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

Children and Young People Amendment Bill 2018

EXPLANATORY STATEMENT

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Introduction

This Explanatory Statement relates to the *Children and Young People Amendment Bill 2018* as presented in the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. The Explanatory Statement does not form part of the Bill and has not been endorsed by the Legislative Assembly.

The Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Purpose

The Bill has two purposes:

- a) To make amendments to the *Children and Young People Act 2008* (CYP Act) to clarify requirements for commencing a care and protection appraisal for matters involving allegations of abuse or neglect of a child; and
- b) To make amendments to the CYP Act to enable the sub-delegation of functions of a Responsible Person, giving full effect to important elements of *A Step Up for Our Kids: One Step Can Make a Lifetime of Difference (Out of Home Care Strategy 2015-2020)* (*A Step Up for Our Kids*) released by the ACT Government in January 2015.

Background of Glanfield Inquiry

The amendments relating to care and protection appraisals were prompted by the ACT Government's commitment to improve responses to family violence guided by the *Response to Family Violence* (2016) and, in particular, to respond to Recommendation 9(a) of the *Report of the Inquiry: Review into the system level responses to family violence in the ACT* (Glanfield Inquiry).

Recommendation 9(a) of the Glanfield Inquiry found that it is reasonable, in limited circumstances involving allegations of abuse or neglect by a parent or a person with daily care responsibility, for Child and Youth Protection Services (CYPS) to undertake an appraisal without being required to obtain an agreement from a parent or person with daily care responsibility.

In response to recommendation 9(a) of the Glanfield Inquiry, the ACT Government committed to removing legislative barriers to CYPS staff effectively undertaking care and protection appraisals.

Background of out of home care reforms

The amendments relating to the sub-delegation of Responsible Person functions realise the original intent of the role of a Responsible Person, supporting the ACT Government's ongoing commitment to improving the delivery of out of home care.

Previous amendments to implement *A Step Up for Our Kids* enabled the Director-General, Community Services Directorate to delegate specific functions to a Responsible Person. In implementation, however, it became evident that there was misalignment between the establishment of the role under the regulatory oversight system for care and protection organisations, and the intention of the role to exercise delegated responsibilities, as the *Legislation Act 2001* does not allow a delegate to sub-delegate responsibilities.

This Bill further clarifies the intent of previous amendments to enable case management decisions to be made closer to the child or young person, ensure that the ability to sub-delegate is reflected in the appropriate legislation, and provide greater clarity of the function of a Responsible Person.

The Bill also inserts technical and consequential amendments and rectifies unintended consequences of previous amendments, including the re-insertion of the ability to revoke the authorisation of foster or residential care services.

Overview of the Bill

Amendments in the Bill are intended to meet obligations under the CYP Act to promote and protect the best interests of children and young people as paramount, while providing the necessary mechanisms to ensure the rights of parents and people with daily care responsibility are limited in the least restrictive manner.

The amendments introduced by the Bill:

- clarify the requirements for effectively undertaking an appraisal for matters involving allegations of abuse or neglect of a child;
- enable the sub-delegation of functions of a Responsible Person; and
- insert technical and consequential amendments to ensure the proposed amendments are effective and rectify unintended consequences of previous amendments.

Amendments to clarify requirements for appraisals

In relation to care and protection appraisals, the amendments to division 11.2.2 of the CYP Act provide clarity for practice, application and interpretation enabling CYPS staff and the public to clearly understand the circumstances in which the Director-General may carry out an appraisal and the requirements that the Director-General should satisfy when executing this power.

The Bill does not seek to create new powers for the Director-General but clarify the pathways that already exist to guide CYPS to undertake appraisals to protect children and young people at immediate risk of harm. In doing so, the Bill provides a better balance of the rights of children at risk of harm with the rights of parents and people with daily care responsibility, within the ACT's human rights framework.

Re-balancing these rights is prompted by the need to better respond to the needs of children and young people in situations of family violence. This was made clear by the Glanfield Inquiry as well as the findings from the second *Insights Report* published by the Office of the Coordinator-General for Family Safety in February

2018, which highlighted the need for a greater focus on addressing the long-term and significant impact of trauma on children and young people as a result of family violence.

In addition, the ACT's Domestic Violence Prevention Council (DVPC) held an Extraordinary Meeting on 4 April in 2018 to focus specifically on the needs of Canberra's children and young people, recognising that children and young people can be profoundly impacted by violence in the home even when the violence is not directed at them, and that children can be lost in the complex response to family and domestic violence.

In this context, the amendments enable a better response to the needs of children in situations of family violence, by protecting and promoting the best interests of the child or young person.

Amendments to sub-delegate functions of a Responsible Person

In relation to the sub-delegation of functions of a Responsible Person, the Bill ensures that individuals within an organisation who have a closer relationship to the child or young person are able to make informed case management decisions.

These amendments are minor and technical in nature and do not alter the policy intent of the CYP Act. For example, clause 15 (section 883) allows those agencies funded under *A Step Up for Our Kids* to independently administer Responsible Person delegations within their own organisation in accordance with delegated authority. Clause 15 also removes the power of the responsible person to subdelegate to an approved foster or kinship carer, ensuring that delegated responsibilities are consistent with the policy intent of *A Step Up for Our Kids*.

Amendments to rectify unintended consequences of previous amendments

The Bill also addresses unintended consequences of previous legislative amendments to give effect to key elements of *A Step Up for Our Kids*. For example, the ability to revoke an approved carer's authorisation in section 523 'Revocation of foster carers authorisation' was removed as part of streamlining the CYP Act.

The omission of section 523 was a consequential amendment arising from the removal of section 519 'Authorisation of foster carer – general parental authority', which was replaced by the classification of an approved carer under section 514B.

The insertion of section 514B ensured that a carer's authorisation would not be able to be automatically revoked, but would allow the Director-General, Community Services Directorate to retain their discretion and rely on the power given by law to make a decision, including the power to reverse or change the decision consistent with section 180 of the *Legislation Act 2001*.

The unintended consequence of omitting section 523 was the creation of a gap in reviewable decisions as described in section 523 (4), and reliance on the work-around of deferring to section 180 of the *Legislation Act 2001* to reverse an approved carer's authorisation. In addition, as the CYP Act is prescriptive, the processes required to be undertaken when revoking a carer's approval were also removed.

The removal of section 523 and subsequent reliance on section 514 meant that carer approval was a reviewable decision, but carer revocation was not. The power to revoke therefore needed to come from the application of the *Legislation Act 2001* not from the CYP Act.

While this provided a procedural workaround to revoke a carer approval, it did not adequately address carer' ability to request a review of the decision to revoke their authorisation. This Bill reinstates this provision in the CYP Act.

In addition, the re-introduction of section 523 ensures carers have the option to seek an external review of the decision to revoke their carer approval through the ACT Civil and Administrative Tribunal (ACAT).

Overview of human rights considerations

The amendments in this Bill have been carefully considered in the context of the objects of the CYP Act described in section 7. Specific attention has been given to the overarching objective to protect the safety, welfare and wellbeing of children and young people in the ACT, and balancing their rights and interests with those of parents or people with daily care responsibility.

The amendments build on and support the analysis of human rights implications outlined in the *Children and Young People Amendment Bill 2015 (No 3)* and the *Children and Young People Legislative Amendment Bill 2016*.

The Bill engages, supports and places limitations on the following rights in the *Human Rights Act 2004* (Human Rights Act):

- section 11 (Protection of family and children)
- section 12 (Privacy and reputation), and
- section 21 (Fair trial).

These rights are principally engaged through amendments to clarify the requirements for undertaking a care and protection appraisal. Engagement with these rights needs to be carefully considered with respect to section 28 of the Human Rights Act (Human rights may be limited) to determine whether the engagement is proportionate and can be demonstrably justified, and whether it employs the least restrictive means available to achieve the purposes of protecting the human rights of children, young people and their families.

The amendments in this Bill have been developed in line with the notion that governments not only have responsibility to ensure that human rights are free from violation, but that governments are required to provide for the full enjoyment of rights, subject to any reasonable and justifiable limitations. Consideration of this responsibility supports the positive protection of the rights of children, young people and their families, consistent with section 11 of the Human Rights Act.

The Bill also seeks to embody and express relevant international human rights standards for children and young people, such as the *Convention on the Rights of the Child*. For example, the Convention requires states to act in the best interests of

the child (article 3) and provide special protection when a child cannot remain in their immediate family environment (with birth parents) (article 20).

The ACT Government acknowledges that the amendments in the Bill engage and limit the human rights of a section of the ACT community – children, young people and their parents or people with daily care responsibility. Human rights are subject to reasonable limits which are demonstrably justifiable, as outlined in section 28(2) of the Human Rights Act.

In determining if a limit is reasonable and demonstrably justifiable, the following relevant factors have been considered:

- the nature of the right affected
- the importance of the purpose of the limitation
- the nature and extent of the limitation
- the relationship between the limitation and its purpose, and
- the least restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

Section 11 Protection of family and children

Under section 11 of the Human Rights Act:

- (1) The family is the natural and basic group unit of society and is entitled to be protected by society, and
- (2) 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 nature of the right affected

The Human Rights Act recognises that families have the right to be protected by society. It also recognises that children and young people have the right to be protected from harm. This Bill seeks to effectively balance these rights in circumstances where abuse or neglect is occurring within the family unit.

The amendments to care and protection appraisals support and engage the right to protection of family and children in two key ways – by supporting the right of children to be protected from harm and by limiting the protection of the family unit in circumstances where children are being abused or neglected by their parents or people with daily care responsibility.

Furthermore, in allowing the sub-delegation of the functions of a Responsible Person, the Bill supports the best interests of a child or young person by allowing individuals within an organisation who have a closer relationship to the child or young person to make informed case management decisions.

The importance of the purpose of the limitation

The Bill aims to shift the application of division 11.2.2 of the CYP Act to balance the rights of children and young people with the rights of parents and people with daily care responsibility. This is important because children have the right to special protection due to their vulnerability to exploitation and abuse, particularly in

circumstances where abuse or neglect is alleged or perpetrated by a parent or person with daily care responsibility.

The Bill seeks to protect children and young people at immediate risk of abuse or neglect by removing the legislative barriers to effectively undertaking a care and protection appraisal. Legislative barriers can reduce the likelihood of disclosure where there is an allegation of abuse or neglect of a child where the parent or person with daily care responsibility is the alleged perpetrator. These barriers were identified by the Glanfield Inquiry and the changes contained in the Bill are important in improving responses to family violence.

The nature and extent of the limitation

The Bill limits the rights of parents or people with daily care responsibility to refuse to agree to an appraisal and provides clarity for CYPS staff and the public on the pathways available to staff for assessing circumstances where there are allegations of abuse or neglect involving a child or young person.

The Bill seeks to avoid a situation, as has previously occurred, where a violent parent endangers the safety and wellbeing of a child and intimidates CYPS, because staff were obliged to obtain agreement from each parent or person with daily care responsibility in order to interview the child.

Amendments to section 368 remove the requirement to seek agreement from ‘each’ parent or person with daily care responsibility, but maintain an obligation to obtain agreement from ‘at least one’ parent or person with daily care responsibility and require the Director-General to take reasonable steps to notify any other parent or person with daily care responsibility. This ensures that an appraisal may progress and each person is informed about the appraisal. This change addresses circumstances where disagreeing parents may unduly delay the appraisal process.

The Bill also seeks to avoid a situation where a parent who is the subject of the allegation of abuse and violence refuses to agree to an appraisal and so prevents CYPS from commencing an appraisal.

Amendments to section 369(1)(d) clarify that if both parents or people with daily care responsibility refuse to agree to an appraisal, a limited appraisal under section 371 may occur, where it is in the best interests of the child or young person. The Director-General will be required to take reasonable steps as soon as practicable to inform at least one parent or person with daily care responsibility that an action under section 371 has occurred.

In addition, section 370(1)(a) and section 371 have been amended to change the threshold for undertaking care and protection appraisals without obtaining agreement when it is ‘not in the best interests of the child or young person’. Formerly, the threshold was if the child was ‘at risk of significant harm’.

The term ‘significant harm’ was a considerably higher threshold than the threshold required for a decision to commence an appraisal. This change is consistent with section 345(1)(a)(iii), which identifies that a child or young person is in need of care and protection if they are at risk of abuse or neglect.

The change aligns the division to the overriding objects and purpose of the CYP Act, which establishes that the rights of children and young people are paramount. In the context of responding to family violence and findings of the Glanfield Inquiry, it is important to ensure the protection of children is not compromised in care and protection matters.

Given these amendments to section 370, the term ‘not practicable’ has been removed from the criteria for determining whether to proceed with a limited appraisal without seeking agreement. This responds to concerns raised by the ACT Human Rights Commission and ensures the section is robust in its protection of human rights.

The relationship between the limitation and its purpose

The purpose of the amendments is to limit the rights of parents or people with daily care responsibility to agree to a care and protection appraisal in circumstances where a parent is the alleged perpetrator of abuse or violence.

A key issue with the previous construction of division 11.2.2 was that its provisions gave greater weight to the rights of parents or people with daily care responsibility than to the rights of children and young people to be protected and kept safe from harm.

The limitations align with the principles and purpose of the CYP Act, which determines that the right of a child to be free from abuse and neglect is paramount. This purpose outweighs the right of every parent or person with daily care responsibility to agree to participate in an appraisal in circumstances where the parent is the alleged perpetrator and CYPS suspect harm to a child.

The least restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

The Bill makes clear that obtaining agreement is the preferred method for commencing any appraisal. This seeks to ensure that at least one parent or person with daily care responsibility is informed and may exercise their rights, while also maintaining the safety, welfare and wellbeing of the child or young person as paramount.

Continuing to seek agreement from each parent or person with daily care responsibility would place the least restrictions on the right of protection of family. However, it would not remove legislative barriers to effectively undertake appraisals or clarify the powers of the Director-General and does not best serve the interests and rights of children. On the other hand, entirely removing the requirement to seek agreement from each parent would amount to an unreasonable restriction of human rights.

This Bill seeks to implement the least restrictive means reasonably available to achieve the policy intent of the amendments by including a requirement to take reasonable steps to notify any other parent or person who has daily care responsibility, where agreement has been obtained from at least one person. Notifying the other parent or person with daily care responsibility of the intention to carry out an appraisal provides the parent or person with an opportunity to engage in the process.

Unless it is not in the best interests of the child or young person, CYPS staff seek agreement from each parent or person with daily care responsibility, which reflects best practice. This means that in most circumstances, each parent or person with daily care responsibility will be informed of the process and understand that an appraisal will be carried out.

The ACT Government has concluded that, in balancing the respective rights of children and their families, these amendments do not unreasonably or unnecessarily infringe on the human rights of children and young people or their parents. This is because children and young people are entitled to a safe and secure family environment, and because there is a rational connection between the proposed amendments and the issues they aim to address. These amendments are considered as a reasonable limit to rights in situations where it is in the best interests of the child to undertake an appraisal or where seeking agreement may jeopardise a criminal investigation.

Section 12 Privacy and reputation

Under section 12 of the Human Rights Act:

Everyone has the right—

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily, and
- (b) not to have his or her reputation unlawfully attacked.

The nature of the right affected

Section 12 recognises that a person must not have their privacy, family, home or correspondence interfered with unlawfully or arbitrarily. This means that when a care and protection appraisal is carried out, there should be no risk of the information contained within those documents being used in such a way as to compromise a person's privacy and reputation. However, the right to privacy is limited to the extent that it is necessary for information to be shared about children and young people when it is in their best interests.

The Bill limits the right to privacy of one parent or person with daily care responsibility because section 368 allows an appraisal to commence with agreement from one parent or person with daily care responsibility and by notifying any other parent or person.

Amendments to section 369(1)(d) may also limit the right to privacy of parents and people with daily care responsibility by establishing that if they refuse to agree to an appraisal, the Director-General may commence a limited appraisal under section 371 where it is in the best interests of the child or young person.

The importance of the purpose of the limitation

The Bill places limitations on the right to privacy to a reasonable degree necessary to protect the safety and wellbeing of children and young people. This limitation is important to protect the rights of children and young people, aligning with section 11 of the Human Rights Act.

These amendments improve the ability of CYPS staff to respond appropriately to situations where a child or young person may be experiencing abuse or neglect, such as situations of family violence where one parent is the alleged perpetrator.

The nature and extent of the limitation

Care and protection appraisals require the collection of information that may be shared to effectively make decisions in the best interests of the child or young person. In most cases, this information will amount to protected and sensitive information.

Where a limited appraisal proceeds under section 370, a parent or person with daily care responsibility may not know that this information is being collected. To balance this pathway, clause 10 includes provisions to notify the parent or person with daily care responsibility as soon as practicable after action has been taken under section 370.

Individuals and organisations holding protected or sensitive information about children and young people are required to comply with a range of privacy and information sharing requirements under ACT and Commonwealth laws.

The Director-General is governed by information collection and sharing provisions of the CYP Act and the *Public Sector Management Act 1994*. As a public authority, the Director-General and Community Services Directorate must act consistently with the Human Rights Act. The necessary protections are in place to ensure information that is collected and shared remains confidential.

Given these safeguards, the Bill does not compromise a person's reputation. The Director-General maintains confidentiality relating to decisions and the information that is collected and shared as part of a care and protection appraisal, including situations where a person is the subject of an allegation.

The relationship between the limitation and its purpose

Recommendation 9 of the Glanfield Inquiry found that it is reasonable, in limited circumstances involving allegations of abuse or neglect by a parent or person with daily care responsibility, for CYPS to undertake an appraisal without being required to obtain agreement from a parent or person with daily care responsibility.

The amendments require CYPS to seek the agreement of at least one parent or person with daily care responsibility and to take reasonable steps to notify any other parent or person with daily care responsibility about the proposed appraisal, unless it is not in the child's best interests or is not practicable, for example because one parent cannot be easily located or is the subject of the allegation.

The purpose of the limitation is to protect the best interests of children and young people. This will be achieved by ensuring that information can be obtained and disseminated in the interests of their safety and wellbeing. The limitation will also ensure that appraisals are not unnecessarily delayed because of disagreement between parents or because a parent or person with daily care responsibility who is the subject of an allegation refuses to allow an appraisal to commence.

The least restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

The Bill acknowledges the critical importance of protecting children and young people from harm and of ensuring that the best interests of children are paramount in the appraisal process. While the least restrictive means of undertaking an appraisal would be to obtain the agreement of each parent or person with daily care responsibility, this would undermine the policy intent of the amendments to better protect children and young people in the appraisal process.

The Bill limits families' right to privacy by lowering the threshold of section 370 to ensure that a limited appraisal under section 371 can proceed without seeking prior agreement of either parent. On balance, this is considered a reasonable limit to rights in order to achieve the purpose of acting in the best interests of the child or in situations where to seek agreement may jeopardise a criminal investigation.

Similarly, if one parent or person with daily care responsibility refuses to agree to an appraisal, the risk to a child or young person's safety remains. The Bill ensures that the right to privacy for a parent or person with daily care responsibility is limited only to the extent necessary to protect children and young people in limited circumstances when there are allegations of abuse or neglect or family violence situations.

Section 21 Fair trial

Under section 21 of the Human Rights Act:

- (1) Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
- (3) But each judgment in a criminal or civil proceeding must be made public unless the interests of a child requires that the judgment not be made public.

The nature of the right affected

The right to a free and fair public hearing means that parents and people with daily care responsibility have the right to know if their rights are being affected and to be given fair opportunity to be involved in matters that affect their children and family. To this extent, section 21(1) and section 21(3) of the Human Rights Act are relevant to the operation of the Bill.

The Bill places certain limits on these rights in clause 10. Principally, the appraisal pathways outlined in the Bill mean that a parent or person with daily care responsibility may have their section 21 rights limited in two ways:

- their rights may be affected without their knowledge, and/or
- they may be denied an opportunity to object.

This Bill also reinstates the ability of the Director-General to revoke the authorisation of foster or residential care services. This engages section 22(1) by promoting an applicant's right to procedural fairness. The requirements of procedural fairness

include that a person should not be penalised by a decision unless that person has been given notice of a decision affecting their rights or interests.

For example, amendments to section 514EA(3) promote procedural fairness and facilitate the fair resolution of the revocation of approved carers. A person must be given notice of the Director-General's intention to revoke the authorisation, which must include the reasons for revoking their authorisation and provide an opportunity for the person to make a written submission to the Director-General. The Director-General must consider any written submission provided in response.

The importance of the purpose of the limitation

The objects, purpose and principles of the CYP Act articulate its primary function in safeguarding and promoting the wellbeing, care and protection of children and young people. In doing so, section 8 of the CYP Act ensures that the paramount consideration of decision makers must be the best interests of the child.

To give effect to these functions, there are circumstances where it is important to limit the rights of parents and people with daily care responsibility to ensure the best interests of children and young people are at the forefront of decision-making.

For example, there are time-critical circumstances where informing a parent or person with daily care responsibility that an appraisal is being carried out may put the safety, welfare and wellbeing of a child or young person at risk. These circumstances occur where there are concerns about the safety, welfare and wellbeing of a child or young person in situations of family violence where a parent is an alleged perpetrator. For this reason, it is important that the Bill limits the rights of parents or people with daily care responsibility by the least restrictive means possible.

The nature and extent of the limitation

Decisions made under part 11.2 are not administrative in nature and therefore do not ordinarily give rise to an external review pathway. Appraisals are often time-critical and require swift action, particularly where section 370 applies. This means that in circumstances of family violence, the protection of a child or young person is at the forefront of decision-making and places a limitation on parents' right to privacy.

For example, amendments to section 368(2)(a)(i) remove the requirement to seek agreement from 'each' parent or person with daily care responsibility to clarify that the Director-General (and care and protection staff) may proceed with an appraisal once they have obtained the agreement of one person.

Furthermore, section 370(1)(a) and section 371 have been amended to change the threshold for undertaking care and protection appraisals without obtaining agreement to when it is 'not in the best interests of the child or young person' (previously the threshold was 'at risk of significant harm'). This change also has implications for a person's right to know that their rights are being affected.

The relationship between the limitation and its purpose

These changes align division 11.2.2 to the overriding objects and purpose of the CYP Act that enshrine the rights of children and young people as paramount. It is

important to ensure the protection of children is not compromised in care and protection matters, given the traumatic effects on children with any exposure to or experience of family violence.

The Bill allows the Director-General to effectively respond to circumstances of family violence where it is not appropriate to inform a person that appraisal action will be undertaken, including where a person is in a relationship with the alleged offender.

The least restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

The Bill seeks to limit the rights of parents and people with daily care responsibility through the least restrictive means available to achieve the policy intent. It is recognised that including parents or people with daily care responsibility in decision-making about their children is vitally important and will result in better outcomes for children and families.

Given this, CYPS staff routinely engage with all parties to build trust and develop effective relationships. Staff encourage parents, or people with daily care responsibility, to participate in appraisal processes when these occur. CYPS also continues to endeavour to inform each parent or person with daily care responsibility where it is in the child's best interests to do so. This means that all parties are generally able to exercise their rights, while maintaining the safety, wellbeing and welfare of the child or young person as paramount.

For example, the Bill includes provisions to take reasonable steps to notify any other parent or person who has daily care responsibility, where agreement has been obtained from at least one person (s368(2)(a)(ii)).

In practice, agreement is generally sought from each parent or person with daily care responsibility. For example, when agreement is obtained from one parent, then efforts seeking others' agreement serve as notification. This is reflected in s369(1)(a) and (b) mirroring s369(5).

The Bill also maintains the restriction on actions that may be taken in relation to a child or young person without the agreement from at least one parent. Where there is no agreement, the Director-General may only undertake limited activities as set out in section 371, specifically a visual inspection and interview of the child. The Director-General will also be required to take reasonable steps to inform at least one parent that an action under section 371 has been undertaken.

On balance, it is considered that the Bill appropriately balances the rights of a child with the rights of parents or people with daily care responsibility, governed by the overriding principle that decisions must be taken in the best interests of a child or young person.

Notes on Clauses

Clause 1 Name of the Act

This is a technical clause and sets out the name of the Act as the *Children and Young People Amendment Act 2018*.

Clause 2 Commencement

This clause enables the Act to commence on the day after it is notified on the Legislation Register.

Clause 3 Legislation Amended

This Act amends the *Children and Young People Act 2008*.

Clause 4 Aspects of parental responsibility may be transferred Section 17 (1) (g), note

This clause is a consequential amendment. The previous note referred to section 503A, which is being moved to the new section 883A.

The note has been updated to reflect the change from section 503 to the new section 883.

Clause 5 Aspects of parental responsibility may be shared Section 18 (1) (d), note

This clause is a consequential amendment. The previous note referred to section 503A, which is being moved to the new section 883A.

The note has been updated to reflect the change from section 503 to the new section 883.

Clause 6 Director-general must give identity cards Section 26 (2)

This clause is a consequential amendment as a result of introducing section 883A, that the Director-General does not need to provide identity cards to delegations under section 883A, and subdelegations under section 883B.

Clause 7 Director-general action on child protection report Section 361 (4) (a)

This clause is a consequential amendment reflecting the name of section 368.

Clause 8 Section 361 (4) (b)

This clause is a consequential amendment reflecting the name of section 371.

Clause 9 Division 11.2.2, heading

This clause changes the name of division 11.2.2 to Appraisal by Director-General.

Clause 10 Sections 368 to 371

This clause reframes division 11.2.2 to clarify the power to carry out appraisals to ensure Child and Youth Protection Services (CYPS) and the public clearly understand the circumstances in which the Director-General may carry out an appraisal and requirements that must be satisfied when executing this power.

Section 368 establishes the power to carry out a care and protection power if the Director-General decides that a child concern report about the child or young person is a child protection report under section 360 (5) (Director-general to act on child concern report).

Section 368 clarifies that there are four pathways available to the Director-General, Community Services Directorate, to proceed with an appraisal:

- (a) with agreement from at least one parent or person with daily care responsibility with reasonable steps taken to notify any other parent or person with daily care responsibility
- (b) with an Appraisal Order (Court Order)
- (c) without agreement of either parent where it is in the best interests of the child or young person (under section 370), or
- (d) where the Director-General has daily care responsibility for the young person, or shares it with another person.

Section 368(2)(a)(i) removes the requirement to seek agreement from 'each' parent or person with daily care responsibility. It maintains an obligation to obtain agreement from 'at least one'. The threshold has been changed to ensure CYPS and the public are clear that an appraisal may proceed with one person's agreement.

Section 368(2)(a)(ii) requires that each other person is notified that an appraisal is occurring. In practice, agreement is sought from each person. If one person agrees, then efforts seeking others' agreement will serve as notification. This is reflected in s369(5) mirroring s369(1)(a) and (b).

Section 368(2)(d) makes explicit that an appraisal may be carried out where the Director-General has or shares daily care responsibility. This power was previously implicit, given that the Director-General would agree to an appraisal. This provision provides further clarity as to the power to carry out an appraisal.

Section 369 outlines the requirements to satisfy agreement and notification for the purposes of carrying out an appraisal under section 368(2)(a). It also clarifies the circumstances where the Director-General is not required to notify a person about an appraisal being carried out.

Section 370 changes the threshold to carry out an appraisal without agreement to circumstances where it 'is not in the best interests of the child'. It clarifies circumstances in which the Director-General may carry out a limited appraisal under section 371 without obtaining agreement from a parent or person with daily care responsibility.

Section 371 clarifies that if section 370 applies, the Director-General may only visually examine or interview the child or young person. Section 371(2) ensures that the Director-General may enter a school, health facility or childcare service to visually examine and interview a child or young person when the child or young person is in one of these settings.

The term ‘visual examination’ is intended to mean that the Director-General 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 section does not authorise the Director-General to adjust or remove the clothing of the child or young person 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 parent or person with daily care responsibility or authorised by an appraisal order.

Sections 371(3) requires the Director-General to take reasonable steps to inform at least one parent or person with daily care responsibility as soon as practicable after visually examining or interviewing a child or young person.

Section 371(4) establishes that where it is not in the best interests of the child or young person or may jeopardise a criminal investigation, the Director-General is not required to inform a parent or person with daily care responsibility.

Section 371(5) clarifies that this section does not limit the Director-General’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 sections 360(4) and 361, emergency action at section 406, applications to the Childrens Court for a care and protection order at section 424 or giving information as authorised under part 25.3.

**Clause 11 Appraisal Orders—application by director-general
Section 376 (b) and notes**

This clause reflects changes made to sections 369 and 370 to ensure the appraisal order process aligns with division 11.2.2.

**Clause 12 Appraisal Orders—criteria for making
Section 382 (a)**

This clause reflects changes made to sections 369 and 370 to ensure the appraisal order process aligns with division 11.2.2.

**Clause 13 Care plans—director-general delegations
Section 457A**

This clause omits section 457A to consolidate delegated functions into the new section 883A.

**Clause 14 Annual review report—director-general delegations
Section 501A**

This clause omits section 501A to consolidate delegated functions into the new section 883A.

**Clause 15 Parental Responsibility—director-general delegations
Section 503A**

This clause omits section 503A, to consolidate delegated functions into the new section 883A. This clause removes the power of a responsible person to subdelegate parental responsibility to a foster or kinship carer.

**Clause 16 Placement with out-of-home carer—director-general delegations
Section 513A**

This clause omits section 513A to consolidate delegated functions into the new section 883A.

**Clause 17 Approved carers—director-general may approve
Section 514B (1), note**

This clause omits the note because a specific provision about revocation is being inserted (section 514EA).

Clause 18 Section 514EA

This clause inserts section 514EA to address the unintended consequence of omitting section 523 as part of the *Children and Young People Amendment Act 2015 (No 3)*. This clause reinstates the ability of the Director-General to revoke a carer's approval without deferring to section 180 of the *Legislation Act 2001*.

This clause outlines the process required when revoking a carer's approval and makes provisions for a carer to request an external review of the decision to revoke their carer authorisation.

A person must be given notice of the Director-General's intention to revoke the authorisation, which must include the reasons for revoking their authorisation and provide an opportunity for the person to make a written submission to the Director-General. The Director-General must consider any written submission provided in response.

**Clause 19 Approved carers—director-general delegations
Section 514G**

This clause omits section 514G to consolidate delegated functions into the new section 883A.

**Clause 20 Transition plans—director-general delegations
Section 529HA**

This clause omits section 529HA to consolidate delegated functions into the new section 883A.

**Clause 21 Access to protected information—director-general delegations
Section 529NA**

This clause omits section 529NA to consolidate delegated functions into the new section 883A.

**Clause 22 Meaning of *reviewable decision*—div 24.1.3
Section 839, table 839.1A, new item 2A**

This clause is a consequential amendment as a result of Section 514EA and the reinstatement of the ability of the Director-General to revoke a carer's approval.

The inclusion of this item in Section 839, table 839.1A as a reviewable decision ensures clarity of process and the ability to seek a review of the revocation decision.

Clause 23 Care teams—sharing safety and wellbeing information Section 863 (5) and note

This clause omits section 863(5) and note to consolidate delegated functions into the new section 883A.

Clause 24 New sections 883A to 883C

This clause establishes sections 883A to 883C to consolidate delegated functions.

Section 883A(1) consolidates Director-General delegations with respect to a responsible person for an approved kinship and foster care organisation. The Director-General may delegate functions including care plans, annual review reports, placements, approval of carers, transition plans, entitlement to personal items and access to protected information. This section also authorises the delegation of daily care responsibility and the authority to decide contact provisions.

Section 883A(2) consolidates Director-General delegations with respect to a residential care service. The Director-General may delegate functions including care plans, annual review reports, transition plans, entitlement to personal items and access to protected information and care teams.

Section 883B enables a responsible person to subdelegate functions to a position within the responsible person's organisation. The responsible person must be satisfied that the position has responsibility for the operation or administration of the function. The occupant of the position must be an employee of the organisation and possess the necessary skills and qualifications to properly undertake the responsible person duties.

Section 883C requires that each organisation that subdelegates responsible person duties must maintain a register of subdelegations. The register must include the start date, the position receiving the subdelegation, any limitations or conditions on the circumstances, the functions subdelegated, any amendments and the nature of those amendments, and if the subdelegation is revoked, the date of revocation.

Section 883C(3) enables the Director-General to inspect an organisation's register within a reasonable time requested by the Director-General.

Clause 25 New chapter 31

This clause establishes transitional arrangements for certain Director-General delegations. Chapter 31 allows certain delegations that are already in force to continue under Clause 24.