



New South Wales

Children and Young Persons (Care and Protection) Amendment (Family is Culture Review) Bill 2022

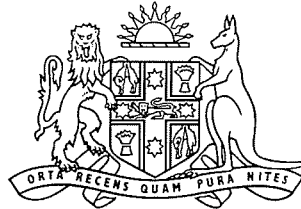
Contents

		Page
	1 Name of Act	2
	2 Commencement	2
Schedule 1	Amendment of Children and Young Persons (Care and Protection) Act 1998 No 157	3
Schedule 2	Amendment of Advocate for Children and Young People Act 2014 No 29	12
Schedule 3	Amendment of Children (Protection and Parental Responsibility) Act 1997 No 78	13
Schedule 4	Amendment of Ombudsman Act 1974 No 68	14

This PUBLIC BILL, originated in the LEGISLATIVE COUNCIL and, having this day passed, is now ready for presentation to the LEGISLATIVE ASSEMBLY for its concurrence.

Legislative Council

Clerk of the Parliaments.



New South Wales

Children and Young Persons (Care and Protection) Amendment (Family is Culture Review) Bill 2022

Act No , 2022

A Bill for

An Act to amend the *Children and Young Persons (Care and Protection) Act 1998* to implement recommendations of the Family is Culture report regarding Indigenous children and young people entering into, and living in, out-of-home care; and for related purposes.

The Legislature of New South Wales enacts—

1

1 Name of Act

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This Act is the *Children and Young Persons (Care and Protection) Amendment (Family is Culture Review) Act 2022*.

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2 Commencement

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This Act commences on the date of assent to this Act.

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Schedule 1	Amendment of Children and Young Persons (Care and Protection) Act 1998 No 157	1
		2
[1] Section 3 Definitions		3
	Insert in alphabetical order in section 3(1)—	4
	<i>Aboriginal and Torres Strait Islander Child and Young Person Placement Principles</i> —see section 13.	5
	<i>Aboriginal community controlled organisation</i> means an organisation that meets the criteria prescribed by the regulations.	6
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		8
[2] Section 9 Principles for administration of Act		9
	Insert after section 9(2)(g)—	10
	(h) In deciding what action it is necessary to take in order to protect an Aboriginal or Torres Strait Islander child or young person from harm, it is to be presumed that removing an Aboriginal or Torres Strait Islander child or young person from the child’s or young person’s family causes harm.	11
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[3] Section 13 Aboriginal and Torres Strait Islander Child and Young Person Placement Principles		16
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	Insert before section 13(1)—	18
	(1A) In the application of this Act to matters involving Aboriginal or Torres Strait Islander children and young people, all decision makers must apply each of the following elements of the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles that are relevant to the decision being made—	19
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	(a) prevention , which recognises that children and young people should be brought up by their own family and community,	24
		25
	(b) partnership , which recognises that Aboriginal or Torres Strait Islander community representatives should be involved in all decision making concerning the protection of children and young people,	26
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	(c) placement , which deals with where a child or young person should be placed if removed from their family,	29
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	(d) participation , which aims to ensure that children and young persons and their parents participate in all decision-making concerning the protection of the child or young person,	31
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	(e) connection , which recognises that a child or young person in out-of-home care must be supported to maintain their connection to their family, community and culture.	34
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[4] Sections 13A–13C		37
	Insert after section 13—	38
13A Aboriginal and Torres Strait Islander family support		39
	(1) It is acknowledged that the placement of Aboriginal or Torres Strait Islander children or young persons in out-of-home care can have serious negative consequences for the children or young persons concerned, their families and the indigenous community as a whole.	40
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	(2) Consequently, it is a principle to be applied in the administration of this Act that the Secretary is to take active steps to reduce the need for Aboriginal or	44
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Torres Strait Islander children and young people to be removed from their families and placed in out-of-home care.	1 2
(3) Without limiting the general application of the principle in subsection (2), the Secretary must take active steps to reduce the need for Aboriginal or Torres Strait Islander children and young people to be removed from their families and placed in out-of-home care, when exercising functions and powers under this Act including, but not limited to functions and powers under section 17, 37, 63 or 85.	3 4 5 6 7 8
(4) Active steps, for the purposes of this section, must be tailored to the circumstances of the individual child or young person and their family and include, but are not limited to—	9 10 11
(a) the provision of family support services that are—	12
(i) accessible, and	13
(ii) adequately resourced, and	14
(iii) culturally appropriate, and	15
(iv) so far as is practicable, designed and delivered by Aboriginal or Torres Strait Islander community controlled organisations, and	16 17
(b) considering the use of—	18
(i) parent responsibility contracts as provided for in Chapter 4, Part 3, Division 2, and	19 20
(ii) parent capacity orders as provided for in Chapter 5, Part 3, and	21
(iii) temporary care arrangements as provided for in Chapter 8, Part 3, Division 1, and	22 23
(c) other steps prescribed by the regulations.	24
13B Declaration by Children’s Court	25
(1) A relative of an Aboriginal or Torres Strait Islander child or young person may apply to the Children’s Court for a declaration that the Secretary has failed to take active steps under section 13A to reduce the need for the child or young person to be removed from the child or young person’s family and placed in out-of-home care.	26 27 28 29 30
(2) If the Children’s Court is satisfied that the Secretary has failed to take active steps under section 13A to reduce the need for the child or young person to be removed from the child or young person’s family and placed in out-of-home care, the Children’s Court may make a declaration to that effect.	31 32 33 34
(3) A declaration by the Children’s Court under this section may include the following—	35 36
(a) the ways in which the Secretary has failed to take active steps in relation to the particular child or young person,	37 38
(b) other things the Secretary could have done to fulfil their duty to take active steps in relation to the particular child or young person.	39 40
(4) An application may be made under this section—	41
(a) in connection with proceedings for—	42
(i) a care order under Chapter 5, Part 2, or	43
(ii) a parent capacity order under Chapter 5, Part 3, or	44
(b) at another time.	45

13C	Reporting responsibilities of Minister	1
(1)	Within 12 months after the commencement of section 13A, the Minister is to table in both houses of Parliament a plan that sets out the following—	2 3
(a)	the active steps that will be taken under section 13A to provide family support services to Aboriginal and Torres Strait Islander families and communities,	4 5 6
(b)	how the active steps to be taken under section 13A will be delivered,	7
(c)	how the active steps to be taken under section 13A will be funded.	8
(2)	On or before 1 April and 1 October each year, the Minister is to table a report in both houses of Parliament setting out the following for the preceding reporting period—	9 10 11
(a)	the Government’s achievements against the plan required by subsection (1),	12 13
(b)	the Aboriginal community controlled organisations that have been funded to deliver services under the plan required by subsection (1) and the amount of funding each organisation has received,	14 15 16
(c)	the actions the Minister has taken to engage with Aboriginal and Torres Strait Islander people to negotiate and agree on the implementation of programs and strategies that promote self-determination as provided for in section 11,	17 18 19 20
(d)	the means approved by the Minister under section 12 for Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities to participate in—	21 22 23
(i)	decisions made concerning the placement of Aboriginal and Torres Strait Islander children and young persons in out-of-home care, and	24 25 26
(ii)	other significant decisions made under this Act that concern Aboriginal or Torres Strait Islander children and young persons,	27 28
(e)	the Minister’s assessment of the effectiveness of the actions reported under paragraphs (c) and (d),	29 30
(f)	each declaration given by the Children’s Court under section 13B.	31
(3)	In this section—	32
	<i>preceding reporting period</i> means the period of 6 months ending on 30 June or 31 December immediately before the report is to be tabled in Parliament.	33 34
[5]	Section 61AA	35
	Insert after section 61—	36
61AA	Application for care orders— Aboriginal or Torres Strait Islander children and young people	37 38
(1)	This section applies to a care application for an Aboriginal or Torres Strait Islander child or young person other than an application for an emergency care and protection order under section 46.	39 40 41
(2)	The requirements imposed by this section are in addition to the other requirements imposed under this Act.	42 43
(3)	The care application must be accompanied by a report that—	44
(a)	provides a detailed justification for any removal, and	45

(b)	demonstrates the removal is the least intrusive option that could be employed, and	1 2
(c)	sets out the active steps the Secretary has taken under section 13A to reduce the need for the child or young person to be placed in out-of-home care, including the following—	3 4 5
(i)	family support services that were provided to the child or young person’s family,	6 7
(ii)	alternatives to removal that were considered and an explanation of why the alternatives are not satisfactory.	8 9
(4)	The regulations may prescribe information that must be included in a report under subsection (3).	10 11
[6]	Section 63 Evidence of prior alternative action	12
	Insert after section 63(1)—	13
(1A)	If the Secretary fails to provide the information required by subsection (1) the Children’s Court may—	14 15
(a)	dismiss the care application made for the child or young person, or	16
(b)	discharge the child or young person who is in the care responsibility of the Secretary from the care responsibility.	17 18
(1B)	If the Children’s Court is satisfied the information provided by the Secretary under subsection (1) demonstrates that alternatives to a care order, including the provision of family support and assistance, were not adequately considered, the Court may—	19 20 21 22
(a)	dismiss the care application made for the child or young person, or	23
(b)	discharge the child or young person who is in the care responsibility of the Secretary from the care responsibility.	24 25
[7]	Section 79AA	26
	Insert after section 79—	27
79AA	Aboriginal or Torres Strait Islander children and young people—special considerations	28 29
(1)	Before making an order under section 79(1)(b), (e) or (f) for an Aboriginal or Torres Strait Islander child or young person, the Children’s Court must be satisfied that the Secretary has taken active steps under section 13A to provide support services to the family of the child or young person.	30 31 32 33
(2)	If the Children’s Court is considering making an order under section 79(1)(b) for an Aboriginal or Torres Strait Islander child or young person the Children’s Court must, for the purpose of determining if there are special circumstances under section 79(10), take the following matters into account—	34 35 36 37
(a)	the steps the Secretary has taken under section 13A to provide support services to the family of the child or young person,	38 39
(b)	the availability of other support services that are reasonably required to support the restoration of the child or young person to the child or young person’s parents.	40 41 42
[8]	Section 83(5)	43
	Omit subsections (5)–(9). Insert instead—	44
(5)	In this section and section 83A—	45

- parent*, in relation to a child or young person, means— 1
- (a) the birth parent of the child or young person, or 2
 - (b) if the child or young person has been adopted—the adoptive parent of the child or young person. 3
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- reasonable period* means a period— 5
- (a) not more than 24 months, or 6
 - (b) if the child or young person is an Aboriginal or a Torres Strait Islander—not more than 48 months. 7
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[9] Section 83A 9

Insert after section 83— 10

83A Consideration of permanency plan by Children’s Court 11

- (1) The Children’s Court is to decide whether to accept the Secretary’s assessment, under section 83, of whether or not there is a realistic possibility of restoration within a reasonable period— 12
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 - (a) for a child who is less than 2 years of age on the date the Children’s Court makes an interim order allocating parental responsibility for the child to a person other than a parent—within 6 months after the Children’s Court makes the interim order, and 15
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 - (b) for a child or young person who is 2 or more years of age on the date the Children’s Court makes an interim order allocating parental responsibility for the child or young person to a person other than a parent—within 12 months after the Children’s Court makes the interim order. 19
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- (2) Despite subsection (1), the Children’s Court may extend, by up to 3 months, the period in which it is to decide if it will accept the Secretary’s assessment of whether or not there is a realistic possibility of restoration if, having regard to the circumstances of the case, the Children’s Court considers it— 24
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 - (a) appropriate, and 28
 - (b) in the best interests of the child or young person. 29
- (3) If the Children’s Court does not accept the Secretary’s assessment, the Children’s Court may direct the Secretary to prepare a different permanency plan. 30
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- (4) The Children’s Court must not make a final care order for a child or young person who is not an Aboriginal or a Torres Strait Islander unless it expressly finds— 33
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 - (a) permanency planning for the child or young person has been appropriately and adequately addressed, and 36
37
 - (b) prior to approving a permanency plan involving restoration, there is a realistic possibility of restoration within a reasonable period, having regard to— 38
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 - (i) the circumstances of the child or young person, and 41
 - (ii) the evidence, if any, that the child or young person’s parents are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care. 42
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- (5) For a child or young person who is an Aboriginal or a Torres Strait Islander, the Children’s Court must not make a final care order unless it expressly finds— 45
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(a)	permanency planning for the child or young person has been appropriately and adequately addressed, and	1 2
(b)	all efforts have been exhausted to facilitate placement with a member of the child's or young person's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, and	3 4 5 6
(c)	prior to approving a permanency plan that does not involve restoration, there is no realistic possibility of restoration within a reasonable period, having regard to the following—	7 8 9
	(i) the circumstances of the child or young person,	10
	(ii) the evidence, if any, that the child's or young person's parents, if given appropriate family support as provided for in section 13A, are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care, and	11 12 13 14 15
(d)	the permanency plan includes a cultural plan that explicitly states how it will support continuing contact with the child's or young person's Aboriginal or Torres Strait Islander family, community and culture, and	16 17 18
(e)	the permanency plan has been approved by a recognised Aboriginal community controlled organisation.	19 20
(6)	For the purposes of subsections (4)(a) and (5)(a), the permanency plan need not provide details as to the exact long term placement for the child or young person but must contain sufficient detail to allow the Children's Court to understand—	21 22 23 24
	(a) the child's or young person's needs, and	25
	(b) how the child's or young person's needs will be met.	26
(7)	A permanency plan is of no effect until approved by the Children's Court. Note— The terms <i>parent</i> and <i>reasonable period</i> are defined in section 83(5).	27 28
[10]	Section 87 Making of orders that have a significant impact on persons	29
	Insert after section 87(2)—	30
(2A)	If the child or young person the subject of application is an Aboriginal or a Torres Strait Islander, the Children's Court must—	31 32
	(a) consider the effect of the order on the relevant Aboriginal or Torres Strait Islander community, and	33 34
	(b) provide an opportunity to be heard to—	35
	(i) a representative of the relevant community, or	36
	(ii) a member of a recognised Aboriginal community controlled organisation with a relevant connection to the relevant community.	37 38 39
(2B)	Regulations may be made, for the purposes of subsection (2A)(b), for the following—	40 41
	(a) the remuneration of individuals who are heard by the Children's Court,	42
	(b) the payment of the reasonable expenses incurred by an individual who is heard by the Children's Court.	43 44
[11]	Section 93 General nature of proceedings	45
	Insert after section 93(3)—	46

(3A)	The Children’s Court may make a determination under subsection (3)—	1
(a)	if both of the following apply—	2
(i)	a party to the proceeding applies for the rules of evidence to apply to the proof of a fact,	3
(ii)	the court is of the view that proof of that fact is or will be significant to the determination of the proceedings, or	4
(b)	if the court is otherwise of the view that it is in the interests of justice to direct that the rules of evidence apply to the proceedings or part of the proceedings.	5
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[12]	Section 93AA	10
	Insert after section 93—	11
93AA	General principle for proceedings concerning Aboriginal or Torres Strait Islander children or young people	12
		13
(1)	In any proceedings before the Children’s Court concerning Aboriginal or Torres Strait Islander children or young people, the Children’s Court must—	14
		15
(a)	presume that the removal of a child or young person from their family or community causes harm including the serious harm arising from disrupting the child or young person’s connection to his or her culture, and	16
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		19
(b)	actively consider the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles.	20
		21
(2)	The presumption in subsection (1)(a) is rebuttable.	22
(3)	When giving its reasons for a decision under Chapter 5 that involves an Aboriginal or Torres Strait Islander child or young person, the Children’s Court must set out the following—	23
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		25
(a)	how the presumption in subsection (1)(a) has been considered,	26
(b)	if the presumption in subsection (1)(a) has been rebutted—the grounds for the rebuttal,	27
		28
(c)	how the following have been applied—	29
(i)	the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles,	30
		31
(ii)	the principle of self-determination as provided for in section 11,	32
(iii)	the principle of participation as set out in section 12.	33
[13]	Section 105 Publication of names and identifying information	34
	Insert after section 105(5)—	35
(5A)	Despite subsection (5), it is a defence to prosecution for an offence under subsection (2) if it is proved that the person who published or broadcast the name of a child or young person acted in good faith and—	36
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		38
(a)	to promote the safety, welfare or well-being of the child or young person, or	39
		40
(b)	otherwise in the public interest.	41
[14]	Section 106A Admissibility of certain other evidence	42
	Omit section 106A(1). Insert instead—	43

(1)	The Children’s Court must admit in proceedings before it any evidence adduced that a parent or primary care-giver of a child or young person the subject of a care application is a person who has been named or otherwise identified by the coroner or a police officer, whether by use of the term “person of interest” or otherwise, as a person who may have been involved in causing a reviewable death of a child or young person.	1 2 3 4 5 6
[15]	Section 248A Collection of information by Secretary and Children’s Court	7
	Insert after section 248A(3)—	8
(4)	If information is made publicly available in accordance with regulations made under subsection (2)(c), the information must be made available in a way that ensures the identity of a person to whom the information relates must not be readily ascertainable.	9 10 11 12
[16]	Section 263A	13
	Insert after section 263—	14
263A	Review of provisions inserted by Children and Young Persons (Care and Protection) Amendment (Family is Culture Review) Act 2022	15 16
(1)	The Minister is to review the amendments made to this Act by the <i>Children and Young Persons (Care and Protection) Amendment (Family is Culture Review) Act 2022</i> to determine whether the policy objectives of the amendments remain valid and whether the amended provisions of this Act remain appropriate for securing those objectives.	17 18 19 20 21
(2)	The review is to be undertaken as soon as possible after the period of 2 years from the date of commencement of the <i>Children and Young Persons (Care and Protection) Amendment (Family is Culture Review) Act 2022</i> .	22 23 24
(3)	A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 2 years.	25 26
[17]	Section 264 Regulations	27
	Insert after section 264(1A)(l)—	28
(m)	the recognition, for the purposes of section 83A(5)(e) and 87(2A)(b)(ii), of Aboriginal community controlled organisations.	29 30
[18]	Schedule 3 Savings, transitional and other provisions	31
	Insert at the end of the Schedule, with appropriate Part and clause numbering—	32
Part	Provisions consequent on enactment of Children and Young Persons (Care and Protection) Amendment (Family is Culture Review) Act 2022	33 34 35
	Definition	36
	In this Part—	37
	amending Act means the <i>Children and Young Persons (Care and Protection) Amendment (Family is Culture Review) Act 2022</i> .	38 39
	Pending proceedings before the Children’s Court	40
	Sections 61AA, 63(1A) and (1B), 79AA, 93(3A) and 93AA, as inserted by the amending Act, extend to proceedings before the Children’s Court that were	41 42

pending, but not finally determined, immediately before the commencement of the amending Act.	1 2
Permanency planning	3
Section 83(5), as substituted by the amending Act, applies to an application before the Children’s Court that was pending, but not finally determined, immediately before the commencement of the section.	4 5 6
Pending applications before the Children’s Court	7
Sections 83A and 87(2A), as inserted by the amending Act, extend to an application before the Children’s Court that was pending, but not finally determined, immediately before the commencement of the amending Act.	8 9 10
Publication of names and identifying information	11
Section 105(5A), as inserted by the amending Act, does not apply to a publication or broadcast made before the commencement of the section.	12 13
Admissibility of certain evidence	14
Section 106A(1), as amended by the amending Act, extends to proceedings before the Children’s Court that were pending, but not finally determined, immediately before the commencement of the amendment.	15 16 17

**Schedule 2 Amendment of Advocate for Children and Young
 People Act 2014 No 29**

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Section 37 Functions of Committee

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Insert at the end of section 37(1)(b)(ii)—

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or

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- (iii) the *Children's Guardian Act 2019* in relation to out-of-home care, including the accreditation and oversight of agencies arranging for or providing out-of-home care,

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**Schedule 3 Amendment of Children (Protection and Parental
Responsibility) Act 1997 No 78** 1
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Section 7A 3

Insert after section 7— 4

7A Attendance of Secretary at proceedings 5

(1) This section applies to a child who, under the *Children and Young Persons
(Care and Protection) Act 1998*, is— 6
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(a) under the parental responsibility of the Minister administering that Act,
or 8
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(b) in the care responsibility of the Secretary within the meaning of that
Act. 10
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(2) A court exercising criminal jurisdiction over a child to whom this section
applies may require the attendance, at the place where the proceedings are
being or are to be conducted, of a representative of the Secretary. 12
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Schedule 4 Amendment of Ombudsman Act 1974 No 68

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Section 13 Decision for investigation

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Insert after section 13(5)—

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- (6) To avoid doubt, the Ombudsman may investigate a complaint despite there being related court proceedings, either underway or anticipated, if, in the Ombudsman’s opinion, the investigation is unlikely to adversely effect those proceedings.

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