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

CHILDREN AND YOUNG PEOPLE AMENDMENT BILL 2023

REVISED EXPLANATORY STATEMENT

**Presented by
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CHILDREN AND YOUNG PEOPLE AMENDMENT BILL 2023

INTRODUCTION

This Explanatory Statement relates to the Children and Young People Amendment Bill 2023 as presented to the ACT Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

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

The Children and Young People Amendment Bill 2023 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 (ACT).

OVERVIEW OF THE BILL

The object of the Children and Young People Amendment Bill 2023 is to provide for the safety, welfare and wellbeing of children and young people. The Bill also establishes principles and key responsibilities that govern child protection intervention.

The Australian Capital Territory's *Children and Young People Act 2008* (ACT)(CYPA) has played a critical role in shaping the care, protection and rights of children and young people in the ACT.

The CYPA is one of the Territory's most extensive and complex pieces of legislation. Since its commencement in 2008, the CYPA has been subject to regular amendments, leading to a progressive increase in its complexity. Recent inquiries, reviews and research, combined with feedback from system users and developments in other jurisdictions, have identified the need for substantial reform of the CYPA and the way it operates in practice.

Modernising the CYPA is a priority action under Next Steps for Our Kids 2022-2030 (Next Steps), the ACT's strategy for strengthening families and keeping children and young people safe.

The legislative reform aims to achieve the following policy objectives:

- promote shared responsibility for child protection through collaborative information sharing and reform of mandatory reporting laws.
- empower children by strengthening their rights and voices in decision-making.
- enable diversion from the statutory child protection system into earlier support services.
- deliver more equitable, transparent and accountable decision-making processes.
- address the over-representation of Aboriginal and Torres Strait Islander children, young people and families in the child protection system.

Legislative reform is intended to be delivered in two stages, with this Bill delivering early changes to some fundamental parameters and definitions that will support changes in practice while further detailed work is completed.

The Bill will enable the ACT's child protection system to provide better and earlier support to families at risk. It will also start the process of fully embedding the Aboriginal and Torres Strait Islander Child Placement Principle into legislation, implementing a key recommendation of the Our Booris, Our Way review.

The Bill will achieve these objectives by:

- adjusting the focus of the legislation and functions of the director-general to align with a family support-oriented service system.
- recognising the importance of self-determination for Aboriginal and Torres Strait Islander peoples as Australia's first peoples.
- inserting the five elements of the Aboriginal and Torres Strait Islander Child Placement Principle – prevention, partnership, placement, participation and connection – and including them as 'best interests' considerations for decisions about children and young people.
- re-organising concepts of abuse and neglect toward an overarching concept of 'significant harm', including changing concepts of sexual abuse and domestic violence, revising the term neglect, and explicitly enabling consideration of cumulative harm.
- providing guidance on factors to consider in making a decision about 'best interests', clarifying that in determining the best interests of a child or young person, the decision-maker must always consider the risk of significant harm, in addition to the relevant other best interest factors where relevant; and
- implementing amendments to Chapter 19A (Children and Young People Death Review Committee) that reflect agreed recommendations from the Committee.

OUTLINE OF PROVISIONS

Chapter 1 Preliminary

Section 7: Main objects of Act

Clause 5 proposes to amend sections 7(a) and (b) from providing for and promoting the "wellbeing, care and protection" of children and young people¹ to "safety, welfare and wellbeing". This amendment is applicable throughout the CYPA. Relevantly, while the director-general plays a central role in the administration of the CYPA, the main objects of Act and its guiding principles apply to all agencies and individuals who provide support and services to children and families under the CYPA.

¹ The terms 'child', 'children', 'young person' and 'young person' are used interchangeably, and all refer to people under the age of 18 years.

The concept of care and protection has often been interpreted as a statutory function and an obligation primarily under government purview. While tertiary services play an indispensable role in this regard, it has become increasingly evident that reliance on statutory functions to address the complex issue of child maltreatment is insufficient.

The preferred way of protecting children's safety, welfare and wellbeing is through providing information and support services to families. Aligned with the *Safe and Supported: The National Framework for Protecting Australia's Children 2021-2031*, the Bill recognises that the optimal approach to child protection lies in preventing child maltreatment from occurring in the first place.² It emphasises the necessity of proactive, preventative measures driven by collaboration across government, communities and sectors that have an impact on children and young people's safety, welfare and wellbeing.

The Bill seeks to proactively recalibrate the CYPA by rebalancing its current emphasis on statutory child protection, redirecting greater attention toward supporting families at an earlier stage to promote the safety, welfare and wellbeing of children and young people.

The change in language from "wellbeing, care and protection" to "safety, welfare and wellbeing" represents a fundamental shift from how child protection has traditionally been conceived and approached. This shift signifies a reordering of priorities within the CYPA, affirming an increased focus on addressing the underlying cause of child maltreatment and reducing the associated risks of intergenerational transmission.³

The purpose of the amendment is to reflect the child protection and family support system's contemporary role and ensure alignment with the director-general's functions, as set out in section 22. This revised purpose does not intend to broaden the scope of the CYPA, change the criteria for statutory intervention, or compel the director-general to provide support to a wider range of families beyond those already covered by the Act.

Chapter 2 Administration

Section 22: Director-general's functions

The Bill amends the director-general's responsibility to intervene to protect children from significant harm while recognising that the primary responsibility for the care and protection of children lies with the family.

The functions of the director-general relate to the provision of services to prevent harm to children, to support the community to intervene at an early stage to assist vulnerable families and to respond to the needs of children and families when harm or risk of harm occurs. These functions are part of the broader context within which the powers and obligations outlined in the Bill take effect.

² Council of Australian Governments. (2009). *Protecting children is everyone's business: National Framework for Protecting Australia's Children 2009-2020*: an initiative of the Council of Australian Governments. [Canberra, A.C.T.: Dept. of Families, Housing, Community Services and Indigenous Affairs].

³ Greene, C. A., Haisley, L., Wallace, C., & Ford, J. D. (2020). *Intergenerational effects of childhood maltreatment: A systematic review of the parenting practices of adult survivors of childhood abuse, neglect, and violence*. *Clinical psychology review*, 80, 101891.

Clauses 11 and 12 proposes to amend section 7(a)–(d) that sets out the functions of the director-general of the ACT Community Services Directorate (s 22). The primary amendments made to this section include references to the “safety, welfare and wellbeing” of children in alignment with the main objects of Act. Additionally, references to abuse and neglect have been amended to “significant harm,” as redefined at proposed section 344.

These revisions aim to better reflect the legislative intent and the broader child protection and family support reform agenda, emphasising a stronger focus on early intervention and preventative measures to strengthen families and address the underlying causes of child maltreatment.

Chapter 1 Preliminary

Section 10: Aboriginal and Torres Strait Islander children and young people — placement principles

Clause 10 gives effect to the commitment to embed the Aboriginal and Torres Strait Islander Child Placement Principle (Child Placement Principle) into the CYPA as part of the comprehensive system change needed to address over-representation.

Clause 10 proposes to amend section 10 to specify that in making a decision under CYPA in relation to an Aboriginal or Torres Strait Islander child or young person, the decision-maker must take into account the Aboriginal and Torres Strait Islander children and young people placement principles, in addition to the matters in section 8 [best interest of children and young people as paramount] and section 9 [principles applying to the Act].

Proposed section 10, defines the Child Placement Principle as:

- a) **The Prevention Principle:** The principle that children and young people should be brought up within their own family, community and culture.
- b) **The Partnership Principle:** The principle that Aboriginal and Torres Strait Islander community representatives should be given opportunities to participate in:
 - I. the design and delivery of services for children and young people; and
 - II. decisions under this Act about children and young people.
- c) **The Placement Principle:** The principle that a child or young person who is to be placed with an out-of-home carer must be placed in accordance with the priorities for placement set out in Section 513.
- d) **The Participation Principle:** The principle that a child or young person, their parents, and other family members should be given opportunities to participate in decision-making processes about care arrangements for the child or young person, including placement and contact.
- e) **The Connection Principle:** The principle that children and young people should have their connections to family, community, culture, and Country supported and maintained.

These principles are recognised as being a best interest consideration, as set out in proposed section 349(2)(f).

The Child Placement Principle, as outlined in the Bill, reinforces the importance of enhancing and preserving Aboriginal and Torres Strait Islander children’s connection to family, community and culture. The principles acknowledge the child’s right to be raised in their own culture and highlight the importance of family participation and community involvement in child protection decision-making. By recognising culture and connection as sources of strength and protection for Aboriginal and Torres Strait Islander children, the Bill affirms the essential role played by family, extended family, kinship networks, and the community in the upbringing and welfare of Aboriginal and Torres Strait Islander children.

In accordance with section 513, the aim is to ensure that whenever possible and when safe to do so, Aboriginal and Torres Strait Islander children and young people are placed with their biological family, extended family, local Aboriginal community or wider Aboriginal community in accordance with the child placement hierarchy.

Embedding the Child Placement Principle in legislation is an ACT Government priority, aligned with strong commitments to the Our Booris, Our Way Review,⁴ the National Framework for Protecting Australia’s Children⁵ and the National Agreement on Closing the Gap.⁶ This commitment is also reflected in the Parliamentary and Governing Agreement: 10th Legislative Assembly (2020).⁷

While the incorporation of the Child Placement Principle in legislation is a critical step toward addressing the over-representation of Aboriginal and Torres Strait Islander children in the child protection and out-of-home care system, achieving full implementation will necessitate improving links between legislation, policy and practice, providing earlier supports for families and recognising and enhancing leadership, participation and decision-making among Aboriginal and Torres Strait Islander peoples.⁸

Section 10A (a) and (b): Aboriginal and Torres Strait Islander children and young people—other Principles

Clause 10 introduces two new principles to be applied when administering the CYP A.

New section 10A(a) recognises Aboriginal and Torres Strait Islander people should participate in the care and protection of their children with as much self-determination as possible. This principle emphasises Aboriginal and Torres Strait Islander children, young people, parents and family members should participate in all child protection decisions affecting them, including intervention, placement and care and judicial decisions.⁹

⁴ Our Booris, Our Way Steering Committee (A.C.T.) (2019). *Our Booris our way final report*. ACT Government, Canberra City, Australian Capital Territory Recommendation 3 at p 75.

⁵ Department of Social Services. *Safe and Supported: The National Framework for Protecting Australia’s Children 2021-2031*, December 2021, Focus Area 2 at p 28.

⁶ National Agreement on *Closing the Gap*, July 2020, Outcome 12 at p 30.

⁷ Australian Labour Party (ACT Branch) and ACT Greens, *Parliamentary and Governing Agreement: 10th Legislative Assembly for the Australian Capital Territory*, November 2020, at paragraph 19.3.

⁸ Arney, F., Iannos, M., Chong, A., McDougall, S., & Parkinson, S. (2015). *Enhancing the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Policy and practice considerations* (CFCA Paper No. 34). Melbourne: Child Family Community Australia information exchange.

⁹ SNAICC (2019). *The Aboriginal and Torres Strait Islander Child Placement Principle: A guide to support implementation*. SNAICC.

New section 10A(b) recognises the ACT Government’s role to protect and promote an Aboriginal and Torres Strait Islander child’s cultural identity. In the context of statutory services, this principle articulates the need to actively support children in out-of-home care to maintain or re-establish their connections to family, community, culture and Country.

Chapter 10 Care and Protection—General

Section 344: What is significant harm?

Clause 22 proposes, in section 344, a new concept of “significant harm” as the threshold that justifies statutory intervention in the best interests of children. Significant harm is defined as “any detrimental effect of a significant nature on the safety, welfare or wellbeing of the child or young person”. This definition replaces the concept of “at risk of abuse and neglect”.

The threshold condition serves as a safeguard to protect the child and their family from unwarranted interference by the Territory.

In cases where statutory services have reasonable cause to suspect that a child is experiencing or is at risk of experiencing significant harm, the Territory is positively obligated to carry out the assessment considered necessary as proposed in clause 36 (proposed new s 344). These assessments are conducted to enable the Territory to make informed decisions regarding whether the child or young person is at risk of significant harm.

Significant harm shares a common characteristic with the previous concept of abuse and neglect in that there are no fixed or absolute criteria for determining what constitutes significant harm to a child.

The nature of harm may arise from the result of physical, psychological or emotional abuse or neglect of a child or the result of family violence, sexual abuse or exploitation but is not limited as to its cause. The “risk of significant harm” concept includes circumstances where harm has not yet occurred but is likely to occur if no action is taken to protect the child.

A singular act, omission or circumstance may meet the threshold for significant harm. In other situations, significant harm may arise from the combination or accumulation of acts, omissions or circumstances, both immediate and enduring, which disrupt, alter or harm the child’s safety, welfare or wellbeing.

The absence of a fixed criteria is a shared feature across all child protection systems and legislation and underscores the complex, evolving and context-dependent nature of assessing child maltreatment. As such, child protection laws must exhibit flexibility and adaptability to accommodate the diverse range of circumstances that can influence a child’s safety, welfare and wellbeing. This is essential as children’s situations and experiences can vary widely.

In effect, the Bill aims to provide guidance rather than enforce strict limitations on the interpretation of child maltreatment, recognising that imposing such restrictions would be contrary to the child’s best interests.

Concepts of child maltreatment

Clause 22 proposes to collapse sections 342 and 343 and unify information under section 344. As well as the definition of significant harm, clause 22 provides circumstances of child maltreatment that provide clarity to the concept of significant harm. These are broader in scope than the existing abuse and neglect concepts under the CYPA (ss 342, 343).

The revision aims to establish a more comprehensive and contemporary understanding of child maltreatment, however, is not intended to restrict the scope of section 344(1). In other words, while section 344(2) offers additional clarity by listing particular concepts of significant harm, it does not narrow or limit the scope of what can be considered significant harm under section 344(1).

Abuse and neglect are categories of harm, focusing on the actions and inactions of adults, involving either the infliction of harm or the failure to act in preventing harm. Neglect is developmentally defined and is related to the degree of dependency on others to provide for the child's needs. In contrast, abuse relies not on the degree of dependence but on the degree of harm inflicted. Both concepts heavily rely on the actions and inactions of adults to be understood; however, in isolation, this construct only accounts for a singular aspect of assessing risk and child safety and does not account well for the child's experience.

The existing definitions of abuse and neglect in the CYPA (see ss 342, 343) are divided into four subtypes: physical abuse, sexual abuse, emotional abuse and neglect. Focusing on individual forms of abuse can create the misleading impression that there are strong lines of demarcation between the different types of childhood maltreatment and adversities.¹⁰ It is well-established that abuse and neglect seldom happen in isolation. Critical factors that influence how child abuse and neglect affect children and young people include the severity, frequency and duration of harm and the co-occurrence of multiple forms of maltreatment. It is also recognised that some harm type combinations are more harmful than others, and the age and order of onset play an important role in understanding the risks to the child and the prediction of longer-term adverse impacts across life domains.¹¹

Under the current arrangement, the CYPA does not account well for the nuances of different harm types and the complex interactions between subtypes. These nuances can be easily undetected, misinterpreted or overlooked, placing the child at an increased risk.

In its current form, the CYPA only associates a concept of significant harm with neglect and emotional abuse. Its definition includes "a single instance of significant harm and multiple instances of harm that, when considered together, constitute significant harm". This existing restricted legislative requirement is misleading, as significant harm has the potential to apply to all forms of child maltreatment, not limited to neglect and emotional abuse. Moreover, the definition is event-focused and primarily centred on the actions of adults and their circumstances. This approach falls

¹⁰ Price-Robertson, Rhys & Rush, Penelope, 1974- & Wall, Liz & Higgins, Daryl J & Child Family Community Australia et al. (2013). *Rarely an isolated incident: acknowledging the interrelatedness of child maltreatment, victimisation and trauma*. Australian Institute of Family Studies, Melbourne, Vic

¹¹ Haslam D, Mathews B, Pacella R, Scott JG, Finkelhor D, Higgins DJ, Meinck F, Erskine HE, Thomas HJ, Lawrence D, Malacova E. (2023). *The prevalence and impact of child maltreatment in Australia: Findings from the Australian Child Maltreatment Study: Brief Report*. Australian Child Maltreatment Study, Queensland University of Technology.

short of considering the child's experience adequately. The deficiency in considering the child's experience becomes more pronounced when coupled with the standard of proof required, known as the 'balance of probabilities test',¹² being applied early in the assessment process. This burden of proof necessitates evidence of harm before further assessment and interventions can be initiated, which can lead to early warning signs or subtle forms of harm being disregarded or downplayed.

Across Australia, the focus of child protection systems has increasingly shifted away from exclusively focusing on the actions of parents or caregivers toward the outcomes for the child.¹³ The Standing Committee on Health, Ageing and Community Services (HACS) Interim Report on Child and Youth Protection Services (2020) recommended that the CYPA be amended to better determine the severity of various types of alleged abuse and neglect. It also recommended amendments to better address the identification of cumulative harm and intervention for children and young people at risk of cumulative harm.

Aligned with the contemporary understanding of child maltreatment, the proposed significant harm threshold intends to balance the actions of adults, the risk environment and the experiences of children and recognise the accumulation of harm.

As highlighted, under the threshold of significant harm, the Bill introduces circumstances to enhance identification and response to child maltreatment:

- New section 344(2)(a)(i) expands the types of sexual risk beyond sexual abuse to include grooming and sexual exploitation. Doing so, addresses the broader range of harmful behaviours and actions that can cause significant harm to children and young people in these contexts. Grooming behaviour involves the perpetrator manipulating a child to gain their trust, build rapport and exert power over them; a serious criminal offence in the ACT punishable by law¹⁴ but is not specifically addressed under existing child protection legislation. A wider concept is expected to allow for a more progressive and responsive policy approach to child sexual abuse. This aligns with the ACT Government's commitment to enhancing systemic responses to child sexual abuse.
- New section 344(2)(b) introduces a revised concept of neglect that includes circumstances where a child or young person's "basic physical, emotional, developmental, or psychological needs are not being met". This broader framing aims to avoid unhelpful stigmatisation and create an environment where families are more likely to seek and receive the necessary help and support to ensure the wellbeing of their children.
- New section 344(3)(a) and (b), in reference to section 344(2), introduces a standalone definition that considers a child or young person's experience of significant harm, as either "a single act, omission or circumstance, or a combination or accumulation of acts, omissions or circumstances". This nuanced understanding recognises that significant harm or the risk of significant harm may not always be readily observable when examined in isolation. Instead, the harm to the child becomes apparent when looking at

¹² Refer to points 50-57 of this document (p. 11-13)

¹³ AIHW (Australian Institute of Health and Welfare) (2022) *Child protection Australia 2020–21* Appendixes A to C. Child Welfare Series 87, AIHW, Australian Government.

¹⁴ *Crimes Act 1900* s 66.

the pattern of events, conditions and experiences over an extended period of time. In essence, this provision reflects a more sophisticated and informed approach to child maltreatment, one that recognises the complexities of assessment and provides for children to receive the necessary support and services to address both immediate concerns and the long-term consequences of cumulative harm.

- New section 344(4) aligns the definition of family violence in section 344(2) with the *Family Violence Act 2016* (s 8), ensuring consistency and comprehensive coverage in addressing family violence concerns related to child protection. The existing legal requirement that a child must have either experienced or been at risk of being exposed to incidences of violence that has or would cause significant harm¹⁵ to their wellbeing or development. This provision is concerning as it requires a child to be exposed to violence to an extent that it is deemed to cause significant harm¹⁶ to their wellbeing or development, without sufficient consideration for their sense of safety or experience. Research has shown that the pattern of coercive control used by perpetrators is directed at both adult survivors and children, disrupts global family functioning and has long-term impacts on the normal development of children and young people¹⁷. Extensive research has also challenged the notion that children are passive and unaffected by family violence if it is not directly witnessed.¹⁸

Section 356 maintains the existing mandatory reporting obligations for sexual abuse and non-accidental injury, meaning those with a legal duty to report these types of concerns must continue to do so in accordance with the CYPA.

The balance of probabilities test

Section 344 of the CYPA currently employs the threshold “at risk of abuse or neglect” and uses the balance of probabilities test to determine “if, on the balance of probabilities, there is a significant risk of the child or young person being abused or neglected”.

The definition of balance of probabilities is not defined under the CYPA. However, in civil¹⁹ court proceedings, the test is used to establish the likelihood of an event or fact, which differs from the higher standard of proof, beyond a reasonable doubt applied in criminal²⁰ court proceedings.

Currently, the threshold of a child being at risk of abuse and neglect (using the balance of probabilities test) is related to the determination of “in need of care and protection,” as outlined in section 345. A child or young person may meet this threshold if they have been abused or neglected, are currently experiencing abuse or neglect, or are at risk of abuse or neglect, and when no one with

¹⁵ The current CYPA defines significant harm as “a single instance of significant harm or multiple instances of harm that together make up significant harm” (s 341).

¹⁶ Ibid.

¹⁷ Heward-Belle, S., Healey, L., Isobe, J., Roumeliotis, A., Link, E., Mandel, D., Tsantfski, M., Young, A. & Humphreys, C. (2020). *Working at the intersections of domestic and family violence, parental substance misuse and/or mental health issues*. Practice Guide from the STACY Project: Safe & Together Addressing Complexity. Melbourne, University of Melbourne and Sydney.

¹⁸ Ibid.

¹⁹ *Evidence Act 2011* (ACT) s 140

²⁰ *Criminal Code Act 1995* (Cth) s 13.1(3)

parental responsibility for the child or young person is willing and able to protect them from abuse, neglect, or the risk thereof. This determination is also utilised in section 360 during the assessment process of a child concern report.

In practice, the use of balance of probabilities test sets a high standard of proof for the evidence needed during an early assessment phase of child protection work. The event focus and evidentiary standard of the balance of probabilities test and its consequent impact on the determination of “in need of care and protection” impacts the Territory’s ability to initiate proactive measures to protect children from harm, particularly in matters associated with cumulative risk.

The inability to act proactively can expose children to risks in matters where there is reasonable suspicion that harm might be occurring or is foreseeable but not yet fully evident. In effect, imposing a burden of proof early in the process constrains the Territory to await concrete evidence of harm before intervening. This strict burden of proof can delay early protective measures until the child’s safety is compromised, reinforcing a common perception that statutory services are either under protective or overly intrusive.

For this reason, a new way to understand, assess and respond to risk is needed. The Bill proposes to remove the balance of probabilities test as the standard of proof required when undertaking early assessments. This allows for proactive support to children and families, that may not require a statutory response and provides avenues for further investigation where not enough is known in an initial assessment. This amendment is based on the important distinction between findings of fact of abuse and neglect and the risk of significant harm.

As highlighted above, during the early assessment phase, the threshold that justifies statutory intervention in family life becomes the risk of significant harm as proposed in section 360 of the Bill.

The CYPA will still require the civil standard of proof, balance of probabilities, in Childrens Court proceedings, as specified in section 711 of the CYPA.

Section 349 What is in best interests of child or young person?

The best interest principles under the CYPA find their origin in the United Nations Convention on the Rights of the Child (Convention). The Convention refers to the best interests of the child being the primary consideration when the government intervenes in family life and to the government respecting and providing support for the responsibilities, rights and duties of parents, extended family or, where applicable, the community.²¹

The inclusion of the best interest principles in the legislation serves as a recognition that vulnerable children involved with child protection, like all children, have a right to grow up safe from harm, to have a relationship with their parents and family members, to grow up connected to their culture, and to have their wishes and perspectives heard and considered in any decision or service intervention.²²

²¹ United Nations (General Assembly), *Convention on the Rights of the Child*, (opened for signature 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

²² Victoria. Department of Human Services. (2007). *The best interests framework for vulnerable children and youth*. Melbourne, Vic.: Dept of Human Services.

Section 8 states that the best interest principle must be the paramount consideration in decision-making under the CYPA. This means that the Territory, along with all agencies and individuals responsible for providing support and services to children and families under the CYPA, must, in accordance with the best interest principles, take action to protect children from harm, safeguard their rights and promote healthy development through age-appropriate means.

Building upon this foundation, the best interest principles set out in section 349(1) and (2) offer further guidance on considerations to achieve the objectives for this vulnerable cohort outlined in the Next Steps for our Kids 2022-2030: ACT Strategy to Strengthen Families and Keep Children and Young People Safe (Next Steps).²³

The best interest considerations set out in section 349 are non-hierarchical and allows all matters to be taken into consideration and balanced in light of each situation. For each child, particular matters will be more relevant than others in arriving at a best interests assessment. As a child develops, their preferences, needs and circumstances evolve, requiring a flexible approach to assessing what serves them best.

New section 349(1) of the Bill specifies that “in deciding what is in the best interests of a child or young person, the need to ensure the child or young person is not at risk of significant harm must always be considered”. This is intended to make it clear to all users of the CYPA that safety is a fundamental consideration when considering the best interests of the child. Significant harm is defined at proposed section 344.

A key revision to the best interest principles is distinguishing the responsibility between the obligation to ensure the safety of the child or young person and preventing significant harm. By separating out this provision at proposed section 349(1), it places emphasis on the decision-maker to have due regard on a child’s risk of significant harm without pre-determining the weight of this consideration.

Section 349(2) outlines that the decision-maker must also consider other factors, as listed, relevant to the child or young person when determining their best interests. A key revision here is recognising that for Aboriginal and Torres Strait Islander children and young people, connection to family, community, culture, and Country, and participation of their family in decisions about their care arrangements is in their best interests (s 349(2)(f), s10)).

Section 349(3) specifies that in the context of the care and protection chapters, the decision-maker has the discretion to consider any additional facts or circumstances they consider relevant when assessing the child’s best interests. This implies that the scope of what constitutes the best interest of the child is not intended to be limited by the parameters set out in section 349(1) and 349(2).

Safeguarding the safety of children and young people forms a fundamental and indispensable aspect of a child protection system that operates in the best interests of every child. In this regard, child protection decision-making differs from decision-making in other contexts where safety may not always be a prominent concern.

²³ Australian Capital Territory. Community Services Directorate (2021). *Next Steps for our Kids 2022-2030: ACT Strategy to Strengthen Families and Keep Children and Young People Safe*. ACT Government, [Canberra].

Protecting the child from harm must remain central to any child protection assessment of the child's best interests. However, the best interest provision for considering a child's risk of significant harm is not meant to be applied narrowly or in a one-dimensional manner. In line with the Convention, it must encompass a broader perspective that takes into account various factors contributing to a child's safety, wellbeing and development. This includes an assessment of both immediate safety and the child's long-term outcomes.

When conflicts arise, it is the responsibility of the decision-maker to carefully evaluate the circumstances of the individual case and determine which considerations should take precedence. As such, the decision-maker should always be provided with as much information as possible in relation to what is in a child's best interests to ensure they have sufficient information available to make a decision.

Other principles and provisions of the CYPA build upon these best interest principles to guide the design and development of services for vulnerable children, as well as to provide direction to out-of-home care, family support and child protection service providers in their professional activities. These principles and provisions are found in various sections within the Act, including section 7 [Main objects of Act], section 9 [Principles applying to the Act], section 350 [Care and protection principles], sections 10 and 10A [Aboriginal and Torres Strait Islander Child Placement Principle], section 20 [Childcare services] and section 94 [Youth justice principles].'

Chapter 11 Care and Protection—reporting and assessing risk of significant harm

Section 353: Definition of child concern report

Clause 33 amends section 353, which currently provides for the definition of a child concern report. A child concern report will be substituted by a voluntary or mandatory report. This is a consequential amendment to the removal of the two-stage risk assessment in proposed section 360.

Under the proposed changes to section 360, CYPA will continue to treat voluntary and mandatory reports in the same manner, without differentiation in how they are considered or acted upon by the Territory.

Section 356 heading

The proposed change in clause 34 is to replace the term "abuse" in the heading of section 356 with the term "significant harm". This change in the header is consistent with the alteration in the assessment threshold for "significant harm" in section 360.²⁴ The provisions for mandated reporting remain unchanged.

Mandated reporters and reporting

Section 356 outlines reporting requirements for mandated reporters, who under the CYPA have specific responsibilities to report concerns of sexual abuse or non-accidental physical injury when

²⁴ Refer to points 76-84 of this document (p.16-17)

their belief is based on information obtained during the course of their work or as a result of it. As highlighted, the provisions outlined in section 356 remains unchanged in this Bill.

Section 360: Assessing risk of significant harm

The CYPA outlines a complex, multi-stage process for the assessment of children and young people.

Currently in the CYPA, section 360(2) outlines that upon receiving a child concern report, the director-general must (a) consider the report and (b) carry out an assessment of the matters raised in the report to decide if the child or young person may be in need of care and protection.

To qualify as a report under the CYPA, the information provided by the reporter must pertain to a belief or suspicion that a child or young person may be in need of care and protection. If, upon review, it can be confirmed that the report was duly considered and that any decision to act or refrain from acting was made in alignment with the report's criteria, then the above statutory obligation set out at 360(a) and (b) would be considered satisfied.

If the director-general suspects on reasonable grounds that the child or young person may be in need of care and protection, then the director-general must decide that the child concern report is a child protection report as set out in 360(5) and undertake further assessment. The requirements of a child protection report are set out in section 361.

The only substantial difference between the child concern report and child protection report is the suggested information gathering activities. The range of possible actions available to the director-general in these stages extends from referral to the police to taking no action. This suggests the legislation was intended to allow the widest possible degree of discretion and flexibility in the assessment process rather than the complex two-stage assessment process that has evolved

To clarify this complex and repetitive process, clause 36 proposes to simplify the two-tier hierarchical structure of a child concern report (s 360) and a child protection report (s 361) into a unified assessment provision proposed in section 360. It also removes the legislative threshold of "in need of care and protection" in section 360(b) and replaces it with "risk of significant harm".

Under clause 36, proposed section 360(1) will now clarify that on receiving either a voluntary or mandatory report concerning a child or young person, or if otherwise there is a belief or suspicion that a child or young person may be at risk of significant harm, the director-general "must conduct the assessment deemed necessary to determine whether the child or young person is at risk of significant harm".

Under proposed section 360(1) the CYPA will maintain a clear, non-discretionary requirement, emphasised by the use of the term "must", concerning the obligation of the director-general to conduct an assessment.

While conducting the assessment, the director-general may also offer or contribute to providing services aimed at enhancing and supporting the safety, welfare and wellbeing of the child or young person and their family, as proposed in section 360(3).

Child cultural identity

Under clause 366 proposed in section 360(4), a new provision has been introduced that stipulates that the director-general must, as soon as practicable, attempt to identify whether the child is an Aboriginal or Torres Strait Islander child or young person. This provision acknowledges the importance of and protects a child's connections to family, culture and community, recognising this as being in their best interest and crucial to their safety and wellbeing throughout all phases of child protection intervention.²⁵ It also acknowledges that early identification is a critical component for the full implementation of all five elements of the Child Placement Principle.

Chapter 19A Children and Young People Death Review Committee

Section 727B Functions of committee

Clauses 46 to 64 proposed at chapter 19A, sections 727B–T, sets out the functions and responsibilities of the ACT Child and Young Person Death Review Committee based on the Committee's annual reporting.

In 2021, the ACT Child and Young Person Death Review Committee completed the *Review of Children and Young People Who Have Died as a Result of Intentional Self-Harm*²⁶ (the Review) in response to an increase in deaths by suicide in 2018. The Bill addresses recommendations from the 2021 Review, as well as findings from a review into the Committee's effectiveness in 2019. The 2021 recommendations are echoed by the findings in the *Review of Children and Young People in the ACT* (2020) by the ACT Government's Office for Mental Health and Wellbeing.²⁷

The Bill retains the core functions of the Committee while expanding its scope to include the 18 to 24-year age group and review of 'serious injuries.' The amendments support efforts to reduce preventable deaths of children and young people in the ACT and systemic changes to improve support and services to children and their families. The Bill also makes a range of minor amendments to improve the functioning of the Committee.

CONSISTENCY WITH HUMAN RIGHTS

The Bill introduces several amendments aimed at strengthening the prevention of child maltreatment and enhancing the response systems for vulnerable children and their families. In doing so, the Bill engages with, supports and imposes limitations on several rights under the *Human Rights Act 2004* (ACT) (HRA).

Broadly, the Bill engages and places limitations on the following HRA rights:

- **Section 11:** Protection of the family and children
- **Section 12:** Right to privacy and reputation

²⁵ SNAICC (2019). *The Aboriginal and Torres Strait Islander Child Placement Principle: A guide to support implementation*. SNAICC.

²⁶ ACT Children and Young People Death Review Committee (2020). *Review of ACT children and young people who have died as a result of intentional self-harm: 2017-2019*. Canberra: ACT Children and Young People Death Review Committee.

²⁷ *Review of Children and Young People in the ACT* (2020) Office of Mental health and Wellbeing. Australian Capital Territory, Canberra.

- **Section 14:** Freedom of thought, conscience, religion and belief

These limitations are considered reasonable, having regard to the human rights of children to safety, protection and justice.

The Bill also engages and supports the following HRA rights:

- **Section 8:** Recognition and equality before the law
- **Section 11:** Protection of the family and children
- **Section 27:** Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities.

The preamble to the HRA states that few rights are absolute and may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. Section 28 of the HRA requires that any limitation on a human right must be authorised by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate, with subsection (2) stating that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

- (a) the nature of the right affected
- (b) the importance of the purpose of the limitation
- (c) the nature and extent of the limitation
- (d) the relationship between the limitation and its purposes; and
- (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

The protection of the family and children (s 11) and right to privacy and reputation (s 12) are considered to impose the highest level of limitation. As such, a detailed analysis of whether these limitations on a human right are reasonable and proportionate against the criteria set out in section 28 is presented first, followed by subsequent discussions of the other engaged and supported human rights.

Section 11: Protection of the family and children

The nature of the right affected (28(a))

Section 11(1) of the HRA recognises that families are the fundamental group unit of society and entitles families to protection by society and the State. An explanatory note under section 11 of the HRA clarifies that the term ‘family’ has a broad meaning, recognising the many different types of families that reside in the ACT, all of whom are entitled to protection. This right is supported by the right to privacy in section 12 of the HRA, which prohibits a public authority from unlawfully or arbitrarily interfering with a person’s family or home. As outlined in the Convention on the Rights of the Child (1989), ratified by Australia in 1990,²⁸ these rights align with article 9, which stipulates that children should not be separated from their parents unless it is for their own good, and article 18,

²⁸ United Nations (General Assembly), *Convention on the Rights of the Child*, (opened for signature 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

which states that parents share responsibility for bringing up their children and should always consider what is best for each child.

Section 11(2) of the HRA 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 (Convention), imposing a clear obligation on the government to implement measures aimed at ensuring the protection of children where necessary.

The Bill operates within a framework that places a high priority on preserving families through early intervention and preventative measures, recognising that the Territory is under positive obligation to help families stay safely together.

The introduction of risk of significant harm (s 344) aims to provide a more modern framework for understanding and addressing child maltreatment. In turn, this will support users under the CYPA in recognising and responding to various forms of maltreatment experienced by children more effectively. The focus on early identification aims to address child protection issues more proactively and, where possible, prevent the need for statutory intervention. It is guided by the core principle of employing the least restrictive measures necessary to ensure a child's protection, balancing the protection of the family unit in section 11(1) and the child's right to protection from maltreatment aligned with section 11(2).

The importance of the purpose of the limitation (28(b))

The primary objective of the Bill is to safeguard children from the risk of significant harm while prioritising the child's best interests. It is recognised that the most effective approach to achieving this goal is by providing earlier support to families to proactively prevent situations that could lead to significant harm to children.

The amendments proposed in the Bill are designed to place children's best interests at the forefront of the legislation. By giving primacy to best interests and emphasising the child's right to protection from significant harm, the Bill aligns with the rights of children articulated in various international agreements. This includes the right to life and protection from torture or cruel, inhuman, or degrading treatment or punishment, as outlined in articles 6(1), 7, 24(1) of the International Covenant on Civil and Political Rights (ICCPR).²⁹

Generally, the best interests of the child are a primary consideration in all actions concerning children under article 3(1) of the Convention. In the context of child protection, best interest discretion is elevated to the paramount consideration, noting the Convention advises governments that they should ensure decisions are made with due regard for the best interests of children, particularly those from vulnerable groups.³⁰ This aligns but is not limited to articles 3, 9(1)(3), 18(1), 19, 21, 34.

²⁹ United Nations (General Assembly), *International Covenant on Civil and Political Rights* (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171.

³⁰ Australia. Human Rights and Equal Opportunity Commission. (1999). *Human rights brief 1: an occasional publication of the Human Rights and Equal Opportunity Commission*. <http://nla.gov.au/nla.arc-12882>.

Notably, article 19(1) of the Convention states that governments must take all appropriate legislative, administrative, social and educational measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. This is reinforced by article 19(2), which further states that protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment.³¹

The amendments to the Bill demonstrate a proactive approach in responding to the critical problem of child maltreatment. By adapting the legislative frame to the evolving understanding of child maltreatment and recognising this as a violation of a child's fundamental human rights, the Bill underscores the seriousness of the issue as recognised by the HRA. Furthermore, it highlights the importance of early intervention to address the underlying factors contributing to child maltreatment in accordance with the principles outlined in stated international treaties.

The nature and extent of the limitation ((28c))

As in common with the existing CYPA, the Bill maintains the obligation to protect children from child maltreatment. The Bill replaces references to concepts of abuse and neglect with the overarching concept of significant harm, including strengthening the concepts of sexual abuse and family violence, revising the term neglect, and explicitly enabling consideration of cumulative harm (s 344). Furthermore, it streamlines the provisions related to the assessment of significant harm (s360).

The right to family protection is limited by amendments to sections 344 and 360, which may lead to interference with family life and the disruption of family units. Despite the provision of preventative and early intervention, some children will still be exposed to the risk of significant harm. In situations where a child is considered at risk of significant harm, the Territory is positively obligated to intervene. In such cases, these children and their families require a transparent system for assessing and addressing their needs.

The system employed to protect children includes:

- receiving reports of alleged risk of significant harm to a child;
- investigating these reports and assessing a child's need for protection; and
- if a child needs protection, determining what level of intervention, if any, is required to ensure the child's safety.

This may require actions that impose upon or limit parental rights and involve activities considered intrusive into private family life.

In a minority of cases the severity of significant harm may necessitate prioritising the child's safety and wellbeing over preserving the family unit, if considered in the child's best interest. The CYPA

³¹ United Nations (General Assembly), *Convention on the Rights of the Child*, (opened for signature 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

authorises the director-general to act without parental agreement to assume protective responses to children if it is determined to be in the child's best interests³². In certain situations, this action may lead to the temporary or permanent suspension of legal parental responsibilities for a parent or caregiver.

On balance, the nature and extent of this limitation is consistent with a child's right to protection (s11(2)) and the right to life (s 9) under the HRA where the Territory has positive obligations to protect a child from acts or omissions which may cause loss of life.³³

The relationship between the limitation and its purposes (28d)

The Convention emphasises the significance of maintaining the family unit. This means that, ideally, parents and their children should be together and steps must be taken to support and preserve family unity when it is in the child's best interests. In the assessment of risk of significant harm, the rights in sections 11(1) and 11(2) will be engaged simultaneously. In most cases there will be no conflict between sections 11(1) and 11(2), as a child's best interests will usually be best served by the protection of their family. However, in some cases, achieving harmonisation between the two rights will not be possible.

In child protection, the best interest principles proposed in section 349 become relevant when the obligations inherent in parental rights are not observed or are exercised in a manner that compromises the child's safety, welfare or wellbeing. In such cases, the best interest principle of the child serves as a crucial framework for addressing situations where these two principles may come into conflict and where it becomes necessary to qualify parental rights in order to ensure child's safety.

The Territory and decision-makers have to carefully weigh the rights of all parties involved, bearing in mind that the right of the child to have their best interests taken as a paramount consideration means that the child's interests takes precedence over other considerations, as protected in CYPA (pt 1.2 s 8) and affirmed by the United Nations Committee on the Rights of the Child General Comment 14.³⁴ For Aboriginal and Torres Strait Islander children the best interest principle in proposed section 349(f) requires the decision-maker to consider the five elements of the Child Placement Principle as outlined in proposed section 10. Therefore, the weight given to what serves the child's best interests must be flexible, recognising that it varies based on individual circumstances.

This approach aligns with the guidance provided in the United Nations Committee on the Rights of the Child General Comment 14 regarding the implementation of the Convention's article 3(1).³⁵ The General Comment recommends, and as adhered to in the Bill (s 349), the utility of establishing a list of elements that decision makers could consider in a best interests assessment, emphasising that this list should be both non-exhaustive and non-hierarchical. The Committee's General Comment

³² *Children and Young People Act 2008* (s 370).

³³ United Nations Human Rights Committee, *General Comment No. 36 Article 6: Right to life*, 124th sess, UN Doc CCPR/C/GC/36 (3 September 2019) [3], [7].

³⁴ UN Committee on the Rights of the Child. (2013, May 29). *General comment no. 14 (2013) On the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), CRC/C/GC/14 at [39].

³⁵ *Ibid.*

recognises that the best interest principles are intricate and must be evaluated on a case-by-case basis, emphasising the need for the list of best interest considerations to offer concrete guidance while allowing for flexibility.

While the Bill aligns with section 11(1) and supports the importance of family unity, it acknowledges that this principle can be subject to qualification by the right to protect children under section 11(2).

Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve (s 28(e)).

There are no less restrictive and reasonably available ways of achieving the legitimate purpose of the Bill than implementing an incremental level of involvement in a family's life. The Bill does not endorse indiscriminate intrusion into families. Any intervention that disrupts family life must be aimed at ensuring the child is protected from harm. As highlighted, statutory processes to address child protection concerns typically begin with minimally invasive measures. These measures are intended to respect the family's autonomy and privacy while addressing any potential risks to the child's safety, welfare and wellbeing.

Balancing 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. This graduated approach aligns with the principle of proportionality by ensuring that any intrusion into family life is both necessary and proportionate to the potential harm to the child.

Section 12 Right to privacy and reputation

The nature of the right affected (s 28(a))

Section 12(a) of the HRA recognises that everyone has the right not to have their privacy, family, home or correspondence interfered with unlawfully or arbitrarily, and section 12(b) recognises the right not to have their reputation unlawfully attacked. The nature of this right is not absolute and may be subject to reasonable limits, as outlined in section 28. The term 'arbitrary interference' is defined in article 17 to ensure that even actions authorised by law should align with the provisions, aims and objectives of the ICCPR and should be reasonable, necessary and proportionate to the need and circumstances.³⁶

The right to privacy and reputation needs to be considered by a child's right to protection in section 11(2) of the HRA, which states every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind. The HRA does not provide a precise definition of the term "child", however it is widely interpreted as referring to an individual below 18 years of age. Section 11(2) of the HRA recognises that children are entitled to the same rights as adults, plus additional protections according to their best interests and by virtue of being a child. This inherent vulnerability necessitates special consideration and protection under the law,

³⁶ United Nations (General Assembly), *International Covenant on Civil and Political Rights* (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171

even to the extent of suspending certain privacy and reputational protections when there is a credible risk to the child.

Considering these provisions, it is reasonable to suggest that an individual's right to privacy and reputation can be subject to interference, provided that the interference is both lawful and reasonable within the given context.

The importance of the purpose of the limitation (s 28(b))

The Bill activates section 12, imposing an obligation on the Territory to act when it receives information about a child's risk of significant harm. Under the CYPA, statutory services are positively obligated to assess a child's circumstances and, where necessary, take appropriate action to protect the child.

To assess a child's risk of significant harm, the director-general has powers under the CYPA to ensure that risks to the child can be appropriately managed. The assessment of significant harm (s 360) may include application of information-sharing provisions under the CYPA. Although these provisions are not subject to the Bill, the CYPA includes provisions allowing the director-general to collect and share safety and wellbeing information with authorised individuals and entities, in order to carry out responsibilities under the Bill (pt 24.3 div 25.3.2).

The nature and extent of the limitation (s 28(c))

Information reported to statutory services related to a child's risk of significant harm can vary significantly in scope, scale and potential consequences. In response, the Bill grants the director-general a range of functions to effectively address this broad spectrum of possible risk scenarios.

The approach to assessing a child's risk of significant harm to a child typically begins with the least intrusive measures and progresses towards more intrusive actions only when necessary. This incremental approach aims to safeguard the child while respecting individual privacy rights to the greatest extent possible.

The justification for any imposition must be determined on a case-by-case basis, ensuring that any intrusions on privacy and reputation are reasonable, proportionate, and justifiable to achieve the legitimate purpose of the Bill, with the child's individual best interests remaining the primary focus. Typically, the extent to which a person's rights are limited corresponds with the severity of the risk posed to the child.

The relationship between the limitation and its purposes (s 28(d))

The limitation achieves the purpose of protecting children from significant harm. Proposed section 360(2) authorises the director-general to conduct an assessment deemed necessary to determine whether the child or young person is at risk of significant harm. While conducting the assessment, they may offer or contribute to providing services to enhance and support the safety, welfare and wellbeing of the child or young person and their family under proposed section 360(3) of the Bill.

During an assessment, the CYPA permits the collection and disclosure of safety and wellbeing information to aid the Territory in assessing the child's risk of significant harm and implementing protective measures in the child's best interests.

In most cases, actions taken to assess reports of alleged significant harm are undertaken with the participation and agreement of the child's parent(s). In some cases, the severity of significant harm may result in the director-general not needing parental agreement if it is determined to be in the child's best interests.³⁷ This may include situations where seeking agreement may place the child at risk or whereby doing so may jeopardise a criminal investigation. In certain circumstances, temporary restrictions on individual rights to privacy and reputation may be necessary. This limitation is consistent with the child's right to the protection under section 11(2) of the HRA.

Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve (s 28(e))

As set out in Section 10 of the HRA, the Territory is positively obligated to take measures to ensure that children within the ACT are not subjected to torture or inhuman or degrading treatment.³⁸ Aligned with Section 11(2) these measures should provide effective protection of children and include reasonable steps to prevent ill-treatment, which the authorities had or could have reasonably foreseen,³⁹ of particularly vulnerable members of society.

The provisions in the Bill that may impact a person's right to privacy are directly linked to the significant harm threshold condition related to the function of the Bill. Proposed sections 344 and 360 serve the purpose of protecting the best interests of children. The Convention requires that it be a 'primary consideration' in all actions concerning children and is the paramount principle of the CYPA. The best interest principle recognises that children are particularly vulnerable members of society and require special protection.

On balance, the limitations imposed on a person's right to privacy and reputation by the Bill are considered reasonable, proportionate and justified to achieve the legitimate purpose of the Bill, as they are the least restrictive means available to achieve the purpose of protecting children.

Section 14 Freedom of thought, conscience, religion and belief

In relation to parental rights

The freedom of thought and conscience is divided into two components: the freedom of personal autonomy, which grants individuals the freedom to think and believe as they choose, and the freedom of manifestation, which allows individuals to express and demonstrate their thoughts or beliefs publicly. Freedom of thought protects an individual's right to have their own thoughts, ideas and beliefs without interference from the government or other individuals or entities. It ensures that people are free to think as they wish. Article 18 of the ICCPR does not permit any limitations on the freedom of thought or on the freedom to have or adopt a religion or belief of one's choice. These

³⁷ *Children and Young People Act 2008* (s 370)

³⁸ *A v United Kingdom* (1998) 27 EHRR 611 at [22]; *M and M v Croatia* [2015] ECHR 759 at [136]; *DMD v Romania* [2017] ECHR 815 at [44].

³⁹ *Z v United Kingdom* (2001) 34 EHRR 97 at [73]; *E v United Kingdom* (2002) 36 EHRR 519 at [88].

freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19.1.⁴⁰

Freedom of conscience, on the other hand, relates to an individual's moral and ethical beliefs. It protects a person's right to act in accordance with their conscience, provided that these actions do not infringe upon the rights and freedoms of others. Human rights distinguishes between the absolute freedom of personal autonomy, which allows individuals the freedom to think and believe as they choose without any limitations, and the freedom of manifestation, which can be subject to restrictions when its exercised in a way that poses a risk of harm to others.⁴¹ Article 18.3 permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.⁴²

When discussing freedom of thought, conscience, religion and belief, parents or caregivers have the right to raise their children in ways they see fit. However, these freedoms are not absolute and must be exercised responsibly, respecting the child's individuality and ensuring that the child's safety, welfare, wellbeing and rights are not compromised. While parents can impart their beliefs to their child, they must also ensure that the child's right to develop their own beliefs and opinions is respected. This means allowing the child to explore other viewpoints and make their own choices as they grow older. Additionally, the parents must ensure that their parenting or religious practices do not harm the child's physical or psychological wellbeing. If, for example, a particular parenting or religious practice poses a significant risk to the child's health, statutory intervention may be required to protect the child's right to life and protection (HRA, ss 9 and 11(2)).

When a child's safety, welfare or wellbeing is considered at risk or compromised, the Territory employs a range of graduated measures to mitigate the risks to the child. Statutory services may initially offer voluntary support to parents, including educational resources and services. If parents do not cooperate and the child's situation does not improve, statutory services may seek parental cooperation with the requirements of a case plan designed to address the child's needs. If these measures fail to alleviate concerns, parental restrictions, such as a court order granting the Territory to seek an assessment or medical attention, may be imposed. In more severe cases where there's an immediate risk to the child's safety, statutory services may temporarily assume parental responsibility to ensure the child's safety. In extreme situations where all other interventions fail, and the child's rights and safety are seriously compromised, authorities may legally override all parental rights of parental freedom, privacy and family autonomy to ensure the child's right to protection (11(2)).

Section 28 of the HRA requires that any restriction on a human right must be sanctioned by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate. To ensure proportionality, the means selected for interference must be the least restrictive reasonably available and should be examined on whether competing rights are justifiably balanced.

⁴⁰ United Nations Human Rights Committee, *General Comment No. 22 Article 18: The right to freedom of thought, conscience, CCPR/C/21/Rev.1/Add.4* [3][4].

⁴¹ Australia. Human Rights and Equal Opportunity Commission. (1999). *Human rights brief 4: an occasional publication of the Human Rights and Equal Opportunity Commission.*

⁴² *Ibid* [7].

Section 14 of HRA, the freedom of thought, conscience, religion and belief will only be limited where it poses a significant risk to the child. The amendments made to the Bill have not substantially changed the existing restrictions on human rights imposed by the CYPA. These limitations are deemed to be reasonable and justified given the circumstances, as they are the least invasive measures available to achieve the objective of protecting children.

In relation to the reporting of sexual abuse

The Royal Commission into Institutional Responses to Child Sexual Abuse, established in 2013, recommended that state and territory governments amend laws concerning mandatory reporting to child protection authorities to include people in religious ministry (rec 7.3(e)).⁴³ In response to the Royal Commission recommendation 7.3(e) and in commitment to improving systemic responses to child sexual abuse⁴⁴, the existing CYPA explicitly requires the reporting of information relating to child sexual abuse and non-accidental physical injury disclosed within the context of a religious confession (356(C)(i)(ii)).

As of September 1, 2019, ministers of religion, religious leaders, and clergy members from various denominations are now classified as mandated reporters. The CYPA specifies that a person who is or was a member of the clergy of a church or religious denomination is not entitled to refuse to make a mandatory report solely on the basis that it contains information communicated to the member during a religious confession (356(2)).

New section 344(a)(ii) introduces the concepts of grooming and sexual exploitation. The provision's primary objective is to prioritise the safety of children in accord with the growing understanding of child sexual abuse. This amendment does not change the mandated reporting requirements outlined in section 356. Mandated reporters are still only obligated to report concern falling under the "sexual abuse" component of this provision.

Section 28 of the HRA requires that any restriction on a human right must be authorised by a Territory law, be based on evidence and be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate. The existing limitations on human rights imposed by the CYPA have not been lessened or exacerbated by the Bills amendments and are considered proportionate and justified under the circumstances. They represent the least restrictive means available to achieve the purpose of protecting children and victims of child sexual abuse, noting that even if only a single case of child sexual abuse is detected or prevented, the amendments would still be deemed proportionate.⁴⁵

Section 8 Recognition and equality before the law

Section 8 of the HRA provides that everyone is equal before the law and is entitled to equal protection of the law without discrimination. The purpose is to ensure that all laws and policies are

⁴³ Australia. *Royal Commission into Institutional Response into Child Sexual Abuse & Royal Commission into Institutional Response into Child Sexual Abuse*. (2012). Royal Commission into Institutional Response into Child Sexual Abuse. <http://nla.gov.au/nla.arc-137540>.

⁴⁴ *Government Response to the Listen. Take Action to Prevent, Believe and Heal Report* (2022).

⁴⁵ The Hon. Justice Julie Dodds-Streeton and Jack O'Connor (2019), *Analysis Report: Implementation of Royal Commission into Institutional Responses to Child Sexual Abuse Recommendations Regarding the Reporting of Child Sexual Abuse with Implications for the Confessional Seal*, pp. 47.

applied equally and do not have a discriminatory effect. The right to recognition and equality before the law is a standalone right that also permeates all human rights.

Section 8 of the HRA sets out examples of discrimination on the basis of race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or 'other status.' In addition to the grounds identified as examples in the HRA, the *Discrimination Act 1991* (ACT) (s 8) provides that it is unlawful to discriminate based on a person having one or more protected attributes, including but not limited to age, race, colour, sex, sexual orientation, language, religion, disability, or other status.

Direct discrimination occurs when a person treats a person with an attribute unfavourably because of that attribute. Discrimination means any distinction, exclusion, restriction or preference based on any ground which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by everyone, on an equal footing, of all rights and freedoms.⁴⁶ It can be taken to include different treatment of persons who are in relevantly similar situations, where an objective and reasonable justification is absent.⁴⁷

Indirect discrimination may arise when an unreasonable rule or policy applies to everyone but has the effect of disadvantaging some people because of a personal characteristic they share. The right to equality and the prohibition on discrimination do not prevent special measures or affirmative action aimed at correcting inequalities that arise from facially neutral laws.⁴⁸ Sometimes, it may be necessary to treat people differently to achieve equality. This is because differences between people (and, at times, in common with their communities) may make it difficult for them to enjoy their rights without support.

The principle of equality, as it pertains to social justice and human rights, asserts that all individuals should be treated fairly and impartially, without any form of discrimination or bias. However, achieving true equality may require more than removing existing discriminatory practices in certain situations. It may necessitate taking affirmative action to address the underlying conditions that contribute to or perpetuate discrimination.⁴⁹ The need for affirmative action arises from the recognition that historical and systemic discrimination can create deeply entrenched disparities for certain individuals and groups.⁵⁰ These disparities may not be easily rectified by simply ending discriminatory practices, as the effects of past discrimination can continue to permeate and disadvantage certain groups.

Domestic case law confirms that while special measures or affirmative actions do not necessarily have to guarantee equal opportunity in an absolute sense, there must be reasonable acceptance the measures taken are justifiable, rational and reasonably connected to the objective of promoting equality and diminishing discrimination.⁵¹

⁴⁶ UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989. HRI/GEN/1/Rev.1 at [7].

⁴⁷ *Fredin v Sweden* (1991) 13 EHRR 784 at [60]; *Stubbings v United Kingdom* (1996) 23 EHRR 213 at [70]; *Willis v United Kingdom* (2002) 35 EHRR 21 at [48].

⁴⁸ *Griggs v Duke Power Co* (1971) 401 US 424 at 429.

⁴⁹ UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989. HRI/GEN/1/Rev.1 at [10].

⁵⁰ *Belgian Linguistic Case* (1979-80) 1 EHRR 252 at [10]; *Thlimmenos v Greece* (2001) 31 EHRR 15 at [44]; *Stec v United Kingdom* (2006) 43 EHRR 47 at [51].

⁵¹ *Gerhardy v Brown* (1985) 159 CLR 70 at 87-88 and 105; *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149 at 160-161[34]; *Catholic Education Office v Clarke* (2004) 138 FCR 121 at 149[130].

The HRA recognises the special significance of human rights for Aboriginal and Torres Strait Islander peoples as First Nations people. The fundamental principle underpinning the various cultural rights protected under s 27 of the HR Act is recognition and respect for the identity of Aboriginal and Torres Strait Islander peoples, both as individuals and in common with their communities.

The proposed section 10 will amend the CYPA to explicitly specify that when decisions are being made about Aboriginal or Torres Strait Islander children and young people, the Aboriginal and Torres Strait Islander Child Placement Principle must be applied.

The Aboriginal and Torres Strait Islander Child Placement Principle acknowledges the child's right to be raised within their own family and community, supports Aboriginal and Torres Strait Islander people to participate in significant decisions affecting their children, and ensures children are placed in accordance with the placement hierarchy if they become involved with the statutory care system.

The amendments are intended to be an affirmative action to address the recognition and equality before the law.

Part 3 Section 27 Aboriginal and Torres Strait Islander culture

Section 27(2) of the HRA 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. This section is based on two international instruments. First is the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁵² which Australia ratified in 1975. Second are articles 25 and 31 of the United Nations Declaration on the Rights of Indigenous Peoples,⁵³ adopted by the General Assembly in 2007.

Article 3 of the Convention provides all organisations concerned with children should work towards what is best for each child. Article 8 provides that governments should respect a child's right to family ties, with article 7 asserting that children have the right to know their parents and, as far as possible, to be cared for by them. Article 20 provides that children who cannot be looked after by their own family must be looked after properly by people who respect their religion, culture and language.

Revised section 10 incorporates the Aboriginal and Torres Strait Islander Child Placement Principle, which safeguards the rights of Aboriginal children and young people, their families and communities involved with the statutory child protection system. It prioritises preserving the family unit, working in collaboration with the community, involving children and families in decision-making processes, maintaining connections to family, community, culture, and Country, and ensuring children who are placed in out-of-home care are done so in accordance with the Aboriginal and Torres Strait Islander Child Placement Principle hierarchy set out in section 513 of the CYPA.

New section 360(4) affirms the director-general's duty to promptly determine if a child is of Aboriginal or Torres Strait Islander identity. This acknowledgment prioritises preserving the child's

⁵² United Nations (General Assembly). *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

⁵³ United Nations (General Assembly). *United Nations Declaration on the Rights of Indigenous Peoples*: (adopted 61/295. 13 September 2007).

cultural and community connections, essential for their wellbeing and safety throughout all phases of child protection involvement. Early identification is pivotal in effectively implementing all five elements of the Aboriginal and Torres Strait Islander Child Placement Principle.

The Bill also recognises and promotes the importance of self-determination. New section 10 A(a) recognises Aboriginal and Torres Strait Islander people should participate in the care and protection of their children and young people with as much self-determination as is possible. This principle recognises Aboriginal and Torres Strait Islander children, parents and family members have the right to participate in all child protection decisions affecting them, including intervention, placement and care and judicial decisions.⁵⁴ While the HRA does not specifically protect self-determination, it is closely related to other rights that are protected and articulated at article 1 of the United Nations Declaration on the Rights of Indigenous Peoples.⁵⁵

Amendments have been introduced with the intent of affirmatively addressing the principles of recognition and equality under the law.

⁵⁴ SNAICC (2019). *The Aboriginal and Torres Strait Islander Child Placement Principle: A guide to support implementation*. SNAICC.

⁵⁵ United Nations (General Assembly). *United Nations Declaration on the Rights of Indigenous Peoples*: (adopted 61/295. 13 September 2007).

CLAUSE NOTES

Children and Young People Amendment Bill 2023

Detail

Part 1 – Preliminary

Clause 1 — Name of Act

This is a technical clause that names the short title of the Act.

Clause 2 — Commencement

This clause provides that the Act will commence on a day fixed by the Minister by written notice. If the Act has not commenced before 31 March 2024, it will automatically commence on that day.

Clause 3 — Legislation Amended

This clause lists the legislation amended by this Bill. This Bill will amend the *Children and Young People Act 2008*.

Clause 4 – Application of Act to children and young people etc Section 6(c)

This clause amends s354(i)(ii) and (iii) by omitting abuse and neglect and substituting risk of significant harm.

Clause 5 – Main objects of Act

This clause amends sections 7(a) and (b) to omit “wellbeing, care and protection” to substitute the words “safety, welfare and wellbeing”.

Clause 6 – Section 7(c)

This clause substitutes the existing section 7(c), which defines an object of Act as “preventing abuse and neglect of children and young people” and replaces it with the object “to provide children and young people with the care and protection necessary to protect them from significant harm”.

Clause 7 – Section 7(d)(i)

This clause omits the words “wellbeing, care and protection” and substitutes “safety, welfare and wellbeing”.

Clause 8 – Section 97(d)(ii)

This clause substitutes the reference to “preventing abuse and neglect” of Aboriginal and Torres Strait Islander children and young people to “providing for Aboriginal and Torres Strait Islander children and young people to receive the care and protection necessary to protect them from significant harm”. This is consistent with the removal of the concept of “abuse and neglect” and replacement with “risk of significant harm”.

Clause 9 – Section 7(e)

This clause omits the reference to “wellbeing, care and protection” and substitutes a reference to “safety, welfare and wellbeing”.

Clause 10 – Section 10

This clause substitutes a new clause, introducing the Aboriginal and Torres Strait Islander Child Placement Principle. It provides that when making a decision under the CYPA in relation to an Aboriginal or Torres Strait Islander child or young person, the decision maker must take into account the Aboriginal and Torres Strait Islander Child Placement Principle as set out in this new section 10, as well as the matters set out in sections 8 and 9.

The Child Placement Principle specifies that Aboriginal and Torres Strait Islander:

- children should be brought up within their own family, community and culture (the prevention principle)
- community representatives should be given opportunities to participate in design and delivery of services for children and young people, as well as decisions under the CYPA about children and young people (the partnership principle)
- children and young people placed with out-of-home carers must be placed in accordance with the priorities for placement set out later in the CYPA in section 513 (the placement principle)
- children and young people, their parents and other family members should be given opportunities to participate in decision making processes about care arrangements (the participation principle), and
- children and young people should have connections to family, community, culture and Country supported and maintained (the connection principle).

Additionally, a new Section 10A specifies that the following principles are to be applied in administering this Act:

- a) Aboriginal and Torres Strait Islander people should participate in the care and protection of their children and young people with as much self-determination as possible

- b) that government has a responsibility to protect and promote Aboriginal and Torres Strait Islander children and young people's cultural identity.

Clause 11 – Director-general's functions Section 22(1)(a) and (b)

This clause omits the reference to "wellbeing, care and protection" and substitutes a reference to "safety, welfare and wellbeing". Furthermore, it replaces the term "abuse and neglect" with "risk of significant harm." Additionally, it provides clarification that the director-general must provide assistance to families in (a) reducing the risk of significant harm to children and young people and to (b) protect children and young people where a risk of significant harm has been identified.

Clause 12 – Section 22(1)(d) and (e)

This clause omits the reference to "abuse and neglect" and substitutes a reference to "risk of significant harm".

Clause 13 – What is *suitability information*? Section 65(1), definition of suitability information, paragraph (g)

This clause substitutes "child concern report" for "voluntary report or mandatory report."

Clause 14 – Family group conferences – criteria Section 80(2), example 1

This clause substitutes a reference to "substantiated abuse" for where the director-general "identifies a risk of significant harm". This is consistent with the introduction of significant harm to the CYPA.

Clause 15 – Section 80(2), example 3

This clause omits "substantiates the abuse" and substitutes with "identifies a risk of significant harm". This is consistent with the introduction of significant harm to the CYPA.

Clause 16 – Application of care and protection chapters Part 10.1 heading, note, paragraph (c)

This clause omits substantiates the abuse and substitutes with "identifies a risk of significant harm". This is consistent with the introduction of significant harm to the CYPA.

Clause 17 –What are the care and protection chapters? Section 336, definition of care and protection chapters, paragraph (b)

This clause omits "abuse and neglect" and substitutes with "risk of significant harm". This is consistent with the introduction of significant harm to the CYPA

Clause 18 – Definitions – care and protection chapters Section 341(1), definitions of abuse and neglect

This clause is omitted.

Clause 19 – Section 341(1), new definition of significant harm

This clause inserts definition of significant harm at section 344.

Clause 20– Section 341(2), definitions of at risk of abuse or neglect and significant harm

This clause is omitted.

Clause 21 – Sections 342 and 343.

This clause is omitted.

Clause 22 – Section 344

This clause introduces the definition and concepts of “significant harm”, replacing the concept of “abuse and neglect”.

The clause defines significant harm to mean “any detrimental effect of a significant nature on the safety, welfare or wellbeing of the child or young person”. Without limiting subsection (1), section 344(2) sets out examples of significant harm as 1 or more of the following circumstances being either experienced:

- sexual abuse, grooming or sexual exploitation; or
- physical or emotional abuse
- the child or young person’s basic physical, emotional, developmental or psychological needs are not being met
- the child or young person is being exposed to family violence as defined in section 344(4).

Section 344(3) sets out that the above may relate to a single act, omission or circumstance, or a combination or accumulation of acts, omissions or circumstances.

Clause 23 – When are children and young people in need of care and protection? Section 345(1)

This clause omits “abuse and neglect” and substitutes with “risk of significant harm”. This is consistent with the introduction of significant harm to the CYPA

Clause 24 – Section 346

This clause collapses section 346, specifying that for the care and protection chapters, the circumstances may have arisen wholly or partly outside the ACT where a belief or suspicion arises that a child is at risk of significant harm.

Clause 25 – Section 349 What is in best interests of child or young person? Section 349(1) and (2)

Section 349 outlines the matters that are relevant to the best interest of a child or young person. This clause revises the best interest principles as:

1. For the care and protection chapters, in deciding what is in the best interests of a child or young person, the need to ensure the child or young person is not at risk of significant harm must always be considered.
2. The decision-maker must also consider each of the following matters that are relevant to the child or young person:
 - a) any views or wishes expressed by the child or young person.
 - b) the nature of the child's or young person's relationship with each parent and anyone else.
 - c) the likely effect on the child or young person of changes to the child's or young person's circumstances, including separation from a parent or anyone else with whom the child or young person has been living.
 - d) the practicalities of the child or young person maintaining contact with each parent and anyone else with whom the child or young person has been living or with whom the child or young person has been having substantial contact.
 - e) the capacity of the child's or young person's parents, or anyone else, to provide for the child's or young person's needs including emotional and intellectual needs.
 - f) for an Aboriginal or Torres Strait Islander child or young person—the Aboriginal and Torres Strait Islander children and young people placement principles set out in section 10.
 - g) that it is important for the child or young person to have settled, stable and permanent living arrangements
 - h) for decisions about placement of a child or young person—the need to ensure that the earliest possible decisions are made about a safe, supportive and stable placement.
 - i) the attitude to the child or young person, and to parental responsibilities, demonstrated by each of the child's or young person's parents or anyone else.
 - j) any significant harm to the child or young person, or a family member of the child or young person.

- k) any court order that applies to the child or young person, or a family member of the child or young person.
- 3. The decision-maker may also consider any other fact or circumstance the decision-maker considers relevant.

Clause 26 – Care and protection principles Section 350(1)(b)

This clause omits “wellbeing, care and protection” and substitutes with “safety, welfare and wellbeing”.

Clause 27 – Section 350(2)

This clause revises wording from “section 10 (Aboriginal and Torres Strait Islander children and young people principle)” to “section 10 (Aboriginal and Torres Strait Islander children and young people—placement principles)”.

Clause 28 – Chapter 11 heading

This clause revises the heading to “care and protection—reporting and assessing risk of significant harm”. This is consistent with the introduction of significant harm to the CYPA.

Clause 29 – Part 11.1 heading

This clause revises the heading to “care and protection—reporting of significant harm”. This is consistent with the introduction of significant harm to the CYPA.

Clause 30 – Definitions—Act Section 353, definition of child concern report

This clause is omitted.

Clause 31 – Division 11.1.2 heading

This clause revises the heading to “reporting risk of significant harm to children and young people”. This is consistent with the introduction of significant harm to the CYPA.

Clause 32 – Section 354 heading

This clause omits the reference to “abuse and neglect” substitutes risk of “significant harm”. This is consistent with the introduction of significant harm to the CYPA.

Clause 33 – Section 354(1)

This clause omits the reference to “abuse and neglect” substitutes risk of “significant harm”. This is consistent with the introduction of significant harm to the CYPA.

Clause 34 – Section 356 heading

This clause omits the reference to “abuse and neglect” substitutes risk of “significant harm”. This is consistent with the introduction of significant harm to the CYPA.

Clause 35 – Reports made to public advocate or Aboriginal and Torres Strait Islander children and young people commissioner Section 359(1) (a)

This clause substitutes clause (a) providing for where a person believes or suspects that a child or young person is at risk of significant harm. This is consistent with the introduction of significant harm to the CYPA.

Clause 36 – Sections 360 and 361

Clause 36 proposes to simplify the two-tier hierarchical structure of a child concern report (s 360) and a child protection report (s361) into a unified assessment provision proposed in section 360. It also removes the legislative threshold of “in need of care and protection” in section 360(b) and replaces it with “risk of significant harm”.

Proposed section 360(1) clarifies that this section applies if the director-general

- a) receives a voluntary report or a mandatory report about a child or young person; or
- b) otherwise believes or suspects that a child or young person may be at risk of significant harm.

Section 360(2) requires the director-general to carry out the assessment the director-general considers necessary to decide whether the child or young person is at risk of significant harm.

Section 360(3) enables the director-general, carrying out the assessment, to provide, or assist in providing, services to strengthen and support the safety, welfare and wellbeing of the child or young person and their family.

Section 360(4) requires the director-general as soon as practicable, to attempt to identify whether the child is an Aboriginal or Torres Strait Islander child or young person.

Section 360(5) enables the director-general to refer a matter to the chief police officer if the director-general suspects that it relates to a criminal offence.

Clause 37 – Division 11.1.3 heading

This clause revises the heading to “prenatal reporting of anticipated risk of significant harm”. This is consistent with the introduction of significant harm to the CYPA.

Clause 39 – Section 362 heading

This clause revises the heading to “prenatal reporting - anticipated risk of significant harm”. This is consistent with the introduction of significant harm to the CYPA.

Clause 39 – Section 362(1)

This clause omits “in need of care and protection” substitutes with “at risk of significant harm after the child is born”. This is consistent with the introduction of significant harm to the CYPA.

Clause 40 – How prenatal reports may be used in evidence Section 364(2)(b)

This clause clarifies the director-general may carry out a care and protection appraisal of a child or young person if, after considering a voluntary report or a mandatory report about the child or young person, the director-general believes the child or young person may be at risk of significant harm. This is consistent with the introduction of significant harm to the CYPA.

Clause 41 – Care and protection appraisal—power to carry out Section 368(1) and note

This clause omits the reference to “in need of care and protection” substitutes risk of “risk of significant harm”. This is consistent with the introduction of significant harm to the CYPA.

Clause 42 – Care and protection appraisal—obtaining agreement not in best interests of child or young person etc Section 370(1), example 1

This clause clarifies the parent or other person with daily care responsibility is the subject of an allegation of causing significant harm to the child or young person. This is consistent with the introduction of significant harm to the CYPA

Clause 43 – Care and protection appraisal—visual examination and interview Section 371(5)(a)

This clause in accordance with section 360, omits the term child concern report and replaces with the risk of significant harm. This is consistent with the introduction of significant harm to the Act.

Clause 44 – Public advocate to be told about action following appraisals Section 507(1)(a) and (b)

This clause substitutes current section 507(1)(a) and (b) with a provision for the director-general to tell the public advocate about action following appraisals where:

- a) the director-general receives a voluntary report or a mandatory report about a child or young person; and
- b) because of the report, the director-general believes the child or young person is at risk of significant harm.

Clause 45 – Sections 644(b) and 651(1)(b)

This clause revises wording from “section 10 (Aboriginal and Torres Strait Islander children and young people principle)” to “section 10 (Aboriginal and Torres Strait Islander children and young people—placement principles)”.

Clause 46 – Functions of committee Section 727B(1)

This clause revises the functions of the Children and Young People Death Review Committee as:

- a) to keep a register of deaths of children and young people under part 19A.3;
- b) to report to the Minister in relation to deaths of children and young people under part 19A.4;
- c) to identify patterns and trends in relation to deaths or serious injuries of children, young people and young adults.
- d) to identify areas requiring further research, by the committee or another entity, that arise from the identified patterns and trends.
- e) to undertake research that aims to help prevent or reduce the likelihood of deaths or serious injuries of children, young people and young adults.
- f) to make recommendations about legislation, policies, practices and services for implementation by the Territory and non-government bodies to help prevent or reduce the likelihood of deaths or serious injuries of children, young people and young adults.
- g) to monitor the implementation of the committee’s recommendations.
- h) any other function given to the committee under this chapter.

Clause 47 – New section 727B(3)

This clause inserts a new provision that clarifies that a young adult refers to an adult who is younger than 25 years old.

Clause 48 – Appointment of committee members New Section 727D(2)(a)(xiii)

This clause specifies that a person may be appointed to the Children and Young People Death Review Committee if they have qualifications, experience or expertise in coronial law and practice.

Clause 49 – New section 727D(D)(d)

This clause inserts a new provision, allowing the Minister to appoint a person to the Children and Young People Death Review Committee if they are a public servant working in the administrative unit responsible for the *Education Act 2004*.

Clause 50 – Appointment of advisers Section 727G

This clause is omitted.

Clause 51 – New Section 727IA

This clause inserts in part 19A.1 a new section 727IA on appointment of advisers. It allows for the chair of the Children and Young People Death Review Committee to appoint a person as an adviser to assist the committee in the exercise of its functions. The appointment may be subject to conditions stated in the appointment.

Clause 52 – Section 727N(2)(d)

This clause omits “child protection report” and substitutes with a “voluntary report or a mandatory report”.

Clause 53 – Section 727N(4)

This clause omits section 727N(4) that the child and young person death review committee must not include any information on the register about the cause or circumstances of death of a child or young person until any coronial inquest or review by the Territory has ended.

Clause 54 – Section 727O(4)

This clause omits the requirement that information mentioned section 727N(4) must be given to the child and young person death review committee as soon as practicable after the end of the inquest or review.

Clause 55 – Section 727R(1)(c)

This clause omits that the child and young people death review register is only accessed by staff mentioned in section 727I and substitutes this with “committee members”.

Clause 56 – Part 19A.4 heading

This clause replaces “Annual reports about deaths of children and young people” to “Reporting by committee”.

Clause 57 – Section 727S heading

This clause substitutes the section 727S heading to “Biennial reporting”.

Clause 58 – Section 727S(1)

This clause substitutes section 727S(1) to require a report to the Minister to be prepared each period of two calendar years.

Clause 59 – Section 727S(1)

This clause substitutes section 727S(1) to reference the biennial reporting period.

Clause 60 – Section 727 S(1)(b)

This clause omits “child protection report” and substitutes with “voluntary report or a mandatory report”.

Clause 61 – Section 727S(1)(c)(ii)

This clause omits “child protection report” and substitutes with “voluntary report or a mandatory report”.

Clause 62 – Section 727S(4)

This clause omits subsection (4) to align with biennial reporting.

Clause 63 – Section 727T(1A)

This clause inserts a new section (1A) that requires the Children and Young People Death Review Committee to give reports to the Minister and to any other Ministers that may be responsible for matters within the report.

Clause 64 – Section 727T(4)

This clause substitutes subsection (4) to require any Minister who receives the report to provide information to the CYP death review committee about any action taken within three months.

Clause 65 – Section 806(1)(b)(iii)

This clause substitutes “child concern report” for “voluntary report or mandatory report.”

Clause 66 – Section 806(2)(a)

This clause substitutes “child concern report” for “voluntary report or mandatory report.”

Clause 67 – What is sensitive information? Section 845(2), definition of care and protection report information, paragraphs (a) and (b)

This clause substitutes “child concern report” for “voluntary report or mandatory report.”

Clause 68 – Section 845(2), definition of care and protection report information, paragraphs (a)

This clause omits section 354 (Voluntary reporting of abuse and neglect), section 356 (Offence—mandatory reporting of abuse) or section 362 (Prenatal reporting—anticipated abuse and neglect) and substitutes with section 354 (Voluntary reporting of risk of significant harm), section 356 (Offence—mandatory reporting of significant harm) or section 362 (Prenatal reporting—anticipated risk of significant harm)

Clause 69 – Certain identifying information not to be given Section 857(a)(i)

This clause substitutes “child concern report” for “voluntary report or mandatory report.”

Clause 70 – What is safety and wellbeing information? Section 858(1), definition of safety and wellbeing information, example 1

This clause omits the term “at risk of abuse and neglect” and substitutes with “at risk of significant harm”. This is consistent with the introduction of significant harm to the CYPA.

Clause 71 – Investigative entity may divulge protected information etc Section 867(2)(d)(i)(A)

This clause substitutes “child concern report” for “voluntary report or mandatory report.”

Clause 72 – Section 868 heading

This clause substitutes “child concern report” for “voluntary report or mandatory report.”

Clause 73 – Section 868(1)

This clause substitutes “child concern report” for “voluntary report or mandatory report.”

Clause 74 – Protection of people giving certain information Section 874(2)(g) and (h)

This clause substitutes “child concern report” for “voluntary report or mandatory report.”

Clause 75 – Section 874(2)(j) to (m)

This clause introduces to the concept of “significant harm” as set out in section 344.

Clause 76 – New Chapter 32

This clause inserts a new chapter 32 to include section 988 titled “CYP death review committee – change from annual to biennial reporting”.

This new section will provide a transitional process to move to biennial reporting with annual reporting continuing for the 2023 calendar year and reporting every 2 calendar years from the 2024 calendar year.

Clause 77 – Dictionary

This clause omits the definitions for “abuse”, “at risk of abuse or neglect”, “child concern report” and “neglect”.

Clause 78 – Dictionary, definition of significant harm

This clause omits section 341 and substitutes with section 344.