

2005

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Minister for Children, Youth and Family Support)

Children and Young People Amendment Bill 2005 (No 2)

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(As presented)

(Minister for Children, Youth and Family Support)

Children and Young People Amendment Bill 2005 (No 2)

A Bill for

An Act to amend the *Children and Young People Act 1999*

The Legislative Assembly for the Australian Capital Territory enacts as follows:

J2005-874

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

1 **1 Name of Act**

2 This Act is the *Children and Young People Amendment Act*
3 *2005 (No 2)*.

4 **2 Commencement**

5 This Act commences on a day fixed by the Minister by written
6 notice.

7 *Note 1* The naming and commencement provisions automatically commence on
8 the notification day (see Legislation Act, s 75 (1)).

9 *Note 2* A single day or time may be fixed, or different days or times may be
10 fixed, for the commencement of different provisions (see Legislation
11 Act, s 77 (1)).

12 *Note 3* If a provision has not commenced within 6 months beginning on the
13 notification day, it automatically commences on the first day after that
14 period (see Legislation Act, s 79).

15 **3 Legislation amended**

16 This Act amends the *Children and Young People Act 1999*.

17 *Note* This Act also amends the *Public Advocate Act 2005* (see s 31).

18 **4 Section 11**

19 *substitute*

20 **11 Best interests of child or young person paramount**
21 **consideration**

- 22 (1) In making a decision or taking action under this Act in relation to a
23 child or young person, the decision-maker or person taking the
24 action must regard the best interests of the child or young person as
25 the paramount consideration (the *best interests principle*).

- 1 (2) This section does not apply to a decision under chapter 6 (Young
2 offenders).

3 *Note* A decision-maker making a decision under ch 6 about a young person
4 or young offender must have regard to the best interests of the young
5 person or young offender (see s 68 (aa)).

6 **5 General principles**
7 **Section 12 (1)**

8 *omit everything before paragraph (b), substitute*

- 9 (1) In making a decision or taking action under this Act in relation to a
10 child or young person, the decision-maker or person taking the
11 action must apply the following principles except when it would be
12 contrary to the best interests of a child or young person:

13 **6 Section 14**

14 *omit everything before paragraph (a), substitute*

15 **14 Indigenous children and young people principle**

16 In making a decision or taking action under this Act in relation to an
17 Aboriginal or Torres Strait Islander child or young person, the
18 decision-maker or person taking the action must take into account
19 the following:

20 **7 Indigenous placement principle**
21 **Section 15 (1)**

22 *substitute*

- 23 (1) In making a decision about the placement of an Aboriginal or Torres
24 Strait Islander child or young person, the decision-maker must make
25 the decision in accordance with—

26 (a) this section; and

27 (b) any indigenous cultural plan in force for the child or young
28 person.

1 **8 New section 15 (5)**

2 *insert*

3 (5) In this section:

4 *indigenous cultural plan*, for a child or young person, means a plan
5 to preserve and enhance the identity of the child or young person as
6 an Aboriginal or Torres Strait Islander person, that is developed by
7 the chief executive in consultation with—

- 8 (a) the child or young person (taking into consideration the age
9 and maturity of the child or young person); and
10 (b) any Aboriginal or Torres Strait Islander people who have an
11 interest in the wellbeing of the child or young person; and
12 (c) any relevant indigenous organisation.

13 **9 Members of the council**
14 **Section 36 (2)**

15 *substitute*

16 (2) The Minister must ensure that there is always—

- 17 (a) at least 1 member who represents the interests of carers; and
18 (b) at least 1 member who represents the interests of Aboriginal
19 and Torres Strait Islander people.

20 **10 Principles**
21 **Section 68**

22 *insert*

- 23 (aa) regard must be had to the best interests of the young person or
24 young offender;

11 Section 151

substitute

151 What is *abuse*?

In this chapter:

abuse, of a child or young person, means—

- (a) physical abuse; or
- (b) sexual abuse; or
- (c) emotional abuse (including psychological abuse) if the child or young person has suffered or is suffering in a way that has caused or is causing significant harm to his or her wellbeing or development; or
- (d) emotional abuse (including psychological abuse) if—
 - (i) the child or young person has been or is being exposed to conduct that is domestic violence under the *Domestic Violence and Protection Orders Act 2001*; and
 - (ii) the exposure has caused or is causing significant harm to the wellbeing or development of the child or young person.

151A What is *neglect*?

In this chapter:

neglect, of a child or a young person, means a failure to provide the child or young person with a necessity of life that has caused or is causing significant harm to the wellbeing or development of the child or young person.

Examples of necessities of life

- 1 food
- 2 shelter
- 3 clothing

1 4 medical care

2 *Note* An example is part of the Act, is not exhaustive and may extend, but
3 does not limit, the meaning of the provision in which it appears (see
4 Legislation Act, s 126 and s 132).

5 **151B When is a child or young person *at risk of abuse or***
6 ***neglect?***

7 For this chapter, a child or young person is ***at risk of abuse or***
8 ***neglect*** if, on the balance of probabilities, there is a significant risk
9 of the child or young person being abused or neglected.

10 **Examples of when a child is at risk of abuse or neglect**

11 1 Jane is 3 months old and the chief executive has already received 5 reports
12 about her. Jane’s parents are long-term drug users and Jane was born with
13 neonatal withdrawal syndrome. Jane’s parents’ relationship is violent and,
14 although Jane herself has not been physically harmed, she has been in her
15 mother’s arms when her father assaulted her mother. Police have been called
16 to the family home a number of times because of reports of family violence.
17 This usually results in Jane’s parents separating for a short period then
18 reconciling. Jane’s mother has 3 older children from earlier relationships
19 who are subject to care and protection orders and are being cared for by kin
20 (under s 31 (1) (b)) because of emotional abuse from witnessing violence
21 between their mother and Jane’s father. Jane’s parents have agreed to work
22 with the chief executive to address their drug use and violent behaviour.
23 However, they have not actually made the changes they agreed to make.
24 Jane’s parents do not have contact with extended family and Jane is not
25 regularly seen by any health professionals or other community support
26 people. In these circumstances, the chief executive may decide that, on the
27 balance of probabilities, there is a significant risk of Jane being abused or
28 neglected. Jane is therefore a child at risk of abuse or neglect.

29 2 Michael is 7 years old and in the full-time care of his mother. He has never
30 had any contact with his father. Michael’s mother has a mental illness
31 characterised by episodes of psychosis. When Michael’s mother has been
32 unwell, she has locked Michael and herself in the home for weeks at a time.
33 Michael sometimes says that ‘bad people’ are after him and will hurt him and
34 his mother. Michael’s mother attempted suicide by driving off a bridge with
35 Michael in the car. In these circumstances, the chief executive may decide
36 that, on the balance of probabilities, there is a significant risk of Michael
37 being abused or neglected. Michael is therefore a child at risk of abuse or
38 neglect.

1 3 Tom is 9 years old and is in the sole care of his father. Since Tom was
 2 6 years old, the chief executive has received numerous reports that Tom's
 3 father calls him derogatory names and yells at him on a daily basis, often in
 4 the presence of other people. Tom's school counsellor reports that Tom
 5 appears anxious, is fearful of loud noises in the school environment and
 6 regularly cries for insignificant reasons. Tom is assessed as being at risk of
 7 childhood depression by the school counsellor. Tom's father considers his
 8 parenting of Tom to be good and will not allow the chief executive to visit
 9 the family home to talk to Tom. In these circumstances, the chief executive
 10 may decide that, on the balance of probabilities, there is a significant risk of
 11 Tom being abused or neglected. Tom is therefore a child at risk of abuse or
 12 neglect.

13 4 Amy is 13 years old and regularly goes missing from home to avoid the
 14 constant fighting between her mother and stepfather. Amy is engaging in
 15 indiscriminate sexual activity and regularly consumes alcohol and illicit
 16 drugs which she pays for through prostitution. Amy has intentionally
 17 overdosed on medication 3 times and each overdose has required medical
 18 treatment. Amy's parents consider that she is now making her own choices
 19 and there is nothing they can do to help her. In these circumstances, the
 20 chief executive may decide that, on the balance of probabilities, there is a
 21 significant risk of Amy being abused or neglected. Amy is therefore a child
 22 at risk of abuse or neglect.

23 *Note* An example is part of the Act, is not exhaustive and may extend, but
 24 does not limit, the meaning of the provision in which it appears (see
 25 Legislation Act, s 126 and s 132).

26 **12 New section 155A**

27 *in division 7.1.1, insert*

28 **155A Helping families understand care and protection** 29 **procedures**

30 (1) A decision-maker making a decision under this chapter for a child or
 31 young person must endeavour to ensure that the relevant people for
 32 the decision—

33 (a) understand what the decision is going to be about; and

34 (b) understand the decision-making process; and

- 1 (c) know that the child or young person and people with parental
2 responsibility for the child or young person may take part in
3 the decision-making process and have their views and wishes
4 heard; and
- 5 (d) are informed of, and understand, the decision.
- 6 (2) The chief executive must give the relevant people for the decision
7 sufficient information about the decision-making process, in
8 language and a way that they can understand, to allow the child or
9 young person, and people with parental responsibility for the child
10 or young person to take part fully in the decision-making process.
- 11 (3) In this section:
- 12 ***relevant people***, for a decision for a child or young person, means—
- 13 (a) the child or young person or, if the child is represented, the
14 representative of the child or young person; and
- 15 *Note* Representation of children and young people is further dealt with
16 in s 23 and s 24.
- 17 (b) a person with parental responsibility for the child or young
18 person.
- 19 (4) This section is subject to any order of a court.
- 20 *Note 1* A child or young person has a right to take part in a proceeding under
21 this Act in relation to the child or young person (see s 22).
- 22 *Note 2* A court must also take steps to ensure that the child or young person
23 and other people understand proceedings etc (see s 408).

1 **13 In need of care and protection**
2 **Section 156 (1)**

3 *substitute*

- 4 (1) For this chapter, a child or young person is *in need of care and*
5 *protection* if—
- 6 (a) the child or young person—
- 7 (i) has been abused or neglected; or
- 8 (ii) is being abused or neglected; or
- 9 (iii) is at risk of abuse or neglect; and
- 10 (b) no-one with parental responsibility for the child or young
11 person is willing and able to protect the child or young person
12 from suffering the abuse or neglect.

13 **14 Section 157**

14 *substitute*

15 **157 Incident need not have happened in ACT**

- 16 (1) This section applies if a person believes that a child or young person
17 is in need of care and protection under section 156 because the child
18 or young person—
- 19 (a) has been abused or neglected; or
- 20 (b) is being abused or neglected; or
- 21 (c) is at risk of abuse or neglect.
- 22 (2) It does not matter whether conduct giving rise to the belief happened
23 completely or partly outside the ACT.

1 **15** **Mandatory reporting**
2 **Section 159 (1) (i)**

3 *substitute*

- 4 (i) a public servant who, in the course of employment as a
5 public servant, works with, or provides services
6 personally to, children and young people or families; or

7 **16** **New section 159 (3)**

8 *insert*

- 9 (3) Subsection (2) does not apply to a person if the person reasonably
10 suspects that—
11 (a) someone else has made a report to the chief executive about—
12 (i) the same child or young person; and
13 (ii) the same abuse or injury; and
14 (b) the other person has reported the same grounds for their
15 suspicion as the person has for their suspicion.

16 **17** **Section 162**

17 *substitute*

18 **162** **Chief executive must record reports**

19 The chief executive must make and keep a written record of—

- 20 (a) each report made to the chief executive under section 158
21 (Voluntary reporting) or section 159 (Mandatory reporting);
22 and
23 (b) each child protection appraisal made because of a report
24 mentioned in paragraph (a).

- 1 **162A** **Records about authorised carers to go to public advocate**
- 2 (1) This section applies if—
- 3 (a) the chief executive receives a report about a child or young
- 4 person under section 158 (Voluntary reporting) or section 159
- 5 (Mandatory reporting); and
- 6 (b) at the time of the incident that gave rise to the report—
- 7 (i) the chief executive had parental responsibility for the
- 8 child or young person; and
- 9 (ii) someone else (the *authorised carer*) was exercising the
- 10 chief executive’s parental responsibility for the child or
- 11 young person under section 31 (Authorisation to exercise
- 12 parental responsibility for particular child or young
- 13 person); and
- 14 (c) the incident that gave rise to the report involved the authorised
- 15 carer.
- 16 (2) As soon as practicable after making a record under section 162 (a)
- 17 about the report, the chief executive must give a copy of the record
- 18 to the public advocate.

19 **18** **Action by facilitator**
20 **Section 169 (3)**

21 *omit everything before paragraph (c), substitute*

- 22 (3) A facilitator may do anything necessary or convenient to be done in
- 23 relation to facilitating a conference (whether or not the conference
- 24 actually takes place), including, for example, all or any of the
- 25 following:
- 26 (a) prepare for the conference, including, for example—
- 27 (i) meeting with people; and

- 1 (ii) consulting with people with knowledge of or experience
2 in a particular culture; and
- 3 (iii) providing mediation; and
- 4 (iv) resolving conflicts;
- 5 *Note* An example is part of the Act, is not exhaustive and may extend,
6 but does not limit, the meaning of the provision in which it
7 appears (see Legislation Act, s 126 and s 132).
- 8 (b) asking a person to give information or a report to a conference
9 without inviting that person to be a participant at the
10 conference;

11 **19 Chief executive to report**
12 **Section 267 (4)**

13 *substitute*

- 14 (4) A report under this section for a final care and protection order for a
15 child or young person must be given—
- 16 (a) each year; or
- 17 (b) if the order is in force for less than 1 year—at least 1 month,
18 but not earlier than 2 months, before the order expires.

19 **20 Section 403 (5)**

20 *substitute*

- 21 (5) This section expires on 1 December 2006.

22 **21 Sections 404 and 405**

23 *substitute*

24 **404 When is information *divulged*?**

25 In this chapter:

26 *divulge* includes communicate.

1 **405 Who is an *information holder*?**

2 For this chapter, a person is an *information holder* if—

- 3 (a) the person is or has been—
- 4 (i) the chief executive; or
- 5 (ii) the public advocate; or
- 6 (iii) an official visitor; or
- 7 (iv) someone else exercising a function under this Act; or
- 8 (v) someone else engaged in the administration of this Act;
- 9 or
- 10 (b) the person has been given information under this Act by a
- 11 person mentioned in paragraph (a).

12 *Note* Protected information may be given to people under various

13 provisions of this Act, including:

- 14 • s 29 (Power to give and receive information)
- 15 • s 45 (Assistance for public advocate)
- 16 • s 73 (Powers of court in relation to reports)
- 17 • s 162A (Records about authorised carers to go to public
- 18 advocate)
- 19 • s 405H (Information may be given in best interests of child
- 20 or young person).

21 **405A What is *protected information*?**

- 22 (1) For this chapter, information is *protected information* if it is
- 23 information about a person that is disclosed to, or obtained by, an
- 24 information holder because the person is, or has been, an
- 25 information holder.
- 26 (2) Without limiting subsection (1), *protected information* includes
- 27 sensitive information.

1 **405B What is *sensitive information*?**

2 (1) For this chapter, information is *sensitive information* if it is—

- 3 (a) child abuse information; or
4 (b) child abuse appraisal information; or
5 (c) interstate child abuse information; or
6 (d) family group conference information; or
7 (e) information prescribed by regulation for this section.

8 (2) In this section:

9 ***child abuse information*** means information—

- 10 (a) in a report (a ***child abuse report***) made under—
11 (i) section 158 (Voluntary reporting); or
12 (ii) section 159 (Mandatory reporting); or
13 (b) in a record (a ***child abuse record***)—
14 (i) made under section 162 (a) (Chief executive must record
15 reports); or
16 (ii) that relates to a notification under the *Children's Services*
17 *Act 1986*, section 103 (as in force at any time); or
18 (c) that would allow information in a child abuse report or child
19 abuse record to be worked out; or
20 (d) that identifies a person who made a child abuse report or would
21 allow the identity of the person to be worked out.

22 ***child abuse appraisal information*** means information—

- 23 (a) in a record (an ***appraisal record***) of a child protection appraisal
24 made because of a child abuse report; or
25 (b) that would allow information in an appraisal record to be
26 worked out.

- 1 ***interstate child abuse information*** means information—
- 2 (a) in a report (an ***interstate child abuse report***) made under a
- 3 provision of a law of a State corresponding (or substantially
- 4 corresponding) to section 158 or section 159 that is provided to
- 5 the chief executive under a provision of the law of the State
- 6 corresponding (or substantially corresponding) to—
- 7 (i) section 29 (Power to give and receive information); or
- 8 (ii) section 323 (Disclosure of information); or
- 9 (b) that would allow information in an interstate child abuse report
- 10 to be worked out; or
- 11 (c) that identifies a person who made an interstate child abuse
- 12 report or would allow the identity of the person to be worked
- 13 out.
- 14 ***family group conference information*** means—
- 15 (a) information about anything said or done in a meeting, or for
- 16 mediation or conflict resolution, under section 169 (3) (a)
- 17 (Action by facilitator) for a family group conference (whether
- 18 or not the conference actually takes place); or
- 19 (b) information, or information in a report, given under
- 20 section 169 (3) (b) for a family group conference (whether or
- 21 not the conference actually takes place); or
- 22 (c) information in a signed agreement under section 172
- 23 (Agreements arising from conferences); or
- 24 (d) information in a record under section 173 (Outcome of
- 25 conference); or
- 26 (e) information about anything said or done at a family group
- 27 conference including information given in a report to the
- 28 family group conference; or

1 (f) information that would allow information mentioned in
2 paragraphs (a) to (e) to be worked out.

3 **405C Offence—secrecy of protected information**

4 (1) An information holder commits an offence if the information
5 holder—

6 (a) makes a record of protected information about someone else;
7 and

8 (b) is reckless about whether the information is protected
9 information about someone else.

10 Maximum penalty: 50 penalty units, imprisonment for 6 months or
11 both.

12 (2) An information holder commits an offence if the information
13 holder—

14 (a) does something that divulges protected information about
15 someone else; and

16 (b) is reckless about whether—

17 (i) the information is protected information about someone
18 else; and

19 (ii) doing the thing would result in the information being
20 divulged to someone else.

21 Maximum penalty: 50 penalty units, imprisonment for 6 months or
22 both.

23 (3) This section is subject to the following sections:

24 (a) section 405D (Exception—information given under this Act);

25 (b) section 405E (Exception—information given under another
26 law);

27 (c) section 405F (Exception—information given with agreement).

405D Exception—information given under this Act

(1) Section 405C (1) does not apply to the making of a record of protected information if the record is made—

(a) under this Act; or

(b) in the exercise of a function, as an information holder, under this Act.

(2) Section 405C (2) does not apply to the divulging of protected information if the information is divulged—

(a) under this Act; or

(b) in the exercise of a function, as an information holder, under this Act.

Note Various provisions of this Act provide for protected information to be given to people, including:

- s 29 (Power to give and receive information)
- s 45 (Assistance for public advocate)
- s 73 (Powers of court in relation to reports)
- s 162A (Records about authorised carers to go to public advocate)
- s 405H (Information may be given in best interests of child or young person).

405E Exception—information given under another law

(1) Section 405C (1) does not apply to the making of a record of protected information if—

(a) the information is not sensitive information; and

(b) the record is made—

(i) under another territory law; or

(ii) in the exercise of a function, as an information holder, under another territory law.

- 1 (2) Section 405C (2) does not apply to the divulging of protected
2 information if—
- 3 (a) the information is not sensitive information; and
- 4 (b) the information is divulged—
- 5 (i) under another territory law; or
- 6 (ii) in the exercise of a function, as an information holder,
7 under another territory law.

- 8 *Note* Other legislation may provide for information to be given to people,
9 including:
- 10 • *Freedom of Information Act 1989*, s 10 (Right of access) (but see
11 s 38)
- 12 • *Health Records (Privacy and Access) Act 1997*, s 10 (Statement of
13 principle regarding right of access) (but see s 14).

14 **405F Exception—information given with agreement**

- 15 Section 405C (2) does not apply to protected information if the
16 information—
- 17 (a) is not sensitive information; and
- 18 (b) is about a person; and
- 19 (c) is divulged with the person’s agreement.

20 **405G Giving protected or sensitive information to a court**

- 21 (1) An information holder need not divulge protected information, that
22 is not sensitive information, to a court unless it is necessary to do so
23 for this Act or another territory law.
- 24 (2) An information holder need not produce a document containing
25 protected information, that is not sensitive information, to a court
26 unless it is necessary to do so for this Act or another territory law.
- 27 (3) An information holder need not divulge sensitive information to a
28 court unless it is necessary to do so for this Act.

1 (4) An information holder need not produce a document containing
2 sensitive information to a court unless it is necessary to do so for
3 this Act.

4 (5) In this section:

5 *court* includes a tribunal, authority or person with power to require
6 the production of documents or the answering of questions.

7 *produce* includes allow access to.

8 **405H Information may be given in best interests of child or**
9 **young person**

10 (1) The chief executive may give someone protected information
11 (including sensitive information) about a child or young person if
12 the chief executive considers that the giving of the information is in
13 the best interests of the child or young person.

14 (2) A facilitator may give the chief executive protected information
15 (including sensitive information) about a child or young person if
16 the facilitator considers that the giving of the information is in the
17 best interests of the child or young person.

18 *Note* A person who is given information under this section must comply with
19 s 405C (Offence—secrecy of protected information).

20 **22 New chapter 17**

21 *insert*

22 **Chapter 17 Transitional**

23 **418 References to public advocate**

24 (1) In this Act:

25 *public advocate* includes a person who is, or has at any time been,
26 the community advocate under the *Community Advocate Act 1991*,
27 as in force at any time.

1 (2) Subsection (1) is a law to which the Legislation Act, section 88
2 (Repeal does not end effect of transitional laws etc) applies.

3 **419 Expiry—ch 17**

4 This chapter expires on the day the *Public Advocate Act 2005*,
5 section 3 commences.

6 **23 Dictionary, new definition of *at risk of abuse or neglect***

7 *insert*

8 *at risk of abuse or neglect*, for chapter 7 (Children and young
9 people in need of care and protection)—see section 151B.

10 **24 Dictionary, definition of *best interests principle***

11 *substitute*

12 *best interests principle*—see section 11 (1).

13 **25 Dictionary, new definition of *divulge***

14 *insert*

15 *divulge*, for chapter 15 (Confidentiality and immunity)—see
16 section 404.

17 **26 Dictionary, definition of *facilitator***

18 *substitute*

19 *facilitator* means a person who is appointed as a facilitator under
20 section 166.

21 **27 Dictionary, definition of *indigenous placement principle***

22 *omit*

- 1 **28** **Dictionary, new definitions of *information holder* and *in***
2 ***need of care and protection***
- 3 *insert*
- 4 *information holder*, for chapter 15 (Confidentiality and
5 immunity)—see section 405.
- 6 *in need of care and protection*, for chapter 7 (Children and young
7 people in need of care and protection)—see section 156.
- 8 **29** **Dictionary, definition of *neglect***
- 9 *substitute*
- 10 *neglect*, for chapter 7 (Children and young people in need of care
11 and protection)—see section 151A.
- 12 **30** **Dictionary, new definitions of *protected information* and**
13 ***sensitive information***
- 14 *insert*
- 15 *protected information*, for chapter 15 (Confidentiality and
16 immunity)—see section 405A.
- 17 *sensitive information*, for chapter 15 (Confidentiality and
18 immunity)—see section 405B.
- 19 **31** **Public Advocate Act 2005, amendments 1.4 to 1.6**
- 20 *omit*

Endnotes

1 Presentation speech

Presentation speech made in the Legislative Assembly on 2005.

2 Notification

Notified under the Legislation Act on 2005.

3 Republications of amended laws

For the latest republication of amended laws, see www.legislation.act.gov.au.

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