

Australian Capital Territory

# Children and Young People (Intensive Therapy Place) Declaration 2024 (No 1)

Notifiable instrument NI2024–173

made under the

*Children and Young People Act 2008*, section 589 (Intensive therapy place - declaration)

## EXPLANATORY STATEMENT

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### Introduction

This explanatory statement relates to the *Children and Young People (Intensive Therapy Place) Declaration 2024 (No 1)* as notified on the Legislative Register. It has been prepared to assist the reader of the Notifiable Instrument and to help inform debate on it. It does not form part of the Notifiable Instrument and has not been endorsed by the Assembly.

The Statement must be read in conjunction with the Notifiable Instrument. It is not, and is not meant to be, a comprehensive description of the Notifiable Instrument.

### Purpose

This notifiable instrument declares an intensive therapy place under section 589 of the *Children and Young People Act 2008* at a location which is excluded from this declaration under section 590 of the *Children and Young People Act 2008* so as not to disclose its location.

### Overview

The *Children and Young People Act 2008* (CYP Act) contains provisions that allow for support for highly complex children or young people to be facilitated by seeking an intensive therapy order from the Childrens Court.

In these circumstances support would be provided through an intensive therapy order, which is an order that:

- a) directs the child or young person to undergo either or both of the following:
  - i. assessment of the child or young person's behaviour and needs;
  - ii. treatment in accordance with a therapy plan; and

- b) may authorise the [Community Services Directorate] Director-General to issue a direction (a confinement direction) that the child or young person be confined from time to time while the order is in force as the Director-General considers reasonably necessary as a last resort for the purpose of the assessment or treatment; and
- c) if the order authorises the issue of a confinement direction— transfers daily care responsibility for the child or young person to the Director-General for any period of confinement; and
- d) includes any other conditions the court considers necessary to—
  - i. prevent the child or young person from engaging in harmful conduct; and
  - ii. ensure the child or young person undergoes any necessary treatment in accordance with a therapy plan.

Under the CYP Act when a confinement direction is issued, a child or young person must reside in an intensive therapy place. An intensive therapy place must be declared by the Director-General only if the place:

- a) is not a detention place, former detention place or any part of a place that accommodates young detainees; and
- b) complies with the intensive therapy standards.

Intensive therapy standards may be made by the Minister for Families and Community Services under s887 of the CYP Act and notified via Disallowable Instrument.

The operating entity for an intensive therapy place must keep a register (an **intensive therapy register**) in relation to children or young people for whom the Childrens Court makes an interim intensive therapy order or an intensive therapy order and who are confined at the intensive therapy place.

The Community Services Directorate Director-General will disclose the location of this intensive therapy place to the people entitled s 597(1) of the CYP Act who have access to the intensive therapy register.

### Context

The ACT has not previously declared an intensive therapy place, as the provisions to do so only came into effect 27 March 2024.

The Director-General recognises that an application for an Intensive Therapy Order, with a possible confinement direction in the intensive therapy place, is a last resort as it limits the rights of a young person.

This means an Intensive Therapy Order is required as the young person cannot currently be protected from individuals that pose the greatest risk to them in the community, as they do not currently have the capacity to keep themselves safe and out of harmful situations. The young person has stated they still need a level of protection to support them to continue to build on

strengths she has gained under provision of a Therapeutic Protection Order since December 2023.

The Director-General considers that if an Intensive Therapy Order, with a possible confinement direction, is not made, this young person will remain at risk of significant harm. This young person has continuously engaged in significant high risk and life-threatening behaviours for some months and shows no insight into the harm caused to them by their own behaviour and that of others with whom they engage.

The Director-General holds the belief there are no less restrictive ways available or that have not already been tested to ensure the young person's safety. It is considered in this young person's best interest to be removed from their current circumstances.

The Director-General may apply to the Childrens Court for an intensive therapy order, being satisfied that the criteria for making the order are met. This includes being satisfied there has been a risk assessment for the child or young person, less restrictive ways have been tried and were unsuccessful in preventing the young person from engaging in harmful conduct, and consideration has been given to why these less restrictive ways were not appropriate.

#### Engagement with Human Rights

Broadly, this notifiable instrument relates to the intensive therapy order of children and young people that may limit the following rights under the *Human Rights Act 2004* (HR Act):

- Section 8 – recognition and equality before the law
- Section 9 – right to life
- Section 10 – protection from torture and cruel, inhuman or degrading treatment
- Section 11 – protection of the family and children
- Section 12 – privacy and reputation
- Section 13 – freedom of movement
- Section 18 – right to liberty and security of person
- Section 21 – fair trial

The CYP Act builds in safeguards that protect against unlawful and arbitrary interferences with rights contained in the HR Act and to ensure the child or young person is confined at an intensive therapy place for the shortest necessary time to reduce the risk to the child or young person.

The use of the intensive therapy place instrument requires the application of the human rights principle of proportionality, where the period of confinement and exercise of powers in the place of intensive therapy must be limited to that which is reasonably necessary to safeguard the child's or young person's wellbeing and interests.

An Oversight Group will continue to monitor and ensure all therapeutic work and activity is in place to provide safety and security proportionate to the needs of the young people to respond to the significant risk posed. In addition, the Director-General will disclose the location of this intensive therapy place to the people entitled s 597(1) of the CYP Act who have access to the intensive therapy register and an oversight function of the therapy place.

*Right to protection from torture and cruel, inhuman or degrading treatment (s10)*

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

Section 10(2) of the HR Act protects a person against medical treatment without consent. The expression “medical treatment” has a broad meaning and is able to encompass assessments and treatments which respond to matters including but not limited to medical conditions, psychological conditions or behavioural issues. This right, whether exercisable by the child or young person or by a person with parental responsibility, is limited by the fact that the Childrens Court can order that a child or young person be confined for the purpose of undergoing assessment and/or treatment, without the relevant consent, pursuant to an intensive therapy order.

### **2. Legitimate purposes (s 28(2)(b)) and rational connection between the limitation and the purpose (s 28(2)(d))**

The purpose of giving this power to the Childrens Court is to address the harmful behaviours of a child or young person through assessment and treatment (where possible) to prevent significant harm to themselves or others in the future.

This power (and resulting limitation on the right to protection from torture and cruel, inhuman or degrading treatment) will be effective to achieve this purpose as it means that the Childrens Court can authorise the involuntary treatment of a child or young person to prevent harm to themselves or to others.

Specifically, where the Childrens Court is satisfied that if the order for treatment is not made there will be a significant risk of significant harm to the child or young person or someone else arising from the child or young person’s conduct and the risk is imminent, then the Childrens Court can make that order for treatment.

### **3. Proportionality (s 28(2)(e))**

These orders are only made in circumstances where the Childrens Court is satisfied that, without the order, the young person’s situation poses a ‘significant risk of significant harm’.

The Childrens Court must be satisfied that the Director-General has tried less restrictive measures, and these have not been successful, or has considered other less restrictive measures and these were not appropriate. The Court must also be satisfied that measures included in an intensive therapy plan will assist in reducing the likelihood that the child or young person will engage in

this harmful conduct. Finally, it must be satisfied that the making of the order is otherwise in the best interests of the child or young person.

Critically, these orders are only made after a hearing before the Childrens Court. The conferral of the power on the Childrens Court means the decision is made by a body that is required to act judicially and that each of the steps in the decision-making process is regulated by the practice and procedure of the Court.

The requirement in the CYP Act that the application be served on parents, carers, the Public Advocate and (where relevant) the Aboriginal and Torres Strait Islander Children and Young People Commissioner (s 541) also means that those persons with a direct interest in the safety and wellbeing of the young person have notice of the application and may exercise their right to appear before and be heard by the Childrens Court.

The limitations on the right to consent to medical treatment are proportionate in the sense that they represent “reasonable limits” that can be “demonstrably justified in a free and democratic society” for the purposes of section 28 of the HR Act.

*Confinement at an Intensive Therapy Place – Restriction of liberty of a child or young person*

*Right to privacy and reputation (s 12)*

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

Section 12 of the HR Act protects persons from ‘unlawful’ interference with their privacy. Under international law, the right to privacy has been interpreted as applying in a variety of different circumstances. It has been defined widely as ‘the right to be left alone’, and so includes the right to non-interference by government, the right to personal autonomy and the right to be free from unreasonable search and seizure.

It includes the right to not have personal information collected, stored, used or disclosed unless it is for legitimate purposes and in accordance with the law.

While the engagement of the child or young person upon referral to the panel is voluntary, the provisions in the intensive therapy order scheme that permit the panel obtain and share personal information, require the child or young person to engage in therapy, and allow confinement and restraint in that context, limit the right in s 12.

### **2. Legitimate purposes (s 28(2)(b)) and rational connection between the limitation and the purpose (s 28(2)(d))**

The purpose of the information sharing is to allow the needs of the child or young person to be identified and the supports and services to be designed appropriately. The purposes of the involuntary treatment, and any confinement, is to prevent the child or young person from engaging in harmful conduct that poses a risk to themselves or others, and to ensure the young

person undergoes the assessment and any therapeutic treatment deemed necessary as part of the therapy plan.

### **3. Proportionality (s 28(2)(e))**

Where personal information is collected, stored, used or disclosed, the clarity of the purpose, the tight connection between the purpose and the underlying purposes of the intensive therapy order and the strict provisions on use and disclosure in ch 25 of the CYP Act, serve to ensure that the privacy of the child or young person and others is protected.

Where there is a need to exercise the powers of confinement or restraint, it is likely that a young person will need to be searched in order to find any item or substance that may pose a risk to themselves or others, or otherwise limit the ability of the Director-General to maintain the therapeutic value of an intensive therapy place.

As a general principle, reasonable expectations of privacy may be low in some settings compared with others.<sup>1</sup> While a person in custody is entitled to enjoy all the rights that are held by ordinary citizens,<sup>2</sup> and will only lose that entitlement to the extent that is necessary to secure their safe custody, a person who is in lawful custody will have a lower expectation of privacy, particularly in relation to searches.<sup>3</sup>

The nature and limitation of the right to privacy in this respect is attributed to the implementation of the intensive therapy order in an intensive therapy place. The searches include all measures that are necessary to protect the young person from harming themselves or any other person.

The limitations on the right to privacy are proportionate in the sense that they represent “reasonable limits” that can be “demonstrably justified in a free and democratic society” for the purposes of section 28 of the HR Act.

#### *Right to freedom of movement (s 13)*

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

Section 13 of the HR Act protects the right to move freely within the limits of the ACT and the right to freely enter and leave the ACT.

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<sup>1</sup> *Hunter v Southam* [1984] 2 SCR 145 at 159; *R v Grayson and Taylor* [1997] 1 NZLR 399.

<sup>2</sup> *Raymond v Honey* [1983] 1 AC 1; *R v Lobban* (1988) 35 A Crim R 68; *Kuczynski v R* (1994) 72 A Crim R 568; *Solosky v The Queen* [1980] 1 SCR 821; *Hirst v United Kingdom* (2006) 42 EHRR 41 at [69]; *Dickson v United Kingdom* (2008) 46 EHRR 41 at [68].

<sup>3</sup> *Conway v Canada* [1993] 2 SCR 872; *R v Kennedy* 1996 3 C.R. (5th) 170 and *Fieldhouse v Canada* 1995 40 C.R. (4th) 263.

The power of the Childrens Court to order, under an intensive therapy order, that the Director-General may authorise a child or young person be confined for a period at a stated place limits this right.

## **2. *Legitimate purposes (s 28(2)(b)) and rational connection between the limitation and the purpose (s 28(2)(d))***

The purpose of the limitation is, firstly, to ensure that the assessment or treatment can proceed and, secondly, to prevent significant harm to the child or young person or to others (where necessary) during the period of the order.

The grounds for the granting of authority to confine by the Childrens Court, the criteria for the decision to confine by the Director-General and the manner and degree of confinement by the Director-General and their delegates ensure that there is a rational connection between the limitation and the purpose identified above.

The intensive therapy order is only granted where the Childrens Court is satisfied there is a significant risk of significant harm and the authority to confine is only granted to ensure the assessment or treatment in accordance with the order. Moreover, the order and the authorisation are only granted where the Court and the Director-General are satisfied that less restrictive measures have been tried, and were unsuccessful, or are inappropriate and that the order is likely to reduce the risk of harmful conduct and the risks posed by the child or young person to themselves or others.

The authority to confine is only exercised where the Director-General believes that it is necessary in the circumstances to implement the therapy plan.

Accordingly, the purpose serves a legitimate objective and there is a rational connection between the limitation on the right and the achievement of that objective.

## **3. *Proportionality (s 28(2)(e))***

While the prohibition on medical treatment without consent (s 10(2)) is addressed to a different set of interests than the right to move freely (s 13), the considerations that go to the proportionality of the restrictions on the right to consent to treatment will also go to the proportionality of the restrictions on the right to move freely.

The limitations on the right to privacy are proportionate in the sense that they represent “reasonable limits” that can be “demonstrably justified in a free and democratic society” for the purposes of s 28 of the HR Act.

1. Section 11(2) of the Human Rights Act states that every child, by virtue of age, has the right to the protection needed without distinction or discrimination of any kind. Likewise, the child's right to protection aligns with Australia's commitment to the Convention on the Rights of the Child (the Convention), imposing a clear obligation on the Government to implement measures aimed at ensuring the protection of children where necessary.

2. Consideration must be given to whether there are no less restrictive and reasonably available ways of achieving the legitimate purpose for the use of the intensive therapy plan.
3. While use of the intensive therapy plan does not align with s 11(1) and cannot support the importance of family unity, its use acknowledges that this principle can be subject to qualification by the right to protect children under s 11(2).
4. The need to protect children while minimising disruption to family life is not a one-size-fits-all process. It necessitates a nuanced approach considering a child's context, situation and needs. Only if the evidence-based risk assessment suggests a significant risk to the child's safety are more intensive measures considered.

### Summary

There is an obligation on the Territory to act when it receives information about a child's risk of significant harm. Under the CYP Act, statutory services are positively obligated to assess a child's circumstances and, where necessary, take appropriate action to protect the child.

Given this, it is considered the proposed limitations on a child and young person set out through an order to reside in an intensive therapy place under an intensive therapy order are reasonable and proportionate and show rational connection to the rights that are limited to prevent the child or young person in engaging in harmful conduct.

Appropriate safeguards and measures to ensure human rights are upheld will be in place under the arrangements set out in this notifiable instrument and, if limited, that those limitations are commensurate with the risk to the safety, welfare and wellbeing of the young person and the community.

An oversight group will be established as part of the therapy plan and will include oversight agencies such as the Public Advocate, Official Visitor, ACT Senior Practitioner, OPCAT representative member and an independent advocate.

In alignment with the legislation, standard operating procedures ensure a copy of a therapy plan developed by the Therapeutic Support Panel, Chair and Case Management team for a child or young person referred to the Panel be sent to Public Advocate, Senior Practitioner and Victims of Crime Commissioner.