



ACT
Government

Children and Young People Amendment Bill 1 2023

Discussion paper

June 2023

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Overview

This discussion paper will support public consultation on amendments to the Children and Young People Act 2008 and presents an opportunity for the community to provide feedback on the proposed changes, which are aimed at achieving better outcomes for children and young people in our community. The amendments support the ACT Government's focus on universal service delivery and the provision of earlier support to families in need within the child protection system.

The draft Bill will amend the [Children and Young People Act 2008](#) (the CYP Act), Recent inquiries, reviews, and research, as well as user complaints about the CYP Act, have highlighted concerns and emphasised the need for significant change.

The reform of the CYP Act aligns with [Next Steps for Our Kids 2022–2030: ACT strategy for strengthening families and safeguarding children and young people](#) (Next Steps). This strategy serves as the ACT Government's reform agenda, emphasising universal service delivery and earlier support for families in need.

The initial stage of legislative reform is in accordance with the ACT Government's overarching reform agenda and establishes the legislative foundation for Child and Youth Protection Services (CYPS) to provide proactive and early support to families.

It is proposed the draft Bill contains the following amendments:

1. adjusting the focus of the legislation and functions of the Director-General to align with a family support-oriented service system.
2. recognising the importance of self-determination for Aboriginal and Torres Strait Islander peoples as Australia's First Peoples.
3. inserting the five elements of 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.
4. reorganising concepts of abuse and neglect toward an overarching concept of 'significant harm', including explicitly enabling consideration of cumulative harm.
5. providing guidance on factors to consider when making a decision about 'best interests', including clarifying that decisions must give significant weight to the safety of the child or young person.
6. streamlining the two-stage intake process involved with Child Concern Reports and Child Protection Reports to enable the introduction of a contemporary evidence-based assessment process and diversion of families from the statutory system.
7. increasing the timeframe for emergency applications to be filed the ACT Childrens Court to allow children, young people and their families time to obtain legal advice and representation.
8. amending the functions and responsibilities of the ACT Children and Young Person Death Review Committee.

This discussion paper provides a detailed explanation of the proposed legislative reforms, the supporting policy rationale and targeted consultation questions.

Please note that the draft Bill will be further developed and the scope of a final Bill will be determined following this consultation process.

We appreciate the time and effort involved in considering the proposed legislative amendments. Your feedback and perspectives are invaluable to ensuring the effective operation of the proposed reforms.

Publishing responses

Once the discussion paper consultation period has closed, the ACT Government may make submissions publicly available.

There are two circumstances in which your submission will be kept confidential:

- You request that your submission is made confidential by clearly marking your request on the first page of your submission, or
- Your submission identifies a child, young person or their family.

You may also request that your submission be published, but your name or your organisation's name is withheld. If you wish your name or your organisation's name to be withheld, clearly mark your request on the first page of your submission.

In accepting submissions, the ACT Government must consider the right to privacy of all parties. If your submission identifies a child, young person or their family, the Government may decide that your submission cannot be published. However, this does not mean that your submission will not be considered or contribute to the Government's consideration of key policy issues.

Proposed amendments to the *Children and Young People Act 2008*

1. Amending the focus of the legislation and functions of the Director-General

It is proposed the draft Bill will amend the objects of the CYP Act to provide that children and young people receive the support necessary to protect them from significant harm through whole of government assistance to them, their parents and families, the community and others who have a responsibility for them. Proposed amendments also broaden the functions of the Director-General to include providing, or assisting in providing, support and services to families where risk of significant harm has been identified. These changes are intended to better align the legislation with its purpose and the responsibilities of the Director-General while also aligning with the vision for a child protection and family support system.

2. Legislation scope

It is important to note that the broader purpose of the amendments does not intend to expand the matters covered by the CYP Act, change the criteria for when statutory intervention is required, or impose a requirement on the Director-General to provide support to a larger group of families beyond those

currently covered by the CYP Act. Instead, focus is on clarifying and updating the role of the child protection system in line with the Director-General's existing functions.

3. Aboriginal and Torres Strait Islander reforms

Reform specific to Aboriginal and Torres Strait Islander children, young people and their families is central to this process. Proposed amendments reflect the ACT Government's commitment to partnering with Aboriginal and Torres Strait Islander people and reducing the over-representation of Aboriginal and Torres Strait Islander children and young people across the statutory system.

The Aboriginal and Torres Strait Islander child placement principle (ATSCIPP) is an umbrella term for a set of propositions that aim to reduce the over-representation of Aboriginal and Torres Strait Islander children in the care and protection system, to enhance the experiences of those children in out of home care and to improve the pathways for those children on long-term orders, including to restoration where possible.

The ATSCIPP promotes a holistic approach to Aboriginal and Torres Strait Islander children, families and communities centred on five elements: prevention, partnership, placement, participation and connection. While specific focus is on aspects of Aboriginal and Torres Strait Islander culture and community, those elements reflect a contemporary approach to care and protection. This is child-centred and family-focused and promotes early support, preservation and restoration. In early 2022, the Community Services Directorate (CSD) engaged SNAICC - National Voice for Our Children, to provide advice on embedding the child placement principle into legislation, with SNAICC consulting widely with Canberra's Aboriginal and Torres Strait Islander community. The SNAICC final report was delivered in September 2022. This report primarily focused on embedding the child placement principle in legislation, but also contains valuable proposals for supporting policy and practice.

The ACT Government's endorsement of the recommendations will be seen through the passage of the amendments to the CYP Act. Oversight of CSD's implementation of SNAICC's recommendations will continue to be monitored by the Our Booris, Our Way Implementation Oversight Committee.

It is proposed that embedding the full intent of the ATSCIPP in legislation will occur across two stages. This is to ensure alignment of the recommendations with policy and practice changes related to Next Steps and other reforms.

Proposed amendments across both stages will uphold the ACT Government's commitment to the [Our Booris, Our Way Review](#), the [National Framework for Protecting Australia's Children](#) and the [National Agreement on Closing the Gap](#).

It is proposed the draft Bill proposes explicitly inserting the five elements of the child placement principle:

- The prevention principle (a child should be brought up within the child's own family, community and culture).
- The partnership principle (Aboriginal or Torres Strait Islander community representatives should be given opportunities participate in the design and delivery of services for children and young people, and decisions under the CYP Act about Aboriginal or Torres Strait Islander children).
- The placement principle (if a child is to be placed in care, the child should be placed according to a hierarchy of preferred options, with the first option being a member of the child's family group).

- The participation principle (a child and the child's parents and family members should be opportunities to participate in decisions about care arrangements for children and young people).
- The connection principle (a child should be supported to develop and maintain a connection with the child's family, community, culture, traditions and language, particularly when the child is in the care of a person who is not an Aboriginal or Torres Strait Islander person).

These amendments ensure positive steps are consistently taken to apply the child placement principle. The amendments also set a clear standard for the application of the principle, strengthen the rights recognised by the principle, and support transparent and accountable processes.

It is proposed that the five elements of the child placement principle be linked to section 27 of the [Human Rights Act 2004](#).

It is proposed amendments also recognise self-determination for Aboriginal and Torres Strait Islander people as Australia's first people and specify this as a principle to be applied in administering the CYP Act.

Proposed amendments explicitly acknowledge that connection to family, culture and country, together with family participation is in the best interests of Aboriginal and Torres Strait Islander children (proposed amendments to 'best interests' considerations are discussed further below).

Finally, proposed amendments insert a requirement that the Director-General must attempt to understand whether a child or young person is an Aboriginal or Torres Strait Islander child or young person at the earliest opportunity. This is so that cultural identity can be appropriately recorded and to ensure all elements of the child placement principle are applied for each family and child.

Question:

1. *Do you foresee any unintended consequences or challenges with the stage 1 reforms proposed for Aboriginal and Torres Strait Islander children and families?*

4. Reorganising towards the concept of 'significant harm'

Concepts of 'abuse' and 'neglect' and 'risk of abuse or neglect' are central to the operation of the care and protection chapters of the CYP Act. For individuals working with children, it is important to be able to recognise abuse and neglect when they come across it. These concepts currently determine which children and families are reported to and engage with the child protection system and which families will be brought before the court.

It is proposed that concepts of 'abuse' and 'neglect' will be reorganised to an overarching concept of 'significant harm', defined as that which causes a significant negative impact on the 'safety, welfare or wellbeing' of a child or young person. This change is intended to provide a broader, less prescriptive definition of when and how statutory child protection services can and should support families and provide greater flexibility to divert families to non-statutory support services, where appropriate to do so.

4.1 Cumulative harm

The current definitions of abuse and neglect are divided into four categories: physical abuse, sexual abuse, emotional abuse, and neglect. These definitions focus on the actions of parents and caregivers. However, this approach does not accommodate the cumulative harm that can result from a combination of circumstances, nor does it differentiate between severe and less severe cases across each category of abuse and neglect.

The statutory child protection service in the ACT has faced criticism for failing to recognise and respond appropriately to cumulative harm.¹ The Standing Committee on Health, Ageing and Community Services (HACS) Interim Report on Child and Youth Protection Services (2020)² recommended the *Children and Young People Act 2008* be amended to better address the identification of cumulative harm and intervention for children and young people at risk of cumulative harm.

In Australia, child protection systems are increasingly shifting their focus from solely looking at the actions of parents to considering the outcomes for the children involved.³ Focusing on 'significant harm' will redirect the focus of the ACT child protection system towards understanding children and young people's experiences in a more holistic way and achieving positive outcomes for children and young people. This change will also more closely align with the approach of other jurisdictions.

It is proposed amendments insert a new concept to highlight and clarify the importance of considering cumulative patterns of harm on a child or young person, including clear provisions that 'significant harm' to a child or young person may be caused by the 'existence of a single, series or combinations of circumstances.

Questions:

Reorganising abuse and neglect within 'significant harm' is intended to shift the focus of the child protection system toward the safety, welfare and wellbeing of children and young people.

2. Tell us about the advantages, challenges or other consequences you see with this approach.

Cumulative harm is recognised as a series or combination of acts, omissions, or circumstances.

3. Tell us about the advantages, challenges or other consequences you see with this approach.

¹ *Report of the Inquiry: Review into the system level responses to family violence in the ACT*, 2016 (the Glanfield Inquiry; *Changing the Narrative for Vulnerable Children: Strengthening ACT Systems*, ACT Children and Young People Death Review Committee, 2018).

² Recommendation 1, of the Standing Committee on Health, Ageing and Community Services (HACS) Interim Report on Child and Youth Protection Services (2020).

³ AIHW (Australian Institute of Health and Welfare) (2022) Child protection Australia 2020–21 Appendixes A to C. Child Welfare Series 87, AIHW, Australian Government, accessed 15 April 2023.

4.2 Limiting the ‘balance of probabilities’ to court proceedings

‘Risk of abuse or neglect’ is currently defined at section 344. It uses the test of ‘balance of probabilities’ to determine if there is a significant risk of the child or young person being abused or neglected.

The balance of probabilities test refers to the standard of proof required during civil court proceedings to demonstrate an event or fact. This is different from the test applied in criminal court proceeding where the standard of proof is ‘beyond a reasonable doubt’.

The existing definition of ‘risk of abuse and neglect’ is problematic as it introduces the legal concept of ‘balance of probabilities’ during an assessment phase. This is not easy to understand for non-legal professionals and can become misleading when undertaking risk assessment and providing supports to children and families.

Even a slight possibility of harm occurring may warrant taking precautions or providing support that reduces risk for children and young people. The likelihood and potential consequences of future events fall on a spectrum of possibilities that extend beyond the ‘balance of probabilities’ test.

Proposed amendments suggest removing the balance of probabilities test as the standard of proof required when undertaking assessments and providing support to children and families. This change will allow for the implementation of an evidence-based risk assessment tool that would ensure key decisions are informed by information and research known to be relevant to that decision.

This is a significant move away from a system focused on the investigation of families to a high legal standard of proof at a very early stage, toward a system that better assesses need and provides supports to at risk children and their families. The CYP Act will still require the civil standard of proof (known as the balance of probabilities) in Childrens Court proceedings at section 711 of the CYP Act.

Question:

Our aim in removing the balance of probabilities test from the assessment phase is to enable proactive support for families.

4. *Tell us about the advantages, challenges or other consequences you see with this approach.*

4.3 Amendments to the definition of sexual abuse

Australia has a clear responsibility to protect children from sexual abuse and to prevent it from occurring under Articles 19 and 34 of the United Nations Convention on the Rights of the Child, ratified by Australia in 1990. The ACT Government has also committed to improving systemic responses to child sexual abuse,⁴ in the Government Response to the [Listen. Take Action to Prevent, Believe and Heal Report \(2022\)](#).

⁴ Page 9, The government response to the *Listen. Take Action to Prevent, Believe and Heal Report (2022)* < [Government-Response-to-the-Listen.-Take-Action-to-Prevent-Believe-and-Heal-Report.DOC.pdf](#)>

The [Royal Commission into Institutional Response to Child Sexual Abuse](#) commented that primary indicators of child sexual abuse are most observed in sexualised behaviour or trauma symptoms.⁵ Indicators may be subtle and are often attributed to other concerns or problems the child may be experiencing, particularly in families where other forms of abuse are present. These indicators may be present without an actual disclosure or specific allegation of sexual abuse.

It is proposed that the Bill include a wider statutory definition of sexual abuse that includes grooming and sexual exploitation, unified alongside other forms of abuse.

Grooming behaviour involves the perpetrator manipulating a child to gain their trust, build rapport, and exert their power over them. Grooming of a young person is a serious criminal offence in the ACT punishable by law⁶ but not specifically considered under child protection legislation.

It is expected that a wider statutory definition of sexual abuse unified alongside other forms of abuse and risk will reflect and allow for a more progressive and responsive policy approach to child sexual abuse and meet ACT Government commitments to improving systemic responses to child sexual abuse.

Question:

A broader definition is intended enhance the response to child sexual abuse.

5. *Tell us about the advantages, challenges or other consequences you see with this approach.*

4.4 Amendments to the definition of domestic violence

The concept of 'emotional abuse' includes at section 343 (d) exposure to, or risk of 'seeing or hearing' the physical, sexual, or psychological abuse of a person with whom the child or young person has a domestic relationship.

The legislative requirement that a child must have 'seen' or 'heard' incidences of violence as well as this having caused a significant impact on them is problematic. A considerable body of research has disputed the idea that children are passive and unaffected by domestic violence if it is not directly witnessed.⁷ 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 people.⁸

⁵ *Royal Commission into Institutional Response to Child Sexual Abuse*, Final Report: Volume 1, page 72

⁶ *Crimes Act 1900* s 66

⁷ 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 University. <https://violenceagainstwomenandchildren.com/wp-content/uploads/2020/10/STACY-Summary-Practice-Guide_Working-with-Complexity.pdf>

⁸ Ibid

It is proposed amendments rely on the definition of ‘family violence’ at section 8 of the [Family Violence Act 2016](#). This definition recognises the various forms of violence that can occur against a family member, as well as the diverse range of experiences endured by those who suffer from such violence, including:

- sexual violence or abuse;
- emotional, psychological, and economic abuse; and
- coercion or other behaviour that controls or dominates a person and causes them to fear for their safety or wellbeing, such as property damage, stalking or harming an animal.

Question:

A broader definition is intended enhance the response to domestic and family violence.

6. Tell us about the advantages, challenges or other consequences you see with this approach.

4.5 Amendments to the definition of neglect

Neglect is defined at section 343 as failure to provide a child or young person with a ‘necessity of life’ that causes ‘significant harm’ to ‘wellbeing or development’.

The current definition of neglect is considered too narrow and outdated in contrast to the contemporary understanding of neglect, which focuses to a greater extent on the physical, emotional, and psychological needs of the child not being met, rather than the omission of an adult. Examples of necessities of life provided in the current legislation include specific failure to provide ‘food, shelter, clothing and health care treatment’.

Neglect is often accompanied by feelings of shame and stigma. Families may fear judgment, criticism or intervention by child protective services. This fear can prevent them from seeking support or accessing services that could assist them in addressing the underlying issues contributing to neglect. Preliminary community consultation on the legislative reform has identified that the term neglect is ‘outdated, judgemental and shame-based’.

The concept of ‘harm’ and ‘risk’ characterised in reference to the physical and psychological impact on a child is considered more appropriate and more likely to result in effective engagement with families.

Proposed amendments remove the term ‘neglect’ from the legislation and reclassify these circumstances to where there is significant harm caused by a child or young person’s basic physical, emotional, developmental, or psychological needs not being met.

This amendment is anticipated to reduce the overall number of children and young people being investigated for reasons of neglect, where these issues could be better addressed through the provision of support services.

Question:

7. Tell us about the advantages, challenges or other consequences you see with this approach.

5. Considering broader factors in ‘best interests’

In Australian and international law, the fundamental principle concerning children is that all decisions made and actions taken should be in their ‘best interests’.

Best interests of children and young people are considered at section 8 of the CYP Act. This is to ensure a decision-maker must regard the best interests of the child or young person as the paramount consideration for decisions under the CYP Act. The best interests principle has been criticised on the basis that it lacks certainty.⁹

Prioritising safety is fundamental to safeguarding the best interests of children and young people, as it provides them with the protective environment necessary for their healthy development and creates a foundation for children and young people to enjoy and exercise their full range of human rights.

Proposed amendments provide guidance on the factors to consider in making a best interests decision and clarify that the primary consideration is a child or young person’s safety.

Proposed amendments also recognise that for Aboriginal and Torres Strait Islander children and young people, connection to family, community, culture and country, and participation of family in decisions about their care arrangements are in their best interests (as outlined above).

Questions:

8. *Are there any circumstances where a child’s safety should not be the primary consideration when determining their best interests.*
9. *Tell us about the advantages, challenges or other consequences you see with this approach.*

6. Streamlining the child protection intake processes

The CYP Act currently prescribes a complex, multi-stage approach to intake and assessment of reports about children. Section 360 and 361 require that upon receiving a ‘child concern report’ the Director-General must consider the report and carry out a two-staged assessment to decide if the child needs protection. Information seeking is the only effective difference between the first and second stage of the assessment.

The range of possible actions available to the Director-General in both stages extends from ‘referral to police’ to ‘take no action’, suggesting the legislation was intended to allow the widest possible degree of discretion and flexibility in the assessment process rather than the prescriptive and complex two-stage assessment process that has evolved.

Detailed provisions, codifying intake and assessment of reports did not exist in the previous legislation and are also uncommon in other jurisdictions.

⁹ JL Dolgin ‘Why has the best interests standard survived?: The historic and social context’ (1996) 16 Children’s Legal Rights Journal 1, 2

Proposed amendments collapse and unify the two-staged risk assessment process required at section 360 and 351 to enable the introduction of evidence-based assessment processes (as discussed above).

It is anticipated that this will also provide greater scope for the provision of alternative supports and resources to vulnerable children and families aimed at diversion from the statutory child protection system.

Proposed amendments will require the Director-General to carry out an assessment to decide if the child or young person is at risk of significant harm. During an assessment, the Director-General may:

- Provide or assist to provide services to support the child's or family's safety, welfare or wellbeing.
- Make early and ongoing attempts to understand if a child is Aboriginal or a Torres Strait Islander and accurately record a child's cultural identity.
- Refer a report to police if it may relate to a criminal investigation.

This means that in practice, an initial assessment at the intake stage of the child protection process will now be able to be directed toward a preliminary identification of whether a child or young person is at risk of significant harm. This can be followed by an assessment of the child's situation and what, if anything, needs to be done to support the child and their family.

Questions:

The streamlining of the child protection intake process will reduce the administrative burden and enable practitioners to work more closely with children, young people and their families.

10. *Tell us about the advantages, challenges or other consequences you see with this approach.*

Early and ongoing attempts to accurately record the cultural identity of Aboriginal and Torres Strait Islander children and young people during child protection process will allow for their cultural and specific needs to be better addressed.

11. *Do you foresee any unintended consequences or challenges with this approach in stage 1?*

7. Increasing the timeframe for emergency applications to be filed

The Standing Committee on Health, Ageing and Community Services (the HACS inquiry) recommended a review into statutory timeframes for taking matters to the Childrens Court, in particular following emergency action. Proposed amendments extends the timeframe for when the Director-General must file an application with the ACT Childrens Court following emergency action from two to three working days. This is to allow families time to obtain legal advice and representation.

Question:

12. *Is 3 working days sufficient time for children and families to obtain legal advice and representation following emergency action?*

8. Improving the ACT Children and Young People Death Review Committee

In 2021, the ACT Children and Young People Death Review Committee completed a *Review of Children and Young People Who Have Died as a Result of Intentional Self-Harm* (the Review) in response to an increase in deaths by suicide in 2018. The draft Bill addresses recommendations from the 2021 Review and 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.

The draft 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.

Questions:

Research indicates a prolonged phase of brain development between adolescence and early adulthood, typically spanning until age 25. The draft Bill will expand the scope of inquiry for the Children and Young People Death Review Committee to include young people aged 18 to 24 years.

13. *Tell us about the advantages, challenges or other consequences you see with this approach.*

The draft Bill will also expand the Committee's scope to include serious injuries of children and young people. This change will allow the Committee to review patterns of serious injuries, in addition to its primary focus on the deaths of children and young people and make recommendations for service improvements.

14. *Tell us about the advantages, challenges or other consequences you see with this approach.*

Contributing reports and reviews

Several parallel measures are being implemented to reform the child protection system and improve child safety and family wellbeing. These include:

- Implementing the [Our Booris, Our Way recommendations](#) to reduce the over-representation of Aboriginal and Torres Strait Islander children in the child protection system in the ACT.
- Embedding the SNAICC Aboriginal and Torres Strait Islander Child Placement Principle in the *Children and Young People Act 2008*: Final Report. See the [discussion paper](#)).
- Creating a [Charter for Parents and Families involved with ACT child protection services](#).

- Commissioning the [Child, Youth and Family Services Program](#) (CYFSP) to support at-risk families.
- Developing an external merits review of child protection decisions.
- Raising the [minimum age of criminal responsibility](#).

Together, underpinned by legislative amendments, these measures aim to enhance our ability to protect children, preserve families, make more informed decisions, and improve the overall lives and wellbeing of children in the ACT.