

Passed by both Houses



New South Wales

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

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*I certify that this PUBLIC BILL, which originated in the LEGISLATIVE COUNCIL, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.*

*Legislative Council*  
2022

*Clerk of the Parliaments*



New South Wales

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

Act No \_\_\_\_\_, 2022

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An Act to amend the *Children and Young Persons (Care and Protection) Act 1998* to provide for matters arising from particular recommendations of the Final Report of the Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-Home Care in New South Wales; and to amend the *Advocate for Children and Young People Act 2014*, the *Children (Protection and Parental Responsibility) Act 1997* and the *Ombudsman Act 1974* for related purposes.

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**The Legislature of New South Wales enacts—**

**1 Name of Act**

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

**2 Commencement**

This Act commences as follows—

- (a) for Schedule 1[1], to the extent that it inserts the definitions of ***exercise, function*** and ***principle of active efforts***, [2], [8]–[16], [22], [24], [25] and [26]—on a day or days to be appointed by proclamation,
- (b) otherwise—on the date of assent to this Act.

## Schedule 1 Amendment of Children and Young Persons (Care and Protection) Act 1998 No 157

### [1] Section 3 Definitions

Insert in alphabetical order in section 3(1)—

*Aboriginal and Torres Strait Islander Children and Young Persons Principle*—see section 12A(1).

*entity* includes—

- (a) a person, and
- (b) an unincorporated body.

*exercise* a function includes perform a duty.

*function* includes—

- (a) a power, and
- (b) an authority, and
- (c) a duty.

*principle of active efforts*—see section 9A.

### [2] Section 9A

Insert after section 9—

#### 9A Principle of making “active efforts”

- (1) The Secretary must act in accordance with the principle of active efforts in exercising functions under this Act.
- (2) The *principle of active efforts* means—
  - (a) in taking action to safeguard or promote the safety, welfare and well-being of a child or young person—making active efforts to prevent the child or young person from entering out-of-home care, and
  - (b) for a child and young person who has been removed from the child’s or young person’s parents or family—
    - (i) making active efforts to restore the child or young person to the child’s or young person’s parents, or
    - (ii) for a child or young person for whom it is not practicable or in the child’s or young person’s best interests to be restored to the child’s or young person’s parents—to place the child or young person with family, kin or community.

**Note—** See the permanent placement principles in section 10A and the placement principles for Aboriginal and Torres Strait Islander children and young persons in section 13.
- (3) Under the principle of active efforts, the Secretary must also ensure active efforts are—
  - (a) timely, and
  - (b) practicable, thorough and purposeful, and
  - (c) aimed at addressing the grounds on which the child or young person is considered to be in need of care and protection, and
  - (d) conducted, to the greatest extent possible, in partnership with the child or young person and the family, kin and community of the child or young person, and

- (e) culturally appropriate, and
  - (f) otherwise in accordance with any requirements prescribed by the regulations.
- (4) Without limiting subsections (1)–(3), active efforts include—
- (a) providing, facilitating or assisting with access to support services and other resources, and
  - (b) if appropriate services or resources do not exist or are not available—considering alternative ways of addressing the relevant needs of the child or young person and the family, kin or community of the child or young person, and
  - (c) activities directed at finding and contacting the family, kin and community of the child or young person, and
  - (d) the use of any of the following—
    - (i) a parent responsibility contract,
    - (ii) a parent capacity order,
    - (iii) a temporary care arrangement under Chapter 8, Part 3, Division 1,
    - (iv) alternative dispute resolution under section 37, and
  - (e) another matter, activity or action prescribed by the regulations.
- (5) To avoid doubt, this section is subject to the requirement under section 9(1) that this Act is to be administered under the principle that, in any action or decision concerning a particular child or young person, the safety, welfare and well-being of the child or young person are paramount.

**[3] Section 10A Permanent placement principles**

Omit “guardianship of a relative, kin or other suitable person” from section 10A(3)(b).

Insert instead “with a relative, kin or other suitable person in accordance with a guardianship order”.

**[4] Section 10A(3)(b1)**

Insert after section 10A(3)(b)—

- (b1) if it is not practicable or in the best interests of the child or young person to be placed in accordance with paragraph (a) or (b), the next preference is placement with a suitable person or persons jointly in accordance with an order made under section 79(1)(f), with the support of the Secretary under section 153(1) or financial assistance of the Secretary under section 161(1),

**[5] Section 10A(3)(c)**

Omit “or (b)”. Insert instead “, (b) or (b1)”.

**[6] Section 10A(3)(d) and (e)**

Insert “, (b1)” after “(b)” wherever occurring.

**[7] Section 12A**

Insert after section 12—

**12A Aboriginal and Torres Strait Islander Children and Young Persons Principle**

- (1) This section sets out the *Aboriginal and Torres Strait Islander Children and Young Persons Principle*, which applies to the administration of this Act in relation to Aboriginal and Torres Strait Islander children and young persons.
- (2) The Aboriginal and Torres Strait Islander Children and Young Persons Principle consists of the following 5 elements—
  - (a) *prevention*—recognising that a child or young person has a right to be brought up within the child’s or young person’s own family, community and culture,
  - (b) *partnership*—recognising that Aboriginal and Torres Strait Islander community representatives should participate in the design and delivery of services for children and young persons and in individual decisions about children and young persons,
  - (c) *placement*—recognising that, if a child is to be placed in out-of-home care, the child’s placement is to be in accordance with the placement principles for Aboriginal and Torres Strait Islander children and young persons in section 13,
  - (d) *participation*—recognising that a child or young person, and the child’s or young person’s parents and family members, should participate in decisions about the care and protection of the child or young person,
  - (e) *connection*—recognising that a child or young person has a right to be supported to maintain connections to family, community, culture and country.
- (3) In making a decision under this Act in relation to a matter involving an Aboriginal or Torres Strait Islander child or young person, a decision maker must apply each of the elements of the Aboriginal and Torres Strait Islander Children and Young Persons Principle that are relevant to the decision being made.

**[8] Section 63**

Omit the section. Insert instead—

**63 Evidence of active efforts to take alternative action**

- (1) When making a care application in relation to a child or young person, the Secretary must provide evidence to the Children’s Court of the following—
  - (a) the active efforts made by the Secretary, in accordance with the principle of active efforts, before the application was made and the reasons the active efforts were unsuccessful,
  - (b) the alternatives to a care order that were considered by the Secretary before the application was made and the reasons the alternatives were not considered appropriate.
- (2) Without limiting subsection (1), the Secretary must provide evidence that, before making the care application, active efforts were made to—
  - (a) provide, facilitate or assist with support for the safety, welfare and well-being of the child or young person, including support for the parents of the child or young person, and
  - (b) consider any of the following actions that are relevant—
    - (i) a parent responsibility contract,
    - (ii) a parent capacity order,

- (iii) a temporary care arrangement under Chapter 8, Part 3, Division 1,
  - (iv) an alternative dispute resolution process under section 37.
- (3) Subsections (1)(a) and (2) do not apply in relation to a care application that is seeking an emergency care and protection order.
- (4) The Children's Court may adjourn proceedings if the Court is not satisfied with the evidence provided by the Secretary under subsection (1).  
**Note—** See also sections 69 and 70, which provide that the Children's Court may make interim care orders in relation to a child or young person and any other interim orders the Children's Court considers appropriate for the safety, welfare and well-being of a child or young person pending the conclusion of the proceedings, including less intrusive interim orders.
- (5) If the Children's Court is not satisfied with the evidence provided by the Secretary under subsection (1), the Court must not take either of the following actions unless the Court is satisfied that taking the action is in the best interests of the safety, welfare and well-being of the child or young person—
  - (a) dismiss a care application in relation to the child or young person,
  - (b) discharge the child or young person from the care responsibility of the Secretary.

**[9] Section 78 Care plans**

Insert after section 78(2)—

- (2A) If the care plan is for an Aboriginal or Torres Strait Islander child or young person, the plan must also—
  - (a) include a cultural plan that sets out how the following will be maintained and developed—
    - (i) the child's or young person's connection with their Aboriginal or Torres Strait Islander family and community,
    - (ii) the child's or young person's Aboriginal or Torres Strait Islander identity, and
  - (b) be developed, to the greatest extent practicable, in consultation with—
    - (i) the child or young person, and
    - (ii) the parents, family and kin of the child or young person, and
    - (iii) relevant Aboriginal or Torres Strait Islander organisations or entities for the child or young person, and
  - (c) address how the plan has complied with the following—
    - (i) the permanent placement principles,
    - (ii) the Aboriginal and Torres Strait Islander Children and Young Persons Principle,
    - (iii) the placement principles for Aboriginal and Torres Strait Islander children and young persons set out in section 13.

**[10] Section 78A Permanency planning**

Omit section 78A(3).

**[11] Section 79AA**

Insert after section 79—

**79AA Special circumstances that warrant allocation of parental responsibilities to Minister for more than 24 months**

- (1) This section applies if the Children's Court is deciding, under section 79(10), whether or not there are special circumstances that warrant the allocation of parental responsibility to the Minister for a period of more than 24 months.
- (2) Without limiting the matters to which the Children's Court may have regard in making its decision, the Court may have regard to the following—
  - (a) whether support services and other resources that are reasonably required to support the restoration of the child or young person to the child's or young person's parents are available to the parents,
  - (b) if the services and other resources mentioned in paragraph (a) are not available at the time the Court is making its decision—whether a longer period of allocation of parental responsibility to the Minister is needed to facilitate access to the services or other resources,
  - (c) the active efforts made by the Secretary to restore the child or young person to the child's or young person's parents,
  - (d) any other matters prescribed by the regulations.

**[12] Section 83 Preparation of permanency plan**

Insert after section 83(3)—

- (3A) A permanency plan prepared under subsection (3) must include the following—
  - (a) the reasons for the Secretary's assessment that there is not a realistic possibility of restoration within a reasonable period, and
  - (b) details of the active efforts the Secretary has made to—
    - (i) restore the child or young person to the child's or young person's parents, or
    - (ii) if restoration to the child's or young person's parents is not practicable or in the best interests of the child or young person—place the child or young person with family, kin or community.

**[13] Section 83(5B)**

Insert after section 83(5A)—

- (5B) Before deciding whether to accept the Secretary's assessment of whether or not there is a realistic possibility of restoration within a reasonable period, the Children's Court may direct the Secretary to provide the Court with—
  - (a) the reasons for the Secretary's assessment that there is not a realistic possibility of restoration within a reasonable period, and
  - (b) evidence of the active efforts the Secretary has made to—
    - (i) restore the child or young person to the child's or young person's parents, or
    - (ii) if restoration to the child's or young person's parents is not practicable or in the best interests of the child or young person—place the child or young person with family, kin or community.

**[14] Section 83(7) note**

Insert at the end of section 83(7)—



**Note—** Section 83A(3) provides additional matters about which the Children's Court must make express findings before making a final care order in relation to an Aboriginal or Torres Strait Islander child or young person.

**[15] Section 83(8A)**

Omit section 83(8A). Insert instead—

- (8A) For the purposes of this section, a *reasonable period* must not exceed 24 months unless the Secretary is satisfied, having regard to any matters prescribed by the regulations, there are exceptional circumstances that warrant a longer period.

**[16] Section 83A**

Insert after section 83—

**83A Additional requirements for permanency plans for Aboriginal and Torres Strait Islander children and young persons**

- (1) This section sets out requirements for the preparation of a permanency plan for an Aboriginal or Torres Strait Islander child or young person that are in addition to the requirements set out in section 83.
- (2) If the Secretary assesses, under section 83(3), that there is not a realistic possibility of restoring a child or young person to the child's or young person's parents within a reasonable period, the Secretary must—
  - (a) include in the permanency plan evidence of the active efforts made, in accordance with the principle of active efforts, to determine whether the child or young person can be placed with any of the following, in accordance with the principle for the general order for placement of Aboriginal and Torres Strait Islander children and young persons under section 13(1)—
    - (i) a relative,
    - (ii) a member of kin or community,
    - (iii) another suitable person, and
  - (b) include in the permanency plan—
    - (i) a recommendation that the child or young person be placed with a relative, member of kin or community or other suitable person identified under paragraph (a), or
    - (ii) a recommendation that the child or young person not be placed with a relative, member of kin or community or other suitable person and the reasons for the recommendation.
- (3) After considering a permanency plan for an Aboriginal or Torres Strait Islander child or young person, the Children's Court must not make a final care order unless it expressly finds—
  - (a) the plan complies with the following—
    - (i) the permanent placement principles,
    - (ii) the Aboriginal and Torres Strait Islander Children and Young Persons Principle,
    - (iii) the placement principles for Aboriginal and Torres Strait Islander children and young persons set out in section 13, and
  - (b) the plan includes a cultural plan that sets out how the following will be maintained and developed—

- (i) the child's or young person's connection with the child's or young person's Aboriginal or Torres Strait Islander family and the Aboriginal or Torres Strait Islander community of the child or young person,
- (ii) the child's or young person's Aboriginal or Torres Strait Islander identity, and
- (c) the plan has been developed, to the greatest extent practicable, in consultation with—
  - (i) the child or young person, and
  - (ii) the parents, family and kin of the child or young person, and
  - (iii) relevant Aboriginal or Torres Strait Islander organisations or entities for the child or young person.

**[17] Section 87 Making of orders that have a significant impact on persons**

Insert after section 87(2)—

- (2A) For subsection (2), if the group affected is an Aboriginal or Torres Strait Islander family or community, the representative or representatives of the group approved by the Court may be a member of a relevant Aboriginal or Torres Strait Islander organisation or entity for the child or young person.

**[18] Section 93 General nature of proceedings**

Insert “, and subject to subsections (1) and (2),” after “proceedings before it” in section 93(3).

**[19] Section 93(3A)**

Insert after section 93(3)—

- (3A) Without limiting subsection (3), the Children's Court may determine that the rules of evidence or certain rules of evidence are to apply in relation to proceedings or parts of proceedings if—
  - (a) a party to the proceedings applies to the Court for the rules of evidence or certain rules of evidence to apply in relation to the proof of a fact, and
  - (b) in the Court's opinion, proof of that fact is or will be significant to the determination of the proceedings or parts of the proceedings.

**[20] Section 106A Admissibility of certain other evidence**

Omit “subsection (1)” from section 106A(2). Insert instead “subsection (1)(b)”.

**[21] Section 106A(3)**

Omit the subsection. Insert instead—

- (3) A parent or primary care-giver in relation to whom evidence referred to in subsection (1)(b) has been adduced may rebut the prima facie evidence referred to in subsection (2) by satisfying the Children's Court that, on the balance of probabilities, the parent or primary care-giver was not involved in causing the relevant reviewable death of the child or young person.

**[22] Section 245 Decisions that are administratively reviewable by Civil and Administrative Tribunal**

Omit section 245(1)(a) and (a1). Insert instead—

- (a) a decision of the relevant decision-maker not to authorise a person as an authorised carer, other than the following decisions—

- (i) a decision not to authorise a person as a residential care worker,
- (ii) a decision not to authorise a person who—
  - (A) has been granted an authorisation as an authorised carer on a provisional basis, and
  - (B) had not, at the time the authorisation took effect, made an application but was taken under the regulations to have made an application,

**Note—** See the *Children and Young Persons (Care and Protection) Regulation 2022*, section 21(2).

- (a1) a decision of the relevant decision-maker to—
  - (i) suspend a person’s authorisation as an authorised carer, or
  - (ii) impose conditions on a person’s authorisation as an authorised carer,
- (b) a decision of the relevant decision-maker to cancel a person’s authorisation as an authorised carer, other than a decision to—
  - (i) cancel an authorisation granted on a provisional basis, or
  - (ii) cancel an authorisation on the occurrence of an event prescribed under section 137(2)(e),

**[23] Section 264 Regulations**

Insert after section 264(1A)(b)—

- (b1) processes to be used when identifying children and young persons as Aboriginal or Torres Strait Islander persons for the purposes of administering this Act,

**[24] Section 265**

Omit the section. Insert instead—

**265 Review of particular amendments to Act**

- (1) The Minister is to review this Act to determine whether—
  - (a) the policy objectives of the amendments made by the amending Act remain valid, and
  - (b) the terms of the Act remain appropriate for achieving the policy objectives of the amendments made by the amending Act.
- (2) The review is to be undertaken as soon as practicable after the period of 12 months from the commencement of this section (the *review period*).
- (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 review period.
- (4) In this section—  
*amending Act* means the *Children and Young Persons (Care and Protection) Amendment (Family is Culture) Act 2022*.

**[25] Section 266**

Insert after section 265—

**266 Minister to give annual report about active efforts**

- (1) The Minister must prepare an annual report relating to the implementation and impact of the principle of active efforts for each of the 5 financial years following the commencement of this section.

- (2) Each report must include details about the following matters for the financial year to which the report relates—
  - (a) the actions taken by the Secretary to implement the principle of active efforts,
  - (b) funding that was directly invested in active efforts measures, including to—
    - (i) the Department, and
    - (ii) non-government organisations and Aboriginal community controlled organisations,
  - (c) steps taken to improve Aboriginal and Torres Strait Islander self-determination and participation in decision-making, including steps taken to implement the Aboriginal and Torres Strait Islander Children and Young Persons Principle.
- (3) The Minister must report to Parliament—
  - (a) for the first report—within 6 months after end of the first financial year immediately following the commencement of this section, and
  - (b) for each subsequent report—within 6 months after the end of the each subsequent financial year.

**[26] Schedule 3 Savings, transitional and other provisions**

Insert at the end of the Schedule—

**Part 14 Provision consequent on enactment of Children and Young Persons (Care and Protection) Amendment (Family is Culture) Act 2022**

**57 Existing care applications**

- (1) This clause applies to a care application made, but not finally determined before the commencement of this clause.
- (2) To avoid doubt, the following sections of the Act, as inserted or amended by the amending Act, apply only in relation to the determination of care applications made by the Secretary on or after the commencement of this clause—
  - (a) section 9A,
  - (b) section 63,
  - (c) section 78,
  - (d) section 78A,
  - (e) section 79AA,
  - (f) section 83,
  - (g) section 83A.
- (3) In this clause—

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

## Schedule 2 Amendment of other legislation

### 2.1 Advocate for Children and Young People Act 2014 No 29

#### Section 37 Functions of Committee

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

- or
- (iii) the *Children's Guardian Act 2019* in relation to out-of-home care,

### 2.2 Children (Protection and Parental Responsibility) Act 1997 No 78

#### Section 7

Omit the section. Insert instead—

#### 7 Attendance of parents and other persons at proceedings

- (1) A court exercising criminal jurisdiction in relation to a child may require the attendance, at the place at which the proceedings are being or are to be conducted, of—
  - (a) one or more of the child's parents, or
  - (b) if the child is in statutory out-of-home care under which the Minister has parental responsibility for the child—
    - (i) the Minister, or
    - (ii) a representative of the Minister, including an officer or employee of a designated agency, or
  - (c) if the child is in statutory out-of-home care under which the Secretary has parental responsibility for the child—
    - (i) the Secretary, or
    - (ii) a representative of the Secretary, including an officer or employee of a designated agency.
- (2) For subsection (1)(a), the court may specify which parent or parents are to attend.
- (3) In this section—  
*designated agency* has the same meaning as in the *Children's Guardian Act 2019*.

## **2.3 Ombudsman Act 1974 No 68**

### **Section 13 Decision for investigation**

Insert after section 13(5)—

- (6) To avoid doubt, the Ombudsman may investigate or continue to investigate conduct even if the conduct is or is likely to become the subject of court or other proceedings, unless the Ombudsman considers the investigation is likely to adversely affect the proceedings or potential proceedings.