee and is necessary to make a decision in relation to the young detainee's placement or case management. This power engages 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 2004. However the limitation on these rights is proportionate as the power is necessary to protect the safety and emotional wellbeing of the young detainee and other young detainees.

Clause 189 — Security classification—basis etc

This clause requires the Chief Executive to give a young detainee a security classification and enables review of the classification at any time. The clause also sets out factors that must be considered when deciding the level of security risk the young detainee poses. The factors include the risk the young person may pose within the youth detention place, as well as the risk they pose if they escape. The security measures imposed must be only that which are the least restrictive.

Clause 190 — Property of young detainees

This clause provides for the young detainee's property to be brought into a detention place. The property is subject to any conditions set by the Chief Executive. Property may be secured away from the young detainee, or the Chief Executive may conditionally allow the property to be in the possession of the young detainee. The Chief Executive must ensure that the register of young detainees includes details of the property each young detainee has at a detention place.

Clause 191 — Possession of prohibited things

This clause introduces a new offence for a young detainee to possess a prohibited thing. The maximum penalty is 5 penalty units. This penalty reflects the limited capacity of young detainees to earn money. Prohibited things are declared under clause 147.

Possession of a prohibited thing by a young detainee is also a behaviour breach under chapter 8.

Clause 192 — Mandatory reporting of threats to security etc at detention place

This clause introduces a new obligation for adults who provide services at a detention place, including work that is not remunerated. This could include, for example, youth detention officers, health professionals, community based youth workers and a minister of religion.

The obligation arises if the person reasonably suspects, through providing services at the detention place, that a young detainee or anyone else at the detention place poses a significant threat to security or good order at the detention place; or has something concealed on him or her that is a prohibited thing or that may be used by him or her in a way that may involve a risk to the personal safety of anyone at the detention place.

This requirement engages human rights law, in particular sections 11(2) (protection of the child), and 12 (privacy) of the *Human Rights Act 2004*. However the limitation on these rights is proportionate as the power is necessary to protect the safety of everyone in the detention place.

Clause 193 — Trust accounts of young detainees

This clause requires the Chief Executive to establish trust accounts to deposit money belonging to young detainees. Any fines incurred as a consequence of discipline or behaviour management consequences can be deducted from a young detainee's trust account. A regulation may be made by the Chief Executive about the management of trust accounts.

Clause 194 — Register of searches and uses of force

This clause requires the Chief Executive to maintain a register of intrusive searches and the use of force. The register must contain details of the following searches:

- strip searches on admission under clause 253,
- strip searches directed by Chief Executive under clause 257,
- body searches directed by Chief Executive under clause 263,
- searches of premises and property under clause 274,

- searches of young detainees cells for privileged material under clause 275;
- searches of young detainees cells for suspected privileged material under clause 276;

Sub-clause (2) sets out what details must be included in the register in relation to searches. Sub-clause (2)(e) requires details and reasons to be entered in the register about incidents where certain same sex requirements for strip or body searches are not complied with, as permitted under sub-clauses 259(4), 265(5) and 269(4). This is to ensure that there is oversight and review of any non-compliance.

The register must also contain details of any time when force is used under division 6.6.4. The register must include details of the incident, including the circumstances, the decision to use force and the force used.

The register must be available for inspection by the inspection entities listed at sub-clause (5). To ensure that there is a minimum amount of oversight of the register, this clause obliges the Public Advocate to inspect the register every three months at a minimum.

This clause does not limit the details that the Chief Executive may include in the register.

Division 6.6.2 — 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 to run a safe detention place.

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

Clause 195 — Disapplication of Listening Devices Act

This clause displaces the *Listening Devices Act 1992*.

Clause 196 — Monitoring—general considerations

This clause sets out the factors the Chief Executive must balance when establishing systems to monitor young detainees, or exercising the powers to monitor individual young detainees. This clause requires the application of the human rights principle of proportionality. Sub-clause (g) allows the Chief Executive to consider any matter reasonably believed to be relevant to the exercise of a function under division 6.6.2 and considered against the criteria in (a) to (f).

Clause 197 — Notice of monitoring

This clause requires the Chief Executive to make people who enter a detention place aware that the person may be monitored.

Clause 198 — Monitoring at detention places

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

Clause 199 — Monitoring telephone calls etc

This clause provides the authority for the Chief Executive to monitor and record a young detainee's phone calls, and other electronic communications such as email or fax. 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 or record protected communication with certain listed persons acting in a professional capacity. At common law and in human rights

jurisprudence, young detainees have a right to access their lawyer and various relevant office holders.

Clause 200 — Monitoring ordinary mail

This clause provides the authority for the Chief Executive to monitor, open and inspect a young detainee's ordinary mail. Ordinary mail may be read if the Chief Executive believes the mail will undermine security, revictimise a victim, or circumvent any investigative process. The Chief Executive can also read the mail if the Chief Executive suspects the mail is not in the best interests of the young detainee (for example, if it contains sexually explicit, abusive or harmful content). This power engages the right to privacy under the *Human Rights Act 2004*, however it is a proportionate limitation as it balances the young detainee's right to privacy with their right to protection.

Ordinary mail is any mail other than the categories of mail set out in the definition of protected mail in sub-clause (4).

If the monitoring of mail reveals evidence of an offence the police must be advised. Investigations of offences are a function of the police.

Sub-clause (3) authorises the Chief Executive to read a random selection of young detainees' mail in addition to the suspicion based power of sub-clause (2). An operating procedure can be drafted to set out the detail of how this power will be exercised.

Sub-clause (4) defines 'protected mail' as correspondence between a young detainee and the people listed in (a) to (f) acting in their official capacity. 'Search' is also defined broadly so that it would be unnecessary to physically open every piece of mail.

Clause 201 — Monitoring protected mail

Protected mail may be opened in the presence of a young detainee if it is suspected that the mail is dangerous or contains contraband.

Protected mail may only be read with the written consent of the young detainee. A breach of human rights would otherwise occur.

Clause 202 — Mail searches—consequences

This clause requires any mail that is searched, but not seized, to be delivered as intended to the addressee.

Sub-clause (2) requires the Chief Executive to pass on information that may be evidence of an offence to the police.

Division 6.6.3 — Segregation

The segregation of young detainees is a fundamental way of managing the safety and health of young 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.

Subdivision 6.6.3.1 — General

Clause 203 — Definitions—div 6.6.3

This clause sets out definitions for this division. 'Segregation' has a wide meaning. It can mean anything from restricting a young detainee from being in certain parts of the detention place at certain times, through to denying a young detainee the opportunity to have contact with other young detainees.

Clause 204 — Purpose of segregation under division 6.6.3

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

Clause 205 — Segregation not to affect minimum living conditions

This clause ensures that the minimum living conditions prescribed by clause 140 are not affected by segregation directions. However, sub-clause (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 young detainee is segregated because they have a contagious disease, a weekly visit, as prescribed by clause 176 may not be possible.

Clause 206 — Notice of segregation directions – safe room and other

This clause requires the Chief Executive to give written notice of any safe room segregation direction made. The notice must include details about the direction and the duration and effect of the direction. The notice must be given to the young detainee and the Public Advocate. For young detainees under 18 years, the notice must be given to a parent or someone else who has parental responsibility for the young detainee. For young detainees who are adults, the Chief Executive must notify their nominated support person (listed in the register at clause 184(2)(n).

Subdivision 6.6.3.2 — Safe room segregation

This part authorises segregation in a designated part of the youth detention place known as a safe room.

Clause 207 — Designation of safe rooms

This clause allows the Chief Executive to declare a part of a detention place to be a safe room in writing. This declaration is an instrument within the meaning of section 14 of the *Legislation Act 2001*.

In order to make the declaration, the Chief Executive must be satisfied of the criteria outlined at (2)(a) and (b) which seek to ensure the area is safely designed and will facilitate monitoring of, and communication with, the young detainee, by the Chief Executive and health professionals (other than non-treating health professionals).

Clause 208 — Segregation—safe room

This clause outlines the criteria for when the Chief Executive may make a safe room segregation direction. The criteria have been carefully designed to ensure that the safe room is only used to protect the young detainee from harming themselves, and used only as a last resort.

Clause 209 — Safe room segregation directions—privacy

This clause creates a rule about how the safe room segregation direction is put into effect which has the objective of protecting the privacy of the young detainee subject to the direction. The rule is that the confining of a young detainee under a safe room segregation direction, and any force used, must not be done in the presence or sight of another young detainee.

An exception to this rule is created in circumstances of urgent and significant risk to the young detainee or another person and where compliance with the rule would increase the risk.

Clause 210 — Review of safe room segregation directions

This clause creates a statutory rule for the frequency of reviews of a safe room segregation direction. The direction must be reviewed by the Chief Executive after it has been in force for 2 hours and at the end of every subsequent 2 hours for which it is in effect.

Subdivision 6.6.3.3 — Other segregation

This subdivision provides authority for the Chief Executive to make segregation directions on the grounds of safety and security reasons, health reasons and for protective custody reasons.

There are a number of important safeguards incorporated in this subdivision (6.6.3.3), subdivision 6.6.3.4 and subdivision 6.6.3.5 designed to ensure the Chief Executive's decision to segregate a young detainee is subject to review and the young detainee is accorded procedural fairness. These include:

- The Chief Executive is required to revoke the segregation direction immediately if the grounds that gave rise to the making of the direction no longer exist.
- In addition to notice being given to the young detainee of a segregation direction, notice must also be given to a parent or someone who has daily care responsibility, or long-term care responsibility, for the young detainee who is under 18 years or the young detainee's nominated person for young detainees 18 years and over; and and the Public Advocate.
- The young detainee can seek an internal review of the segregation direction under clause 216.
- The young detainee can seek an external review of the segregation direction under clause 218.
- All segregation directions must be recorded by the Chief Executive in a register and the register must be available for inspection and oversight by the persons and entities outlined in clause 221(3).

Clause 211 — Segregation—safety and security

This clause authorises the Chief Executive to make a segregation direction to protect the safety of anyone else at a detention place; or security or good order at a detention place.

Sub-clause (2) requires the Chief Executive to have regard to relevant cultural considerations and the likely impact of segregation on the health and well-being of the young detainee.

Sub-clause (3) contains an obligation for the Chief Executive to revoke the direction if the grounds that gave rise to the making of the direction no longer exist.

Clause 212 — Segregation—protective custody

This clause authorises the Chief Executive to make a segregation direction to protect the young detainee's safety.

Sub-clause (2) enables the Chief Executive to give a direction on the Chief Executive's own initiative or on request by the young detainee.

Sub-clause (3) contains an obligation for the Chief Executive to revoke the direction if the grounds that gave rise to the making of the direction no longer exist.

Clause 213 — Segregation—health etc

This clause authorises the Chief Executive to make a segregation direction for health related reasons, including

- to assess the young detainee's physical or mental health; or
- to protect anyone (including the young detainee) from harm because of the young detainee's physical or mental health; or
- to prevent the spread of disease.

Sub-clause (2) contains an obligation for the Chief Executive to revoke the direction if the grounds that gave rise to the making of the direction no longer exist.

In deciding whether to make a segregation direction for health reasons, or revoke the direction, sub-clause (3) requires the Chief Executive to have regard to advice by a treating doctor regarding the segregation.

Clause 214 — Interstate segregated young detainees transferred to ACT

This clause has the effect of continuing an interstate segregation direction after a young detainee is transferred into custody at an ACT detention place.

The direction ends 3 days after the day the young detainee is taken into custody at the detention place unless this division applies otherwise.

Subdivision 6.6.3.4 — Review of certain segregation directions

Clause 215 — Meaning of segregation direction—subdiv 6.6.3.4

This clause creates a definition of segregation direction for this subdivision (6.6.3.4) which is intentionally narrower than the definition of segregation direction for this division (6.6.3) outlined at clause 203.

A segregation direction for this subdivision is a safety and security, protective custody or health segregation direction under clauses 211, 212 and 213 respectively. It does not include safe room segregation direction under clause 210.

Clause 216 — Internal review of segregation directions

This enables the Chief Executive to review a safety and security, protective custody or health segregation direction under clauses 211, 212 and 213 respectively, at any time upon the Chief Executive's own initiative or upon a request from the young detainee.

This clause also requires the Chief Executive to review a segregation direction if a transfer to a correctional centre or somewhere else (for example, a health facility) is imminent. As a matter of course, the Chief Executive must review a segregation direction within the first 7 days, conduct a second review within 7 days, and conduct subsequent reviews every 14 days thereafter while the direction remains in force. The Chief Executive must review a health segregation direction on request by the treating 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 place. Directions to segregate may be made consecutively.

Clause 217 — End of segregation directions

This clause clarifies that, unless revoked sooner, a safety and security, protective custody or health segregation direction ends 28 days after the day it is given or 90 days after a further segregation direction or directions given following a review under subdivision 6.6.3.4.

Clause 218 — Application for review of segregation directions

This clause enables a young detainee to apply for a review of a segregation direction. An application is made to an external reviewer, who is a Magistrate appointed to review disciplinary matters and segregation decisions. The segregation decision remains in force unless an external reviewer makes another decision in its place or revokes the decision.

Clause 219 — External review of segregation directions

This clause empowers an external reviewer to review a segregation direction or refuse to do so.

If an external reviewer decides to review a segregation direction the review procedure in Chapter 9 must be used. If an external reviewer refuses to review the segregation direction, clause 220(3) requires the external reviewer to provide reasons for the refusal.

Under sub-clause (3), after a review, the external reviewer 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 external reviewer can vary the existing direction, or set it aside. The clause enables the external reviewer to end the segregation direction.

Clause 220 — Notice of decision about segregation direction

This clause requires the external reviewer to give prompt written notice of their decision under clause 219 to the young detainee, a parent or person with parental responsibility for young detainees aged under 18 years, or the nominated support person (see 184(2)(n)) for young detainees aged over 18 years and the Chief Executive. Reasons must be outlined in the notice, if the external reviewer refuses to review the direction.

Subdivision 6.6.3.5 — Register of segregation directions

This sub-division requires a segregation register to be maintained by the Chief Executive.

Clause 221 — Register of segregation directions

This clause requires a register to be maintained by the Chief Executive containing details in relation to each segregation direction given under this division. Sub-clause (1) outlines what the register must include at a minimum in relation to each segregation direction given.

The register must be available for inspection by the entities outlined at sub-clause (3).

This clause does not limit the details that the Chief Executive may include in the register.

Division 6.6.4 — 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 *United Nations 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 incidents must be reported immediately to a higher administrative authority;
- 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 young detainee, limits the ability of individuals to move freely and is inherently degrading. It therefore engages human rights law, 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*.

Clause 222 — Managing use of force

This clause sets out requirements on the Chief Executive to:

- Make arrangements to ensure that force is always used as a last resort and in accordance with this division;

- Ensure those persons using force first consider the individual's characteristics and capacities, except in urgent circumstances;
- Ensure the young detainee receives any appropriate health assessment or treatment because of force used against them which results in an injury;
- Offer a medical examination to a young detainee by a treating doctor or nurse after any force is used; and
- Make a policy or procedure which sets out the circumstances when force may be used and the kinds of force that may be used.

Clause 223 — Authority to use force

This clause sets out the grounds by which a youth detention officer may use force. A youth detention officer can only use force if they believe the purpose cannot be achieved another way, and then only if it is necessary and reasonable to achieve the purposes outlined at sub-clause (b).

Clause 224 — Application of force

This clause sets out requirements on the youth detention officer in using force. A youth detention officer can only use force (except in urgent circumstances) if they 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 injury.

Clause 225 — Use of restraint

This clause sets out rules for applying force with the use of restraint. A restraint may include body contact, handcuffs, restraint jackets and other restraining devices and anything else prescribed by regulation.

Clause 226 — Monthly reports about use of force

This clause requires a youth detention officer to provide a monthly report, summarising incidents involving the use of force in relation to a young detainee, to the Chief Executive.

Division 6.6.5 — Access to detention places

This division facilitates entry to the detention place by visitors.

Clause 227 — Visiting conditions

This clause empowers the Chief Executive to declare conditions that apply to visitors and visits at a place of detention through a disallowable instrument. This may include conditions that relate to times and duration of visits, the number of visitors allowed and the circumstances in which visitors may be monitored.

Clause 228 — Notice of visiting conditions

This clause 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 to be inspected on request by visitors.

Clause 229 — Taking prohibited things etc into detention place

This clause creates an offence for taking or removing a prohibited thing from a detention place or giving a prohibited thing to a young detainee, including through sending. The offence applies to any person, including a young detainee. An exception to the offence is created if the Chief Executive approves the action. 'Prohibited things' are those declared and notified by the Chief Executive to be prohibited under clause 147.

Clause 230 — Directions to visitors

This clause authorises the Chief Executive to give a visitor directions to ensure the visitor complies with any conditions in force or to uphold the security or good order of a detention place. The direction may be given verbally or in writing.

Non-compliance with the direction is a strict liability offence. Sub-clauses (2) and (3) create a strict liability offence for a visitor failing to comply with a direction. The Government is of the view that a strict liability offence is warranted. The physical element of the offence, a failure to comply, is the critical feature of the offence. Providing for mental elements of the offence would diminish the regulating purpose of the offence.

The offence extends the existing statutory defences in the *Criminal Code 2002* by including a defence that the person took reasonable steps to comply with the direction.

Clause 231 — Directions to leave detention place etc

This clause empowers the Chief Executive to refuse a person entry to a detention place and to direct a person to leave a detention place.

Sub-clauses (4), (5) and (6) create a strict liability offence for a visitor failing to comply with a direction to leave or attempting to enter detention place. A strict liability offence is warranted. The physical element of the offence, a failure to comply, is the critical feature of the offence that needs to be upheld. Providing for mental elements of the offence would diminish the regulating purpose of the offence.

The offence extends the existing statutory defences in the *Criminal Code 2002* by including a defence that the person took reasonable steps to comply with the direction.

Clause 232 — Removing people from detention place

This clause authorises the use of force to remove a person from the detention place, or prevent a person entering the place, following non-compliance with a direction under clause 231. The use of force must be commensurate to the necessary aim.

Division 6.6.6 — 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 younger child's best interests. The ACT Human Rights Commissioner in the *Human Rights Audit of Quamby Youth Detention Centre* endorsed this recommendation.

In response to these recommendations, this division allows a young detainee who is a primary caregiver for their child aged up to 6 years old, to have contact with, or care for their child, in a detention place subject to directions and any youth detention policy or operating procedure in place. This division upholds the human rights to protection of the family and children outlined at section 11 of the *Human Rights Act 2004*.

Clause 233 — Chief Executive may allow young child to stay with young detainee

Sub-clauses (1) and (2) provides that where a young detainee is a primary caregiver for their child aged up to 6 years old, the Chief Executive may allow young detainees to have contact with, or care for their child in a detention place. This is subject to any direction by the Chief Executive and any youth detention policy or operating procedure in place contemplated by sub-clause (4).

In considering whether to allow the detainee to have contact with or care for their child, the Chief Executive (responsible for care and protection matters in the ACT) must carry out a care and protection appraisal of the child and must be satisfied that that allowing the detainee to have contact with or care for their child in the detention place would be in the child's best interests.

Sub-clause (4) allows the Chief Executive to make a youth detention policy or operating procedure about the arrangements for a young detainee to have contact with, or care for, their child in a detention place.

This clause is intended to be additional to the general entitlement of young detainees to receive visits from family members at clause 140(1)(g), which may include the young detainee's son, daughter, stepson or stepdaughter.

Part 6.7 — Alcohol and drug testing

This part provides the requisite powers to test young detainees and youth detention officers 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 place and managing young detainees with drug and alcohol problems. The use of drugs and alcohol by young detainees and youth detention officers who are responsible for their wellbeing, can create risks to the safety of everyone at the detention centre and pose substantial risks to security and good order. The powers to conduct alcohol and drug testing outlined in this division, engages the right to privacy and reputation at section 12 of the *Human Rights Act 2004*, however it is a reasonable and proportionate limitation as it is necessary to protect the safety of all people in the detention place.

Division 6.7.1 — General

This division outlines key concepts for alcohol and drug testing of young detainees and youth detention officers.

Clause 234 — Definitions—pt 6.7

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

Clause 235 — Positive test samples

This clause defines what a 'positive test sample' means and includes: a young 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 young 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.

Division 6.7.2 — Alcohol and drug testing—young detainees

The division provides for alcohol and drug testing of young detainees.

Clause 236 — Alcohol and drug testing of young detainees

This clause empowers the Chief Executive to direct a young detainee to provide a test sample, and state what type of sample is required. The Chief Executive or a relevant non-treating doctor or non-treating nurse can direct how the young detainee must provide the sample. Any sampling method must be taken in accordance with any operating procedures made by the Chief Executive. However, only non-treating doctors and nurses can take blood. Samples are required to be given to a youth detention officer for identification and recording, prior to analysis.

After analysis the Chief Executive must notify the young detainee and a relevant person of the results as soon as practicable. For young detainees aged under 18 years, the relevant person to be notified is a person with parental responsibility for the young detainee. For young detainees aged over 18 years, the relevant person to be notified is their nominated support person, details of whom is required to be included at the register at clause 184(2)(n).

Contravening a direction by the Chief Executive under this Act by a young detainee is a behaviour breach and may be dealt with under chapter 8.

Clause 237 — Effect of positive test sample by young detainee

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

Division 6.7.3 — Alcohol and drug testing—youth detention officers

Clause 238 — Alcohol and drug testing of youth detention officers

This clause authorises the development of regulations to test for alcohol and drugs by youth detention officers, and may include circumstances for testing and the conduct of the tests. A youth detention officer is an authorised person who has been delegated functions under the Act by the Chief Executive as outlined at clause 96.

Part 6.8 — Young detainees—leave

This part deals with leave for young detainees from the detention place.

Division 6.8.1 — Local leave

This division sets out the authority for the Chief Executive to authorise leave within the ACT for a young detainee.

Clause 239 — Local leave directions

This clause authorises the Chief Executive to direct that a young detainee be transferred from a detention place to any other place in the ACT. This may be for any purpose the Chief Executive considers appropriate. For example, the Chief Executive may direct the transfer of a young detainee to a service in the community which provides a program that would assist the young detainee's rehabilitation.

This may be limited by any condition prescribed by regulation or any other condition believed necessary and reasonable by the Chief Executive that is consistent with any condition prescribed by regulation (if any exist).

The direction must be by way of written permit and the conditions must be stated in the permit.

Clause 240(1) requires that a young detainee who is the subject of a local leave direction be given a local leave permit.

Clause 240 — Local leave permits

This clause provides the authority for the Chief Executive to authorise a young detainee to be absent from the detention place within the ACT for a specified period.

Sub-clause (1) requires a young detainee who is the subject of a local leave direction under clause 239 to be given a local leave permit. It is not intended that a transfer direction which has the effect of transferring a young detainee to Court or a health facility as permitted in chapter 5, would require a local leave permit.

Sub-clause (2) allows the Chief Executive to give a written permit (known as a local leave permit) to authorise a young detainee's absence from a detention place within the ACT for any reason, after having regard to the young detainee's best interests. For example, the Chief Executive may provide a leave permit for a young detainee to attend the funeral of a family member.

The leave permit must outline the purpose for which the leave is granted and the period for which it is granted being not longer than 7 days. However, this does not include permits to attend educational or training programs or employment. These activities may occur over a number of weeks for a certain amount of hours each day. In these circumstances, the leave

permit must state the venue of the activity and the period for which the leave is granted which may be over 7 days.

The leave permit may be limited by any condition prescribed by regulation or any other condition believed necessary and reasonable by the Chief Executive. The conditions must be stated in the permit. Any time spent on leave counts as time served in detention.

For example, a transition plan for a young detainee from the detention place to the community includes a vocational training program that is 6 weeks in duration for four hours each day. The leave permit must state where the vocational training program is being undertaken and the length of the permit being 6 weeks. The permit is subject to the condition that the young detainee may be absent on unescorted leave for 5 hours per day on weekdays (4 hours program time and 1 hour traveling time).

Division 6.8.2 — Interstate leave

Clause 241 — Interstate leave permits

This clause authorises the Chief Executive to grant a young detainee leave to travel to a State or Territory and stay in that State or Territory, after having regard to the young detainee's best interests. 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, except when the leave is granted for employment or education purposes which may occur over a number of weeks for a certain amount of hours each day (for example, several hours of employment in Queanbeyan which may be permitted as part of the young detainee's transition plan).

For young detainees with a high security classification, interstate leave can only be issued for the purpose of receiving a health service or compassionate reasons such as attending a funeral. Other young detainees can be granted interstate leave for any purpose the Chief Executive reasonably believes is appropriate. Any time spent on leave counts as time served in detention.

Clause 242 — Effect of interstate leave permit

This clause establishes that a leave permit may authorise a young detainee 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 243 — Powers of escort officers

This clause empowers an escort officer to give the young detainee on interstate leave directions and to use force, when necessary, to prevent escape or to arrest the young detainee following escape. An escort officer is also authorised to conduct a scanning, frisk or ordinary search of the young detainee in accordance with parts 7.2, 7.3 and 7.9, with any necessary changes prescribed by regulation.

Division 6.8.3 — Leave - miscellaneous

Clause 244 — Lawful temporary absence from detention place

This clause clarifies that any young detainee who is lawfully absent from a youth detention place is still in the legal custody of the Chief Executive and if under escort, they are also taken to be in the escort officer's custody.

Chapter 7 — Criminal matters—search and seizure at detention places

The provisions in this chapter re-enact provisions introduced as part of the *Children and Young People Amendment Act 2007*. New provisions include those that relate to searches of other people and use of search dogs.

Searches of young detainees are necessary to prevent the entry of unauthorised items that may harm any person within a youth detention place, including young detainees. The *Human Rights Act 2004* 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 young detainees.

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 2004*.

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 young detainees 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, developmental capacity and history (for example - history of abuse, impairment, sexuality, and religious or spiritual beliefs) 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 (or support person for young detainees over 18 years) to be present during a strip search on admission or a body search.

Part 7.1 — Preliminary—ch 7

This part sets out whom the chapter applies to and key definitions.

Clause 245 — Definitions—ch 7

This clause sets out the definitions of the types of searches and related terms contemplated by chapter 7.

The definitions are aligned with the *Crimes Act 1900*, part 10.

Clause 246 — 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.

Part 7.2 — Searches generally

This part provides the powers and procedures for personal searches of children and young people who are detained at a youth detention place.

Clause 247 — Searches – intrusiveness

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 248 — Searches – use of search dog

This clause enables specially trained dogs to be used during any searches authorised by this chapter of the Bill.

Trained dogs have great acuity for smelling and identifying particular substances, such as drugs. Enabling dogs to be used for searches will reduce the time taken for searches and the level of intrusiveness required for the search.

Sub-clause (4) enables the Chief Executive to make an operating procedure about the use, training and management of search dogs.

Clause 249 — Searches - transgender and intersex young detainees

A number of clauses in this chapter require that a person conducting a search, or a person who is present at a search, 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 in these circumstances.

Clause 188(7) requires that for the criminal matters chapters, the detainee's sex is taken to be that entered for the detainee in the register of young detainees. For transgender or intersex young detainees who elect to be identified as a certain sex, that sex will be entered in the register.

Sub-clause (2) however envisages circumstances where a transgender or intersex detainee does not elect to be identified as a particular sex. In this circumstance, the sub-clause allows the detainee to require that a search be conducted by a female or male, and the detainee is taken to be treated as that sex for the purposes of this chapter. For example, if the detainee chooses a female person to conduct the search, then the detainee is taken to be female for the purposes of this chapter. This means that other same sex requirements in the chapter (such as being present at a strip search or assisting at a body search) would need to be fulfilled by a female.

Clause 250 — Notice of strip and body searches —person responsible for or nominated by young detainee

This clause requires the Chief Executive to notify a person with parental responsibility for the young detainee aged under 18 years that a strip search (including but not limited to on admission) or a body search will take place. For young detainees over 18 years, this should be the support person nominated by the young detainee listed at clause 184(2)(n) of the register.

If the person with parental responsibility or support person cannot be contacted before the search is conducted, or if it is impracticable to do so, for example because of the urgency of the situation, they must be notified after the search is conducted.

Part 7.3 — 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 place.

Clause 251 — Directions for scanning, frisk and ordinary searches

This clause enables the Chief Executive to direct a youth detention officer 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 place.

Sub-clause (2) enables a youth detention officer 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 place.

Clause 252 — Requirements for scanning, frisk and ordinary searches

This clause sets out the procedures required for scanning, frisk and ordinary searches.

This clause obliges the youth detention officer 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 the young detainee or someone else and compliance would exacerbate the threat.

A requirement for the youth detention officer to be the same sex as the young detainee to conduct a frisk search has been established at sub-clause (3) as the search involves touching of the young detainee's outer clothing. Ordinary and scanning searches however are less intrusive searches than frisk searches as there is no touching of the young detainee, therefore there is no similar same sex requirement. To protect the privacy and dignity of the detainee in an ordinary search, which involves the removal of outer clothing (such as a jacket, gloves or footwear) or for a frisk search, the Bill at sub-clause (2) requires that the search be conducted in a private area.

At sub-clause (4), the same sex requirement to conduct a frisk search can be displaced in very limited circumstances where the Chief Executive believes there is an imminent and serious threat to the personal safety of the young detainee or someone else and compliance would exacerbate the threat. While this engages human rights at sections 10(1)(b) (inhuman or degrading treatment), 12 (privacy), and 19(1) (humane treatment) under the *Human Rights Act 2004*, it is a proportionate and justifiable limitation as public authorities have a positive duty to protect the life of a person in the custody of the Territory. The *Human Rights Act 2004* provides at section 9 that everyone has the right to life.

An example of when the same sex requirement for a frisk search can be displaced is as follows. A female youth detention officer accompanies a group of young detainees from the kitchen area to another area in the detention place. The youth detention officer is informed by a young detainee that he has seen a young male detainee in the group pick up a knife. When asked by the youth detention officer, the male detainee denies that he has picked up the knife. The youth detention officer believes that the delay in waiting for a male officer to conduct a frisk search of the young detainee could exacerbate the risk to the other detainees. The female officer conducts the search after seeking approval from the appropriate delegate of the Chief Executive to do so.

Part 7.4 — Strip searches—young detainees

This part provides the powers and obligations for strip searches of children and young people who are detained at a youth detention place.

Clause 253 — Strip searches on admission to detention place

Preventing contraband finding its way into a youth detention place, particularly weapons and drugs, is an important method of keeping every person in a youth detention place 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 place 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 280 enables any contraband, or suspected contraband, to be seized by the Chief Executive.

Sub-clauses (1) and (4) 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, developmental capacity and known history (for example - history of abuse, impairment, sexuality and religious or spiritual beliefs).

For young detainees under 18 years, sub-clauses (2) and (4) require the Chief Executive to then ascertain if it is necessary for the strip search to be undertaken in the presence of a person with parental responsibility, after considering the young detainee's age, maturity, developmental capacity and known history (for example - history of abuse, impairment, sexuality and religious or spiritual beliefs). The Chief Executive also needs to have regard to whether it is in the best interests of the young detainee for the person with parental responsibility to attend the strip search. For example, the Chief Executive may be aware that the person with parental responsibility has posed a risk to the young detainee in the past by attempting to bring contraband into the youth detention place and giving it to the young detainee. The young detainee must also agree to the presence of the person with parental responsibility.

For young detainees aged 18 years and over, sub-clause (3) allows the Chief Executive to arrange for the strip search to be conducted in the presence of a support person nominated by the young detainee, in circumstances where the Chief Executive considers their presence to be necessary or desirable because of the young detainee's vulnerability (for example, developmental capacity, impairment or history of abuse). A support person can be any person who the Chief Executive considers desirable (for example, someone who does not pose a risk to security or good order) and whose presence is agreed to by the young detainee. It is not intended to be limited to the detainee's support person at 184(2)(n) of the register.

Clause 254 — Strip searches of young detainees under 18 years old - 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 253(2), 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 255(2), then the search can continue in their absence.

Clause 255 — Strip searches 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. For example, if the person engages in behaviour that causes distress, including verbally

abusing the youth detention officer conducting the search. Clause 254(3) allows the search to continue in this circumstance.

Clause 256 — Removing people from search area

This clause allows the Chief Executive to direct a youth detention officer to use force which is necessary and reasonable to ensure compliance with a direction to leave a strip search under clause 255(2).

Clause 257 — Strip searches directed by Chief Executive

This clause enables the Chief Executive to direct a youth detention officer 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 or behaviour breach, something that could injure anyone at the youth detention place or elsewhere, or be a risk to the security or good order of the youth detention place.

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 place.

Clause 258 — Obligations on youth detention officers before strip searches

This clause sets out the rules that the youth detention officer 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 259 — Youth detention officers at strip searches

Sub-clause (1)(a) requires that a strip search must be conducted by a youth detention officer 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 youth detention officers who are the same sex as the young detainee, and sub-clause (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 the young detainee's personal safety and also reasonably believes that compliance with the same-sex requirement would exacerbate that threat. As this is a limitation on the young detainee's right to privacy and dignity, the Bill introduces a new requirement at clause 194(2)(e) to record (in the register of searches and use of force) incidents where the same sex requirement was not complied with, detailing the Chief Executive's reasons for believing the requirement did not apply.

An example of when this power would be required is when a male youth detention officer receives information that a male young detainee has a knife concealed under their clothes. The young detainee is taken to a private area and the officer conducts a scanning, frisk or ordinary search but fails to detect the knife. The officer considers it necessary to conduct a strip search, however there will be a delay in getting another male officer to observe the search (as they are located in another part of the detention place). The officer believes that the delay in waiting for the male officer to observe the search will exacerbate the serious and imminent threat to the detainee's personal safety. The officer, after seeking approval from a delegate of the Chief Executive, conducts the strip search in the presence of a female officer. The reasons for not complying with a same sex requirement are entered in the register at clause 194(2)(e).

Clause 260 — Strip searches—general rules

This clause sets out the general rules that the youth detention officer 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 and religious or spiritual beliefs);
- a search must not be conducted in the presence of anyone who is of the opposite sex, except if they are a non-treating doctor or non-treating nurse who is acceptable to the young detainee, or a person with parental responsibility or a support person, or a youth detention officer 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 261 — 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 youth detention officer must comply with:

- The young detainee's genital area (or female young detainee's breasts) must not be visually inspected for the search 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 262 — 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 youth detention officer 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 during the search, the person must be offered adequate replacements.

Part 7.5 — Body searches—young detainees

Clause 263 — 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 non-treating 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 place. Sub-clause (2) requires the Chief Executive, in deciding to authorise a body search, to give consideration to the young detainee's age, maturity, developmental capacity and known history (for example - history of abuse, impairment, sexuality and religious or spiritual beliefs).

A non-treating doctor acting under this clause is immune from civil liability under clause 877 of the Bill if their conduct is engaged in honestly and without recklessness.

Clause 264 — Obligations of Chief Executive before body searches

This clause sets out the rules that the Chief Executive must comply with before a non-treating 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 265 — People present at body searches

This clause sets out who can be present at a body search.

Sub-clause (2) ensures a non-treating 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 youth detention officers 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. As this is a limitation on the young detainee's right to privacy and dignity, the Bill introduces a new requirement at 194(2)(e) to record (in the register of searches and use of force) incidents where the same sex requirement was not complied with, detailing the Chief Executive's reasons for believing the requirement did not apply.

Sub-clause (6) requires that for young detainees under 18 years, the search must be conducted in the presence of a person with parental responsibility if their presence is believed by the Chief Executive to be necessary and in the young detainee's best interests, after considering the young detainee's age, maturity, developmental capacity and history (for example - history of abuse, impairment, sexuality and religious or spiritual beliefs). The young detainee must agree for them to be present. The detainee's best interests, 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.

For young detainees aged 18 years and over, sub-clause (8) allows the Chief Executive to arrange for the body search to be conducted in the presence of a support person, in circumstances where the Chief Executive considers their presence to be necessary or desirable because of the detainee's vulnerability (for example, developmental capacity, impairment or history of abuse). A support person can be any person who the Chief Executive considers desirable (for example, someone who does not pose a risk to the young detainee) and whose presence is agreed to by the young detainee. Given the intrusiveness of a body search, it is not intended to be limited to the detainee's nominated support person at 184(2)(n) of the register.

Clause 266 — Body searches of young detainees under 18 years old - no-one with parental responsibility available

Where it has been determined by the Chief Executive that it is necessary for a person with parental responsibility to attend under clause 265(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 a youth detention officer 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 267(2), then the search can continue in their absence.

Clause 267 — Body searches—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 266(3) allows the search to continue in this circumstance.

Clause 268 — Removing people from search area

This clause allows the Chief Executive to direct a youth detention officer to use force which is necessary and reasonable to ensure compliance with a direction to leave a body search under clause 267(2).

Clause 269 — Help for body searches

This clause allows a non-treating doctor conducting a body search to ask the Chief Executive for assistance that the non-treating doctor believes is reasonable and necessary for the search. The Chief Executive is enabled to direct or authorise a youth detention officer or someone else present for the search to assist in its conduct.

The person providing the assistance must be the same sex as the detainee 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. As this is a limitation on the young detainee's right to privacy and dignity, the Bill introduces a new requirement at 194(2)(e) to record (in the register of searches and use of force) searches where the same sex requirement was not complied with, detailing the Chief Executive's reasons for believing the requirement did not apply.

A person assisting under this clause is immune from civil liability under clause 877 of the Bill if their conduct is engaged in honestly and without recklessness.

Clause 270 — 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 271 — Body searches—rules about touching young detainees

This clause allows a non-treating doctor, who is authorised by the Chief Executive to conduct the body search, to touch and examine the young detainee's body orifices for the search. The non-treating nurse, who is present but not conducting the search, may touch and examine the young detainee's orifices.

Clause 272 — Seizing things discovered during body searches

Sub-clause (1) allows anything discovered during the search to be seized by the non-treating 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 youth detention officer as soon as practicable.

Part 7.6 — Searching people other than detainees

Clause 273 — 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 7.3 apply to the conduct of a search under this part. Force cannot be used to ensure compliance with a search under this part.

Part 7.7 — Searches of premises and property

This part provides the powers and obligations for searches of premises and property at a youth detention place.

Clause 274 — Searches—premises and property generally

This clause enables the Chief Executive to search any part of a youth detention place; 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 place as this is addressed in parts 7.2, 7.3, 7.4, 7.5 and 7.6.

Searches of premises and property may be conducted physically, with the aid of an electronic device or other technology, or with the assistance of a search dog.

Clause 275 — Searches of young detainee cells—privileged material

This clause allows a youth detention officer 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. A search undertaken under this section must be entered at the register of searches and use of force at clause 194.

Clause 276 — Searches of young detainee cells—suspected privileged material

This clause provides obligations for the youth detention officer 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.

A search undertaken under this section must be entered at the register of searches and use of force at clause 194.

Part 7.8 — Searches—use of force

This part provides the powers and obligations for using force to carry out a search under this chapter.

Clause 277 — Searches— 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 incidents must be reported immediately to a higher administrative authority;
- 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 2004*.

Under this clause, the youth detention officer may only use force in accordance with division 6.6.4.

Part 7.9 — Seizing property

This part provides the powers and procedures for seizing property at the youth detention place.

Clause 278 — Meaning of owner—pt 7.9

This clause sets out the meaning of the owner of a thing for this part. This 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 279 — 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 147 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, is not in the young detainee's best interests or is a means of making an unauthorised purchase.

An example of correspondence that is not in a young detainee's best interests would include mail addressed to a young detainee by a person convicted of a sexual offence against a child or young person.

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 clause 147 for the meaning of privileged material.

Clause 280 — Seizing property—general

This clause enables the Chief Executive to seize a person'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 or a behaviour breach.

Any prohibited thing found during a search may also be seized unless written approval exists for the person to possess the thing.

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. See clause 147 for the meaning of privileged material.

Clause 281 — Notice of seizure

This clause obliges the Chief Executive to notify certain persons of things seized under this chapter.

The owner, or if the owner cannot be located, the person in possession of the thing when it was seized, must be notified in writing within 7 days.

Sub-clause (3) sets out what must be in the notice. The meaning of owner is at clause 278.

Clause 282 — 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, is a behaviour breach, is unsafe or a risk to security or good order, 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 place.

The *Uncollected Goods Act 1996* provides for the disposal of abandoned goods.

Clause 283 — Return of things seized but not forfeited

If something is seized under clause 279 or 280 but not forfeited, 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 or behavioural breach involving the thing has commenced within that 6 months, then at the end of that proceeding and any appeal or review.

If an item is no longer required to be retained as evidence, the Chief Executive must return it immediately to the owner.

Chapter 8 — Criminal matters – discipline at detention places

This chapter provides a framework for responding to behaviour breaches by young detainees in the detention place. The chapter creates a distinction between low-level breaches (minor behaviour breaches) and breaches which are of a persistent or serious nature (behaviour breaches). Minor behaviour breaches may be dealt with through the behaviour management framework and this could lead to the imposition of behaviour management consequences prescribed by the Bill. Behaviour breaches may be dealt with through the discipline process of administrative charging and hearing, leading to the imposition of behaviour management consequences.

The *Human Rights Audit of Quamby Youth Detention Centre* made a number of recommendations in relation to the behaviour management system. The Audit recommended that the behaviour management system should be comprehensively reviewed and given a specific legislative basis to ensure clarity and consistency in implementation. This chapter and chapter 9 give effect to the Government's agreement to this recommendation.

This chapter and chapter 9 also incorporate human rights protections such as those outlined in the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*. The Rules provide 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".

This chapter is modelled on the discipline scheme introduced as part of the *Corrections Management Act 2007*, with appropriate modifications for young detainees.

The provisions in this chapter and chapter 9:

- accord young detainees procedural fairness and natural justice in responding to an alleged behaviour breach;
- allow the behaviour management framework to reinforce positive behaviour in reflection of the age and developmental maturity of young detainees, not only respond to negative, undesirable behaviour;
- allow young detainees to have the assistance of two support persons at critical points of the process;
- require any response to behaviour breaches, including the imposition of behaviour management consequences, to be proportionate to the circumstances of the breach; and
- address human rights requirements that there is separation between criminal proceedings and administrative proceedings.

Part 8.1 — Discipline at detention places – general

Clause 284 — Application – ch 8

This clause states that the chapter applies to behaviour breaches and allegations of behaviour breaches by young detainees.

Clause 285 — Definitions – ch 8

This clause outlines definitions for the chapter including definitions for accused detainee, administrator, allegation report, behaviour management framework, minor behaviour breach, behaviour breach, charge notice, behaviour management consequences, and reporting and investigation procedure.

A definition of support person is also included in this clause. A support person can be chosen by a young detainee for help, support or representation in relation to action under chapters 8 or 9 which is disciplinary in nature. The Chief Executive must consider that the support person is capable of providing some help to the young detainee or is capable of representing their interests.

The Chief Executive must also consider that it is in best interests of the young detainee for the person to be their support person. An example of when the Chief Executive may consider that it is not in a young detainee's best interests for a person to be the young detainee's support person is if the person has previously brought contraband into the detention place.

Examples of support persons are included. Support persons may include a statutory office holder such as the Public Advocate, a lawyer, family members or friends of the young detainee with the Chief Executive's agreement.

The Bill contemplates that a young detainee may want two support persons to assist him or her, such as parents. This is allowed under clauses 299(2), 303(2) and 309(2).

Clause 286 — Meaning of behaviour breach

This clause lists the behaviour that constitutes a behaviour breach under the chapter. It includes behaviour that may also constitute a criminal offence and minor behaviour breaches as defined under clause 286.

Clause 287 — Meaning of minor behaviour breach

This clause provides a definition for minor behaviour breach. A minor behaviour breach is a behaviour breach listed in clause 285 that does not involve a serious risk to the health or safety of a person or security or good order.

Clause 288 — Meaning of privilege

This clause provides that a 'privilege' is any benefit a young detainee may have, material or otherwise, beyond the minimum entitlements set out in chapter 6. In this chapter, loss of privilege can be imposed as an administrative penalty in response to a behaviour breach or minor behaviour breach.

The meaning of privilege is not intended to include using common areas at a detention place for mixing with other young detainees, or participating in activities other than those forming part of a young detainee's case management plan. Freedom of association is a fundamental human right, the application of which is reinforced by section 15 of the *Human Rights Act 2004*.

Clause 289 — Overlapping behaviour breaches and criminal offences

This clause 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 young detainee if the young detainee has been convicted of a criminal offence relating to the same behaviour, incident or act;
- if a criminal prosecution acquits a young detainee on a criminal charge, a disciplinary process may begin or continue for the same behaviour, incident or act.

This clause is not intended to limit the discretion to separately deal with several behaviour breaches that are committed during a single incident (for example if a young detainee is alleged to have been disrespectful towards someone, break a window and physically assault a person within a 10 minute period). For example, the behaviour breaches of being disrespectful and breaking a window may be dealt with under the behaviour management framework, while the assault of a person may be referred to the police or the Director of Public Prosecutions.

Part 8.2 — Responding to behaviour breaches

This part sets out the powers and functions of persons involved in the discipline process. There are three primary roles – the youth detention officer who reports an alleged breach, the authorised or appointed person who investigates the breach, and the administrator who makes a disciplinary charge.

At each stage in the process, the authorised persons 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 undertaken by different persons.

Clause 290 — Who is an investigator?

This clause provides 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 or undertaken by a person appointed under 291.

Clause 291 — Appointment of investigators

This 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 292 — Report etc by youth detention officer

This clause 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 behaviour breach to an investigating officer (to be called an allegation report).

The clause requires an allegation report to be made in accordance with the reporting and investigation procedures, outlined at clause 293.

Clause 293 — Reporting and investigation procedures

This clause requires the Chief Executive to make reporting and investigation procedures for the making, recording and investigating of allegation reports by way of notifiable instrument.

This clause sets out what the procedures must provide for at a minimum. This includes:
- that allegation reports must be in writing and given to an administrator;
- in relation to any one breach, the tasks of reporter, investigator or administrator must be done by different persons;
- that the young detainee must be given notice about the allegation report in a language and way the young detainee can understand;

- that the young detainee has a right to contact one or two support persons to assist him or her to respond to an alleged behaviour breach. The meaning of a support person is set out at clause 285; and
- that a young detainee must be informed of their right to contact one or two support persons for assistance in responding to an alleged behaviour breach.

Clause 294 — Action by administrator

This clause sets out the administrator's powers in response to an allegation report. The administrator means an authorised person to whom the Chief Executive has delegated functions of an administrator under this chapter.

The administrator must consider the allegation report and may arrange for further investigation by an investigator if considered necessary. This investigation must be undertaken in accordance with the reporting and investigation procedures.

After considering the report, the administrator can take the following action which the administrator considers reasonable and proportionate in the circumstances:
- Discuss the behaviour with the young detainee in the form of counselling, warning or reprimanding;
- Deal with the young detainee under the behaviour management framework if it is a minor behaviour breach;
- Charge the young detainee with a breach;
- Refer the matter to the Chief Police Officer or the Director of Public Prosecutions. Any referral of this nature must be in writing and include the allegation report and any other reports about investigations conducted regarding the alleged behaviour breach.

The administrator also has the option of taking no further action in relation to the report.

Sub-clause (5) requires the administrator to review any previous minor behaviour breaches and consequences imposed before deciding what action to take for a minor behaviour breach.

Clause 295 — Disciplinary charge

This clause stipulates the requirements for charging a young detainee with a behaviour breach. The young detainee must be informed in writing of a behaviour breach charge. The administrator must include the behaviour breach charged; a statement of the conduct that gave rise to the charge; the option of accepting the charge and consenting to disciplinary action proposed by the administrator in relation to the charge; and detailing the disciplinary action the administrator considers appropriate to account for the breach.

Part 8.3 — Dealing with minor behaviour breaches

This part sets out the framework for dealing with minor behaviour breaches.

Clause 296 — Behaviour management framework

This clause requires the Chief Executive to establish a behaviour management framework for responding to minor behaviour breaches. The framework will be publicly available by way of notifiable instrument.

This clause sets out what the framework must provide for at a minimum. This includes:
- A framework for ensuring that any behaviour management consequences imposed on a young detainee are reasonable and proportionate to the minor behaviour breach;
- Guidance for how privileges can be withdrawn for minor behaviour breaches; and
- A mechanism for internal review by the Chief Executive, upon the Chief Executive's own initiative or upon request of a young detainee, of decisions to impose behaviour management consequences for minor behaviour breaches. This is to ensure that young detainees who receive behaviour management consequences for minor behaviour breaches have an avenue to seek a review of the decision.

Clause 297 — Behaviour management framework – behaviour management consequences

This clause sets out the maximum administrative penalties (called behaviour management consequences) that may be imposed for a minor behaviour breach under the behaviour management framework.

The maximum behaviour management consequences that may be imposed under the behaviour management framework are proportionately less than could be imposed as behaviour management consequences for a behaviour breach under the disciplinary framework. This reflects that a minor behaviour breach is not as serious or persistent as a behaviour breach and should be dealt with by way of lesser penalty.

The maximum behaviour management consequences are:

- A fine of not more than $25;
- A withdrawal of privileges, for not longer than 6 days;
- A requirement to make an apology to an affected person;
- A requirement to perform extra chores, for not longer than 2 hours;
- Anything prescribed by regulation to be a behaviour management consequence for the behaviour management framework which is reasonable and proportionate to minor behaviour breaches.

In relation to the consequence of a fine, clause 193 provides for the deduction of money from a young detainee's trust account for the purpose of paying a fine.

Privilege is defined in clause 288. Withdrawal of privileges may involve, for example, the loss of radio, television, MP3 players, hobbies and crafts. Withdrawal of privileges could not result in a loss of freedom of association with others in the detention place or a loss of activities contained in a young detainee's case management plan or any other entitlement outlined in clause 140 relating to minimum living conditions. Any minimum living condition in chapter 6 that is not prescribed to be an entitlement can be regarded as a privilege.

The administrator must have regard to the individual characteristics of the young detainee, including age, developmental capacity, rehabilitation needs and any known history, in deciding whether to impose an administrative penalty. 'Any known history' is intended to be construed broadly to encapsulate the personal history of the child or young person which is known to the administrator, for example, any history of abuse or neglect, past behaviour or health needs and risks. The administrator is required to be satisfied that any penalty is reasonable and proportionate to the circumstances and gravity of the behaviour breach.

Clause 298 — Behaviour management framework - limits

This clause includes a new rule to ensure that a young detainee can not indefinitely receive consequences under the behaviour management framework without review which would otherwise be available to the young detainee if the breach was dealt with under the disciplinary process.

The rule is that after a young detainee reaches half the maximum consequence under the discipline framework for fines, withdrawal of privileges or requirements to perform extra chores, then any future minor behaviour breach alleged to have been committed by the young detainee must be dealt with under the discipline framework and not the behaviour management framework.

For example, over a period of 6 months, a young detainee commits 5 minor behaviour breaches and the consequence of each breach is a fine of $25. The young detainee allegedly commits a sixth minor behaviour breach. As the young detainee's consequences for the previous 5 breaches have cumulatively totalled half the maximum consequence for a disciplinary breach (ie. $125), the administrator must not decide to deal with the breach by way of the behaviour management framework.

However, sub-clause (3) clarifies that the administrator may take any other action under clause 294 for a subsequent minor behaviour breach, including counselling, warning,

reprimanding, referring the alleged breach to the Chief Police Officer or Director of Public Prosecutions or charging the young detainee for the behaviour breach. The administrator also retains discretion to take no further action.

Clause 294(5) requires the administrator to review any previous minor behaviour breaches and consequences imposed before deciding what action to take, if any, for a minor behaviour breach.

Part 8.4 — Disciplinary action – behaviour breach charged

Division 8.4.1 — Disciplinary action by administrator

This division provides the young detainee with options to admit to the behaviour breach charged and accept proposed disciplinary action under division 8.4.1 or apply for a review of the charge under division 8.4.2.

Clause 299 — Right to contact support person – disciplinary action by administrator

This clause provides an entitlement for a young detainee to contact one or two support persons if they have been given a charge notice to help the young detainee with having the charge dealt with under this division.

In order for the young detainee to contact a support person or persons, the Chief Executive is obliged to provide access to facilities as soon as practicable, for example, a telephone.

Clause 300 — Behaviour breach admitted by accused detainee

This clause provides the young detainee with the option of admitting to a charge and accepting proposed disciplinary action.

As this is a formal process, the young detainee's decision to admit to a charge and accept the proposed disciplinary action must be written and must be given to the administrator within 48 hours of the young detainee receiving the charge notice.

However, upon written application by the young detainee, the administrator may allow more time than 48 hours if the administrator considers it appropriate in the circumstances.

The administrator is required to put their decision to extend this period in writing and give this notice to the young detainee.

Clause 301 — Disciplinary action by administrator

This clause allows the administrator to take the proposed disciplinary action outlined in the charge notice in any of the following circumstances:

- If the young detainee admits to the charge and accepts the proposed disciplinary action under clause 300; or
- If the young detainee does not elect to admit to the charge or does not apply for a review of the charge under clause 304 within the permitted time. The administrator cannot take disciplinary action if the young detainee has applied for a review of the charge, and the review has not been conducted.

Before taking the disciplinary action outlined in the charge notice, the administrator must form the belief that the young detainee understands the nature of the proposed action to be taken against them.

Division 8.4.2 — Internal review

This division provides an avenue for a young detainee to seek a review a charge.

Clause 302 — Meaning of review officer – div 8.4.2

This clause provides a definition of review officer for this division. A review officer is an authorised person to whom the Chief Executive has delegated the functions of a review officer.

Clause 303 — Right to contact support person – internal review

This clause provides an entitlement for an accused detainee to contact one or two support persons to assist them to apply for a review of the charge. Support person is defined at clause 285.

In order for the young detainee to contact a support person or persons, the Chief Executive is obliged to provide access to facilities as soon as practicable, for example, a telephone. The Chief Executive is also required to provide access to facilities for the young detainee to consult with the support person or persons, for example, a private room.

Clause 304 — Application for internal review

This clause provides that if a young detainee has been notified of a behaviour breach charge, they have up to 48 hours to apply for a review of the charge, after the charge notice is given.

However, upon written application by the young detainee, the administrator may allow more time than 48 hours if the administrator considers it appropriate in the circumstances.

The administrator is required to put their decision to extend this period in writing and give this notice to the young detainee.

Clause 305 — Internal review of charge

This clause obliges the administrator to arrange for a review officer to conduct a review into the behaviour breach. For one incident, the review officer cannot be a person who laid a charge or made an allegation report or investigators report in part 8.2.

The processes in chapter 9 must be used by the review officer to conduct the review with any changes prescribed by regulation.

Clause 306 — Review officer's powers after internal review

This clause empowers the review officer to impose disciplinary action if a review into a charge is complete.

If the charge is proven on the balance of probabilities, then the review officer may impose disciplinary action set out in division 8.4.4. Sub-clause 310(3) provides that the disciplinary action continues during the external reviewer's review of the decision, and only ceases if the external reviewer makes this decision. However, clauses 313(4) and (5) provide a remedy for a young detainee if disciplinary action is taken which is later reduced or set aside by an external reviewer.

The review officer must dismiss the charge if the evidence does not prove the young detainee committed a breach on the balance of probabilities.

The review officer must also dismiss the charge if satisfied that it would be appropriate to do so for other reasons.

The review officer may also refer a matter to the Chief Police Officer or the Director of Public Prosecutions if the review officer believes that the evidence revealed at a review warrants criminal investigation or proceedings.

The young detainee must be informed in writing of the review officer's decision under this clause. The notice must include reasons for the decision; a statement that a young detainee has a right to apply for review of the decision and a statement that the young detainee has a right to contact a support person.

Division 8.4.3 — External review of internal review decisions

This division provides for the creation of a position of external reviewer to review decisions arising out of internal disciplinary reviews.

Clause 307 — Meaning of external reviewer – div 8.4.3

This clause provides a definition for external reviewer. An external reviewer is a Magistrate appointed under clause 308.

Clause 308 — Appointment of external reviewers

This clause requires the Minister to appoint one or more external reviewers by way of notifiable instrument. The external reviewer must be a Magistrate and must consent in writing to the appointment.

Clause 309 — Right to contact support person – external review

This clause provides an entitlement for an accused detainee to contact a support person or persons to assist them to apply for a review of the decision.

Support person is defined at clause 285. In order for the young detainee to contact a support person or persons, the Chief Executive is obliged to provide access to facilities as soon as practicable, for example, a telephone. The Chief Executive is also required to provide access to facilities for the young detainee to consult with the support person or persons, for example, a private room.

Clause 310 — Application for external review

This clause allows a young detainee to apply for a review of a decision under 306(2) that a behaviour breach has been proven.

Sub-clause (2) requires that the application must be made within 7 days after the young detainee is given notice of any disciplinary action by a review officer under clause 306.

Sub-clause (3) provides that the disciplinary action continues during the external reviewer's review of the decision, and only ceases if the external reviewer makes this decision. However, clauses 313(4) and (5) provide a remedy if disciplinary action is taken which is later reduced or set aside by an external reviewer.

Clause 311 — External review of change

This clause empowers an external reviewer to review a disciplinary decision or refuse to review the decision. The external reviewer must use the processes set out in chapter 9 to review a disciplinary decision with any changes prescribed by regulation.

Clause 312 — Refusal to review

This clause specifies that the young detainee and their support person or persons are entitled to written notice of the external reviewer's decision to refuse to review the disciplinary decision. The notice must set out the reasons why the application was refused and that the decision may be reviewed under the *Administrative Decisions (Judicial Review) Act 1989*.

Clause 313 — External reviewer's powers after external review

This clause empowers the external reviewer to confirm the decision; vary the decision; or set aside the decision and make a new decision. The young detainee, the support person or persons for the young detainee and the Chief Executive must be informed in writing of the external reviewer's decision following the review.

The notice must set out the reasons for the decision and that the decision may be reviewed under the *Administrative Decisions (Judicial Review) Act 1989*.

As clause 310(3) does not stay or otherwise affect the taking of disciplinary action pending the external review, sub-clauses (4) and (5) provide a remedy for a young detainee if a successful external review reduces or sets aside the behaviour management consequences imposed. Sub-clause (4) provides that if the external reviewer's decision reduces or sets aside a fine, the Chief Executive must credit the amount deducted to the young detainee's trust account. For any other behaviour management consequence, the Chief Executive must take steps to provide a reasonable and commensurate remedy, in consultation with the young detainee. For example, if a consequence of 10 hours extra chores is reduced by an external reviewer's decision to 5 hours of extra chores, and the young detainee has performed 7 hours of chores under the original decision, then the Chief Executive must consult with the young detainee about a remedy for the extra 2 hours of chores performed. The Chief Executive may consider that a reasonable remedy is an additional privilege, for example, watching a movie.

Division 8.4.4 — Disciplinary action generally

This division provides the action that can be taken if a disciplinary charge is proven. The action includes the imposition of one of more administrative behaviour management consequences.

The note at clause 319 removes doubt that records must be kept by the Chief Executive under the *Territory Records Act 2002* of disciplinary action taken against young detainees.

Clause 314 — Application – div 8.4.4

This clause sets out the application of division 8.4.4. It applies to a young detainee against whom disciplinary action can be taken under the part.

Clause 315 — Meaning of relevant presiding officer – div 8.4.4

This clause sets out the meaning for relevant presiding officer for the division. The relevant presiding officer could be an administrator acting under division 8.4.1 or a review officer acting under division 8.4.2 or an external reviewer acting under division 8.4.3.

Clause 316 — Disciplinary action by relevant presiding officer

This clause provides that any officer who has the authority to impose disciplinary action (as outlined at clause 315) 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 the imposition of a behaviour management consequence, the officer may simply warn or reprimand the young detainee by way of (1)(a) and (b).

The relevant review officer must have regard to the individual characteristics of the young detainee, including age, developmental capacity, rehabilitation needs and any known history, in deciding whether to impose a behaviour management consequence. 'Any known history' is intended to be construed broadly to encapsulate the personal history of the child or young person which is known to the presiding officer, for example, any history of abuse or neglect, past behaviour or health needs and risks. The presiding officer must be satisfied that any behaviour management consequence is reasonable and proportionate to the circumstances and gravity of the behaviour breach.

Clause 317 — Disciplinary action – behaviour management consequences

This clause sets out administrative penalties (called behaviour management consequences) that may be imposed against a young detainee for a behaviour breach that is proven or admitted to by the young detainee. These behaviour management consequences are:

- A fine not exceeding $250;
- A withdrawal of privileges not exceeding 60 days;
- A requirement to make an apology to an affected person;
- A requirement to perform extra chores not exceeding 20 hours;
- Anything prescribed by regulation to be a behaviour management consequence and that is reasonable and proportionate to behaviour breaches.

The maximum fine that can be imposed is $250 as the majority of young 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 60 days.

A 'privilege' is defined in clause 288 as any benefit a young detainee may have, material or otherwise, beyond the minimum entitlements set out in chapter 6. Withdrawal of privileges may involve, for example, the loss of radio, television, MP3 players, hobbies and crafts. Withdrawal of privileges could not result in a loss of freedom of association with others in the detention place or a loss of activities contained in a young detainee's case management plan. Any minimum living condition in chapter 6 that is not prescribed to be an entitlement can be regarded as a privilege.

Clause 318 — Maximum behaviour management consequences

This clause sets a limit on the maximum behaviour management consequences that can be imposed for one incident. If the same conduct leads to two or more charges being proven, the officer imposing a penalty cannot impose a penalty beyond the maximum that can be imposed for one breach.

Clause 319 — Privileges and entitlements – impact of discipline

This clause ensures that disciplinary action does not affect any minimum living condition set out in chapter 6.

A 'privilege' is defined in clause 288 as any benefit a young detainee may have, material or otherwise, beyond the minimum entitlements set out in chapter 6.

Chapter 6 draws a line between the minimum conditions that are regarded as entitlements and conditions that may be considered to be privileges. The note to part 6.5 explains that any withdrawal of privileges as a consequence of behaviour management or disciplinary action does not affect any entitlement set out under chapter six. Conversely, any condition in chapter 6 that is not prescribed to be an entitlement can be regarded as a privilege, which may be affected by action taken under this chapter or chapter 9.

Chapter 9 — Criminal matters—conduct of disciplinary reviews

This chapter outlines procedures for the conduct of disciplinary reviews. The procedures incorporate procedural fairness, namely the right to a fair hearing, the right to an unbiased hearing and a decision based on logically probative material.

Chapter 9 intends to provide for a procedure that is fair and prompt.

Part 9.1 — Conduct of disciplinary review – general

While the process in chapter 9 is envisaged to be used predominantly for disciplinary purposes, the process is also suitable for reviews and hearings conducted to review other prescribed decisions in this Bill. External review of certain segregation directions in chapter 6 also uses the review and hearing procedures in this chapter (see clause 219).

Clause 320 — Application—ch 9

This clause clarifies that the chapter applies to reviews mentioned in the divisions listed. The note explains that the chapter also applies to reviews of segregation directions under clause 219.

Clause 321 — Definitions—ch 9

This clause provides an abbreviated definition of decision-makers in the disciplinary process who can impose sanctions. The definition labels any review officer or external reviewer as the 'review officer'.

Part 9.2 — Disciplinary review procedures

Clause 322 — Nature of disciplinary reviews

Sub-clause (1) explicitly stipulates that disciplinary reviews are administrative procedures.

Sub-clause (2)(a) affirms that the common law principle of natural justice applies.

Sub-clause (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, sub-clause (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.

Sub-clause (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 323 — Notice of disciplinary review etc

This clause requires that a review officer notify a young detainee of a review. The young 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 8.4.1.

Sub-clause (2) lists the matters that must be in the notice.

Sub-clause (3) enables the young detainee to make submissions to the review officer for the review in any form acceptable to the review officer. The young detainee is entitled to receive assistance from one or two support persons for this purpose under sub-clause (5).

Sub-clause (4) creates an entitlement for the young detainee to assistance from the Chief Executive to put the submission in a form acceptable to the review officer. This does not necessarily have to be in writing. The Chief Executive must inform the young detainee of this entitlement.

Sub-clause (6) obliges the review officer to consider submissions made by the young detainee prior to any deadline set in the notice of the review.

Clause 324 — Conduct of disciplinary reviews

This clause allows reviews to be conducted prudently and expediently. The provision enables the procedure to be exercised in a manner commensurate to the circumstances.

Sub-clause (2) enables the review officer to hold a hearing. Sub-clause (3) requires the procedure in part 9.3 to be used for hearings. In some cases a hearing may be unnecessary if, for example, the young detainee makes a submission to the effect that they concede the breach.

Sub-clause (4) stipulates that reviews are not open to the public. However, this is subject to clause 330(5) which empowers the review officer to allow a youth detention officer or anyone else to be present and to be heard at a hearing. Examples of people who may be allowed to be present include a support person, a person with parental responsibility and another young detainee.

Sub-clause (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 323 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 young detainee had no opportunity to make submissions, this would be a matter of substance and the decision may be invalid.

Clause 325 — Review officer may require official reports

This clause authorises the review 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 326 — Review officer may require information and documents

This clause authorises the review officer to seek information from people with a relevant connection to the alleged disciplinary breach being decided.

The clause enables the review officer to ask for particular information or particular documents.

Sub-clause (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 this clause does not override a person's privilege against self-incrimination nor exposure to civil penalty. The clause also retains client legal privilege.

Clause 327 — Possession of review documents etc

This clause enables the review officer to have possession of documents, or other things obtained, for the duration of the review. However, the review officer may return the documents, or other things, prior to the completion of the review.

Clause 328 — Record of review

The review officer is obliged to keep a record of the review proceedings.

Part 9.3 — Disciplinary hearing procedures

Clause 329 — Notice of disciplinary hearing

This clause requires the review officer to notify the accused young detainee and the Chief Executive, if the review officer is not the Chief Executive, of a hearing. The young detainee should already be informed of charges laid.

Sub-clause (2) stipulates that the notice must say when and where the hearing will take place and state the young detainee's rights and obligations in clauses 330 and 331.

Sub-clause (3) clarifies that the hearing must, if practicable, be held at the detention place. It is intended that most hearings will be held at the detention place unless special and exceptional circumstances arise which make this impractical.

Clause 330 — Review officer's powers at review

Sub-clause (1) authorises the review officer to direct witnesses to attend the hearing to answer questions or produce relevant documents or things for the hearing.

Sub-clause (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 review officer.

Sub-clause (3) provides the review officer with explicit authority to require an accused young detainee or a witness to answer questions, produce documents, or produce other things.

Sub-clause (4) enables the review officer to disallow questions that are unfair, prejudicial, vexatious or are an attempt to abuse the review procedure.

Sub-clause (5) gives the review officer the power to allow a youth detention officer and other people to be heard at a hearing.

The power in this clause does not override a person's privilege against self-incrimination nor exposure to civil penalty. The clause also retains client legal privilege (see note to *Legislation Act 2001*, section 170 and 171).

Clause 331 — Rights of accused detainee at disciplinary hearing

Sub-clause (1) entitles the young detainee accused of breaching discipline to be present at the hearing.

Sub-clause (2)(a) establishes a young detainee's right to be heard, to examine witnesses, to cross-examine witnesses and to make submissions to a review.

Sub-clause (2)(b) establishes that a young detainee has a right to a support person or lawyer at a disciplinary hearing who may make submissions on their behalf.

Clause 332 — Exclusion of accused detainee from hearing

This clause empowers the review officer, by written order, to exclude a young detainee from a hearing if the young detainee interrupts, interferes with or obstructs the hearing or contravenes a direction made by the review officer about the conduct of the hearing, without reasonable excuse.

Clause 333 — Hearing in accused detainee's absence

This clause clarifies that the young detainee's presence is not inherently required for the review officer to determine if a charge is proven. However, this does not set aside the review officer's obligation to see that natural justice is applied. The review officer should consider why the young detainee failed to attend and consider whether making a decision in the young detainee's absence would not offend natural justice.

For example, if the young detainees refuse to attend, the young detainee may have waived their right to question witnesses etc. However, if the young detainee was physically unable to attend due to circumstances out of the young detainee's control, the review officer may consider whether a hearing should be re-convened.

Clause 334 — Appearance at disciplinary hearing by audiovisual or audio link

This clause 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 review officer.

The clause draws upon relevant provisions of the *Evidence (Miscellaneous Provisions) Act 1991*.

Chapter 10 — Care and protection—general

This chapter includes general matters relating to care and protection such as principles and considerations and overarching concepts.

Section 11(1) of the *Human Rights Act 2004* provides that the family is the natural and basic group unit of society and is entitled to be protected by society. The care and protection principles outlined at clause 349 emphasise that the primary responsibility for providing care and protection for children and young people rests with their parents and family members (clause 349(1)(a)) and support should be given to parents and family members to provide for the care, protection and wellbeing of children and young people (clause 349(1)(b)). However, the care and protection chapters place reasonable limits on this right in circumstances where a child or young person has been abused or neglected or is at risk of abuse or neglect and is in need of some form of protective intervention from the State through reporting, appraising and care and protection orders tailored to meet the child or young person's protective needs. This gives effect to section 11(2) of the *Human Rights Act 2004* which provides that every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

The care and protection chapters include cultural plans and a placement principle for Aboriginal and Torres Strait Islander children and young people at clause 512. This engages the right to equal protection of the law without discrimination, at section 8(3) of the *Human Rights Act 2004*. However it is justifiable under section 28 of the *Human Rights Act 2004*, because the proposed positive discriminatory measures recognise the needs of Aboriginal and Torres Strait Islander children, their families and their communities in the light of their history as Indigenous Australians separated from families[1] and their over-representation in the child protection system.

Part 10.1 — Application of care and protection chapters

This part outlines what the care and protection chapters are in the Bill and sets out rules for ascertaining the age of a child or young person being responded to under the care and protection chapters.

Clause 335 — What are the care and protection chapters?

This clause outlines the meaning of the term 'care and protection chapters'. The care and protection chapters are chapters 10 to 19 inclusive of the Bill which deal with the care and protection continuum from reporting to assessing and responding to abuse and neglect of children and young people at risk.

Clause 336 — Age—proof of age to be sought before action taken

This clause provides for a duty on the Childrens Court, the Chief Executive and a police officer to undertake reasonable inquiries to ascertain the age of a person before dealing with them as a child or young person under the care and protection chapters in the Bill.

Clause 337 — Age—application of care and protection chapters if no proof of age

This clause allows the Childrens Court, Chief Executive and a police officer to deal with a person as a child or young person under the care and protection chapters if the age of the person cannot be established after reasonable inquiries and it reasonably appears to the Court, Chief Executive or police officer that the person is a child or young person.

Clause 338 — Age—care and protection chapters stop applying if person discovered to be adult

This clause provides that any order or agreement under the care and protection chapters lapses if a child or young person has been dealt with as a child or young person by the Childrens Court, the Chief Executive or a police officer and it is established that the person is 18 years or older.

[1] Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, 1997, HREOC.

Clause 339 — Care and protection chapters stop applying when young person becomes adult

This clause provides that the care and protection chapters cease to have effect for people once they turn 18 years. To remove any doubt, the clause provides that it does not operate to require a person detained for an offence or charge to be released by virtue only of the fact that he or she has turned 18 years.

Part 10.2 — Important concepts for care and protection chapters

This part sets out the concepts that apply across the care and protection chapters.

Clause 340 — Definitions—care and protection chapters

This clause includes definitions for the care and protection chapters and the Act.

For the Act, these definitions include abuse, care and protection appraisal, care and protection principles, contact, family group conference, in need of care and protection, neglect and care and protection assessment.

For the care and protection chapters, these definitions include at risk of abuse or neglect, former caregiver, party and significant harm.

A definition of significant harm is introduced in the Bill. It is intended to remove doubt that significant harm may include a single serious event causing significant harm to a child or young person or multiple instances of harm that, when viewed individually, may not amount to significant harm but the cumulative effect of these instances is significant harm to a child or young person.

Clause 341 — What is abuse?

This clause provides the definition of abuse for the Act. Abuse is defined to mean physical abuse, sexual abuse or emotional abuse.

This re-enacts section 151of the 1999 Act, however the definition of emotional abuse has been expanded to incorporate the new definition of psychological abuse at clause 460 which includes exposure to domestic violence.

Clause 342 — What is neglect?

This clause provides the definition of neglect for the Act as a failure to provide a necessity of life that has caused or is causing significant harm to the wellbeing or development of a child or young person. Examples of necessities of life are included. These include such things as food, shelter, clothing and health care treatment.

This re-enacts section 151A of the 1999 Act. Health care treatment has been included as an example of a necessity of life in place of the example of medical care in the 1999 Act. Health care treatment is defined in the dictionary as treatment of an illness, disability, disorder or condition by a health professional.

Clause 343 — When are children and young people at risk of abuse or neglect?

This clause provides the definition of when a child or young person is at risk of abuse or neglect. A child or young person will be at risk of abuse or neglect if there is a significant risk of the abuse or neglect occurring. The standard of proof is the 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.

Risk of abuse or neglect includes circumstances where abuse or neglect has not yet occurred but will probably occur if no action is taken to protect the child. This may include circumstances where past evidence relating to other children within the family indicates risk to the subject child. It also includes circumstances where a child or young person is abandoned, or where action or inaction of a person with parental responsibility or another person exposes the child or young person to significant risk of abuse or neglect by others.

Examples are included to highlight circumstances in which a child or young person is at risk of abuse or neglect. This re-enacts section 151B of the 1999 Act.

Clause 344 — When are children and young people in need of care and protection?

This clause outlines the circumstances in which a child or young person is considered to be in need of care and protection. The Childrens Court must find that a child or young person is in need of care and protection before making a care and protection order in relation to the child or young person (see clause 463(5)).

There are two aspects to the test to be satisfied to show that a child or young person is in need of care and protection. Firstly, the child or young person must have experienced abuse or neglect in the past or must be currently experiencing abuse or neglect or must be at risk of abuse or neglect. At risk of abuse or neglect is defined in clause 343.

Secondly, the child or young person must not have a person with parental responsibility for them willing and able to protect them from the abuse or neglect or the risk of abuse or neglect. If a child or young person's protection can be achieved by a person or persons with parental responsibility (possibly with some help and support), then the child or young person will not be in need of care and protection. This is intended to limit the circumstances in which statutory child protection services can intervene within a family.

In addition to the test outlined above, sub-clause (2) provides that a child or young person can also be in need of care and protection in the following circumstances:

- If there is serious or ongoing conflict between the child or young person and the people with parental responsibility for him or her, that has resulted or could result in the child or young person's care arrangements breaking down or being significantly disrupted; or
- If the people with parental responsibility for the child or young person are deceased, or have abandoned the child or young person or are not able to be located after reasonable inquiry; or
- If the child or young person is being sexually or financially exploited and persons with parental responsibility for the child or young person cannot prevent it from happening or cause it to happen.

Clause 345 — Incident need not have happened in ACT

This clause allows for the event amounting to a child or young person being in need of care and protection to be one which occurs outside the Territory.

This clause varies the critical nexus in clause 6 which provides that functions under the Act can be exercised in relation to children and young people who ordinarily live in, or are present in, the Territory or who are subject to an event occurring in the Territory which leads to a voluntary or mandatory report about their care and protection.

Clause 346 — Who is a former caregiver?

For the care and protection chapters, a former caregiver is defined in this clause.

Where parental responsibility has shifted as a result of the operation of the Act (for example, by Court order or the taking of emergency action), the former caregiver is the person who was providing care for the child or young person prior to that shift. Where a voluntary care agreement is to be entered into (see Part 12.3), the former caregiver is the person caring for the child or young person at the time the agreement is being proposed. The term is not intended to include a person such as a baby-sitter or day carer.

This re-enacts section 153 of the 1999 Act.

Clause 347 — What is contact with a person?

This clause provides a definition of contact for the Act. Contact describes the direct or indirect interaction that a child or young person may have with other people.

It is a principle of the care and protection chapters that if a child or young person does not live with his or her family because of the operation of the Act, contact with the child or young person's family members and significant people must be supported where it is appropriate and practicable (see clause 349(1)(c)). For a child or young person who is, or is proposed to be, subject to a care and protection order or interim care and protection order, a care plan prepared by the Chief Executive may include contact arrangements for the child or young person with family members and significant people as appropriate (see clause 454(b)(v)).

Part 14.8 of the Bill addresses contact provisions in care and protection orders. A contact provision in a care and protection outlines who may have contact with the child or young person, and where it is not in the child or young person's best interests, who must not have contact with the child or young person. Clause 485 creates a rebuttable presumption when an application is made for a contact provision in a care and protection order that is in the best interests of the child or young person for the child or young person to have contact with a person with parental responsibility for the child or young person or his or her siblings. The Bill also requires contact to be facilitated for a child or young person in certain circumstances, for example, after the taking of emergency action (see clause 411).

Part 10.3 — Principles and considerations for care and protection chapters

This part sets out the principles and considerations that apply across the care and protections chapters (chapters 10 – 19).

Clause 348 — What is in best interests of child or young person?

Clause 8 in Chapter 1 outlines that the best interests of a child or young person are the paramount consideration for decisions being made under the care and protection chapters. 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.

These matters include a greater emphasis on:

- stability for children and young people in out of home care through early decision-making for a safe, supportive and stable placement; and
- protecting and promoting the cultural and spiritual identity of Aboriginal or Torres Strait Islander children and young people through connections to family and community.

The list of matters that a decision maker can take into account to determine what is in a child or young person's best interests for the care and protection chapters is not exhaustive. Decision-makers may take into account other relevant information in order to determine what is in a child or young person's best interests.

This clause re-enacts and expands section 13 of the 1999 Act for the care and protection chapters.

Clause 349 — Care and protection principles

This clause outlines care and protection principles. These principles were contained in the general principles at section 12 of the 1999 Act and are relocated to this chapter as they specifically relate to care and protection matters.

A new principle has been included to emphasise that the safety and wellbeing of children and young people who have been removed from their parents is paramount over the interests of their parents. This principle seeks to balance the right of the child or young person to protection at section 11(2) of the *Human Rights Act 2004* with the interests of parents and the right to protection of the family at section 11(1) of the *Human Rights Act 2004*.

The principles in this clause are to guide all decisions and actions made or taken under the Act, whether by the Chief Executive, Courts or otherwise.

Clause 350 — Helping families understand care and protection procedures

This clause provides that, for any decision under the care and protection chapters, the decision-maker must strive to ensure that the child or young person or their legal representative and people with parental responsibility for them 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 applies to all decisions made about a child by all decision makers in the care and protection chapters, including Courts. It embodies the requirement in Article 9 of the *Convention on the Rights of the Child* that all interested parties shall be given an opportunity to participate in care and protection proceedings and make their views known.

This clause re-enacts section 155A of the Act. This principle was introduced to guide decision-makers regarding consultation with, and participation of, children and young people and people with parental responsibility in care and protection decision-making under the Act.

Clause 351 — Views and wishes of children and young people

This clause contains a new principle for decision-makers making a decision under the care and protection chapters.

The clause is broadly modelled on sections 60CD and 60CE of the *Family Law Act 1975* and is intended to deal with how decision-makers inform themselves of views expressed by children and young people.

This clause requires decision-makers to give a child or young person a reasonable opportunity to convey their views and wishes directly to the decision-maker except in circumstances where the decision-maker is satisfied that the child or young person does not have sufficient developmental capacity to express his or her views or wishes. The term 'developmental capacity' is intended to broadly cover a child's capacity to make decisions or put their views across that may be limited because of their age or stage of development, or a developmental delay, or a disability.

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.

This clause does not allow a decision-maker to compel a child or young person to express their views or wishes.

This clause upholds children and young people's right to participate, which is recognised in numerous articles of the *Convention on the Rights of the Child*:

> "Article 9. (2) In any proceedings pursuant to paragraph 1 [which speaks to the separation of a child from their parents] of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
>
> Article 12. (1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13. (1.) The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice".

Chapter 11 — Care and Protection – reporting, investigating and appraising abuse and neglect

This chapter outlines the reporting and assessing of suspected abuse and neglect of children and young people.

This chapter addresses key recommendations of the 2004, *The Territory as Parent: Review of the Safety of Children in Care in the ACT and of ACT Child Protection Management* (The Vardon Report) and *The Territory's Children: Ensuring safety and quality care for children and young people: Report on the Audit and Case Review* (The Murray Report).

These reports both recommended that section 161(3) of the 1999 Act be amended so as to ensure that the Chief Executive must act in relation to a report made under sections 158 [voluntary reports] or 159 [mandatory reports] of the 1999 Act in relation to a child or young person for whom the Chief Executive has parental responsibility.

These recommendations are addressed at clauses 359 and 360 which introduce a requirement for the Chief Executive to undertake an initial assessment of matters raised in child concern reports to assess whether the child or young person may be in need of care and protection. These clauses also enhance the capacity of the Chief Executive to make better decisions about the level of risk to children and young people and take the most appropriate action in response to the assessed level of risk.

Part 11.1 — Care and protection—reporting abuse and neglect

Division 11.1.1 — Definitions

This division sets out definitions of care and protection terms for the Act.

Clause 352 — Definitions—Act

This clause defines certain care and protection terms for the purposes of the Act, including voluntary report, mandatory report, child concern report and prenatal report. This chapter introduces new concepts of a child concern report (which includes both mandatory and voluntary reports) and a child protection report (where the Chief Executive suspects a child or young person is in need of care and protection and deems that a child concern report should be treated as a child protection report).

Division 11.1.2 — Reporting abuse and neglect of children and young people

This division relates to reporting of abuse and neglect of children and young people.

This division seeks to create a differential response to reports received by the Chief Executive about abuse and neglect of children and young people. It differentiates between all reports received (child concern reports) and those reports where the Chief Executive suspects the child or young person may be in need of care and protection (child protection reports).

Clause 353 — Voluntary reporting of abuse and neglect

This clause allows for any person (whether in or outside the Territory) to report to the Chief Executive their reasonable belief or suspicion about a child or young person being abused or neglected or being at risk of abuse or neglect.

This re-enacts section 158 of the 1999 Act, however, the threshold is changed from reporting that a child or young person is in need of care and protection to reporting a belief or suspicion about the child or young person being abused, neglected or being at risk of abuse or neglect. This change arose from concerns that generally reporters could not reasonably know whether there is a person with parental responsibility who is willing and able to protect the child or young person, which is necessary to establish whether a child or young person is in need of care and protection.

Clause 354 — Offence—false or misleading voluntary report

Section 354 of the Bill includes an offence to make a false or misleading voluntary report. In order for the offence to be proved, the prosecution must show that the information or allegations provided in the report are false or misleading in a material respect. Information or an allegation provided in a report can be taken to be false or misleading if it is shown that the person knowingly omitted anything in their report without which makes anything they have stated false or misleading. The false or misleading information or allegation can be made orally, in a document, or in any other way.

The use of the words "in a material particular" is intended to act as a limitation to prevent prosecutions where a false or misleading allegation or fact is trivial or of little consequence. Ultimately, however, the question of whether the information or allegation is false or misleading in a material particular is a question to be resolved by the trier of fact.

The key fault element for the offence is knowledge, which is defined in section 19 of the *Criminal Code 2002*. To prove the offence, the prosecution will need to show that the defendant knew that the information or allegation was false or misleading in a material particular, or if the person omitted to say something without which the report is false or misleading in a material particular, that the person knew that omission would make the report false or misleading.

Clause 355 — Offence—mandatory reporting of abuse

This clause requires certain people listed in sub-clause (2) (called mandated reporters) to report to the Chief Executive their reasonable work-related belief of sexual abuse or non-accidental physical injury to a child or young person.

Sub-clauses (2)(a),(b),(c),(d) and (e) rely on definitions of doctor, dentist, nurse, enrolled nurse and midwife in the *Legislation Act 2001*, where:

> ***doctor***—
> (a) means a person unconditionally registered as a medical practitioner under the Health Professionals Act 2004; and
> (b) for an activity, includes a person conditionally registered as a medical practitioner under the Health Professionals Act 2004 to the extent that the person is allowed to do the activity under the person's conditional registration.
>
> ***dentist—***
> (a) means a person unconditionally registered as a dentist under the Health Professionals Act 2004; and
> (b) for an activity, includes a person conditionally registered as a dentist under the Health Professionals Act 2004 to the extent that the person is allowed to do the activity under the person's conditional registration.
>
> ***nurse—***
> (a) means a person unconditionally registered as a nurse under the *Health Professionals Act 2004*; and
> (b) for an activity, includes a person conditionally registered as a nurse under the *Health Professionals Act 2004* to the extent that the person is allowed to do the activity under the person's conditional registration; but (c) does not include an enrolled nurse.
>
> ***enrolled nurse***—
> (a) means a person unconditionally enrolled as a nurse under the *Health Professionals Act 2004*; and
> (b) for an activity, includes a person conditionally enrolled as a nurse under the *Health Professionals Act 2004* to the extent that the person is allowed to do the activity under the person's conditional registration.
>
> ***midwife***—
> (a) means a person unconditionally registered as a midwife under the *Health Professionals Act 2004*; and

(b) for an activity, includes a person conditionally registered as a midwife under the *Health Professionals Act 2004* to the extent that the person is allowed to do the activity under the person's conditional registration.

Sub-clause (2)(f) is new and expands the list of mandated reporters 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*. This is to ensure consistency in mandatory reporting requirements for children and young people in all settings where education is provided to them.

The definitions of person caring for a child at a childcare centre and teacher at sub-clause (2) are also new and clarify that these concepts relate to persons in paid employment and include assistants and aides.

Clause 356 — Mandatory reporting - exceptions

This clause creates an exception to the requirement for mandated reporters to report non-accidental physical injury or sexual abuse of a child or young person under clause 355 and an exception to the requirement for mandated reporters to report non-accidental physical injury of a child or young person under clause 355(1)(c)(ii).

The first exception to the requirement to report non-accidental physical injury or sexual abuse of a child or young person under clause 355 is if the mandated reporter reasonably believes that another person has made a report to the Chief Executive about the same child or young person and the same abuse or injury. For example, a doctor in a hospital would not be required to report sexual abuse of a child if the doctor is aware that a nurse has reported the same abuse about the same child to the Chief Executive. This re-enacts section 159(3) of the 1999 Act.

The second exception to the requirement to report non-accidental physical injury of a child or young person under clause 355(1)(c)(ii) is if the mandated reporter reasonably believes that the child or young person has experienced, or is experiencing, non-accidental physical injury caused by another child or young person and the subject child or young person has a person with parental responsibility who is willing and able to protect them from further injury. This is a new exception to the requirement to report. It is intended to narrow the grounds for reporting non-accidental physical injury to the Chief Executive in circumstances where the child or young person has received a non-accidental physical injury from another child or young person (for example, in a playground incident) and the child or young person will be protected from further injury by a person with parental responsibility.

Clause 357 — Offence—false or misleading mandatory report

This clause includes an offence to make a false or misleading mandatory report. In order for the offence to be proved, the prosecution must show that the information or allegations provided in the report are false or misleading in a material respect. Information or an allegation provided in a report can be taken to be false or misleading if it is shown that the person knowingly omitted anything in their report without which makes anything they have stated false or misleading. The false or misleading information or allegation can be made orally, in a document, or in any other way.

The use of the words "in a material particular" is intended to act as a limitation to prevent prosecutions where a false or misleading allegation or fact is trivial or of little consequence. Ultimately, however, the question of whether the information or allegation is false or misleading in a material particular is a question to be resolved by the trier of fact.

The key fault element for the offence is knowledge, which is defined in section 19 of the *Criminal Code 2002*. To prove the offence, the prosecution will need to show that the defendant knew that the information or allegation was false or misleading in a material particular, or if the person omitted to say something without which the report is false or misleading in a material particular, that the person knew that omission would make the report false or misleading.

Clause 358 — Reports made to Public Advocate

This clause addresses the circumstance of a person who reasonably suspects or believes that a child is being abused, neglected or is at risk of abuse and neglect and reports that information to the Public Advocate. The Public Advocate is required to forward that information to the Chief Executive. This clause has the effect of treating the information as if it were a voluntary report made to the Chief Executive under clause 353. This re-enacts section 164 the 1999 Act.

However, like clause 353, under the 1999 Act a person could make a report if they believed or suspected a child or young person was *in need of care and protection* however, this has been amended to reporting a belief or suspicion about the child or young person being abused, neglected or being at risk of abuse or neglect. This change is necessary, as generally reporters do not reasonably know whether there is a parent willing and able to protect the child or young person, which is necessary to establish whether a child or young person is in need of care and protection.

Clause 359 — Chief Executive to act on child concern report

This clause addresses key recommendations of the 2004, *The Territory as Parent: Review of the Safety of Children in Care in the ACT and of ACT Child Protection Management* (The Vardon Report) and *The Territory's Children: Ensuring safety and quality care for children and young people: Report on the Audit and Case Review* (The Murray Report). These reports both recommended that section 161(3) of the 1999 Act be amended so as to ensure that the Chief Executive must act in relation to a report made to him or her under section 158 [voluntary reports] or section 159 [mandatory reports] in relation to a child or young person for whom the Chief Executive has parental responsibility.

Sub-clause (2) introduces a requirement for the Chief Executive to undertake an initial assessment of matters raised in the child concern report to assess whether the child or young person may be in need of care and protection. This initial assessment may include an examination of information already held by the Chief Executive in Departmental records, for example, child concern reports received in the past and previous appraisals or assessments. It may also include the use of a risk assessment tool which has been empirically validated to predict risk to children and young people.

The primary purpose of the initial assessment is to determine:

- whether a child concern report warrants statutory intervention and should be treated as a child protection report under clause 360; and
- the most appropriate supports for families where a child or young person may be at a lower risk of abuse or neglect, but the matters are not serious enough to warrant statutory intervention.

This new requirement intends to facilitate better and more informed decisions being made about the level of risk to children and young people.

Sub-clause (4) expands the actions that the Chief Executive can take in response to a report after conducting the initial assessment. The Chief Executive will retain the discretion to determine the most appropriate action following an initial assessment of the report information. Sub-clause (4)(h) allows for no further action to be taken in response to a child concern report. This discretion is necessary in circumstances where the seriousness of the report does not warrant taking action. For example, after conducting the initial assessment the Chief Executive may form the view that the child or young person is not in need of care and protection. In this circumstance, taking no action may be the most appropriate course of action.

The intention of this clause is to:

- enable better decisions to be made about the level of risk to children and young people, through the new provision for a preliminary assessment of matters raised in reports at sub-clause (2)(b);
- respond earlier and more flexibly to families where children are at risk of abuse and neglect by referring the matters raised in a report to a community based service for

appropriate assistance under sub-clause (4)(d) and providing support services for the child or young person and, if appropriate, the child's or young person's family under sub-clause (4)(e);
- provide a balanced approach to the need for support required by parents and families in order to prevent abuse and neglect while at the same time providing a statutory response where a child or young person may be in need of care and protection; and
- allow a more differentiated approach to the concerns that people have about children and young people and encourage a greater sense of responsibility on the part of the broader human services sector to support families and protect children.

Clause 360 — Chief Executive action on child protection report

This clause outlines what action the Chief Executive may take after determining that a child concern report constitutes a child protection report.

Under this clause, the Chief Executive can undertake more intrusive action than is permitted for child concern reports on the basis that the Chief Executive has formed a reasonable suspicion that the child or young person may be in need of care and protection. In addition to the action the Chief Executive may take under clause 359(4) in relation to child concern reports, the Chief Executive can:
- seek information from anyone to decide the most appropriate response;
- enter into a voluntary care agreement;
- carry out a care and protection appraisal under clause 367;
- take emergency action, subject to the criteria outlined in clause 405; or
- apply to the Childrens Court for a care and protection order under clause 423.

The Chief Executive will retain the discretion to determine the most appropriate action in response to the report and may take no further action. Taking no action may be the most appropriate response in circumstances where after taking action (for example, after seeking information from the child's school) in relation to the child protection report, the Chief Executive considers that the child or young person is not in need of care and protection.

Division 11.1.3 — Prenatal reporting of anticipated abuse and neglect

Pre-natal reporting is necessary for the Chief Executive to respond to reports made during a woman's pregnancy that a child who may be born as a result of the pregnancy may be in need of care and protection.

The prenatal 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 prenatal 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 children (who may be born as a result of pregnancy) 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; and

- 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.

This division introduces a power at clause 361 for the Chief Executive to allow the exchange of information before the birth of a child, after a prenatal report is made, without the consent of the pregnant woman if the Chief Executive reasonably suspects that the child may be in need of care and protection after the child is born. It is considered that this limitation on the right to privacy for the pregnant woman is proportionate to the objective served by the provisions in reducing the likelihood of future abuse or neglect of children.

Clause 361 — Prenatal reporting—anticipated abuse and neglect

This clause allows the Chief Executive to receive prenatal reports that a child who may be born as a result of a pregnancy may be in need of care and protection. With the consent of the pregnant woman, the Chief Executive may take any action considered appropriate, for example, arranging a drug and alcohol assessment.

Without the consent of the pregnant woman, the Chief Executive may also give advice to the person who made the report. This may include, for example, information and advice about services in the community that may assist the pregnant woman.

This clause also allows the exchange of information before the birth of a child, after a prenatal report is made, without the consent of the pregnant woman in certain circumstances. In the first instance, the Chief Executive will ask the pregnant woman to consent to the Chief Executive giving prenatal information to a prenatal information sharing entity or asking an information sharing entity for prenatal information. Prenatal information is defined as information that is relevant to the safety, wellbeing and development of a child after the child is born. For example, prenatal information may include information about the pregnant woman's history of drug and alcohol use or mental health issues. Prenatal information sharing entities are outlined at sub-clause (10).

If the pregnant woman does not consent, the clause allows the Chief Executive to give the prenatal information to the information sharing entity, or ask the information sharing entity for the prenatal information, only if the Chief Executive reasonably suspects that the child may be in need of care and protection after the child is born.

The following examples illustrate the circumstances which this clause seeks to address:

- the Chief Executive receives a prenatal report in relation to a pregnant woman with an intellectual disability whose children have been previously removed due to severe neglect. The Chief Executive works with the woman and Public Advocate to seek her informed consent for further action but the woman refuses to give consent. This power would allow the exchange of information between the Public Advocate, previous community based service providers and health services to assess the future risk to the child after its birth and take appropriate action at birth;

- the Chief Executive receives a prenatal report in relation to a pregnant woman who is the subject of frequent domestic violence from the father of her child. The Chief Executive seeks the woman's consent to work with her to address the concern, but she refuses consent on the basis that she is afraid of partner. This clause would allow for the exchange of information between relevant community services, police and the Chief Executive in order to assess the future risk to the child after its birth and develop appropriate intervention plans to be implemented at birth; and

- the Chief Executive receives a prenatal report in relation to a pregnant woman who is a heavy user of illicit drugs and has schizophrenia. The Chief Executive seeks the woman's consent to work with her but she refuses consent. This power would allow for the exchange of information between mental health services, drug and alcohol services and the Chief Executive in order to assess the future risk to the child after its birth.

The power to share information about a pregnant woman engages the right to privacy under the *Human Rights Act 2004*. It is considered, however, that this is a reasonable intrusion on the pregnant woman's right to privacy as sharing the information facilitates a comprehensive assessment of the level of future risk to the child and enables appropriate and least intrusive plans to be developed for the child's future care and protection.

Certain prenatal information sharing entities, outlined at sub-clause (10), rely on definitions set out in the *Legislation Act 2001* as follows:

- administrative unit means an administrative unit for the time being established under the *Public Sector Management Act 1994*, section 13 (1).
- public employee means— (a) a public servant; or (b) a person employed by a Territory instrumentality; or (c) a statutory office-holder or a person employed by a statutory office-holder. The *Legislation Act 2001*, further defines statutory office-holder as a person occupying a position under an Act or statutory instrument (other than a position in the public service).
- Territory authority means a body established under an Act, but does not include a body declared by regulation not to be a Territory authority.
- Territory instrumentality means a corporation that—(a) is established under an Act or statutory instrument, or under the Corporations Act; and (b) is a Territory instrumentality under the *Public Sector Management Act 1994*.

Clause 362 — Offence—false or misleading prenatal report

Section 362 of the Bill includes an offence to make a false or misleading prenatal report. In order for the offence to be proved, the prosecution must show that the information or allegations provided in the report are false or misleading in a material respect. Information or an allegation provided in a report can be taken to be false or misleading if it is shown that the person knowingly omitted anything in their report without which makes anything they have stated false or misleading. The false or misleading information or allegation can be made orally, in a document, or in any other way.

The use of the words "in a material particular" is intended to act as a limitation to prevent prosecutions where a false or misleading allegation or fact is trivial or of little consequence. Ultimately, however, the question of whether the information or allegation is false or misleading in a material particular is a question to be resolved by the trier of fact. The key fault element for the offence is knowledge, which is defined in section 19 of the *Criminal Code 2002*. To prove the offence, the prosecution will need to show that the defendant knew that the information or allegation was false or misleading in a material particular, or if the person omitted to say something without which the report is false or misleading in a material particular, that the person knew that omission would make the report false or misleading.

Clause 363 — How prenatal reports may be used in evidence

This clause addresses the admissibility of prenatal reports.

Sub-clause (2) provides that the report, or evidence of the contents of the report, may be admitted in evidence in any Court proceeding if the report or evidence is given by the reporter, the proceeding is a proceeding under the care and protection chapters for a child who is born as a result of the pregnancy, the proceeding is an appeal from a decision of the Childrens Court made under the care and protection chapters for a child who is born as a result of the pregnancy or the proceeding is in relation to a charge or allegation against a person for how a function under the Act has been exercised.

Clause 364 — Prenatal report information is sensitive information

This clause deems prenatal report information to be sensitive information. Sensitive information is defined in clause 844.

Pre-natal information means information in a prenatal report (or would allow the information to be worked out) or identifies a person who made a prenatal report or allows their identity to be worked out. The intention of this clause is to give prenatal information an appropriate level of

protection to uphold the right to privacy of the pregnant woman and to protect the identity of the reporter.

Part 11.2 — Care and protection—appraisals

This part outlines appraisals and assessments which are utilised to determine whether a child or young person is in need of care and protection.

Division 11.2.1 — Definitions

Clause 365 — What is a care and protection appraisal?

This clause outlines the meaning of a care and protection appraisal. An appraisal is an assessment by the Chief Executive of a child or young person's circumstances undertaken in response to a child protection report.

Appraisal powers include visual examination, interview, information sharing, making enquiries or arranging an assessment (which may be exercised in relation to a child or young person or another person, for example, a parent).

Clause 366 — What is a care and protection assessment?

This clause outlines the meaning of a care and protection assessment.

A care and protection assessment means a medical, dental, social, paediatric, developmental, psychological or psychiatric assessment, examination or test of the child or young person or another person in relation to the child or young person, for example, a parent. It also includes assessment of the parenting capacity of a parent or other person with parental responsibility. This may involve, for example, a social assessment and a psychological assessment of the parent or other person with parental responsibility.

A care and protection assessment may be necessary to provide further information to the Chief Executive or the Childrens Court about a person's capacity to care for or have contact with a child or young person.

A care and protection assessment must be undertaken by an assessor authorised under clause 437.

This clause does not authorise an assessment, examination or test involving surgery and anything else prescribed by regulation for this clause.

Division 11.2.2 — Appraisal with agreement or order

This division outlines when a care and protection appraisal of a child or young person can occur.

Clause 367 — Care and protection appraisal—only with agreement or appraisal order

This clause provides that the Chief Executive may undertake an appraisal in response to a child protection report where it is reasonably suspected that the child or young person may be in need of care and protection.

The Chief Executive may undertake the appraisal in one of three ways:

- under an appraisal order in force which authorises the appraisal; or
- by making reasonable endeavours to seek the agreement of each person with daily care responsibility for the child or young person to the appraisal (unless it is not practicable or not in the best interests of the child or young person to do so) and where the agreement of at least one parent or person with parental responsibility has been obtained; or
- if the Chief Executive reasonably suspects that seeking the agreement of a parent or person with daily care responsibility would place the child or young person at significant risk of abuse or neglect or jeopardise a criminal investigation and the appraisal involves an interview of the child or young person or visual examination.

Clause 368 — Care and protection appraisal—acknowledgement of agreement

This clause sets out obligations on the Chief Executive in seeking a person's agreement for an appraisal. Clause 367(4) allows the person's agreement to be given orally or in writing. In circumstances where agreement is given orally (for example, over the phone), clause 367(6) requires the Chief Executive to keep a written record of that agreement.

Clause 369 — Care and protection appraisal—agreement need not be sought if risk etc

The Chief Executive is not required to seek the agreement of a person who has daily care responsibility for the child or young person prior to interviewing or visually examining the child or young person or sharing information, if seeking the person's agreement would put the child or young person at significant risk of abuse or neglect or jeopardise a concurrent police investigation.

For example, if the Chief Executive receives a report that a child is being sexually abused by their parent who is their sole carer, the Chief Executive would not be required to seek the consent of this parent for an appraisal involving an initial interview of the child as it would place the child at significant risk of further abuse.

These powers are necessary to ensure that a child or young person is adequately protected during the appraisal process. In some circumstances prior knowledge by the parents/persons with parental responsibility of the Chief Executive's action is likely to obstruct the appraisal and result in the child or young person being placed at significant risk of emotional and physical harm, for example, through coercion not to disclose abuse or threats of violence if the child or young person discloses abuse.

It is considered that in these circumstances, the rights of a child to be protected from harm override fundamental legislative principles in regard to the rights of individuals (in this case those of the parents).

Clause 370 — Visual examination etc without agreement

This clause authorises the Chief Executive to visually examine or interview a child or young person for the purpose of appraising a child protection report. Sub-clause (2) provides authority for the Chief Executive to enter a school, health facility or childcare service for this purpose while the child or young person is in one of these settings.

The term 'visually examine' is intended to mean that the Chief Executive will sight the child or young person as the child or young person would appear to a person in the street. This is to assess the child or young person's overall presentation that may show signs of harm, for example, bruising or other physical marks to the child or young person's body. This clause does not authorise the Chief Executive to adjust or remove the child or young person's clothing in order to undertake a visual examination. In circumstances where this is considered necessary, a medical examination would be warranted, with the agreement of a person with daily care responsibility or authorised by an appraisal order.

Sub-clause (3) requires the Chief Executive to inform at least one person with daily care responsibility for the subject child or young person that a visual examination or interview has been carried out. However, in circumstances where the Chief Executive is satisfied that informing that person of the action taken would put the child or young person at significant risk of abuse or neglect or jeopardise a criminal investigation, sub-clause (4) allows this requirement to be displaced.

Sub-clause (5) clarifies that this section does not limit the Chief Executive's capacity to undertake necessary actions to protect the child or young person, including any action authorised in response to a child concern report or child protection report at clauses 359 and 360, emergency action at clause 405, applications to the Childrens Court for a care and protection order at clause 423 or giving information as authorised under part 25.3.

Division 11.2.3 — Appraisal orders

This division introduces appraisal orders. An appraisal order authorises the Chief Executive to undertake an appraisal where voluntary cooperation of a parent or person with parental responsibility for an appraisal cannot be achieved.

These orders are broadly similar to Temporary Assessment orders in Queensland (see *Child Protection Act 1999*, Chapter 2, Part 2).

The order may also include a temporary parental responsibility provision which transfers daily care responsibility for a child or young person to the Chief Executive and authorises entry to premises to find a child or young person. The purpose of the order is to authorise an appraisal and transfer of daily care responsibility 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 division also sets out procedural matters relating to an application for an appraisal order or an application for extension of an appraisal order, including:

- Clause 377 Appraisal orders – application to state grounds;
- Clause 378 Appraisal orders - who must be given application;
- Clause 379 Appraisal orders - Court to consider application promptly.

Clause 371 — What is an appraisal order?

This clause outlines the meaning of an appraisal order. The order authorises the Chief Executive to conduct a care and protection appraisal of a child or young person. This may include a care and protection assessment as outlined at clause 366 of the child or young person or another relevant person, for example, a parent.

An appraisal order may also 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 appraisal order may also include a temporary parental responsibility provision. This provision has the effect of transferring daily care responsibility provision to the Chief Executive for the period of the order.

Clause 372 — What is a temporary parental responsibility provision?

This clause includes the meaning of a temporary parental responsibility provision in an appraisal order. A temporary parental responsibility provision transfers responsibility for daily care of the child or young person to the Chief Executive. This provision may be necessary in circumstances where the child or young person would be at significant risk if they were to remain in their care arrangements during the period of the appraisal order.

This provision also authorises the Chief Executive to enter and search a place to find the child or young person.

Clause 373 — Offence—contravene appraisal order

This clause creates an offence for contravening an appraisal order. A person may contravene an order by engaging in conduct that contravenes a provision of the order or by failing 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.

Clause 374 — Appraisal orders—prevails over care and protection orders

This clause removes doubt that if there is an apparent inconsistency between an appraisal order and a care and protection order, then the appraisal order is taken to override the care and protection order.

For example, an appraisal order with a temporary parental responsibility provision for a child or young person would take precedence over a care and protection order with a supervision provision for the child or young person.

Clause 375 — Appraisal orders—application by Chief Executive

This clause allows the Chief Executive only to apply for an appraisal order for a child or young person. 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 a person with responsibility for day to day matters has not given consent, where necessary, or cannot be found.

Clause 376 — Appraisal orders—urgent applications

An appraisal order is intended to be available in urgent circumstances. This clause provides for the Chief Executive to make an application for an appraisal order by telephone, fax or other electronic means in urgent circumstances.

Sub-clause (2) requires the Chief Executive to give to the following people a copy of the application for the appraisal order in urgent circumstances before the application is heard by the Court: the child or young person, each parent (with daily care or long-term care responsibility), any other person with daily care or long-term care responsibility and the Public Advocate. Clause 700 allows a person to apply for leave to have an application heard ex parte where notice of the application to the persons required to be served would place the child or young person at significant risk of significant harm. Clause 722 allows the Court to make an order dispensing with service of an application under the care and protection chapters.

Clause 377 — Appraisal orders—application to state grounds

This clause requires an application for an appraisal order to address minimum requirements, including the grounds on which the order is sought and a proposal for the child or young person's care during the period of the order if a temporary parental responsibility provision is sought. For example, the Chief Executive may propose that the child or young person is placed in foster care during the period of the appraisal order with a temporary parental responsibility provision.

Clause 378 — Appraisal orders—who must be given application

This clause outlines the persons who must be served with the Chief Executive's application for an appraisal order and when they must be served. The Chief Executive must give a copy of the application for an appraisal order, at a minimum of working day before the application is heard by the Court, to the child or young person, each parent (with daily care or long-term care responsibility), any other person with daily care or long-term care responsibility and the Public Advocate.

This requirement is displaced in circumstances of urgent applications under clause 376 and following the taking of emergency action under part 13.1.

Clause 379 — Appraisal orders—Court to consider application promptly

This clause requires the Childrens Court to hear and decide an application for an appraisal order within 5 working days of the application being filed. The length of an appraisal order under clause 383 is 4 weeks. The requirement for the Childrens Court to hear and decide an application for an appraisal order within 5 working days is necessary to ensure that the application is finalised quickly in order to expedite the appraisal of the child or young person's circumstances and avoid delay in the best interests of the child or young person.

Clause 380 — Appraisal orders—no interim orders

This clause prohibits the Childrens Court from making an interim appraisal order. This is because appraisal orders are intended to be available quickly and in an uncomplicated manner for a one-off appraisal.

Clause 381 — Appraisal orders—criteria for making

This clause outlines the criteria for making an appraisal order. In order to make an appraisal order, the Childrens Court must be satisfied that a parent or person with daily care responsibility who is required to agree but does not agree to the appraisal and a care and protection appraisal is needed to assess whether the child or young person is in need of care and protection.

Clause 382 — Appraisal orders—different provisions and requirements

This clause enables the Childrens Court, upon application or on its own initiative to include a temporary parental responsibility provision in an appraisal order.

The Court may also include any of the requirements outlined at sub-clause (a) for any person or entity, in relation to the child or young person for whom the appraisal order is about.

Clause 383 — Appraisal orders—length

This clause outlines the length of an appraisal order and a temporary parental responsibility provision in an appraisal order. An appraisal order may be up to 4 weeks in length. A temporary parental responsibility provision in an appraisal order may also be up to 4 weeks in length. The length of the appraisal order and temporary parental responsibility provision may be of different duration.

An appraisal order of a full 4 weeks in duration may be necessary for the Chief Executive to adequately assess the level of risk to a child or young person. This may be because the family circumstances are particularly complex and multiple interviews are necessary for the appraisal to be completed.

Clause 384 — Appraisal orders—extension application

This clause allows the Chief Executive to apply for extension of an appraisal order for a child or young person. Clause 387 allows the appraisal order to be extended up to 8 weeks. An application for extension of an appraisal order must state the grounds for the extension and a proposal for the child or young person's care during the period of the order if extension of a temporary parental responsibility provision is sought.

To make the application, the Chief Executive must reasonably believe that the appraisal cannot be properly carried out unless the order is extended. Often this will be because the necessary assessment has not been able to be undertaken in the original timeframe of the order because of delays in arranging assessment interviews with relevant people, appointments cancelled by persons being assessed or delays in accessing specialist authorised assessors (for example, due to a long waiting list).

Clause 385 — Appraisal orders—who must be given extension application?

This clause outlines the persons who must be served with the Chief Executive's application for extension of an appraisal order and when they must be served. The Chief Executive must give a copy of the application to each party to the proceeding in which the order was made and the Public Advocate.

Clause 386 — Appraisal orders—Court to consider extension application promptly

Sub-clause (1) requires the Court to be satisfied that any adjournment of an application for extension of an appraisal order is appropriate considering the urgency of the application. In the event of an adjournment after initial consideration or otherwise, sub-clause (2) requires the Childrens Court to hear and decide an application for extension of an appraisal order within 5 working days of the application being filed.

Sub-clause (3) has the effect of continuing any appraisal order in force when an application for extension of an appraisal order is filed until the application is finalised by the Childrens Court. This applies regardless of whether the application is heard and decided within the prescribed period of 5 working days after filing.

Clause 387 — Appraisal orders—criteria for extension

This clause outlines the criteria for extending an appraisal order. In some circumstances, the length of the appraisal order will not be sufficient for the Chief Executive to undertake, or facilitate, the necessary assessments forming the appraisal. This clause allows the Childrens Court to extend an appraisal order for a period of up to a maximum of 8 weeks from the date of the original appraisal order.

Chapter 12 — 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 under the Bill between a person or persons with parental responsibility for a child or young person and another person or persons. This occurs through the registration of family group conference agreements and voluntary care agreements.

Family group conferences are outlined in chapter 3 of the Bill. A family group conference is a meeting of family members and significant people for a child or young person that has the purpose of reaching agreement on an aspect of the child or young person's care, protection or wellbeing. Under clause 80(2), a family group conference may be arranged by the Chief Executive if the Chief Executive reasonably believes a child or young person is in need of care and protection and arrangements should be made to secure the child or young person's care and protection. An agreement arising out of a family group conference convened for this purpose may be registered with the Childrens Court under part 12.2 of this chapter if the agreement has the effect of proposing a shift in parental responsibility for the child or young person (other than to the Chief Executive). Clause 76(2) specifically precludes parental responsibility being shifted to the Chief Executive under a family group conference agreement as the conference aims to facilitate an outcome of an appropriate family member exercising parental responsibility for the child or young person where this is considered necessary and appropriate by conference participants.

A voluntary care agreement is an agreement in writing between the Chief Executive and a person with parental responsibility for a child or young person to share either daily care or long-term care responsibility for the child or young person, or both, for a specified period of time. The child or young person does not need to be in need of care and protection for the Chief Executive to enter into a voluntary care agreement, although there may be care and protection concerns for the child or young person. The Chief Executive must be satisfied of the criteria set out in clause 396 before entering into an agreement. This is to ensure that the agreement is the most appropriate and proportionate response to ensure the child or young person's safety and wellbeing.

Part 12.1 — Definitions

This part sets out definitions of terms used in the Act and the chapter.

Clause 388 — Definitions—ch 12

This clause sets out definitions of terms used in the Act and the chapter including voluntary care agreement, registered and a party.

Part 12.2 — Registration of family group conference agreements that transfer or share parental responsibility

This part contains provisions regarding registration of a family group conference agreement.

Clause 389 — Registered family group conference agreement—application

This clause provides authority for the Chief Executive to apply to the Childrens Court to register a family group conference agreement following a family group conference arranged for a child or young person in need of care and protection if an agreement is reached between the parties that daily care or long-term care responsibility should be transferred to another person or shared with a person.

A family group conference agreement may propose that daily care or long-term care responsibility be transferred or shared between family members or significant people attending the conference. An agreement may not transfer or share parental responsibility for the child or young person with the Chief Executive (see clause 76). This is because the agreement is intended to be limited to family arrangements.

Sub-clause (3) outlines what must accompany the application. This is a copy of the family group conference agreement and a signed statement by each party (excluding the Chief Executive) that the person had an opportunity to get legal advice about the meaning and effect of the agreement.

Sub-clause (4) requires the Chief Executive to serve a copy of the application on the Public Advocate, in line with the requirement for the Public Advocate to be given a copy of applications for orders under the care and protection chapters.

It may be that a family group conference will have been held concerning a child or young person who has been in foster care as a result of a care and protection order for more than two years. If this happens and the participants at the conference agree that the child or young person should remain with his or her foster carers until aged 18, it is also intended by sub-clause (2) that the Chief Executive may apply to the Court for an order to this effect (for example by seeking a variation to an existing final care and protection order) rather than by registering the family group conference agreement.

This clause re-enacts section 175(1),(2),(4) and (5) of the 1999 Act. The restriction on registering an agreement equivalent to an enduring parental responsibility order at section 175(3) of the 1999 Act has been removed on the basis that there may be circumstances where a child or young person will not be able to return to their parents or former caregivers and it is appropriate than a long-term care and protection order which transfers daily care and long-term care responsibility to a person, to be made until the child or young person is 18 years.

Clause 390 — Registered family group conference agreement—registration

This clause allows for the Childrens Court to register or refuse to register a family group conference agreement on application from the Chief Executive. A family group conference agreement must be registered if the Court is satisfied that it could make a care and protection order with equivalent effect. If satisfied it could not make a care and protection order with the same effect, the Court must refuse to register the agreement and notify the Chief Executive of that decision.

An agreement may not transfer to, or share parental responsibility for the child or young person with, the Chief Executive (see clause 76).

Clause 391 — Registered family group conference agreement—notice

This clause requires the Childrens Court to notify the Chief Executive and the Public Advocate when a family group conference agreement is registered. The Chief Executive must then give a copy of that notice to each person invited to attend the family group conference.

This clause re-enacts section 176(3) and (4) of the 1999 Act.

Clause 392 — Registered family group conference agreement—effect and enforcement

This clause outlines the effect of a registered family conference agreement. It has the effect of a care and protection order made by the Childrens Court and can be enforced accordingly.

Under clause 422, it is an offence to contravene a care and protection order.

This clause re-enacts section 177 of the 1999 Act.

Part 12.3 — Voluntary agreement to share parental responsibility with Chief Executive

This part outlines voluntary care agreements.

Clause 393 — What is a voluntary care agreement?

A voluntary care agreement is a written agreement between the Chief Executive and a parent or someone else who has responsibility for daily care or long-term care for a child or young person to share either or both aspects of parental responsibility for the period of the agreement. This re-enacts section 182(1) of the 1999 Act.

A child or young person for whom the Chief Executive has daily care responsibility may be placed with an out-of-home carer under clause 511, for example, under a voluntary care agreement.

The voluntary care agreement may include a binding arrangement whereby people with parental responsibility who are parties to a voluntary care agreement pay, or contribute to, the Chief Executive's costs in looking after a child or young person under the agreement. The contribution must not exceed the amount paid by the Territory for the care of the child or young person and is a debt due and payable to the Territory. This re-enacts section 188 of the 1999 Act.

Clause 394 — Voluntary care agreements—who may initiate?

The making or ending of a voluntary care agreement can be initiated by the Chief Executive, a person with daily care or long-term care responsibility for the child or young person including a parent, or the child or young person (or their representative). This re-enacts section 182(2) of the 1999 Act.

Clause 395 — Voluntary care agreements—who are parties?

This clause establishes that the Chief Executive and persons with parental responsibility who enter the agreement are parties to a voluntary care agreement. The subject child or young person is not a party as such, though may be required to consent to the agreement if they are school leaving age or older - see clause 396(d). Voluntary care agreements made by people with parental responsibility who are under 18 years are valid.

This clause re-enacts sections 181 and 185 of the 1999 Act.

Clause 396 — Voluntary care agreements—Chief Executive's criteria

This clause sets out the matters which the Chief Executive must have regard to before entering into a voluntary care agreement.

Sub-clause (a) requires the Chief Executive to consider whether other forms of assistance would be better options than entering a voluntary care agreement, such as arranging for kinship care or intensive family support.

Sub-clause (b) requires the Chief Executive to be satisfied that a voluntary sharing of responsibility for daily care matters or long-term matters for the child or young person is necessary to ensure the child or young person's wellbeing.

Sub-clause (c) requires the Chief Executive to consider the child or young person's views or wishes if they have sufficient developmental capacity to understand the nature of the proposal that they be temporarily cared for by someone else.

Sub-clause (d) requires the Chief Executive to seek the consent of the young person to the voluntary care agreement if the young person is school leaving age or older (15 years) and has sufficient maturity or developmental capacity to understand and agree to the proposed voluntary care agreement.

Clause 397 — Voluntary care agreements—start day

This clause provides that he Chief Executive's shared responsibility commences on the day the agreement is signed or later as agreed between the parties. This re-enacts section 182(4) of the 1999 Act.

Clause 398 — Voluntary care agreements—length

A voluntary care agreement can be made for up to 6 months for a child or young person under 15 years. A statutory limit of 6 months is placed on an agreement for a child or young person under this age as it would be necessary for the Chief Executive to consider an application for a care and protection order if the child or young person requires care for a period in excess of 6 months to ensure appropriate planning is made to meet the child or young person's protective and developmental needs.

For young people who are school leaving age or older and have sufficient maturity and developmental capacity to understand and agree to the proposed agreement, a voluntary care agreement can be made for longer than 6 months if the young person agrees. This clause re-enacts sections 182(5) and 184 of the 1999 Act.

Clause 399 — Voluntary care agreements—extension

This clause applies to the extension of voluntary agreements that are made for less than 6 months, or longer agreements made with the consent of young people who are school leaving age or older.

Sub-clause (1) enables the parties to extend an agreement if the proposed extension is no longer than 6 months (in each 12 month period). If the agreement is in relation to a young person who is school leaving age or older, the agreement can be extended with the consent of the young person.

Sub-clause (2) requires the Chief Executive to be satisfied of certain matters before agreeing to extend a voluntary care agreement, including whether another form of assistance would be preferable, whether the sharing of responsibility will ensure the child or young person's wellbeing, consideration of the views and wishes of children and young people, and seeking the agreement of a young person who is school leaving age or older.

Sub-clause (3) allows multiple extensions of voluntary care agreements (to the maximum period allowed under clause 399).

This clause re-enacts sections 183 and 184 of the Act.

Clause 400 — Voluntary care agreements—early ending

This clause allows for parties to a voluntary care agreement to terminate the agreement earlier than they first agreed. This can only occur by a party giving written notice to the other parties to the agreement.

This re-enacts section 186 of the 1999 Act.

Clause 401 — Voluntary care agreements—return of children and young people

This clause provides that when a voluntary care agreement ends, the Chief Executive must return the subject child or young person to a former caregiver, or other person as agreed between the parties to the agreement, thereby ending the Chief Executive's shared responsibility. In making a decision to return the child or young person to a person other than a former caregiver, the Chief Executive would need to be satisfied that this is in the best interests of the child or young person.

Sub-clause (4) creates an exception to this requirement if emergency action has been or is being taken or if an application has been made by the Chief Executive for a care and protection order with a parental responsibility provision in favour of the Chief Executive.

Sub-clause (5) requires the Chief Executive's responsibility to cease if the Court refuses to make an order giving the Chief Executive parental responsibility.

This re-enacts section 187 of the 1999 Act, with a key difference which requires the Chief Executive to return the child or young person as soon as practicable after the day the voluntary care agreement ends. For example, if the voluntary care agreement ends on a

Saturday, the Chief Executive must arrange for the return of the child or young person as soon as practicable on the next day, Sunday.

Chapter 13 — Care and protection and therapeutic protection – emergency situations

Part 13.1 — Emergency action

This part outlines when a child or young person is in need of emergency care and protection or emergency therapeutic protection and confers powers on the Chief Executive and police officers to take action to ensure the child or young person's safety in emergency circumstances.

A new concept of a child or young person in need of emergency therapeutic protection is created in this part for the care and protection chapters. It contemplates circumstances where a child or young person would meet the criteria for a therapeutic protection order and the child or young person's safety can only be secured through their immediate placement in a therapeutic protection place (for example, pending the application and making of an interim therapeutic protection order). Emergency action can be taken for a child or young person in need of emergency therapeutic protection. It may only be taken for a child or young person over the age of 10 years in line with the criteria for the making of the order (see clause 548).

The effect of this part is to limit the circumstances where the Chief Executive or a police officer can assume daily care responsibility for a child or young person without an order of a Court to those instances when immediate intervention must occur to protect a child or young person from immediate and significant harm. The Bill includes a statutory time limit of two working days (or until the matter can be brought before the Childrens Court) for the Chief Executive or a police officer to retain daily care responsibility for the child or young person after which the responsibility lapses if an order under the care and protection chapters has not been made by the Childrens Court.

Accordingly, clause 813 in chapter 23 provides authority for a police officer or an authorised person to enter premises at any time without consent of the occupier of the premises or a warrant if the officer reasonably believes that a child or young person at the premises is in need of emergency care and protection or emergency therapeutic protection and the purpose of the entry is to take emergency action for the child or young person. This may include the use of reasonable and necessary force to enter the premises to safeguard the wellbeing of the child or young person. In these circumstances the delay involved in an authorised person or police officer leaving the premises to obtain a warrant would expose the child or young person to a significant risk of harm. The Government considers that the right of a child or young person to be protected from immediate and significant harm overrides the fundamental legislative principle that power to enter premises should be conferred only with a warrant issued by a judicial officer.

Part 13.2 provides a mechanism for judicial oversight immediately after emergency action has been taken. Upon application by an affected person or the Public Advocate, the Childrens Court may, by order, reverse the decision or action of the Chief Executive or a police officer and make an order for the release of the child or young person from the Chief Executive or police officer's daily care responsibility and placement into the care of a person stated in the order.

The Government considers that, in these circumstances, the powers exercised under the Bill are adequately defined and subject to appropriate judicial review and are therefore proportionate under section 28 of the *Human Rights Act 2004*.

Clause 402 — When are children and young people in need of emergency care and protection?

This clause sets out when a child or young person is considered to be in need of emergency care and protection for the care and protection chapters in the Bill. The care and protection chapters are chapters 10 to 19 inclusive of the Bill which deal with the care and protection continuum from reporting to assessing and responding to abuse and neglect of children and young people at risk.

A child or young person is in need of emergency care and protection if the child or young person is in immediate need of care and protection. In need of care and protection is defined in clause 344. This clause provides that a child or young person is in need of care and protection if—

(a) the child or young person—

(i) has been abused or neglected; or

(ii) is being abused or neglected; or

(iii) is at risk of abuse or neglect; and

(b) no-one with parental responsibility for the child or young person is willing and able to protect the child or young person from the abuse or neglect or the risk of abuse or neglect.

A child or young person may also be in need of emergency care and protection if they are likely to be in immediate need of care and protection if emergency action is not taken.

Clause 403 — When are children and young people in need of emergency therapeutic protection?

The 1999 Act authorised the placement of a child or young person in a therapeutic protection place after taking emergency action. This clause introduces a new term of a child or young person who is in need of emergency therapeutic protection. It contemplates circumstances where a child or young person meets the criteria for a therapeutic protection order and the child or young person's safety can only be secured through their immediate placement in a therapeutic protection place (for example, pending the application and making of an interim therapeutic protection order).

A child or young person may only be placed at a therapeutic protection place if the Chief Executive believes on reasonable grounds that the child or young person is in need of emergency therapeutic protection or if an interim or final therapeutic protection order is in force (see clause 530).

Clause 404 — What is emergency action?

This clause sets out the meaning of emergency action for the Act which can be taken by the Chief Executive or a police officer. Emergency action is a form of protective intervention for a child or young person at significant risk which has the effect of transferring daily care responsibility for the subject child or young person to the Chief Executive or a police officer.

Daily care responsibility is outlined at clause 19. A person with daily care responsibility may make decisions about, and have responsibility for, all the facets of a child or young person's daily care. The transfer of parental responsibility as part of emergency action was provided for at sections 224 and 225 of the 1999 Act.

To remove any doubt, this clause specifies that daily care responsibility exercised by the Chief Executive or a police officer includes the authority and responsibility for making decisions about where the child or young person is to reside or temporarily stay. This may involve a decision that the child or young person remain at the location or premises where the child or young person is (for example, a hospital) or a decision to move the child or young person to another place (for example, a kinship or foster placement). It includes the authority for physical movement of the child or young person in the latter circumstance.

Daily care responsibility exercised by the Chief Executive or a police officer also includes the authority and responsibility for making all other decisions associated with or necessary for the child or young person's daily care.

Chapter 23, clause 813 provides authority for a police officer or an authorised person to enter premises at any time without consent of the occupier of the premises or a warrant if the officer reasonably believes that a child or young person at the premises is in need of emergency care and protection or emegrency therapeutic protection and the purpose of the entry is to take emergency action for the child or young person. This may include the use of reasonable and necessary force to enter the premises to safeguard the wellbeing of the child or young person.

Clause 405 — Emergency action—criteria for taking emergency action

This clause empowers the Chief Executive or a police officer to take emergency action for a child or young person who is reasonably believed to be in need of emergency care and protection or emergency therapeutic protection. The circumstances when this is authorised are specifically limited to those where the Chief Executive or a police officer reasonably believes that:

- a child or young person is in immediate need of care and protection or would be in need of emergency care and protection if the officer does not take emergency action; or
- a child or young person meets the criteria for a therapeutic protection order and the child or young person's safety can only be secured through their immediate placement in a therapeutic protection place.

For a child or young person to be in need of care and protection, the child or young person firstly must have experienced abuse or neglect in the past or must be currently experiencing abuse or neglect or must be at risk of abuse or neglect. At risk of abuse or neglect is defined in clause 343. Secondly, the child or young person must not have anyone with parental responsibility willing and able to protect them from abuse or neglect or the risk of abuse or neglect. In addition, the Chief Executive or police officer must reasonably believe the child or young person immediately requires care and protection.

This is an intentionally high threshold to be met before the Chief Executive or a police officer has the requisite authority to assume daily care responsibility for the child or young person without first obtaining a warrant or order of the Court. The Chief Executive or police officer may form the belief that a child or young person is in need of emergency care and protection or emergency therapeutic protection if a person with parental responsibility is completely absent or not able and willing to protect the child or young person for other reasons, for example, incapacity due to drug or alcohol use.

For example, a 9 month old infant is found locked in a car parked in a car park on a hot summer's day. The delay involved in an officer leaving the carpark to seek a warrant or order to authorise action to remove the infant from the car could result in significant harm or death. The officer forms the belief that the child is in need of emergency care and protection and uses force to enter the vehicle and remove the child in order for the child to receive immediate medical treatment.

Sub-clause (2) clarifies that emergency action can be taken under sub-clause (1) irrespective of who the child or young person is in the care, or apparent care, of and includes circumstances where the child or young person is in the care, or apparent care, of a parent or another person who has daily care responsibility for the child or young person.

Clause 406 — Emergency action—assistance

This clause enables the Chief Executive or a police officer to use necessary and reasonable assistance to take emergency action.

For example, the Chief Executive may seek the assistance of police to use force to enter premises to take emergency action.

Clause 407 — Emergency action—certain people must be told

This clause sets out obligations on a police officer and the Chief Executive to inform certain people that emergency action has been taken.

Sub-clause (1)(a) requires a police officer who has taken emergency action to inform the Chief Executive in writing immediately after taking the action of the child or young person's name, why the action was taken and what action was taken. Sub-clause (2) creates an exception to the requirement for this notification to be in writing if it is not practicable. In these circumstances, the police officer may verbally inform the Chief Executive immediately and then put the notification in writing as soon as practicable thereafter.

The act of the police officer informing the Chief Executive that emergency action has been taken for a particular child or young person has the effect of transferring the police officer's daily care responsibility to the Chief Executive under clause 408(3). The police officer is then required to place the child or young person at a place (for example, a therapeutic protection place if the child or young person is in need of emergency therapeutic protection) or with a person advised by the Chief Executive (for example, a foster or kinship carer).

Sub-clause (1)(b) requires a police officer, if practicable, to inform the parents of the child or young person and each other person with parental responsibility of the emergency action being taken.

Sub-clause (3) requires the Chief Executive to notify parents and persons with parental responsibility for the child or young person about the emergency action, if the police officer has not already done so under clause 407(1), as well as notify the Public Advocate and the Childrens Court. A parent who has parental responsibility or another person with daily care responsibility or long-term care responsibility may apply to the Childrens Court for an emergency action release order under part 13.2 for the child or young person's release from the parental responsibility of the Chief Executive or a police officer.

Notification of the Childrens Court is necessary for the Court to be aware that an application for an emergency action release order may be made under part 13.2 by a person affected by the emergency action (for example, the subject child or young person, a parent who has parental responsibility, another person with daily care responsibility or long-term care responsibility or the child or young person's former caregiver) or the Public Advocate. Notification of the Public Advocate provides a mechanism for oversight of the Chief Executive or police officer's decision to take emergency action and is necessary to facilitate the Public Advocate's right to apply to the Childrens Court for an emergency action release order for the child or young person's release from the parental responsibility of the Chief Executive or a police officer.

Clause 408 — Emergency action—daily care responsibility after action

This clause clarifies the legal status of the child or young person following emergency action being taken.

Sub-clause (1) clarifies that, following emergency action being taken for a child or young person by the Chief Executive, the Chief Executive has daily care responsibility. Daily care responsibility is outlined at clause 19 and allows a person with daily care responsibility to make decisions about, and have responsibility for, all the facets of a child or young person's daily care.

Sub-clause (2) clarifies that, following emergency action being taken for a child or young person by a police officer, the police officer has daily care responsibility until the police office tells the Chief Executive about his or her action under clause 407. The effect of the police officer informing the Chief Executive of the emergency action being taken shifts daily care responsibility to the Chief Executive under sub-clause (3). The Chief Executive may authorise the police officer to exercise daily care responsibility for the child or young person under sub-clause (4). This may be necessary, for example, while the Chief Executive makes arrangements for a placement for the child or young person with a kinship or foster carer.

If the Chief Executive makes a direction to the police officer to place the child or young person at a place or with a person under clause 407(1)(c), the police officer must comply with the direction.

Clause 409 — Emergency action—length of daily care responsibility

This clause limits the transfer of daily care responsibility to the Chief Executive or a police officer to an aggregated maximum of two working days following the day on which the action was taken, unless those two working days are separated by a Saturday, a Sunday and a public holiday.

In the latter case, an application for an order under the care and protection chapters must be brought before the Court (if necessary) on the next sitting day of the Court following the day the action was taken. For example if the action is taken on the Thursday before Easter, and the following Friday and Monday are public holidays but the Childrens Court sits on a Saturday, the matter must be brought before the Court on the Saturday. If the Court does not sit on the Saturday, the matter must be brought before the Court on the Tuesday if that is the next sitting day.

If emergency action is taken at 11pm on a Thursday, the two working days are interrupted by a weekend and therefore the matter must be brought before the Court on the next sitting day which is the Friday.

Clause 410 — Care and protection appraisal and placement

This clause enables the Chief Executive to make arrangements for a child or young person whom the Chief Executive has parental responsibility for following emergency action, including arrangements for a care and protection appraisal. A care and protection appraisal is defined at clause 365 and may include the Chief Executive visually examining or interviewing the child or young person, or taking any other action listed under clause 365(b) such as seeking further information. An appraisal is necessary to determine, before the Chief Executive's daily care responsibility lapses under clause 409, whether the child or young person's care and protection can only be secured through an application by the Chief Executive for an order under the care and protection chapters, or whether less intrusive action may secure the child or young person's care and protection, for example, intensive family support.

Sub-clause (b) clarifies that the Chief Executive may make a decision to place the child or young person with a parent (including a parent who was not the primary caregiver for the child or young person before the emergency action was taken), another person with daily care responsibility or long-term care responsibility (for example, a person with parental responsibility under an order of the Family Court of Australia) or a former caregiver of the child or young person (irrespective of whether the former caregiver was providing the care in an informal care arrangement and irrespective of whether the former caregiver has parental responsibility for the child or young person).

Clause 411 — Emergency action—contact with family

Sub-clause (1) requires the Chief Executive or police officer to allow reasonable contact between the child or young person and their family members and significant people as far as practicable. For example, it may not be practicable for the Chief Executive or the police officer to facilitate personal contact for all the child or young person's extended family members and significant people during the period that the Chief Executive or police officer has daily care responsibility before the matter is required to be brought before the Childrens Court under clause 409.

Sub-clause (2) gives the Chief Executive or police officer discretion to limit or stop contact if satisfied that the contact would create a risk of harm to the child or young person. This may be necessary in circumstances where the contact may create a risk to the child's physical safety or emotional wellbeing, either directly or indirectly by the person with whom the child or young person is to have contact.

Clause 412 — Emergency action—application for orders

This clause sets out who an application must be given to by the Chief Executive if the Chief Executive applies for certain orders under the care and protection chapters before the Chief Executive or a police officer's daily care responsibility for the child or young person lapses, according to the statutory timeframe outlined at clause 409.

The Childrens Court is required by sub-clause (3) to give initial consideration to the Chief Executive's application on the day of filing.

The Chief Executive is not required to apply for a care and protection order following emergency action as the circumstances which gave rise to the emergency action being taken may no longer exist, and accordingly the Chief Executive may not suspect or believe the child or young person is in need of care and protection to warrant an application for an order under the care and protection chapters. In these circumstances, clause 414 requires the Chief Executive or a police officer to return the child or young person into the care of one of the persons listed at clause 414(2) at the end of the period outlined in clause 409.

Clause 413 — Emergency action – end of daily care responsibility

This clause clarifies when daily care responsibility for the child or young person ceases to be vested in the Chief Executive or a police officer.

Sub-clause (2)(a) provides that the Chief Executive or police officer no longer has daily care responsibility for the child or young person if, under clause 414(2), the child or young person is returned to a parent who has parental responsibility, another person with daily care or long-term care responsibility or a former caregiver of the child or young person.

Sub-clause (2)(b) provides that the Chief Executive or police officer no longer has daily care responsibility for the child or young person if the Childrens Court makes an order giving daily care responsibility for the child or young person to another person. For example, the Childrens Court makes an interim care and protection order with a parental responsibility provision in favour of a family member.

Clause 414 — Emergency action – return of child or young person

This clause outlines what action must be taken by the Chief Executive or police officer at the end of the statutory timeframe outlined in clause 409 when daily care responsibility for the child or young person lapses without an order being made by the Childrens Court.

For example, if the Chief Executive takes emergency action and does not apply for a care and protection order for the child or young person which is granted, the Chief Executive is required to return the child or young person not later than the end of the period prescribed by clause 409 to one of the persons listed at clause 414(2).

Sub-clause (2) requires the Chief Executive or police officer to return the child or young person into the physical care of a parent who has parental responsibility, another person with daily care or long-term care responsibility or a former caregiver of the child or young person. In making a decision about who to return the child or young person to in these circumstances, the Chief Executive or police officer would need to be satisfied that it is in the best interests of the child or young person to be delivered into their care.

Part 13.2 — Emergency action release orders

This division creates a mechanism for review of emergency action taken by the Chief Executive or a police officer by allowing an affected person or the Public Advocate to apply for an emergency action release order.

An emergency action release order authorises the release of a child or young person, for whom the Chief Executive or a police officer has daily care responsibility following emergency action being taken, into the care of a person stated in the order.

Clause 415 — What is an emergency action release order?

This clause sets out the meaning of an emergency action release order for the Bill. The order authorises the release of a child or young person from the parental responsibility of the Chief Executive or a police officer following emergency action being taken into the care of a person stated in the order.

Clause 416 — Emergency action release order—application

The persons listed in sub-clause (2) may apply to the Childrens Court for an emergency action release order following emergency action being taken by the Chief Executive or a

police officer for the release of the child or young person from the parental responsibility of the Chief Executive or a police officer. These persons are the child or young person, a parent who has parental responsibility, another person with daily care responsibility or long-term care responsibility, the child or young person's former caregiver, or the Public Advocate.

Clause 417 — Emergency action release order—application to state grounds

This clause provides that an application for an emergency action release order must state the grounds for seeking the order, addressing why the person considers the child or young person is no longer in need of emergency care and protection or therapeutic protection.

Clause 418 — Emergency action release order—who must be given application

This clause outlines who must be given an application for an emergency action release order and when it must be given. Due to the short time frame in which an application for an emergency action release order may be heard, this clause requires the applicant to give a copy of the application to the persons listed in (a) to (e) at any reasonable time before it is heard by the Court.

Clause 419 — Emergency action release order—criteria for making

This clause outlines the criteria for the Childrens Court to make an emergency action release order. To make an emergency action release order, the Childrens Court must be satisfied that the child or young person is no longer in need of emergency care and protection or emergency therapeutic protection.

Chapter 14 — Care and protection—care and protection orders

This chapter outlines 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).

Key changes in the Bill from the 1999 Act include:

- Drug use provisions in care and protection orders are introduced in the Bill. These provisions are intended to address a child or young person's protective needs while the child or young person remains in the care of, or having contact with, a parent or primary caregiver whose parenting capacity is impacted by their use of a substance.
- The Bill removes references to short care and protection orders as drafted in the 1999 Act. The review of the Act found that these orders were not commonly used in practice and did not achieve their intended use as a care and protection order that was available in a timely and uncomplicated manner.
- The Bill consolidates all matters related to contact for a child or young person within a contact provision in a care and protection order, including directions that a person not have contact with a child or young person. Such directions prohibiting a person's contact with a child or young person would have been made as specific issues orders under the 1999 Act.
- Similarly, the Bill consolidates all matters related to residence arrangements for a child or young person within a residence provision in a care and protection order, including directions that a person not reside with a child or young person. Such directions prohibiting a person residing with a child or young person would have been made as specific issues orders under the 1999 Act.
- Other types of specific issues orders under the 1999 Act have become provisions within a care and protection order, for example, under the Bill, a mental health tribunal provision directing an assessment of a child or young person's mental health would have been a specific issues order under the 1999 Act. Similarly, a parental responsibility provision under the Bill will address a child or young person's parental responsibility, and not a specific issues order about parental responsibility as would have been made under the 1999 Act.
- The Bill exclusively retains specific issues provisions within care and protection orders for directing a person to do or refrain from doing something directly relevant to a child or young person's care and protection.
- In order to achieve stability for children and young people subject to care and protection orders and minimise the making of multiple short-term orders, the Bill provides guidance to the Childrens Court about the length of parental responsibility provisions within care and protection orders, being options of short-term parental responsibility provisions up to 2 years in duration or long-term parental responsibility provisions until the child or young person turns 18 years. Clause 476 creates a rebuttable presumption that it is in the best interests of a child or young person to become subject to a long term parental responsibility provision after a short term parental responsibility provision in the circumstances outlined in clause 476(2).

The requirements contained in the 1999 Act at Schedule 1 regarding service of care and protection applications and notice of care and protection hearings have been incorporated into this chapter, with some modifications.

Part 14.1 — Preliminary

This part includes definitions for chapter 14 and outlines what a care and protection order is.

Clause 420 — Definitions—ch 14

This clause sets out definitions for chapter 14, including authorised assessor and provisions. The Bill contains references to a care and protection order with different provisions, rather than different care and protection orders as existed under the 1999 Act.

For example, under the Bill, a care and protection order with residence and parental responsibility provisions would have been residence and parental responsibility orders under

the 1999 Act. Another example is a care and protection order with an enduring parental responsibility provision under the Bill which would have been an enduring parental responsibility order under the 1999 Act. There is no intended or actual difference between the meaning of a provision or provisions attached to a care and protection order under the Bill compared to a care and protection order or orders as would have been made under the 1999 Act.

Clause 421 — What is a care and protection order?

This clause sets out the meaning of a care and protection order for the Act. A care and protection order may include provisions such as a short term parental responsibility provision, long-term parental responsibility provision or enduring parental responsibility provision (see part 14.6), residence provision (see part 14.7), contact provision (see part 14.8), drug use provision (see part 14.9), supervision provision (see part 14.10), mental health tribunal provision (see part 14.11) or a specific issues provision (see part 14.12).

Clause 422 — Offence—contravene care and protection order

This clause creates an offence to engage in conduct that contravenes a provision of a care and protection order. This re-enacts an existing offence at section 210(3) of the 1999 Act. The maximum penalty is 100 penalty units, imprisonment for one year or both.

Part 14.2 — Applications 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 that were previously contained in Schedule 1 of the 1999 Act.

Clause 423 — Care and protection order—application by Chief Executive

This clause clarifies that the basis of an application for a care and protection order in this chapter by the Chief Executive is a reasonable belief that a child or young person is in need of care and protection. This re-enacts section 195(1) of the 1999 Act.

Clause 424 — Care and protection order—application by others

This clause enables people other than the Chief Executive to apply for a care and protection order.

A person other than the Chief Executive may apply for a care and protection order if they reasonably believe that the child or young person is in need of care and protection, they have consulted with the Chief Executive about the application and they have the leave of the Childrens Court to make the application. If the person seeks leave, the Childrens Court must hear the applicant and the Chief Executive, and the Court may grant leave to the applicant to make the application. If an application is made, the Chief Executive and the Public Advocate can attend and be heard at proceedings under Schedule 1, Part 1.2, *Court Procedures Act 2004*, section 74C.

Clause 425 — Care and protection order—application must state provisions sought and grounds

This clause outlines what must be in an application for a care and protection order.

The Bill introduces a new requirement for applications for a care and protection order with a parental responsibility provision. These applications must state:

- whether parental responsibility is proposed to be shared or transferred; and
- the persons who are to share parental responsibility for the child or young person; and
- the person or persons to whom parental responsibility is proposed to be transferred for the child or young person.

Clause 426 — Care and protection orders—who must be given application

This clause provides that an application must be served on the listed persons at least 3 working days before the application is heard by the Court. The timeframe for service of

application re-enacts Schedule 1 of the 1999 Act. There is an exception to this requirement if the Chief Executive or police officer has daily care responsibility following the taking of emergency action, in which case clause 412 only requires service of the application before the application is heard by the Childrens Court.

Clause 427 — Care and protection order—cross-application for different provisions

This clause allows a party to a proceeding to cross apply on an application for a care and protection order by the Chief Executive or another person for:

- a different order under the care and protection chapters; or
- a different provision to be included in the order; or
- different terms in a provision in the order.

The applicant must believe on reasonable grounds that the different provision, terms or order are in the best interests of the child or young person. The applicant must also have the leave of the Childrens Court to cross apply. Sub-clause (2) provides that the Childrens Court, in order to give leave, must be satisfied there are reasonable grounds for believing that the different provision, terms or order is in the best interests of the child or young person.

Different orders which may be sought on cross application are any other orders under the care and protection chapters including a therapeutic protection order, appraisal order, DVPO protection order or assessment order. An example of a cross application for a different order would be a cross application by a parent for an assessment order upon the Chief Executive's application for a care and protection order with a drug use provision.

An example of a cross application for a different provision would be a cross application for a supervision provision in a care and protection order upon the Chief Executive's application for a care and protection order with a residence provision.

An example of a cross application for different terms in a provision in the order would be a cross application for a residence provision in favour of the applicant upon application by the Chief Executive for a care and protection order with a residence provision authorising the Chief Executive to decide with whom the child is to reside.

Clause 428 — Care and protection order—cross-application must state provisions sought and grounds

This clause provides that a cross application for a care and protection order must state the proposed provisions, the proposed different terms in the provisions in the order or the proposed different order. The cross application must also include a draft of the different provision, terms or order and why this would be in the best interests of the child or young person.

The Bill introduces a new requirement for a cross application for a care and protection order with a parental responsibility provision. These applications must state:

- whether parental responsibility is proposed to be shared or transferred and state which aspect or aspects are proposed to be shared or transferred; and·
- the persons who are to share parental responsibility for the child or young person; and
- the persons to whom parental responsibility is proposed to be transferred for the child or young person.

Clause 429 — Care and protection order—Court to consider application and cross-application promptly

This clause requires a Magistrate of the Childrens Court to give initial consideration to an application or cross application not later than 5 working days after it is filed.

The Bill introduces a new requirement that initial consideration of an application or cross-application for a care and protection order be made by a Magistrate. This ensures there is judicial oversight of the application from the earliest point in the process and allows for appropriate directions to be issued by the judicial officer about the conduct of the application.

Part 14.3 — Interim care and protection matters

This part deals with action the Childrens Court may take before adjourning an application or cross application for a care and protection order, including Court-ordered meetings, interim care and protection orders, assessment orders and orders that can be made by the Childrens Court under the *Domestic Violence and Protection Orders Act 2001* during care and protection proceedings. This part also addresses care plans which outline proposals for the child or young person's care when they are subject to an interim or final care and protection order.

Division 14.3.1 — General

Clause 430 — Interim matters—Court action before adjournment

This clause outlines action the Childrens Court may take before adjourning an application or cross application for a care and protection order.

Sub-clause (1) requires the Childrens Court, before adjourning the application or cross-application, to identify the matters in dispute, consider the length of the hearing required in the matter and give necessary directions.

Sub-clause (2) allows the Childrens Court to take one or more of the following actions before adjourning an application or cross-application:

- order that a meeting take place to identify or resolve issues in dispute (called a Court-ordered meeting);
- make an assessment order;
- make an interim care and protection order to remain in force during the adjournment period;
- make a DVPO interim protection order;
- extend or revoke any interim care and protection order already in force and/or any provision within the order.

Clause 431 — Interim matters—Court-ordered meeting

This clause outlines who can attend a Court ordered meeting and provides for a person, appointed by the Court, to preside over the meeting. The person appointed must be independent of the parties. Examples include a community based mediator or a registrar of the Court.

Sub-clause (4) provides that the person presiding over the meeting must report the outcome only of the meeting to the Childrens Court, in order for the Court to know whether there has been any progress in resolving the matters in dispute. Accordingly clause 872 provides that evidence of anything said or done at a Court ordered meeting is admissible in the care and protection proceeding to which it relates only if the parties to the proceeding agree to the evidence being admitted or the Childrens Court gives leave for the evidence to be admitted. This is intended to allow parties to participate in a Court-ordered meeting in good faith to identify and resolve matters in dispute, and in the knowledge that any information disclosed, or discussed, at the meeting can only be admitted in the relevant care and protection proceedings with their agreement or with the leave of the Court.

Division 14.3.2 — Interim care and protection orders

This division makes provision for interim care and protection orders.

Clause 432 — Interim matters—interim care and protection orders

Sub-clause (1) enables the Childrens Court, on application or its own initiative, to make an interim care and protection order for a child or young person where an application for a care and protection order has been made but not decided and the Childrens Court reasonably believes that the child or young person is (or would be) in need of care and protection if the interim order was not made.

Sub-clause (2) provides that the Childrens Court is required to include in an interim care and protection order one or more provisions that the Court is satisfied are in the best interests of the child or young person. For example, the Childrens Court may consider that the child or young person's circumstances require the making of an interim care and protection order with a drug use provision and a supervision provision to ensure the child or young person's safety during the period of the adjournment.

Under the 1999 Act this power was limited to orders for parental responsibility, contact, assessment and specific issues orders however this limitation was removed to give the Childrens Court discretion to tailor the care and protection order as it considers appropriate to meet the protective needs of the child or young person.

Sub-clause (4) provides that the Childrens Court may require the Chief Executive to give the Court a care plan for a child or young person for the period of an interim care and protection order before it makes the order. Care plans are dealt with at division 14.3.4.

Clause 433 — Offence—contravene interim care and protection order

This clause contains a new strict liability offence 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.

Clause 434 — Interim care and protection orders—revocation or amendment

This clause addresses how interim care and protection orders made by the Childrens Court can be revoked or amended.

Sub-clause (2) allows a party to proceedings to apply for revocation or amendment of an interim care and protection order. The meaning of a party is outlined at clause 699.

Sub-clause (3) requires the applicant to give the application to each other party to the proceeding and the Public Advocate at a minimum of three working days before the application is heard. It also requires the applicant to give the application to anyone else who was required to be given a copy of the application for the care and protection order, as these persons may not be parties within the meaning set out at clause 699.

Sub-clause (4) requires the Childrens Court to give initial consideration to the application not later than 5 working days after filing.

Sub-clause (5) requires the Childrens Court to give directions about the conduct of the proceeding at the time of giving initial consideration to the application.

Sub-clause (6) requires the Childrens Court, after hearing the application, to take one of the actions outlined at (a) to (d). Action that may be taken by the Court includes dismissing the application, revoking the interim care and protection order, amending the interim care and protection order or substituting a provision in the order for a different provision.

Division 14.3.3 — Assessment orders

This division outlines assessment orders. An assessment order authorises a care and protection assessment of a person (defined at clause 366) which is relevant to a child or young person's care and protection. The order can be no longer than 10 weeks (clause 448), however, the order may be extended to up to 18 weeks if the assessment cannot be effectively undertaken if the order is not extended or 26 weeks if special and exceptional circumstances exist which mean the extension is necessary for the assessment to be completed (clause 453).

Clause 435 — What is an assessment order?

This clause outlines the meaning of an assessment order for the care and protection chapters. It is an order authorising the Chief Executive to arrange a care and protection assessment of a person (which includes the child or young person) and may include

requirements in relation to the conduct of the assessment. The assessment may be of the child or young person or another person, including for example other family members.

A care and protection assessment is outlined at clause 366 and means any of the following:

- a medical examination or test of the person;
- a dental examination or test of the person;
- a social assessment of the person;
- an assessment of the person;
- a paediatric or developmental assessment of the person;
- a psychological examination or test of the person;
- a psychiatric examination or test of the person;
- if the person is a parent or other person with parental responsibility—an assessment of the person's parenting capacity.

It does not include an assessment, examination or test that involves surgery or anything prescribed by regulation.

This clause re-enacts section 217 of the 1999 Act in relation to special assessments. Assessments involving child protection appraisals at section 217 of the 1999 Act are now dealt with by appraisal orders at division 11.2.3 of the Bill.

Clause 436 — Care and protection assessment—terms of reference for care and protection assessment

In order to facilitate the expeditious conduct of assessments ordered by the Childrens Court, sub-clause (1) requires the Chief Executive to decide the matters to be assessed in a care and protection assessment of a child or young person (known as the terms of reference) and choose an authorised assessor to conduct the assessment, subject to the Childrens Court ordering otherwise. Assessors are authorised by the Chief Executive under clause 437.

Sub-clause (2) allows the terms of reference to relate to the subject child or young person or another person and may include any matter considered appropriate by the Chief Executive to be assessed.

Sub-clause (3) provides that the Chief Executive must consult with the other parties before deciding the terms or reference or determining the authorised assessor to undertake the assessment. In consulting the other parties, the Chief Executive must inform the other parties about the proposed terms of reference or assessor and provide 7 days for submissions to be made to the Chief Executive about either of these matters. The Chief Executive is obliged to take into account any submissions made by a party, however, to the extent of any disagreement between the Chief Executive and another party about the proposed terms of reference or assessor, the Chief Executive's decision takes precedence, subject to the Court otherwise ordering.

Clause 437 — Care and protection assessment—authorisation of assessors

This clause allows the Chief Executive to authorise a person (for example, a certain interstate medical specialist), or category of people (for example, all registered health professionals under the *Health Professionals Act 2004*), to carry out care and protection assessments (an authorised assessor) if the person is suitably qualified to carry out care and protection assessments. The authorisation occurs by way of notifiable instrument.

Authorised assessors may include for example, registered health professionals under the *Health Professionals Act 2004* or other corresponding interstate Act, a person who is eligible for membership of the Australian Association of Social Workers, or a suitably qualified delegate of the Chief Executive.

Clause 438 — Care and protection assessment—report after making

This clause requires an authorised assessor who carries out a care and protection assessment to give the Chief Executive, as soon as practicable after the assessment is

completed, the assessment report and any records made by the assessor in the course of carrying out the assessment.

Section 220 of the 1999 Act created an offence for an assessor who failed to provide the assessment report to the Court (if it so ordered) and each person named in the order for the purpose of receiving the report. This clause removes the offence and requires the report to be given to the Chief Executive to reflect that the Chief Executive has made arrangements for the assessment. As sub-clause (3) provides that the report is taken to be a report to the Childrens Court rather than evidence tendered by a party, this clause clarifies that it is appropriate for the Chief Executive to assist the Court with producing the finalised assessment report. In any event, sub-clause (2) obliges the Chief Executive to file the report with the Childrens Court.

Clause 439 — Offence—contravene assessment order

This clause creates an offence for contravening an assessment order. The maximum penalty is 50 penalty units, imprisonment for 6 months or both.

Clause 440 — Assessment orders—prevails over care and protection order

This clause removes doubt that if there is an apparent inconsistency between an assessment order and a care and protection order, then the assessment order is taken to override the care and protection order.

For example, an assessment order with a requirement that a person attend for the assessment at a stated time would take precedence over a care and protection order with a supervision provision which required the person to report to the Chief Executive at the same time.

Clause 441 — Assessment orders—on application or Court's own initiative

This clause provides that the Court, either of its own motion or upon application by a party to the proceeding, may make an assessment order. Section 217 of the 1999 Act previously provided that the order could only be made upon application. This restriction has been removed to enable the Court to make an assessment order where the Court considers it necessary to assess whether the child or young person is in need of care and protection and the other criteria in clause 447 are met.

Clause 442 — Assessment orders—application by party

This clause introduces new criteria that a party to a proceeding must satisfy in order to apply for an assessment order. These criteria include that the assessment is necessary to assess whether the child or young person is in need of care and protection and the assessment could not be properly carried out without an order.

Sub-clause (1)(c) requires the applicant to reasonably believe that any subsequent care and protection assessment for a child or young person is not harmful or detrimental to them. The intention of this clause is to ensure that children and young people are not subjected to unnecessary, multiple assessments which could cause them direct or indirect harm or detriment. An example of the former is emotional distress caused by questions posed by an assessor. An example of the latter is missing significant amounts of school time to attend assessment appointments.

Sub-clause (2) requires the applicant for an assessment order to meet the cost of the assessment. This is consistent with the general principle that the applicant bears the costs of their application.

Clause 443 — Assessment orders—application to state grounds

This clause outlines that an application for an assessment order must state the grounds on which the order is sought.

Clause 444 — Assessment orders—who must be given application

This clause outlines who must be provided with a copy of the application for an assessment order and when they must receive it. This requirement does not apply if the Chief Executive or a police officer has parental responsibility for a child or young person as a result of taking emergency action.

Clause 445 — Assessment orders—Court to consider application promptly

This clause requires the Childrens Court to give initial consideration to an application for an assessment order not later than 5 working days after the application is filed. This timeframe is necessary to minimise the detrimental effects of time delays in assessing and then planning if necessary for the child or young person's care and protection needs.

Clause 446 — Assessment orders—no interim order

This clause provides the Childrens Court cannot make an interim assessment order. This is because an assessment order is a final, once only order authorising a specific event, namely the assessment. This re-enacts section 203(2) of the 1999 Act.

Clause 447 — Assessment orders—criteria for making

This clause provides for the Childrens Court to make an assessment order in relation to a child or young person, about any person and state the matters about which the Court must be satisfied before making the order. This clause replaces criteria at section 218(1) of the 1999 Act. The intention of these new criteria is to ensure that children and young people are not subjected to unnecessary assessments that are not in their best interests.

Clause 448 — Assessment orders—length

This clause provides that assessment orders can be made for a maximum of 10 weeks.

However, clause 453(2) allows the Childrens Court to extend an assessment order up to 18 weeks (from the date the original order was made) if necessary for the completion of the assessment or up to 26 weeks if special and exceptional circumstances exist which mean the extension is necessary for the assessment to be completed. An example of special and exceptional circumstances is that the Court may be satisfied that the assessment cannot be properly carried out if the assessor has not been able to meet and interview all relevant family members for a family assessment as some family members were overseas. Another example is that the Court may be satisfied that the assessment cannot be properly carried out as the child who is the subject of a paediatric assessment became ill mid way through the assessment and the child needs time to recuperate before the assessment can be completed.

Clause 449 — Assessment orders—extension application

This clause allows a party to a proceeding for a care and protection order to apply for an extension of an assessment order if the party reasonably believes the assessment could not be carried out unless the order is extended.

Clause 450 — Assessment orders—extension application must state grounds

This clause outlines what must be addressed in an application to extend an assessment order.

Clause 451 — Assessment orders—who must be given extension application?

This clause outlines who must be provided a copy of the application for an assessment order and when they must receive it.

Clause 452 — Assessment orders—Court to consider extension application promptly

This clause requires the Childrens Court to give initial consideration to an application for an assessment order not later than 5 working days after the application is filed. This timeframe is necessary to minimise the detrimental effects of time delays in assessing and then if necessary, planning for the child or young person's care and protection needs.

Sub-clause (2) requires the Court to be satisfied that any adjournment of an application for extension of an assessment order is appropriate considering the urgency of the application.

Sub-clause (3) has the effect of continuing any assessment order in force when an application for extension of an assessment order is filed until the application is finalised by the Childrens Court. This applies regardless of whether the application is considered within the prescribed period of 5 working days after filing.

Clause 453 — Assessment orders—criteria for extension

This clause provides the criteria for the Childrens Court to extend an assessment order. Sub-clause (1)(a) requires the Court to be satisfied that the care and protection assessment cannot be effectively undertaken if the order is not extended. An example is that the Court may be satisfied that the assessment cannot be properly carried out if the assessor has not been able to meet and interview all relevant family members for a family assessment as some family members were overseas. Another example is that the Court may be satisfied that the assessment cannot be properly carried out as the child who is the subject of a paediatric assessment became ill mid way through the assessment and the child needs time to recuperate before the assessment can be completed.

Sub-clause (1)(b) allows the Childrens Court to extend an assessment order up to a maximum of 18 weeks (from the date the original order was made) if the assessment cannot be effectively undertaken if the order is not extended.

Sub-clause (2) allows the order to be extended up to 26 weeks if special and exceptional circumstances exist which mean the extension is necessary for the assessment to be completed. An example of a special and exceptional circumstance is if an assessor becomes ill mid way through an assessment and requires 3 weeks leave, which impacts upon the overall timeframe in which the assessment was to be completed.

Division 14.3.4 — Care plans

This division outlines care plans for a child or young person who is, or is proposed to be, subject to a care and protection order. A care plan is a written document outlining the Chief Executive's proposals for the care and protection of the child or young person. Key new proposals introduced by the Bill include:

- A stability proposal - which outlines how the Chief Executive proposes to ensure a long-term placement for a child or young person in a safe, nurturing and secure environment. The stability proposal will include strategies to support children and young people who live with their parents, and for children who do not live with their parents, concurrent planning for restoration with parents and/or placement in alternative care.
- A cultural proposal - for Aboriginal and Torres Strait Islander children and young people subject to care and protection orders. This outlines how the Chief Executive proposes to preserve and enhance the identity of the child or young person as an Aboriginal or Torres Strait Islander person.

The Childrens Court must consider a care plan before it makes a care and protection order under clause 463(1)(b). The Childrens Court may require the Chief Executive to give the Court a care plan for a child or young person for the period of an interim care and protection order before it makes the order under clause 432(4).

Clause 454 — What is a care plan?

This clause outlines the meaning of a care plan for a child or young person who is or proposed to be subject to a care and protection order or interim care and protection order.
A care plan is a written document outlining the Chief Executive's proposals for the care and protection of the child or young person.

Sub-clause (b)(ii) allows the Chief Executive to include cultural proposals in care plans for Aboriginal and Torres Strait Islander children and young people subject to, or proposed to be subject to interim or final care and protection orders. Under the 1999 Act, such proposals

were limited to Aboriginal and Torres Strait Islander children and young people who were in out of home care. This proposed positive discriminatory measure is a justifiable limitation on the right to recognition and equality before the law under the *Human Rights Act 2004*, as it recognise the needs of Aboriginal and Torres Strait Islander children, their families and their communities in the light of their history as Indigenous Australians and their over-representation in the child protection system and in out of home care.

Sub-clause (b)(iv) extends section 259 in the 1999 Act by including proposals regarding stability planning for the child or young person in the care plan.

This clause re-enacts section 259 of the Act related to care plans.

Clause 455 — Care plans—stability proposals

This clause seeks to improve stability for children and young people. One of the key determinants of a child's outcomes in out-of-home care is stability of placement, or permanency. Research confirms that[2]:

- Multiple placements in care results in serious relational, emotional and cognitive consequences for children; and
- Stability is important, particularly in the early years of children's lives. Children who do not have responsive caring early in life will have great difficulty overcoming these deficits later.

Consultations on the review of the *Children and Young People Act 1999* supported the introduction of stability plans for children and young people who are subject to a care and protection order, with the capacity to concurrently plan for restoration to parents' care and placement in alternative care.

Clause 454(b)(iii) allows the Chief Executive to include a proposal in a care plan about how the Chief Executive proposes to ensure the living arrangements for the child or young person are as stable as possible. If a proposal under clause 454 (b)(iii) is included in a care plan, the Chief Executive must prepare a proposal (a stability proposal) which outlines how the Chief Executive proposes to ensure a long-term placement in a safe, nurturing and secure environment. The stability proposal will include strategies to support children and young people who live with their parents, and for children who do not live with their parents, concurrent planning for restoration with parents and/or placement in alternative care.

Clause 456 — Care plans—who must be consulted

This clause introduces a new requirement for the Chief Executive to consult about the care plan with a child or young person, parents or other persons with daily care responsibility and anyone else involved with implementing the care plan. For proposals about Aboriginal or Torres Strait Islander children and young people, the Chief Executive is required to consult with certain Aboriginal or Torres Strait Islander people and support organisations identified by the Chief Executive.

Examples have been included in the Bill of persons who are likely to be involved in implementing a proposal in a care plan as an out-of-home carer (being a foster carer, kinship carer, residential care service) or a community based service (for example, family support service).

Participants consulted on the review of the 1999 Act supported enhanced participation in care planning by children, young people, their families, and agencies responsible for implementation of the care plan.

Division 14.3.5 — Orders under Domestic Violence and Protection Orders Act

This division relates to orders made by the Childrens Court under the *Domestic Violence and Protection Orders Act 2001*.

2 Australian Catholic University, Institute of Child Protection Studies (2005) Placement Planning - a review of the literature, unpublished,

The 1999 Act provided for the Childrens Court to 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. The 1999 Act did not provide for these orders to be made by the Childrens Court in circumstances where an application for a care and protection order is not before the Court. The Magistrates Court has jurisdiction under the *Domestic Violence and Protection Orders Act 2001* in these circumstances.

The Bill remakes these provisions. The power for the Childrens Court to make a DVPO protection order upon an application for a care and protection order allows an additional level of protection to be afforded to a child or young person at risk of significant harm from domestic violence. For example, the Chief Executive applies to the Childrens Court for a care and protection order with a supervision provision for a child who is at risk of physical abuse as a consequence of domestic violence perpetrated by the child's mother's partner towards the mother. After the Chief Executive files the application for the care and protection order, the Chief Executive then applies for a DVPO interim protection order to prevent the perpetrator from residing in the same house as the child during the period of the proceedings.

The criteria for making a DVPO protection order under the Bill (which is defined at clause 457 to include both DVPO interim and final protection orders) has been expanded to include psychological abuse within the meaning of domestic violence. This addresses concerns raised in consultation for the review of the 1999 Act 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, both short and long term.

Clause 834 provides that a person may appeal to the Supreme Court against a decision of the Childrens Court to make a DVPO protection order in accordance with the *Domestic Violence and Protection Orders Act 2001*. Part 8 of the *Domestic Violence and Protection Orders Act 2001* outlines appeal rights and rules.

Clause 457 — Definitions—div 14.3.5

This clause sets out definitions used for this division. It incorporates an expanded definition of domestic violence which includes the meaning of domestic violence outlined at section 9(1) of the *Domestic Violence and Protection Orders Act 2001* and includes psychological abuse of a child or young person which is defined at clause 460.

This clause creates a definition of DVPO protection order as meaning a DVPO interim protection order or a DVPO final protection order.

Clause 458 — DVPO interim protection orders

While an application for a care and protection order is before the Childrens Court, sub-clause (1) enables the Court to make a DVPO interim protection order for the subject child or young person if satisfied that it is necessary to ensure the child or young person's safety until the application for the care and protection order is decided.

Sub-clause (2) provides that the Court may have regard to the need to ensure the person against whom the order is made will not engage in domestic violence in relation to the child or young person. Domestic violence is defined at clause 457 and includes psychological abuse defined at clause 460.

Sub-clause (3) allows the Childrens Court to make the DVPO interim protection order on its own initiative, or on application by a party to the proceeding for the care and protection order, or on application by the Public Advocate.

Sub-clause (4) addresses the interaction of the *Domestic Violence and Protection Orders Act 2001* with this Act. Any DVPO interim protection order that the Court makes must be consistent with this division and the *Domestic Violence and Protection Orders Act 2001*.

Clause 459 — DVPO final protection orders

While an application for a care and protection order is before the Childrens Court, sub-clause (1) enables the Court to make a DVPO final protection order for the subject child or young person if satisfied that the person against whom the order is to be made has engaged in domestic violence towards the child or young person or has engaged in personal violence and may place the child or young person at risk of personal violence if the order were not made.

Sub-clause (2) allows the Childrens Court to make the DVPO final protection order on its own initiative, or on application by a party to the proceeding for the care and protection order, or on application by the Public Advocate.

Sub-clause (3) addresses the interaction of the *Domestic Violence and Protection Orders Act 2001* with this Act. Any DVPO final protection order that the Court makes must be consistent with this division and the *Domestic Violence and Protection Orders Act 2001*.

Clause 460 — What is psychological abuse of a child or young person?

This clause incorporates a new definition of psychological abuse of a child or young person. The meaning of domestic violence at clause 457 includes psychological abuse. It is intended to address the harm caused to a child or young person by their intentional or incidental exposure or risk of exposure to physical, sexual or psychological abuse of any person who the child or young person lives with. This is intended to be construed broadly to include all persons within the child or young person's usual household or regular living arrangements (for example, where the child has more than one usual residence due to a shared care arrangement between separated parents).

Psychological abuse of a child or young person is defined as 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 consistent with developments in other jurisdictions, for example, New Zealand.

Sub-clause (2) clarifies that a person who also suffers the abuse is not to be considered as having exposed the child or young person to the abuse. However, if this person has parental responsibility, this does not mean that the person is willing and able to protect the child or young person from significant emotional or psychological harm or risk in accordance with the second part of the test of in need of care and protection under clause 344(1)(b).

Sub-clause (3) clarifies that one incident or act may cause or result in psychological abuse of a child or young person in addition to multiple incidents of a less serious nature which cumulatively have the effect of psychological abuse of a child or young person.

Clause 461 — No DVPO protection order if no proceeding under care and protection chapters

This clause provides that the jurisdiction of the Childrens Court to make a DVPO protection order for a child or young person does not enliven until care and protection proceedings are before the Court following an application filed by the Chief Executive or another person. In these circumstances where the jurisdiction of the Childrens Court is not enlivened, the Bill removes doubt that this clause does not preclude an application being made under the *Domestic Violence and Protection Orders Act 2001*.

Clause 462 — Effect of making DVPO protection order under this Act

This clause addresses the status and effect of a DVPO protection order made under this Act.

Sub-clause (1) provides that a DVPO protection order made by the Childrens Court under this Act is taken to have been made under the *Domestic Violence and Protection Orders Act 2001*.

Sub-clause (2) provides that the validity of a DVPO protection order is not affected by the making of such an order upon application for a care and protection order.

Sub-clause (4) reconciles the expanded definition of domestic violence in the *Domestic Violence and Protection Orders Act 2001* with the expanded definition of domestic violence at clause 457 which includes psychological abuse as outlined at clause 460. The expanded definition of domestic violence is intended to address the harm caused to a child or young person by their intentional or incidental exposure or risk of exposure to physical, sexual or psychological abuse of any person who the child or young person lives with. This is intended to be construed broadly to include all persons within the child or young person's usual household or regular living arrangements (for example, where the child has more than one usual residence due to a shared care arrangement between separated parents).

Psychological abuse of a child or young person is defined as 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.

Part 14.4 — Making care and protection orders

This part includes the criteria for making a care and protection order.

Clause 463 — Care and protection order—criteria for making

Sub-clause (1) empowers the Childrens Court to make a care and protection order and outlines the criteria for the making of a care and protection order.

Sub-clause (1)(a) requires the Childrens Court to be satisfied that the child or young person is in need of care and protection before making a care and protection order. The test for when a child or young person is in need of care and protection is outlined at clause 344. Sub-clause (5) specifies that the Court must satisfy itself that the child or young person is in need of care and protection and must not only accept the admission of the parties that the child or young person is in need of care and protection.

Sub-clause (1)(b) requires the Court to consider the care plan for the child or young person prepared by the Chief Executive before making a care and protection order. The care plan is outlined at division 14.3.4 and is a written plan detailing the Chief Executive's proposals for meeting the child or young person's protective and care needs.

Sub-clause (1)(c)(i) requires the Court to be satisfied that the provisions included in the order are necessary to ensure the care and protection of the child or young person before making a care and protection order. The types of provisions that may be included in a care and protection order are outlined at sub-clause (2). The Court must include at least one provision in a care and protection order and may include any number of provisions considered necessary to meet the child or young person's protective needs. This ensures that the provision or provisions included in the order are a proportionate and tailored response to the circumstances which gave rise to the child or young person being in need of care and protection.

Sub-clause (1)(c)(ii) requires the Court to be satisfied that making the order is in the best interests of the child. This reflects the principle that the best interests of a child or young person is the paramount consideration for all decision makers across the Bill at clause 8.

Sub-clause (2) enables the Court to include a provision or multiple provisions in a care and protection order, on application by a party or on its own initiative, if satisfied that the provision or provisions are in the best interests of the child or young person.

The provisions that may be included in a care and protection order are:
- short-term parental responsibility provision (see clause 475)
- long-term parental responsibility provision (see clause 478)
- enduring parental responsibility provision (see clause 480)

- residence provision (see clause 483)
- contact provision (see clause 484)
- drug use provision (see clause 487)
- supervision provision (see clause 488)
- mental health tribunal provision (see clause 490)
- specific issues provision (see clause 491)

Sub-clause (3) specifies that the Court may only make an enduring parental responsibility provision as part of the care and protection order if satisfied that the additional criteria outlined at clause 481 are met. As an enduring parental responsibility provision has the effect of transferring daily care and long term responsibility for a child or young person to a person (other than the Chief Executive) until 18 years, it is necessary that the additional criteria at clause 481 are met to ensure the provision is appropriate for the child or young person's circumstances.

Sub-clause (4) requires the Chief Executive to give a copy of the care plan to each other party to the proceeding unless ordered otherwise by the Childrens Court.

Sub-clause (5) provides that whether a child or young person is in need of care and protection is a matter for the Court to decide on the balance of probabilities and must not merely be based on admissions by the parties that the child is in need of care and protection.

Sub-clause (6) specifies that a provision may be included in a care and protection order by the Court on its own initiative or on application by a party to the proceeding.

Sub-clause (7) specifies that if it is intended that a person make decisions about a child or young person's residence, then a residence provision must be made as part of the care and protection order. For example, the Court decides to include a parental responsibility provision in favour of the Chief Executive and intends for the Chief Executive to have responsibility for deciding where the child resides. The Court must make a residence provision authorising the Chief Executive to decide the child's residence.

Clause 464 — Care and protection order—length

This clause requires the Childrens Court to state the length of each provision included in the care and protection order.

Sub-clause (2) provides that where an order contains multiple provisions which are of different duration, the length of the order is the length of the longest provision within the order. For example, a care and protection order contains a supervision provision for 3 years, a specific issues provision that a person not reside at the same premises as the child or young person for 1 year and a drug use provision for 3 years. The length of the order is taken by force of this sub-clause to be 3 years.

Part 14.5 — Extending, amending and revoking care and protection orders

This part includes the procedures for extending, amending and revoking care and protection orders.

Clause 465 — Care and protection order—extension and amendment applications

This clause allows for a person (including a party to the original proceedings) to seek the leave of the Court to apply to extend or amend a provision in a care and protection order in a manner stated in the application. This clause is necessary to allow the Childrens Court to extend or amend an order in such a way that meets the child or young person's changing needs for care and protection (which may increase or decrease over time).

The onus of proof that the extension or amendment of the order is in the best interests of the child or young person rests with each applicant. For the care and protection chapters, a decision maker must consider the matters outlined at clause 348 in deciding what is in the best interests of a child or young person.

Sub-clause (2) requires leave to be given by the Court to a person who was a party to the original proceeding in which the order was made.

Sub-clause (3) allows the Childrens Court to give leave to a person to apply more than once in a 12 month period only if satisfied there has been a significant change in any relevant circumstances since the care and protection order was made or last varied.

Clause 466 — Care and protection order—revocation applications

This clause allows for people (including parties to proceedings) to seek the leave of the Court to apply to revoke a provision in a care and protection order in a manner stated in the application.

The onus of proof is that the revocation of the order is in the best interests of the child or young person, or that the child or young person would not be in need of care and protection if the order was revoked, or that the order cannot be administered effectively because of the child or young person's persistent refusal to comply with the residence provision of the order. The onus of proof rests with the applicant.

Clause 467 — Care and protection order—application to state what sought and grounds

This clause outlines requirements for extension, amendment or revocation applications.

Clause 468 — Care and protection order—who must be given extension, amendment or revocation

This clause outlines who must be given a copy of the application for extension, amendment or revocation of a provision in a care and protection order and the timeframe in which the application must be given.

Clause 469 — Care and protection order—Court to consider extension, amendment and revocation applications promptly

Sub-clause (1) requires the Court to give initial consideration to an application for extension, amendment or revocation of a provision in a care and protection order or a care and protection order not later than 5 working days after filing.

Sub-clause (2) requires the Court to set directions for the conduct of the proceeding at the time of initial consideration.

Sub-clause (3) provides that any order or direction in force on the day of filing continues in force until the application is heard and decided. This applies regardless of whether the application is considered within the prescribed period of 5 working days after filing.

Clause 470 — Care and protection order—criteria for extensions and amendments

This clause outlines the criteria for extensions and amendments of provisions in care and protection orders.

Sub-clause (1) requires the Court to be satisfied that the extension or amendment is in the best interests of the child or young person.

Sub-clause (2) specifies that an extension of a provision can be for any length considered appropriate by the Court. However, sub-clause (4) has the effect of creating a special rule for the extensions of short-term parental responsibility provisions by providing that this clause is subject to clause 476. Clause 476 creates a rebuttable presumption that it is in the best interests of a child or young person to become subject to a long term parental responsibility provision after a short term parental responsibility provision in the circumstances outlined in clause 476(2).

Sub-clause (3) allows the Court to amend a provision in a care and protection order in any manner considered appropriate. This could include the substitution of a provision with a

different provision or the addition of a provision. An example of the former is the substitution of a supervision provision for a short term parental responsibility provision due to a successful restoration of the child from out of home care to the care of the child's parents. An example of the latter is the addition of a drug use provision to a supervision provision in a care and protection order due to concerns about the emergent drug use of the child's primary caregiver.

Clause 471 — Care and protection order—criteria for revocation

This clause outlines the criteria for the Childrens Court to revoke a care and protection order or a provision in a care and protection order.

Sub-clause (1)(a) allows the Court to revoke a care and protection order or a provision in a care and protection order if satisfied that the child or young person would not be in need of care and protection if the order was revoked. This includes circumstances where a child or young person is no longer in need of care and protection because of changes in the circumstances which gave rise to the child or young person being in need of care and protection and the child or young person being able to return to their former care arrangements. It also includes circumstances where a young person is no longer in need of care and protection because the young person is of sufficient age and maturity to transition to independent living arrangements.

Sub-clause (1)(b) introduces a new criterion for the revocation of a care and protection order or a provision in a care and protection order that the order cannot be adMinistered effectively because of the child or young person's persistent refusal to comply with the residence provision of the order. This has been included because there are circumstances where the child or young person's non-compliance with the residence part of a care and protection order (for example, due to absconding) means the order cannot be properly adMinistered.

Sub-clause (1)(c) allows the Court to revoke a care and protection order or a provision in a care and protection order if satisfied that it is in the best interests of the child or young person to revoke the order.

Sub-clause (2) requires the Childrens Court to take into account the matters listed at (2)(a) to (d) related to the child or young person and their situation before revoking a care and protection order. These considerations are intended to guide the Court in making a decision to revoke a care and protection order, and to ensure that the revocation of the order does not diminish a child or young person's protection.

Clause 472 — Care and protection orders—financial burdens

This clause provides that a care and protection order imposing a financial cost on a person is to be borne by the person unless the Childrens Court orders otherwise.

Part 14.6 — Parental responsibility provisions

This part includes parental responsibility provisions. For a care and protection order, a parental responsibility provision must be short-term (see division 14.6.2), long-term (see division 14.6.3) or enduring (see division 14.6.4). An interim care and protection order may include a parental responsibility provision (see clause 432(2)(f)).

Division 14.6.1 — General

Clause 473 — What is a parental responsibility provision?

This clause contains the meaning of a parental responsibility provision in a care and protection order. It is a provision about who has daily care responsibility or long-term care responsibility for a child or young person. It can include one or more of the following directions:

- That a person (or persons) stated in the order has daily care responsibility for the child or young person;

- That a person (or persons) stated in the order has long-term care responsibility for the child or young person;
- That daily care or long-term care responsibility or both be shared between persons stated in the order;
- That a person who has long-term care responsibility consult with one or more other people who share long-term care responsibility for the child or young person in relation to a long term matter;
- That a person who has parental responsibility must exercise the responsibility in a stated way.

An example of the first direction is a parental responsibility provision with a direction that the Chief Executive has daily care responsibility for Henry.

An example of the second direction is a parental responsibility provision with a direction that Aunt Mary has long-term care responsibility for Sally.

An example of the third direction is a parental responsibility provision with a direction that daily care responsibility and long-term care responsibility for Hugh be shared between Hugh's mother, step-father and the Chief Executive.

An example of the fourth direction is a parental responsibility provision with a direction that the Chief Executive consult Richard's parents in making a decision as to whether Richard should attend a Government or non-Government school

An example of the fifth direction is a parental responsibility provision with a direction that the Chief Executive must facilitate contact for Fiona with her grandparents on a regular basis.

Clause 474 — Chief Executive sharing daily care responsibility

This clause address circumstances where the Chief Executive and another person (or more than one other person) share daily care responsibility for a child or young person. Each person may act independently of each other in discharging the responsibility. However, sub-clause (2) provides that the other person or persons who share daily care responsibility with the Chief Executive must not discharge their responsibility in a manner that would be inconsistent or incompatible with how the Chief Executive is exercising the responsibility.

For example, the Chief Executive shares daily care responsibility for Ben with Ben's mother. The care plan provides that Ben resides in a shared care arrangement with his mother and foster carers. While Ben is residing with his mother, Ben's mother exercises daily care responsibility for Ben. While Ben is residing with foster carers, the Chief Executive authorises the foster carers to exercise daily care responsibility under clause 517. The care plan specifies that Ben is not to have contact with a a friend of Ben's mother who is convicted of child sex offences. While Ben is residing with his mother, Ben's mother decides to allow Ben to have contact with this person. This clause operates to disallow Ben's mother to discharge her daily care responsibility in this manner as it not compatible with how the Chief Executive wants daily care responsibility for Ben to be discharged as outlined in the care plan.

Division 14.6.2 — Short-term parental responsibility provisions

This division contains the meaning of a short-term parental responsibility provision and the criteria for extending this provision.

Clause 475 — What is a short-term parental responsibility provision?

This clause provides the meaning of a short-term parental responsibility provision. This is a parental responsibility provision in a care and protection order that is not longer than 2 years.

A parental responsibility provision is defined at clause 473. The provision may transfer or share daily care or long-term care responsibility for a child or young person and may include other directions about how parental responsibility is to be exercised by a person or persons.

Under clause 464, the Childrens Court must state the length of each provision included in a care and protection order. For example, the Court may make a care and protection order with a short-term parental responsibility provision sharing daily care responsibility for a child between the Chief Executive and a parent for 1 year.

Clause 476 — Short-term parental responsibility provision—extension

This clause addresses the criteria for extension of a short-term parental responsibility provision in a care and protection order. A short-term parental responsibility provision is a parental responsibility provision which is not longer than 2 years.

The *Second Report on Key Findings from the Review of the Children and Young People Act 1999* identified concerns that multiple, short parental responsibility orders (between 2 and 5 years in duration) were being made for children and young people. Concern was expressed that this creates considerable uncertainty and instability for children and young people and often disrupts their attachment and relationships with new caregivers. This can occur whilst intervention is occurring to return a child or young person to their parents.

The intention of this clause is to limit the making of multiple short term parental responsibility provisions (of up to 2 years in duration) and to create a presumption for the child or young person to be subject to a long-term parental responsibility provision after being in out of home care for the 2 year period of a short term parental responsibility provision.

The clause creates a rebuttable presumption that it is in the best interests of the child or young person to be subject to a long term parental responsibility provision (until 18 years) when an application to extend a short term parental responsibility provision is made. This presumption can be rebutted by a parent or other person who has had parental responsibility during the term of the order by satisfying the Childrens Court that the person is likely to be able to resume care of the child or young person during the period of the extension and it also in the best interests of the child or young person for the person to resume care.

The reverse onus of proof contained in this clause engages the right to a fair trial at section 21 of the *Human Rights Act 2004*. This is a justified limitation on the right to a fair trial as it balances the need to promote stability for children and young people in out of home care with the rights of parents or persons with parental responsibility to demonstrate to the Court their circumstances have changed sufficiently to resume parenting responsibilities for the child or young person and that it is in the best interests of the child or young person to be returned to their care.

The United Nations Committee on the Rights of the Child has recognised the need for the earliest possible decisions to be made about long term placement. In their Fortieth Session, 2007, General Comment No.7 (2005), Implementing child rights in early childhood (UN Commentary), the Committee stated that:

> "Children's rights to development are at serious risk when they are orphaned, abandoned or deprived of family care or when they suffer long-term disruptions to relationships or separations (e.g. due to natural disasters or other emergencies, epidemics such as HIV/AIDS, parental imprisonment, armed conflicts, wars and forced migration). These adversities will impact on children differently depending on their personal resilience, their age and their circumstances, as well as the availability of wider sources of support and alternative care. Research suggests that low-quality institutional care is unlikely to promote healthy physical and psychological development and can have serious negative consequences for long-term social adjustment, especially for children under 3 but also for children under 5 years old. To the extent that alternative care is required, early placement in family-based or family-like care is more likely to produce positive outcomes for young children. States parties are encouraged to invest in and support forms of alternative care that can ensure security, continuity of care and affection, and the opportunity for young children to form long-term attachments based on mutual trust and respect, for example through fostering, adoption and support for members of extended families".

Clause 477 — Short-term parental responsibility provision—financial contribution

This clause allows for the Childrens Court to order that a parent contribute financially (giving rise to a recoverable debt owing to the Territory) to the cost of care for a child or young person for whom the Chief Executive has daily care or long-term care responsibility.

To ensure that the order is not unduly onerous on a person's financial situation, the Court is obliged to consider the financial circumstances of the parent in deciding the amount of the contribution.

Division 14.6.3 — Long-term parental responsibility provisions

This division contains the meaning of long-term parental responsibility provisions.

Clause 478 — What is a long-term parental responsibility provision?

This clause provides the meaning of a long-term parental responsibility provision. A long-term parental responsibility provision is in force until a child or young person is 18 years old and transfers daily care and long-term care responsibility for the child or young person to the Chief Executive or another stated person, unless otherwise ordered by the Childrens Court.

Clause 479 — Long-term parental responsibility provision—financial contribution by parents

This clause allows for the Childrens Court to order that a parent contribute financially (giving rise to a recoverable debt owing to the Territory) to the cost of care for a child or young person for whom the Chief Executive has daily care or long-term care responsibility.

To ensure that the order is not unduly onerous on a person's financial situation, the Court is obliged to consider the financial circumstances of the parent in deciding the amount of the contribution.

Division 14.6.4 — Enduring parental responsibility provisions

This division remakes provisions in Chapter 7 of the 1999 Act related to enduring parental responsibility orders.

A care and protection order with an enduring parental responsibility provision may not transfer parental responsibility to the Chief Executive. However, the Chief Executive may assume long-term responsibility for a child or young person until they are 18 years old under a care and protection order with a long-term parental responsibility provision (see division 14.6.3).

Clause 480 — What is an enduring parental responsibility provision?

This clause outlines the meaning of an enduring parental responsibility provision in a care and protection order. An enduring parental responsibility provision transfers responsibility for day-to-day matters and long term matters for the child or young person to a stated person (who is not the Chief Executive) and is in force until the child or young person is 18 years old.

Sub-clause (2) removes doubt that an enduring parental responsibility provision is deemed to include a residence provision which authorises the person to decide where and with whom the child or young person will live.

Clause 481 — Enduring parental responsibility provision—criteria for making

The Court must be satisfied of the additional criteria outlined in this clause when making an enduring parental responsibility provision.

The Childrens Court may not make an enduring parental responsibility provision for an Aboriginal or Torres Strait Islander child or young person unless it has given any Aboriginal or Torres Strait Islander person or organisation that has provided ongoing support services to the child or young person and their family a reasonable opportunity to provide a submission in writing about the making of the proposed provision. This is to ensure that cultural

considerations about long-term care for a child or young person are taken into account in making the provision.

Clause 482 — Enduring parental responsibility provision—financial contribution

This clause re-enacts section 263(4) of the 1999 Act and allows the Chief Executive to provide financial or other assistance, on the terms and conditions that the Chief Executive considers appropriate, to the person with parental responsibility under a care and protection order with an enduring parental responsibility provision.

This discretionary clause does not create or confer an obligation for the Chief Executive to provide financial or other assistance in these circumstances.

Part 14.7 — Residence provisions

This part outlines residence provisions.

Clause 483 — What is a residence provision?

This clause outlines the meaning of a residence provision in a care and protection order. A residence provision is about where or with whom a child or young person must live or authorises a person to decide where or with whom a child or young person must live.

It may include one or both of the following directions:

- that a stated person must not live at the same premises as the child or young person (including that the stated person must stop living at those premises);
- that a stated person may live with the child or young person only subject to stated conditions.

An example of the former is a direction that a lodger residing in the subject child's family home cease to reside at the premises as the lodger has been charged with sexually abusing the subject child.

An example of the latter is a direction that a person reside with the subject young person subject to the condition that the person attend an anger management program.

Clause 422 creates an offence to engage in conduct that contravenes a provision of a care and protection order. The maximum penalty is 100 penalty units, imprisonment for one year or both.

Part 14.8 — Contact provisions

This part expands section 260 of the 1999 Act in relation to contact orders. The 1999 Act provided that only a specific issues order, not a contact order, may prohibit a person having contact with a child or young person (section 206(5)). The Bill consolidates all matters relating to contact arrangements for a child or young person, including a direction that a person or persons 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 is about who may or must not have contact with the child or young person or a provision authorising the Chief Executive or another person to decide with whom the child or young person may have contact and to decide any conditions for contact.

Clause 484 — What is a contact provision?

This clause outlines the meaning of a contact provision in a care and protection order. This is a provision about who may, or must not, have contact with the child or young person or a provision authorising the Chief Executive or another person to decide with whom a child or young person is to have contact and any conditions for the contact.

An example of the latter provision would be a contact provision authorising the Chief Executive to decide with whom a child or young person is to have contact. In these

circumstances, the Chief Executive would prepare a care plan (see division 14.3.4) outlining the contact arrangements for the child or young person with family members and significant persons.

Clause 422 creates an offence to engage in conduct that contravenes a provision of a care and protection order. The maximum penalty is 100 penalty units, imprisonment for one year or both.

Clause 485 — Contact provision—presumption about contact with family

This clause creates a rebuttable presumption that it is in the best interests of the child or young person for people with parental responsibility and siblings to have contact with the child or young person upon an application for a contact provision in a care and protection order.

Sibling of a child or young person is defined in the dictionary and includes a stepbrother or stepsister and a half-brother or half-sister.

Clause 486 — Contact provision—sibling may join proceeding without leave

This clause provides that siblings of a subject child or young person do not need the leave of the Childrens Court to be joined as a party to a proceeding for a contact provision in a care and protection order. This re-enacts section 206(4) of the 1999 Act.

Sibling of a child or young person is defined in the dictionary and includes a stepbrother or stepsister and a half-brother or half-sister.

Part 14.9 — Drug use provisions

The 2006 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 specific issues orders made by the Childrens Court authorising drug testing.

This part introduces new clauses related to drug use provisions in a care and protection order. These provisions engage human rights outlined in the *Human Rights Act 2004*, including the protection of the family and children (section 11), right to privacy and reputation (section 12), and protection from torture and cruel, inhuman or degrading treatment or punishment (section 10(1)), and no medical or scientific experimentation or treatment without consent (section 10(2)):

The limitations on these rights are proportionate on the basis that:

- The objective of drug use provisions is to protect children and young people, particularly vulnerable infants, from significant risk of abuse and neglect due to a primary caregiver's parenting capacity being impaired because of their use of substances;
- The provisions seek to objectively monitor and address the level of risk to a child or young person in order to avoid more intrusive intervention which may involve separating the child or young person from their caregiver/s;
- The provisions may also inform planning to return a child or young person to a former caregiver through objectively assessing the fomer caregvier's use of drugs and their effect on parenting capacity.

The intent of these provisions is to allow assessment and monitoring of the effect of any type of drug on a person's parenting capacity (and subsequent risk to a child or young person), irrespective of the illegality or otherwise of the person's use.

Clause 487 — What is a drug use provision?

This clause 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 must include one or more of the following directions:

- that the person not use a stated drug;
- that the person use a stated drug only in accordance with certain stated conditions;
- that the person undergo drug testing as directed by the Chief Executive in accordance with drug testing standards.

A drug use provision in a care and protection order is intended to address risk to a child or young person residing with, or having contact with, a parent (usually) or other significant person who is using drugs. Accordingly it is intended that a drug use provision will be directed at addressing the risk to the child or young person posed by the drug use of this person.

Under clause 886, the Minister may make drug testing standards by way of disallowable instrument. The standards will improve transparency through 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.

The Childrens Court may make a drug use provision in a care and protection order on application or its own initiative. A drug use provision may be extended, amended or revoked under part 14.5. Under clause 717, 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, or if the application is heard in the absence of any other party or person under clause 700.

Clause 422 creates an offence to engage in conduct that contravenes a provision of a care and protection order. The maximum penalty is 100 penalty units, imprisonment for one year or both.

Part 14.10 — Supervision provisions

This part provides the meaning of a supervision provision in a care and protection order.

Clause 488 — What is a supervision provision?

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.

It may include one or more of the following requirements:
- That the child or young person or a parent or someone with daily or long-term care responsibility report to the Chief Executive at the reasonable times and places decided by the Chief Executive;
- That the child or young person or a parent or someone else with daily care or long-term care responsibility take part in discussions with the Chief Executive about the child or young person's care, wellbeing and development;
- That a person with parental responsibility allow the Chief Executive entry to premises for the purpose of supervising the child or young person under the provision.

A supervision provision in a care and protection order is intended to address risk to a child or young person through placing the child or young person under the supervision of the Chief Executive. This provision enables the Chief Executive to monitor the level of risk to the child or young person through regular contact with the child or young person and their parents or persons with responsibility for them.

Clause 422 creates an offence to engage in conduct that contravenes a provision of a care and protection order. The maximum penalty is 100 penalty units, imprisonment for one year or both.

Clause 489 — Supervision provision—meetings with Chief Executive

This clause makes clear that a supervision provision authorises the Chief Executive to meet and talk with the child or young person in the absence of, or within hearing distance, of any other person.

This is to ensure that the child or young person can talk freely and openly to the Chief Executive about the circumstances that gave rise to the making of the supervision provision and their ongoing care, wellbeing and development. It will also facilitate the Chief Executive making informed assessments about the ongoing level of risk to the child or young person.

Part 14.11 — Mental health tribunal provisions

This part provides the meaning of a mental health tribunal provision in a care and protection order.

Clause 490 — What is a mental health tribunal provision?

A mental health tribunal provision authorises a referral for a child or young person to the Mental Health Tribunal to allow the Tribunal to decide whether the child or young person has a mental illness or mental dysfunction and if so, to make recommendations to the Childrens Court about how the child or young person should be dealt with.

Definitions of mental illness and mental dysfunction for the Bill are included at clause 529 which correspond to the definitions in the *Mental Health (Treatment and Care) Act 1994* dictionary.

Mental dysfunction is defined under that Act as a disturbance or defect, to a substantially disabling degree, of perceptual interpretation, comprehension, reasoning, learning, judgment, memory, motivation or emotion.

Mental illness is defined under that Act as a condition that seriously impairs (either temporarily or permanently) the mental functioning of a person and is characterised by the presence in the person of any of the following symptoms:

- delusions;
- hallucinations;
- serious disorder of thought form;
- a severe disturbance of mood;
- sustained or repeated irrational behaviour indicating the presence of the symptoms referred to in paragraph (a), (b), (c) or (d).

This provision may be made upon application for a care and protection order to assist the Court to determine whether a care and protection order is the most appropriate order to make, or whether another order is more appropriate (for example, a therapeutic protection order) or another course of action.

Part 14.12 — Specific issues provisions

This part details specific issues provisions. Specific issues orders were introduced in the 1999 Act at section 246 in order to address a wide range of care and protection matters for a child or young person such as parental responsibility, prohibition of contact or residence with a child or young person, referrals to the mental health Tribunal and supervision. Under the Bill, a specific issues provision in a care and protection order will specifically address a child or young person's protective needs by directing a person to do or not do something or comply with a stated condition.

Clause 491 — What is a specific issues provision?

This clause outlines the meaning of a specific issues provision in a care and protection order. A specific issues provision in a care and protection order means a provision about the care and protection of a 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.

A specific issues provision in a care and protection order is intended to address risk to a child or young person which may arise from the action or inaction of a person who is caring for the child or young person or having contact with the child or young person (usually a parent). The Bill intentionally frames specific issues provisions broadly to enable the Court to

determine what is necessary to direct a person to do or not do to reduce the level of risk to the child or young person.

Examples include a specific issues provision directing a parent to attend a parenting course, a specific issues provision directing a primary caregiver to refrain from corporal punishment of the child or a specific issues provision requiring a person to comply with a condition not to remove the child from the ACT.

Clause 422 creates an offence to engage in conduct that contravenes a provision of a care and protection order. The maximum penalty is 100 penalty units, imprisonment for one year or both.

Part 14.13 — Annual review reports—parental responsibility provisions 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 the parental or supervisory responsibility of the Chief Executive.

Clause 492 — What is a reviewable care and protection order?

This clause introduces a new term of reviewable care and protection order for this chapter. A reviewable care and protection order means a care and protection order with a supervision provision or a parental responsibility provision giving daily care or long-term care responsibility to the Chief Executive that has been in force for over 6 months.

For example, a reviewable care and protection would include a care and protection order in force for over 6 months with a parental responsibility provision sharing daily care responsibility between the Chief Executive and a parent; or a care and protection order in force for over 6 months with a parental responsibility provision transferring long-term care responsibility to the Chief Executive or a care and protection order in force for over 6 months with a supervision provision.

An annual review report is not required to be prepared for a child or young person subject to a care and protection order with an enduring parental responsibility provision, as the Chief Executive does not have parental responsibility for the child or young person.

Clause 493 — What is an annual review report?

This clause outlines the definition of an annual review report. It is a report about the circumstances and living arrangements of the subject child or young person and whether the arrangements in place for the child or young person's care and protection at the time of reporting, continue to be in the best interests of the child or young person.

Clause 494 — Annual review report—prepared at least annually

This clause outlines when an annual review report for a reviewable care and protection order must be prepared which is each year, or in cases where the order is in force for less than 1 year, at least one month but not earlier than 2 months, before the order expires.

Clause 495 — Annual review report—consultation

This clause requires the Chief Executive to arrange a meeting with the child or young person (if satisfied the child or young person can understand and take part in the meeting), parents or other persons with parental responsibility, out-of-home carers (for children and young people in out of home care) and the foster care service (for children and young people placed with a foster carer) to discuss the matters that the Chief Executive proposes to include in the report before the report is finalised. The Chief Executive may also invite anyone one else to the meeting that the Chief Executive considers appropriate. Examples include the Public Advocate or Official Visitor.

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*.

Clause 496 — Annual review report—must be given to certain people

This clause requires the Chief Executive to provide a copy of the annual review report to the listed persons, including the child or young person, each person with daily care or long-term care responsibility, each kinship or foster carer providing care to the child or young person, the Public Advocate and the Childrens Court.

Sub-clause (2) envisages that the Chief Executive may give the annual review report to another person, for example an interpreter or a doctor, to assist in bringing the contents of the report to the attention of a person to whom the report must be given.

Sub-clause (3) allows the Chief Executive to make minor adjustments to the annual review report before distribution to everyone except the Childrens Court and the Public Advocate to protect the privacy and confidentiality of a person or people named in the report as required.

Clause 497 — Annual review report—application for waiver of obligation to give report to someone

This clause describes the circumstances in which the Chief Executive may apply to the Childrens Court for an order to waive the obligation to provide the annual review report to the child or young person, each person with daily care or long-term care responsibility, or each kinship or foster carer for the child or young person. This is called a waiver order.

The Chief Executive may apply for the waiver order if the Chief Executive considers that giving the report to any of these persons would not be in the best interests of the child or young person.

An example of when the Chief Executive may consider that giving the report to a child or young person is not in their best interests is if the report contains information about a parent that is likely to be harmful to the child or young person's mental health at that time and by receiving the information in that form.

An example of when the Chief Executive may consider that giving the report to a parent is not in the child or young person's best interests is if the parent has previously made threats of violence against the child's carers and the report contains information that is likely to lead to the identification and location of the child's carers.

An example of when the Chief Executive may consider that giving the report to a kinship or foster carer is not in the child or young person's best interests is if the Chief Executive has received a report of alleged abuse of the child in care and is in the process of investigating the report. The Chief Executive may consider that giving the report to the carer is likely to jeopardise the investigation and place the child or young person at risk.

Clause 21 provides that the Chief Executive is not required to act in relation to parents or persons with parental responsibility (under this clause this would mean to give the report to a parent or person with parental responsibility for a child or young person) if the person cannot be found after reasonable inquiry.

Clause 498 — Annual review report—waiver of obligation to give annual review report to someone

This clause outlines how the Childrens Court is to deal with an application by the Chief Executive for an order (the waiver order) waiving the requirement to give the annual review report to the child or young person, each person with daily care or long-term care responsibility for the child or young person, or each kinship or foster carer for the child or young person.

Sub-clause (2) provides that in circumstances where the Chief Executive has applied for a waiver order, the Childrens Court may hear an application ex parte if necessary.

Sub-clause (3) provides that the Court must make the waiver order if satisfied that giving the annual review report to the person stated in the application would not be in the best interests of the child or young person.

Under sub-clause (4), if the Court is not so satisfied, the Court must order the Chief Executive to give the person a complete or edited copy of the annual review report. The Court may also make any other order about the report being provided to the person that the Court considers appropriate.

Clause 499 — Annual review report—Public Advocate may require Chief Executive to give annual review report to someone

In circumstances where the Chief Executive is required to prepare an annual review report but has not done so or obtained an order waiving compliance, the Public Advocate may apply to the Childrens Court for an order for production within 14 days. The order is called an annual review report order.

Clause 500 — Annual review report—extension of care and protection order

If the Childrens Court makes an annual review report order requiring the Chief Executive to produce the annual review report and the care and protection order is due to lapse within one month, the Childrens Court may extend the care and protection order so that it ends not more than one month later.

Chapter 15 — 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 daily care and/or long-term care responsibility for a child or young person under a voluntary care agreement or order under the care and protection chapters.

In exercising parental responsibility for a child or young person, the Chief Executive may make arrangements for the child or young person's care with an out-of-home carer. An out-of-home carer includes a foster carer, kinship carer or residential care service.

This chapter obliges the Chief Executive to ensure that persons and agencies providing out of home care for children and young people are suitable entities to exercise parental responsibility on behalf of the Chief Executive. In approving an entity to be a suitable entity, the Chief Executive must consider suitability information about the entity outlined at clause 65 and for foster and kinship carers, this includes an assessment of the suitability of adult members of the carer's household under clause 65(1)(h).

This chapter does not address the authorisation of services and places for the Chief Executive's exercise of parental responsibility for a child or young person under a therapeutic protection order. This is dealt with in chapter 16.

Part 15.1 — General

Clause 501 — Definitions – Act

This clause outlines definitions for the Act. Some terms included in this clause are new, including general parental authority, specific parental authority, residential care service, foster care service and kinship carer. These terms are introduced to more closely align the Bill with current practice.

Clause 502 — Chief Executive may provide assistance

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 parental responsibility. This clause does not intend to limit the range of matters for which the Chief Executive may provide assistance. This clause re-enacts section 27(2) of the 1999 Act.

Sub-clause (2) also provides discretion for the Chief Executive to provide, or arrange the provision of, financial assistance or other types of help to a child or young person who ceases to be subject to the Chief Executive's parental responsibility for whatever reason. This does not create or confer an obligation for the Chief Executive to provide financial or other assistance in these circumstances. This re-enacts section 33 of the 1999 Act.

Part 15.2 — Chief Executive has long-term care responsibility

This part addresses circumstances when the Chief Executive has long-term care responsibility for a child or young person.

Clause 503 — Chief Executive sharing long-term care responsibility

This clause provides a mechanism to resolve disputes regarding the exercise of long-term care responsibility between the Chief Executive and other persons who share long-term care responsibility.

Under clause 473, the Court may order that a person (including the Chief Executive) who has long-term care responsibility consult with one or more other people who share long-term care responsibility for the child or young person in relation to a long-term matter.

Sub-clause (2) provides that to the extent of any disagreement between the Chief Executive and the other person or persons 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 agreeing to the issuing of a passport for a young person to allow the young person to travel overseas with his or her carer, the Chief Executive must consult with each of the young person's parents who retain responsibility for long-term care (if consultation with the parents is a requirement of the care and protection order). If one of the young person's parents opposes the issuing of a passport, the Chief Executive may apply to the Childrens Court seeking an order to authorise the passport's issue.

Clause 504 — Chief Executive must consult about long-term care

This clause provides that if the Chief Executive has responsibility for long-term care 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 care, as far as practicable.

Part 15.3 — Chief Executive has daily care responsibility

This part addresses circumstances when the Chief Executive has daily care responsibility for a child or young person.

Clause 505 — Pt 15.3 applies to care and protection chapters

This clause outlines the application of this part. This part applies if the Chief Executive has responsibility for daily care for a child or young person by effect of the care and protection chapters (for example, a child subject to a voluntary care agreement or a care and protection order including a parental responsibility provision).

This part does not apply if the Chief Executive has responsibility for daily care for a child or young person under an interim or final therapeutic protection order. A child or young person subject to an interim or final therapeutic protection order must be placed at a therapeutic protection place under clause 534.

Clause 506 — Public advocate to be told about action following appraisals

This clause provides that the Chief Executive must provide a report to the Public Advocate when:

- an incident gives rise to a child concern report being made about a child or young person for whom the Chief Executive has parental responsibility and is placed in out of home care; and
- the Chief Executive decides it is a child protection report and an appraisal is conducted; and
- the incident involves the authorised carer or happened while the child or young person was in an approved care placement. This includes children and young people placed in out-of-home care or on approved contact visits.

The report to the Public Advocate must be about the incident and what action, if any, has been taken in response to the incident.

The intention of the provision is for the Public Advocate to provide oversight of the Chief Executive's actions in relation to children and young people allegedly abused or neglected in care or while on an approved contact visit. This clause re-enacts section 189A.

Part 15.4 — Out-of-home carers

This part provides a framework for the approval of out-of-home carers to care for children and young people for whom the Chief Executive has daily care or long-term care responsibility, including processes for revoking authorisations of out-of-home carers.

Division 15.4.1 — Placement with out-of-home carer

Clause 507 — Who is an out-of-home carer?

This clause provides the meaning of out-of-home carer for a child or young person for the Act as a kinship carer, a foster carer or a residential care service for the child or young person.

Clause 508 — 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 515 and with whom the Chief Executive has placed the child or young person under clause 511.

Clause 509 — 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 517 or 518.

Clause 510 — 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 519.

Clause 511 — Chief Executive may place child or young person with out-of-home carer

This clause allows the Chief Executive to place the child or young person with an out-of-home carer if the Chief Executive has daily care responsibility for a child or young person.

This does not require the Chief Executive to place a child or young person with an out-of-home carer and the Chief Executive may place the child or young person in any care arrangement that the Chief Executive considers suitable.

If the Chief Executive is placing an Aboriginal or Torres Strait Islander child or young person with an out-of-home carer, the placement must be in accordance with clause 512.

Clause 512 — Priorities for placement with out-of-home carer—Aboriginal or Torres Strait Islander child or young person

This clause re-enacts the Indigenous placement principle at section 15 of the 1999 Act. This clause gives effect to a recommendation of the 1997 Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families entitled 'Bringing them Home'. It applies the Aboriginal and Torres Strait Islander placement principle for Aboriginal and Torres Strait Islander children and young people in out-of-home care and creates a hierarchy for placements of Aboriginal and Torres Strait Islander children and young people in accordance with cultural traditions and practices.

Sub-clause (1)(c) also requires that any placement of Aboriginal or Torres Strait Islander child or young person with an out-of-home carer is in accordance with any Aboriginal or Torres Strait Islander cultural plan in existence. This clause re-enacts the requirement for cultural plans introduced as part of the *Children and Young People Amendment Act 2006*.

The meaning of a cultural plan in this section is a care plan developed by the Chief Executive that includes proposals for the preservation and enhancement of the identity of the child or young person as an Aboriginal or Torres Strait Islander person under clause 454. For Aboriginal and Torres Strait Islander children and young people, clause 456 requires the plan to be developed by the Chief Executive in consultation with:

- the child or young person;
- each person who has daily care responsibility for the child or young person;
- anyone else who would be involved in implementing a proposal;
- Aboriginal and Torres Strait Islander people who have an interest in the wellbeing of the child or young person through family, kinship and cultural ties; and

- any Aboriginal or Torres Strait Islander people or organisation identified by the Chief Executive as providing ongoing support services to the child or young person or his or her family.

This principle engages the right to equal protection of the law without discrimination, at subsection 8(3) of the *Human Rights Act 2004*. However it is justifiable under section 28 of the *Human Rights Act 2004*, because the proposed positive discriminatory measures recognise the needs of Aboriginal and Torres Strait Islander children, their families and their communities in the light of their history as Indigenous Australians separated from families[3] and their over-representation in the child protection and out of home care systems.

Clause 513 — 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. This includes, but is not limited to, a child or young person for whom the Chief Executive has parental responsibility.

A place of care is a place approved by the Minister to be operated by a residential care service under clause 524. The Bill contemplates that a residential care service may operate more than one place at which children and young people can be placed under the care and protection chapters.

Places of care are defined in the Act separately from other residential care services, for the purpose of distinguishing places that the Official Visitor is required to inspect and handle complaints about.

A therapeutic protection place is authorised under chapter 16.

Division 15.4.2 — 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 care services) and places of care.

Clause 514 — Definitions-Act

This clause includes definitions for the Act of foster care service, general parental authority, out of home care authorisation, and specific parental authority.

Clause 515 — Authorisation of kinship carer—specific parental authority

This clause allows the Chief Executive with parental responsibility for a child or young person to authorise a family member or significant person for the child or young person to exercise daily care responsibility and/or long-term care responsibility for the Chief Executive.

Family member is defined at clause 13. Significant person is defined at clause 14.

In urgent circumstances, the Chief Executive may need to orally authorise a kinship carer. Under clause 520, the Chief Executive is required to provide a written authorisation to the kinship carer 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 daily care for the child or young person. A person may be approved as a suitable entity after providing suitability information to the Chief Executive at clause 65.

3 *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997, HREOC.

Sub-clause (5) provides that a kinship carer's authorisation only applies while the child or young person is placed with them, and therefore lapses when the child or young person leaves that placement.

Clause 516 — Authorisation of foster care service

This clause allows the Chief Executive to authorise an entity to be a foster care service. The role of a foster care service is to recruit people to become foster carers and provide support for foster carers. The Chief Executive must be satisfied that the entity is a suitable entity to facilitate foster care services and complies with, and be likely to continue to comply with, the out of home care standards.

Clause 517 — Authorisation of foster carer— specific parental authority

This clause allows the Chief Executive with responsibility for daily care or long-term care responsibility for a child or young person to authorise a person to exercise the responsibility for the Chief Executive as a foster carer.

In urgent or other circumstances, the Chief Executive may need to verbally authorise a foster carer to exercise daily care or long-term care responsibility for the child or young person. Under clause 520, 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.

Sub-clause (4) provides that the responsibility must be exercised by the person in accordance with any directions given by the Chief Executive. Sub-clause (5) provides that an authorisation under this clause lapses if the child or young person leaves the placement for any reason.

Clause 518 — Authorisation of foster carer—general parental authority

This clause allows the Chief Executive to authorise a person to exercise daily care or long-term care responsibility for any child or young person on the Chief Executive's behalf as a generally approved foster carer.

The authorisation may occur only if the Chief Executive is satisfied the person is a suitable entity to exercise the responsibility for any child or young person and the person has given the Chief Executive suitability information about each other adult member of the person's household.

Sub-clause (3) provides that the responsibility must be exercised by the foster carer in accordance with any directions given by the Chief Executive. An example of a direction includes complying with the agreed arrangements for the child or young person set out in the care plan.

Clause 519 — Authorisation of residential care service—general parental authority

This clause allows the Chief Executive to authorise an entity, in writing, to exercise daily care or long-term care responsibility for the Chief Executive for any child or young person on the Chief Executive's behalf.

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 exercise the responsibility and the entity complies with, and is likely to continue to comply with, the out of home care standards.

Sub-clause (3) provides that the responsibility must be exercised by the entity in accordance with any directions given by the Chief Executive.

Clause 520 — Out-of-home carer must be given copy of authorisation and any relevant Court orders

After a verbal authorisation to a person or entity as an out-of-home carer, this clause requires the Chief Executive to provide a written authorisation and a copy of any relevant Court order about the child or young person, as soon as practicable thereafter.

Clause 521 — Revocation of foster care service's authorisation

This clause allows the Chief Executive to revoke an entity's authorisation as a foster care service and is additional to the power conferred by section 180 of the *Legislation Act 2001*. Section 180 of the Legislation Act provides that the power to make a decision under a law includes the power to reverse or change the decision, which is exercisable in the same way, and subject to the same conditions, as the power to make the decision.

In order to revoke an entity's authorisation, the Chief Executive must be satisfied that the entity is not a suitable entity to facilitate foster care services or has not complied with, or continued to comply with, the out of home care standards.

Sub-clause (3) reflects natural justice requirements that an entity must be given notice of the Chief Executive's intention to revoke the authorisation, including the grounds and provide an opportunity for the entity to make a written submission to the Chief Executive about the notice. The Chief Executive must consider any written submission provided in response.

The Chief Executive must then revoke the authorisation or withdraw the notice of intention to revoke. A decision to revoke an authorisation under this clause is a reviewable decision by the Administrative Appeals Tribunal (see clause 838).

Clause 522 — 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 2001*. Section 180 of the Legislation Act provides that the power to make a decision under a law includes the power to reverse or change the decision, which is exercisable in the same way, and subject to the same conditions, as the power to make the decision.

In order to revoke a person's authorisation as a foster carer, the Chief Executive must be satisfied that:

- the person is not a suitable entity to have responsibility for any child or young person; or
- the person has not adequately cared for or protected the child or young person; or
- the person has not complied with a direction of the Chief Executive in exercising parental responsibility for any child or young person.

An example of the person not being a suitable entity to have responsibility for any child or young person is if the person's suitability information changes and the person informs the Chief Executive under clause 70(2) that they have been convicted of an offence against a child or young person.

An example of the person not adequately caring for or protecting the child or young person is if person does not meet minimum standards for the provision of care to a child or young person whether or not the standards are outlined in the out of home care standards.

An example of the person not complying with a direction of the Chief Executive in exercising parental responsibility is if the Chief Executive directs the person not to allow the child to have contact with a person who has previously harmed the child and the person does not comply with the direction by allowing the child to have contact with the person.

Sub-clause (3) reflects natural justice requirements that a person must be given notice of the Chief Executive's intention to revoke the authorisation, including the grounds and provide an opportunity for the entity to make a written submission to the Chief Executive about the notice. The Chief Executive must consider any written submission provided in response.

After considering any submission, the Chief Executive may consider any other relevant matter and must decide to either revoke the authorisation; or revoke the notice.

A decision to revoke an authorisation under this clause is a reviewable decision by the Administrative Appeals Tribunal (see clause 838).

Clause 523 — 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 2001*. Section 180 of the Legislation Act provides that the power to make a decision under a law includes the power to reverse or change the decision, which is exercisable in the same way, and subject to the same conditions, as the power to make the decision.

In order to revoke an entity's authorisation as a residential care service, the Chief Executive must be satisfied that the entity is not a suitable entity to have daily care responsibility for any child or young person, or has not adequately cared for or protected the child or young person or has not complied with the out of home care standards.

Prior to revoking the authorisation under sub-clause (1), the Chief Executive is required to give written notice to the entity that the Chief Executive intends to revoke their general authorisation as a residential care service (with reasons) and their right to make a submission about the notice within 14 days.

After considering any submission, the Chief Executive may consider any other relevant matter and must decide to either revoke the authorisation; or revoke the notice. A decision under this clause to revoke an authorisation is a reviewable decision by the Administrative Appeals Tribunal (see clause 838).

Clause 524 — 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. An approval of a place of care will be publicly notified as a notifiable instrument.

In order to assess an application for approval of a place of care, the Minister may ask the residential care service to allow the Chief Executive to inspect the place to ensure it complies with the out of home care standards, for example, in relation to physical facilities. If the residential care service does not allow entry for this purpose, sub-clause (3) provides that the application need not be decided.

Division 15.4.3 — 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 to support and promote the child or young person's sense of identity and knowledge of their personal history, particularly their placement in out of home care.

Clause 525 — Definitions—div 15.4.3

This clause creates definitions for this division. Care entities are defined to mean a child or young person's foster carer 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 526 — 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 527 — Information must be kept after placement ends

This clause requires the care entity to keep the child or young person's 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 in the following circumstances:

- if the care entity ceases to be a care entity under the Act for any reason;
- it is two years after the placement has ended;
- the Chief Executive has requested the information for any reason;
- the person to whom the personal information relates becomes an adult.

Sub-clause (4) provides that any records or personal information given to the Chief Executive under this clause become a record of an agency under the *Territory Records Act 2002*.

Clause 528 — Child or young person must have access to information

This clause provides that the care entity may be authorised by the Chief Executive to give a child or young person access to their personal information and records if the care entity retains the information and the Chief Executive considers it to be in the child's or young person's best interests.

Sub-clause (3) obliges the care entity to give the child or young person access to the personal information and records if the entity has been authorised by the Chief Executive to do so.

Under sub-clause (4), the Chief Executive's authorisation may be conditional regarding the access to be given and the care entity must comply with any conditions.

Chapter 16 — Care and protection—therapeutic protection of children and young people

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 in circumstances where the child or young person poses a significant risk of significant harm to themselves or others.

The provisions relating to therapeutic protection engage human rights law. The Bill seeks to build in safeguards that protect against unlawful and arbitrary interferences with rights contained in the *Human Rights Act 2004* and to ensure the child or young person is confined at a therapeutic protection place for the shortest necessary time to reduce the risk to the child or young person.

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 16.1 — Preliminary

This part outlines definitions. It also provides a rule that a child or young person may only be confined at a therapeutic protection place under an interim or final therapeutic protection order or if the Chief Executive believes that the child or young person is need of emergency therapeutic protection.

Clause 529 — Definitions – Act and ch 16

This clause sets out definitions for the Act and chapter and introduces a number of new terms, including harmful conduct, therapeutic protection history, therapeutic protection place, therapeutic protection plan and therapeutic protection person.

Clause 530 — Therapeutic protection only under therapeutic protection order or for emergency protection

This clause enables the Chief Executive to confine a child or young person at a therapeutic protection place under a therapeutic protection order (whether interim or final). This is intended to ensure that the therapeutic protection place is not used to confine children and young people without the requisite legal authority of an interim or final therapeutic protection order and the grounds for that order having been met.

However, a child (over 10 years) or young person can also be confined at a therapeutic protection place for a period of up to two working days (or if interupted by a weekend, the next sitting day) if the Chief Executive reasonably believes the child or young person is in need of emergency therapeutic protection (see clause 403), that is if the child or young person meets the criteria for a therapeutic protection order (outlined at clause 548) and their immediate placement is necessary to ensure their safety. In accordance with the human rights principle of proportionality, this could only be used as measure of last resort and for the shortest necessary time.

Part 16.2 — Therapeutic protection orders

This clause sets out a framework for the application, making, review, extension and revocation of therapeutic protection orders, including interim therapeutic protection orders.

Division 16.2.1 — Definitions—Act and pt 16.2

This clause sets out definitions and concepts used under the chapter and Act.

Clause 531 — What is a therapeutic protection order?

This clause 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 daily care responsibility for the child or young

person to the Chief Executive for the period of confinement. The order may also include conditions the Court considers necessary to prevent the child or young person from engaging in harmful conduct.

This clause re-enacts section 235(2) of the 1999 Act.

Clause 532 — What is harmful conduct?

This clause 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 Childrens Court to examine the grounds for making, amending or extending a therapeutic protection order. It replaces the concept in the 1999 Act of 'serious harm' to ensure that therapeutic protection orders are only considered for those children and young people most at risk of serious harm to themselves or others.

Clause 533 — What is a risk assessment?

This clause introduces the concept of a risk assessment that is used in the application for a therapeutic protection order to assess the level of risk 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 534 — What is a therapeutic protection place?

This clause establishes the concept of a therapeutic protection place declared by the Minister. Only children or young people subject to an interim or final therapeutic protection order, or in need of emergency therapeutic protection, may be placed at a therapeutic protection place.

Clause 535 — What is a therapeutic protection plan?

This clause establishes the concept of a therapeutic protection plan which replaces and extends the meaning of a schedule for therapeutic protection at section 243 of the 1999 Act. The plan is developed by the Chief Executive as part of the application, and endorsed by the Childrens Court as part of making an interim or final therapeutic protection order under clause 543 or 548.

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 expected results of those services and the proposed education, supervision and contact arrangements for the child or young person.

Under the 1999 Act, contact arrangements were largely at the discretion of the Chief Executive but the Bill contemplates that these arrangements will be overseen by the Court through this clause. For Aboriginal or Torres Strait Islander children and young people, there is an obligation that the plan will include proposals to preserve and enhance their identity at Aboriginal or Torres Strait Islander people.

Clause 536 — What is therapeutic protection history?

This clause establishes the concept of therapeutic protection history that outlines how the plan referred to in clause 535 was implemented for the child or young person. The therapeutic protection history for a child or young person is considered by the Childrens Court as part of the application to amend or extend a therapeutic protection order.

Clause 537 — What is a transition plan?

This clause introduces the concept of a transition plan, which is a plan developed by the Chief Executive for the child or young person's transition from therapeutic protection.

The transition plan may outline proposals and recommendations for ongoing intervention for the child or young person (for example, through therapy or counselling) and any other

services considered necessary to support and assist the child's or young person's transition from therapeutic protection.

Division 16.2.2 — Applications for therapeutic protection orders

This division outlines applications for therapeutic protection orders.

Clause 538 — Therapeutic protection order—application by Chief Executive

This clause enables the Chief Executive only to apply for a therapeutic protection order if satisfied that the criteria for making the order in clause 548 are met.

Clause 539 — Therapeutic protection order—application to state grounds etc

This clause outlines what must be included in applications for therapeutic protection orders, including a risk assessment, details of previous therapeutic protection orders, any therapeutic protection history, less restrictive interventions that the Chief Executive has tried or considered that were not successful or 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 540 — Therapeutic protection orders—who must be given application

This clause outlines who must be given the application for a therapeutic protection order by the Chief Executive and when they must be given the application.

Clause 541 — Therapeutic protection order—Childrens Court to consider application promptly

Sub-clause (1) requires the Court to give initial consideration to an application for a therapeutic protection order not later than 2 working days after filing.

Sub-clause (2) requires the Court to set directions for the conduct of the proceeding (including hearing of the proceeding) at the time of initial consideration.

Sub-clause (3) provides that this clause is displaced if the Chief Executive or a police officer has taken emergency action, in which case the Childrens Court must give consideration to the application on the day it is filed under clause 412.

Division 16.2.3 — Interim therapeutic protection orders

This division outlines interim therapeutic protection orders.

Clause 542 — What is an interim therapeutic protection order?

This clause establishes that an interim therapeutic protection order authorises a period of confinement for a child or young person for up to 2 weeks. During this period, the order transfers daily care responsibility for the child or young person to the Chief Executive (see clause 531).

Clause 543 — Interim therapeutic protection order—criteria for making

This sets out the prerequisites of which the Court must be satisfied before making an interim therapeutic protection order. The Childrens 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 outlined at clause 548 are met.

Clause 544 — Interim therapeutic protection order—mental health referral

Children and young people being considered for a therapeutic protection order may have an undiagnosed mental illness or dysfunction that would otherwise be considered by the Mental Health Tribunal. This clause introduces a new requirement for the Court to refer children and young people who it reasonably suspects may have a mental illness or mental dysfunction for assessment by the Mental Health Tribunal, to decide whether they are suffering from a mental

illness or mental dysfunction and if so, make recommendations to the Court about how the child or young person should be dealt with.

The *Mental Health (Treatment and Care) Act 1994* dictionary defines mental dysfunction as a disturbance or defect, to a substantially disabling degree, of perceptual interpretation, comprehension, reasoning, learning, judgment, memory, motivation or emotion. The Act further defines mental illness as a condition that seriously impairs (either temporarily or permanently) the mental functioning of a person and is characterised by the presence in the person of any of the following symptoms:
(a) delusions;
(b) hallucinations;
(c) serious disorder of thought form;
(d) a severe disturbance of mood;
(e) sustained or repeated irrational behaviour indicating the presence of the symptoms referred to in paragraph (a), (b), (c) or (d).

Clause 545 — Interim therapeutic protection order—length

This clause provides that an interim therapeutic protection order can be made for up to 2 weeks. Any interim therapeutic protection order in force which would end before the application is decided remains in force until the application for the therapeutic protection order is decided.

Clause 546 — Interim therapeutic protection order—no extension, amendment, revocation

This clause establishes that interim therapeutic protection orders cannot be extended, amended or revoked. Interim therapeutic protection orders may be made for up to two weeks under clause 545.

Clause 547 — Offence—interim therapeutic protection order

This clause creates an offence for a person (other than the subject child or young person) to engage in conduct that contravenes a provision of an interim therapeutic protection order. An example is assisting a child or young person who is subject to an interim therapeutic protection order to abscond from the place.

Division 16.2.4 — Making a therapeutic protection order

This division addresses the making of a therapeutic protection order.

Clause 548 — Therapeutic protection order—criteria for making

This clause introduces new criteria for making a therapeutic protection order to ensure that these orders are used as a last resort and only for those children and young people most at risk of serious harm to themselves or others.

Before making an order, the Childrens 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;
- the child or young person is not suffering from a mental illness; or is suffering from a mental illness in addition to other behaviours or dysfunction giving rise to the risk of harm 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 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.

Examples are included to illustrate other ways to prevent a child or young person from engaging in harmful conduct.

Clause 549 — Therapeutic protection order—length

This clause continues to have the effect of section 244 of the 1999 Act that a therapeutic protection order can be made for up to 8 weeks. The length of the order must be stated in the order.

Clause 550 — Therapeutic protection order—statement of reasons

This clause introduces a new requirement for the Childrens Court to provide a statement of reasons after deciding an application for a therapeutic protection order.

Clause 551 — Offence—therapeutic protection order

This clause creates an offence for a person (excluding the subject child or young person) to engage in conduct that contravenes a provision of a therapeutic protection order.

Division 16.2.5 — Review of therapeutic protection orders

This clause introduces an obligation for the Chief Executive to review therapeutic protection orders that are in force. This is to ensure that children and young people are only confined for the minimum necessary period to address risks.

Clause 552 — Initial review within 4 weeks

This clause introduces a new obligation for the Chief Executive to review the operation of a therapeutic protection order within 4 weeks of the order being made. This is called an initial review.

Clause 553 — Ongoing review at least each 4 weeks

This clause introduces a new obligation for the Chief Executive to review the operation of a therapeutic protection order within 4 weeks of the initial review and each four weeks thereafter while the order is in force.

Clause 554 — Review – views to be considered

For each review conducted under clauses 552 or 553, the Chief Executive must seek and consider the views of the child or young person, each person who has parental responsibility for the child or young person (other than the Chief Executive) and each person who had daily care responsibility for the child or young person immediately before the order was made, the Public Advocate and the Official Visitor.

The Chief Executive must consider the views of any other person the Chief Executive considers appropriate. This may include, for example, a health professional or other professional involved in the therapeutic support of the child or young person.

Clause 555 — Review report

This clause requires the Chief Executive to prepare a review report about the operation of the therapeutic protection order after the initial review and each ongoing review. The Chief Executive is required to give a copy of the report to the child or young person, each person with parental responsibility (including each person who had daily care responsibility before the order was made), each Official Visitor who has visited the child or young person in therapeutic protection and the Public Advocate.

Clause 556 — Chief Executive's action after review

This clause requires the Chief Executive to take certain action in relation to the order after making decisions as a result of the initial review or each ongoing review.

If the Chief Executive decides the order should be extended, amended or revoked this clause requires the Chief Executive to apply to the Court for the relevant extension, amendment or revocation of the order.

Division 16.2.6 — Extending a therapeutic protection order

This division addresses extensions of therapeutic protection orders. It introduces a maximum upper limit of 6 months for extensions of a therapeutic protection order by the Childrens Court.

Clause 557 — Therapeutic protection order—extension application

This clause enables the Chief Executive only to apply to the Childrens Court to extend a therapeutic protection order if the Chief Executive reasonably believes the criteria for extending the order are met.

Clause 558 — Therapeutic protection order—extension application must state grounds etc

This clause 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 further risk assessment.

Clause 559 — Therapeutic protection order—who must be given extension application

This clause provides that the application must be given to each party to the original proceeding and the Public Advocate at least one working day before the application is to be heard by the Court.

Clause 560 — Therapeutic protection order—Childrens Court to consider extension application promptly

This clause provides that the Childrens Court must give initial consideration to an application for extension of a therapeutic protection order within two working days after the day the application is filed. The Childrens Court is required to give directions about the conduct of the proceeding at the time of giving initial consideration to the application. As the effect of a therapeutic protection order is confinement of a child or young person, it is imperative that the Court gives prompt attention to an application for extension of a therapeutic protection order with appropriate directions for the timely finalisation of the application.

Sub-clause (3) provides that any therapeutic protection order in force on the day of filing continues in force until the application is heard and decided. This applies regardless of whether the application is considered within the prescribed period of 2 working days after filing.

Clause 561 — Therapeutic protection order—criteria for extension up to 6 months

This clause outlines the criteria for the Childrens Court to extend a therapeutic protection order.

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. The length of a therapeutic protection order for a child or young person will be guided by the need to provide adequate time for assessment, and stabilisation through therapeutic intervention. It is intended that, where necessary, therapeutic intervention could continue after the period of a therapeutic protection order, either voluntarily or through a care and protection order.

Clause 562 — Therapeutic protection order extension—statement of reasons

This clause requires the Childrens Court to record reasons for its decision following hearing and deciding an application to extend a therapeutic protection order.

Division 16.2.7 — Amending or revoking a therapeutic protection order

This division addresses applications for amendment or revocation of therapeutic protection orders.

Clause 563 — Therapeutic protection order—application for amendment or revocation

This clause 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. These persons include the Chief Executive, the child or young person, a person with parental responsibility for the child or young person, a former caregiver or the Public Advocate.

Clause 564 — Therapeutic protection order—application for amendment must state grounds etc

This clause sets out what must be included in an application for amendment of a therapeutic protection order.

Clause 565 — Therapeutic protection order—application for revocation must state grounds etc

This clause sets out what must be included in an application for revocation of a therapeutic protection order.

Clause 566 — Therapeutic protection order—who must be given application for amendment or revocation

This clause provides that the application must be given to each party to the original proceeding, anyone else required to be given the application and the Public Advocate at least one working day before the application is to be heard by the Court.

Clause 567 — Therapeutic protection order—Childrens Court to consider application for amendment or revocation promptly

This clause provides that the Childrens Court must give initial consideration to an application for amendment or revocation of a therapeutic protection order within 5 working days after filing. The Childrens Court is required to give directions about the conduct of the proceeding at the time of giving initial consideration to the application. As the effect of a therapeutic protection order is confinement of a child or young person, it is imperative that the Court gives prompt attention to an application for amendment or revocation of a therapeutic protection order with appropriate directions for the timely finalisation of the application.

Sub-clause (3) provides that any therapeutic protection order in force on the day of filing continues in force until the application is heard and decided. This applies regardless of whether the application is considered within the prescribed period of 5 working days after filing.

Clause 568 — Therapeutic protection order—criteria for amendment

This clause 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 569 — Therapeutic protection order—criteria for revocation

This clause 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 570 — Therapeutic protection order amendment or revocation—statement of reasons

This clause requires the Childrens Court to record reasons for its decision following hearing and deciding an application to amend or revoke a therapeutic protection order.

Part 16.3 — Children and young people in therapeutic protection

This part creates a definition of when a child or young person is in therapeutic protection. It authorises personal searches of children and young people and the use of force in certain circumstances.

Division 16.3.1 — Preliminary

Clause 571 — When is a child or young person in therapeutic protection?

This clause 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 an interim or final therapeutic protection order or following emergency action being taken because the child or young person is in need of emergency therapeutic protection. It therefore does not include children and young people who are visiting the place.

Clause 572 — Transgender and intersex children and young people—sexual identity

The sexual identity of a child or young person has a critical impact upon how intimate searches are conducted. This clause sets out how the sexual identity of a transgender or intersex child or young person should be ascertained. The clause provides a decision-making choice for the child or young person and the operating entity if the child or young person does not or refuses to nominate an identity (which must be informed by a report of a non-treating health professional).

In making decisions about whether to place a transgender or intersex child or young person with females or males, in some circumstances their choice of sex and subsequent placement decision may put the child or young person or other children or young people at risk of intimidation or harm. It may also be necessary to include in the therapeutic protection plan, supports for a transgender or intersex child or young person who may be ambivalent about their sexual identity. Sub-clause (5) therefore introduces a power for the operating entity to obtain a report by a non-treating health professional about the child or young person's sexual identity, if the operating entity reasonably believes the report is in the best interests of the child or young person and is necessary to make a decision in relation to the child or young person's placement, supervision and management. This power engages 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 2004*. However the limitation on these rights is proportionate as the power is necessary to protect the safety and emotional wellbeing of the subject child or young person and other children or young people in therapeutic protection.

Division 16.3.2 — Supervision

This division authorises supervision of the child or young person in therapeutic protection and escorts of children and young people outside the therapeutic protection place.

Clause 573 — Therapeutic protection—supervision

This clause enables the operating entity 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 574 — Therapeutic protection—escort outside therapeutic protection place

This clause enables a child or young person in therapeutic protection to leave a therapeutic protection place if they are escorted by the operating entity. This leave may be for any reason including, but not limited to, visits to a doctor, for compassionate reasons or approved contact arrangements.

Sub-clause (2) removes doubt that a child or young person under escort outside the therapeutic protection place is taken to be in therapeutic protection.

Division 16.3.3 — Visits by accredited people

This division provides an entitlement for children and young people in therapeutic protection to contact with accredited people.

Clause 575 — Who is an accredited person?

This clause lists persons considered to be accredited persons for a child or young person in therapeutic protection.

Clause 576 — Therapeutic protection—visits by accredited people must be allowed

This clause requires the operating entity 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 577 — Therapeutic protection—visits by accredited people

This clause allows visits by accredited people to occur to a child or young person in therapeutic protection. Accredited persons are outlined at clause 575 and include the Chief Executive, a lawyer, an Official Visitor, a commissioner exercising functions under the *Human Rights Commission Act 2005* (for example, the Children and Young People Commissioner), the Public Advocate and the Ombudsman.

Division 16.3.4 — 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 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*.

Clause 578 — Therapeutic protection—managing use of force

This clause sets out the obligations for the operating entity in relation to the use of force in the therapeutic protection place against a child or young person.

This includes a requirement for the operating entity to make arrangements to ensure that force is always used as a last resort and for a purpose that cannot be achieved in any other way and in accordance with the rules set out in this division and therapeutic protection standards.

Clause 579 — Therapeutic protection—authorised use of force

This clause authorises the use of necessary and reasonable force by a therapeutic protection person to prevent a child or young person in therapeutic protection from inflicting self harm or harming someone else or to prevent unlawful damage, destruction or interference with property.

Clause 580 — Therapeutic protection—application of force

This clause sets out how force may be used, when required. The therapeutic protection person 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 injury.

Clause 581 — Therapeutic protection—medical examination after use of force

This clause requires the operating entity to ensure the child or young person receives a medical examination by a doctor (other than a non-treating doctor) and appropriate health care if they are injured by the use of force.

Sub-clause (2) requires the operating entity to provide a child or young person with the opportunity to be examined by a doctor or nurse (other than a non-treating doctor or non-treating nurse) after the use of force in relation to the child or young person.

Clause 582 — Therapeutic protection—monthly reports about use of force

This clause obliges the operating entity for a therapeutic protection place to report to the Chief Executive after the end of each month regarding incidents where force is used against a child or young person in therapeutic protection.

Division 16.3.5 — Searches

Searches of children and young people who are confined in a therapeutic protection place are necessary to prevent the entry of items that may harm the child or young person or other people within the place. The *Human Rights Act 2004* 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 the 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 dangerous things that could threaten the safety of children and young people at a therapeutic protection place.

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 2004*.

To ensure that searches of children and young people are proportionate to the necessary aim of the searches, the division introduces a number of obligations on persons conducting or assisting with a search. These obligations 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.

This division replaces the search scheme outlined at sections 399 to 401 of the 1999 Act for children and young people in therapeutic protection 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.

Many of the safeguards outlined in this division are based on those introduced as part of the *Children and Young People Amendment Act 2007*, for the revised search and seizure scheme at the youth detention place.

Subdivision 16.3.5.1 — Application and definitions—div 16.3.5

Subdivision 16.3.5.1 sets out the meaning of different types of searches that are authorised under this division.

Clause 583 — Application—div 16.3.5

This clause sets out the application of the division. The division applies to a child or young person who is in therapeutic protection. A child or young person is in therapeutic protection if the child or young person is confined under an interim or final therapeutic protection order or in need of emergency therapeutic protection (see clause 571).

Clause 584 — What is a scanning search?

This clause sets out the meaning of a scanning search.

Clause 585 — What is a frisk search?

This clause sets out the meaning of a frisk search.

Clause 586 — What is an ordinary search?

This clause sets out the meaning of an ordinary search.

Clause 587 — What is a body search?

This clause sets out the meaning of a body search.

Clause 588 — What is a strip search?

This clause sets out the meaning of a strip search.

Clause 589 — What is a dangerous thing?

This clause sets out the meaning of a dangerous thing, as a thing that, if used by, or allowed to remain with, a child or young person may cause serious damage to the health of the child or young person or someone else or threaten the life of the child or young person or someone else. Examples include matches and knives.

Subdivision 16.3.5.2 — Searches generally

This part provides authority for personal searches of children and young people who are confined at a therapeutic protection place, including scanning, frisk, ordinary, strip and body searches.

Clause 590 — Searches—intrusiveness

This clause obliges the person conducting a search under this division 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.

Clause 591 — Searches—transgender or intersex child or young person

A number of clauses in this part require that a person conducting a search, or present at a search, be the same sex as the child or young person 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 operating entity should determine the child or young person's sex for the purpose of conducting a search under this division.

Clause 572(7) requires that, the child or young person's sex is taken to be that entered in the therapeutic protection register. For transgender or intersex children and young people who elect to be identified as a certain sex under 572(2), that sex will be entered in the register.

Sub-clause (2) however envisages circumstances where a transgender or intersex child or young person does not elect to be identified as a particular sex. In this circumstance, the sub-clause allows the child or young person to require that a search be conducted by a female or male, and the child or young person is taken to be treated as that sex for the purposes of this division. For example, if the child or young person chooses a female person to conduct the search, then the child or young person is taken to be female for the purposes of this division. This means that other same sex requirements in the division (such as being present at a strip search or assisting at a body search) would need to be fulfilled by a female.

Clause 592 — Searches—use of force

This clause allows a therapeutic protection person to use force that is reasonable and necessary to conduct or assist at a search under this division, or to preserve anything seized or that may be seized during the search. Force may only be used in accordance with division 16.3.4.

Subdivision 16.3.5.3 — Scanning, frisk and ordinary searches

This subdivision outlines the authority to conduct scanning, frisk and ordinary searches of children and young people in therapeutic protection.

Clause 593 — Directions for scanning, frisk and ordinary searches

This clause enables the operating entity to direct a therapeutic protection person to conduct a scanning search, frisk search or ordinary search of a child or young person at any time that the operating entity believes is prudent for security or good order at a therapeutic protection place.

Sub-clause (2) enables a therapeutic protection person to conduct a scanning, frisk or ordinary search of a child or young person if they suspect the child or young person is carrying a dangerous thing or something that may be used by the child or young person to pose a risk to the safety of the child or young person or others, or involve an offence or pose a risk to security or good order at the therapeutic protection place.

Dangerous thing is defined at clause 589 as a thing that, if used by, or allowed to remain with, a child or young person may cause serious damage to the health of the child or young person or someone else or threaten the life of the child or young person or someone else. Examples include matches, knives and a drug.

Clause 594 — Scanning, frisk and ordinary searches—requirements before search

This clause obliges the therapeutic protection person conducting a scanning, frisk or ordinary search to tell the child or young person about the search and the reasons for the search and ask for their cooperation.

Clause 595 — Frisk and ordinary searches—privacy

This clause obliges the therapeutic protection person conducting a frisk or ordinary search to:

- 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 child or young person; and

- for frisk searches – ensure that the person conducting the search is the same sex as the child or young person, unless there is an imminent and serious threat to the personal safety of child or young person or someone else and compliance would exacerbate the threat.

Clause 596 — Scanning, frisk and ordinary searches—clothing

This clause obliges the therapeutic protection person conducting a scanning, frisk or ordinary search to ensure the child or young person searched is left with or given reasonably appropriate clothing, if clothing is seized because of the search.

Subdivision 16.3.5.4 — Strip searches

Subdivision 16.3.5.4 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 by the child or young person. The operating entity can direct the person to leave if they are preventing or hindering the search.
- The operating entity must conduct the search in a way that is appropriate to the child's or young person's age, maturity, developmental capacity and any known history.
- 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.

Clause 597 — Strip searches—authorisation

This clause enables the operating entity to direct a therapeutic protection person to conduct a strip search if the operating entity suspects that the child or young person may be concealing a dangerous thing on their person and a less intrusive search (scanning, frisk or ordinary search) has failed to find the thing.

Dangerous thing is defined at clause 589 as a thing that, if used by, or allowed to remain with, a child or young person may cause serious damage to the health of the child or young person or someone else or threaten the life of the child or young person or someone else. Examples include matches, knives and a drug.

Sub-clause (2) requires the operating entity to first ascertain whether a strip search is necessary, after considering any information known about the child or young person's age, maturity, developmental capacity and known history (for example - history of abuse, impairment and sexuality).

Clause 598 — Strip searches—requirements before search

This clause sets out the rules that the therapeutic protection person must comply with before a strip search is conducted, including telling a child or young person about the search, the reasons for the search, whether the child or young person will be required to remove any clothing, and the reasons for this.

Sub-clause (4) obliges the therapeutic protection person to seek the cooperation of the child or young person for the search.

Clause 599 — Strip searches—second therapeutic protection person must be present

Sub-clause (1)(a) requires that a strip search be conducted by a therapeutic protection person who is the same sex as the child or young person.

Sub-clause (1)(b) requires that the strip search be conducted in the presence of one or more therapeutic protection persons who are the same sex as the child or young person, and sub-clause (2) requires the number of therapeutic protection person 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 therapeutic protection people to assist in the search, if the person conducting the search reasonably believes it is necessary and reasonable for the search.

Sub-clause (4) allows therapeutic protection people present at the search to be the opposite sex to the child or young person being searched, if the operating entity reasonably believes there is an imminent and serious threat to personal safety of the child or young person and also reasonably believes that compliance with the same-sex requirement would exacerbate that threat.

As this is a limitation on the child or young person's right to privacy and dignity, the Bill introduces a new requirement at clause 632(2)(e)(iv) to record (in the therapeutic protection register) searches when the same sex requirement was not complied with, detailing the operating entity's reasons for believing the requirement did not apply.

Clause 600 — Strip searches—support person must be present

This clause requires the search to be conducted in the presence of someone who can support and represent the child or young person's interests and is acceptable to the child or young person. This may include a therapeutic protection person or delegate of the Chief Executive who is capable of fulfilling this function.

Sub-clause (2) provides that if the child or young person does not agree to the presence of a support person, or a support person is directed to leave, then the search can continue in their absence.

Clause 601 — Strip searches—directing support person to leave

This clause allows the operating entity to direct a support 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.

Sub-clause (3) allows the search to continue in this circumstance.

Clause 602 — Strip searches—enforcing direction to leave

This clause allows the operating entity to direct a therapeutic protection person to use force which is necessary and reasonable to ensure compliance with a direction to leave a strip search under clause 601(2).

Clause 603 — Strip searches—general rules

This clause requires the search to be conducted as quickly as possible and in a way that provides reasonable privacy and is appropriate to the child or young person's sexuality, impairment or history (for example - history of abuse).

Clause 604 — Strip searches—privacy

Sub-clause (1) requires a strip search to be conducted in a private area or an area that provides reasonable privacy for the child or young person.

Sub-clause (2) requires the entity to conduct a search in a way that provides reasonable privacy for the child or young person.

Sub-clause (3) provides a search must not be conducted in the presence of anyone who is of the opposite sex, except if they are a support person or a therapeutic protection person present at the search.

Clause 605 — Strip searches—no touching body

This clause prohibits the touching of a child or young person's body during a strip search, subject to the use of force at division 16.3.4.

Clause 606 — Strip searches—visual inspection of body

This clause sets out the rules about the visual inspection of a child or young person's body during a strip search which the therapeutic protection person must comply with:

- The child or young person's genital area (or female child or young person's breasts) must not be searched unless it is necessary to do so; and
- The search must not involve more visual inspection of the child or young person's body than is reasonably necessary. Visual inspection of the child or young person's genital area, anal area, buttock and breasts must be kept to a minimum.

Clause 607 — Strip searches—clothing

This clause sets out the rules about the child or young person's clothing during a strip search that the therapeutic protection person must comply with:

- A search must not involve the removal of more clothes, or the removal of more clothes at any one time, than is reasonably necessary. A child or young person must not be more than half undressed at one time;
- The child or young person must be allowed to dress in private as soon as the whole search process is finished; and
- If clothing is seized, the child or young person must be offered adequate replacements.

Subdivision 16.3.5.5 — Body searches

Subdivision 16.3.5.5 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 non-treating doctor or in the presence of a non-treating 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 operating entity 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 operating entity.

Clause 608 — Body searches—directions

Body searches are at the most intrusive end of the continuum of searches. This clause authorises contact with a child or young person's orifices to enable a physical search of the child or young person's orifices, known as a body search.

Sub-clause (1) enables the operating entity to authorise a non-treating doctor to conduct a body search of a child or young person if the operating entity reasonably suspects the child or young person has ingested or inserted something that may be harmful to their health or wellbeing. Sub-clause (2) requires the operating entity, in deciding to authorise a body search, to give consideration to the child or young person's age, maturity, developmental and known history (for example - history of abuse, impairment and sexuality).

A non-treating doctor acting under this clause is immune from civil liability under clause 877 of the Bill if their conduct is engaged in honestly and without recklessness.

A non-treating doctor asked to exercise body search functions under this chapter must not be the child or young person's treating doctor, except in an emergency – see clause 631.

Clause 609 — Body searches—requirements before search

This clause sets out the rules that the operating entity must comply with after a non-treating doctor is authorised to conduct a body search and before the search is conducted, including telling a child or young person about the search, the reasons for the search, whether the child or young person will be required to remove any clothing, and the reasons for this.

Sub-clause (4) obliges the operating entity to seek the cooperation of the child or young person for the search.

Clause 610 — Body searches—non-treating nurse must be present

This clause requires a non-treating nurse to be present at a body search.

Sub-clause (2) requires that at least one of the two medical persons present at the body search (non-treating doctor or non-treating nurse) is the same sex as the child or young person. A non-treating nurse asked to be present for body search functions under this chapter must not be the child or young person's treating nurse, except in an emergency – see clause 631.

Clause 611 — Body searches—another person may be present

Sub-clause (1) allows the operating entity to direct one or more therapeutic protection persons to be present at the body search. Sub-clause (2) requires the number of persons 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) provides that any therapeutic protection person providing assistance must be of the same sex, except if, under sub-clause (4) the operating entity reasonably believes there is an imminent and serious threat to personal safety of the child or young person and also reasonably believes that compliance with the same-sex requirement would exacerbate that threat.

As this is a limitation on the child or young person's right to privacy and dignity, the Bill introduces a new requirement at clause 632(2)(e)(iv) to record (in the therapeutic protection register) searches when the same sex requirement was not complied with, detailing the operating entity's reasons for believing the requirement did not apply.

Clause 612 — Body searches—support person must be present

This clause requires a body search to be conducted in the presence of someone who can support and represent the child or young person's interests and is acceptable to the child or young person. This may include a therapeutic protection person or delegate of the Chief Executive who is capable of fulfilling this function.

Sub-clause (2) provides that if the child or young person does not agree to the presence of a support person then the search can continue in their absence.

Clause 613 — Body searches—directing support person to leave

This clause allows the operating entity to direct a person present for a body search to leave if they are acting in a way that prevents or hinders the search from being undertaken effectively. Sub-clause (3) allows the search to continue in this circumstance.

Clause 614 — Body searches—touching body

This clause allows a non-treating doctor who is the same sex as the child or young person and is authorised by the operating entity to conduct the body search and a non-treating nurse

present who is the same sex as the child or young person to touch and examine the child or young person's body orifices for the search.

Clause 615 — Body searches—clothing

This clause sets out the rules about the child or young person's clothing during a body search that must be complied with by a person doing the search:

- A search must not involve the removal of more clothes, or the removal of more clothes at any time, than is reasonably necessary. A child or young person must not be more than half undressed at one time;
- The child or young person must be allowed to dress in private as soon as the whole search process is finished; and
- If clothing is seized, the child or young person must be offered adequate replacements.

Clause 616 — Body searches—assistance

This clause allows a non-treating doctor conducting a body search to ask the operating entity for assistance that the doctor believes is reasonable and necessary for the search.

The operating entity is enabled to direct or authorise a therapeutic protection person or someone else present for the search to assist in its conduct.

Sub-clause (3) provides that the person providing the assistance must be of the same sex, except if, under sub-clause (4) the operating entity reasonably believes there is an imminent and serious threat to personal safety of the child or young person or someone else and also reasonably believes that compliance with the same-sex requirement would exacerbate that threat.

As this is a limitation on the child or young person's right to privacy and dignity, the Bill introduces a new requirement at 632(2)(e)(iv) to record (in the therapeutic protection register) searches when the same sex requirement was not complied with, detailing the operating entity's reasons for believing the requirement did not apply.

A person assisting under this clause is immune from civil liability under clause 877 of the Bill if their conduct is engaged in honestly and without recklessness.

Clause 617 — Body searches—non-treating doctor may seize things

Sub-clauses (1) and (2) allow anything that may jeopardise a child or young person's health or wellbeing discovered during a body search to be seized by the non-treating doctor, unless seizing the thing would be likely to cause injury to the child or young person or someone else. Sub-clause (3) requires anything seized by the non-treating doctor to be passed on to the operating entity as soon as practicable.

Division 16.3.6 — Seizing dangerous things

This division provides the powers and procedures for seizing dangerous things at the therapeutic protection place.

Clause 618 — Application-div 16.3.6

This clause sets out the application of the division. The division applies to a child or young person who is in therapeutic protection. A child or young person is in therapeutic protection if the child or young person is confined under an interim or final therapeutic protection order or in need of emergency therapeutic protection (see clause 571).

Clause 619 — Seizing property—who is the owner?

This clause sets out who is the owner of a thing for this division. An owner of a thing includes a person entitled to possession of the thing. This 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 child or young person may be the owner of something mailed to them, intended as a gift.

Clause 620 — Seizing property—dangerous things may be seized

This clause authorises the operating entity to seize a dangerous thing found during a search under this part, unless the child or young person has written approval to possess the thing.

Dangerous thing is defined at clause 589 as a thing that, if used by, or allowed to remain with, a child or young person may cause serious damage to the health of the child or young person or someone else or threaten the life of the child or young person or someone else. Examples include matches and knives.

Clause 621 — Seized property—must tell owner

This clause obliges the operating entity to notify certain persons of things seized under this part.

The owner or, if the owner can not be located, the person in possession of the thing when it was seized, must be notified in writing by the operating entity of the seizure, as soon as practicable but not late than 7 days.

Sub-clause (2) sets out what must be in the notice.

Clause 622 — Seized property—forfeiture

This clause provides an explicit power for things seized under clause 620 to be forfeited to the Territory.

If an item is allowed to be possessed by a person 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 may be used to commit an offence, or is unsafe, the item may be forfeited to the Territory.

Sub-clause (2) enables the operating entity 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 therapeutic protection place.

The *Uncollected Goods Act 1996* provides for the disposal of abandoned goods.

Clause 623 — Seized property—return

If something is seized under clause 620, but not forfeited under clause 622, the operating entity 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 operating entity must return it immediately to the owner.

Part 16.4 — Therapeutic protection—administration

This part sets out powers and obligations for the administration of a therapeutic protection place.

Division 16.4.1 — Therapeutic protection places

This division addresses the declaration of therapeutic protection places and the authorisation of operating entities for therapeutic protection places, including mechanisms for suspension and revocation of authorisations.

Clause 624 — Therapeutic protection place—declaration

This clause enables the Minister to declare a therapeutic protection place. The place cannot be used to accommodate young detainees and must comply with therapeutic protection place standards.

Clause 625 — Therapeutic protection place—exclusion of matters from declaration etc

This clause 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. The Chief Executive is required to disclose the location of the therapeutic protection place to the persons who may have access to the register under clause 633(1).

Clause 626 — Therapeutic protection place—policies and procedures

This clause enables the Chief Executive to make therapeutic protection place policies and operating procedures, consistent with the Bill, to facilitate the effective and efficient management of therapeutic protection places (by way of notifiable instrument).

Clause 627 — Authorisation of operating entity for therapeutic protection place

This clause contemplates that the Chief Executive may not directly administer the therapeutic protection place and allows the Chief Executive to authorise an operating entity for a therapeutic protection place.

In order to authorise an entity, the Chief Executive must be satisfied that the entity is a suitable entity (in accordance with part 2.4) and the entity complies with, and is likely to continue to comply with, the therapeutic protection standards.

Clause 628 — Suspension of operating entity's authorisation

This clause allows the Chief Executive to suspend an entity's authorisation as an operating entity for a therapeutic protection place. It is necessary for the Chief Executive to have authority to immediately suspend, with effect, the authorisation of an operating entity for a therapeutic protection place in circumstances where the Chief Executive reasonably suspects that the entity is not a suitable entity to operate a therapeutic protection place or the entity has not complied with, or continued to comply with, the therapeutic protection standards.

Sub-clause (2) reflects natural justice requirements that an entity must be given notice of the Chief Executive's intention to suspend the authorisation, including the grounds and provide an opportunity for the entity to make a written submission to the Chief Executive about the notice.

The Chief Executive must consider any written submission provided in response and must either revoke the suspension or give the entity notice of the Chief Executive's intention to revoke the authorisation.

Sub-clause (3) provides that a suspension takes effect immediately.

Clause 629 — Revocation of operating entity's authorisation

This clause allows the Chief Executive to revoke an entity's authorisation as an operating entity for a therapeutic protection place and is additional to the power conferred by section 180 of the *Legislation Act 2001*. Section 180 of the *Legislation Act* provides that the power to make a decision under a law includes the power to reverse or change the decision, which is exercisable in the same way, and subject to the same conditions, as the power to make the decision.

In order to revoke an entity's authorisation, the Chief Executive must be satisfied that the entity is not a suitable entity to operate a therapeutic protection place or has not complied with, or continued to comply with, the therapeutic protection standards.

Sub-clause (3) reflects natural justice requirements that an entity must be given notice of the Chief Executive's intention to revoke the authorisation, including the grounds and provide an opportunity for the entity to make a written submission to the Chief Executive about the notice. The Chief Executive must consider any written submission provided in response.

Division 16.4.2 — Therapeutic protection plan

This division provides for oversight of the therapeutic protection plan by the Official Visitor or Public Advocate.

Clause 630 — Public advocate and Official Visitor may be given therapeutic protection plan

This clause requires the Chief Executive to promptly give to the Public Advocate or Official Visitor a copy of a therapeutic protection plan for a child or young person upon request by the Public Advocate or Official Visitor. Therapeutic protection plan is outlined at clause 535 and includes details of the therapeutic intervention being provided and the expected results of that therapeutic intervention.

Division 16.4.3 — Non-treating health professionals

Division 16.4.3 provides for non-treating health professionals to exercise non-therapeutic functions under this chapter, such as body searches.

Clause 631 — Health professionals – not treating functions

This clause allows the operating entity to authorise a health professional to exercise non-treating functions under the chapter for children and young people in therapeutic protection. The authorisation may be oral or written. Non-treating functions under the chapter are reports regarding the identity of people who identify as being transgender or intersex (see clause 572) and body searches (see subdivision 16.3.5.5).

The operating entity is required to ensure that a child or young person's treating health professional is not asked to exercise non-treating 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 defined at sub-clause (4) as someone who has a professional relationship with the child or young person for the provision of health services.

The clause contemplates health professionals as set out in the *Health Professionals Act 2004*, as some tasks may not require a doctor only. For this chapter a non-treating health professional includes a non-treating nurse and non-treating doctor.

The purpose of distinguishing between treating and non-treating health professionals is to prevent treating doctors from having to engage in medical tasks that are related to the security of the therapeutic protection place. This is necessary to meet human rights requirements and protect the child or young person's trust and confidence in any doctor who provides treatment.

International instruments set out the principle that doctors and other people providing therapeutic services cannot be involved in any custodial matters that are not directly therapeutic. [*Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Child or young persons against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly resolution 37/194 of 18 December 1982.]*

Division 16.4.4 — Therapeutic protection register

Division 16.4.4 creates an obligation for the operating entity to establish a therapeutic protection register containing certain details related to children and young people in therapeutic protection. The purpose of this division is to enable external oversight of the therapeutic protection place and services provided to children and young people, while protecting the privacy of each individual child or young person.

Clause 632 — Therapeutic protection register

This clause requires the establishment of a therapeutic protection register by the operating entity. The clause sets out what must be in the therapeutic protection register. This includes details related to the order, any reviews of the order, the therapeutic protection history, and details of intrusive searches (strip and body searches) or force used on the child or young person.

The information contained in the register is not limited to the details outlined in the Bill. It may include any other information the operating entity considers relevant, for example, information about the child or young person's daily needs, such as any medication prescribed for them.

Clause 633 — Therapeutic protection register—who may have access?

This clause sets out who may have access to the therapeutic protection register. It authorises a wide range of persons to provide external oversight of the information contained in the register in order to ensure that the rights of children and young people in therapeutic protection are protected.

Sub-clause (2) ensures that the privacy of children and young people in therapeutic protection is protected by creating a rule that the register may only be accessed by the persons in sub-clause (1).

Clause 634 — Therapeutic protection register—Public Advocate to inspect

In order to ensure there is at least one external agency regularly oversighting the therapeutic protection register, this clause requires the Public Advocate to inspect the therapeutic protection register at least once every 3 months.

Chapter 17 — Care and protection—interstate transfer of orders and proceedings

This chapter gives effect to a uniform national scheme for the transfer of care and protection orders and proceedings between States (including the Northern Territory and New Zealand). The chapter now reflects that all States are now participating in the uniform scheme.

Clause 851 in Chapter 25 allows the Chief Executive to give information to any person who is exercising a function under, or administering, a law of another State that corresponds or substantially corresponds to a provision in this Act. It authorises the giving of information that the Chief Executive reasonably believes is necessary to allow the person to exercise the function or administer the law.

Part 17.1 — Preliminary

This part defines certain terms to encompass Courts and proceedings in the different jurisdictions to which transfers under the Chapter may relate. This part also allows 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'. This part continues to have the effect of section 299 of the 1999 Act and includes some amendments to bring the ACT scheme into alignment with the uniform national scheme.

Clause 635 — Object of ch 17

This clause describes the objects of this chapter in terms of the desirability of arranging transfers of orders and proceedings for the most timely protection of children and young people who move or proposed to move between jurisdictions. This re-enacts section 298 of the 1999 Act. An additional object has been added to recognise the desirability of an order relating to the care and protection of a child or young person having effect, and being enforced, in the State in which the child or young person resides. This is intended to bring the Bill into alignment with the uniform national scheme.

Clause 636 — Definitions—ch 17

This clause sets out definitions for this chapter.

Clause 637 — What is a child welfare order?

This clause sets out the meaning of a child welfare order. This replaces the term 'child care and protection order' which is a term used more generically across the Bill. Under the 1999 Act, a child care and protection order related to an order with an aspect of parental responsibility, however described. The Bill however expands this to include supervision, contact and specific issues provisions in care and protection orders (or equivalent orders in other jurisdictions) to allow these provisions and orders to be transferred.

Clause 638 — What is a child welfare proceeding?

This clause sets out the meaning of a child welfare proceeding.

Clause 639 — What is a child welfare law?

This clause sets out the meaning of a child welfare law. The meaning of a child welfare law encapsulates the care and protection chapters under the Bill or corresponding laws in other jurisdictions. It also includes a law of a State declared by the Minister to be a corresponding law for this chapter.

Clause 640 — What is an interstate law?

This clause sets out the meaning of an interstate law.

Clause 641 — Who is an interstate officer?

This clause sets out the meaning of an interstate officer.

Part 17.2 — Interstate transfer of ACT child welfare orders

This part provides for the administrative and judicial transfer of an ACT child welfare order to another State, including the Northern Territory and New Zealand.

Division 17.2.1 — Transfers of orders by Chief Executive

This division enables the Chief Executive to administratively transfer orders made under a care and protection chapter to another State, with the consent of certain persons affected by the transfer of the order.

This division re-enacts and continues to have the effect of sections 300 to 303 of the 1999 Act.

Clause 642 — Chief Executive may transfer child welfare order

This clause enables the Chief Executive to administratively transfer ACT orders (with conditions as appropriate) to another 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 listed in clause 644, consent to the transfer of the order (and any conditions in the order).

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.

Clause 643 — Chief Executive transfer – considerations

This clause introduces a requirement for the Chief Executive to have regard to certain matters in deciding to transfer a child welfare order for a child or young person to another State. This new clause is intended to more closely align the ACT scheme with the uniform national scheme.

Clause 644 — Chief Executive transfer—certain people must agree

This clause requires certain people to give their consent to the transfer of the order (including any conditions of the order). This includes people who have daily care or long-term care responsibility, or care and protection orders with residence provisions or contact provisions in relation to a child or young person, the child or young person's parents, and the young person themselves if they are over school leaving age (15 years). However these people are not required to agree if they cannot be found after reasonable inquiry or do not have sufficient maturity or developmental capacity to agree to the transfer.

The child or young person may already live in the destination jurisdiction with a person who has a care and protection order with a residence provision in their favour. Similarly, someone who has a care and protection order with a residence or parental responsibility provision for the child or young person may already be living in the destination jurisdiction (but the child has not moved there yet). In these circumstances, sub-clauses (2) and (3) provide that it is sufficient if the relevant people simply consent to the child or young person living there, and their specific agreement to the transfer of the order is not required. These provisions are necessary to allow the child to move interstate before the order is transferred.

Clause 645 — Chief Executive transfer—certain people must be told

The Chief Executive is required to give certain persons written notice of the decision to transfer within 3 days working days of the decision. Those people include a young person (over 12 years old), parents with parent parental responsibility, people with parental responsibility, and the Public Advocate.

Clause 646 — Chief Executive transfer—limited time for review

This clause enables a person to apply for judicial review of the Chief Executive's decision within 10 working days. Such an application operates as a stay of the decision to transfer the order.

Division 17.2.2 — Transfer of orders by Childrens Court

This division enables the Childrens Court to transfer orders made under a care and protection chapter to another State.

This division re-enacts and continues to have the effect of sections 304 to 309 of the 1999 Act.

Clause 647 — Childrens Court transfer—application

Sub-clause (1) allows the Chief Executive to apply to the Childrens Court to make an order transferring a child welfare order to another State. Sub-clause (2) outlines who must be served with a copy of the application. This is each party to the original proceeding and the Public Advocate.

Clause 648 — Childrens Court transfer—criteria

This clause enables the Childrens Court to transfer ACT orders if the orders are not subject to appeal and where interstate officers consent to the transfer.

Clause 649 — Childrens Court transfer—interstate orders

This clause enables the Childrens Court to transfer ACT orders (with conditions as appropriate) if similar orders (and conditions) exist in the destination jurisdiction.

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 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.

This re-enacts section 304 of the 1999 Act.

Clause 650 — Childrens Court transfer—considerations

This clause sets out matters that the Court must consider in transferring an order to another State. These matters include 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. This re-enacts section 307 of the 1999 Act and has been expanded for additional considerations outlined at (1)(a),(b),(c),(f) and (g) to align with the uniform national scheme.

There is also a new power at sub-clause (2) for the Childrens Court to consider relevant reports of the Chief Executive.

Clause 851 in Chapter 25 allows the Chief Executive to give information to any person who is exercising a function under, or administering, a law of another State that corresponds or substantially corresponds to a provision in this Act. It authorises the giving of information that the Chief Executive reasonably believes is necessary to allow the person to exercise the function or administer the law.

Clause 651 — Childrens Court transfer—care plans

This clause requires the Court to consider a care plan filed and served by the Chief Executive before making a transfer order. This re-enacts section 308 of the 1999 Act.

Clause 652 — Childrens Court transfer—appeal applications

This clause restricts the time a person can appeal on a question of law to the Supreme Court against a transfer order of the Court to 10 working days, with such application to operate as a stay of the decision.

Clause 653 — Childrens Court transfer—appeals

This clause 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 17.2.3 — Interstate registration of ACT orders

This division provides for the interstate registration of ACT orders that are transferred interstate.

This division continues to have the effect of sections 316, 319 and 320 of the 1999 Act.

Clause 654 — Interstate registration of ACT orders—effect

This clause provides that, where registration of an order is revoked under clause 655, 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 under part 14.13 for care and protection orders with a parental responsibility or a supervision provision 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 655 — Interstate registration of ACT orders—revocation

This clause 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 persons in sub-clause (3).

Clause 656 — Interstate registration of ACT orders—Childrens Court file

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 Court's file about the order or proceedings from that Court.

Part 17.3 — Interstate transfer of ACT child welfare proceedings

This part provides for the transfer of ACT care and protection proceedings to another State.

This part re-enacts and continues to have the effect of part 8.3 of the 1999 Act.

Clause 657 — Transfer of ACT proceedings—applications

This clause allows the Chief Executive to apply for an order to transfer a child welfare proceeding to the State Childrens Court of another State. It requires the Chief Executive to give certain persons listed in sub-clause (2) a copy of the application for transfer of proceedings.

Clause 658 — Transfer of ACT proceedings—criteria

This clause allows for the Childrens Court to transfer proceedings to a State Childrens Court in another State 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 659 — Transfer of ACT proceedings—considerations

This clause provides that, in considering a transfer, the Court is to have regard to whether there are or have been 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 significant other people are living or likely to live.

Clause 660 — Transfer of ACT proceedings—interim orders

This clause 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) or allow contact and may subsequently be varied, extended or revoked by a relevant Court in the other jurisdiction.

Clause 661 — Transfer of ACT proceedings—appeal applications

This clause restricts the time a party to the proceeding can appeal to the Supreme Court (on a point of law) against an order of the Childrens Court transfer of proceedings within 10 working days, with such application to operate as a stay of the decision.

Clause 662 — Transfer of ACT proceedings—appeals

This clause 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 Childrens Court for rehearing.

Clause 663 — Transfer of ACT proceedings—revocation of registration

This clause requires the registrar of the Childrens 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.

Clause 664 — Transfer of ACT proceedings—Childrens Court file

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 Court's file about the proceedings from that Court.

Part 17.4 — ACT registration of interstate child welfare orders

This part provides for the registration of interstate child welfare orders in the ACT.

This part continues to have the effect of part 8.4 of the 1999 Act.

Clause 665 — ACT registration—interstate child welfare orders

This clause provides for the Chief Executive to file in the Childrens Court orders from other participating jurisdictions for the transfer of care and protection orders, together with any interim orders made on transfer. However the Chief Executive cannot file such orders if the decision to transfer a child or young person is subject to an appeal, review or stay or the time for applying for an appeal or review has not lapsed.

Clause 666 — ACT registration of interstate orders—interstate registrar

Under this clause, the registrar of the Childrens Court (in which transferred orders are registered under clause 665) must notify the relevant interstate Court and officer of the registration.

Clause 667 — ACT registration of interstate orders—effect

This clause 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.

This re-enacts section 317(1) and (2) of the 1999 Act.

Clause 668 — ACT registration of interstate orders—application for revocation

This clause 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.

This re-enacts section 318(1) and (2) of the 1999 Act.

Clause 669 — ACT registration of interstate orders—revocation

This clause 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).

This re-enacts section 318(3) (4) and (5) of the 1999 Act.

Clause 670 — ACT revocation of interstate orders—interstate registrar

Under this clause the registrar of the Childrens Court must notify the relevant interstate Court and officer of the revocation of the registration of an interstate child welfare order.

Part 17.5 — ACT registration of interstate child welfare proceedings

This part provides for the registration of interstate child welfare proceedings in the ACT. It continues to have the effect of part 8.4 in the 1999 Act.

Clause 671 — ACT registration—interstate child welfare proceedings

This clause provides for the Chief Executive to file in the Childrens Court, orders from other participating jurisdictions for the transfer of interstate care and protection proceedings to the ACT, together with any interim orders made on transfer. However the Chief Executive cannot file such orders if the decision to transfer the proceeding is subject to a current appeal, review or stay or the time commencing an appeal or review has not lapsed.

This re-enacts section 315(2) and (3) of the 1999 Act.

Clause 672 — ACT registration of interstate proceedings—interstate registrar

Under this clause the registrar of the Childrens Court must notify the relevant interstate Court and officer about the registration of an interstate proceedings transfer order or interim order.

Clause 673 — ACT registration of interstate proceedings—effect

Sub-clause (1) provides that proceedings transferred under this part are to be treated on registration as having commenced in the Territory on the day of registration. This sub-clause re-enacts section 317(3) of the 1999 Act.

Sub-clause (2) provides that the Court is not bound by a finding of fact made in a Court from which an order or proceeding was transferred, but allows for the Court to have regard to the transcript of, or evidence led in, that other Court.

This sub-clause re-enacts section 322 of the 1999 Act.

Clause 674 — ACT registration of interstate proceedings—application for revocation

This clause allows the Chief Executive, the child or young person concerned, a person with daily care responsibility 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 proceedings order or an interim order.

This re-enacts section 318(1) and (2) of the 1999 Act.

Clause 675 — ACT registration of interstate proceedings—revocation

This clause 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).

This re-enacts section 318(3), (4), (5) of the 1999 Act.

Clause 676 — ACT registration of interstate proceedings—interstate registrar

Under this clause the registrar of the Childrens Court must notify the relevant interstate Court and officer of the revocation of the registration of an interstate proceedings transfer order or interim order.

This re-enacts section 316(1) of the 1999 Act.

Part 17.6 — Interstate transfer of child welfare orders and proceedings—miscellaneous

This part relates to the transfer of orders and proceedings from New Zealand to the ACT when the transfer relates to a Maori child or young person.

Clause 677 — ACT registration of interstate orders and proceedings—Maori children and young people

When an order or proceeding concerning a Maori child or young person is transferred to the ACT from New Zealand, this clause 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.

This re-enacts section 321 of the 1999 Act.

Chapter 18 — Care and protection—police assistance

This chapter confers powers on police to provide assistance to the Chief Executive under the care and protection chapters. It also deals with the issuing of safe custody warrants for a child or young person subject to orders under the care and protection chapters.

Part 18.1 — Assistance in carrying out orders etc

Clause 678 — Police assistance

This clause enables the Chief Executive to request police assistance for enforcing a care and protection order or interim care and protection order, for enforcing a therapeutic protection order or interim therapeutic protection order, for enforcing a DVPO final protection order or DVPO interim protection order, for conducting an appraisal or a care and protection assessment, whether under an appraisal or assessment order or not, or taking emergency action.

Sub-clause (2) requires the Chief Police Officer to comply with any request made by the Chief Executive.

Clause 679 — Police powers

This clause outlines powers conferred on police officers when assisting the Chief Executive. Ordinarily these powers are exercised under a warrant, but in more limited circumstances they could be exercised if the police officer reasonably believes that the delay in obtaining a warrant would prejudice the action or the safety of a child or young person.

For example, if the police officer was attending premises where children were being held by a parent who is making threats to harm the children and considered that the delay in obtaining a warrant would place the children at risk of harm, then the officer could act to enter premises.

This re-enacts section 192(3) and (4) of the 1999 Act.

Clause 680 — Seized things may be kept until matter completed

This clause provides that things seized under 679(1)(b) may be kept until the action or any proceeding arising from the action is finalised. This re-enacts section 192(8) of the 1999 Act.

Clause 681 — Offence—failure to answer police questions

This clause creates an offence for failing to answer a question asked by a police officer under clause 679(1)(d) to give relevant information. The maximum penalty is 50 penalty units. This re-enacts section 192(6) of the 1999 Act.

Part 18.2 — Safe custody

This part amends division 7.3.8 of the 1999 Act relating to safe custody. The provisions relating to the issue of safe custody warrants have been modernised in accordance with modern drafting practice.

Clause 682 — Safe custody—parental responsibility to Chief Executive

This clause clarifies that daily care responsibility for a child or young person is transferred to the Chief Executive if they are taken into safe custody by a police officer or the Chief Executive under this part. This is a new clause to remove doubt about who has daily care responsibility after the execution of a safe custody warrant.

Clause 683 — What is a safe custody warrant?

This clause sets out the meaning of a safe custody warrant for this part.

Clause 684 — Safe custody warrant—application

This clause enables the Chief Executive or a police officer to apply to a Magistrate for a safe custody warrant for a child or young person if they reasonably believe that the criteria for issuing a warrant (outlined at clause 685) are satisfied. This re-enacts section 270(1) and (2) of the 1999 Act.

Sub-clause (3) provides that the Magistrate may refuse to consider an application if it is incomplete.

Clause 685 — Safe custody warrant—criteria

This clause provides authority for a Magistrate to issue a safe custody warrant for a child or young person at stated premises if satisfied that someone has contravened a certain order (appraisal order, interim care and protection order, assessment order, care and protection order, DVPO interim protection order, DVPO final 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 at the premises, within 14 days.

This re-enacts section 270(1) of the 1999 Act.

Clause 686 — Safe custody warrant—content

This clause outlines what must be included in a safe custody warrant, including:

- the name of the child or young person;
- the order for which the safe custody warrant is issued;
- the authority to use necessary and reasonable force and assistance in entering stated premises;
- the hours in which the premises may be entered;
- the date of expiry of the warrant not later than 14 days after issue; and
- when the Chief Executive's daily care responsibility for the child or young person ends.

Clause 687 — Safe custody warrant—application made other than in person

This clause provides for an application for a safe custody warrant by phone, fax or other means in urgent circumstances, for examples, where a child or young person would be at risk if an officer left the premises to seek a warrant in person.

Clause 688 — Safe custody warrant—announcement before entry

This clause requires the Chief Executive or a police officer executing the warrant to announce they are authorised to enter premises, give anyone at the premises an opportunity to allow entry and identify themselves to the occupier of the premises (or their apparent representative). Compliance with this requirement is not necessary if the person executing the warrant reasonably believes that immediate entry in required to ensure the safety of anyone or to ensure the effective execution of the warrant.

Clause 689 — Safe custody warrant—details of warrant to be given to occupier etc

This clause requires the Chief Executive or police officer executing the warrant to make available a copy of the warrant to the occupier (or their apparent representative) and written notification of the person's rights and obligations.

Clause 690 — Safe custody warrant—occupier entitled to be present etc

During the execution of the warrant, this clause permits the occupier (or their apparent representative) to observe the execution of the warrant, unless this would impede the warrant's execution or are under arrest and allowing observation would interfere with the objectives of the warrant.

Clause 691 — Safe custody warrant – placement of child or young person

This clause requires the placement of a child or young person taken into custody under a safe custody warrant in a place stated in the warrant or if there is no place stated in the warrant, in a place decided by the Chief Executive. Under clause 686(2), the warrant may state where the child or young person is to be placed by the person executing the warrant, if known by the Magistrate at the time of issuing the warrant.

Clause 692 — Offence—remove child or young person

This clause creates an 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 693 — Safe custody—matter must be brought to Court promptly

This clause requires the Chief Executive to bring the matter before the Childrens Court as soon as practicable and not later than one working day following a child or young person being taken into safe custody under a warrant.

Chapter 19 — Care and protection – provisions applying to all proceedings under care and protection chapters

This chapter outlines procedures applying to proceedings arising under the care and protection chapters.

The care and protection chapters in the Bill are chapters 10 to 19 inclusive. Appraisal orders are dealt with in chapter 11. Assessment orders, care and protection orders and interim care and protection orders are dealt with in chapter 14. Therapeutic protection orders and interim therapeutic protection orders are dealt with in chapter 16. Applications and cross-applications for these orders must be made in accordance with the procedural rules outlined in this chapter.

This chapter includes procedures outlined at division 7.3.10 of the 1999 Act.

Part 19.1 — Applications

This part outlines the form and content of applications, including cross applications.

Clause 694 — Application—includes cross-application

This clause provides that for this chapter an application includes a cross application.

Clause 695 — Application—must include statements, documents and reports

This clause re-enacts section 276 of the 1999 Act to provide that an applicant is required to produce, with their application, a written statement of the oral evidence that will be presented at the hearing and a copy of any document or expert report that will be relied upon at the hearing of the application.

Clause 696 — Application—statements and reports to be signed etc

This clause re-enacts section 277 of the 1999 Act to provide that documentation prepared specifically for use in applications must be in affidavit form or at least signed, dated and bearing a statement that its provider believes the content to be true and knowing it may be placed before the Court.

Clause 697 — Application—oral applications

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

Clause 698 — Application—withdrawal or discontinuance

This clause allows for parties to withdraw from or discontinue care and protection proceedings by filing and serving a notice to that effect endorsed appropriately by any party who consents to the course of action.

Part 19.2 — Parties

This part outlines who the parties to an application are, procedures for joining and removing parties, hearing applications in a party's absence, service of material and representation of parties. However, representation of children and young people is dealt with in the *Court Procedures Act 2004*, part 7A.

Clause 699 — Parties—who are parties to an application?

This clause describes the parties to proceedings as the applicant, the subject child or young person, any person served with the application who participates in the proceeding other than as a witness or representative, and a person required or allowed by the Court to attend and be joined as a party.

However, the Public Advocate, though served with all care and protection applications, is not considered to be a party to care and protection proceedings unless the Public Advocate has applied to be joined as a party. Clause 703(3) requires the Court to join the Public Advocate as a party to the proceeding if the Public Advocate applies.

Clause 700 — Parties—hearing in party's or other person's absence

This clause allows for the Court to grant leave for a care and protection application to be heard ex parte, if service of the application would place a child or young person at significant risk of significant harm.

This clause engages the right to a fair trial at section 21 of the *Human Rights Act 2004*, which is aimed at ensuring the proper administration of justice by upholding the right to a fair and public hearing. Hearing an application ex parte limits the respondent's right to a fair trial or a fair hearing. This may involve an acceptance at face value of the truth of the allegations, without the respondent having been given a full opportunity to contest the allegations.

Ordinarily, the Bill requires that an applicant is required to give certain people notice of any application in relation to a child or young person (see for example, clause 444 in relation to assessment orders). However, in certain limited circumstances, giving notice of an application, for example by the Chief Executive to a parent or person with parental responsibility, would endanger the child or young person. For example, the Chief Executive, after receiving a child concern report which is deemed to be a child protection report, may assess that a child has experienced severe physical abuse by a parent and the parent has made threats to harm the child if the child tells anyone. To protect the child or young person in these circumstances, the Chief Executive may apply for an appraisal order by telephone contact with the Childrens Court Magistrate. Giving notice to the parent of an application for an appraisal order in these circumstances may place the child at a significant risk of significant physical harm. In these circumstances, the Chief Executive may seek an order from the Court to dispense with service of the application under clause 722.

A person's right to fair trial needs to be balanced with the child or young person's right to protection from significant harm. This limitation on the right to a fair trial is therefore reasonable and proportionate to the risk to the child or young person.

Clause 835(2)(c) allows a person who is not a party to seek the leave of the Court to appeal the making of any order.

Clause 701 — Parties—failure to attend proceeding

This clause provides that where a person has been served with notice of the proceeding but fails to attend, the Court must adjourn the proceedings to allow that person's attendance or make orders it considers appropriate (which may bind the person). This re-enacts section 281 of the 1999 Act.

Clause 702 — Parties—Court may join affected party

This clause provides that if the Court is about to make an order binding a person who is not a party, it may join the person as a party or must at least give the person the opportunity to make submissions about the order (even if the urgency of the case requires the Court to make the order prior to hearing the submission). This re-enacts section 282 of the 1999 Act.

Clause 703 — Parties—application to join party

This clause allows for people to apply to be joined in proceedings, including by oral application. It requires the Court to join the Public Advocate if the Public Advocate applies.

It also creates a rebuttable presumption in favour of joining people who have been continuously caring for the child or young person for 2 years or more. This is intended to include any persons caring for the child or young person for this period and is not limited to out-of-home carers. This recognises that persons who have been caring for a child or young person for an extended period have a significant interest in any care and protection

proceedings for the child or young person who has been in their care. This re-enacts section 283 of the 1999 Act.

Clause 704 — Parties—filed material to be given to joined parties

Where a person has been joined in proceedings, this clause requires the Court to give a direction as to what documentation is to be provided to the joined party. This re-enacts section 284 of the 1999 Act.

Clause 705 — Parties—application for removal of party

This clause allows a party to a proceeding to make application for an order that another party be removed as a party.

Clause 706 — Parties—Court may remove party

This clause allows for the Court, on application or its own motion (after having given the parties an opportunity to be heard), to remove a previously joined party if it is no longer appropriate for the person to be joined. This re-enacts section 285 of the 1999 Act.

Clause 707 — Parties—notice of address for service

This clause requires each party to a proceeding under the care and protection chapters to file with the Court, and serve on each other party, a notice of address for service which is a written statement detailing the party's name and address for service of Court documents. This re-enacts section 286 of the 1999 Act.

Clause 708 — Parties—representation

This clause allows for parties to appear in Court in person or represented by a lawyer or represented by another person, with the leave of the Court.

The Chief Executive may appear before the Childrens Court through a delegate or a person authorised to appear on the Chief Executive's behalf. The delegate or person authorised to appear on the Chief Executive's behalf is not required to be a lawyer.

A lawyer representing a party to a proceeding under the care and protection chapters must file and give to each other party a notice of address for service outlining that the lawyer acts for the party and an address in the ACT for service of documents. In order to cease acting for a party to a proceeding under the care and protection chapters, a lawyer must file with the Court, and give to each other party, a written statement detailing this.

Clause 709 — Exclusion of people from hearings

This clause allows for the Court to exclude anyone from the Courtroom for all or part of the hearing if it considers it appropriate, including the child or young person subject to proceedings and parents (if they have parental responsibility) or other persons with parental responsibility. This re-enacts section 288(2) of the 1999 Act.

Part 19.3 — Burden of proof

Clause 710 — Burden of proof

This clause outlines the burden of proof for proceedings under the care and protection chapters as the balance of probabilities. This re-enacts section 197 of the 1999 Act.

Part 19.4 — 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 the care and protection chapters.

Clause 711 — Procedures at hearings to be informal

In line with the principle at clause 9(d) of acting without delay so as not to prejudice the wellbeing of the child or young person, the clause exhorts the Court to act with as little formality, technicality and delay as it can in proceedings under the care and protection chapters. This re-enacts section 288(1) of the 1999 Act.

Clause 712 — Court may call witnesses

This clause allows the Court, on its own motion, to call a person as a witness if the Court considers that the person's evidence may be of assistance to the Court. This re-enacts section 292(1) of the 1999 Act.

Clause 713 — Court may summons people to attend

In addition to any action the Court may take under clause 712, this clause allows for the Court to issue summonses and warrants as necessary to compel a person's attendance before the Court.

Section 292(4) of the 1999 Act contained an offence for failure to attend Court in answer to a summons. This is no longer necessary as it is addressed by the *Court Procedures Rules 2006*:

- rule 2444 (Enforcement—failure of individual to comply with subpoena) – this rule allows a Court to order a warrant be issued for the individual's arrest; and
- rule 6612 (Failure to comply with subpoena—contempt of Court) – this rule allows the Court to deal with failure to comply with a subpoena as contempt of Court.

Clause 714 — Child or young person as witness

This clause provides that a child or young person may not be called as a witness in care and protection proceedings without the leave of the Court, and if called as a witness, allows for the Court to regulate the way in which evidence may be taken from the child or young person. This re-enacts section 293 of the 1999 Act.

Clause 715 — Court not bound by rules of evidence

This clause allows the Court to inform itself of matters before it in any manner it considers appropriate, and in so doing the Court is not bound by the rules of evidence (including the rule against hearsay). This re-enacts section 291of the 1999 Act.

Clause 716 — Restriction on taking evidence

In addition to regulating a child or young person's evidence under clause 714, the Court may also regulate the way in which other witnesses are examined or cross-examined if necessary or convenient to the proceedings to do so. This re-enacts section 294 of the 1999 Act.

Part 19.5 — 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.

Clause 717 — Orders—obligations on people

This clause requires the Court to give a person a reasonable opportunity to be heard before imposing an obligation on the person, unless the person agrees to the order being made or the person cannot be found after reasonable inquiry. This re-enacts section 199 of the 1999 Act.

Clause 718 — Orders—by agreement

This clause allows for parties to file draft minutes of consent orders endorsed appropriately by the parties and any person intended to be bound by the proposed order. This re-enacts section 296 of the 1999 Act.

Clause 719 — Orders—must be given to people

This clause requires the Court to serve its orders on the Chief Executive and the Public Advocate, and each party or his or her lawyer who has filed a notice of address for service. This re-enacts section 290 of the 1999 Act.

Clause 720 — Residence, contact and specific issues provisions – giving, amending or extending directions

This clause requires the Childrens Court, when making, amending or extending a care and protection order with a specific issues provision, a contact provision that prohibits contact or a residence provision which prohibits residence with a child or young person or allows residence in accordance with certain conditions, to serve the order or revised order on the affected person and certain other persons (Chief Executive, Public Advocate, Chief Police Officer, other parties to the proceeding). This re-enacts section 248(2) of the 1999 Act.

Clause 721 — Orders—statement of reasons

This clause allows a party to request written reasons for a decision of the Childrens Court to make an order under the care and protection chapters, including a therapeutic protection order, within 28 days of the decision and requires the Childrens Court to give those reasons within 28 days of the request.

The clause also provides for a party to request reasons about an extension, amendment or revocation of a therapeutic protection order, given the intrusive nature of these orders.

This re-enacts 289 section of the 1999 Act.

Clause 722 — Orders about service

This clause enables a Court to make an order that dispenses with, or shortens the time for, service of a notice, order or other instrument under the care and protection chapters. This may be necessary, for example where notice of an application to a parent or other person may put a child or young person at risk of harm.

Part 19.6 — Costs

This part includes clauses about costs and re-enacts section 297 of the 1999 Act.

Clause 723 — Costs—parties bear own unless Court orders otherwise

This clause 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. This re-enacts section 297(3) of the 1999 Act.

Clause 724 — Costs—frivolous, vexatious, dishonest application

This clause provides that costs may be ordered in a proceeding for frivolous, vexatious or dishonest applications or exceptional circumstances. This re-enacts section 297(4) of the 1999 Act.

Clause 725 — Costs—parties bear own costs unless order otherwise

This clause 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. This re-enacts section 297(7) of the 1999 Act.

Clause 726 — Costs—how Court may share costs

This clause allows a Court that has made an order under clauses 724 or 725 to order that costs may be paid or shared between the parties. This re-enacts section 297(6) of the 1999 Act.

Chapter 20 — Childcare services

This chapter provides a regulatory framework for childcare services in the Territory. Childcare services are childcare centres and family day care schemes. The chapter specifically exempts other forms of care for children from this regulatory framework (see clause 730).

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. Key changes to the 1999 Act 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.

Under clause 875, if a person suspects that a provision of this chapter or the childcare services standards are being, or have been, contravened, then the person may report the suspicion, and the reasons for the suspicion, to the Chief Executive.

Part 20.1 — Childcare services—preliminary

This part outlines definitions for the Act and chapter and objects and principles for the chapter. It also clarifies the application of the chapter by exempting certain types of care for children from its operation.

Clause 727 — Definitions—Act and ch 20

This clause defines certain terms for the purposes of the Act and this chapter. Some significant new terms are—

'Childcare services' which replaces the term 'childrens services' in the 1999 Act. 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.

'Childcare worker' which means a person who cares for a child for the childcare service. This replaces the term in the 1999 Act of 'a person working in the service' to clarify who is directly responsible for the care and supervision of the children for offences at part 20.3. This is not intended to cover people who exclusively provide other services at a childcare service, for example, cooking, cleaning, or book-keeping.

Clause 728 — Objects—ch 20

This clause sets out the objects of the chapter. The objects of the chapter are to provide an effective licensing system for childcare services and to impose standards for childcare services. This re-enacts section 325 of the 1999 Act.

Clause 729 — Principles—ch 20

This clause sets out principles which a person must apply when making decisions or taking action under the childcare chapter. These principles emphasise the importance of childcare services providing care that is safe, positive and nurturing and childcare services promoting the educational, social and developmental wellbeing of children. This re-enacts section 326 of the 1999 Act.

The note to this clause clarifies the interaction of these principles with the principles applying across the Bill. A decision-maker making a decision under this chapter for a particular child or young person must regard the best interests of the child or young person as the paramount consideration (see clause 8). 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 (see clause 8).

Clause 730 — Application—ch 20

This clause automatically exempts certain types of care from the licensing operation of this chapter, including care provided at a playgroup, at adjunct care, by a family member (not part

of a family day care scheme), by an out-of-home carer, school, home education, participation in activities or club membership or at hospital. This re-enacts section 330 of the 1999 Act.

Part 20.2 — Childcare services—important concepts

This part sets out concepts used in the childcare chapter and the Act.

Clause 731 — What is a childcare service?

This clause sets out the meaning of a childcare service for this Act. It means a childcare service provided at a childcare centre as defined at 732 or a family day care scheme as defined at 733. It re-enacts the meaning of a 'children's service' at section 327 of the 1999 Act. This terminology change was necessary to describe the nature of the services being provided to children and to delineate from other types of services provided to children under the Act.

Clause 732 — What is a childcare centre?

This clause defines the meaning of a childcare centre by reference to the number of children cared for at the centre for monetary or other benefit, being:

- At least 5 children not yet attending school or home education or
- At least 8 children with up to 4 children not yet attending school or home education.

This means that persons or services providing care to 4 children under school age or 7 children (including up to 4 under school age) are not within the meaning of a childcare centre.

A childcare worker's own child is to be counted for this ratio if other children are also being cared for (for monetary or other consideration). Any children cared for in emergency, unexpected or exceptional circumstances for less than 2 consecutive days are not to be counted.

Clause 733 — What is a family day care scheme?

This clause defines a family day care scheme. It relates to a service that organises, coordinates and monitors home-based care for children. This is distinct from individual family day care providers who provide childcare in their own homes for other people's children. It does not apply to care provided to children for monetary or other benefit in the children's own homes or home-based arrangements such as nanny or babysitting schemes.

Clause 734 — Who is the proprietor of a childcare service?

This clause sets out the meaning of a proprietor of a childcare service for this chapter. For licenced childcare services this is the licenced proprietor for the service, re-enacting the current meaning of a proprietor at section 324(b) of the 1999 Act. In other cases (for example, unlicenced childcare services), a proprietor is the person who owns or operates the childcare service.

Clause 735 — Who is a controlling person for a childcare service?

This clause sets out who is a controlling person for a childcare service in this chapter. A 'controlling person' is intended to be a person or persons nominated by the proprietor as having principal responsibility for managing and controlling the childcare service in the proprietor's absence or on behalf of the proprietor. The controlling person must be a natural person. The controlling person may also be the proprietor if the proprietor is a natural person, and not a corporation.

Clause 736 — Offence—fail to notify change of controlling person

This clause is a strict liability offence requiring proprietors to notify the Chief Executive of changes to controlling people in their service. It re-enacts section 352 of the 1999 Act.

Part 20.3 — Childcare services—offences

This part creates offences for certain actions and inactions by responsible persons for childcare services. A responsible person for a childcare service is defined at clause 737 as a proprietor, a controlling person or a person caring for a child for the childcare service.

The Bill contemplates that one or more of these persons may be held liable for the offences contained in this part. This is intended to allow discretion in prosecuting the most appropriate person responsible considering all of the circumstances of the alleged contravention.

Clause 737 — Who is a responsible person for a childcare service?

This clause creates a definition of responsible person for a childcare service for this chapter. A responsible person for a childcare service is a proprietor, a controlling person or a person caring for a child for the childcare service.

It re-enacts section 366 (1)(a) and (b) from the 1999 Act and replaces 'a person working in the service' to 'a person caring for a child for the childcare service'. This is intended to capture persons directly responsible for the care and supervision of the children. This is not intended to cover people who exclusively provide other services at the childcare service, for example, cooking, cleaning or bookkeeping.

Clause 738 — Offence—fail to protect child from injury

This clause re-enacts section 366(2) from the 1999 Act and requires responsible persons (defined in 737) to take reasonable precautions to ensure that a service is free from a hazard likely to cause injury. Failure to do so is an offence of 50 penalty units, imprisonment for 6 months or both.

Sub-clause (2) is new and creates an exception to the offence for a person caring for a child at the service, in circumstances where they were unable to take the precaution or could not influence the precaution to be taken (such as a fence being secure) which would otherwise be the responsibility of the proprietor or controlling person.

Clause 739 — Offence—fail to supervise child

This clause requires responsible persons (defined in 737) to take reasonable steps to ensure that a child being cared for by the service is adequately supervised. Failure to do so is an offence of 50 penalty units, imprisonment for 6 months or both. This re-enacts section 366(3) from the 1999 Act.

Clause 740 — Offence—unreasonably discipline child

This clause requires responsible persons (defined in 737) to not subject a child being cared for by the service to unreasonable discipline. Failure to do so is an offence of 50 penalty units, imprisonment for 6 months or both. This re-enacts section 366(4) from the 1999 Act.

Clause 741 — Offence—fail to maintain buildings, equipment etc

This clause requires responsible persons (defined in 737) to take reasonable steps to ensure that the buildings, grounds, equipment and furnishings used in the service are maintained in a safe, clean and hygienic condition and in good repair. Failure to do so is an offence of 50 penalty units, imprisonment for 6 months or both. This re-enacts section 366(5) from the 1999 Act.

Part 20.4 — Childcare services—childcare service licences

This part sets out the licensing scheme for childcare services. It outlines the application process for new licences and renewal process for existing licences, suspension and cancellation of licences, offences, assessment and reporting requirements and enforcement powers. Further enforcement powers are outlined at chapter 23.

Division 20.4.1 — Childcare service licences—application, eligibility, etc

This division sets out the application process for new childcare service licences.

Clause 742 — Childcare service licence—proposed proprietor may apply

This clause enables a proposed proprietor to apply, in writing, for a licence to operate a childcare service. The application must include suitability details of the proposed proprietor and proposed controlling person (if known at the time of the application).

Where the controlling person is not nominated at the time of application, the proprietor is required to nominate a controlling person within 30 days of the licence commencing.

Under section 343 of the 1999 Act, only proprietors who had an approval in principle and operated a children's service continuously for two years, could apply for a licence. This requirement has been removed in the Bill in order 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 and cancelled.

Clause 743 — Childcare service licence—further information

This enables the Chief Executive to ask the proprietor to give further information and allow the Chief Executive to inspect proposed premises in order to make a decision about the application.

Clause 744 — Childcare service licence—Chief Executive need not decide if no information or inspection

This clause provides that if the Chief Executive's request for information or access to inspect premises is not met by the proprietor, then the Chief Executive may refuse to assess the application.

Clause 745 — Childcare service licence—eligibility

This clause outlines the type of factors the Chief Executive can take into account when deciding if someone is eligible to hold a childcare service licence. This includes whether the proposed proprietor and each controlling person are suitable entities and whether the proposed proprietor and premises are complying with, and are likely to continue to comply with, childcare services standards. The main differences from the 1999 Act are that:

- the range of matters which the Chief Executive may assess in deciding whether someone (including a proposed proprietor or controlling person) is a suitable entity has been expanded at part 2.4; and
- current and future compliance with standards replaces demonstrated compliance with conditions. This is intended to cover for example, a standard about expected requirements at the time of the application.

Clause 746 — Childcare service licence—decision on application

This clause requires the Chief Executive to refuse or grant a licence, based on the assessment in clause 745 of whether the proposed proprietor is eligible for a licence. It further requires the Chief Executive to notify the proposed proprietor within 30 days of receiving the completed application (including any further information, references, results of tests or medical examinations and inspection of premises). This clause re-enacts section 345 of the 1999 Act however section 345(3) required notification within 60 days of receiving the complete application.

A decision under this clause to refuse to give a proprietor a childcare service licence is a reviewable decision (see clause 838, Table 2) and the proprietor may apply to the Administrative Appeals Tribunal for a review of the decision.

Clause 747 — Childcare service licence—content

This clause outlines the range of matters that must be stated on the childcare licence. This clause does not limit the matters that may be included on the licence.

Clause 748 — Childcare service licence—childcare service standards

This clause requires a childcare service to be operated in accordance with childcare services standards made by the Minister under clause 886. Different sets of childcare services standards can be made for different types of childcare services – for example standards that apply to family day care schemes can be different to standards for childcare centres.

Childcare services standards replace licence conditions in the 1999 Act which were set out in policy documents. The transition from conditions to standards is intended to provide a stronger and more transparent legislative basis by which standards can be enforced.

Sub-clause (2) outlines the requirements for issuing a temporary standards exemption and sets down maximum timeframes for their use. This replaces section 349 of the 1999 Act which enabled the Chief Executive to vary a condition of the licence. This clause enables a standard to be varied for a limited time (6 months with an extension to 12 months). For example, an exemption to a staffing standard to enable a non qualified staff to act in a qualified position while recruiting to that position.

Clause 749 — Childcare service licence—length

This clause enables the Chief Executive to give a licence for up to a maximum of three years. This re-enacts clause 349(2) of the 1999 Act. This clause introduces a new power enabling the Chief Executive to extend a licence that would otherwise expire during an application period.

Clause 750 — Childcare service licence—extensions

This clause enables the Chief Executive to extend a licence (that was originally granted for less than three years) to a maximum period not exceeding 3 years from the date the licence originally commenced. In order to approve the application for the extension, the Chief Executive must be satisfied that the licenced proprietor would be eligible for the extended licence under clause 745. If the licenced proprietor would not be eligible, the Chief Executive must refuse to extend the licence. The Chief Executive is required to tell the proprietor about the decision in writing within 30 days of receiving the application.

A decision under sub-clause (3) to refuse to extend a childcare service licence is a reviewable decision (see clause 838) and the licenced proprietor may apply to the Administrative Appeals Tribunal for a review of the decision.

Clause 751 — Childcare service licence—amendment

This clause enables the proprietor to apply, in writing, to the Chief Executive to amend a childcare service licence to reflect changes in the premises where the childcare centre may operate, the maximum number of children that may be cared for at the centre and the ages of children who may be cared for at the centre.

The Chief Executive may only amend the licence if satisfied that the proprietor and premises would meet the childcare services standards under the proposed amendment. This is required to allow variations to licences for operational changes and emergency situations, for example, a service that needs to relocate temporarily due to property damage from a storm.

An application to amend a licence must be decided within 30 days. A decision under sub-clause (3) to refuse to amend a childcare service licence is a reviewable decision (see clause 838) and the licenced proprietor may apply to the Administrative Appeals Tribunal for a review of the decision.

Clause 752 — Childcare service licence—transfer

This clause enables the Chief Executive to transfer a childcare service licence from a licenced proprietor to someone else, where satisfied that the person would be eligible under this chapter. This can be done on application by a proprietor. The Chief Executive is required to tell the proprietor about the decision in writing within 30 days of receiving the application. The transfer takes effect from a date specified by the Chief Executive.

Under section 349(1)(a) of the 1999 Act, the Chief Executive was able to remove a proprietor from a licence, which in effect transferred the licence to the remaining proprietor/s. This new clause however allows the transfer of a licence to eligible persons, which may include a current or new proprietor.

A decision under sub-clause (3) to refuse to transfer a childcare service licence is a reviewable decision (see clause 838) and the licenced proprietor may apply to the Administrative Appeals Tribunal for a review of the decision.

Division 20.4.2 — Childcare service licences—renewal

This division sets out the process for the renewal of a childcare service licence in force.

Clause 753 — Childcare service licence renewal—licenced proprietor may apply

This clause enables a licenced proprietor to apply, in writing, to renew a licence to operate a childcare service. The application must be submitted in writing between 30 and 60 days before the licence ends. This re-enacts section 346 of the 1999 Act. The Chief Executive may extend the application time under this clause and extend the licence under clause 749 while a decision is being made about the application.

Clause 754 — Childcare service licence renewal—further information

This clause enables the Chief Executive to ask the licenced proprietor to give the Chief Executive further information and allow the Chief Executive to inspect proposed premises in order to make a decision about the renewal of a childcare service licence.

Clause 755 — Childcare service licence renewal—Chief Executive need not decide if no information or inspection

This clause clarifies that if the Chief Executive's request for information or access to inspect premises is not met by the licenced proprietor, then the Chief Executive does not need to decide whether the proprietor is eligible for renewal of a licence in force. The licence would then lapse at the expiry date.

Clause 756 — Childcare service licence renewal—eligibility

This clause enables the Chief Executive to renew a licence if the proprietor is eligible for a licence under clause 745 and has complied with the childcare services standards during the period of the licence.

Sub-clause (2) contemplates circumstances where the Chief Executive may wish to consider a broad range of factors in determining whether a service has complied with the standards during the period of the licence. The Chief Executive may take into account any periods of noncompliance, or persistent noncompliance, with the childcare services standards; actions taken to rectify any noncompliance with the childcare services standards; and the future likelihood of compliance with the childcare services standards.

The Chief Executive may be satisfied that a service has complied with the standards notwithstanding that the service received a compliance notice under clause 759 but immediately took steps to remedy the non-compliance. The Chief Executive may therefore decide to renew a licence if the proprietor was otherwise eligible.

Clause 757 — Childcare service licence renewal—decision on application

This clause requires the Chief Executive to renew a licence or refuse to renew a licence, based on the assessment in clause 756. It further requires the Chief Executive to notify the proposed proprietor within 30 days of receiving the completed application (which includes any further information, references, results of tests or medical examinations and inspection of premises). This clause re-enacts section 347 of the 1999 Act.

A decision under sub-clause (3) to refuse to renew a childcare service licence is a reviewable decision (see clause 838) and the licenced proprietor may apply to the Administrative Appeals Tribunal for a review of the decision.

Division 20.4.3 — Childcare service licences—suspension and cancellation

This division outlines powers by which the Chief Executive may enforce the requirements of this chapter.

Clause 758 — Who is an affected child?

This clause sets out the meaning of an affected child for this division.

Clause 759 — Childcare service licence—compliance notices

This clause allows the Chief Executive to issue written notices for non-compliance with the chapter or a childcare services standard which direct the proprietor to take steps in the notice to comply with relevant provisions or standards by a stated date. This re-enacts section 358(1)(a).

The Bill requires the Chief Executive to inform a person with parental responsibility for each child who receives, or enrolled to receive, care at the service about compliance notices issued (this is a discretionary power under the 1999 Act). The Bill introduces a mechanism by which the proprietors can appeal the notice within 7 days of receiving the notice, before persons with parental responsibility are informed. The Chief Executive may confirm, amend or revoke the notice in response to a proprietor's submission.

A decision under this clause to confirm a compliance notice is a reviewable decision (see clause 838) and the licenced proprietor may apply to the Administrative Appeals Tribunal for a review of the decision.

Clause 760 — Childcare service licence—suspension for noncompliance

This clause enables the Chief Executive to issue a written notice directing the suspension of a childcare service from a stated date, where the licenced proprietor has failed to take the steps outlined in the compliance notice issued under clause 759. The proprietor must also be informed that they can make a submission about the suspension within 30 days of receiving the suspension notice (under the 1999 Act the timeframe was 7 days). The Chief Executive can revoke the notice at any time or after considering a submission from the proprietor under clause 761.

There is a new requirement for the Chief Executive to tell a person with parental responsibility for each child who receives, or enrolled to receive, care at the service, about a suspension notice. This was a discretionary power under the 1999 Act.

A decision under this clause to suspend a childcare service licence is a reviewable decision (see clause 838) and the licenced proprietor may apply to the Administrative Appeals Tribunal for a review of the decision.

Clause 761 — Childcare service licence—ending noncompliance suspension

This clause requires the Chief Executive to consider a submission from the proprietor about the suspension notice. After considering the submission, the Chief Executive is required to confirm the suspension and decide the length of the suspension or end the suspension. The proprietor and a person with parental responsibility for each child who receives, or enrolled to receive, care at the service must be told about the Chief Executive's decision. The notification of a parent was a discretionary power under section 358(5) of the 1999 Act.

A decision under this clause to confirm suspension of a childcare service licence is a reviewable decision (see clause 838) and the licenced proprietor may apply to the Administrative Appeals Tribunal for a review of the decision.

Clause 762 — Childcare service licence—suspension if children unsafe

In addition to other powers in this chapter, this clause enables the Chief Executive to issue a written notice directing the immediate suspension of a childcare service, where the Chief Executive reasonably believes that children being cared for at the service are unsafe and the exercise of this power is necessary to protect children. Written notice of the suspension must be given to the proprietor. A person with parental responsibility for each child who receives, or enrolled to receive, care at the service must be told about the suspension. The notice can be revoked by the Chief Executive at any time. This re-enacts section 359 of the 1999 Act. Removal of a child in immediate danger is authorised under clause 777.

A decision under this clause to suspend a childcare service licence is a reviewable decision (see clause 838) and the licenced proprietor may apply to the Administrative Appeals Tribunal for a review of the decision.

Clause 763 — Childcare service licence—notice of intention to cancel

This clause enables the Chief Executive to cancel a licence in certain circumstances including: where the licence was obtained improperly, the proprietor has been convicted or found guilty of an offence against this Act or ceases to be a suitable entity, or has operated the service in a way that does not comply with a childcare services standard, or the controlling person ceases to be a suitable entity.

This clause enables the Chief Executive to give a licenced proprietor written notice that the Chief Executive intends to cancel the licence, reasons for this and provide the proprietor the opportunity to make a submission about the notice within 21 days of receiving it. A person with parental responsibility for each child who receives, or enrolled to receive, care at the service must be told about the notice. This re-enacts clause 350 in the 1999 Act.

Clause 764 — Childcare service licence—cancellation

In the clause, after considering any submission received by the proprietor, the Chief Executive is required to:

- cancel the licence; or
- revoke the intention to cancel notice issued under section 2637 (and inform the proprietor and a person with parental responsibility for each child who receives, or enrolled to receive, care at the service).

A decision under this clause to cancel a childcare service licence is a reviewable decision (see clause 838) and the licenced proprietor may apply to the Administrative Appeals Tribunal for a review of the decision.

Clause 765 — Childcare service licence—cancellation notice

This requires the Chief Executive to give the proprietor a written notice which effectively cancels the licence from a stated date, if the Chief Executive decides to cancel the licence under section 764. The notice must be given at least 7 days before the cancellation date. A person with parental responsibility for each child who receives, or enrolled to receive, care at the service must be told about the notice. This re-enacts clause 350(4)(b) in the 1999 Act.

Clause 766 — Offence—fail to return cancelled childcare service licence

This clause requires a licenced proprietor to return a licence to the Chief Executive within 7 days of receiving a cancellation notice. This re-enacts section 351 of the 1999 Act.

Clause 767 — Childcare service licence—identity of childcare workers protected

This clause is a new requirement for the Chief Executive to protect the identity of an individual childcare worker when the Chief Executive is required to tell persons with parental responsibility under this division about non-compliance, suspension and cancellation matters.

Division 20.4.4 — Childcare service licence—offences

This division sets out offences and penalties applicable to childcare service licences which re-enact offences at part 9.4 of the 1999 Act.

Clause 768 — Offence—operate unlicenced childcare service

This clause makes it an offence to operate a childcare service without a childcare licence. This re-enacts section 362 of the Act.

Clause 769 — Offence—advertise unlicenced childcare service

This clause makes it an offence to advertise a childcare service for which there is no licence in force.

Sub-clause (3) is new and allows people who have applied for a childcare licence to advertise the service on condition that the advertisement clearly states that the service is not licenced. This clause contemplates that services that are in the process of being established may advertise for service users or staff prior to a licence being granted.

Clause 770 — Offence—operate childcare service when licence suspended

This clause makes it an offence for proprietors and controlling persons for licenced childcare services to operate the service while their licence is suspended under clauses 760 or 762.

The maximum penalty is 50 penalty units, imprisonment for 6 months or both.

Clause 771 — Offence—operate childcare service in contravention of standards

This clause makes it an offence for licenced proprietors and controlling persons to operate a service in contravention of the standards. This replaces the offence of contravening a condition of the licence at section 364 of the 1999 Act as standards will replace conditions.

Division 20.4.5 — Childcare service licences—register, assessment and reporting

This division outlines the procedures for assessment and reporting of compliance with standards by childcare services.

Clause 772 — Childcare service licence—register

This clause requires the Chief Executive to establish a register of childcare service licences. This clause does not preclude the register also including other details about childcare service licences that the Chief Executive considers appropriate, for example, changes in proprietors, and licence expiry dates.

Clause 773 — Assessing compliance with childcare services standards

This clause is a new requirement for the Chief Executive to assess service compliance with standards at least once during the period of a licence.

This clause contemplates the establishment of an assessment tool (made by the Minister through a disallowable instrument) for assessing childcare services compliance with standards.

Clause 774 — Annual childcare services standards report

This clause is a new requirement for the Chief Executive to publish an annual report about temporary standards exemptions, amended or confirmed compliance notices, compliance suspension notices, safety suspension notices, intention to cancel or cancellation notices, compliance assessments made during the financial year, any finding of guilt or convictions against this chapter, and any submissions from licenced proprietors. The report must be in accordance with a report requirement declared by the Minister under clause 775 and not identify a childcare worker, a child or someone who made a confidential report about a

childcare service (or allow their identity to be worked out). The annual report will be notified on the legislation register.

Clause 775 — Annual childcare services standards report—requirements

This clause is a new power enabling the Minister to make requirements for a childcare services standards report by way of disallowable instrument. The intention of this clause is to ensure transparency and fairness about those matters which are included in a childcare services standard report.

Clause 776 — Annual childcare services standards report—consultation

This clause provides that information about an assessment of non-compliance will be provided to the licenced 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 notice about the annual report must not identify someone who made a confidential report about a childcare service (or allow their identity to be worked out).

Part 20.5 — Childcare services—enforcement

This part includes enforcement powers in circumstances where a child is in immediate danger at a childcare service. Further enforcement powers for this chapter are contained in chapter 23.

Clause 777 — Removal of child in immediate danger

This clause re-enacts the power at section 360 of the 1999 Act which enables the Chief Executive to remove a child or children (and anything required for their care) from a service if the Chief Executive is satisfied that there is an immediate danger to the health or safety of the child or children. If the Chief Executive exercises this power, the Chief Executive is to take all reasonable steps to inform a person with parental responsibility for the child and must return the child to the care of the person or arrange for the child to be cared for at another service. This clause introduces a new requirement for the Chief Executive to return things required for the child's care to their owners when they are no longer needed.

It is intended that this power may be used in urgent and serious circumstances where there is an immediate danger to the health or safety of a child or children at the service. This is a high test and will not be met in circumstances where the child is not at imminent risk and a parent or person with parental responsibility for the child could attend and remove the child themselves, for example, the outbreak of an infectious disease.

Chapter 21 — Employment of children and young people

This chapter regulates employment for children and young people aged under 18 years in the Territory.

Article 32 of the *Convention on the Rights of the Child* (CROC) provides recognition of the rights of children to be protected from economic exploitation and from performing any work that is likely to be hazardous, or likely to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development.

In 2005, the *Children at Work* report by the NSW Commission for Children and Young People found that children enjoy working, it is important to them and it contributes to their development in many ways. The report also found some trends of concern for children and young people in the workplace including high levels of harassment and injury. Research shows that while some work can support studies, work for long hours or at too young an age can impact on educational performance and retention. An Australian Council of Educational Research report concluded that students working longer hours from younger ages (over five hours in year nine and over ten hours in year eleven), negatively impacts on school completion and continuing on to post-school education[4]. A Queensland *Review of Child Labour* report indicates the negative effects that long working hours can have on children include: high levels of fatigue, negative effects on ability to concentrate, incomplete homework, poor results, and lack of preparation for exams[5].

The Bill seeks to achieve a balance between the need to protect children and young people from the risk of harm in employment and the desirability of preserving the right of children and young people to engage in and benefit from employment.

This chapter does not regulate occupational health and safety for children and young people in employment as this is addressed in the *Occupational Health and Safety Act 1989*.

In making a decision under this chapter in relation to a particular child or young person, the decision maker must regard the best interests of the child or young person as the paramount consideration. 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 8.

Under clause 875 if a person suspects that a provision of this chapter is being, or has been, contravened, then the person may report the suspicion, and the reasons for the suspicion, to the Chief Executive.

Part 21.1 — Important concepts

Clause 778 — Ch 21 subject to Education Act 2004, s 13

This clause provides that the chapter is subject to section 13 of the *Education Act 2004*. Section 13 of the Education Act creates an offence for a person to employ a child or young person under 15 years old when the child or young person is required to be at school, at a school activity or at an approved education course.

The offence also applies where a child under school leaving age is residing interstate or is enrolled in a school interstate. For example, it is illegal to employ a child under school age in the ACT whether or not the child's residential address or school is in the ACT or NSW.

Clause 779 — Definitions—ch 21

This clause outlines definitions for the chapter. It provides a new definition of ‘contrary to the best interests of a child or young person’ as set out at clause 781.

4 Smith, E., & Green, A. (2001). *School students learning from their paid and unpaid work*. Canberra: Australian Council for Educational Research.
5 The Commission for Children and Young People and Child Guardian, *Queensland Review of Child Labour*, April 2005

Clause 780 — When does someone employ a child or young person?

This clause provides the meaning of employment for the chapter. The definition of employment has been modernised in accordance with current drafting practice and has been expanded to include not for profit work.

The Bill introduces a legislative basis for regulating work experience programs for children and young people under school leaving age by including work experience (which has not been exempted under part 21.2) in the definition of employment. The Minister may make standards for work experience by way of a disallowable instrument under clause 886.

The definition of employment excludes children and young people who participate in tobacco compliance testing under part 6A of the *Tobacco Act 1927*.

Clause 781 — When is employment contrary to the best interests of a child or young person?

This clause outlines when employment is taken to be contrary to the best interests of a child or young person. If employment is contrary to the best interests of a child or young person, the Bill may operate to prohibit a child or young person from engaging in the employment (see for example, clause 798 which allows the Chief Executive to prohibit a child or young person from engaging in employment that is contrary to their best interests).

Employment will be contrary to the best interests of a child or young person in any of the following circumstances:

1. **If the employment occurs when the child or young person is required under the *Education Act 2004* to attend a school, school activity or approved educational course.**

This category creates a nexus with the requirement for compulsory school attendance under the *Education Act 2004*. It reflects that employers cannot employ anyone between 6 and 15 years of age during school hours, or at any other time that prevents or interferes with their compulsory attendance at school.

2. **If the employment is likely to prejudice the child or young person's ability to benefit from education or training they are participating in.**

This category considers the impact of employment on a child or young person's education and reflects the importance of providing optimal learning conditions for children and young people to allow them to derive maximum benefit from formal education and training.

This is not intended to prohibit any interference with education or training. For example, employment in the entertainment industry for a limited season out of school hours may not be prejudicial to a child's education or training, whereas employment which caused a child to be continually tired and inattentive in the classroom may constitute a ground for the Chief Executive to prohibit or make conditions about the employment.

3. **If the employment is likely to harm the child or young person's health, safety, or personal or social development.**

Health and safety is intended to be construed broadly to incorporate all aspects of a child or young person's physical, mental and emotional health and safety. This category would include, for example, circumstances where a child or young person's employment causes excessive tiredness, causes injury (for example, through operating machinery) or places the child or young person at risk of physical harm from over exertion.

Employment harmful to a child or young person's personal or social development recognises that employment may negatively impact upon a child or young person's social and developmental opportunities, their capacity to engage in recreation or opportunities to learn valuable social and cognitive skills outside the classroom. For example, a child may be

prohibited from engaging in employment of excessive hours leaving no time for the child to play with friends and engage in sporting activities.

Part 21.2 — Work experience programs—exemption

This part establishes a framework to exempt work experience programs arranged by educational institutions from the operation of this chapter, if they meet work experience standards made by the Minister under clause 886. This part replaces the transitional arrangement introduced as part of the *Children and Young People Amendment Act 2006* which excluded all work experience programs for children and young people arranged by educational institutions from the operation of the employment provisions.

Clause 782 — Work experience program – exemption from ch 21

This clause allows an educational institution to apply for an exemption from this chapter for a work experience program conducted by the educational institution.

The application is required to be made in writing to the Chief Executive and include full details of how the program complies with the work experience standards.

If educational institutions that organise or arrange work experience programs for young people under school leaving age do not have an exemption under this chapter, then those work experience programs are subject to the employment provisions in this chapter, including the offence to employ a child or young person under school leaving age (clause 794). The only exceptions to that offence are employment in light work (clause 795) or employment in a family business (clause 796). If the employment is declared high-risk employment then the employer is required to obtain a permit from the Chief Executive (clause 798). Work experience activities for children and young people under school leaving age that do not meet these exemptions or requirements for declared high risk employment would therefore be unlawful.

Clause 783 — Work experience program – decision on application

This clause enables the Chief Executive, following receipt of an application, to exempt an educational institution's work experience program from the employment chapter if the Chief Executive reasonably believes that the program complies with, and will continue to comply with, the work experience standards.

An exemption may be subject to stated conditions. For example, the Chief Executive may exempt a program on condition that it requires employers to provide minimum levels of training and supervision to students engaged in work experience programs.

Clause 784 — Work experience program exemption – further information

This clause allows the Chief Executive to seek further information about an application for an exemption or program at any time from an educational institution after an application has been received or following a decision to exempt the program. This is necessary to ensure that the Chief Executive has all relevant information to decide the application and to ensure ongoing compliance of the program with the standards.

This clause also requires the education institution to comply with the request for further information.

Clause 785 — Suspension of work experience program exemption

This clause enables the Chief Executive to immediately suspend an educational institution's exemption from the chapter by way of written notice. This clause provides the educational institution with the opportunity to make a submission about the suspension.

The suspension of an exemption under this division would mean the work experience program would then be subject to the employment provisions in this chapter, including the offence to employ a child or young person under school leaving age (clause 794). The only exceptions to that offence are employment in light work (clause 795) or employment in a

family business (clause 796). If the employment is declared high-risk employment then the employer is required to obtain a permit from the Chief Executive (clause 798). Work experience activities for children and young people under school leaving age that do not meet these exemptions or requirements for declared high risk employment would therefore be unlawful.

A decision under this clause to suspend a work experience program exemption is a reviewable decision (see clause 838) and the educational institution may apply to the Administrative Appeals Tribunal for a review of the decision.

Clause 786 — Revocation of educational institution's exemption

This clause enables the Chief Executive to immediately suspend an educational institution's exemption from the chapter by way of written notice. This clause provides the educational institution with the opportunity to make a submission about the suspension.

The revocation of an exemption under this division would mean the work experience program would then be subject to the employment provisions in this chapter, including the offence to employ a child or young person under school leaving age (clause 794). The only exceptions to that offence are employment in light work (clause 795) or employment in a family business (clause 796). If the employment is declared high-risk employment then the employer is required to obtain a permit from the Chief Executive (clause 798). Work experience activities for children and young people under school leaving age that did not meet these exemptions or requirements for declared high risk employment would therefore be unlawful.

A decision under this clause to revoke a work experience program exemption is a reviewable decision (see clause 838) and the educational institution may apply to the Administrative Appeals Tribunal for a review of the decision.

Part 21.3 — Employment of children and young people

This part sets out the general powers of the Chief Executive and the Minister in relation to the employment of children and young people aged up to 18 years. It re-enacts section 375 of the 1999 Act and introduces a new requirement for employers to comply with standards made by the Minister under clause 886 in relation to the employment of children and young people.

Clause 787 — Chief Executive may prohibit employment

The Bill remakes general supervisory powers for the Chief Executive in relation to the employment of any child or young person in the Territory.

Under this clause, the Chief Executive is empowered to prohibit the employment of any child or young person by way of notice given to an employer (called an employment prohibition notice) if the Chief Executive believes that the employment is, or is likely to be, contrary to the best interests of the child or young person.

A decision under this clause to prohibit an employer from employing, or continuing to employ a child or young person, is a reviewable decision (see clause 838) and the employer or the child or young person may apply to the Administrative Appeals Tribunal for a review of the decision.

Clause 788 — Offence—contravene employment prohibition notice

This clause creates an offence for an employer, after being given an employment prohibition notice, to engage in conduct that contravenes the notice. An employer is liable to a penalty of $5000 (if charged as an individual) or $25000 (if charged as a corporation), imprisonment for 6 months or both.

Clause 789 — Chief Executive may state conditions of employment

Another supervisory power for the Chief Executive is contained in this clause which empowers the Chief Executive to place conditions on the employment of a child or young person by way of notice given to an employer (called an employment conditions notice). This

is to ensure that the employment is not contrary to the best interests of the child or young person.

A decision under this clause to state conditions in relation to a child or young person's employment is a reviewable decision (see clause 838) and the employer or the child or young person may apply to the Administrative Appeals Tribunal for a review of the decision.

Clause 790 — Offence—contravene employment conditions notice

This clause creates an offence for an employer, after being given an employment conditions notice, to engage in conduct that contravenes the notice. An employer is liable to a penalty of $5000 (if charged as an individual) or $25000 (if charged as a corporation).

Clause 791 — Children and young people employment standards

This clause creates a new requirement for employers to comply with standards made by the Minister under clause 886 in relation to the employment of children and young people.

Part 21.4 — Employment of children and young people under school-leaving age

This part sets out offences relating to the employment of children and young people under school leaving age (15 years), including in high risk employment declared by the Minister. It sets out an administrative framework for the Chief Executive to give conditional consent to high risk employment and includes new requirements on employers in relation to seeking that consent.

Clause 792 — What is light work?

This clause expands the meaning of light work to mean work that is not contrary to the best interests of a child or young person. Types of light work that were deemed an exhaustive list of light work in the 1999 Act have been translated to examples of light work in this clause, with the exception of circus work, as some circus activities present a risk of physical injury.

Under clause 794, it is an offence to employ a child or young person under school leaving age, subject to certain exceptions including employment in light work.

This amendment will have the effect of allowing children and young people under school leaving age to work in a broader range of light work activities than is presently permitted. The employer of the child or young person has the responsibility of determining what is light work, within the meaning set out by this clause. If the Chief Executive discovers children and young people are working in employment that is contrary to their best interests, the Chief Executive can prohibit the employment under clause 787 or state conditions of employment under clause 789, which the employer must comply with.

Clause 793 — What is high risk employment?

This clause creates a definition of high risk employment which means employment declared to be high risk under clause 797(1).

Clause 794 — Offence—employment of children and young people under school-leaving age

This clause creates a prohibition on the employment of children and young people under the age of 15 years. This prohibition is subject to two exceptions, namely for light work and for family business employment, outlined in clauses 795 and 796 respectively.

A work experience program for children and young people under school leaving age is subject to this offence, if the educational institution that arranges the program does not have an exemption from the Chief Executive under this chapter.

Clause 795 — Exception to s 794—employment in light work

This clause creates the first exception to the general prohibition on the employment of children and young people under the age of 15 years. If the child or young person is engaged

in light work for not more than 10 hours per week and the employment is not contrary to their best interests, then the general prohibition is displaced.

If the light work is for more than 10 hours per week, the proposed employer is required to notify the Chief Executive about the employment at least 7 days before it starts.

A duty to notify the Chief Executive of a child or young person's light work employment over 10 hours in one week is placed on employers as employment for a lesser period does not give rise to an expectation of harm to the child or young person.

Upon being notified, the Chief Executive may exercise general powers at clauses 787 and 789 to prohibit or restrict the proposed employment.

Clause 796 — Exception to s 794—employment in family business

This clause creates the second exception to the general prohibition on the employment of children and young people under the age of 15 years. This exception arises in circumstances where the child or young person's employer is a parent, or a company of which one of their parents is a director or a partnership of which one of their parents is a partner.

This clause also provides that the family business employment must be light work. While this requirement is expressed differently to the test in the 1999 Act, this amendment has the same effect of section 372 of 1999 Act, where children and young people under the age of 15 could be employed in family businesses, however that employment could not constitute a breach of the *Education Act 1937* or be likely to prejudice the health, safety or personal or social development of the young child or their ability to benefit from his or her training. Further the young child could not be employed in dangerous employment, without a permit from the Chief Executive.

Clause 797 — Declaration of high risk employment

The 1999 Act prohibited the employment of a child or young person under school leaving age in activities dangerous to the health or safety of the child or young person without the consent of the Chief Executive, however the Act was silent on what dangerous activities were.

This clause replaces the concept of 'dangerous employment' in the 1999 Act with 'high risk employment', which is an industry, occupation or activity declared by the Minister. To declare an industry, occupation or activity as high risk, the Minister must be satisfied that it is likely to harm a child's or young person's health, safety, personal or social development (including by sexual or financial exploitation).

This clause is not intended to displace other laws that regulate health and safety in the workplace, such as the *Occupational Health and Safety Act 1989*. It recognises that children and young people are more vulnerable to harm in the workplace related to factors such as their maturity and developmental capacity, inexperience and training. The research indicates that young workers are less likely than older workers to complain or to ask for training and are more likely to take risks than adults in all spheres of activity.

It is an offence to employ a child or young person in high risk employment, without a permit under clause 801.

Clause 798 — High risk employment – employer may apply for permit

This clause sets out new requirements on employers with respect to applying for permits from the Chief Executive to employ children and young people under school leaving age in high risk employment. An application for a permit must be in writing and include the details of the employment and how the employer proposes to protect the child or young person during the employment. The employer is also required to seek the consent of a person with parental responsibility.

The 1999 Act was silent on the requirements of employers in seeking the consent of the Chief Executive to employ children and young people in dangerous employment under section 374.

This clause sets out the minimum information requirements needed to assess and manage the risk to the child or young person in the workplace.

Clause 799 — High risk employment permit – decision on application

This clause enables the Chief Executive to issue a permit to employ a child or young person under school leaving age in declared high risk employment. The permit may be subject to certain stated conditions which the employer must comply with. Examples are provided of relevant conditions.

If the Chief Executive believes that the proposed employment is likely to harm the child or young person's health, safety, personal or social development, then the Chief Executive must not permit the employment.

The Chief Executive's power to consent to dangerous employment was provided at section 374 of the 1999 Act.

Clause 800 — High risk employment permit – further information

This clause allows the Chief Executive to seek further information about an application for a high risk employment permit at any time from an employer after an application has been received or following the issue of a high risk employment permit. This is necessary to ensure that the Chief Executive has all relevant information to decide the application and to ensure ongoing compliance of employment with any conditions set out in the permit.

This clause also requires the employer to comply with the request for further information as soon as practicable.

Clause 801 — High risk employment permit – content

This clause outlines what a high risk employment permit must contain including the name of the employer, the child or young person to be employed, the location of the premises where the employment is to be undertaken, the length of the permit and any conditions to which the permit is subject. Examples of conditions include supervision, training or protective clothing.

Clause 802 — Offence—employment of child or young person under school-leaving age in high risk employment

This clause creates an offence to employ a child or young person under school-leaving age in high risk employment. This offence does not apply if there is a current high risk employment permit in force for the child or young person.

The penalty of 200 penalty units, imprisonment for 2 years or both is consistent with the penalty for the offence of employing a child or young person in activities dangerous to their health or safety at section 374(4) of the 1999 Act.

Clause 803 — Offence—contravene condition of permit

This clause creates an offence for persons who engage in conduct that contravenes a condition of the Chief Executive's permit to employ a child or young person in high risk employment.

The maximum penalty of 100 penalty units, imprisonment for 1 year or both is consistent with the maximum penalty for the offence of failing to comply with a condition to which the Chief Executive's consent to dangerous employment is subject at section 374(5) of the 1999 Act.

Chapter 22 — Research involving children and young people

The Bill introduces new provisions for the Chief Executive to approve certain research projects. Research projects that require the approval of the Chief Executive under this chapter involve the participation of certain children and young people in the research project (including those in the custody and care of the Chief Executive) or require the Chief Executive to give the researcher access to protected or sensitive information about children and young people. They also include projects that involve the participation of a person who exercises a function under the Act or the research being conducted at a place of care, detention place, or therapeutic protection place.

The Minister may make research standards for the Act under clause 886 by way of disallowable instrument.

Clause 804 — Definitions—ch 22

This clause outlines the definitions for this chapter of approved research project, ethics committee, researcher and research project.

Clause 805 — What is a research project?

This clause sets out the scope of research projects for this chapter. A research project for this chapter means a project involving one or more of the following:

- the Chief Executive giving the researcher protected (including sensitive) information about a child or young person. Protected and sensitive information are defined at clauses 843 and 844 respectively.
- the researcher has recruited the participation of certain children or young people through the Chief Executive; including those who are the subject of proceedings under the Act, those for whom a care and protection order is in force, those who are the subject of a child concern report, those for whom the Chief Executive has parental responsibility (for example, under a voluntary care agreement, or an appraisal order, therapeutic protection order, or interim care and protection order with a parental responsibility provision), and young detainees.
- the researcher has recruited the participation of a person who exercises a function under the Act, for example, an authorised person or youth detention officer.
- the researcher conducting the research project at a place of care, place of detention or place of therapeutic protection.

The following activities are exempted from the scope of the research chapter:

- activities conducted by the Chief Executive as a quality assurance exercise or audit. For example, file reviews, case studies, professional casework supervision;
- the release of de-identified protected information about a child or young person by the Chief Executive to a researcher.

Clause 854 allows the Chief Executive to give protected information to a researcher for an approved research project.

Clause 806 — Approval of research projects—generally

This clause authorises the Chief Executive to approve a research project. The Chief Executive may only approve a research project if satisfied that the project complies with, or is likely to comply with, the research standards and the Chief Executive has given approval under clause 808 for the participation of a child or young person in the project.

Under clause 809, the Minister may approve an ethics committee for this chapter. This clause also enables the Chief Executive to consider a recommendation made by that ethics committee in deciding whether to approve the project.

Clause 807 — Research standards – certain matters to be covered

This clause requires any research standards made by the Minister under clause 886 to address the matters outlined at (1)(a) to (e) for projects involving the participation of a child or

young person which seek to protect the child or young person's welfare, health, safety and privacy.

Any research standards made by the Minister under clause 886 must also address the secrecy of protected information given to researchers under clause 865.

Clause 808 — Approval of research projects—child or young person to take part

In order to ensure that children and young people participating in research projects are adequately protected, this clause provides that the Chief Executive must be satisfied that the researcher and any other person to have contact with children and young people for the project is a suitable entity to have contact with children or young people in the way proposed in the project. Part 2.4 allows the Chief Executive to approve an entity as a suitable entity for a stated purpose under the Act if satisfied that the entity is suitable for the purpose.

This clause also requires the researcher to seek the written consent of a child or young person with sufficient developmental capacity to consent or a person with daily care responsibility for the child or young person for research projects involving the participation of a child or young person. The research must also inform the child or young person that consent can be refused and if consent is given, the child or young person has an entitlement to withdraw from the project at any stage of the project.

Clause 809 — Approval of ethics committees

This clause enables the Minister to approve an ethics committee for this chapter by way of a notifiable instrument.

This clause does not preclude the Minister from approving an existing ethics committee for this chapter, for example, a university ethics committee.

Clause 810 — Offence—researcher contravene approved standards

This clause introduces an offence for researchers who carry out an approved research project in a way that does not comply with the research standards. The maximum penalty is 50 penalty units.

Chapter 23 — Enforcement

This chapter outlines enforcement powers for functions exercised under the Act by authorised persons or police officers. An authorised person is a person to whom the Chief Executive has delegated a power under the Act (see clause 26).

This chapter allows entry to premises with the consent of the occupier of the premises or with a search warrant issued by a Magistrate. This chapter also authorises entry to premises without the consent of the occupier and without a warrant in certain defined circumstances. These powers are limited to the following specific circumstances where a child or young person is at imminent risk of significant harm or the Chief Executive is inspecting a licenced childcare service or a declared therapeutic protection place where children and young people are being cared for:

- For an authorised person to assess whether a child or young person, who the Chief Executive has daily care responsibility for and is placed in out-of-home care, is being properly cared for (see clause 814- Power to enter premises—ch 15 (Care and Protection—Chief Executive has aspect of parental responsibility));
- For an authorised person or police officer to assess whether a child or young person is in need of emergency care and protection or emergency therapeutic protection and take emergency action for the child or young person (see clause 813 - Power to enter premises—ch 13 (Emergency care and protection));
- For an authorised person to enter a therapeutic protection place (see clause 815(1) - Power to enter premises—ch 16 (Therapeutic protection of children and young people));
- For an authorised person to enter premises if a licenced childcare service is operating on the premises (see clause 816(2) - Power to enter premises—ch 20 (Childcare services)).

Entry to premises without consent of the occupier or a warrant issued by a judicial officer in these limited circumstances is necessary to ensure the protection of a child or young person at risk of immediate and significant harm or to fulfil the Chief Executive's duty of care to children and young people for whom the Chief Executive has parental responsibility or to fulfil an inspectorate role for licenced childcare services.

The Government considers that the objective of protecting children and young people in these circumstances overrides the fundamental legislative principle that power to enter premises should be conferred only with a warrant issued by a judicial officer.

The note to Chapter 23 makes clear that in making a decision under this chapter in relation to 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 8. 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 8.

Part 23.1 — General

This part outlines definitions for the chapter.

Clause 811 — Definitions—ch 23

This clause outlines definitions for key terms used in this chapter, such as 'occupier of premises', 'offence' and 'connected with an offence'. An authorised person is defined at clause 26 as a person to whom the Chief Executive has delegated functions under the Act.

Part 23.2 — Powers of authorised people

This part outlines the powers of authorised persons and police officers for this chapter, including entry to premises without a warrant in certain circumstances and general powers that can be exercised upon entry to premises.

Clause 812 — 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.

Any reasonable time includes, but is not limited to, during business hours.

This does not authorise entry into a part of premises that is being used only for residential purposes.

Clause 813 — Power to enter premises—Chapter 13 (Care and protection and therapeutic protection -emergency situations)

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 or emergency therapeutic protection and the entry is for the purpose of the authorised person or police officer taking emergency action for the child or young person.

In need of emergency care and protection is defined at clause 402. A child or young person is in need of emergency care and protection if the child or young person—

- is in immediate need of care and protection; or
- is likely to be in need of immediate care and protection if emergency action is not taken.

In need of emergency therapeutic protection is defined at clause 403. A child or young person is in need of emergency therapeutic protection if—

- the child or young person meets the criteria for a therapeutic protection order; and
- the immediate placement of the child or young person in a therapeutic protection place is necessary to ensure the child or young person's safety.

This entry may occur at any time of the day or night. This clause authorises the authorised person or police officer to use reasonable and necessary force to safeguard the wellbeing of the child or young person.

This clause is additional to clause 812 (power to enter premises – general) which authorises entry to premises with the occupier's consent or in accordance with a search warrant.

Clause 814 — Power to enter premises—ch 15 (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 daily care responsibility for the child or young person and has placed the child or young person with an out-of-home carer under clause 511; 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 been asked to allow the Chief Executive to inspect the place and the entity has agreed to the request.

Any reasonable time includes, but is not limited to, during business hours.

This clause is additional to clause 812 (power to enter premises – general) which authorises entry to premises with the occupier's consent or in accordance with a search warrant.

Clause 815 — Power to enter premises—ch 16 (Care and protection - therapeutic protection of children and young people)

This clause provides that an authorised person may, at any reasonable time, enter a therapeutic protection place which is not being operated by the Chief Executive.

This clause also provides for entry by authorised persons if the Minister is deciding whether to declare the place as a therapeutic protection place and the operating entity has been asked to allow the Chief Executive to inspect the place and the entity has agreed to the request.

The clause only authorises entry into a residential part of the premises at any reasonable time if it is being used to operate the therapeutic protection place.

Any reasonable time includes, but is not limited to, during business hours.

This clause is additional to clause 812 (power to enter premises – general) which authorises entry to premises with the occupier's consent or in accordance with a search warrant.

Clause 816 — Power to enter premises—ch 20 (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 in order to assess an application for a childcare service licence or renewal of a childcare service licence.

This clause also authorises an authorised person to enter premises at any reasonable time if a licenced childcare service is operating on the premises.

Any reasonable time includes, but is not limited to, during business hours.

This clause only authorises entry into a residential part of the premises if it is being used to operate the childcare service.

This clause is additional to clause 812 (power to enter premises – general) which authorises entry to premises with the occupier's consent or in accordance with a search warrant.

Clause 817 — 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. An authorised person must have an identity card under clause 26.

Clause 818 — Consent to entry

The clause provides requirements for an authorised person in seeking the consent of an occupier for entry to premises under the general entry power at clause 812(1)(b).

An authorised person must produce their identity card and inform the occupier of the purpose of the entry and that anything found and seized under this chapter may be used in evidence in Court and that their consent may be refused.

If the occupier consents, the authorised person must ask the occupier to sign a written acknowledgment (called 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.

The authorised person is required to give a copy of any acknowledgement of consent to the occupier immediately after it is signed.

This clause obliges a Court 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 819 — General powers on entry to premises

This clause provides that an authorised person may undertake certain activities while on premises under this chapter, including one or more of the following:

- 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;
- requiring the occupier, or another person at the premises, to produce records or copies of records that the person has or has access to that are reasonably required by the authorised person for the Act;
- requiring the occupier, or another person at the premises, to give the authorised person reasonable help to exercise a power under this chapter.

An offence is created for a person who fails to take all reasonable steps to comply with a requirement made of the person under (1)(f) or (g). The maximum penalty is 50 penalty units.

Clause 820 — Duty to give information or documents

This clause allows an authorised person to give a written notice requiring a person to produce a document or information stated in the notice that is required for this Act.

For example, under clause 773 there is a requirement for childcare services to give information requested by the Chief Executive that is needed to assess compliance with childcare services standards.

Sub-clauses (2) and (3) require a person to give the information or document within a timeframe of not less than 14 days specified in the notice. An authorised person may extend the timeframe that the information or document can be produced in and the person may then produce the document or information in the extended timeframe.

Sub-clause (4) creates an offence for a person who fails to take all reasonable steps to comply with the notice to produce within the specified timeframe. The maximum penalty is 50 penalty units.

For example, in order to assess compliance with standards, it may be necessary to inspect certain documents or records (for example, log books) of a service that may or may not be held at the premises. This clause allows an authorised person to require the production of a document or documents in these circumstances as required for the Act.

Clause 821 — 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 thereafter, record the reason given by the person. The authorised person is required to produce his or her identity card for inspection.

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 produces his or her identity care for inspection. The maximum penalty is 10 penalty units.

Clause 822 — Power to seize things

This clause provides a power for an authorised person to seize certain things after entry to premises with consent or with a warrant.

If the entry to premises occurs with the occupier's consent, the authorised person 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.

If the entry to premises occurs under a warrant, the authorised person may seize anything at the premises that the warrant authorises them to seize.

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 may leave the thing at the place of seizure but restrict access to it.

An offence is created if a person interferes with a seized thing, or anything containing a seized thing, to which access has been restricted, if the person knows access to the thing 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 23.3 — Search warrants

This part outlines the issuing of search warrants and entry to premises under search warrants.

Clause 823 — Warrants generally

This clause allows an authorised person to apply to a Magistrate, by way of sworn application stating the grounds, for a warrant to enter premises.

In order to issue the search warrant, the Magistrate must be satisfied there are reasonable grounds for suspecting there is a particular thing or activity connected with an offence against this Act; and the thing or activity is, or is being engaged in, at the premises; or may be, or may be engaged in, at the premises within the next 14 days.

This clause outlines the details that must be included on the warrant, including the premises authorised to be entered, the offence for which it is issued, what may be seized under the warrant, when the premises may be entered and the date of expiry of the warrant (which must be within 14 days of issue).

Clause 824 — Warrants—application made other than in person

This clause allows applications for warrants to be made other than in person, for example, by electronic means in urgent circumstances.

Clause 825 — Search warrants—announcement before entry

This clause obliges an authorised person to take certain action before entry to premises under a search warrant, including announcing that the authorised person is authorised to enter the stated premises; giving anyone at the premises an opportunity to allow entry to the premises and identifying themselves to the occupier or apparent occupier of the premises.

This obligation is waived in circumstances where the authorised person reasonably believes that immediate entry to the premises is necessary to ensure the safety of a person (including the authorised person or an assisting person) or the effective execution of the warrant.

Clause 826 — Details of search warrant to be given to occupier etc

This clause obliges an authorised person or assisting person to provide a copy of the warrant and written information about the rights and obligations of the person to the occupier of the premises, or an apparent representative of the occupier, if either person is present while the search warrant is being executed.

Clause 827 — Occupier entitled to be present during search etc

This clause confers a right on an occupier, or apparent representative of an occupier, to observe the conduct of a search if either person is present at the premises while the search warrant is being executed.

However, this right is waived in circumstances where this would impede the effective conduct of the search or it would interfere with the objectives of the search if the person is under arrest.

Part 23.4 — Return and forfeiture of things seized

This part deals with things seized under this chapter.

Clause 828 — Receipt for things seized

This clause requires an authorised person to give a receipt for anything seized under this chapter to the person from whom it was seized as soon as practicable thereafter.

In circumstances where it is not practicable to comply with this requirement, the authorised person is obliged to leave the receipt at the place of seizure secured in a conspicuous way.

This clause requires the receipt to include certain details, including details of the seized thing and contact details for the authorised person.

Clause 829 — Moving things to another place for examination or processing under search warrant

This clause contemplates circumstances in which it is unclear whether a thing at the entered premises may be seized lawfully by the warrant. In these circumstances, this clause enables the thing to be moved to another place for examination or processing to determine whether it can be seized.

Clause 830 — Access to things seized

This clause provides that a person who would have been entitled to inspect a seized thing if the seizure did not occur has a right, after the seizure, to inspect the thing, or take extracts from it or copy it if it is a document.

Clause 831 — Return of things seized

This clause outlines when a seized thing must be returned to its owner or when the Territory must pay compensation to the owner for loss of the thing.

Part 23.5 — Miscellaneous

Clause 832 — Damage etc to be minimised

This clause obliges an authorised person to take all reasonable steps to cause the least amount of inconvenience, detriment and damage as is practicable in acting under this chapter.

Clause 833 — Compensation for exercise of enforcement powers

This clause creates a right for a person to claim compensation from the Territory because of loss or expense suffered because of action under this chapter.

Chapter 24 — Appeals and review

Chapter 24 deals with appeals and reviews under the Act. Chapter 11 of the 1999 Act dealt with appeals and review. Chapter 11 was reviewed with the view to ensure compliance with the *Human Rights Act 2004*, particularly to ensure the right to appeal decisions is not unfairly restricted.

The restriction on appeals under chapter 7 (children and young people in need of care and protection) of the 1999 Act has been removed and the Bill has been drafted to allow appeals in accordance with the rules of the *Magistrates Court Act 1930*.

Under the 1999 Act, application could be made to the Administrative Appeals Tribunal for review of certain decisions of the Chief Executive. This has been retained. In addition, certain new powers under the Bill to make administrative decisions are also reviewable by the Administrative Appeals Tribunal.

The note to Chapter 24 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 8. 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 8.

Part 24.1 — Appeals

This part sets out appeal mechanisms for decisions made under the Bill.

Division 24.1.1 — Appeals generally

Clause 834 — Appeals to Supreme Court—generally

This clause limits the appellate jurisdiction of the Supreme Court to those decisions made by the Childrens Court under the care and protection chapters outlined at clause 835.

An appeal right also lies to the Supreme Court for a DVPO protection order made by the Childrens Court under this Act in accordance with the *Domestic Violence and Protection Orders Act 2001*. DVPO protection order is defined at clause 457 to include a DVPO interim protection order and a DVPO final protection order. Part 8 of the *Domestic Violence and Protection Orders Act 2001* deals with reviews and appeals.

Division 24.1.2 — Appeals—Care and protection chapters

This division outlines appeal rights for decisions made under the care and protection chapters. The care and protection chapters are outlined at clause 335 and are chapters 10 to 19 of the Bill.

Clause 835 — Appeals to Supreme Court—care and protection chapters

This clause lists the types of appeals the Supreme Court can hear under the care and protection chapters of the Bill and who is entitled to make the appeal.

Sub-clause (1) provides that any decision of the Childrens Court under the care and protection chapters outlined at (a) to (h) may be appealed to the Supreme Court by a person specified in sub-clause (2).

Sub-clause (2) specifies that a party to the proceeding in which the decision was made or a person named in the order or other decision may appeal to the Supreme Court under this clause. Sub-clause (2)(c) also allows an appeal to be made by another person with the leave of the Supreme Court. This contemplates circumstances where a person may not be a party to the proceeding within the definition outlined at clause 699 and the person may not be named in the order made under the care and protection chapters, however, the person is affected by the decision and should be conferred with appeal rights. For example, the Childrens Court makes an appraisal order ex parte with a temporary parental responsibility

provision for a child under clause 382 as the Court is satisfied that giving notice of the application to the child's parents would place the child at significant risk of significant harm. Sub-clause (2)(c) operates to allow the child's parents to seek leave to appeal the making of the order, as they are not parties to the proceeding and they are not named in the order.

Clause 836 — Application of Magistrates Court Act

This clause ensures that the *Magistrates Court Act 1930*, part 4.5 (Civil appeals) applies in relation to a care and protection chapter appeal under clause 835.

Clause 837 — Orders that the Supreme Court may make

This clause limits the types of orders or other decisions that may be made by the Supreme Court under a care and protection chapter appeal in clause 835 to those orders or other decisions that were available to the Childrens Court to make in the original proceeding being appealed from.

Division 24.1.3 — Administrative Appeals Tribunal review

This division provides for review by the Administrative Appeals Tribunal of certain decisions made by the Chief Executive.

Clause 838 — Review of decisions – ch 15, ch 20 and ch 21

This clause outlines reviewable decisions by the Administrative Appeals Tribunal and who may apply for a review of the decision, as follows:

- Table 838.1 outlines reviewable decisions for when the Chief Executive has an aspect of parental responsibility (chapter 15);
- Table 838.2 outlines reviewable decisions for the childcare services chapter of the Bill (chapter 20);
- Table 838.3 outlines what decisions are reviewable decisions for the employment chapter of the Bill (chapter 21).

Sub-clauses (2) and (3) provide that the Chief Executive must give written notice of reviewable decisions to the persons specified in column 3 of the table and in accordance with the code of practice in force under the *Administrative Appeals Tribunal Act 1989*, section 25B (1).

Column 4 of the table outlines who may apply to the Administrative Appeals Tribunal for a review of the decision.

Clause 839 — Decision to refuse to give childcare service licence must not be stayed or otherwise affected pending outcome of review

This clause provides that a decision under clause 746(3) (Childcare service licence—decision on application) to refuse to give a childcare service licence is not a reviewable decision under section 39A(2) of the *Administrative Appeals Tribunal Act 1989* or section 16 of the *Administrative Decisions (Judicial Review) Act 1989*.

This has the effect of:

- restricting the Administrative Appeals Tribunal from making an order staying or otherwise affecting the operation or implementation of the Chief Executive's decision to refuse to give a childcare service licence, pending determination of an application for review by the Administrative Appeals Tribunal; and
- restricting the Supreme Court from making an order or other decision to suspend the operation of the Chief Executive's decision to refuse to give a childcare service licence, pending the appeal being heard by the Supreme Court.

It is appropriate for this decision of the Chief Executive not to be stayed or otherwise affected pending review or appeal as the decision relates to the Chief Executive's assessment that a person is ineligible to hold a childcare service licence to operate a childcare service.

This clause re-enacts section 385 of the 1999 Act.

Chapter 25 — Information and secrecy and sharing

The collection and sharing of personal information about children and young people (and people involved in their care) engages human rights law, in particular sections 11(2) (protection of the child) and 12 (privacy) of the *Human Rights Act 2004*. The reforms set out in this chapter seek to improve the balance between the need for information sharing in protecting the interests of children and young people while still maintaining an appropriate level of privacy protection.

Appropriate information sharing is necessary to:

- Protect and promote the health, safety and wellbeing of all children and young people for whom there are concerns about possible abuse or neglect, or are in the Chief Executive's care or custody;
- Develop proportionate interventions that are based on a holistic assessment of the child or young person's circumstances and level of risk;
- Facilitate early intervention and practice for children and young people at risk in order to prevent, or reduce the likelihood of, increased statutory intervention; and
- Facilitate regular inter-agency dialogue to protect and promote the best interests of children and young people.

The 2007 Australian Law Reform Commission Report, *Review of Australian Privacy Law* noted that a number of bodies have identified instances where a child has been seriously injured or killed by a parent where disclosure of information about the parent's behaviour to appropriate service providers could have helped to prevent the injury or death. 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.

Consultation on the review of the 1999 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.

Stakeholders reported that individuals working within agencies are often hesitant to share information as there is some confusion regarding multi-layered privacy regulation at the Federal, State and Territory level.

There are often large amounts of personal information collected about children and young people (and in some cases their families) who come into contact with child protection, youth justice, childcare or employment regulation service systems. A number of international guidelines relating to the rights of children make reference to the need to protect privacy, including the *Convention on the Rights of the Child*, the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985* (the Beijing Rules*)* and the *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*. It is critical that information is collected, used and disclosed in appropriate circumstances and to appropriate persons.

To encourage better information sharing practices between agencies, the Bill establishes criteria where protected (including sensitive) information can be shared between persons and agencies in particular circumstances. 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 or children and young people in the criminal justice system, children who use child care services and children and young people engaged in employment.

To enhance protection of personal information, the Bill:

- Re-enacts secrecy provisions and a tiered framework for the protection and release of information, established by the *Children and Young People Amendment Act 2006*.
- Introduces a power for the Minister to make standards regarding the giving and seeking of protected information by the Chief Executive, to achieve greater transparency in information sharing arrangements between government and non-government agencies

and persons. This will allow adoption of the same privacy protections and simplify the task of developing information-sharing protocols.

- Allows for Chief Executive Instructions to be issued regarding the sharing of information between care team members, which must be complied with. This will allow care team members to share necessary information about a particular child or young person, in compliance with privacy requirements.
- Prohibits the release of information about the identity of a person who has reported concerns for a child or young person in the Territory or another state, or has reported suspected contraventions of provisions of the Act (or statutory instruments under the Act).

Further, the offence at section 61A of the 1999 Act relating to the prohibition on publishing identifying material from proceedings about children and young people and their family members is relocated to the *Criminal Code 2002* (see Schedule 1, clause 1.82 to the Bill). The offence has been expanded to protect the identity of children and young people who are, or have been, subject to interim or final orders under the care and protection chapters, in the parental responsibility of the Chief Executive or the subject of a child concern report.

The note to Chapter 25 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 8. 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 8.

Part 25.1 — Application and definitions

This part sets out the application and definitions of this chapter.

Clause 840 — Application - ch 25

This clause establishes that provisions in this chapter apply to young offenders and young detainees who are adults in the same way as they would apply to those who are under 18 years old. This is necessary because this chapter contains provisions relevant to young offenders and young detainees, and references to child or young person throughout this chapter need to also apply to young offenders and detainees who are over 18 and under 21, who may be in the custody of the Chief Executive.

Clause 841 — Definitions–– Act and ch 25

This part sets out definitions for this chapter and the Act. For the Act, protected information is defined at clause 843 and sensitive information is defined at clause 844. For the chapter, definitions of ‘divulge’, ‘information’ and ‘information holder’ are included in this clause. Examples of information are included for guidance and to clarify that information may be written or verbal, fact or opinion.

Clause 842 — Who is an information holder?

This clause outlines who an information holder is for the chapter. Information holders include 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. This re-enacts section 405 of the 1999 Act.

Clause 843 — What is protected information?

This clause defines protected information for the Act. It provides that 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 set out in clause 844 unless otherwise provided in the Bill. For example, clause 853 provides that an out-of-home carer or a foster care service may give a person protected information, but not sensitive information, about a child or young person.

This clause re-enacts section 405A of the 1999 Act.

Clause 844 — What is sensitive information?

This clause defines sensitive information for the Act.

Sensitive information is care and protection report information, care and protection appraisal information, interstate care and protection information, family group conference information, contravention report information and prenatal report information under clause 364. It also includes any information prescribed by regulation as sensitive information.

Sensitive information is treated differently to all other protected information because it could identify a person who made a report under the Bill, previous enactments or corresponding interstate laws, and it is important that the Bill protects and promotes the community's confidence in reporting concerns about children and young people or circumstances impacting upon their care, protection and wellbeing.

Part 25.2 — Offence to record or divulge protected information

This part creates offences for the recording and divulging of protected information and includes exceptions to the offences in certain circumstances.

Clause 845 — Offence—secrecy of protected information

Offences are created in certain circumstances where information holders make or divulge a record of protected information about someone else. This clause re-enacts the offence at section 405C of the 1999 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 are outlined at clauses 846 to 848.

Clause 846 — Exception to s 845—information given under this Act

This clause provides an exception to the offence at clause 845. It allows information holders to record or divulge protected information that is recorded or divulged:

- under this Act; or
- in the exercise of a function, as an information holder, under this Act.

Clause 847 — Exception to s 845—information given under another law

This clause provides a further exception to the offence at clause 845. It allows information holders to record or divulge protected (not including sensitive) information:

- under another law in force in the Territory; or
- in the exercise of a function, as an information holder, under another law in force in the Territory.

This exception re-enacts section 405E of the 1999 Act.

Clause 848 — Exception to s 845—information given with agreement

This clause provides a further exception to the offence at clause 845. It allows information holders to divulge protected (not including sensitive) information with the consent of the person who the information is about.

The Bill does not require a person's consent to be given in writing and their consent may therefore be given verbally.

This re-enacts section 405F of the 1999 Act.

Part 25.3 — Sharing protected information

This part allows for the sharing of protected information.

Division 25.3.1 — Generally

This division enables the release of protected information acquired under the Act in certain circumstances.

Clause 849 — Minister or Chief Executive – giving information to person about the person

This clause enables the Minister or Chief Executive to give a person protected (including sensitive) information about the person. This re-enacts section 29(1)(b) of the 1999 Act.

This is intended to facilitate the giving of personal history information to a person who was previously in the care of the Chief Executive, but is not limited to these circumstances.

Further provisions that facilitate the giving of protected information by foster carers, foster care agencies and residential care services to children and young people in out of home care are outlined at division 15.4.3 of the Act.

Clause 850 — Minister or Chief Executive – giving information in best interests of child or young person

This clause enables the Minister or Chief Executive to give protected (including sensitive) information about a child or young person to any person if the Minister or Chief Executive considers giving the information would be in the best interests of the child or young person.

The Minister must consult with the Chief Executive before exercising discretion to release information under this clause. The intention of this is to allow the Chief Executive to advise the Minister of circumstances not known to the Minister, where the release of the information may not be in the child or young person's best interests.

This clause requires the Minister and Chief Executive to form a view about whether the giving of the information would be in the child or young person's best interests.

This clause further clarifies that an information sharing entity (defined at clause 858) may ask the Chief Executive for information and the Chief Executive can release information to that entity if the Chief Executive considers that giving the information would be in the best interests of the child or young person. This is intended to facilitate effective interagency communication and information sharing in the best interests of a child or young person. However, the release of the information is at the discretion of the Chief Executive and this clause does not require the Chief Executive to release information.

Clause 851 — Chief Executive - giving information to person under corresponding provisions

This new clause allows the Chief Executive to give information to any person who is exercising a function under, or administering, a law of another State which corresponds or substantially corresponds to a provision in this Act (for example, an interstate officer exercising child protection, youth detention, child care regulation or child employment regulation functions).

State is defined at clause 841 for this chapter to include New Zealand to facilitate the sharing of information under the care and protection transfer of orders and proceedings scheme in chapter 17.

This clause authorises the giving of information that the Chief Executive reasonably believes is necessary to allow the person to exercise the function or administer the law. Examples of when information could be given by the Chief Executive include:

- An interstate child protection officer who needs the information to perform his or her statutory child protection responsibilities.
- An interstate youth detention officer who needs the information to develop a pre-sentence report for an offence committed in that State by a young resident of the ACT.
- An interstate officer who needs the information to assess the suitability of a prospective proprietor of a childcare centre in that State.
- An interstate statutory officer holder who needs the information in order to exercise employment functions related to children and young people in that State.

This clause expands section 323 of the 1999 Act which allowed the Chief Executive to give information to an interstate officer which the Chief Executive considers necessary for the interstate officer to perform functions under an interstate care and protection law.

Clause 852 — Family group conference facilitator – giving information in best interests of child or young person

This clause enables a family group conference facilitator to give the Chief Executive protected information about a child or young person if the facilitator considers giving the information is in the best interests of the child or young person. This re-enacts section 405H(2) of the 1999 Act.

The Chief Executive may appoint family group conference facilitators by notifiable instrument under clause 78.

Clause 853 — Out-of-home carer and foster care service – giving information necessary for responsibilities

This new clause provides explicit authorisation for out-of-home carers and foster care services to release protected information (that is not sensitive information) about a child or young person if this is necessary for the exercise of their care responsibilities for the child or young person.

Out-of-home carer for a child or young person is defined at clause 507 as a kinship carer, a foster carer or a residential care service. Foster care service is defined at clause 514 as an entity that recruits people to become foster carers, provides supports for foster carers and is authorised by the Chief Executive under clause 516.

An example is a foster carer who gives information about the parents of a child in their care to a school for the purpose of enrolling the child at the school. Another example is a foster care service giving information about a child or young person to a foster carer in order for the foster carer to appropriately care for the child or young person. Another example is a kinship carer who gives information about the immunisation history of a child in their care to a childcare service who will be providing care for the child.

The giving of the information under this clause is subject to any directions made by the Chief Executive, for example, to protect the privacy of the subject child or young person or another person about whom the information relates.

Clause 854 — Chief Executive – giving information to researcher

This new clause enables the Chief Executive to give a researcher protected (including sensitive) information for an approved research project.

Sub-clause (2) clarifies that the information may also include information about another person who is not the child or young person, for example a family member.

Clause 855 — Chief Executive - giving information to authorised assessor

This clause allows the Chief Executive to give an authorised assessor for a care and protection assessment protected (including sensitive) information in relation to a person who is the subject of the assessment.

The Chief Executive may authorise a person to undertake a care and protection assessment under clause 437. These persons are called authorised assessors.

Clause 856 — Certain identifying information not to be given

This new clause prohibits the release of information under this part that identifies or may identify a person as a reporter under this Act or a reporter of an interstate care and protection report.

This clause has the objective of protecting and promoting the community's confidence in voluntarily reporting concerns about a child or young person, or suspected contraventions of the Act. Statutory authorities with responsibility to protect children rely upon members of the public to report concerns about children. The consequences of not establishing such a framework for protection of this information would be diminished confidence by community members to report concerns for children and young people, with a likely outcome of fewer reports being made voluntarily. This could lead to diminished protection for children at risk.

Division 25.3.2 — Sharing safety and wellbeing information

The 1999 Act at section 29 enabled the Chief Executive to ask a defined entity for information relevant to the safety, welfare and wellbeing of a child or young person.

This part establishes an information sharing framework to allow the sharing of information about a child or young person's health, safety and wellbeing between certain persons and agencies. It is intended that this framework will better support collaborative, multi-agency responses to children and young people.

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 places limitations upon the right to privacy to a degree necessary to protect the safety and wellbeing of children and young people in recognition of their vulnerability and the need to ensure their protection.

Clause 857 — What is safety and wellbeing information?

This clause sets out what is safety and wellbeing information. Safety and wellbeing information is information that is relevant to the health, safety or wellbeing of a child or young person. Safety and wellbeing information includes both protected and sensitive categories of information.

Safety and wellbeing information does not only include information about the child or young person. It may include information about any person that is relevant to the health, safety or wellbeing of a child or young person. For example, it may include information about the mental health of a parent of a child that is relevant to the child's care and protection.

Examples of safety and wellbeing information are included for guidance.

Clause 858 — Who is an information sharing entity?

This clause sets out who is an information sharing entity for this part. The list of persons and entities defined to be information sharing entities is intentionally broader than the persons and entities who were previously termed 'defined entities' under section 29(5) of the 1999 Act.

Information sharing entities include community-based services providing services to the child or young person or their family. It is immaterial whether the service is providing services for profit. An example of a community-based service providing services to the child or young person or their family would be a non-government agency providing a parenting support service. Another example of a community-based service is a for-profit childcare service.

Information sharing entities also include ACT education providers. ACT education provider is defined at clause 25 to include non-government schools.

The broader scope of persons and entities deemed to be information sharing entities is necessary to facilitate greater interagency information sharing and collaboration for children and young people, particularly for children and young people at risk of abuse or neglect.

The concept of an information sharing entity relies on definitions set out in the *Legislation Act 2001* as follows:

- administrative unit means an administrative unit for the time being established under the *Public Sector Management Act 1994*, section 13 (1).
- public employee means— (a) a public servant; or (b) a person employed by a Territory instrumentality; or (c) a statutory office-holder or a person employed by a statutory office-holder. The *Legislation Act 2001*, further defines statutory office-holder as a person occupying a position under an Act or statutory instrument (other than a position in the public service).
- Territory authority means a body established under an Act, but does not include a body declared by regulation not to be a Territory authority.
- Territory instrumentality means a corporation that—(a) is established under an Act or statutory instrument, or under the Corporations Act; and (b) is a Territory instrumentality under the *Public Sector Management Act 1994*.

Clause 859 — Minister or Chief Executive – giving safety and wellbeing information to information sharing entity

This clause enables the Minister or Chief Executive to give an information sharing entity protected information about a person which is relevant to the safety and wellbeing of a child or young person.

This clause also allows information sharing entities to ask the Chief Executive for information that could be given by the Chief Executive under this clause. However, the release of the information is at the discretion of the Chief Executive and this clause does not require the Chief Executive to release information to the information sharing entity.

Clause 860 — Information sharing entity – giving safety and wellbeing information to Chief Executive

This new clause allows an information sharing entity to give the Chief Executive safety and wellbeing information in relation to the child or young person if the entity considers that giving the information is in the best interests of the child or young person.

This has the effect of creating lawful authority for information sharing entities to give information to the Chief Executive that would otherwise be prohibited by other legislation, including the *Privacy Act 1988 (Cwlth)* and the *Health Records (Privacy and Access) Act 1997*.

Under the 1999 Act, an information sharing entity could only give information in response to a request from the Chief Executive. This authority however does not rely solely on a request from the Chief Executive.

Clause 861 — Chief Executive – asking information sharing entity for safety and wellbeing information

This clause enables the Chief Executive to request and receive safety and wellbeing information from an information sharing entity.

Under section 28 the 1999 Act, a Territory entity was required to comply promptly with a request from the Chief Executive. This clause however extends the obligation to comply to all information sharing entities and requires those entities to comply not later than 24 hours after the entity receives the request if the Chief Executive tells the entity that the situation is an emergency. This is necessary to enhance timely responses to protect the safety and wellbeing of children and young people.

Clause 862 — Care teams – sharing safety and wellbeing information

This clause enables the Chief Executive to declare that the Chief Executive and a number of other persons and entities are a care team for a child or young person. Examples are included to provide guidance about who may be care team members. This reflects that a number of professionals, agencies and persons have a role in the care and development of a child or young person, particularly a child or young person subject to intervention under the care and protection chapters.

This clause authorises safety and wellbeing information to be shared between care team members.

A person or entity may be included in a care team if they are responsible for coordinating or delivering a service or care to the child or young person, or his or her family members, under this Act or for a criminal proceeding under another Territory law. An example of a care team for a child under this Act would be a care team for a child subject to a care and protection order and placed in out-of-home care. An example of a care team for a young person subject to a criminal proceeding under another Territory law would be a care team for a young person subject to a good behaviour order under the *Crimes (Sentence Administration) Act 2005*.

Sub-clause (4) allows Chief Executive Instructions to be issued regarding the sharing of information between care team members, which must be complied with. This will allow care team members to share necessary information about a particular child or young person. A care team member who receives information under this clause becomes an information holder and is therefore subject to the offence at clause 845 for divulging or recording protected information.

Part 25.4 — Courts and investigative entities

This part has the effect of creating rules for the release of protected information by information holders to Courts and investigative entities.

Clause 863 — Definitions—pt 25.4

This clause includes definitions for this part of Court and produce. A Court is defined to include a Tribunal. An investigative entity is defined in the dictionary to mean an entity with the power to require the production of documents or the answering of questions. Examples are included of investigative entities.

Clause 864 — Giving protected information to Court or investigative entity

If the new Act or another Territory law requires the giving of protected information or a document to a Court or investigative entity, then an information holder must give the information or document required by law.

If the new Act or another Territory law authorises the giving of protected information or a document to a Court or investigative entity, then an information holder may, but need not, give protected (including sensitive) information or document required.

This clause continues to have the effect of section 405G of the 1999 Act, but is expanded to clarify that Court in this section includes a Court of the Commonwealth, State or another Territory.

Clause 865 — Court may order sensitive information to be given or produced

This clause enables a Court or Tribunal to compel an information holder to divulge sensitive information to the Court in any proceeding.

The Bill prevents the Court from divulging sensitive information to parties to a proceeding, unless the Court is satisfied that—

- the information is materially relevant to the proceeding;
- if the information is about a child or young person—the best interests of the child or young person are protected.

In making a decision to release information to the parties, the Court is required to have regard to the importance of protecting the identity of a person who made a child concern report, a confidential report or an interstate care and protection report.

In deciding whether or not the information should be disclosed to parties to a proceeding, the Court must allow an information holder to be heard in relation to its disclosure and the Court must deal with the information in a way that ensures it is not disclosed to anyone else. The Court is required to give leave to a person to make a copy of the information. If the Court refuses to order its disclosure, the Court must return any document containing the information produced to the information holder.

Clause 866 — Investigative entity may divulge protected information etc

Sub-clause (1)(a) allows an investigative entity to release protected information (including sensitive information) in relation to an investigation it is undertaking to any other investigative entity.

An investigative entity is defined in the dictionary as an entity with power to require the production of documents or the answering of questions including, for example, the Chief Police Officer, the Human Rights Commission, the Public Advocate and the Ombudsman.

Sub-clause (1)(b) authorises an investigative entity to release protected information (not including sensitive information) in relation to an investigation it is undertaking, to any other person, for example, in a publication. Sub-clause (2) allows the investigative entity to release sensitive information in relation to an investigation it is undertaking to any other person, but only if the entity is satisfied of the following before divulging the sensitive information:

- the information is materially relevant to the investigation; and
- disclosure of the information is in the public interest; and
- if the information is about a child or young person—the best interests of the child or young person are protected; and
- the information does not include information which identifies someone as a person who made a child concern report, a confidential report or an interstate care and protection report (or allows their identity to be worked out).

Sub-clause (3) requires the investigative entity to allow an information holder to be heard in relation to whether the investigative entity makes a decision to release sensitive information under sub-clause (2).

Part 25.5 — Admissibility of evidence

This part deals with the admissibility into evidence of child concern reports, confidential reports about a contravention of the Act, family group conference information, and Court-ordered conference information.

Clause 867 — How child concern reports may be used in evidence

This clause sets out how child concern reports that have been made honestly and without recklessness may be used in evidence.

Sub-clause (2) provides that the child concern report, or evidence of the content of the report, may only be admitted in evidence in a proceeding before a Court or Tribunal if the report or evidence is given by the reporter, the proceeding is a proceeding under the care and protection chapters for the child or young person who is the subject of the report, the proceeding is an appeal from a decision of the Childrens Court made under the care and protection chapters or the proceeding is in relation to a charge or allegation against a person for how a function under the Act has been exercised.

Sub-clause (3) requires the Court or Tribunal to give the Chief Executive an opportunity to make submissions before admitting a report or evidence of a report into evidence.

Clause 868 — Confidential report—not admissible in evidence

This clause provides that confidential reports made under clause 875 about alleged contraventions of the Act are not admissible as evidence in any proceeding in any Court or Tribunal.

However, this is subject to two exceptions. Firstly, a confidential reporter may give evidence about their suspicion and their reasons for the suspicion in a proceeding before a Court or Tribunal under clause 869. Secondly, under clause 870, evidence may be admitted that a particular matter is contained in a confidential report or that identifies a reporter if the reporter agrees in writing or the Court or Tribunal give leave for the evidence to be admitted.

Clause 869 — Confidential report—confidential reporter may give evidence

This clause enables a confidential reporter to give evidence in any proceeding in a Court or Tribunal about their suspicion regarding an alleged contravention of the Act under clause 875, and their reasons for the suspicion.

Clause 870 — Confidential report—evidence admissible with agreement or leave

This clause continues to have the effect of section 353(4) and (7) of the 1999 Act. 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 871 — Things said at conference not admissible in care and protection proceedings

This clause renders anything said or done at a family group conference arranged under section 80(2) inadmissible in evidence in proceedings other than for the purpose of establishing in proceedings under the care and protection chapters that an agreement was or was not reached.

This is intended to allow parties to participate in a family group conference in good faith and in the knowledge that there is a prohibition on the later use in care and protection proceedings of any information disclosed, or discussed, at the conference.

This clause continues to have the effect of section 180(2) of the 1999 Act.

Clause 872 — Interim matters—things said at Court-ordered meeting

This clause continues to have the effect of section 252(3) of the 1999 Act and provides that evidence of anything said or done at a Court-ordered meeting is admissible in the proceeding to which it relates only if the parties to the proceeding agree to the evidence being admitted or the Childrens Court gives leave for the evidence to be admitted.

This is intended to allow parties to participate in a Court-ordered meeting in good faith to identify and resolve matters in dispute, and in the knowledge that any information disclosed, or discussed, at the meeting can only be admitted in the relevant care and protection proceedings with their agreement or with the leave of the Court.

Part 25.6 — Protection of people who give information

This part provides certain protections for people who give information under the new Act.

Clause 873 — Protection of people giving certain information

This clause provides that the persons listed in sub-clause (2) who give information honestly and without recklessness do not by giving the information breach confidence, professional etiquette or ethics, or a rule of professional conduct, and do not incur civil or criminal liability.

Clause 874 — Interaction with other laws

This clause outlines the interaction of the chapter with other laws which relate to information sharing. It provides that the chapter does not limit a power or obligation under another law to give relevant information. It also clarifies that the chapter has the effect of creating lawful authority for information sharing that would otherwise be prohibited by other legislation, including the *Privacy Act 1988 (Cwlth)* and the *Health Records (Privacy and Access) Act 1997*.

Chapter 26 — Miscellaneous

This chapter contains miscellaneous provisions. The note to Chapter 26 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 8. 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 8.

Clause 875 — Confidential report of contravention of act

This clause provides for a person to make a confidential report to the Chief Executive of their suspicion that a provision of the Act is being contravened or has been contravened. This includes any statutory instruments made under the Act, including standards (see section 104, *Legislation Act 2001*).

Under the *Territory Records Act 2002*, the Chief Executive is obliged to keep a written record of each report received under this clause.

Clause 868 provides that confidential reports made under this clause about alleged contraventions of the Act are not admissible as evidence in any proceeding in any Court or Tribunal. However, this is subject to the two exceptions outlined at clauses at 869 and 870.

Clause 876 — Offence—tattoo child or young person without agreement

This clause re-enacts the strict liability offence at section 388 of the Act for tattooing a child or young person without the written agreement of a person with daily care responsibility or long-term care responsibility. The maximum penalty is 50 penalty units.

The clause includes a new defence to a prosecution for the offence if the defendant proves that the person had shown to them a document of identification prior to tattooing the person and the defendant had no reasonable grounds for believing that the document was not a genuine document of identification. Document of identification is defined for this clause at sub-clause (4).

Clause 877 — Protection of officials from liability

This clause provides for protection of certain people from civil liability in the exercise of functions under the Act for conduct exercised honestly and without recklessness. Any civil liability is displaced from the person to the Territory. This clause re-enacts section 407 of the 1999 Act.

Clause 878 — ACT child welfare services must assist Public Advocate

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. This clause re-enacts section 45 of the 1999 Act.

Clause 879 — Notification of location of child or young person

This clause 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 only if the person believes on reasonable grounds that it is in the best interests of the child or young person to do so.

This clause remakes section 411 of the 1999 Act, however, the clause now requires that the person making the notification forms a belief on reasonable grounds that it is in the best interests of the child or young person for a parent, person with parental responsibility or police officer to be notified of the child or young person's location.

For example, a person in charge of a refuge may consider that it is not in the best interests of a young person to notify the young person's parent that the young person is at the refuge as the young person has requested that their parent not be informed because they are being sexually abused by that parent.

Clause 880 — 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 for a particular child or young person is evidence of the contents of the certificate.

Clause 881 — Evidentiary certificates—Chief Executive—custody etc

This clause provides that a certificate signed by the Chief Executive stating the matters in (1)(a) to (i) is evidence of the contents of the certificate.

Sub-clause (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, for example, the results of a drug test.

Sub-clause (5) obliges a Court to accept these certificates as proof of the facts stated, unless there is contrary evidence.

Clause 882 — Appointment of analyst for Act

This is a new clause to provide for the Chief Executive to appoint analysts for drug testing and other relevant tasks under the Bill. The instrument of appointment is a notifiable instrument.

Clause 883 — Chief Police Officer delegations

This clause allows the Chief Police Officer to delegate any of the Chief Police Officer's functions under the Bill to a police officer. This may include functions such as escorting a young detainee.

Clause 884 — Determination of fees

This clause re-enacts section 416 of the 1999 Act and allows the Chief Executive to set fees for the administration of the Act. Part 6.3 of the *Legislation Act 2001* contains provisions about the making of fees.

Any disallowable instrument setting a fee must be tabled in the ACT Legislative Assembly to allow Assembly members to consider if they wish to move a motion of disallowance. If the declaration is allowed, it must also be notified before becoming enforceable.

Clause 885 — Approved forms

This clause allows the Chief Executive to approve forms for the Act (other than forms for the Childrens Court). In circumstances where the Chief Executive approves a form for a specific purpose, the form is required to be used. Any form approved must be notified on the Legislation Register.

Clause 886 — Standard-making power

This clause provides that the Minister may make the following standards under the new Act:

- family group conference standards;
- drug testing standards;
- out-of-home care standards;
- therapeutic protection standards;
- childcare services standards;
- children and young people employment standards;
- work experience standards;
- research standards; and
- information sharing standards.

Standards are intended to prescribe further detail in relation to the above areas, consistent with, and subordinate to, the new Act.

The existence of a standard making power does not oblige the Minister to make standards about the matter.

Each standard is a disallowable instrument.

Clause 887 — 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 detention places; and
- the health and safety (including medical examinations) of children or young people, and other people including young detainees who are adults, at detention places; and
- managing injuries, establishing a system for compensation for a permanent injury and payments of death benefits for injuries sustained by young detainees in the course of detention or by young offenders in the course of community service work; and
- travel and transport arrangements for children or young people and other people including young detainees who are adults performing community service work; 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 detention places; and
- the safety, management and good order of detention places.

The existence of a regulation making power does not oblige the Executive to make regulations about the matter.

A regulation may include offences for contraventions of the regulation. Any penalties attached to these offences must not be more than 10 penalty units.

Clause 888 — Legislation amended

This clause outlines that the Act will amend the legislation in schedule 1, namely the *Corrections Management Act 2007*, the *Court Procedures Act 2004*, the *Crimes Act 1900*, the *Crimes (Sentence Administration) Act 2005*, the *Crimes (Sentencing) Act 2005*, the *Criminal Code 2002*, the *Evidence (Miscellaneous Provisions) Act 1991* and the *Magistrates Court Act 1930*.

Schedule 1 - Children and Young People Bill 2008

Outline

Schedule one of the Children and Young People Bill provides for modern criminal justice laws that apply to children and young people.

The amendments focus on rehabilitation, flexibility and consistency in sentencing.

The amendments provide a sentencing methodology consistent with *the United Nations Convention on the Rights of the Child* (the CRC) and Australian common law that applies to all people under the age of 18, where the primary focus is rehabilitation.

The amendments also empower all ACT Courts to use Court procedures and practices appropriate for young offenders, again consistent with the CRC.

The changes will also enabling sentencing courts to tailor sentences to the specific rehabilitative needs of young offenders.

The International Covenant on Civil and Political Rights (ICCPR) provides in Article 14(4), which broadly corresponds to section 22(3) of the *Human Rights Act 2004 1994,* that:

> "In the case of juvenile persons, the procedure shall be such as will take account of their age, and the desirability of promoting their rehabilitation."

The CRC and the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("The Beijing Rules") General Assembly resolution 40/33, 1985, expand upon this principle.

Article 17 of the Beijing Rules sums up the key policy considerations for criminal justice matters.

> 17.1 The disposition of the competent authority shall be guided by the following principles:
> (a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society;
> (b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;
> (c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;
> (d) The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.
> 17.2 Capital punishment shall not be imposed for any crime committed by juveniles.
> 17.3 Juveniles shall not be subject to corporal punishment.
> 17.4 The competent authority shall have the power to discontinue the proceedings at any time.

The UN commentary on the Beijing Rules notes that the main difficulty in formulating international guidelines for the adjudication of children and young people stems from the fact that most criminal justice systems have contradictory philosophical sources for sentencing offenders. For example, rehabilitation versus just desert, or therapeutic jurisprudence versus punishment.

The UN comments that:

> "It is not the function of the Standard Minimum Rules for the Administration of Juvenile Justice to prescribe which approach is to be followed but rather to identify one that is most closely in consonance with internationally accepted principles. Therefore the essential elements as laid down in rule 17.1, in particular in subparagraphs (a) and (c),

> are mainly to be understood as practical guidelines that should ensure a common starting point; if heeded by the concerned authorities . . . they could contribute considerably to ensuring that the fundamental rights of juvenile offenders are protected, especially the fundamental rights of personal development and education".

This Schedule of the Children and Young People Bill will create a set of laws that invoke the policy articulated by the CRC and the Beijing Rules and is also consistent with Australia's common law on the sentencing methodology that applies to children and young people.

Rehabilitation of young offenders is the starting point for both the CRC and Australian common law. Australian common law places considerable emphasis on rehabilitation as the starting point for sentencing courts when deciding upon an appropriate sentence for a young offender. In *R v Voss* [2003] NSWCCA 182 the NSW Court of Criminal Appeal cited with approval common law principles laid down in previous cases such as *Wilcox* [1979] (NSW, unreported 15 August 1979), such as:

> . . . in the case of a youthful offender… considerations of punishment and general deterrence of others may properly be largely discarded in favour of individualised treatment of the offender, directed to his rehabilitation.

In Victoria, *R v Mills* [1998] 4 VR 235 is a leading case that also places rehabilitation as the priority principle when sentencing a young offender. In that case Batt JA noted that when sentencing young people:

> (i) Youth of an offender, particularly a first offender, should be a primary consideration for a sentencing court where that matter properly arises.
>
> (ii) In the case of a youthful offender, rehabilitation is usually far more important than general deterrence. This is because punishment may in fact lead to further offending. Thus, for example, individualised treatment focussing on rehabilitation is to be preferred. (Rehabilitation benefits the community as well as the offender).

The principle of rehabilitation being the starting point for sentencing children and young people does not mean that principles such as community safety or accountability, are never considered. Sentencing courts would consider applying those principles in cases of serious offences or serious recidivism, having firstly considered the principle of rehabilitation.

For example, in *DPP v SJK & GAS* [2002] VSCA 131, the Victorian Court of Appeal considered sentences imposed upon two boys (aged 16 and 15 years old at the time of the offence) who had both pleaded guilty to manslaughter of an elderly woman.

The Court of Appeal noted:

> "When youth is raised for sentencing considerations, the focus is usually placed upon the offenders prospects of rehabilitation, but this is by no means the only basis upon which it assumes relevance. For at least a century, the attribution of criminal responsibility and the response in terms of the dispositions handed down upon offenders has increasingly reflected developing ideas and understandings concerning personal responsibility, moral culpability and accountability. In the case of young people, to some extent, the law incorporates an acknowledgment of aspects of immaturity. By reason of the stage of development that an offender may have reached, he or she may not fully appreciate the seriousness and real consequences of the offending actions. However, it does not follow that this is always the situation or that, as teenagers, offenders cannot be held appropriately accountable for their conduct in engaging in serious criminal activity".

The ACT Supreme Court has also advocated the view taken by NSW and Victorian Courts. In *Thorn v Laidlaw* [2005] ACTCA 49 the Court of Appeal noted:

> "The role of rehabilitation is particularly relevant in relation to young offenders, a point recently reiterated by the New South Wales Court of Appeal in *R v AEM Snr; KEM; MM* [2002] NSWCCA 58. Beazley JA, Wood CJ at CL and Sully J observed at [97] that:
> *It is well accepted that in the case of youth, general deterrence and public denunciation usually play a subordinate role to the need to have regard to individual treatment aimed at rehabilitation: see* R v DAR *(unreported New South Wales Court of Criminal Appeal, 2 October, 1997;*) R v Mazzilli *[2001] NSWCA 117".*

A sentencing methodology that reflects the CRC discussion and Australian common law is encapsulated in the foreshadowed amendments to the *Crimes (Sentencing) Act 2005.* These amendments create a new chapter in the Act that specifically deals with sentencing children and young people.

The amendments to the *Crimes (Sentencing) Act 2005* also includes specific dispositions relevant to children and young people, such as education and training conditions, accommodation orders and supervision conditions. Relevant amendments to the *Crimes (Sentence Administration) Act 2005* to administer these orders, and other orders in a manner consistent with the interests of children and young people are also included in this schedule.

The schedule also includes amendments that address the specific needs and interests of children and young people in criminal proceedings.

Article 40, 3 of *the United Nations Convention on the Rights of the Child* maintains that:

> 3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law . . .

The Committee on the Rights of the Child, in its General Comment no.10 (2007), wrote that parties to the convention should establish Courts for children and young people as separate units or as part of existing Court structures [para 31]. In the context of the right to a fair trial, the Committee invites parties to include further procedures that would apply to young people because of their age that would not be applicable to adults.

In *T and V v the United Kingdom* (2000) 30 EHRR 121 the European Court of Human Rights discussed the kinds of procedural safeguards that should be considered for the trial of children and young people and indicated that these safeguards should apply to all Courts:

> 85. It follows that, in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition. In this connection it is noteworthy that in England and Wales children charged with less serious crimes are dealt with in special Youth Courts, from which the general public is excluded and in relation to which there are imposed automatic reporting restrictions on the media . . . Moreover, the Court has already referred to the international tendency towards the protection of the privacy of child defendants . . . It has considered carefully the Government's argument that public trials serve the general interest in the open administration of justice . . . and observes that, where appropriate in view of the age and other characteristics of the child and the circumstances surrounding the criminal proceedings, this general interest could be satisfied by a modified procedure providing for selected attendance rights and judicious reporting.
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> 86. The Court notes that the applicant's trial took place over three weeks in public in the Crown Court. Special measures were taken in view of the applicant's young age and to promote his understanding of the proceedings: for example, he had the trial procedure explained to him and was taken to see the Courtroom in advance, and the hearing times were shortened so as not to tire the defendants excessively. Nonetheless, the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of eleven, and there is evidence that certain of the modifications to the Courtroom, in particular the raised dock which was designed to enable the defendants to see what was going on, had the effect of

> increasing the applicant's sense of discomfort during the trial, since he felt exposed to the scrutiny of the press and public. The trial generated extremely high levels of press and public interest, both inside and outside the Courtroom, to the extent that the Judge in his summing-up referred to the problems caused to witnesses by the blaze of publicity and asked the jury to take this into account when assessing their evidence . . . [references omitted.]

The clauses amending the *Court Procedures Act 2004* intend to create a framework for Court procedures and practices that apply to children and young people in the criminal and civil jurisdictions. The provisions contemplate both the Childrens Court and the Supreme Court and will enable ACT Courts' rules committee to develop rules of Court that are consistent with the CRC.

DETAIL

Part 1.1 — Corrections Management Act

Part 1.1 amends the *Corrections Management Act 2007.* Clauses 1.1 to 1.14 relate to chapter four of the *Corrections Management Act 2007.* Chapter four of the *Corrections Management Act 2007* provides custodial powers and obligations when detainees are held at a police cell or a Court cell.

The amendments below stipulate the limitations, obligations and powers that are relevant to children and young people who are held in custody at a Court or police cell. A child or young person who has not been admitted to a detention place for young people cannot be held in a Court or police cell for longer than 12 hours.

Clause 1.1 — Section 6(3)

Section 6 of the *Corrections Management Act 2007* sets out the classes of people to whom the Act applies. This Bill includes provisions for the custody of young detainees. Consequently, new section 6(3) clarifies that only chapter four of the *Corrections Management Act 2007* applies to young detainees in any way.

Clause 1.2 — Section 29, new definitions

New definitions are cast for section 29 to clarify the different uses of Chief Executive for chapter four of the *Corrections Management Act 2007.* The Chief Executive responsible for adults would be the Chief Executive assigned to administer the *Corrections Management Act 2007* under the *Public Sector Management Act 1994* Administrative Arrangements.

The Chief Executive responsible for children and young people who are detained would be the Chief Executive assigned to administer the foreshadowed *Children and Young People Act 2008* under the *Public Sector Management Act 1994* Administrative Arrangements.

The definition of young detainee in the foreshadowed *Children and Young People Act 2008* is incorporated into chapter four. In this way the custodial laws applying to adults and young people have a common definition distinguishing adults from young people.

Clause 1.3 — New section 29(2)

Clause 1.3 creates a new section 29(2)(a) to ensure that any mention of 'correctional centre' in the chapter is also interpreted to mean a reference to a 'detention place' for young people if the custody relates to a young detainee.

New section 29(2)(b) ensures that a reference to 'corrections officer' in the chapter is also interpreted to mean a reference to a youth detention officer under the foreshadowed *Children and Young People Act 2008* if the custody relates to a young detainee.

'Young detainee' is discussed at clause 1.2 above and at clause 94 in the main body of this Bill.

Clause 1.4 — Section 30(2)

Section 30(2) currently sets a time limit in police cells for adults only. Clause 1.4 creates a time limit for adult detainees and young detainees. Young detainees, who have not been admitted to a detention place, may not be held at a police cell for longer than twelve hours. For adults the maximum time is 36 hours.

For future reference in later sections, the clause uses the in-text definition of 'allowed period' to denote the alternative maximum time limits for adults and young people.

Clause 1.5 — Section 30(3)

Clause 1.5 substitutes the term 'allowed period' for '36 hours' in section 30(3). This will allow the alternative maximum time limits (see clause 1.4 above) to be applied depending upon the

age of the person in custody. For young people, the amendment would have the effect of enabling the Chief Police Officer to transfer a young person to a detention place for admission if the allowed period of twelve hours was reached.

Clause 1.6 — Section 31(2)

Clause 1.6 amends section 31(2) to stipulate that 31(2) only applies to adults, as the search and seizure powers listed in 31(2) are not powers appropriate for young people.

Clause 1.7 — New section 31(3)

New section 31(3) sets out the custodial search powers the police may use for young people in police custody. The powers listed in 31(3)(a) to (e) are references to the parts in the main body of this Bill.

New section 31(3) would not alter the search and seizure powers that exist for the purposes of investigating offences. Section 32 of the *Corrections Management Act 2007* clarifies that these powers remain unaltered.

Clause 1.8 — New section 31A

New section 31A stipulates a set of critical obligations upon custodians for the detention of young people. These obligations are derived from international human rights jurisprudence on the treatment of young people in detention, such as the Beijing Rules discussed in the outline. The intention of this provision is to highlight these particular obligations, it is not intended to exhaust the obligations that might also be required by human rights law.

Clause 1.9 — Section 33(2)

Clause 1.9 inserts a note that draws attention to the provision in the main body of this Bill that would prohibit young people in custody being placed in the same room as an adult who is also in custody. (See clause 801 in the main body of the Bill.)

Clause 1.10 — Section 33(3)

Section 33(3) currently sets a time limit in police cells for adults only. Clause 1.10 creates a time limit for adult detainees and young detainees. Young detainees, who have not been admitted to a detention place, may not be held at a Court cell for longer than twelve hours. For adult detainees the maximum time is 36 hours.

For future reference in later sections, the clause uses the in-text definition of 'allowed period' to denote the alternative maximum time limits for adults and young people.

Clause 1.11 — Section 33(4)

This clause enables the relevant time limits in section 33(3) are applied according to the age of the person, without having to re-state the time limits.

Clause 1.12 — Section 33(5)

Clause 1.12 ensures that the appropriate custodial protections, obligations and powers apply depending upon the age of the person held in a Court cell.

For adults it is the provisions of the *Corrections Management Act 2007,* for young people it would be the provisions set out in this Bill.

Clause 1.13 — New section 33A

New section 31A stipulates a set of critical obligations upon custodians for the detention of young people. These obligations are derived from international human rights jurisprudence on the treatment of young people in detention, such as the Beijing Rules discussed in the outline. The intention of this provision is to highlight these particular obligations, it is not intended to exhaust the obligations that might also be required by human rights law.

Clause 1.14 — Section 34(6)

Clause 1.14 ensures that the appropriate custodial protections, obligations and powers apply depending upon the age of the person if there is some reason that detainees would need to be temporarily held outside of a corrections facility or detention place.

For adults it is the provisions of the *Corrections Management Act 2007,* for young people it would be the provisions set out in this Bill.

Part 1.2 Court Procedures Act

The *Court Procedures Act 2004* provides a statutory framework for creating common practice and procedure for ACT Courts. The Act creates a rule-making power for both the ACT Supreme Court and ACT Magistrates Court, allowing for the creation of common Court rules.

Article 40, 3 of *The United Nations Convention on the Rights of the Child* maintains that:

> 3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law . . .

The Committee on the Rights of the Child, in its General Comment no.10 (2007), wrote that parties to the convention should establish Courts for children and young people as separate units or as part of existing Court structures [para 31]. In the context of the right to a fair trial, the Committee invites parties to include further procedures that would apply to young people because of their age that would not be applicable to adults.

In *T and V v the United Kingdom* (2000) 30 EHRR 121 the European Court of Human Rights discussed the kinds of procedural safeguards that should be considered for the trial of children and young people and indicated that these safeguards should apply to all Courts:

> 85. It follows that, in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition. In this connection it is noteworthy that in England and Wales children charged with less serious crimes are dealt with in special Youth Courts, from which the general public is excluded and in relation to which there are imposed automatic reporting restrictions on the media . . . Moreover, the Court has already referred to the international tendency towards the protection of the privacy of child defendants . . . It has considered carefully the Government's argument that public trials serve the general interest in the open administration of justice . . . and observes that, where appropriate in view of the age and other characteristics of the child and the circumstances surrounding the criminal proceedings, this general interest could be satisfied by a modified procedure providing for selected attendance rights and judicious reporting.
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> 86. The Court notes that the applicant's trial took place over three weeks in public in the Crown Court. Special measures were taken in view of the applicant's young age and to promote his understanding of the proceedings: for example, he had the trial procedure explained to him and was taken to see the Courtroom in advance, and the hearing times were shortened so as not to tire the defendants excessively. Nonetheless, the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of eleven, and there is evidence that certain of the modifications to the Courtroom, in particular the raised dock which was designed to enable the defendants to see what was going on, had the effect of increasing the applicant's sense of discomfort during the trial, since he felt exposed to the scrutiny of the press and public. The trial generated extremely high levels of press and public interest, both inside and outside the Courtroom, to the extent that the Judge in his summing-up referred to the problems caused to witnesses by the blaze of publicity and asked the jury to take this into account when assessing their evidence . . . [references omitted.]

The clauses amending the *Court Procedures Act 2004* intend to create a framework for Court procedures and practices that apply to children and young people in the criminal and civil jurisdictions. The provisions contemplate both the Childrens Court and the Supreme Court.

Clause 1.15 — New part 7A

Division 7A.1 — General

Section 69 re-states the existing law that the law of criminal proceedings in chapter 3 of the *Magistrates Court Act 1930* and the relevant rules that would apply to the Magistrates Court also apply to the Childrens court. Likewise, the rules for civil proceedings used by the Magistrates Court apply to the Childrens Court.

Section 69 is not intended to be interpreted in a manner that excludes the creation of specific rules or practice directions for children and young people. It is envisaged that the rules committee authorised by the *Court Procedures Act 2004* could make specific rules for proceedings involving children and young people.

Section 71 obliges parents to attend Court proceedings if their child is the subject of proceedings. The parent must attend all proceedings.

The section contemplates notification of a parent and enables the Court to issue a warrant to secure the parent's attendance of the proceedings. A warrant may only be issued if the parent is notified of the proceeding but fails to attend.

Section 71(5) provides exceptions to the obligation for a parent to attend. If the person no longer has parental responsibility for the child, as set out in clause 15 of this Bill, the parent is not obliged to attend.

In a criminal proceeding, the parent might also be a victim of an offence allegedly committed by their child. In addition, there may be grounds to believe that parent may also engage in inappropriate behaviour or have an abusive relationship with the child. In these cases, the parent may be excluded from the obligation to attend. The exercise of section 72(2) (discussed below) would also apply.

The section does not apply to chapter 11 of the Bill.

Section 72 restricts public access to Court proceedings involving children and young people. Consistent with the *Convention on the Rights of the Child*, Court proceedings are closed to the public. However, in the interests of fair trial, section 72 also authorises who may be present at proceedings involving children or young people.

Section 72 substantially remakes the existing law, with two additions. The section entitles relevant victims to attend proceedings (j) and people who are involved in circle sentencing to attend (k).

Section 72(2) empowers the Court to exclude victims from attending if the victim's behaviour, or expected behaviour is inappropriate, or there is something inappropriate about the victim's relationship with the child or young person. For example, there may be evidence that the victim is an abusive relationship with the young person. Another example may be that the victim and young offender know each other and there is evidence that the victim of the offence has intimidated or threatened the young person.

Section 72(3) emphasises that the Public Advocate and the Chief Executive may make submissions about a person who should be required or permitted to attend, under 72(l), or submissions about a victim's attendance under 72(2).

Section 73 empowers the Court to excuse parties from attending proceedings. In some cases children are very emotionally affected by attending a hearing, and may not be able to engage in any constructive or rational way.

Example: Tony is a 13 year-old person with an intellectual disability. Having been charged with an offence he is before the Childrens court. Tony is crying and appears to be bewildered by proceedings. He is not in a frame of mind to be able to have a rational discussion with his solicitor, nor appropriately acknowledge the Court. Tony's solicitor seeks leave from the Court to allow his client to be excused from the hearing.

Section 74 remakes 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

Section 74A reflects the intention of clause 14.2 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("The Beijing Rules") General Assembly resolution 40/33, 1985. Clause 14.2 of the Beijing Rules states that:

> "The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely".

While the Beijing Rules apply to criminal proceedings, section 74A upholds the right of a child, or young person, to participate in either civil or criminal proceedings where they are the subject of proceedings.

Section 74A(2) enables a child or young person to seek assistance from the Chief Executive of the foreshadowed *Children and Young People Act* to enable the person to meaningfully participate in proceedings.

Section 74B obliges the Court to take reasonable steps to ensure that the parties to a proceeding, where a child is a party, understand the nature and purpose of the proceeding and any relevant rights of appeal.

Section 74C authorises particular officials to appear, be heard and call witnesses in proceedings where a child or a young person is a party. The officials empowered by this section are: the Chief Executive responsible for the *Children and Young People Act,* an authorised person under the *Children and Young People Act,* the Public Advocate, or a person authorised by the Public Advocate.

Section 74D provides the Court with a power to order a general report about a child or young person during criminal proceedings. Exercising this section does not prevent the use of pre-sentence reports in part 4.2 of the *Crimes (Sentencing) Act 2005.*

Section 74E enables a child or young person to be represented by a lawyer, litigation guardian, or both, when the child or young person is a party to legal proceedings.

The person's advocate must relate the child's views that are relevant to proceedings to the Court.

The person's advocate must either act on the child's instructions or act in the best interests of the person. The person's advocate must tell the Court whether they are acting on instructions or in the best interests of the person.

It is the Government's intention that the meaning of litigation guardian is akin to its meaning in a civil law context. The guardian acts on behalf of the child or young person but is not a party to an action.

Section 74F stipulates that a person may only act as a litigation guardian if they have leave from the Court.

Section 74G ensures that the issue of legal representation of a child or young person is considered by the Court. If a child or young person does not have legal representation, the Court must be satisfied that the child or young person has had the opportunity to obtain representation and that the best interests of the child or young person will still be met.

Section 74H provides the Court with a procedural power to make an order or direction to enable a child or young person before the Court to get legal representation.

Section 74I obliges the rule making committee established under section 9 of the Court Procedures Act 2004 to consider the youth justice principles at section 94 of the foreshadowed *Children and Young People Act.*

As discussed in the introduction to this part, the European Court of Human Rights discussed the particular procedural safeguards that are appropriate for children and young people in *T and V v the United Kingdom* (2000) 30 EHRR 121. The Government's intent with new section 74I is to enable the rule-making committee to make rules for the purposes of criminal proceedings involving children and young people that are consistent with the youth justice principles, and would be consistent with the UN *Convention on the Rights of the Child*.

Division 7A.1 — General

New section 74J provides definitions for division 7A.2.

Section 74K enables the Court to dismiss or adjourn proceedings against a child or young person if the Court is satisfied that the person is in need of care and protections

The *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("The Beijing Rules") General Assembly resolution 40/33, 1985, states:

> 17.4 "The competent authority shall have the power to discontinue the proceedings at any time".

Commentary on article 17.4 notes:

> "The power to discontinue the proceedings at any time (rule 17.4) is a characteristic inherent in the handling of juvenile offenders as opposed to adults. At any time, circumstances may become known to the competent authority which would make a complete cessation of the intervention appear to be the best disposition of the case".

If the Court exercises the power in section 74K, the Court must provide a statement of reasons to the Chief Executive of the foreshadowed Children and Young People Act and the Public Advocate. Subsection (4) requires the Chief Executive of the foreshadowed Children and Young People Act to treat the statement of reasons as a mandatory report of abuse.

Section 74L requires the Chief Executive to report back to the Court and the Public Advocate what action the Chief Executive has taken to the statement of reasons provided by the Court under section 74K.

Subsection (3) enables the Chief Executive to satisfy the obligation to report back if the Chief Executive makes an application for care and protection order and provides a copy of the application to the Public Advocate.

Section 74M empowers the Court to dismiss proceedings following an adjournment in 74K and a report in 74L, providing that the Court is satisfied that any action taken by the Chief Executive is in the best interests of the child or young person. If the Chief Executive has already made an application for a care and protection order, the Court may also dismiss proceedings.

Section 74M(3) enables the Court to continue criminal proceedings, make other diversionary orders, or otherwise dispose of the matter if the Court considers it appropriate to do so. The availability to the Court of the discretion set out in (2) is not intended to negate the discretion available to the Court in (3).

Clause 1.16 — Dictionary, new definitions

Clause 1.16 adds the definition of 'young person' to the dictionary of the *Court Procedures Act 2004.* The definition is the same as that used in the main body of the Bill.

Part 1.3 — Crimes Act 1900

Clause 1.17 — New division 10.7

This clause adds a new Division to the *Crimes Act 1900* which details procedures that police need to observe when investigating and dealing with offences suspected to have been committed by a child or young person. In light of the vulnerability of children and young people in the criminal justice system, in many instances these provisions provide procedural safeguards that go beyond those that must be observed when investigating offences that are suspected of having been committed by adults.

Section 252A gives an issuing officer the power to issue a warrant for the arrest of a child under 10. The issuing officer can only issue the warrant if they believe on reasonable grounds that that the child is or has carried out conduct that makes up the physical elements of an offence, or the child's conduct poses a risk to community safety or the child.

If the warrant is to be issued on the basis of clause 252A(1)(a), the issuing officer has to have to have a reasonable belief that the child has engaged in conduct that makes up the elements of the offence. It does not require the issuing officer to believe that the child has committed an offence. This wording is used because, given that the age of criminal responsibility is 10 and above (see section 25 of the Criminal Code 2002), meaning that children under 10 cannot commit an offence, it is not possible to suspect that a child known to be under 10 has committed an offence. It follows that, if a police officer (or for that matter an issuing officer) are aware or reasonably suspect that a person with respect to whom an application for an arrest warrant has been made, it will not be possible for a warrant to be issued under section 219 of the *Crimes Act 1900,* being the section most commonly relied upon for the issue of an arrest warrant under that Act.

When applying for a warrant under this section, a police officer is required to provide the issuing officer with an affidavit setting out the reasons why the warrant is sought. If the issuing officer issues a warrant, the issuing officer must write on the warrant the reasons that they have relied upon as justifying the issue of the warrant.

Nothing in section 252A is intended to displace the common law rules governing the validity and form of a warrant (see *Ousley v The Queen* (1997) 192 CLR 69).

Once a warrant has been issued under section 252A, section 213 of the *Crimes Act 1900* authorises police to arrest the person without a copy of the warrant in their physical possession. If this occurs, the police officer should show the person a copy of the warrant as soon as practicable. Also, once a warrant has been issued under section 252A of the *Crimes Act 1900,* section 220 of that Act allows police to use necessary and reasonable force to enter premises to arrest the person.

Section 252B provides a power to police officers to arrest children under 10 without a warrant, and sets out the grounds that must be satisfied before such an arrest can be made.

Sub-clause 252B(1)(a)(i) requires the police officer to have a reasonable belief that the child has engaged in conduct that makes up the elements of the offence. It does not require the issuing officer to believe that the child has committed an offence. This wording is used because, given that the age of criminal responsibility is 10 and above (see section 25 of the Criminal Code 2002) and children under 10 therefore cannot commit an offence, it is not possible to suspect that a child known to be under 10 has committed an offence. It follows that, if a police officer knows or reasonably suspects that a person is under 10 years of age, it will not be open to them to use the ordinary power of arrest in section 212 of the *Crimes Act 1900.*

Section 252C requires a police officer who has apprehended a child under 10 under section 2132 or 252B to take the child to a parent or someone exercising daily or long-term care responsibilities. If it is not practicable or appropriate for the police officer to leave the child with one of these people, the police may place the child with another appropriate person or agency, after having consulted with the Chief Executive about the placement.

Section 252D provides a definition for "committed" and "under restraint" for subdivision 10.7.2.

A child or young person will be taken to have committed an offence if they committed it with one or more other people.

A child or young person is "under restraint" if any of the circumstance described in clause 252E apply.

Section 252E describes the circumstances when a child or young person will be taken to be under restraint in subdivision 10.7.2. When a child is under restraint, other sections in subdivision 10.7.2 require the police to follow procedures intended to protect the interests of the child or young person and ensure the integrity of any evidence collected.

The concept of being under restraint extends beyond being under arrest or in lawful detention and includes circumstances where a child or young person is in the company of a police officer in relation to the investigation of an offence or possible offence. The section needs to be read in conjunction with section 252F

The broad definition of the term under restrain is intended to engage the procedural rights and safeguards afforded to children and young people in circumstances where children or young people are more likely to make admissions or incriminating comments. These safeguards are intended to assist in ensuring that any admissions or statements made by a child or young person during the course of an investigation are made voluntarily and are reliable, and to ensure the integrity of other evidence obtained from the chid or young person in the course of an investigation.

Section 252F replaces existing section 77 of the Act and expands on the term "in the company of a police officer" contained in section 252E(c), and is based on section 139(5) of the *Evidence Act 1995* (Cth) and the definition of "protected suspect" in section 23B(2) of the *Crimes Act 1914* (Cth).

The clause excludes specific instances of contact between young people and police involving minor traffic offences from falling within the concept of 'Being in the company of a police officer" in section 252F as these instances are not considered to be of a nature that warrant extra protection.

Section 252G is based on existing section 79 and deals with police interviews of children and young people in circumstances where a police officer suspects that a children and young people may have committed certain offences or where a police officer suspects that a child or young person may be implicated in the commission of certain offences. The provision makes it 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 or provide a forensic sample) unless one of the specified adults is present. If one of the persons listed is present, the police can only interview the child or young person or cause them to do something if authorised by another law. This requirement is intended to ensure that the child or young person's legal rights and interests are protected, and assumes that the child or young person will not always be in a position to effectively protect their own legal rights and interests.

Sub-section (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-section (4) provides for cases of emergency.

Section 252H 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.

Section 252I prevents police from charging a child or young person at a police station unless they are satisfied that proceeding by summons would not achieve one of the purposes referred to in section 212(1)(b) of the Crimes Act. This clause is intended to ensure that any detention of a child or young person should only be used as a measure of last resort and for the shortest appropriate time. The section needs to be read in light of sections 18 and 20 of the *Human Rights Act 2004*, and is intended to give effect to Article 37(b) of *the United Nations Convention on the Rights of the Child.*

Section 252J 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.

Section 252K obliges a person that charges a child or young person with an offence to promptly tell either a parent of the child or young person of that fact, or if the parents of the child don't exercise parental responsibility, someone else who has daily or long-term care responsibility for the child or young person. In informing that person about the fact the child or young person has been charged, the person laying the charge must tell them the terms of the charge, where the child or young person is being (and will be) held, and when the child or young person will next be taken before a Court.

Clause 1.18 — Section 300, new definition of *Magistrates Court*

This clause amends the dictionary for Part 13 of the *Crimes Act* to provide that a reference to the Magistrates Court is a reference to the Childrens court. This reiterates section 287 of the *Magistrates Court Act 1930* and is intended to make it clear that proceedings and issues about an accused's fitness to plead which covered by Part 13 of the *Crimes Act* can be dealt with by the Childrens court.

Clause 1.19 — Section 375

Section 375 is a key section in creating the jurisdiction of the Childrens Court to hear and decide criminal cases, and must be read together with Chapter 4A of the *Magistrates Court Act 1930.* Indeed, the jurisdiction of the Childrens Court to exercise certain powers and functions given to it in Chapter 4A of the *Magistrates Court Act 1930* are contingent on the Court having jurisdiction to hear a matter summarily under section 375.

Although the section has been amended, it remains unchanged insofar as it applies to offences alleged to have been committed by adults. The only change to the section is that it now gives the Childrens Court jurisdiction to summarily hear and decide any charge for an offence not punishable by life imprisonment by a person under the age of 18 at the time the offence was alleged to have been committed. As is the case with people dealt with as adults, if the Childrens Court does proceed under this section and find an offence proved, the maximum penalty it can impose is two years imprisonment.

Before the Childrens Court decides whether to hear an indictable offence summarily, it must have regard to the criteria enumerated in subsection 375(10).

The definition of "Magistrates Court" in subsection 375(13) applies only to section 375, and aids in clarifying the differences in jurisdiction of the Court when dealing with people aged under 18 years at the time the alleged offence was committed.

Clause 1.20 — Dictionary, new definitions

This clause amends the dictionary to provide that the definition of "daily care responsibility" and "long-term care responsibility" in the *Children and Young People Act 2008 applies to the Crimes Act*.

Part 1.4 — Crimes (Sentence Administration) Act 2005

Clause 1.21 — Section 95(1)

This clause will amend subsection 95(1) of the *Crimes (Sentence Administration) Act 2005* to provide that the section will not apply to young offenders.

Clause 1.22 — Section 96(1)

This clause will amend subsection 96(1) of the *Crimes (Sentence Administration) Act 2005* to provide that the section will not apply to young offenders.

Clause 1.23 — New section 102(4)

This clause will amend subsection 102(4) of the *Crimes (Sentence Administration) Act 2005* to provide that the section will not apply to young offenders.

Clause 1.24 — Section 172(1)(b)

This clause will amend subsection 172(1)(b) of the *Crimes (Sentence Administration) Act 2005* to remove the word phrase young offender. As a young offender will be covered by the definition of offender, the Sentence Administration Board will still be able to provide advice with respect to a young offender upon request from the Minister.

Clause 1.25 — Section 172(2)

This clause will amend sub-section 172(1)(b) of the *Crimes (Sentence Administration) Act 2005* to remove the current definition of "young offender", which is to be superseded by the definition of "young offender" in section 133B of the *Crimes (Sentencing) Act 2005.*

Clause 1.26 — Section 213, definition of *registered victim*

This clause amends the definition of "registered victim" in section 213 of the *Crimes (Sentence Administration) Act 2005*. The new definition reflects that there will be two separate victims registers; one for adult offenders and one for young offenders.

Clause 1.27 — Sections 215 and 216

This clause amends section 215 of the *Crimes (Sentence Administration) Act 2005* to create a victims register for the victims of crimes committed by adults.

Throughout the *Crimes (Sentence Administration) Act 2005* there are references to registered victims. In the main, these references are about obtaining victims' views during relevant deliberations about an offender's release, and informing registered victims about the release of offenders or other relevant matters.

The relevant Chief Executive for the purpose of this section is the Chief Executive that administers the *Crimes (Sentence Administration) Act 2005*.

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 role of the Sentence Administration Board, the rights the victim has to information about offenders and the rights the victim has to information about an offender's parole.

Section 215 will not apply to a victims of a crime committed by a young offender.

Section 215A creates a separate but similar victims register for the victims of crimes committed by young offenders. This register will be in substantially similar terms to the one created under section 215. The relevant Chief Executive for the purposes of this section is the Chief Executive that administers the *Children and Young People Act 2008.*

Section 216 provides explicit authority for the Chief Executive to disclose information about sentenced offenders to victims of the offender in question. The Chief Executive must be satisfied that the disclosure is appropriate.

Examples of disclosures are provided to remove any doubt.

Clause 215(2) ensures that parents of victims who are under 15 years-old are privy to the information that can be disclosed.

Section 216A provides a separate but similar authority to that contained in section 216 for the relevant Chief Executive to disclose information about sentenced offenders to victims of the offender in question. However, the circumstances in which identifying information about a young offender may be released are far more limited than they are for adult offenders. Identifying information about a young offender cannot be released unless the relevant offence was a domestic violence offence, or an offence that involves causing harm, or threatening to cause harm, to another person.

The further limitations applying to when identifying information about a young offender can be disclosed, as opposed to when information about adult offenders can be disclosed, are intended to give effect to Articles 8 and 21 of the *United Nations Minimum Standard Rules for the Administration of Juvenile Justice*, which emphasise the need to keep information about individual young offenders confidential to prevent stigmatisation and reduce the prospects for the young offender's rehabilitation and reintegration into the community.

The ability of the Chief Executive to release information when the offence committed was a personal violence offence balances the needs of victims against the interests of young offenders. Given personal violence crimes are ordinarily more serious than other crimes and can have a more significant and direct effect on a victim, it is considered justifiable that identifying information about young offenders be disclosed in relation to violent crimes. This consideration becomes more acute when there is cause to suspect that a young offender convicted of a violent crime might engage in further offending behaviour against a previous victim.

Clause 1.28 — Section 314A, new dot point

This clause amends section 314A of the *Crimes (Sentence Administration) Act 2005* to make it clear that nothing in the *Children and Young People Act 2008*, or anything else contained in any of the other Acts mentioned in the section, effects or modifies the nature and availability of the common law as it relates to the prerogative of mercy. Any provisions in the *Crime (Sentence Administration) Act 2005* or any other Act that relate to remissions or pardons are in addition to, and not in place of, the common law as it relates to the prerogative of mercy.

Clause 1.29 — New chapter 14A

This clause creates a new Chapter 14A to the *Crimes (Sentence Administration) Act 2005* that sets out particular provisions dealing with the administration of sentences imposed on young offenders.

Section 320A explains the purpose of Chapter 14A and provides that, unless otherwise specified in Chapter 14A, the provisions of the *Crimes (Sentence Administration) Act 2005* apply to the administration of an adult sentence also apply to the administration of a young offender's sentence.

Section 320B provides that when a decision maker is making a decision under the Act in relation to a young offender, or is considering whether or not to make a decision in relation to a young offender, the decision maker must make the decision in a manner consistent with the best interests of the young offender. What is and is not in the young offender's best interests

is to be determined by reference to the young offender principles contained in section 94 of the *Children and Young People Act 2008.*

Section 320C provides that a reference in the *Crimes (Sentence Administration) Act 2005* to a correction centre is, in relation to a sentence of imprisonment for a young offender, a reference to a detention place. This means that provisions in the Act applying to the administration and management of prisoners in an adult correctional facility also apply to young offenders in a detention facility unless Chapter 14A provides otherwise.

Section 320D provides that where the *Crimes (Sentence Administration) Act 2005* provides that a decision is to made, or a function is to be exercised by the Chief Executive, if the decision or function is to be exercised in relation to a young offender, then a reference to the Chief Executive is to be taken as a reference to the Chief Executive that administers the *Children and Young People Act 2008.*

Section 320E specifies which government agency is to administer a community-based sentence imposed on a young offender after they have turned 18. The section provides that the Chief Executive responsible for administering the *Crimes (Sentence Administration) Act 2005* and the Chief Executive responsible for administering the *Children and Young People Act 2008* must work out between them who is going to administer the sentence.

The section is intended to ensure that a flexible approach can be taken to administering the sentence. For example, if a young offender that had just turned 18 had served two years of a community based sentence and had one month left to serve, the Chief Executives could decide that, in the interests of continuity, it would be best for the Chief Executive responsible for the *Children and Young People Act 2008* to continue to administer the sentence. Similarly, if a young offender was sentenced for offences of a sexual nature just before they turned 18 but had subsequently turned 18, the Chief Executives may decide that, in light of specialist programs for dealing with sexual offenders provided by the Chief Executive responsible for administering the *Crimes (Sentence Administration) Act 2005*, it would be best for the young offender's sentence to be administered by that Chief Executive.

In determining which Chief Executive should administer the sentence, regard must be had to the best interests of the young offender. This will invariably be influenced by the nature of supervision each Chief Executive can provide, and the type and availability of programs they can offer.

Section 320F provides that, if an authorised person under the *Children and Young People Act 2008* believes on reasonable grounds that a young offender has breached any of the young offenders good behaviour obligations, the authorised person may make a written report to the sentencing court about their belief.

Section 320G provides that where a person is required to be dealt with by a Court for a breach of a sentence imposed on the person as a young offender, the breach must be dealt with by the same Court that imposed the sentence, irrespective of the age of the person at the time the breach is to be dealt with. This requirement is intended to ensure continuity in the way the Court deals with the person, and acknowledges the "case management" role that sentencing courts often undertake.

Section 320H provides that a young offender who is serving a sentence of imprisonment under the supervision of the Chief Executive responsible for administering the *Children and Young People Act 2008* is not eligible to have their sentence transferred under Chapter 11 of the *Crimes (Sentence Administration) Act 2005*. Chapter 11 of that Act can only apply to young offenders who are serving a sentence of imprisonment under the supervision of the Chief Executive responsible for administering the *Crimes (Sentence Administration) Act 2005*.

Section 320I provides that a young offender who is under 18 and is subject to community-based sentence is not eligible to have that sentence transferred under Chapter 12 of the *Crimes (Sentence Administration) Act 2005.*

Part 14A.2 — Young Offenders – Accommodation Orders

Section 320J provides makes it a condition of an accommodation order that the young offender follow the reasonable and lawful directions of certain people that the order may require the young offender to live with. A failure to follow the reasonable direction is to be taken to be a contravention of the accommodation order.

Section 320K provides that the Court that sentenced a young offender to an accommodation order may re-sentence the young offender if they breach the accommodation order, or a condition of the accommodation order.

If the Court does decide to re-sentence the offender, in re-sentencing the young offender the Court must take into account the fact that the previous accommodation order was made, and anything done under the order, and any other order made and done in relation to the offence.

Also, in re-sentencing the young offender, the Court must not impose a penalty that, when taken together with anything done under or time served under a penalty already imposed in relation to the offence, would be greater than the maximum penalty the Court could have imposed in relation to the offence. This section is to be read in light of the sentencing methodology contained in the *Crimes (Sentencing) Act 2005*, and is intended to be applied in a manner that does not interfere with the right against double jeopardy contained in section 24 of the *Human Rights Act 2004.*

Clause 1.30 — Dictionary, new definitions

This clause adds further definitions to the Dictionary in the *Crimes (Sentence Administration) Act 2005*. It provides that a reference to accommodation order in the Act is to have the same meaning as is provided under section 113V of the *Crimes (Sentencing) Act 2005*. It also provides that a reference to the Chief Executive (CYP) in the Crimes (Sentence Administration) Act 2005 is a reference to the Chief Executive responsible for the *Children and Young People Act 2008.*

Clause 1.31 — Dictionary, definition of offender, paragraph (a)

This clause amends the definition of offender in the Dictionary to the *Crimes (Sentence Administration) Act 2005* to make it clear that a reference to an offender in the Act includes a reference to a young offender that has been convicted or found guilty of an offence.

Clause 1.32 — Dictionary, definition of *victims register*

This clause omits the definition of victims register from the Dictionary to the *Crimes (Sentence Administration) Act 2005.*

Clause 1.33 — Dictionary, new definition of *young offender*

This clause amends the Dictionary in the *Crimes (Sentence Administration) Act 2005* to provide that a reference to a young offender in the Act is a reference to a person who has been convicted or found guilty of an offence by a Court which was committed when the person was under 18 years of age.

This definition reflects the intention that the approach that the Courts should take when dealing with young offenders will, for the most part, turn on how old the offender was when they committed the offence, and not how old they are when they are before the Court.

Part 1.5 Crimes (Sentencing) Act 2005

Clause 1.34 — Section 7(2) new note

This clause introduces a new note to section 7(2) of the *Crimes (Sentencing) Act 2005* (*Sentencing Act*) to draw attention to new section 133C in clause 1.75 (discussed below). Clause 133C requires the Court to consider rehabilitation as the primary purpose of sentencing young people and allows the Court to give that purpose more weight than the other purposes in section 7.

Clause 1.35 — Section 8, definition of offender, paragraph (a)

This clause extends the meaning of offender in the *Sentencing Act* to include young offenders. Young offender is defined in new section 133B, clause 1.75. A young offender is a person who has convicted or found guilty of an offence and was under 18 years old when the offence was committed.

Clause 1.36 — Section 9, note 1, first dot point

This clause amends the note in section 9 of the *Sentencing Act* to also contemplate imprisonment at a detention place if a young offender is sentenced to imprisonment. New section 133H, clause 1.75, requires young offenders to be detained at a detention place, rather than a prison, if the young offender is sentenced to imprisonment. The obligation applies to people who are under 21 at the time of imprisonment.

Clause 1.37 — Section 9, note 1, new dot point

This clause adds the disposition of accommodation order to the list of dispositions available to the sentencing court in section 9 of the *Sentencing Act.* An accommodation order is a specific order for young offenders.

Clause 1.38 — Section 10(2), new note 2

This clause inserts a note into section 10 that draws attention to new section 133G. New section 133G provides further matters that must be considered by a sentencing court if the Court is sentencing a young offender to imprisonment.

Clause 1.39 — Section 10(3), note

This clause amends the note in 10(3) that draws attention to new section 133G. New section 133G provides further matters that must be considered by a sentencing court if the Court is sentencing a young offender to imprisonment.

Clause 1.40 — Section 12(4), new note

This clause inserts a note into section 12 that draws attention to new section 133H. New section 133H obliges sentencing notices and orders to be given to the parents of young offenders or people with parental responsibilities for young offenders.

Clause 1.41 — Section 13(3)(a), new note

This clause inserts a note into section 13 that draws attention to the effect of new section 133J. New section 133J removes any obligation to include a condition of giving security for a good behaviour order imposed upon a young offender.

Clause 1.42 — Section 13(3), new note

This clause inserts a note into section 13(3) that points to the additional conditions that may be included in good behaviour orders imposed young offenders, as set out in new section 133J.

Clause 1.43 — Section 14(6), new note

This clause inserts a note into section 14 that draws attention to new section 133H. New section 133H obliges sentencing notices and orders to be given to the parents of young offenders, or people with parental responsibilities for young offenders.

Clause 1.44 — Section 16(6), new note

This clause inserts a note into section 16 that draws attention to new section 133H. New section 133H obliges sentencing notices and orders to be given to the parents of young offenders, or people with parental responsibilities for young offenders.

Clause 1.45 — Section 17(5), new note

This clause inserts a note into section 17 that draws attention to new section 133H. New section 133H obliges sentencing notices and orders to be given to the parents of young offenders, or people with parental responsibilities for young offenders.

Clause 1.46 — Section 23(1), new note

Section 23 of the *Sentencing Act* sets out the criteria for a Court to make a non-association or place restriction order. This clause inserts a note into section 23 that points to further consideration the Court must contemplate when imposing such an order upon a young offender. The extra consideration is set out in new section 133G.

Clause 1.47 — Section 25(2), new note

This clause inserts a note into section 25 that draws attention to new section 133H. New section 133H obliges sentencing notices and orders to be given to the parents of young offenders, or people with parental responsibilities for young offenders.

Clause 1.48 — Section 29(1)(a), new note

This cause replaces the existing note, with a note that includes a reference to a detention place. If young offenders are sentenced to imprisonment, new section 133H will require the person to be detained at a detention place. Adults sentenced to imprisonment are required to be detained at a correction centre.

Clause 1.49 — Section 29(1), example 2, 2nd dot point

This clause omits the reference to detention at a correctional centre, as the amendments to the *Sentencing Act* in this schedule will create an obligation to imprison young people at a detention places rather than a correction centre.

Clause 1.50 — Section 31(c), example

This clause omits the reference to detention at a correctional centre, as the amendments to the *Sentencing Act* in this schedule will create an obligation to imprison young people at a detention places rather than a correction centre.

Clause 1.51 — Section 33(1), new note

Section 33 of the *Sentencing Act* lists particular matters a sentencing court must consider when sentencing a person. This clause introduces a note to section 33 that draws attention to further matters listed in new section 133D that apply when a young offender is sentenced.

Clause 1.52 — Section 40A, new note

Section 40A of the *Sentencing Act* lists presentence report matters a Court may seek to include in a presentence report. This clause introduces a note that draws attention to additional presentence report matters listed in new section 133E that apply to young offenders.

Clause 1.53 — New section 41(7)

This clause introduces a new subsection to section 41 that defines Chief Executive in a way that enables the relevant Chief Executive to prepare a presentence report. For young offenders the relevant Chief Executive will be the Chief Executive responsible for the foreshadowed *Children and Young People Act.* For adults the Chief Executive is the Chief Executive responsible for the *Sentencing Act.*

Clause 1.54 — New section 43(1)(b)(iiia)

This clause introduces a new subsection that enables a presentence report assessor to ask a parent, or someone with parental responsibility, for information about a young offender. The introduction of this subsection enables the assessor to ask for information, but does not oblige the parent or person with parental responsibility, to disclose the information.

Clause 1.55 — New section 43(1A)

This clause applies to young offenders who subsequently become an adult when a pre-sentence report is being conducted. The clause will protect the person's right to privacy by preventing the assessor from seeking information from the person's parents unless the young offender gives consent.

Clause 1.56 — New section 64(3) definition of excluded sentence of imprisonment, new paragraph (f)

This clause excludes a sentence of imprisonment imposed upon a young offender from the parole provisions. Instead of using the adult parole system, the sentencing court must consider making a combination sentence of imprisonment and a good behaviour order with a supervisory condition, as discussed in clause 1.75 new section 133G. This method of supervision in the community reflects current practice exercised by the Childrens court.

Clause 1.57 — New section 77(1A)

Section 77 of the *Sentencing Act* lists criteria that determine if an offender is eligible for periodic detention. This Bill will enable a sentencing court to allow a young offender to serve a sentence of imprisonment by way of periodic detention, if during the sentence of imprisonment the young offender turns 18.

This clause limits young offenders' eligibility for periodic detention to those young offenders who turn 18 during their sentence of imprisonment.

Clause 1.58 — Section 82(1)(c)

Young offenders sentenced to imprisonment will be obliged to be kept in custody at a detention place, consistent with chapter six of this Bill. This clause amends section 82 to enable the section to contemplate the place of imprisonment for both adult offenders and young offenders.

Clause 1.59 — Section 84(1) new note

This clause inserts a note into section 84 that draws attention to new section 133J. New section 133J obliges sentencing notices and orders to be given to the parents of young offenders, or people with parental responsibilities for young offenders.

Clause 1.60 — Section 84(5)

This clause introduces a new subsection to section 84 that defines Chief Executive in a way that enables the relevant Chief Executive to be notified of a sentence of imprisonment. For young offenders the relevant Chief Executive will be the Chief Executive responsible for the foreshadowed *Children and Young People Act.* For adults the Chief Executive is the Chief Executive responsible for the *Sentencing Act.*

Clause 1.61 — Section 85, note 1

This clause amends the note to section 85 of the *Sentencing Act* that recites the minimum and maximum hours of community service that can be imposed upon adult offenders. The amendment adds the minimum and maximum hours that can be imposed upon young offenders. Clause 1.75, new section 133L, sets the minimum and maximum hours that apply to young offenders.

Clause 1.62 — Section 91(1), new note

Section 91 of the *Sentencing Act* prescribes the hours of community service work that can be imposed upon an adult offender. This clause adds a note to section 91 that draws attention to new section 133L that sets out the minimum and maximum hours that apply to young offenders.

Clause 1.63 — Section 92(3), new note

Section 92 of the *Sentencing Act* stipulates the maximum hours of community service work that can be imposed upon an adult offender when concurrent or consecutive orders are involved. This clause adds a note to section 92 that draws attention to new section 133L that sets the minimum and maximum hours that apply to young offenders.

Clause 1.64 — Section 103(1), new note

This clause inserts a note into section 103 that draws attention to new section 133J. New section 133J obliges sentencing notices and orders to be given to the parents of young offenders, or people with parental responsibilities for young offenders.

Clause 1.65 — Section 103(4)

This clause introduces a new subsection to section 103 that defines Chief Executive in a way that enables the relevant Chief Executive to be notified of a good behaviour order. For young offenders the relevant Chief Executive will be the Chief Executive responsible for the foreshadowed *Children and Young People Act.* For adults the Chief Executive is the Chief Executive responsible for the *Sentencing Act.*

Clause 1.66 — Section 113(1) note

This clause removes the current note from this part of the section. Clause 1.67 reinserts the note.

Clause 1.67 — Section 113(2) new notes

This clause reinserts the existing note in section 113, which states that one notice may be given for combination sentence.

This clause inserts another note into section 113 that draws attention to new section 133J. New section 133J obliges sentencing notices and orders to be given to the parents of young offenders, or people with parental responsibilities for young offenders.

Clause 1.68 — Section 121(2), note

This clause inserts a note into section 121 that draws attention to new section 133J. New section 133J obliges sentencing notices and orders to be given to the parents of young offenders, or people with parental responsibilities for young offenders.

Clause 1.69 — New section 126(5), note

This clause introduces a new subsection to section 126 that defines Chief Executive in a way that enables the relevant Chief Executive to initiate a review of a deferred sentence order. For young offenders the relevant Chief Executive will be the Chief Executive responsible for the foreshadowed *Children and Young People Act.* For adults the Chief Executive is the Chief Executive responsible for the *Sentencing Act.*

Clause 1.70 — New section 127(3)

This clause introduces a new subsection to section 127 that defines Chief Executive in a way that enables the relevant Chief Executive to be notified of a deferred sentence order. For young offenders the relevant Chief Executive will be the Chief Executive responsible for the foreshadowed *Children and Young People Act.* For adults the Chief Executive is the Chief Executive responsible for the *Sentencing Act.*

Clause 1.71 — Section 129(5), new note

This clause inserts a note into section 129 that draws attention to new section 133J. New section 133J obliges sentencing notices and orders to be given to the parents of young offenders, or people with parental responsibilities for young offenders.

Clause 1.72 — New section 129(7)

This clause introduces a new subsection to section 129 that defines Chief Executive in a way that enables the relevant Chief Executive to be notified of an amended deferred sentence order. For young offenders the relevant Chief Executive will be the Chief Executive responsible for the foreshadowed *Children and Young People Act.* For adults the Chief Executive is the Chief Executive responsible for the *Sentencing Act.*

Clause 1.73 — Section 130(4), new note

This clause inserts a note into section 130 that draws attention to new section 133J. New section 133J obliges sentencing notices and orders to be given to the parents of young offenders, or people with parental responsibilities for young offenders.

Clause 1.74 — New section 130(6)

This clause introduces a new subsection to section 130 that defines Chief Executive in a way that enables the relevant Chief Executive to be notified of a deferred sentence order that is cancelled by the sentencing court. For young offenders the relevant Chief Executive will be the Chief Executive responsible for the foreshadowed *Children and Young People Act.* For adults the Chief Executive is the Chief Executive responsible for the *Sentencing Act.*

Clause 1.75 — New chapter 8A

Chapter 8A — Sentencing young offenders

As discussed in the outline to Schedule 1 (above) this new chapter sets out a sentencing methodology that reflects the policies articulated by the CRC and Australian common law. New chapter 8A of the *Crimes (Sentencing) Act 2005* specifically deals with Courts' sentencing decisions that apply to children and young people.

The provisions, especially new sections 133C and 133D, are intended by the Government to be the particular expression of the CRC that applies to the task of sentencing. For the sake of clarity in statutory interpretation, the encapsulation of the CRC in the young offender principles at clause 94 of the Children and Young People Bill is not intended to be a statutory alternative, or substitute, for the effect of new sections 133C and 133D. The Government considers new Chapter 8A would be justiciable on the grounds of inconsistency with the *Human Rights Act 2004* and relevant human rights jurisprudence, which would naturally consider the terms of CRC. It is not intended that the principles of the Children and Young People Bill would create grounds for review that are abstract from human rights jurisprudence and Australian common law.

The amendments to the *Crimes (Sentencing) Act 2005* also include specific dispositions relevant to children and young people, such as education and training conditions, accommodation orders and supervision conditions.

Part 8A.1 General

Section 133A stipulates that new chapter 8A of the *Crimes (Sentencing) Act 2005* consists of provisions that apply particularly to children and young people. Any sections, parts, and chapters that are unaltered by chapter 8A, or other amendments in this Schedule, would apply to young offenders in the same manner as they apply to adults.

Section 133B provides a definition for young offender that will be used for the Chapter and the *Crimes (Sentencing) Act 2005.* A young offender is a person who has been found guilty or convicted by a Court and was under the age of 18 years old at the time the offence was committed.

The intent of this definition is to emphasise that the sentencing court should be sentencing the person according to their status at the time of the offence. For example, if a person committed an offence at the age of 15 but were not tried for the offence until they reached the

age of 19, the sentencing court should consider the offending behaviour in the context of the person being a 15 year-old at the time of the offence, rather than as a 19 year-old.

However, this is not intended to prevent the sentencing court from contemplating any sentencing considerations in section 33 of the *Crimes (Sentencing) Act 2005* relevant to a young offender's current age. For example, employment, whether the person has dependents, if the offender has made any reparation for the offence etc.

Section 133C modifies the purposes of sentencing set out in section 7 of the *Crimes (Sentencing) Act 2005* in a manner that is consistent with human rights law and Australian common law.

The International Covenant on Civil and Political Rights (ICCPR) provides in Article 14(4), which broadly corresponds to section 22(3) of the *Human Rights Act 2004 1994,* that:

> "In the case of juvenile persons, the procedure shall be such as will take account of their age, and the desirability of promoting their rehabilitation."

In *Thorn v Laidlaw* [2005] ACTCA 49 the ACT Court of Appeal noted:

> The role of rehabilitation is particularly relevant in relation to young offenders, a point recently reiterated by the New South Wales Court of Appeal in *R v AEM Snr; KEM; MM* [2002] NSWCCA 58. Beazley JA, Wood CJ at CL and Sully J observed at [97] that:
> *It is well accepted that in the case of youth, general deterrence and public denunciation usually play a subordinate role to the need to have regard to individual treatment aimed at rehabilitation: see* R v DAR *(unreported New South Wales Court of Criminal Appeal, 2 October, 1997;* R v Mazzilli *[2001] NSWCA 117.*

New section 133C modifies section 7 by obliging a sentencing court to consider the purpose of rehabilitation when sentencing a young offender. The new section reflects the common law discretion to give more weight to the purpose of rehabilitation than any other purpose set out in section 7(1).

The purposes of sentencing set out in section 7(1) represent the purposes articulated by Courts and Parliaments accrued over centuries of law. New section 133C aims to maintain continuity with this law and the particular common law that applies to young offenders.

New section 133C(2) invokes the sentencing principle of individualised justice. The new section does not intend to codify the sentencing principle, but intends to emphasise a sentencing court's regard for the principle of individualised justice when sentencing young offenders. This emphasis is consistent with the Australian jurisprudence, such as *R v Voss* [2003] NSWCCA 182 and *R v Mills* [1998] 4 VR 235.

The Australian Law Reform Commission sums up the principle of individualised justice:

> 5.21 The principle of individualised justice requires the Court to impose a sentence that is just and appropriate in all the circumstances of the particular case. Courts have consistently recognised the importance of this sentencing principle. For example, in *Kable v Director of Public Prosecutions,* Mahoney ACJ stated that 'if justice is not individual, it is nothing'. (*Kable v Director of Public Prosecutions* (1995) 36 NSWLR 374, 394). Individualised justice can be attained only if a judicial officer possesses a broad sentencing discretion that enables him or her to consider and balance multiple facts and circumstances when sentencing an offender. This broad discretion is required because sentencing is ultimately 'a synthesis of competing features which attempts to translate the complexity of the human condition and human behaviour to the mathematics of units of punishment usually expressed in time or money' (*Weininger v The Queen* (2003) 212 CLR 629, [24]). [ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders,* Report 103, 2006.]

Section 133D adds particular sentencing considerations for young offenders that must be considered by a sentencing court along with the existing considerations in section 33 of the *Crimes (Sentencing) Act 2005.*

These new considerations are tailored for the particular nature of children and young people, being people who are inherently immature and inexperienced compared to adults.

Section 133D(1)(a) accounts for the individual issue of maturity if a young offender is found guilty of a crime. A Court must consider the young offender's maturity relative to an adult in a similar situation. A young offender's immaturity would be a factor that emphaises the need for rehabilitation and parsimony in sentencing.

Section 133D(1)(b) enables the Court to consider the young offender's individual state of development in the context of the offending behaviour. For example, while a young person may be 17 years of age their state of development may not have progressed to a degree expected of most 17 year-olds. State of development may be akin to maturity in many cases, but can also reflect the ability, inability, or limitations, of the young person to engage with the world and the community.

Section 133D(1)(c) allows the young offender's family circumstances to be considered. In some cases offending behaviour by children or young people can be triggered by family circumstances or evolve in a context of dysfunctional family life. This subsection requires the Court to consider that context when sentencing a young offender.

Section 133E enables youth justice workers preparing pre-sentence reports to examine, inquire and report on the matters set out in section 133D.

Section 133F enables the Chief Executive responsible for the *Children and Young People Act* to advise the Court on the availability of resources needed to implement a particular sentence a sentencing court is considering to impose upon a young offender.

Section 133G sets out particular limitations and qualifications that apply if a Court is sentencing a young offender to imprisonment. Any sentence of imprisonment upon a young offender must be for the shortest appropriate term and as a last resort.

If a Court decides to impose a sentence of imprisonment the Court must consider making a combination sentence that also imposes a good behaviour order with a supervision condition following the period of imprisonment.

This provision replaces the existing statutory remission scheme. A statutory remissions scheme administered by the Executive is inconsistent with human rights, primarily because of the distinction between the fair trial requirements for administrative and criminal proceedings.

In *Engel v Netherlands* (1979–80) 1 EHRR 647 the European Court of Human Rights determined a set of criteria that enables sanctions imposed upon a person by a state to be characterised as either criminal or administrative. Any sanction imposed by a state requires commensurate fair trial protections under human rights law. However, the extent of the fair trial protections required depends upon whether the sanction is objectively characterised as criminal or administrative. The criteria for characterisation were:

- the classification of the offence in domestic law;
- the nature of the offence; and
- the severity of the punishment.

This precedent was followed in *Ezeh and Connors v United Kingdom* (2004) 39 EHRR 1, where the Court characterised the power of a prison authority to add days to a sentence without further reference to a Court as a criminal matter, not an administrative one.

The case of *Campbell and Fell v United Kingdom* (1985) 7 EHRR 165, also followed the criteria in *Engel,* when the Court considered whether the character of charges laid in a prison discipline process were criminal or administrative in nature.

In *Campbell and Fell* the Court also examined the issue of the practice of granting and cancelling remissions. The Court noted the English law on the issue that determined that statutory remission was a legitimate expectation that the prisoner would be released earlier

than the nominal term of imprisonment. The European Court noted Lord Justice Waller in the UK decision of *R v Board of Visitors of Hull Prison; ex parte St Germain (No.1)* [1979] QB 425 that:

> Whether it [full remission] is a right or a privilege a prisoner can expect to be released on that date unless he is ordered to forfeit some remission. Lord Reid quoted deprivation 'of rights or privileges' as being of equal importance, and I respectfully agree with him. Whether remission is a right or a privilege is in my opinion immaterial. It is only necessary to consider the case of [X], who was ordered to forfeit 720 days. As a result he would have to serve nearly two years beyond his earliest date of release. It was a very substantial privilege which he had lost. ([1979] 1 All England Law Reports, pp. 723j-724b)

The European Court also decided in *Campbell and Fell* that:

> . . . that deprivation of liberty liable to be imposed as a punishment was, in general, a penalty that belonged to the "criminal" sphere . . . the Court is of the opinion that the forfeiture of remission which Mr Campbell risked incurring and the forfeiture actually awarded involved such serious consequences as regards the length of his detention that these penalties have to be regarded, for Convention purposes, as "criminal". By causing detention to continue for substantially longer than would otherwise have been the case, the sanction came close to, even if it did not technically constitute, deprivation of liberty and the object and purpose of the Convention require that the imposition of a measure of such gravity should be accompanied by the guarantees of Article 6. ((1985) 7 EHRR 165, para 72.)

Consequently, decisions concerning remissions therefore must be dealt with by an independent body. A process that enables the Executive to grant and revoke remissions administratively would be inconsistent with human rights jurisprudence that requires a standard of fair trial akin to a criminal procedure.

As mentioned in the note to the section, there is also no provision to apply the adult parole system to young offenders. Given the small number of young offenders, the Government has decided at this stage not to construct a parole system for young offenders but instead formalise the current practice of the Childrens court.

The effect of combining a sentence of imprisonment and a good behaviour order with a supervision condition meets the rehabilitative goal of supervising a young person's return to the community akin to a parole system. If a young person breaches their good behaviour order, the person is brought before the sentencing court, and the Court's sentencing jurisdiction is re-enlivened.

Section 133G(4) prohibits the imposition of a life sentence upon a person who committed an offence when they were under 18 years old.

Section 133H distinguishes the place of imprisonment for young offenders from the place of imprisonment for adult offenders.

This new section obliges the Executive to imprison young offenders who are not yet 21 years old at a facility for children and young people, a 'detention place'. However, the section is subject to division 5.2.3 of the *Children and Young People Act* (discussed in the main body of this Bill), which enables the Chief Executive to transfer people over 18 to an adult facility in certain circumstances. Division 5.2.3 also requires adults reaching the age of 21 to be transferred from a youth facility to an adult facility.

The new Section only applies to young offenders, namely people who committed an offence when they were under 18 years-old. A person who committed an offence after turning 18, but was not 21 years-old at the time of sentencing, would still be required to serve a sentence of imprisonment at an adult facility.

Provisions governing a detention place are at chapter 6 of the Children and Young People Bill.

Section 133I adds further qualifications to non-association and place restriction orders set out in part 3.4 of the *Crimes (Sentencing) Act 2005.*

Any non-assocation order or place restriction order being considered by a sentencing court for a young offender must not interfere with the young offenders access to education or public transport.

Section 133J obliges the sentencing court to provide copies of sentencing orders and notices to young offenders' parents and people who have parental responsibility.

Section 133K enables any references in the *Crimes (Sentencing) Act 2005* to a correctional centre to be interpreted as a detention place if the provision is being exercised in relation to a young offender who is ordered to serve imprisonment.

Likewise, a reference to a corrections officer should be interpreted as being a reference to a youth detention officer defined in the Children and Young People Bill.

Part 8A.2 Young offenders — good behaviour orders

Division 8A.2.1 — Young offenders — good behaviour orders generally

Section 133L modifies the condition of community service that can be imposed as part of a good behaviour order. Currently section 92 of the *Sentencing Act* stipulates the minimum and maximum hours of community service work that can be imposed upon an adult offender. New section 133L sets a different number of minimum and maximum hours that the sentencing court can impose upon young offenders.

For young offenders, community service must be at least 20 hours and not more than 200 hours. In setting community service hours, the sentencing court must also ensure that the community service does not interfere with the young offender's access to education and training. For example, for a young offender attending school, the Court would need to consider an amount of community service that would not impinge upon normal school hours. Likewise, for a young offender attending technical college or another similar institution, the Court would need to consider the time the young offender is required to attend the institution.

The new section also limits the maximum time a community service condition to 12 months.

New section 133L(3) ensures that any concurrent or consecutive good behaviour order imposing community service upon a young offender does not result in a combined maximum number of hours greater than 200 hours.

New section 133M modifies the conditions that can be imposed as part of a good behaviour order when applied to young offenders. The effect of (1) is to remove the condition of giving security for complying with a good behaviour order. The Government considers children and young people as having little or no capacity to provide monetary security for compliance with a good behaviour order.

The effect of (2) is to provide the sentencing court with two further conditions when sentencing young offenders. An education and training condition and a supervision condition are sentencing dispositions specifically available for young offenders that are not available to adults.

Division 8A.2.2 — Good behaviour orders — education and training conditions

This division sets out the eligibility and suitability for imposing an education and training condition as part of a good behaviour order.

Section 133N defines an education and training condition.

Section 133O specifies that the division applies if the Court considers imposing an education and training condition as part of a good behaviour order.

Section 133P stipulates that the condition can only be made as part of a good behaviour order imposed upon a convicted young offender.

Section 133Q sets out the criteria that must be satisfied before the Court may impose a education and training condition. The Court must be satisfied that the particular training or education proposed is suitable for the young offender; that it is appropriate the young offender engage in the proposed education or training; and there is actually a place in an educational institution or program available for the young offender.

Section 133R sets out the criteria the Court must consider to ascertain if the young offender is suitable for an education or training condition. The pre-sentence report provides the Court with information and recommendations about young offenders' suitability for education or training. If the Court decides to act contrary to any recommendation the pre-sentence report, subsection (4) obliges the Court to record its reasons for the decision. A record of reasons will provide enable youth justice officers administering the sentence with the rationale for the sentence.

Section 133S stipulates that the Court may only impose an education or training condition for a maximum of 3 years.

Section 133T ensures that in the rare circumstance that a young offender is subject to two or more good behaviour orders with education or training conditions, the maximum time for the condition remains 3 years.

Division 8A.2.3 — Good behaviour orders — supervision conditions

This division sets out the detail of supervision conditions that can be imposed upon young offenders, as enabled by new section 133M.

New section 133U defines supervision condition. A supervision condition requires the young offender to comply with directions given by the Chief Executive or the Chief Executive's delegate. A supervision condition also triggers the Chief Executive's powers to require information from agencies or other entities involved in directly supervision the young offender. For example, if the young offender was involved in a rehabilitation program, the Chief Executive may require relevant information from the program to assist with the supervision of the young offender.

The Chief Executive contemplated by the definition is the Chief Executive responsible for administering the sentence. In some cases sentenced young offenders who turn 18 may have their sentences administered by the adult system. (See new section 320I under clause 1.30 above.)

New section 133V obliges the sentencing court to impose a supervision condition if the Court is also imposing either a community service condition, a rehabilitation condition or education and training condition as part of a good behaviour order. 133V(2) aims to clarify that it is not the Government's intention that the circumstances in (1) are the only circumstances where a supervision condition can be imposed as part of a good behaviour order. 133V is not intended to prevent the sentencing court from imposing a supervision condition alone as part of a good behaviour order.

Section 133W sets a maximum period for supervision conditions of three years.

Section 133X stipulates that in the event that two or more good behaviour orders are made in relation to a young offender that include supervision conditions, the total period of supervision must not be longer than three years.

Division 8A.3 — Young offenders — accommodation orders

Section 133Y defines what an accommodation order is. An accommodation order is a Court order that requires a young offender to live at a specific place, or with a specific person. An accommodation order can be require the young offender to live at a place or with a person either within the Act, or outside of it. The order itself can provide where the young offender must live, or who they must live with, or the order can empower the Chief Executive responsible for administering the order to make that decision. If the order leaves it to the Chief Executive to make the decision, the Chief Executive can change the terms of the order as circumstances require. A person can be subject to more than one accommodation order at any given point in time.

The Chief Executive contemplated by the definition is the Chief Executive responsible for administering the sentence. In some cases sentenced young offenders who turn 18 may have their sentences administered by the adult system. (See new section 320I under clause 1.30 above.)

Section 133Z provides that the Court can make an accommodation order in relation to a young offender if that young offender has been convicted of an offence.

Section 133ZA sets out a number of criteria that must be satisfied before the Court can make an accommodation order.

Section 133ZB(1) sets out a number of criteria that the Court must have regard to before making a young offender order. These include any pre-sentence report or relevant sentencing information, any medical records provided to the Court, and any other admissible material that the Chief Executive responsible for administering the *Children and Young People Act 2008* provides.

The criteria listed in section 133ZB are not exhaustive, and the Court may have regard to other relevant matters in deciding whether to impose an accommodation order.

Subsection 133ZB(3) provides that the Court may make, or decline to make, an accommodation order notwithstanding any recommendation or indication in a pre-sentence report or other evidence on the appropriateness of making such an order. However, subsection 133ZB(4) provides that if the Court makes, or declines to make, an accommodation order against a recommendation in a pre-sentence report, the Court must record its reasons in writing for its decision to make, or not make, an accommodation order. Subsection 133ZB(5) provides that a failure to comply with subsection 133ZB(4) will not invalidate an accommodation order that is made.

Section 133ZC provides that an accommodation order must not be longer than three years.

Section 133ZD provides that if a young offender is the subject of an accommodation order, and the Court makes a further accommodation order, the Court may direct how the new order and the existing order work together. For example, the Court might direct that to the extent that to the extent the two order are inconsistent, the second order is to prevail. Subsection 133ZD(2) provides that the new order must not last longer than three years.

Clause 1.76 — Section 136(4), definition or *criminal justice entity,* paragraph (c)

This clause amends section 136 of the *Crimes (Sentencing) Act 2005* to provide that the Chief Executive responsible for that Act and the Chief Executive responsible for the *Children and Young People Act 2008* are criminal justice entities for the purpose of that section.

Clause 1.77 — Dictionary, new definition of accommodation order

This clause inserts a new definition of accommodation order into the Sentencing Act. Accommodation orders are dispositions specific to children and young people. The order is discussed at new part 8A.3 above.

Clause 1.78 — Dictionary, definition of *at*

To remove any doubt, a definition of 'at' is included in the dictionary. The definition includes a person being 'in' a correctional centre or detention place.

Clause 1.79 — Dictionary, new definitions

This clause adds a definition of 'Chief Executive (CYP)', who is the Chief Executive responsible for the *Children and Young People Act.*

A 'detention place' is the term used for the facility that will be used to detain children and young people. The facility is authorised and defined in the *Children and Young People Act.*

'Education and training condition' is defined in the dictionary by reference to new section 133N. An education and training condition is a condition of a good behaviour order available only for children and young people. It is discussed above under new Division 8A.2.2.

Clause 1.80 — Dictionary, definitions of presentence report matter

This clause re-makes the definition of 'pre-sentence report matter' to include the new matters relevant to young offenders set out in new section 133E.

Clause 1.81 — Dictionary, new definitions

This clause adds new definitions that are relevant to young offenders. A 'supervision condition' is a condition of a good behaviour order available only for children and young people. It is discussed above under new Division 8A.2.3.

A new definition of 'young offender' is also included. Young offender is discussed at new section 133B above.

Part 1.6 — Criminal Code 2002

Clause 1.82 — New Section 712A

This clause creates a new offence in the *Criminal Code 2002* of publishing information that identifies someone else as a person who is or was a child or young person the subject of a children's proceeding. The offence is punishable by a maximum penalty of 300 penalty units, three years imprisonment, or both.

As no fault elements are specified in the offence, and the offence has a conduct element (publishing), and an element consisting of a result (identifying the subject of children's proceedings), section 22 of the *Criminal Code* provides that there will be two fault elements, being intention and recklessness. In order to prove the offence, the prosecution will need to show that the defendant intended to publish information, and was reckless as to whether the information identifies someone (other than the defendant) as a person who is or was a child or young person the subject of a children's proceeding.

Anyone who is prosecuted for this offence and published information pursuant to a function in another law (which is defined in the *Legislation Act 2001* to include a duty, power or obligation) will be able to raise the defence of lawful authority contained in section 42 of the *Criminal Code 2002.*

Subsection712A provides that information that identifies someone includes information that discloses the name, address or suburb of the person, or of a family member of the person, or would allow the identity of the person as a child or young person the subject of children's proceedings could be worked out.

Subsection 712A(4) makes it clear that the mere fact that a person is entitled to attend a children's proceeding does not authorise that person to publish identifying information. This would mean, for example, if a victim of crime attended a children's proceeding and

subsequently disclosed identifying information to another person without lawful authority, they could be committing the offence.

Subsection 712A(5) defines a number of terms used in the offence. The term children's proceeding is defined broadly to express the Government's intention to contemplate any proceeding listed where a child or young person was the subject of proceedings. It is immaterial whether the proceeding was bought before this offence is enacted. For example, a proceeding relating to an application for an interim care and protection order which was bought under the *Children and Young People Act 1999* and heard in May of 2004 would be a proceeding to which the offence relates.

Similarly, the definition of publish is very broad. The definition is intended to capture not only media publication, but any communication of information between the defendant and another person where there is no law authorising that communication, and the communication identifies someone else as a person who is, or was, a child or young person the subject of a children's proceeding.

The offence intends to give effect to Rule 21.1 of the 1985 *United Nations Minimum Rules for the Administration of Juvenile Justice,* and protect the privacy of children and young people involved in children's proceedings. Although there is a public interest in the general nature of children's proceedings being made public, there is no inherent right for the public to know the name, or identifying details, of a child or young person who is the subject of children's proceedings. Any interest the public might have of knowing all the details of such a proceeding is overwhelmingly outweighed by the need to protect the child or young person's privacy, and prevent any prejudice to the rehabilitation and future development in life of the child or young person.

Subsection 712A(3) details a number of circumstances when the offence will not apply. It is considered that if the circumstances described in 712A(3) exist, the public interest in having access to the information outweighs the subject of the person's right to privacy.

Part 1.7 — Evidence (Miscellaneous Provisions) Act 1991

Clause 1.83 — New Division 1.84

The section is based on section 88 of the *Children and Young People Act 1999* and creates a presumption that evidence that has been obtained in contravention of, or as a consequence of, a contravention of Part 1C of the *Crimes Act 1914* (Cth) or Part 10 of the *Crimes Act 1900* should be excluded.

Upon an objection from the accused under this section, the burden will be on the accused to prove that the evidence was obtained unlawfully. If the Court is satisfied on the balance of probabilities that the evidence was obtained unlawfully, there is a presumption that it will be excluded unless the prosecution can satisfy the Court of the matters stated in section 81A(2).

If it is established that evidence that has been obtained in contravention of, or as a consequence of, a contravention of Part 1C of the *Crimes Act 1914* (Cth) or Part 10 of the *Crimes Act 1900,* the legal test for its admission is significantly more rigorous than that contained in section 138(1) of the *Evidence Act 1995* (Cth).

The high threshold is based on the particular vulnerability of children and young people in the criminal justice system and the need to ensure compliance with procedural safeguards protecting their rights and interests, and general public policy considerations on the need for authorities to adhere to the rule of law. Such considerations were articulated by Stephen and Aiken JJ in *Bunning v Cross* (1978) 141 CLR 54 at 74 when they cautioned against "the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law". The same point was made by Clark J of the US Supreme Court in *Mapp v Ohio* 367 US 643, 658 (1961) in the context of the Courts power to exclude illegally obtained evidence when the stated that:

"The criminal goes free if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws… As Mr Justice Brandeis, dissenting, said in *Olmes v The United States:*

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches its whole people by its example… If the Government becomes a lawbreaker, it breads contempt for the law; it invites every man to become a law unto himself; it invites anarchy".

Subsection 81A(3) lists a number of factors that the Court must have regard to in deciding whether it is in the public interest to admit evidence under subsection 81A(2).

This section is in addition to section 138 of the *Evidence Act 1995* (Cth), and does not limit the application of section 138 as it relates to illegal or improperly obtained evidence not concerning Part 1C of the *Crimes Act 1914* (Cth) or Part 10 of the *Crimes Act 1900.*

Part 1.8 — Magistrates Court Act 1930

This part makes a number of consequential amendments to the *Magistrates Court Act 1930* creating a division of the Magistrates Court to be known as the Childrens court, and detailing the jurisdiction and the powers of that Court.

Clause 1.84 — New chapter 4A

This clause creates a new Chapter 4A of the *Magistrates Court Act 1930* which creates a division of the Magistrates Court to be known as the Childrens court.

Section 287 provides that the Magistrates Court is to be known as the Childrens Court when exercising jurisdiction under section 288 of the *Magistrates Court Act 1930,* or is constituted by a Magistrate acting under section 291C or 291D(2) of the Act. It is important to emphasise that the Childrens Court will be part of the Magistrates Court, and not separate from it. As such, a reference to the Magistrates Court will include a reference to the Childrens Court, and the powers and jurisdiction provided to the Magistrates Court apply to the Childrens Court, unless another provision in the Magistrates Court Act or any other Territory law provide otherwise.

As the Childrens Court is part of the Magistrates Court, it may use the seal of the Magistrates Court.

Section 288 creates the jurisdiction of the Childrens Court. The Childrens Court has jurisdiction to hear any criminal prosecution of a person who was under 18 years of age when they were alleged to have committed an offence, irrespective of how old the person is when they are bought before the Court. The Court does not, however, have jurisdiction to deal with the prosecution of a crime punishable by life imprisonment. The Court also has jurisdiction and to deal with applications and proceedings under the *Children and Young People Act 2008.*

As part of its criminal jurisdiction, the Childrens Court is to be responsible for hearing bail applications for children and young people.

Subsection 288(1)(a) needs to be read together with Part 4A.3 of the *Magistrates Court Act 1930* and section 375 of the *Crimes Act 1900.* The jurisdiction created in section 288 is subject to section 375(1) of the *Crimes Act 1900.* That is to say, the Childrens Court does not have the power to hear a criminal matter summarily unless it is open to the Court to do so under section 375 of the *Crimes Act 1900.* To be clear, the maximum penalty that the Childrens Court can impose upon hearing a matter summarily is two years imprisonment.

Subsection 288(1)(b) gives the Childrens Court the jurisdiction to hear and decide any application or other proceedings under the *Children and Young People Act 2008.*

Section 289 specifies how people aged under 18 when they were alleged to have committed an offence are to be dealt with if they are jointly charged with a person who was an adult at the time the offence was alleged to have been committed. Sub-section 289(1) provides that

in such a circumstance, the child is to be taken to have been charged separately, which will mean they are to be dealt with in the Childrens Court unless the matter is to be dealt with on indictment, or the Childrens court has remanded the matter to the Supreme Court for sentencing.

Sub-section 289(2) provides an exception to sub-section 289(1) when dealing with committal proceedings. The sub-section provides that, if a person was a child or young person at the time they were alleged to have committed an offence is jointly charged with a person who was an adult at the time the offence was alleged to have been committed, the Magistrate may order that the child or young person be subject to the same committal processes as their co-accused.

Section 290 that the Chief Magistrate is responsible for the way in which the Childrens Court goes about conducting its business. The section also enables the Chief Magistrate to make arrangements for appointing and assigning Magistrates to conduct the business of the Childrens Court. The section requires the Chief Magistrate to consult the other Magistrates before making arrangements.

Section 291 provides that that all criminal proceedings that the Childrens Court has jurisdiction to hear under section 288 of the *Magistrates Court Act 1930* must be heard by the Childrens Court. Put differently, all matters which the Magistrates Court has jurisdiction to hear must be heard by the Childrens Court if the accused is a child or young person. This is subject to sections 291C and 291D. This exception acknowledges that the Childrens Court Magistrate may not be available from time to time and there will be a need for other Magistrates to undertake the work of the Childrens Court.

This section does not prevent a Magistrate other than the Childrens Court Magistrate from admitting a child or young person to bail under the *Bail Act 1992.* It is envisaged that this exception will be primarily utilised when the Magistrates Court sits on a Saturday morning to hear bail applications.

Part 4A.2 — Childrens Court Magistrate

Part 4A.2 deals with the assignment of Magistrates to deal with the work of the Childrens Court.

Section 291A requires the Chief Magistrates to appoint a Magistrate to be the Childrens Court Magistrate. The Chief Magistrate can appoint himself or herself as the Childrens Court Magistrate. The appointment is to be for a period of two years, and must be revoked if the Childrens Court Magistrate requests in writing that the appointment be revoked.

Section 291B provides that an acting Childrens Court Magistrate can only be appointed is there is no Childrens Court Magistrate, i.e. there is an ongoing vacancy, or is absent from duty or cannot exercise the functions of the Childrens court Magistrate for another reason. This section acknowledges that the Childrens Court Magistrate may not be available from time to time and there will be a need for other Magistrates to undertake the work of the Childrens Court. When a Magistrate other than the Childrens Court exercises jurisdiction under section s 291B, then the proceedings are to be taken to be heard in, or dealt with by, the Childrens Court.

Section 291C 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. Importantly, one of those criteria is that the Chief Magistrate's decision to appoint another Magistrate to hear a matter made in accordance with the best interests of the accused.

Section 291D 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 section 291B (Acting Childrens Court Magistrate) or 291C (Assignment of other Magistrates for Childrens Court

matters). This section acknowledges that, in light of the case management role undertaken by the Childrens court, it might be in the young offender's best interests to have the same Magistrate continue to preside over their matter in the interests of continuity and that Magistrates unique understanding of any circumstances relevant to the matter.

Part 4A.3 — Criminal proceedings

Section 291E 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.

Section 291E must be read in conjunction with section 375 of the *Crimes Act 1900.* If the Childrens Court does not have the power to hear a matter summarily under section 375 of the *Crimes Act 1900,* or has the power to hear a matter summarily under section 375 but declines to, then the Court must deal with the matter under Part 3.5 of the *Magistrates Court Act 1930.*

Section 291F 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. This section must be read together with section 291E(1)(a). Where the Childrens Court considers that a term of imprisonment exceeding two years may be an appropriate sentence if the offence is proved it should decline to dispose of the offence summarily.

Section 291F is a 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.

Section 291G applies if the Childrens Court convicts a child or young person of an indictable offence. The section 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 section 74D of the *Court Procedures Act 2004* 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. Also, given that the Childrens Court cannot impose a sentence of more than two years imprisonment, it may refer a matter to the Supreme Court if it considers that a sentence of more than two years imprisonment might be appropriate.

Statutory Instruments under the Children and Young People Bill 2008

This table provides an overview of statutory instruments under the Children and Young People Bill 2008.

Clause No	Clause Heading	Instrument	Statutory Instrument Type	Who Can Make
Chapter 2 Administration				
38	Official visitors—appointment	The Minister must appoint at least 1 Official Visitor. The Minister may appoint a person as an Official Visitor only if satisfied that the person has suitable qualifications or experience to exercise the functions of an Official Visitor. Certain Ministerial appointments require consultation with an Assembly committee and are disallowable (see Legislation Act, div 19.3.3).	Disallowable Instrument	Minister
43	Complaints guidelines	The Minister may make guidelines, consistent with this part, about the handling of complaints by Official Visitors. The guidelines must include 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.	Notifiable Instrument	Minister
Chapter 3 Family group conferences				
78	Family group conference facilitators—appointment	The Chief Executive may appoint a person as a facilitator (a *family group conference facilitator*) for this chapter. However, the Chief Executive may appoint a person to be a family group conference facilitator only if satisfied— • that the person has suitable qualifications and experience to exercise the functions of a family group conference facilitator; and • if the person is not a public employee—that the person is a suitable entity to be a family group conference facilitator.	Notifiable Instrument	Chief Executive
Chapter 5 Criminal matters – transfers				
114	General agreements with other jurisdictions	The Minister may enter into an agreement (a *transfer agreement*) with a Minister of a State, or a person authorised to enter into a transfer arrangement for the Minister, providing generally for the transfer of young offenders— • from or to the ACT; or • through the ACT from a State to another State. A transfer agreement relating to a State must not be entered into unless a declaration under subsection (3) has been notified under the Legislation Act in relation to the State. The Minister may, in writing, declare that a State has enacted legislation dealing with the interstate transfer of young offenders.	Notifiable Instrument	Minister

Clause No	Clause Heading	Instrument	Statutory Instrument Type	Who Can Make
		A declaration is a notifiable instrument.		
Chapter 6 Criminal matters – detention places				
141	Detention places—declaration	The Minister may declare a place to be a detention place.	Notifiable Instrument	Minister
142	Youth detention policies and operating procedures	The Chief Executive may make youth detention policies and operating procedures, consistent with this Act, to facilitate the effective and efficient management of detention services for young detainees.	Notifiable Instrument	Chief Executive
143	Exclusion of matters from notified youth detention policies etc	The Chief Executive may exclude from a youth detention policy or operating procedure notified or available for inspection in accordance with section 142 any matter that the Chief Executive believes on reasonable grounds would be likely to disclose— • information that may endanger public safety or security or good order at a detention place; or • anything prescribed by regulation. If subsection (1) applies to a youth detention policy or operating procedure— • the policy or procedure must contain a statement about the effect of this section; and • the excluded matter must be available for inspection, on request, by any of the following: • a judge; • a Magistrate; • a member of the Legislative Assembly; • a commissioner exercising functions under the *Human Rights Commission Act 2005*; • the Public Advocate; • the Ombudsman; • an Official Visitor; • anyone to whom this section applies because of a declaration under subsection (3). The Minister may declare that this section applies to a stated person. A declaration is a notifiable instrument.	Notifiable Instrument	Minister
146	Prohibited areas	The Chief Executive may, in writing, declare an area of a detention place to be a prohibited area if the Chief Executive believes on reasonable grounds that the declaration is necessary or prudent to ensure 1 or more of the following: • the safety of anyone at the detention place; • security or good order at a detention place; • that the best interests of detainees are protected.	Notifiable Instrument (*Legislation Act 2001*)	Chief Executive
147	Prohibited things	The Chief Executive may declare a thing to be a prohibited thing if the Chief Executive believes on reasonable grounds that the declaration is necessary or prudent to ensure security or good order at a detention place.	Notifiable Instrument	Chief Executive
148	Declaration of emergency	This section applies if the Chief Executive believes on reasonable grounds that an emergency (including an imminent emergency) exists in relation to a detention place that threatens or is likely to threaten— • good order or security at the place; or • the safety of anyone at the place or elsewhere.	Notifiable Instrument - initial declaration	Chief Executive

Clause No	Clause Heading	Instrument	Statutory Instrument Type	Who Can Make
		The Chief Executive may declare that an emergency exists in relation to the detention place for a stated period of not more than— • 3 days; or • if another period is prescribed by regulation—the period prescribed. To remove any doubt, the Chief Executive may make declarations for 2 or more consecutive periods under this section in relation to the same emergency. A declaration commences— • when it is made; or • if it provides for a later commencement—on that later commencement. The first declaration in relation to an emergency is a notifiable instrument. A declaration for a second or subsequent consecutive period in relation to the same emergency is a disallowable instrument. An instrument under subsection (5) or (6) must be notified under the Legislation Act not later than the day after the day it is made.	Disallowable Instrument - subsequent declarations	
165	Requirements and considerations about placement and separation of young detainees	A youth detention policy or operating procedure may make provision, consistent with this section, in relation to the placement and separation of young detainees, including separation for— • use of facilities; and • participation in education or other activities.	Notifiable Instrument	Chief Executive
166	Food and drink	A youth detention policy or operating procedure may include provision for any of the following: • the nutritional standards to be met by food and drink for young detainees; • the provision of nutritional advice about food and drink provided to young detainees; • the appointment of a nutritionist.	Notifiable Instrument	Chief Executive
170	Treatment of convicted and non-convicted young detainees	Without limiting section 142 (Youth detention policies and operating procedures), the Chief Executive must make a youth detention policy or operating procedure providing for different treatment of convicted young detainees and non-convicted young detainees.	Notifiable Instrument	Chief Executive
173	Telephone calls	An operating procedure may include provision regulating the following in relation to young detainees' telephone calls: • the times for making or receiving calls; • the frequency and length of calls; • payment for the cost of calls made.	Notifiable Instrument	Chief Executive
174	Mail	(6) An operating procedure may include provision regulating the following in relation to young detainees' mail: • the way mail is sent or received; • the provision of writing and other material for sending mail; • the storage, and return to the detainee, of mail for which a direction is given under subsection (4).	Notifiable Instrument	Chief Executive
179	Health care	A regulation may make provision in relation to health services for young detainees, including provision about the following:	Regulation	Executive

Clause No	Clause Heading	Instrument	Statutory Instrument Type	Who Can Make
		• the provision of health service clinics for young detainees; • appointments for young detainees with health professionals; • rehabilitation for young detainees who suffer personal injury arising out of or in the course of their detention; • security arrangements for young detainees visiting health professionals or health facilities, particularly outside detention places.		
185	Health reports	The Chief Executive must ensure that a treating doctor assesses the report from a relevant Chief Executive and includes a statement of the young detainee's condition (the *health schedule*) in the young detainee's case management plan (if any). A youth detention policy or operating procedure may include provision in relation to the health schedule, including provision in relation to any of the following: • the content of the schedule and, in particular, any statement about the young detainee's health risks and treatment regime; • the people who may access the health schedule and the circumstances for access.	Notifiable Instrument	Chief Executive
190	Property of young detainees	A youth detention policy may make provision in relation to a young detainee's property, including provision in relation to the following: • storage of the property; • access to, and use of, the property; • transfer of the property; • compensation for loss of, or damage to, the property; • return of the property to the young detainee.	Notifiable Instrument	Chief Executive
193	Trust accounts of young detainees	The Chief Executive must ensure that money belonging to a young detainee is held for the detainee in a trust account. The Chief Executive may deduct amounts from a young detainee's trust account for payment of any fine or reparation that must be paid as a result of disciplinary action against the young detainee. A regulation may make provision in relation to the operation or maintenance of trust accounts.	Regulation	Executive
200	Monitoring ordinary mail	However, the Chief Executive may make a youth detention policy or operating procedure in relation to reading a random selection of young detainees' ordinary mail.	Notifiable Instrument	Chief Executive
207	Designation of safe rooms	The Chief Executive may, in writing, declare a part of a detention place to be a safe room. The Chief Executive may declare a part of a place under subsection only if satisfied that— • its design will minimise the harm that a young detainee can do to himself or herself while in the room; and • it allows monitoring of, and communication with, the young detainee by the Chief Executive and	Notifiable Instrument (*Legislation Act 2001*)	Chief Executive

Clause No	Clause Heading	Instrument	Statutory Instrument Type	Who Can Make
		health professionals (other than a non-treating health professionals).		
222	Managing use of force	The Chief Executive must make a youth detention policy or operating procedure in relation to the use of force, including provision in relation to the following: • the circumstances, and by whom, force may be used; • the kinds of force that may be used; • the use of restraints.	Notifiable Instrument	Chief Executive
225	Use of restraint	The use of force under this division includes the use of restraint. The Chief Executive must ensure, as far as practicable, that the use of force involving a restraint is proportionate to the circumstances, and in particular that— • the circumstances are sufficiently serious to justify the use; and • the kind of restraint is appropriate in the circumstances; and • the restraint is used appropriately in the circumstances. The Chief Executive must also ensure that restraints are only used under this division— • by youth detention officers; and • in accordance with a youth detention policy or operating procedure that applies to their use. In applying force under this division, a youth detention officer may use a restraint, including any of the following: • body contact; • handcuffs, restraint jackets and other restraining devices; • anything else prescribed by regulation.	Notifiable Instrument	Chief Executive
227	Visiting conditions	The Chief Executive may declare conditions that apply in relation to visits to a detention place.	Disallowable Instrument	Chief Executive
233	Chief executive may allow young child to stay with young detainee	This section applies to a young detainee if— • the young detainee has a child who is under 6 years old and not enrolled in school; and • before being detained, the young detainee was the primary caregiver for the child or was having contact with the child. The Chief Executive may, by direction, allow the young detainee to have contact with, or care for, the child in a detention place. • However, the Chief Executive must not give a direction under subsection (2) unless the Chief Executive— • has carried out a care and protection appraisal of the child; and • is satisfied that it is in the best interests of the child for the young detainee to have contact with, or care for, the child in the detention place. The Chief Executive may make a youth detention policy or operating procedure about the arrangements	Notifiable Instrument	Chief Executive

Clause No	Clause Heading	Instrument	Statutory Instrument Type	Who Can Make
		to apply in relation to a young detainee having contact with, or caring for, a child in a detention place.		
235	Positive test samples	A person is taken to provide a *positive test sample* for alcohol or a drug if, when directed under this Act to provide a test sample— • the person fails to provide a test sample in accordance with the direction; or • the person provides an invalid test sample; or • for a young detainee—the young detainee provides a test sample that shows that the young detainee has taken alcohol or a drug. The Chief Executive may exempt a drug from the application of this part. An exemption is a notifiable instrument.	Notifiable Instrument	Chief Executive
238	Alcohol and drug testing—youth detention officers	A regulation may make provision in relation to alcohol and drug testing of youth detention officers whose duties bring them into contact with detainees. In particular, a regulation may make provision in relation to any of the following: • the circumstances for testing, including when and where tests may be conducted; • the conduct of the tests.	Regulation	Executive
Chapter 7 Criminal matters – search and seizure at detention places				
248	Searches—use of search dog	The Chief Executive may direct a youth detention officer to use a search dog to assist a youth detention officer in conducting a search under this chapter. Without limiting subsection (1), the Chief Executive may give the direction if the Chief Executive believes on reasonable grounds that the assistance of the dog would minimise the intrusiveness of the search by the youth detention officer. The youth detention officer and search dog may enter, and remain at any place, to assist in the conduct of a search under this chapter. An operating procedure may make provision in relation to the use of search dogs under this chapter.	Notifiable Instrument	Chief Executive
Chapter 8 Criminal matters – discipline at detention places				
293	Reporting and investigation procedures	The Chief Executive must make reporting and investigation procedures, consistent with this Act, about the making, recording and investigation of allegation reports. Without limiting subsection (1), the reporting and investigation procedures must— • require allegation reports to be made in writing and given to an administrator; and • require the administrator to whom an allegation report is given, and any investigator who investigates the alleged behaviour breach, to be a different person to the youth detention officer who makes the allegation report; and • require a young detainee to be told about an	Notifiable Instrument	Chief Executive

Clause No	Clause Heading	Instrument	Statutory Instrument Type	Who Can Make
		alleged behaviour breach in language and a way he or she can understand; and • allow a young detainee to contact 1 or 2 support people for assistance in responding to an alleged behaviour breach; and • require a young detainee to be told that he or she has the right to contact 1 or 2 support people for assistance in responding to an alleged behaviour breach.		
296	Behaviour management framework	The Chief Executive must establish a behaviour management framework for dealing with minor behaviour breaches. Without limiting subsection (1), the behaviour management framework must provide for the following: • any behaviour management consequences imposed on a young detainee to be a reasonable and proportionate response to the minor behaviour breach; • how privileges can be withdrawn for minor behaviour breaches; • review by the Chief Executive (including on request by a young detainee) of decisions to impose behaviour management consequences for minor behaviour breaches.	Notifiable Instrument	Chief Executive
308	Appointment of external reviewers	The Minister must appoint at least 1 external reviewer. A person may be appointed as an external reviewer only if the person is a Magistrate and consents, in writing, to the appointment. The *Magistrates Court Act 1930*, section 7G (Magistrates not to do other work) does not apply to the appointment of a Magistrate as an external reviewer. The Legislation Act, division 19.3.3 (Appointments—Assembly consultation) does not apply to the appointment of an external reviewer. An appointment is a notifiable instrument.	Notifiable Instrument	Minister
Chapter 14 – Care and protection – care and protection orders				
437	Care and protection assessment—authorisation of assessors	The Chief Executive may authorise a person to carry out care and protection assessments (an authorised assessor). The Chief Executive may authorise a person only if the Chief Executive considers the person is suitably qualified to carry out care and protection assessments. An authorisation is a notifiable instrument.	Notifiable Instrument	Chief Executive
Chapter 15 – Care and protection—Chief Executive has aspect of parental responsibility				
524	Approval of places of care	The Minister may approve a place operated by a residential care service as a place of care for this Act if satisfied that— • the residential care service complies with, and is	Notifiable Instrument	Minister

Clause No	Clause Heading	Instrument	Statutory Instrument Type	Who Can Make
		likely to continue to comply with, the out-of-home care standards; and • the place complies with, and is likely to continue to comply with, the out-of-home care standards. The Minister may ask the residential care service to allow the Chief Executive to inspect the place where the residential care service proposes to operate the place of care. If the Minister asks the residential care service to allow the Chief Executive to inspect the place but the residential care service does not allow the Chief Executive to inspect the place, the Minister need not decide whether to approve the place as a place of care. An approval remains in force until revoked by the Minister. If the Minister approves a place operated by a residential care service as a place of care, the residential care service may care for and accommodate children and young people at the place. An approval is a notifiable instrument.		
Chapter 16 Care and protection—therapeutic protection of children and young people				

533	What is a *risk assessment*?	For this chapter: *risk assessment*, for a child or young person, means an assessment by the Chief Executive about whether—
		• 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 may make risk assessment guidelines.
		A risk assessment guideline is a notifiable instrument.
		A risk assessment must be carried out in accordance with the risk assessment guidelines.
			Notifiable Instrument	Chief Executive

624	Therapeutic protection place—declaration	The Minister may declare a place to be a therapeutic protection place for this Act. However, the Minister may declare a place to be a therapeutic protection place only if the place— • is not used to accommodate young detainees; and • complies with the therapeutic protection standards.	Notifiable Instrument	Minister
626	Therapeutic protection place—policies and procedures	The Chief Executive may make therapeutic protection place policies and operating procedures, consistent with this Act, to facilitate the effective and efficient management of therapeutic protection places. Each therapeutic protection place policy or operating procedure is a notifiable instrument.	Notifiable Instrument	Chief Executive
Chapter 17 Care and protection—interstate transfer of orders and proceedings				
639	What is a *child welfare law*?	In this Act: *child welfare law* means— • the care and protection chapters; or • a law of a State that corresponds to the care and protection chapters; or	Notifiable Instrument	Minister

Clause No	Clause Heading	Instrument	Statutory Instrument Type	Who Can Make
		• a law of a State declared by the Minister under subsection (2) to be a child welfare law for this chapter. The Minister may, in writing, declare a law of a State to be a child welfare law for this chapter if satisfied that the law corresponds, or substantially corresponds, to the care and protection chapters. A declaration is a notifiable instrument.		
640	What is an interstate law?	In this chapter: *interstate law* means— • a law of a State that corresponds to this chapter; or • a law declared by the Minister under subsection (2) to be an interstate law for this chapter. The Minister may, in writing, declare a law of a State to be an interstate law for this chapter if satisfied that the law corresponds or substantially corresponds to this chapter. A declaration is a notifiable instrument.	Notifiable Instrument	Minister
641	Who is an interstate officer?	In this chapter: *interstate officer*, for a State, means— • the person holding the position that has the main responsibility, under the child welfare law of the State, for the protection of children and young people in the State; or • the holder of a position in the State that is declared by the Minister under subsection (2) to be an interstate officer position for the State for this chapter. The Minister may, in writing, declare a position in a State to be an interstate officer position for the State for this chapter. A declaration is a notifiable instrument.	Notifiable Instrument	Minister
Chapter 20 Childcare services				
748	Childcare service licence—childcare service standards	A childcare service licence is subject to the condition that the service must be operated in a way that complies with the childcare services standards. The Chief Executive may exempt a childcare service from 1 or more childcare services standards (a *temporary standards exemption*) if the Chief Executive believes on reasonable grounds that— • the exemption is not likely to prejudice the safety and educational, social and developmental wellbeing of a child or children being cared for by the service; and • the exemption is not likely to impact on the childcare service's promotion of the educational, social and developmental wellbeing of children; and • the childcare service has taken, or is taking, steps to comply with any childcare service standard included in the exemption; and • the exemption will not result in the proprietor of the childcare centre failing to take all reasonably practicable steps to protect the health, safety and welfare of employees of the childcare service.	Notifiable Instrument	Chief Executive

Clause No	Clause Heading	Instrument	Statutory Instrument Type	Who Can Make
		A temporary standards exemption must not include information that identifies a childcare worker or would allow the identity of a childcare worker to be worked out. A temporary standards exemption must be for not longer than 6 months. The Chief Executive may extend a temporary standards exemption if the total period of the exemption is not longer than 12 months. A temporary standards exemption may be conditional. The Chief Executive may revoke a temporary standards exemption at any time on reasonable grounds. A temporary standards exemption is a notifiable instrument.		
773	Assessing compliance with childcare services standards	At least once during the period of a childcare service licence, the Chief Executive must assess the childcare service's compliance with the childcare services standards. The Minister may make childcare services assessment requirements. A childcare services assessment requirement is a disallowable instrument. An assessment must be carried out in accordance with the childcare services assessment requirements.	Disallowable Instrument	Chief Executive
774	Annual childcare services standards report	The Chief Executive must, for each financial year, prepare a report (a *childcare services standards report*) about the compliance of licenced childcare services with the childcare services standards. A childcare services standards report must include— • any temporary standards exemptions under section 748(2); and • any compliance notices confirmed or amended under section 759(4); and • any compliance suspension notices given under section 760;and • any safety suspension notices given under section 762(2); and • any intention to cancel notices or cancellation notices given under section 764 or section 765; and • any assessments made by the Chief Executive under section 773 during the financial year to which the report relates; and • if no assessment was made by the Chief Executive under section 773 during the financial year to which the report relates for a childcare service—the date the service was last assessed and the year the service is to be assessed; and • any submissions that the Chief Executive is required to include under section 776 in a childcare services standards report; and • if a proprietor, controlling person or childcare worker for a childcare service was found guilty of, or convicted of an offence against this chapter—details of the offence.	Notifiable Instrument	Chief Executive

Clause No	Clause Heading	Instrument	Statutory Instrument Type	Who Can Make
		A childcare services standards report must comply with the childcare services standards report requirements.		
775	Annual childcare services standards report—requirements	The Minister may make childcare services standards report requirements.	Disallowable Instrument	Minister
Chapter 21 Employment of children and young people				
797	Declaration of high risk employment	The Minister may declare employment in an industry, occupation or activity to be high risk employment if satisfied that it is likely to harm a child's or young person's health, safety, personal or social development (including by sexual or financial exploitation).	Notifiable Instrument	Minister
Chapter 22 Research involving children and young people				
809	Approval of ethics committees	The Minister may approve a stated committee as an ethics committee for this chapter.	Notifiable Instrument	Minister
Chapter 26 Miscellaneous				
882	Appointment of analyst for Act	The Chief Executive may appoint analysts for this Act.	Notifiable Instrument	Chief Executive
884	Determination of fees	The Chief Executive may determine fees for this Act.	Disallowable Instrument	Chief Executive
885	Approved forms	The Chief Executive may approve forms for this Act (other than for use in relation to the Childrens Court).	Notifiable Instrument	Chief Executive
886	Standard-making power	The Minister may make standards for this Act. The standards may make provision for the following: • the conduct of family group conferences and the implementation of family group conference agreements (*family group conference standards*); • the conduct of drug testing under a drug use provision in a care and protection order (*drug testing standards*); • the care to be provided for children and young people by out-of-home carers (*out-of-home care standards*); • the operation of therapeutic protection places and services (*therapeutic protection standards*); • the operation of childcare services (*childcare services standards*); • employers of children and young people (*children and young people employment standards*); • the requirements for the operation of work experience programs (*work experience standards*); • research involving children and young people (*research standards*); • the giving and seeking of protected information by the Chief Executive under chapter 25 (*information sharing standards*).	Disallowable Instrument	Minister
887	Regulation-making power	The Executive may make regulations for this Act. A regulation may make provision for— • the duties of people in charge of detention places; and • the health and safety (including medical examinations) of children or young people, and	Regulation	Executive

Clause No	Clause Heading	Instrument	Statutory Instrument Type	Who Can Make
		other people, at places of detention; and • any of the following in relation to injuries suffered by children or young people, and other people, that arise out of, or in the course of, their detention, or the performance of community service: • injury management; • compensation for a permanent injury; • vocational rehabilitation; • death benefits; and • travel and transport arrangements for children or young people, and other 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. A regulation may also prescribe offences for contraventions of the regulation and prescribe maximum penalties of not more than 10 penalty units for offences against the regulation.		