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

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Children and Young People Amendment Bill 2024 (No 2)

SUPPLEMENTARY EXPLANATORY STATEMENT

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Children and Young People Amendment Bill 2024 (No 2) Government Amendments

OVERVIEW OF THE BILL

On 19 March 2024, the Children and Young People Amendment Bill 2024 (No 2) (the Bill) was introduced into the Legislative Assembly. The Bill makes amendments to the Children and Young People Act 2008 to establish a better-quality framework for the ACT's child protection and family support system.

The Government amendments to the Bill (the Amendments) are urgently required to resolve a technical issue concerning the sharing of sensitive and protected information within civil claims and proceedings under section 866 of the Children and Young People Act 2008 (the CYP Act).

The purpose of the Amendments is to streamline the ability to share protected or sensitive information in civil claims and proceedings and ease the burden on victim-survivors seeking relevant information in these cases.

The Amendments follow the decision of Acting Justice Curtin (Curtin AJ) in the ACT Supreme Court, in *Kelley Jeffries (a pseudonym) v ACT; Sabrina Cooke (a pseudonym) (by her litigation guardian Kelley Jeffries (a pseudonym)) v ACT [2023] ACTSC 239* (the Jeffries Decision).

The Jeffries decision provides that without a court order, the Director-General is unable to share specific information with the Territory, its legal representatives, or the plaintiffs.

This creates significant delays and difficulties for victim-survivors of child abuse who wish to bring a civil claim arising from their past involvement with Child and Youth Protection Services in accessing relevant protected or sensitive information under the CYP Act to progress any claim.

The Amendments create a new exception to section 846 – secrecy of protected information. This exception specifies that it is not an offence to record or divulge protected information in connection to a civil claim or proceeding where the Territory is the respondent, and where the claimant (or person on whose behalf the claim is made) was a child or young person at the time of the act or omission related to child abuse, that forms the basis of the claim. This exception specifically applies to claims of child abuse as defined in the Civil Law (Wrongs) Act 2002.

The Amendments also introduce a new provision clarifying that the Director General may share information with the Territory or another entity for when it is reasonably required for the proper handling of a civil claim.

The Amendments introduce section 856C, which outlines specific authorisations for sharing information for civil claims related to child abuse as defined in the *Civil Laws (Wrongs) Act 2002* where the Territory is the respondent to the claim. Section 856C(2) empowers the Director General to disclose protected information to another party if the information is relevant to a civil claim and the Director General is satisfied on reasonable grounds that providing the information is necessary for the proper handling of the claim.

Under section 856C(3), a recipient of information from the Director General may further disclose it to another party if they are satisfied on reasonable grounds that such disclosure is necessary for the proper handling of the civil claim.

Sections 856C(4) and 856C(5) specify that a party that receives information under section 856C – whether from the Director General or from another entity – may only use this information or disclose it to another party for a purpose reasonably related to the proper handling of the civil claim.

Through these two subsections, the Amendments strictly confine the use of any information obtained in association with a civil claim, disallowing any secondary use.

A new offence provision is introduced at section 846(3) to support the new section 856C, providing that a person (other than an information holder) will be subject to an offence if they receive protected information for the purposes of handling a civil claim, disclose this information for any other purpose, and demonstrate recklessness regarding whether the information is protected. The maximum penalty is 50 penalty units or 6 months imprisonment, aligning with existing information secrecy offence provisions in the Act.

The purpose of this provision is to expand information sharing protection to individuals who receive information under these provisions but are not information holders, and therefore fall outside the scope of existing information secrecy offences. For example, if a claimant obtains information under these provisions and shares it with a third party, such as an expert or psychologist, to advance their claim, the new offence applies to the third party if they share the information for any other purpose.

It is not intended that the offence will have wide-reaching application. Information sharing is only permissible when it is necessary for the proper handling of a civil claim. This ensures that the sharing of information occurs within the confines of legal necessity and doesn't unnecessarily compromise privacy or confidentiality.

The Amendments further clarify that under section 866, the court has the authority to require the Director-General to disclose protected and sensitive information to a third party, before or after legal action begins. This provision empowers parties involved in a civil claim to seek access to relevant information through judicial channels, regardless of whether formal proceedings have started.

The Amendments aim to reduce delays in civil litigation, making it a more effective means of providing justice for victim-survivors, in line with recommendations from the

Royal Commission's Report on Redress and Civil Litigation, amongst others. This approach also aligns with established practices previously accepted in the ACT, prior to the Jeffries decision.

CONSULTATION ON THE PROPOSED APPROACH

As detailed in the explanatory statement previously tabled with the Bill, the Government engaged in various forms of consultation with the public and stakeholders during its development.

These Amendments were deemed urgent and essential by the Community Services Directorate, following the Jeffries decision, so consultation has been limited to relevant ACT Government directorates.

CONSISTENCY WITH HUMAN RIGHTS

During the development of the Bill and the Amendments due regard was given to compatibility with human rights as set out in the Human Rights Act 2004 (ACT) (the HR Act).

The Amendments engage, promote and impose limitations on certain human rights under the HR Act.

The rights engaged by the Amendments include:

- Section 11 – Protection of the family and children (Engaged)
- Section 12 – Privacy and reputation
- Section 18 – Right to liberty and security of person
- Section 21 – Right to a fair trial

The HR Act's preamble acknowledges that few rights are absolute and states that rights may be subject to reasonable legal limits that can be demonstrably justified in a free and democratic society. Section 28 of the HR Act which outlines factors to consider in determining whether a limitation is reasonable and proportionate, including the nature of the right, the importance and extent of the limitation, the relationship between the limitation and its purpose, and the availability of less restrictive means to achieve the intended purpose.

While the Amendments engage and place limitations on specific rights in the HR Act, namely privacy and reputation (section 12), these limitations are accompanied by appropriate safeguards. The safeguards ensure that any restrictions on rights are proportionate and justified, aligning with the Bill's overarching objectives to promote and uphold the safety, welfare, and wellbeing of children and young people and enhance transparency and accountability of the Territory's decision making with a commitment to protecting and promoting fundamental human rights.

Rights Promoted

The Amendments promote the following rights in the HR Act:

- Section 21 – Right to a fair trial

Section 21 of the HR Act protects the right to a fair trial. The right to a fair trial is of paramount importance to upholding the rule of law.

The right to a fair and timely hearing is a cornerstone of justice, emphasising the need for legal proceedings to be conducted expeditiously and without unnecessary delays. This principle is integral to ensuring that justice is not only done but seen to be done, upholding the integrity of the legal system and the rights of all parties involved.

The Amendments promote the right to a fair trial by ensuring that, where historical child abuse or other harm is or may be litigated, information that is relevant to those claims is accessible by all parties. This will allow the plaintiffs to progress their claims without unnecessary delays or increased costs required by the current information sharing provisions for court proceedings.

Rights Limited

Broadly, the Amendments may engage and limit the following rights in the HR Act:

- Section 12 – Privacy and reputation
- Section 18 – Liberty and security of person

Section 12 – Privacy and reputation

Nature of the right and the limitation (s28(a) and (c))

Section 12 of the HR Act protects people from unlawful or arbitrary interference with their privacy, family, home, or correspondence.

The information that would be sought in civil claims and proceedings under these provisions would inherently involve the highly sensitive and personal information of individuals and their families involved in child protection, out of home care or the youth justice system.

These cases often involve allegations of abuse or neglect and other sensitive information about the experiences of children and young people and their families. Access to this information under these sections could lead to the further disclosure of personal information contained in child protection or youth justice records.

Legitimate purpose (s28(b))

The primary objective of the Amendments is to promote the rights of victims in civil claims and proceedings to expeditiously progress matters in relation to child abuse

claims and to limit the burden on all parties, including the ACT Government, in processing requests for information.

Rational connection between the limitation and the purpose (s28(d))

To facilitate these matters, the provisions require the disclosure of protected, sensitive and personal information held in child protection and youth justice records about children, young people and families. This ensures that all parties to civil claims receive adequate and relevant information to contest their matter, in a manner that is timely and non-burdensome. This is critical to the principle of access to justice.

Proportionality (s28 (e))

The limitation on the right to privacy and reputation in the context of civil claims and proceedings is proportionate, balancing the need for transparent and fair processes with the protection of individuals' right to privacy. Currently, the same information may be accessible to parties but the current process is more onerous one that requires additional court applications. Whilst information will be more readily released, there will still be limits to accessing this information. The Amendments require at section 856C that, only information that is relevant to the civil claim and proceedings and that the person reasonably requires in relation to the claim, may be released.

Importantly, the Amendments strictly confine the use of information obtained solely to matters directly associated with the civil claim or proceeding related to child abuse as defined under the *Civil Law (Wrongs) Act 2002*, imposing penalties for any unauthorised secondary use.

This will minimise any unnecessary intrusion into personal information and private lives whilst ensuring access to justice.

All information obtained under the *Children and Young People Act 2008* continues to be protected by existing secrecy provisions. This includes offences for recording or divulging information when not in accordance with the law and protection of identifying information including information that would allow a person's identity as someone who made a report about a child or young person to be worked out.

The approach in the Amendments balances the commitment to both upholding the right to a fair and transparent legal process and protecting the privacy and dignity of individuals within the system.

Section 18 –Liberty and security of person

Nature of the right and the limitation (s28(a) and (c))

Section 18 of the HR Act protects liberty and security of person. In particular, no one may be arbitrarily arrested or detained.

Section 846(3) creates an offence for people who are not information holders who receive information under these provisions and divulge information for any other purposes other than the proper handling of a civil claim.

The maximum penalty is 50 penalty units or imprisonment for 6 months or both, reflecting existing penalties for unlawful information sharing of information obtained under the Act.

Legitimate purpose (s28(b))

The primary objective of the Amendments is to promote the rights of victims in civil claims and proceedings to expeditiously progress matters in relation to child abuse claims and to limit the burden on all parties, including the ACT Government, in processing requests for information.

Rational connection between the limitation and the purpose (s28(d))

The limitation on liberty and security of person is rationally connected to the legitimate purpose of the Amendments. By ensuring that information shared in the context of civil claims related to child abuse is used solely for its intended purpose, the Amendments protect the integrity of the legal process and the privacy of individuals involved. This focused use of information helps to streamline proceedings, thereby expediting justice for victims and reducing administrative burdens.

The offence provision acts as a deterrent against the misuse of information, reinforcing the seriousness of maintaining confidentiality and appropriate use.

The offence provision extends the existing information sharing offences to include people who are not information holders, who receive information for the proper handling of a civil claim and share this information for an unrelated secondary purpose. The offence provision is comparable to similar offence provisions in the Act.

Proportionality (s28 (e))

The limitation imposed by the Amendments is proportionate to the objectives it seeks to achieve. The measure balances the need to protect the privacy and security of individuals involved in child abuse claims with the broader public interest in the efficient administration of justice.

The restriction offence is narrowly tailored, applying only to the misuse of shared information, to those who receive information under the provisions but are not information holders, and therefore fall outside the scope of existing information secrecy offences. For example, if a claimant obtains information under these provisions and shares it with a third party, such as an expert or psychologist, to advance their claim, the new offence applies to the third party if they share the information for any other purpose.

The requirement for the person to be “reckless” adds an additional layer of protection, ensuring that only those who act with a disregard for the status of the information or the appropriateness of its use are subject to penalties. Specifically, the person must be reckless about whether the information is protected information and whether the purpose for its use is proper in the context of handling a civil claim. This element ensures that accidental or unintentional breaches are not penalised, which helps maintain a fair and just legal framework.

The penalties for breaching this provision—50 penalty units or imprisonment for 6 months, or both—are consistent with existing penalties for unlawful information sharing under the Act. These penalties are designed to be significant enough to deter potential breaches while remaining proportionate to the gravity of the offence. The possibility of imprisonment underscores the seriousness of the offence and aligns with existing legal standards for similar violations, ensuring that the penalties are not excessive but adequate to achieve the intended deterrent effect.

The proposed terms of imprisonment are a maximum term only. Courts have discretion not to apply a term of imprisonment, or to apply a lesser term. The maximum term is expected to only apply to the most serious incidents. Although a lesser term of imprisonment may be considered a less restrictive means to address this behaviour, considering the serious harm the offence can entail by infringing on a person’s privacy, any lesser maximum term of imprisonment is not considered appropriate.

The proportionality of these penalties ensures that the legal response to breaches is balanced and fair. The penalties serve as a substantial deterrent to prevent the misuse of information, thereby protecting the rights and privacy of individuals involved in child abuse claims. At the same time, the inclusion of the element of recklessness as a criterion for culpability ensures that only those who consciously disregard the proper use of the information are penalised, maintaining the integrity of the justice system while protecting individual freedoms.

CLAUSE NOTES

Children and Young People Amendment Bill 2024 (No 2)

Clause 1 Proposed new clauses 22A to 22I, Page 23, line 20 -

This clause inserts clauses 22A to 22I into the *Children and Young People Amendment Bill 2024 (No 2)*.

Clause 22A Offence—secrecy of protected information—New section 846 (3)

This clause inserts a new subsection at section 846, within part 25.2 of the *Children and Young People Act 2008* (the Act). This Part creates an offence to make a record or divulge information that is protected under the Act. Exceptions to these offences are also provided in this Part.

The subsection provides that it is an offence for a person, other than an information holder, who is given protected information about someone else for the purpose of the proper handling of a civil claim under section 856C to divulge the protected information for a purpose other than the proper handling of the civil claim and be reckless about whether the information is protected information about someone else, and whether the purpose is for the proper handling of the civil claim. The subsection stipulates a maximum penalty of 50 penalty units, imprisonment for 6 months, or both.

Clause 22B Exception to s 846—information given under this Act—Section 847 (2)

This clause amends subsection 847 (2), within Part 25.2 of the Act.

As a result of inserting a new offence at subsection 846 (3), reflected in Clause 22A, this amendment extends the exceptions to information sharing offences outlined at section 847 to include section 846 (3).

This means subsections 846 (2) and (3) do not apply to the divulging of protected information if the information is divulged under this Act, or in the exercise of a function, as an information holder, under this Act.

Clause 22C Exception to s 846—information given under another law—Section 848 (2)

This clause amends subsection 848 (2), within Part 25.2 of the Act.

As a result of inserting a new offence at subsection 846 (3), reflected in Clause 22A, this amendment extends the exceptions to information sharing offences outlined at section 848 to include subsection 846 (3).

This means subsections 846 (2) and (3) do not apply to the divulging of protected information if the information is not sensitive information and the information is

divulged under another Territory law, or in the exercise of a function, as an information holder, under another Territory law.

Clause 22D New section 849A

This clause inserts a new section, “Section 849A—Exception to s 846—information given for civil claims in which Territory is respondent” within Part 25.2 of the Act.

This section provides that the offence provisions at section 846 do not apply to the making of a record or sharing of protected information if the record is made, or information divulged, in accordance with section 856C.

Clause 22E New section 856C

This clause inserts a new section, “Section 856C—Giving and using information for civil claims in which Territory is respondent” into the Act.

This section applies to civil claims where the act or omission the subject of the claim relates to child abuse and in which the Territory is a respondent. It only applies if the claimant, or person on whose behalf a claim is made, was a child or young person when an act or omission the subject of the claim, occurred.

Section 856C(2) empowers (but does not require) the Director General to provide protected information to a Territory entity, or person acting on behalf of the Territory, if the Director General is satisfied that the information is reasonably required for the proper handling of a civil claim. It also empowers the Director General to provide protected information to any other entity if satisfied on reasonable grounds that giving the information is necessary for the proper handling of the civil claim.

Examples in this section include the Director General giving protected information to a “party to a claim” or “legal representative of a party to a claim” for the proper handling of a civil claim.

An entity that receives protected information under section 856C(2) is authorised at section 856C(3) to provide the information to another person if they are satisfied on reasonable grounds that the information is required for the proper handling of the civil claim.

An entity that receives protected information under sections 856C(2) or 856C(3) is explicitly confined by section 856C(4) to using that information only for a purpose reasonably related to proper handling or management of the civil claim. Section 856C(5) clarifies that, in this context, “use” of information includes giving information to another entity.

The section does not limit the Director General’s powers to share information otherwise under the Act or another law.

For this section, “child abuse” means child abuse within the meaning of the *Civil Law (Wrongs) Act 2002*, section 114A. A “civil claim” means a claim within the meaning of the *Civil Law (Wrongs) Act 2002*. A “territory entity” means an administrative unit, a territory authority, a public employee, or a police officer.

**Clause 22F Court may order sensitive information to be given or produced—
Section 866 (1)**

Section 866 outlines powers and arrangements for a court to order that sensitive information is provided to it in any proceeding. It also outlines considerations and safeguarding processes in relation to giving sensitive information to parties to a proceeding, including requiring the court to consider the desirability of protecting the identity of persons who made certain reports, as provided by section 857.

This clause amends subsection 866 (1) to extend its application to any civil claim in addition to any proceeding.

Clause 22G Section 866 (1)(a)

This clause makes a further amendment to section 866, specifically to subsection (1) (a). It authorises a court to order an information holder to give sensitive information to a party to a civil claim or any other proceeding.

Clause 22H Section 866 (2)

This clause amends subsection 866 (2), within Part 25.4 of the Act. Part 25.4 addresses the provision of information to courts and investigative entities.

The amendment extends the operation of subsection 866(2) from information relevant to a proceeding, to information relevant to either a claim or proceeding.

It also provides that the court must not give information produced under subsection 866 (1) to parties unless satisfied that the information is materially relevant to the claim or proceeding, and if the information is about a child or young person – that the best interests of the child or young person are protected.

Clause 22I Section 866 (8)

This subsection indicates that the term “civil claim”, as used in section 866, has the same meaning as when used in section 856C (7) – that is, a claim within the meaning of the *Civil Law (Wrongs) Act 2002*.