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**TENTH ASSEMBLY**

**CHILDREN AND YOUNG PEOPLE AMENDMENT BILL 2024 (No 2)**

**EXPLANATORY STATEMENT  
and  
HUMAN RIGHTS COMPATIBILITY STATEMENT  
(*Human Rights Act 2004, s 37*)**

**Presented by  
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## **CHILDREN AND YOUNG PEOPLE AMENDMENT BILL 2024 (No 2)**

The Children and Young People Amendment Bill 2024 **is** a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

### **OVERVIEW OF THE BILL**

The *Children and Young People Act 2008* (CYP Act) stands as a pivotal legislative framework, fundamentally dedicated to ensuring the safety and wellbeing of children and young people in the ACT. As one of the Territory's most comprehensive and complex laws, the CYP Act has been instrumental in establishing standards and protocols for child and youth welfare.

However, the landscape in which the CYP Act operates has evolved significantly since its inception. Recent advancements in research, findings from various reviews, and extensive consultations with system users and stakeholders have highlighted areas for improvement. Additionally, commitments made under both national and local frameworks underscore the need for the Act's refinement and modernisation.

The *Children and Young People Amendment Bill 2024* (No 2) (the Bill) represents the next stage in the ongoing evolution of the legislation aimed at safeguarding and promoting the welfare and rights of children, young people, and care leavers in the ACT. It builds on important changes that were made through the *Children and Young People Amendment Bill 2023*, passed by the ACT Legislative Assembly on 2 November 2023.

The reforms proposed in this Bill align with the commitments set out in the 10th Legislative Assembly Parliamentary and Governing Agreement (PAGA). The reforms also serve to support and enhance key policy initiatives outlined in the *Next Steps for Our Kids Strategy 2022-2030* (*Next Steps*), which is the ACT's comprehensive strategy focused on strengthening families and promoting the safety and wellbeing of children and young people.

This Bill introduces reforms in three vital areas that are integral to the functioning and effectiveness of the care and protection system for children and young people, as well as their families and carers.

#### *Improved Extended Support for Young Care Leavers*

The Bill enables an enhanced support scheme for young people transitioning out of care, providing them with the necessary assistance to successfully navigate the shift to independent living.

### *Incorporation of the Charters*

The Bill establishes a framework for charters to be prepared, maintained, and incorporated into the CYP Act. The charters set expectations for the Director-General and persons involved with the care and protection and youth justice systems to comply with, ensuring a high standard of conduct and professional care is exhibited.

### *Establishment of an External Merits Review Process*

Critically, the Bill confers jurisdiction on the ACT Civil and Administrative Tribunal (ACAT) to hear and determine certain administrative decisions made under the CYP Act by the Director-General after an application for review has been submitted. ACAT's expanded role is confined to these administrative decisions and does not extend to the review of court decisions.

This review mechanism enables affected people to approach ACAT for the reconsideration of specific decisions, thereby reinforcing the separation between administrative and judicial decision-making processes.

The concept of merits review can be comprehensively understood as an in-depth re-evaluation of the essence of an administrative decision. This process involves not only a thorough consideration of the evidence and information taken into account by the original decision-maker but also an examination of any new information that has been submitted.

Functioning as a *de novo* review, the reviewer effectively 'steps into the shoes of the original decision-maker.' The objective is to arrive at 'the correct and preferable decision' – essentially, the most judicious and suitable decision that can be made objectively based on the available information and in strict adherence to the relevant and current legal standards.

The establishment of an external merits review process aligns with and addresses key recommendations from significant inquiries and reports that have reviewed Australia's child protection systems.

Notably, it directly responds to calls for legislative reform articulated in:

- The 2016 Report of the Inquiry: Review into the system-level responses to family violence in the ACT (the Glanfield Inquiry).
- The Standing Committee on Health, Ageing and Community Services' 2020 Inquiry into Child and Youth Protection Services.

Overall, the Bill is designed to enhance and strengthen the child and youth welfare framework in the ACT. It builds upon prior reforms and aligns with overarching strategic objectives, aspiring to establish a more efficient, supportive, and rights-focused system for children and young people. Additionally, it incorporates increased oversight to ensure greater transparency and equity within this framework.

An independent statutory evaluation will be conducted 5 years after the commencement of external merits review. This evaluation is intended to assess the

effectiveness and efficiency of the new jurisdiction in fulfilling its intended purpose. It also provides an opportunity to identify and consider any necessary legislative amendments, ensuring that the jurisdiction remains aligned with its objectives and adapts to evolving contexts in the ACT.

## **A costs and benefits statement**

### *Improved Extended Support for Young Care Leavers*

The ACT Government will incur additional costs in providing additional supports and services to young care leavers. This investment will ensure the availability of critical support services for young adults transitioning out of care. Evidence suggests this will lead to improved outcomes in terms of their social integration and independent living capabilities.

### *Incorporation of the Charters*

The implementation of the charter provisions in the Bill is expected to have no direct financial impact, with the charters' implementation to be managed within existing resource allocations, avoiding additional financial burden.

The incorporation of the charter provisions enhances the legal and operational framework of the Act without incurring extra costs.

### *Establishment of an External Merits Review Process*

The implementation of an external merits review mechanism will require resource allocation, including funding for the establishment of the mechanism within ACAT, tribunal members, administrative staff, IT upgrades, and development of policies, training, and communications.

The expected financial commitment will facilitate the effective implementation of the review mechanism. The allocation of resources aims to ensure equitable access, enhancing the overall effectiveness of the legal system in handling child protection cases in the ACT.

## **OUTLINE OF PROVISIONS**

### **Chapter 15 Part 15.5: Transitions from out of home care**

Chapter 15, Part 15.5 of the CYP Act provides provisions relating to transitions to adulthood for young people leaving out of home care in the ACT. It outlines transition planning for young people leaving care as well as the circumstances in which the Director-General provides after care support.

Part 15.5 provides the Director-General with a discretionary power to provide the support and services considered appropriate to a young person or a young adult (18—24-year-olds).

The ACT Government committed to improve the extended care system for young people from the age of 18 until they turn 21 as part of the PAGA.

Young people leaving out of home care and transitioning to adulthood comprise one of the four priority groups of the National Framework, as outlined in the *Safe and Supported National Framework for Protecting Australia's Children 2021-2031 (Safe and Supported)*. The *Safe and Supported* framework highlights that young people leaving out of home care face greater vulnerability as they move to independent living.

The concept of a continuum of care for children and young people in out of home care was introduced in *A Step Up for Our Kids: Out of Home Care Strategy 2015-2020 (A Step Up)* and the ACT Government committed to embed a continuum of support under priority domain six in *Next Steps*.

The Bill ensures that the Director-General must provide support and services to anyone under the age of 21 years who was previously in out-of-home care.

The kinds of services the Director-General can provide is broadened and simplified to include financial assistance and/or any other assistance the Director-General considers necessary in the circumstances.

For young adults under the age of 25, the Director-General will maintain their discretionary power to provide the support and services considered appropriate.

The Bill also removes barriers to providing financial assistance to care leavers or their previous out-of-home carers.

The extension of care provisions in the Bill have been driven by listening to young people, carers, and community organisations, including out of home care agencies and peak bodies. There has been strong support for the concept that care leavers should be provided with support when they need it.

## **Chapter 2 Part 2.1**

### **Section 24A: Obligations to maintain and uphold Charters**

The ACT Government has developed or committed to developing four key charters relevant to people who intersect with the child protection or youth detention systems:

- Charter for Parents and Families involved with ACT child protection services (charter for Parents and Families)
- Charter of rights for kids in care
- Charter of rights for young people in Bimberi
- Charter for Carers

The ACT Government committed to develop the Charter for Parents and Families and embed it in the CYP Act as part of the PAGA and in *Next Steps*.

A charter for carers has also been committed to under the 'trust and transparency' domain of *Next Steps* and is listed in the *Next Steps Action Plan* for completion in late 2024.

The Bill establishes a consistent approach and standard for the charters within the Act by empowering the Minister to issue directions to the Director-General specifically concerning the preparation and maintenance of charters.

Under section 24 of the CYP Act, the Minister has the authority to issue directives to the Director-General, including the instruction to prepare a charter. A Ministerial directive is a notifiable instrument. Once developed a charter will become a notifiable instrument. The Director-General and staff will be required to comply with the charters unless doing so would be contrary to another provision of the CYP Act, or not in the best interests of a child or young person.

Additional provisions have been made in the Bill to outline the requirement for the Director-General to review the charters once every 5 years after the charter is notified.

The Charter for Parents and Families, Charter of Rights for Kids in Care and Charter of Rights for Young People in Bimberi have already been developed and it is envisaged that, if passed, they will be notified under the new charter provisions in the Bill once the provisions are commenced. To allow this to occur, Clause 2 outlines the commencement date for the charter provisions will be proximate to the passage of the Bill, with the Act (other than the external merits review provisions) commencing on the day after its notification day.

This initiative represents a significant step forward in strengthening the operational guidelines for child protection and youth detention in the ACT, ensuring greater clarity, fairness, and transparency across these critical services.

## **Chapter 16A: External Merits Review mechanism**

Currently, the CYP Act provides for very limited external review of decisions related to the approval of carers or residential care organisations under section 839.

In 2016, the Glanfield Inquiry<sup>1</sup> recommended that the ACT Government review what Child and Youth Protection Services (CYPS) decisions should be subject to internal or external merits review.

On 27 August 2020, the Standing Committee on Health, Ageing and Community Services' Inquiry into Child and Youth Protection Services report was tabled in the ACT Legislative Assembly. Recommendation 19 of the report was that the ACT Government amend the CYP Act to provide for an external review mechanism of child protection decisions.

The Bill will confer jurisdiction on ACAT to comprehensively assess both the merits of a certain child protection decision and any procedural irregularities.

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<sup>1</sup> *The Report of the Inquiry: Review into the system level responses to family violence in the ACT.*  
[https://www.cmtedd.act.gov.au/\\_data/assets/pdf\\_file/0010/864712/Glanfield-Inquiry-report.pdf](https://www.cmtedd.act.gov.au/_data/assets/pdf_file/0010/864712/Glanfield-Inquiry-report.pdf)

This expansive scope for merits review outlined in the Bill reinforces the need for a thorough and inclusive examination of decision-making processes. The ACAT will provide an accessible, efficient and user-friendly forum to undertake these reviews.

The *Human Rights Act 2004* will underpin and inform the conduct of internal and external merits review. Child protection is deeply intertwined with human rights, with child protection systems both supporting and limiting many of the rights protected in the *Human Rights Act 2004*. The external merits review process is intended to reinforce the integration of human rights considerations into care and protection decision-making. This reflects section 40B of the *Human Rights Act 2004* obligations which make it unlawful for public authorities to act in a way that is incompatible with a human right or to fail to give proper consideration to a relevant human right in making a decision.

The external merits review process envisaged by the Bill will also align ACT practice and law with that of other Australian jurisdictions and will align the external merits review process with the established internal review process.

The Bill provides that an external merits review will be able to be sought by an 'affected person' in relation to a relevant decision. An 'affected person' is directly involved and significantly impacted by a decision, and may include a child or young person, a birth parent, siblings or other family members, a carer or prospective carer.

In most situations, an applicant will have to have sought an internal review through the ACT Community Services Directorate (CSD) processes before being able to seek an external merits review. This model is to attempt to resolve concerns as quickly as possible, and amongst those most familiar with the child or young person.

Recognising the interconnected nature of internal and external review mechanisms, the Bill introduces several provisions giving certainty to the internal review processes. The eligible applicants and the scope of decisions subject to internal and external review is consistent across both internal and external merits review processes. An affected person has 28 days from receipt of the internal review notice to file for an internal review, although the internal review decision-maker has the discretion to extend this period. The internal review process is designed to conclude within 40 days of receiving the application for review. Failure to reach a decision within this timeframe is deemed confirmation of the original decision by the internal review decision-maker.

Section 67A(1) of the *ACT Civil and Administrative Tribunal Act* requires the internal reviewer to take reasonable steps to give written notice of their decision, in the form of a reviewable decision notice, to any person whose interests are affected by the decision. While there is no specific timeframe for issuing reviewable decision notices, an affected person can apply to the ACAT for a review within 28 days, in accordance with Section 10 of the ACAT Act 2008. If a reviewable decision notice is provided later than 5 days after the decision date, the application can still be made within

28 days of receiving the notice. Similarly, if no notice is given, individuals have 28 days from becoming aware of the decision to apply to ACAT.<sup>2</sup> Implicit within these provisions is the expectation that a reviewable decision notice should be issued within 5 days and no later than 28 days after a decision is made.

The Bill makes clear that submitting an application for review of an internally reviewable decision does not affect the operation of the decision (section 635D). Nonetheless, the Director-General has the discretion to suspend the decision's effect, in exercising their standard decision-making powers. This approach is intended to ensure that the Director-General has a broad ability to consider continuing or suspending any decision, whilst affording the necessary flexibility to address such situations on a case-by-case basis.

While typically an internal review must precede an external review, the Bill acknowledges that in certain exceptional cases, such as when an urgent medical procedure is involved, a young infant's contact with their breastfeeding parent is going to be restricted or a child is about to be moved interstate, a prompt and definitive decision is essential. The Bill provides five non-exhaustive examples of 'exceptional circumstances' but this is not intended to limit the circumstances where ACAT may consider that bypassing the internal review process is justified.

In these scenarios, where a decision may cause significant disruption for a child or young person or substantially affect the child or young person's relationship with a significant person, is likely to cause harm to a child or young person, where it would be difficult, impractical or impossible to reverse, or deny a party procedural fairness, the Bill allows for an expedited process.

In these exceptional circumstances, an affected individual has the option to directly pursue an external merits review, bypassing the typical requirement of first completing the internal review process. This provision is crucial in ensuring that when faced with time-sensitive, irreversible decisions, or those that may have an immediately harmful impact on a child or young person, the review process can be expedited. This acceleration is essential to address the immediate needs and rights of those involved.

The Bill introduces a user-friendly approach to the external merits review process, aimed at enhancing accessibility for applicants. The Bill provides that once the applicant satisfies the prescribed criteria concerning the nature of the decision and the completion of an internal review process, they may apply for external merits review.

Promotion of the interests of children and young people is central to the proposed scheme. The Bill emphasises the right of children and young people to actively participate in the external merits review process. This participation can be directly by

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<sup>2</sup> Section 10(3) ACT Civil and Administrative Tribunal Act 2008



the child or young person themselves or facilitated through a designated representative acting on their behalf.

The Bill enables children and young people to express their views to ACAT in a manner of their choosing. This may include presenting views through writing, drawing, addressing the tribunal directly, or meeting with tribunal members separately.

A critical provision in the Bill ensures that children and young people cannot be cross-examined or compelled by any party or the tribunal to provide evidence, whether through document production or attending a hearing.

The Bill grants ACAT the authority to assess whether it would be in the best interests of the child or young person to have legal representation to appear before the tribunal. While the aim of the reform is to implement a non-adversarial process, and to minimise the reliance on lawyers and legal representatives, the Bill is necessarily flexible if it is in the best interests of the child or young person to have legal representation. This can arise in situations involving multiple parties, conflicting interests, or a more intricate legal landscape.

The Bill empowers the ACAT to appoint a Litigation Guardian for a child or young person, including for both the subject of the review application or a child or young person whose interests may be affected by the review application. However, this appointment will not be made if the child or young person expresses a preference against having a Litigation Guardian and demonstrates an understanding of the nature and effect of the decisions the child or young person makes in relation to the review application. When a Litigation Guardian is appointed, they are responsible for instructing the legal representative of the child or young person and safeguarding and representing the interests of the child or young person.

The Bill sets out who may be appropriate to be appointed as a Litigation Guardian. A person may be appointed provided the individual is not under a legal disability. “Legal disability” is a well-established legal concept<sup>3</sup>, that requires a person to possess the capacity to comprehend proceedings and provide instructions. The provisions within the Bill aim to ensure the appointment of capable Litigation Guardians, enabling them to provide instructions and make decisions in the interests of the child or young person involved.

The Bill also distinguishes between a direct legal representative and an independent legal representative. A direct legal representative applies where the child or young person is capable of giving proper instructions and a litigation guardian has not been appointed, whereas an independent legal representative applies when the child or young person is not capable of giving proper instructions or a litigation guardian has been appointed. A direct legal representative acts on the instructions of the child or

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<sup>3</sup> *Dalle-Molle by his Next Friend Public Trustee v Manos & Anor* No. SCCIV-02-874 [2004] SASC; See also *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889

young person and presents, as far as possible, the child or young person's views and wishes to the ACAT. An independent legal representative presents, as far as possible, the child or young person's views and wishes to the ACAT, safeguards and represents the child or young person's interests, and acts on the instructions of the any appointed litigation guardian. If a litigation guardian has not been appointed and a child or young person is not capable of giving proper instructions, the independent legal representative will safeguard and represent the interests of the child or young person.

The Bill provides a significant role for the Public Advocate and Aboriginal and Torres Strait Islander Children and Young People Commissioner. The Bill authorises the Public Advocate or the Aboriginal and Torres Strait Islander Children and Young People Commissioner to appear and give evidence in all tribunal review proceedings.

The Bill requires that the Public Advocate and, where applicable, the Aboriginal and Torres Strait Islander Children and Young People Commissioner receive notification of internally reviewable decisions, and internal review outcomes via reviewable decision notices, pursuant to section 635B. This provides them with the ability to seek both internal and external reviews if dissatisfied with a decision.

The Bill empowers the Public Advocate and the Aboriginal and Torres Strait Islander Children and Young People Commissioner to initiate an application for an external review through ACAT on behalf of a child or young person. However, it does not automatically confer party status to them in such proceedings.

There is no requirement to notify affected people, the Public Advocate or Aboriginal and Torres Strait Islander Children and Young People Commissioner when an application is made for internal review.

The Public Advocate or Aboriginal and Torres Strait Islander Children and Young People Commissioner must have attempted to resolve the matter with the Director-General, prior to making an application to ACAT. This requirement is supplementary to the internal review procedures. It ensures that the Public Advocate or the Aboriginal and Torres Strait Islander Children and Young People Commissioner has formally communicated their concerns to the Director-General before proceeding with an ACAT application. There is evidence from other jurisdictions that this additional requirement around statutory office holders has avoided the need for tribunal proceedings to be commenced. It is also envisaged that this requirement will provide avenues for the Public Advocate or Aboriginal and Torres Strait Islander Children and Young People Commissioner to be informed that other internal review applications have been made in relation to that decision to avoid any duplication.

When an application is initiated by either the Public Advocate or the Aboriginal and Torres Strait Islander Children and Young People Commissioner, the ACAT is required to appoint a Litigation Guardian for the child or young person involved.

A Litigation Guardian must not be appointed if the child or young person has expressed a view not to have a Litigation Guardian and understands the nature and effect of that decision. In these instances, the ACAT is obligated to appoint an appropriate legal representative for them if the ACAT considers it is in their best interests.

The Bill allows for the Public Advocate or the Aboriginal and Torres Strait Islander Children and Young People Commissioner to be appointed as a Litigation Guardian for a child or young person, provided they consent to the appointment and have no interest adverse to the interest of the child or young person. When acting as a Litigation Guardian, the Public Advocate or the Aboriginal and Torres Strait Islander Children and Young People Commissioner are not permitted to appear or be heard in any separate capacity.

Following the merits review, the ACAT is empowered pursuant to section 68 of the ACAT Act to vary the decision, confirm the decision, or set aside the decision and make a substitute decision, or refer the decision back to the original decision maker.

#### Schedule 1, Part 1.2: Reviewable decisions

In 2020, Mr. Peter Muir, an independent consultant, was commissioned by the ACT government to seek stakeholder feedback on the types of child protection decisions to be subject to external review in the ACT. The resulting paper, “Review of Child Protection Decisions in the ACT” highlighted strong stakeholder support for the inclusion of decisions related to contact and placement within the scope of an external review mechanism. A small number of stakeholders also advocated for extending external review to encompass all decisions made by the Director-General.

Nationally, issues pertaining to placement and contact decisions consistently emerge as the most frequently raised concerns within the landscape of child protection decision-making.

The Bill responds to stakeholder feedback by expanding the existing list of reviewable decisions beyond those currently in the Act at section 839 to include:

- Contact where the Director-General has authority to makes these decisions pursuant to an order of the court. This excludes minor changes to contact arrangements, such as changes in location, provided they are within a reasonable distance.
- Placement decisions where the Director-General has authority to makes these decisions pursuant to an order of the court.
- Decisions by the Director-General regarding the provision of supports and services to a parent of a child or young person subject to an interim or short-term care and protection order.
- Decisions by the Director-General when exercising their authority under a supervision or drug use provision of a court order.

- Refusal to provide supports or services including financial support to a child or young person or young adult, or financial assistance to a previous out-of-home carer, where the Director-General holds or held parental responsibility.
- Decisions by the Director-General relevant to a child or young person's health, religion or education when exercising authority under a court order.
- Decisions by the Director-General about supports for a child or young person in relation to their culture.
- Decisions by the Director-General relevant to the preservation and enhancement of identity and the implementation of a cultural plan for an Aboriginal or Torres Strait Islander child or young person when exercising authority under a court order.

The Bill reflects stakeholder preferences and national experiences, while avoiding an overly expansive list of reviewable decisions that would hinder the essential urgency needed in child protection decision-making. The Bill provides flexibility for future decision inclusions through regulatory means, once the new mechanism is established and the needs better understood.

The expansion of an external review mechanism in the CYP Act represents a significant advancement in ensuring greater accountability, transparency, equity in decision-making and responsiveness by child and youth protection services in the ACT. It provides affected individuals with a robust platform to seek recourse and review, thereby strengthening the integrity and effectiveness of the child protection system.

## **CONSULTATION ON THE PROPOSED APPROACH**

As part of the PAGA, the ACT Government agreed to improve support for care leavers and incorporated significant charters into the CYP Act.

In 2016, the Glanfield Inquiry recommended the ACT Government review the CYPS decisions that should be subject to internal or external merits review. The review was to have regard to the approach in other jurisdictions and was to be chaired by the Justice and Community Safety Directorate (Recommendation 12).

In 2019, the ACT Government released and consulted on the discussion paper, *Review of Child Protection Decisions in the ACT*, with 20 written submissions received.

In 2020, the Standing Committee on Health, Ageing and Community Services' Inquiry into Child and Youth Protection Services was released.

In 2022, the ACT Government commissioned a consortium from the Centre for Evidence and Implementation at Monash University and Curijo to assist in the development and implementation of an external merits review process in the ACT, during which further consultation occurred.

Between October and December 2023, CSD conducted an extensive public consultation using the YourSay platform, supplemented by a detailed Information Paper and tailored factsheets published to guide the process.

Through the YourSay platform, CSD facilitated both online and in-person information sessions, invited organisations to engage in roundtables, and held one-on-one meetings with stakeholders. Written submissions in response to the Information Paper were actively encouraged.

The YourSay page reached 2782 people, the Information Paper was downloaded 809 times, and 110 personalised emails were sent to affected organisations. Additionally, 23 workshops engaged more than 170 individuals and 28 formal written submissions were received.

Stakeholders who have been engaged over the past five years include:

- Aboriginal Legal Service (NSW/ACT)
- Aboriginal Co-Design Network
- ACT Childrens Court
- ACT Civil and Administrative Tribunal
- ACT Community Services Directorate
- ACT Human Rights Commission
- ACT Magistrates Court
- ACT Policing
- ACT Ombudsman
- Act Together
- ACT Youth Advisory Council
- ACT Council of Social Service (ACTCOSS)
- ACT Disability, Aged and Carer Advocacy Service (ADACAS)
- Advocacy for Inclusion
- Australian Multicultural Action Network
- Bar Association
- Barnardos
- Canberra Restorative Community
- Carers ACT
- Child and Adolescent Mental Health Services (CAMHS)
- Conflict Resolution Services (CRS)
- CREATE Foundation
- Families ACT
- Gugan Gulwan Youth Aboriginal Corporation
- Individual children and young people
- Individual kinship and foster carers
- Karinya House
- Legal Aid ACT
- Melaleuca Place
- Nannies Group ACT
- Our Booris, Our Way Oversight Committee
- Public Advocate and Children and Young People Commissioner
- Red Cross Youth Coalition

- SNAICC
- Uniting (NSW/ACT)
- Yerrabi Yurwang Child & Family Aboriginal Corporation
- Youth Coalition of the ACT
- Victims of Crime Commissioner
- Women’s Legal Centre ACT

Most importantly, the formulation of this legislative framework involved comprehensive consultation with individuals who have firsthand experience of the system. This engagement involved a wide array of participants, including children, young people, birth families, kinship and foster carers, as well as advocates and frontline workers. The value of their contributions cannot be overstated, as they provided input that was clear, specific, and delivered with conviction.

These perspectives were instrumental in guiding the reform process. By placing their unique insights and experiences at the heart of the reform, the Bill proposes a legislative framework that is not only more attuned to the needs of those it serves but also more effective in its application.

The Listening Report reflects the significant support for two key amendments in the Bill: the extension of mandated support to care leavers until the age of 21 and the establishment of an external merits review process within ACAT. The amendments are widely endorsed for enhancing support during critical transitional phases into adulthood and for introducing a fair, transparent and independent review mechanism.

The report indicates no substantial concerns regarding the integration of charters in the CYP Act, suggesting broad stakeholder agreement with the proposed approach.

## **CONSISTENCY WITH HUMAN RIGHTS**

Child protection is deeply intertwined with human rights, placing a critical obligation on states worldwide to actively safeguard every child’s fundamental right to safety and protection from harm. This duty is universally upheld in various international human rights treaties, emphasising the global consensus on the importance of child welfare. Ensuring the efficacy of child protection systems necessitates decision-making processes that adhere to these human rights principles.

The Bill engages, promotes and imposes limitations on several human rights under the *Human Rights Act 2004* (ACT) (HR Act), particularly in the context of the external merits review process.

The HR Act will underpin and inform the conduct of internal and external merits review.

The rights engaged by the Bill include:

- Section 8 – Recognition and equality before the law

- Section 11 – Protection of the family and children
- Section 12 – Privacy and reputation
- Section 21 – Right to a fair trial
- Section 27 – Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities

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 HRA 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 Bill engages and places limitations on specific rights in the HR Act, namely privacy and reputation (section 12), and the right to a fair trial (section 21), 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 child protection decision-making with a commitment to protecting and promoting fundamental human rights.

### **Rights Promoted**

The Bill promotes the following rights in the HR Act:

- Section 11 – Protection of the family and children
- Section 12 – Privacy and reputation
- Section 21 – Right to a fair trial
- Section 27 – Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities

### **Section 11 – Protection of the family and children**

Section 11(1) of the HR Act safeguards the right of the family to protection. The right of the family to protection explicitly recognises families as the fundamental group of society who are entitled to protection from both society and the State. The right emphasises the importance of preserving the integral relationship between parents and children, acknowledging the vital role parents play in exercising parental authority over the care and upbringing of their children.

Section 11(2) of the HR Act stipulates every child is entitled to the protection necessary due to their status as a child, free from any form of distinction or discrimination.

Section 11(2) of the HR Act is complemented by Article 6 of the UN Convention on the Rights of the Child (UNCRC) ratified by Australia in 1990, which recognises that every child has the inherent right to life and that State Parties shall ensure the survival and development of the child to the maximum extent possible.

#### *Transition from care provisions*

Amendments to Part 15.5 of the Bill, including sections 529A to 529JA, promote the right of children to protection because it acknowledges children who leave out-of-home care may require more assistance than those who have not experienced living in out-of-home care. The continuum of support for care leavers, which may include services and financial assistance, protects a cohort of children and young people who may require additional support to ensure they experience a smooth transition to independent living and are equipped to live independently.

Section 529JA broadens the discretion of the Director-General to provide financial assistance to former out-of-home carers. This provision aims to uphold the right to the protection of the family and children by supporting young people to remain in their established families whenever possible.

#### *External Merits Review provisions*

Sections 635A to 635ZB of the Bill provide important oversight of the Government's decisions to intervene in the lives of children, young people, and their families. The external merits review process is a mechanism that is accessible for children, young people, carers, family members, and other significant persons to apply for a review of decisions. The ACAT may review decisions such as where and with whom a child or young person lives and whether they have contact with their parents, siblings, and/or other family members.

The ability for any family member to bring an application to ACAT recognises the family as the fundamental unit to be protected by society and the State. At the same time, in some instances, intervention into the lives of families is necessary to safeguard the safety, welfare, and wellbeing of the child or young person and support the child's rights under section 11(2) of the HRA.

The child's rights are further promoted by provisions that expressly protect the child's interests during ACAT proceedings. For instance, section 635W of the Bill provides that children must not be compelled to give evidence in a review application and section 625X(2) of the Bill prohibits children from being cross-examined.

The Bill includes provision for a person to seek a review of an internally reviewable decision to ACAT and bypass the usual prerequisite of completing the internal review process. This provision ensures that exceptional circumstances, including where time-sensitive, irreversible decisions or decisions that may cause immediate or future harm or detrimental impacts to the child or young person or the broader family, the review process can be accelerated to address the immediate needs and rights of those involved and may support the protection of the family and children.



## Section 12 - Privacy and reputation

Section 12(a) of the HR Act stipulates that everyone has the right not to have his or her privacy, family home, or correspondence interfered with unlawfully or arbitrarily.

### *Transition from care provisions*

The Bill promotes the right to privacy by removing requirements within sections 529J and 529JA that young people, young adults and their previous or out of home carers must share information about their current circumstances with the Director-General in order to be provided with financial assistance.

### *External Merits Review provisions*

The Director-General is empowered under the CYP Act to make decisions intervening in the lives of children, young people, and their families. These decisions inherently interfere with the privacy of families and the family home. The external merits review process introduced in sections 635A to 635ZB of the Bill offers an alternative independent and impartial avenue for families to challenge the Director-General's interference in their private lives.

Section 635Y of the Bill requires a hearing of a review proceeding to be held in private. This section promotes the right to privacy for children, young people, families, and others who may be involved in the external merits review process.

Section 39 of the *ACAT Act 2008*, permits ACAT to, by order, prohibit or restrict the disclosure to a party of all or some of the evidence given before ACAT. Section 635Y(3) of the Bill will broaden the matters ACAT may be satisfied to make directions about the use of evidence to encompass situations where ACAT deems that the disclosure might likely cause harm or pose a danger to a child, young person, or any other individual. In addition, section 635Z of the Bill permits a decision-maker to withhold information from decision notices and reason statements if they are likely to cause harm to a child or young person, or pose a danger to another person, or result in undue interference with the privacy of a child, young person, or another person. These sections promote the right to privacy.

## 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 a cornerstone of Australia's justice system and is of paramount importance to upholding the rule of law.

### *External Merits Review provisions*

The external merits review process is a significant step towards enhancing and promoting the right to a fair trial. The review of decisions by ACAT will ensure child protection decisions are able to be independently reviewed and are as fair and transparent as possible within the framework of the legislation.

Section 635H of the Bill allows any child, young person, family member, carer, or any other person affected by the decision to apply to ACAT for review of a reviewable decision. This section promotes the right to a fair trial, as it does not restrict access

to the external merits review mechanism to a list of designated persons, but instead ensures it is an avenue accessible to any person whose interests have been affected by the decision.

Section 635L of the Bill requires notice to be given of the application for review of a decision to specified persons. The Director-General must comply with this obligation within seven days of being notified by ACAT of the application. This provision promotes the right to a fair trial because it offers affected persons the opportunity to respond to the application.

The Bill provides for the participation of children and young people in review proceedings, where appropriate. Section 635L and Schedule 1 of the Bill requires a child or young person to be provided with notice of a review application where they are an affected person and the ability to be joined as a party to an application. Section 635O provides that children and young people have a right to express their views to the ACAT.

Section 635P of the Bill requires the ACAT to appoint a legal representative for the child or young person if it is in the child or young person's best interests to be legally represented. The Bill provides provision for both direct and independent legal representatives. A legal representative acts as the former if the child or young person is capable of giving proper instructions and a litigation guardian has not been appointed; whereas the latter applies if the child or young person is not capable of giving proper instructions or a litigation guardian has been appointed. The functions for a direct legal representative differ from an independent legal representative.

Under section 635R, both types of legal representatives must present the child or young person's views and wishes to ACAT as far as possible and must act on the instructions of the child or young person or their Litigation Guardian (if appointed).

If a child or young person cannot provide instructions, then the independent legal representative must as far as possible, present the child or young person's views and wishes to ACAT, safeguard and represent the interests of the child and young person, and act on the instruction of a litigation guardian (if appointed).

Similarly, section 635T provides that a Litigation Guardian may be appointed for a child or young person and section 635U stipulates that a Litigation Guardian's role includes safeguarding and representing the interests of the child or young person. Section 635T(1)(a) also permits the appointment of a litigation guardian for a child or young person not the subject of a review application but whose interests may be affected by the review application. These sections promote the right to a fair trial by enabling the meaningful participation of children and young people in review proceedings.

The Bill also amends the *Court Procedure Act 2004* to eliminate fees for ACAT proceedings on applications for review under Chapter 16A of the CYP Act. The ACAT also has limited authority to award costs, as outlined in section 48 of the ACAT Act, where parties typically bear their own costs except in specific circumstances: for fees only, if the tribunal rules in favour of an application, or as a disciplinary measure if a party causes undue delay or obstruction, or if a party violates an order.

These provisions promote the right to a fair trial by removing financial barriers and provide children and young people, as well as their families, with access to a fair hearing.

### Section 27 - Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities

Section 27(2) of the HR Act specifies that Aboriginal and Torres Strait Islander peoples hold distinct cultural rights to enjoy, maintain, control, protect, and develop their identity and cultural heritage as Australia's first people. Section 27 is based on two international instruments: the International Covenant on Economic, Social, and Cultural Rights, which Australia ratified in 1975, and the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly in 2007.

#### *External Merits Review provisions*

The external merits review process promotes the cultural and other rights of Aboriginal and Torres Strait Islander peoples, as it provides an avenue for Aboriginal and Torres Strait Islander children, young people, families, and their community to have decisions reviewed that would impact on a child or young person's capacity to maintain relationships and connections with their family, kin, and culture. The list of reviewable decisions includes decisions that directly affect cultural and other rights of Aboriginal and Torres Strait Islander children and young people, such as contact arrangements, placement decisions, and the contents of cultural plans, including, for example, a proposal about preservation and enhancement of identity of child or young person.

#### ***Rights Limited***

Broadly, the Bill may engage and limit the following rights in the HRA:

- Section 12 – Privacy and reputation
- Section 21 – Fair trial

The Bill also engages the right to recognition and equality before the law (section 8) by the proposed new section 529I(1A), where the Director-General will continue to have discretion over whether to provide services to a young adult from the age of 21 years. This differs to the new requirement for the Director-General to provide services to young adults under 21 years.

The Bill introduces flexibility to address the diverse needs and situations of young adults, ensuring a nuanced and rights-sensitive approach to service provision.

### Section 12 – Privacy

#### ***Nature of the right and the limitation (s 28(2)(a) and (c))***

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

### *Disclosure of certain information for reviews*

The implementation of an external review process inherently involves scrutinising decisions made by child protection services. This scrutiny often requires delving into the personal details of families and individuals involved in child protection cases. These cases often involve allegations of neglect or abuse against parents, family members, and carers, as well as sensitive information about the experiences of children and young people. Such an examination, while crucial for ensuring the fairness and correctness of decisions, can lead to the further disclosure of personal information contained in child protection records.

The requirement at section 635B to provide internal decision review notices and at section 635G to provide reviewable decision notices to each affected person for the decision may be a limitation on the right to privacy and reputation as it necessitates the disclosure of personal and potentially sensitive information. This disclosure is part of the process to ensure transparency and accountability in decision-making, but it also means that private details, which individuals may prefer to keep confidential, are shared with all parties involved in the review process.

In addition, pursuant to section 635L(2), within 7 days after being told about an application by ACAT, the original decision-maker must give notice in writing of the application to not only each affected person for the decision, but also the public advocate and the Aboriginal and Torres Strait Islander children and young people commissioner, if the child or person is an Aboriginal and Torres Strait Islander person. This means information will be shared amongst a broader group of people. These provisions will ensure that these individuals are given the information and documents necessary to exercise their functions.

### *Transitions from care*

Extended support for individuals who were in care and now are over the age of 18 may limit their right to privacy, primarily due to the continued involvement and oversight by child protection services in their lives during an age typically associated with increasing independence and privacy.

As young adults, individuals between the ages of 18 and 25 are at a pivotal stage in their development, where they are transitioning from adolescence to full adulthood. This period is often characterised by a growing desire for autonomy, making life decisions independently, and establishing a private life separate from institutional oversight.

When these young adults continue to receive support from child protection services, their personal information, including details about their living arrangements, education, employment, and health, may remain accessible to and managed by the statutory care system. This ongoing involvement can inadvertently lead to a

perception of continuous surveillance or interference in their private lives, impacting their sense of independence and self-determination.

However, it is anticipated, that even though the Director-General will be required to make support available to young adults between from age of 18 until they turn 21, it will only be provided when that young adult has consented to receiving services from the Director-General.

Young adults between the ages of 21 and 25 years of age will continue to be able to access support as agreed by the Director-General. Due to this being discretionary, it is anticipated that these young adults will have requested discrete services and will have agreed with their information being shared with the Director-General.

### ***Legitimate purposes (s 28(2)(b))***

The primary objective of the Bill is to promote and uphold the safety, welfare, and wellbeing of children and young people.

#### *Disclosure of certain information for reviews*

The legitimate purpose of merits review is to ensure that decisions in relation to children and young people in out of home care are fair, transparent and in the best interests of the child or young person in accordance with the legal framework and that the restrictions placed on rights to maintain family life and relationships are not arbitrary or unjust. The merits review mechanism provides an avenue for all people affected by a decision to seek review and independent oversight.

#### *Transitions from care*

Extended care for individuals over the age of 18 serves a legitimate purpose to address the unique challenges faced by young adults transitioning from the out of home care system. The continuum of support for care leavers, which may include services and financial assistance, protects a cohort of young people who may require additional support to ensure they experience a smooth transition to independent living.

### ***Rational connection between the limitation and the purpose (s 28(2)(d))***

#### *Disclosure of certain information for reviews*

Child protection cases inherently involve sensitive and complex family dynamics, often coupled with serious allegations, necessitating a rigorous and fair review process.

To facilitate this level of scrutiny and fairness, the external review mechanism requires the disclosure of personal and private family details. The disclosure requirements ensure that all parties involved are adequately equipped with the

necessary information to understand, contest if needed, and prepare for the review process. It will also ensure that ACAT itself will have all the necessary information to review the decision and finalise the outcome of the matter. This is a routine practice in administrative review matters before the Tribunal.

The disclosure of such information, as required under sections 635B and 635G, is integral to the principle of access to justice. It ensures transparency and comprehensive communication, which are vital for a fair legal process, especially in cases involving child protection decisions.

### *Transitions from care*

The limitation to privacy inherent in the provision of extended support for young adults is rationally connected to its purpose of ensuring their successful transition into independent adulthood.

This demographic is often at a significant disadvantage compared to their peers who have not been in care, facing higher risks of adverse outcomes in several key areas of life, including education, employment, housing stability, and mental health.

The rationale for extended care is rooted in the recognition that young adults who have grown up in the care system frequently lack the family support networks that typically guide and assist young people as they navigate the transition to independent adulthood. Without a stable and supportive background, these young adults are more vulnerable to a range of social and economic challenges. Extended care aims to fill this gap by providing continued support, crucial in helping these young adults develop the skills and resources they need.

### ***Proportionality (s 28(2)(j))***

#### *Disclosure of certain information for reviews*

The limitation on the right to privacy and reputation in the context of an external review mechanism for decision-making is proportionate, balancing the need for transparent and fair judicial processes with the protection of individual's right to privacy.

While the disclosure of personal information is necessary for a comprehensive review process, it is not without limits. Section 7 and 8 of ACT *Civil and Administrative Tribunal Regulation 2009* outlines the requirements of internal review notices and reviewable decision notices to ensure that only relevant information, crucial to understanding the decisions made and how to seek a review, is included in the materials. This minimises unnecessary intrusion into private lives while maintaining the integrity of the review process.

The Bill also provides for the withholding of information in scenarios where such disclosure would unreasonably infringe upon the privacy of a child or other

individuals involved (section 635Z). This is a safeguard to ensure that information can be protected where appropriate and necessary. The person given the notice may apply to the ACAT for access to the withheld information. Providing the tribunal with the oversight of how this sensitive information is handled is a strong safeguard built into the Bill.

Section 635Y mandates that review proceedings must be held in private, similar to the requirement in section 72 of the *Court Procedure Act 2004*, that ACT Childrens Court proceedings are held in private. This requirement is pivotal in maintaining the confidentiality of sensitive information discussed during the proceedings. By conducting reviews privately, the legislation effectively protects children, young people and their families involved in the out of home care system from public exposure and scrutiny, thus safeguarding their privacy.

Section 635Y of the Bill also broadens the criteria, under section 39 of the *ACAT Act 2008* for ACAT to make orders to prohibit or restrict the disclosure of all or some of the evidence presented before ACAT to certain parties to encompass situations where ACAT deems that the disclosure might likely cause harm or pose a danger to a child, young person, or any other individual. This provision offers a significant safeguard, allowing ACAT to tailor the extent of confidentiality needed on a case-by-case basis. This provision ensures that while the review process is thorough and transparent, it does not arbitrarily infringe upon the privacy of the individuals involved.

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 and protection of identifying information including information that would allow a person's identity as someone who made a report or notification about a child to be worked out.

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

### *Transitions from care*

The Bill makes it mandatory for the Director-General to provide support that is appropriate for people from the age of 18 until they turn 21. Acceptance of support is voluntary. The Bill provides the Director-General with discretion to provide appropriate supports to young adults between the ages of 21 to 25 years who were previously in out of home care. This ensures that any intrusion into their privacy is minimal and consensual. It is also anticipated that young people in need of support may request it from the Director-General. The Director-General's authority is limited to offering and providing these services, without compelling participation. This approach effectively provides a safety net for those in need while respecting individual rights to privacy and personal choice. The Bill achieves a proportionate

balance between providing essential support and upholding the privacy of young adults.

The Bill also removes the current section 529J(2) of the CYP Act which sets criteria for the Director-General to be satisfied prior to providing any financial assistance to 21-25 year olds. This means it is no longer necessary for the Director-General to inquire into the young person's circumstances prior to providing any financial assistance.

## Section 21 – Right to a fair trial

### ***Nature of the Right and the Limitation (s 28(2)(a) and (c))***

The introduction of additional review powers by the ACAT is a significant step towards enhancing and promoting the right to a fair trial, especially in the context of child protection decisions, ensuring they are made with fairness and transparency.

#### *Timely hearing*

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.

In the context of out of home care decision making, timely resolution is especially critical due to the potential impact on the child's well-being and development. Prolonged legal proceedings can exacerbate uncertainties and instability in a child's life, which is detrimental to their overall welfare.

The Bill requires applicants to complete an internal review prior to proceeding to an external review mechanism unless there are exceptional circumstances. While designed to ensure thoroughness and accuracy in decision-making, this could be seen as a limitation on the right to a fair hearing due to potential delays.

#### *Public hearing*

Generally, hearings are required to be held in public. Public hearings are a way of ensuring transparency of proceedings, demonstrating that due process is being followed and that the conduct of the proceedings reflects the impartiality of the hearing.

Section 635Y of the Bill requires that ACAT hearings of certain decisions must be held in private, which constitutes a limitation on the right to a public hearing. Under section 39 of the *ACAT Act*, ACAT may give directions that prohibits the publication or disclosure of evidence to some or all of the parties if ACAT is satisfied that it should be kept private to protect morals, public order or national security in a



democratic society or the interests of the private lives of the parties require the privacy; or publicity would otherwise prejudice the interests of justice. The Bill includes additional matters that ACAT may be satisfied in giving directions under s39, including that a child or young person is likely to be harmed or the safety of another person is likely to be endangered (635Y(2)).

#### *Withholding Information*

The Bill also provides at section 635Z that certain information can be withheld from an internal review notice, a reviewable decision notice or a reasons statement where a child or young person is likely to be harmed; the safety of another person is likely to be endangered; or where there would be undue interference with the privacy of a child or young person, or another person.

#### ***Legitimate Purposes (s 28(2)(b))***

The primary objective of the Bill is to promote and uphold the safety, welfare, and wellbeing of children and young people.

The legitimate purpose of merits review is to ensure that decisions in relation to children and young people in out of home care are fair, transparent and in the best interests of the child or young person in accordance with the legal framework and that the restrictions placed on rights to maintain family life and relationships are not arbitrary or unjust. The merits review mechanism provides an avenue for all people affected by a decision to seek review and independent oversight.

#### *Timely hearing*

The requirement to conduct an internal review is fundamentally centred on the protection of children from harm and the prioritisation of their best interests. This process serves as an essential mechanism for the early identification and correction of any potential errors or oversights in initial decisions.

#### *Public hearing and withholding information*

The purpose of private ACAT review hearings for specific child protection decisions and withholding certain information from notices and reasons statements ensures the privacy and well-being of vulnerable children and young people.

#### ***Rational Connection between the Limitation and the Purpose (s 28(2)(d))***

#### *Timely hearings*

The internal review process is a key component of the overall policy framework. It acts as the first step in ensuring that decisions are made with due care, consideration, and in compliance with legal and ethical standards. By addressing potential issues at an early stage within the system itself, the internal review

contributes to the integrity and efficacy of the external review and may avoid the need for tribunal proceedings to be commenced.

Internal reviews are a mandated first step in all other jurisdictions' reviews of child protection decision making, other than Queensland. They also exist in other legislation, such as the *Taxation Administration Act 1953*.

This tiered approach to review – starting with an internal review and, if necessary, followed by an external one – ensures a comprehensive evaluation of decisions. It also maintains a balance between swift decision-making and thorough oversight. The internal review's connection to the external review process lies in its role in ensuring that by the time a case reaches the external review stage, it has undergone rigorous examination.

### *Public hearing and withholding information*

The requirement for private hearings, as mandated by Section 635Y of the Bill and ability to withhold information under Section 635Z demonstrates a rational connection between the limitation imposed on the right to a public hearing and the purpose of protecting vulnerable children and young adults and maintaining their privacy.

This connection is evident in the sensitive nature of child protection matters, where the details discussed often involve personal, confidential information that could significantly impact the privacy and emotional well-being of those involved. Conducting these hearings in private and limiting information sharing minimises the risk of such sensitive information becoming public, thereby protecting the individuals involved from potential harm.

This approach aligns with Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), recognising the need for non-public hearings in cases involving juveniles or family matters to safeguard the best interests and privacy of children. It also aligns with other proceedings in relation to children and young people. For example, the ACT Childrens Court conducts all its matters, both in child protection and youth justice, in closed court.

### ***Proportionality (s 28(2))***

#### *Timely hearing*

Incorporated in this framework are vital safeguards, including the ability to bypass internal review, as outlined at section 635F of the Bill where there are 'exceptional circumstances'. Section 635F includes several practical examples of what may constitute exceptional circumstances. These examples are intended to provide concrete and specific examples but do not limit the matters that may provide an 'exceptional circumstances' argument. Such circumstances might include scenarios where there is an urgent risk to the child such as medical procedures or where a

significant placement move may be about to take place. These provisions ensure that the system can respond swiftly and effectively in situations where immediate action is required, further underlining the commitment to the child's safety and wellbeing. By allowing for this flexibility, the external review mechanism remains sensitive to the urgency and complexity of certain cases. This adaptability is a critical aspect as it recognises the diversity of situations and ensures that any limitation on family units is proportionate to the specific circumstances of each case.

The Bill also imposes time limitations on the internal review process. Under section 635E(2) of the Bill, the internal reviewer must deal with the application by confirming, varying or setting aside the decision within 40 days after the application is received. Section 635E(3) provides that if the internal reviewer does not take action within the 40 day period, the decision is taken to be confirmed.

### *Public hearing*

The confidentiality of review hearings in ACAT is a crucial element in striking a balance between legal transparency and protecting vulnerable children. While public hearings are generally crucial for transparency and demonstrating due process, the sensitive nature of these decisions necessitate a tailored approach. The private setting seeks to prevent potential harm that public exposure could inflict on these individuals and ensures the confidentiality of sensitive information.

Confidentiality in these proceedings is essential to protect children from potential harms of public exposure, such as stigma and psychological distress. The nature of information in child protection cases is intensely personal, necessitating confidentiality not just as a preference, but as a vital protective measure.

This approach represents a necessary and proportionate measure. Alternatives like partial disclosure might not sufficiently protect children and young people's privacy. The potential harm from public dissemination of sensitive information in these cases outweighs the benefits of complete transparency.

### *Withholding information*

The ability to withhold certain information from an internal review notice, a reviewable decision notice or a reasons statement is crucial to protecting children, young people and others where they may be harmed or endangered or where there may be undue interference in their privacy if that information was shared with certain people (section 635Z(2)). Where information is withheld, the document provided must include a statement that certain information has been withheld and that the person may apply to ACAT for access to that information (section 635Z(3)). The person is then able to apply for access to the withheld information (section 635Z(4)) and ACAT must give access unless satisfied that a child or young person is likely to be harmed, the safety of another person is likely to be endangered or there would be undue interference with the privacy of a child or young person or another person if access was granted (section 635Z(5)).

This approach allows for people involved in these proceedings, particularly children and young people to be protected from their private and sensitive information being inappropriately or unsafely shared, whilst providing pathways for people to access that information where safe and necessary for the conduct of the proceedings.

CHILDREN AND YOUNG PEOPLE AMENDMENT BILL 2024 (NO 2)

*Human Rights Act 2004 - Compatibility Statement*

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Children and Young People Amendment Bill 2024 (No 2)**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA  
Attorney-General

## CLAUSE NOTES

### Children and Young People Amendment Bill 2024

#### Detail

#### Part 1 – Preliminary

##### Clause 1 – Name of Act

This is a technical clause that names the short title of the Act. The name of the Act will be the *Children and Young People Amendment Act 2024 (No 2)*.

##### Clause 2 – Commencement

This clause provides that the Act, other than those provisions specified in subsection (2) will commence on the day after the Act's notification day. This clause also lists a number of provisions which will commence on 1 July 2025.

##### Clause 3 – Legislation Amended

This clause lists the legislation amended by this Bill. This Bill will amend the:

- *Children and Young People Act 2008*
- *Children and Young People Regulation 2009*
- *Court Procedures Act 2004*
- *Magistrates Court Act 1930*

##### Clause 4 – New section 24A

This clause inserts a new section outlining the requirements for charters made by the Director-General. The new section provides the Director-General discretion to make a charter on their own initiative if it relates to a matter about providing, or assisting to provide, services for children and young people. If the matter is the subject of a direction by the Minister, the Director-General is mandated to make a charter in relation to the matter.

The new section requires the Director-General and staff to comply with the charters unless doing so would be contrary to another provision of the CYP Act or not in the best interests of the child or young person. The section does not create rights or impose legally enforceable obligations on anyone. A charter is a notifiable instrument that the Director-General must review at least once every 5 years after the charter is notified.

##### Clause 5 – Section 336, definition of *care and protection chapters*, paragraph (j)

This clause is a consequential amendment as a result of Clause 22 to reflect a change to the heading of Chapter 19 by referring to court proceedings, instead of all proceedings.

**Clause 6 – Age—care and protection chapters stop applying if person discovered to be adult – Section 339(5)**

This clause is a consequential amendment as a result of Clause 8 to reflect a change to the heading of Part 15.5 from ‘Transition to adulthood’ to ‘Transition from out-of-home care’.

**Clause 7 – Care and protection chapters stop applying when young person becomes adult – Section 340(5)**

This clause is a consequential amendment as a result of Clause 8 to reflect a change to the heading of Part 15.5 from ‘Transition to adulthood’ to ‘Transition from out-of-home care’.

**Clause 8 – Part 15.5 heading**

This clause replaces the heading, ‘Transition to adulthood’ with a new heading, ‘Transition from out-of-home care’.

**Clause 9 – Section 529A**

This clause expands the object of this part of the Act from the wellbeing of young persons and young adults to all persons transitioning from or who were previously in out-of-home care.

**Clause 10 – Section 529BA**

This clause amends the definition of a ‘previous out-of-home carer’ to reflect the change in language from ‘young person and young adult’ to ‘person’ in relation to a person who was previously in out-of-home care.

**Clause 11 – Assistance generally – Section 529I(1)**

This clause replaces subsection 529I(1) of the Act with three new subsections. Subsection (1) clarifies the section applies to a child, young person or young adult who was in out-of-home care. Subsection (1A) mandates the provision of services that the Director-General considers appropriate to a child, young person or young adult who is younger than 21 years. Subsection (1A) also provides the Director-General with the discretion to provide services that the Director-General considers appropriate to a young adult who is 21 years or older. ‘Young adult’ is defined in Section 529B as an adult who is younger than 25 years.

Subsection (1B) permits young adults to ask the director-general to stop providing services, but if the services have been stopped they may ask for the services to be provided again.

**Clause 12 – Section 529I(2)**

This clause is a consequential amendment which changes the reference to ‘subsection (1)’ to the new ‘subsection (1A)’.

**Clause 13 – Section 529I(2)(j)**

This clause omits ‘young’ from ‘young person’.

### **Clause 14 – Section 529J heading**

This clause substitutes the heading in the Act, ‘Financial assistance – young person or young adult’ with ‘Financial assistance – child, young person or young adult’.

### **Clause 15 – Section 529J(1)**

This clause expands subsection 529J(1) to include the provision of financial assistance to a child who was in out-of-home care.

### **Clause 16 – Section 529J(2) and examples**

This clause omits subsection (2) and the examples, which removes the requirement that the Director-General may provide financial assistance only if satisfied that it is for an appropriate purpose and reasonably necessary considering the young person’s or young adult circumstances.

### **Clause 17 – Section 529J(5) and (6)**

This clause omits subsections (5) and (6) which removes that the Minister may make guidelines about appropriate purposes for financial assistance and that a guideline is a notifiable instrument. This amendment is consequential to Clause 16, which removes the requirement for the Director-General to be satisfied that financial assistance is for an appropriate purpose.

### **Clause 18 – Financial assistance—previous out-of-home carer – Section 529JA(1) and note**

This clause amends subsection (1) to remove the requirement that a transition plan is in force for a young adult in order for a previous out-of-home carer to receive financial assistance. The clause also removes the unnecessary note, which referenced the definition of ‘previous out-of-home carer’ at section 529BA.

**Clause 19 Section 529JA (3)** This clause omits subsection (3) to remove the requirement that the Director-General consider the previous out of home carer’s circumstances when providing financial assistance.

### **Clause 20 – Section 529K and notes**

This clause expands the categories of people who have an entitlement to personal items from a young person or young adult who has left out-of-home care to also include children who have left out-of-home care.

### **Clause 21 – New chapter 16A**

This clause inserts a new chapter, ‘Chapter 16A Care and protection—notification and review of certain decisions’ into the Act.

### **Part 16A.1 – Preliminary**

Section 635A inserts definitions for the following terms for Chapter 16A:

- ‘affected person’
- ‘decision-maker’



- ‘internally reviewable decision’
- ‘internal reviewer’
- ‘internal review notice’
- ‘reviewable decision’

### **Part 16A.2 – Internal review**

Section 635B requires a decision maker for an internally reviewable decision to issue an internal review notice to each person who is prescribed for the decision.

Prescribed persons are listed in column 4 of the table in Schedule 1 of the Bill.

This section also requires the decision maker to provide an internal review notice to the Public Advocate and, if the child or young person is an Aboriginal or Torres Strait Islander person, the Aboriginal and Torres Strait Islander Children and Young People Commissioner. Note 1 of this section points to section 67B of the ACAT Act which requires that any other person identified as affected by the decision must also receive an internal review notice.

Note 2 of this section outlines that the ACAT Act outlines requirements for internal review notices.

Section 635C outlines that an affected person for the decision, the Public Advocate and, for an Aboriginal or Torres Strait Islander child or young person, the Aboriginal and Torres Strait Islander Children and Young People Commissioner, may apply to the decision-maker for a review of an internally reviewable decision. The section also outlines how an application for review of an internally reviewable decision must be made, and that it must be made within 28 days after the person received the internal review notice, unless the decision-maker grants a longer period.

Section 635D prescribes that making an application for review of an internally reviewable decision does not affect the operation of the decision.

Section 635E outlines that if an application for an internal review is received, the decision-maker must arrange for another person, the ‘internal reviewer’, to undertake the review. The internal reviewer has 40 days after the internal reviewer receives the application to review the decision. The internal reviewer may confirm, or vary the original decision, or set it aside and substitute their own decision. This section also provides that if the internal review is not completed within the 40-day period, the internal reviewer is taken to have confirmed the original decision.

Section 635F outlines that if exceptional circumstances exist that warrant the review of the internally reviewable decision being heard by the ACAT rather than an internal reviewer, a person who may make an application for an internal review under section 635C, may instead apply to the ACAT for review. Examples are provided in this section of circumstances that may be considered exceptional circumstances.

### **Part 16A.3 – ACAT review**

Section 635G requires an internal reviewer who makes a reviewable decision to give a reviewable decision notice to each person who received an internal review notice

under section 635B. Note 1 to the section refers to section 67A of the ACAT Act which requires the internal reviewer to also give a reviewable decision notice to any other person they identify as affected by their decision. Note 2 to this section outlines that requirements for reviewable decision notices are prescribed in the ACAT Act.

Section 635H authorises an affected person to apply to the ACAT for review of the decision.

Section 635I authorises the Public Advocate and, for an Aboriginal or Torres Strait Islander child or young person who is the subject of the decision, the Aboriginal and Torres Strait Islander Children and Young People Commissioner, to apply to the ACAT for a review of a reviewable decision. The section provides that these statutory officeholders may only do this if they have first attempted to resolve the matter in a satisfactory way with the relevant decision maker. The relevant decision maker is the original decision-maker if an application for internal review has not been made; and the internal reviewer if an application for internal review has been made.

#### **Part 16A.4 – ACAT Procedural matters Division 16A.4.1 – Preliminary**

Section 635J inserts definitions for the following terms for Part 16A.4:

- ‘litigation guardian’
- ‘review application’

#### **Division 16A.4.2 – Parties and appearance**

Section 635K outlines who the parties to a review application are. If an application was made by the Public Advocate or the Aboriginal and Torres Strait Islander Children and Young People Commissioner, the parties to a review application are the child or young person the subject of the application and the decision-maker. In any other case, the applicant and the decision-maker are the parties to a review application. This section notes that the provisions of section 29(3) of the *ACT Civil and Administrative Tribunal Act 2008* do not apply to an application for review under this Chapter.

Section 635L outlines the process for notifying affected people of the review application and the details of the application. On receipt of a review application, the ACAT must tell the decision maker about the application and provide details of the application. Within 7 days of being advised of the application by the ACAT, the decision maker must notify the following, in writing, about the application:

- each affected person for the decision;
- the public advocate; and
- if the child or young person to whom the decision relates is Aboriginal or Torres Strait Islander, the Aboriginal and Torres Strait Islander Children and Young People Commissioner.

Provision of information under this section must include details of the application and how the affected person may apply to be joined as a party.

Section 635M outlines that the Public Advocate, and where appropriate, the Aboriginal and Torres Strait Islander Children and Young People Commissioner, may appear and give evidence in an ACAT hearing for a review application. The section further notes that this power does not apply if the relevant statutory officeholder is a litigation guardian for a child or young person in the review. This section includes a note indicating where the role of litigation guardian is provided in the Act.

### **Division 16A.4.3 – Children and young people in review applications**

Section 635N clarifies the terms ‘direct legal representative’ and ‘independent legal representative’ as used in division 16A.4.3.

Section 635O gives a child or young person who is the subject of a review application the right to express their views to the ACAT about matters involved in the review application.

Section 635P provides that the ACAT must appoint a legal representative for a child or young person who is the subject of a review proceeding if ACAT considers it is in the child or young person’s best interests to have one.

Section 635Q outlines the circumstances that give rise to whether a legal representative for a child or young person in a review proceeding is to act as a direct legal representative or as an independent legal representative for the child or young person. The legal representative must act as a direct legal representative if the child or young person has capacity to give instructions and a litigation guardian has not been appointed. The legal representative must act as an independent legal representative if the child or young person lacks capacity to give instructions or a litigation guardian has been appointed for the child or young person.

Section 635R outlines the functions and responsibilities for legal representatives of a child or young person. Both direct and independent legal representatives must provide the child or young person’s views and wishes to the ACAT as far as possible. However, a direct legal representative must act on instructions of the child or young person whereas an independent legal representative must safeguard and represent the interests of the child or young person and act on the instructions of a litigation guardian if one is appointed.

In addition, this section provides that these requirements of a legal representative for a child or young person are not to be taken as exhaustive or as limiting anything else the legal representative may do in representing the child or young person.

This section recognises that not all children and young people will have the developmental or cognitive capacity to provide instructions, however for those who do, it empowers them to do so.

Section 635S outlines that if a lawyer has been appointed by the ACAT for a child or young person under section 635P, the ACAT may remove the legal representative if it considers it is in the child or young person’s best interests to do so. If the ACAT

removes the legal representative, it may order that the review application is suspended until a replacement legal representative is appointed for the child or young person. The ACAT may undertake these actions on its own initiative or following application by a party to the review or anyone else. This section also specifies that its provision do not affect the ACAT's power to remove a legal representative or stop a legal representative participating in a review application under another law.

Section 635T outlines arrangements for the appointment of a Litigation Guardian for a child or young person. The ACAT may appoint a Litigation Guardian for a child or young person if it considers it to be in the child or young person's best interests and their interest may be affected by the review application, and must appoint a Litigation Guardian for a child or young person who is the subject of an application if the review application was started by the Public Advocate or Aboriginal and Torres Strait Islander Children and Young People Commissioner.

However, if the child or young person has expressed that they do not wish to have a Litigation Guardian and the ACAT considers the child or young person is capable of making decisions in relation to the review application and understands their effect, the ACAT must not appoint a Litigation Guardian.

The ACAT must ensure a Litigation Guardian appointed for a child or young person does not have an interest in the review application that does, or might, conflict with the interests of the child or young person. The ACAT must also ensure the person appointed does not have a legal disability and that they agree to be appointed as a Litigation Guardian for the child or young person.

Any person may be appointed as a Litigation Guardian, if they meet these criteria. This includes the Public Advocate or, for an Aboriginal and Torres Strait Islander child or young person, the Aboriginal and Torres Strait Islander Children and Young People Commissioner.

The provisions of section 635T apply regardless of whether a child or young person has a legal representative.

Section 635U outlines the functions and responsibilities of a Litigation Guardian. This includes safeguarding and representing the interests of the child or young person and instructing the child or young person's independent legal representative (if any).

A Litigation Guardian is empowered to do anything that a child or young person they represent may do in relation to a review application and required do anything required of the child or young person they represent, in relation to the review application.

Section 635V provides that the ACAT may remove a Litigation Guardian who was appointed for a child or young person under section 635T. If the ACAT removes a Litigation Guardian, it may order the review application be suspended until a replacement Litigation Guardian is appointed. The ACAT may act under this section on its own initiative or following application by a party to the review application or someone else.

Section 635W provides protections for children and young people regarding whether they give evidence in a review application. The section provides that a child or young person must not be compelled to give evidence and that prior to a child or young person giving evidence, the ACAT must be satisfied that they are willing to do so.

Section 635X provides protections for a child or young person who provides evidence or expresses their views to the ACAT in a review application. These are: it is not permitted for a child or young person to be cross-examined; and only the child or young person's legal representative (if any), Litigation Guardian (if any) and the ACAT are permitted to ask questions of a child or young person.

#### **Division 16A.4.4 – Miscellaneous**

Section 635Y provides that hearings of a review application for Chapter 16A must be in private and are to be taken to be a hearing to which section 39 of the ACAT Act applies. The section also provides two additional criteria to those already provided by section 39(5) of the ACAT Act for the ACAT to consider if making decisions under section 39(2) of the ACAT Act. These criteria are where a child or young person is likely to be harmed or the safety of another person is likely to be endangered. This means that whilst the whole of a review application proceeding under Chapter 16A is private, that some evidence, whether given during the proceeding or contained in a document, may be withheld from one or more other parties to the review application, on the grounds mentioned in this section or section 39(5) of the ACAT Act.

Section 635Z enables a decision maker or internal reviewer who is required to give an internal review notice, a reviewable decision notice or a reasons statement under s 22B of the ACAT Act, to withhold information from the notice or statement if the decision maker considers that not withholding the information:

- is likely to result in harm to a child or young person or
- is likely to endanger the safety of a person who is not a child or young person or
- would result in undue interference in the privacy of a child, young person or someone else.

The section also provides that if a decision maker withholds information in one of these documents, they must include a statement in the document that information has been withheld. The decision maker must also include information in the notice or statement document, that advises that the recipient may apply to the ACAT for access to the withheld information.

The section further provides that a person who receives an internal review notice or a reviewable decision notice or an ACAT reasons statement which has withheld information, may apply to ACAT for access to the withheld information. The ACAT must provide access to the withheld information unless satisfied that if it did:

- a child or young person is likely to be harmed or
- the safety of another person is likely to be endangered or
- there would be undue interference with a person's privacy.

Applications under this section may be considered by ACAT without a hearing.

Section 635ZA outlines arrangements when there is an overlap between matters that are before ACAT in relation to a review proceeding, and a court, in relation to a care and protection proceeding for the relevant child or young person (such proceedings are referred to in this section as a ‘related court proceeding’). If the director general becomes aware of a matter being both before ACAT and in a related court proceeding, the director general must advise ACAT and include information about the proceeding. On receipt of this information, ACAT must suspend the review application if it considers the court’s decision in the related court proceeding would effectively decide the same matters as covered in the review application. ACAT must undertake this action on its own initiative or following an application.

If the matters are effectively decided in the related court proceeding, ACAT must dismiss the review application. If the matters are not decided by the court, ACAT may cancel the suspension and resume its consideration of the review application.

The powers relating to ACAT in this section may be undertaken by a presidential member of ACAT acting alone, but not by a non-presidential member alone.

Section 635ZB outlines provisions for a review of Chapter 16A. The Minister must review this Chapter as soon as practicable after 5 years from the commencement of this section and present a report of the review to the ACT Legislative Assembly. This section expires 6 years after its commencement.

#### **Clause 22 – Chapter 19 heading**

This clause changes the heading of Chapter 19 by referring to ‘court proceedings’, instead of ‘proceedings’. This update means ACAT proceedings are not included in the scope of Chapter 19 provisions. The new heading is ‘Care and protection – provisions applying to court proceedings under care and protection chapters’.

#### **Clause 23 – Dictionary, new definition of *affected person***

This clause inserts a new definition of ‘affected person’ by reference to the relevant provision at section 635A.

#### **Clause 24 – Dictionary, definition of *application***

This clause amends the definition of ‘application’ which applies to Chapter 19, to clarify it only relates to court proceedings.

#### **Clause 25 – Dictionary, definitions of *decision-maker***

This clause inserts a new definition for ‘decision-maker’ in the dictionary of the CYP Act. These updates arise from the new Chapter 16A.

#### **Clause 26 – Dictionary, new definitions**

This clause inserts definitions for the following terms relevant to new Chapter 16A:

- ‘direct legal representative’
- ‘independent legal representative’

- internally reviewable decision'
- 'internal reviewer'
- 'internal review notice'
- 'Litigation Guardian'

### **Clause 27 – Dictionary, definition of *previous out-of-home carer***

This clause substitutes a new definition for this term, arising from the change to the title of Part 15.5.

### **Clause 28 Dictionary, definition of *reviewable decision***

This clause substitutes a new definition for this term to include a reference to Chapter 16A in the definition of 'reviewable decision'.

### **Clause 29 – Dictionary, new definition of *review application***

This clause inserts a definition of 'review application' by reference to the relevant provision of the Bill.

### **Clause 30 Dictionary, definition of *young adult***

This clause updates the reference to Part 15.5 in this definition, to reflect the change of name of Part 15.5.

## **Part 3 – Children and Young People Regulation 2009**

### **Clause 31 – New sections 5 to 7**

Section 5 of the regulation provides that the Director-General is prescribed for a decision mentioned in Schedule 1.

Section 6 of the regulation provides that the decisions of the Director-General mentioned in Schedule 1 part 1.2 and part 1.3 are prescribed.

Section 7 of the regulation prescribes people for a notice of an internally reviewable decision are people mentioned in schedule 1, part 1.2 and part 1.3 in column 4.

### **Clause 32 – New schedule 1**

This clause inserts a schedule, Schedule 1 into the regulation.

## **Schedule 1 – Internally reviewable decisions – care and protection**

### **Part 1.1 – Preliminary**

#### **1.1 – Definitions – sch 1**

This clause inserts a signpost for the term 'Aboriginal and Torres Strait Islander cultural plan'.

This clause also defines what 'carer' means when used in the Schedule.

## **Part 1.2 – Care and protection decisions**

This clause inserts a table which outlines which care and protection decisions are internally reviewable. The table includes reference to the care and protection function being exercised in making a decision, the type of decision that is reviewable, and prescribed person/s relevant to each decision, as per section 635B.

## **Part 1.3 – Assistance decisions**

This clause inserts a table which outlines various decisions that are internally reviewable decisions under this Part. The table includes reference to the section of the CYP Act that outlines the power being exercised by the decision maker, the nature of the decision which is reviewable and prescribed persons relevant to each decision as per proposed section 635B.

## **Clause 33 – Dictionary, note**

This clause inserts a note with signposts to relevant sections of the CYP Act for the following terms:

- child
- daily care responsibility
- out-of-home carer
- parent
- young adult
- young person

## **Clause 34 – Dictionary, new definitions**

This clause inserts new definitions into the CYP Regulation for:

- Aboriginal or Torres Strait Islander cultural plan
- carer

## **Schedule 1 – Other amendments**

### **Part 1.1 – Court Procedures Act 2004**

#### **[1.1] – New section 13(1A)**

This clause inserts a new subsection at section 13(1A) of the *Court Procedures Act 2004*, which prevents the Minister from determining fees for a proceeding in the ACAT on an application for review of a decision under the *Children and Young People Act 2008*, chapter 16A.

### **Part 1.2 – Magistrates Court Act 1930**

#### **[1.2] – Section 288(1)(d)**

This clause amends section 288 of the *Magistrates Court Act 1930* which outlines the jurisdiction of the Childrens Court. In relation to proceedings under the CYP Act,



the term 'any application or other proceeding' is replaced with 'any application to or other proceeding in a court'.