

1999

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

**JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL
(No 2) 1999**

EXPLANATORY MEMORANDUM

**Circulated by authority of
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Attorney-General**

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The Bill amends the law relating to justice and community safety, and for other purposes.

Notes on Clauses

Clauses 1 – 3: These clauses are machinery provisions.

Schedule: Details of the Schedule are set out below.

Overview of amendments to Tribunal legislation

The Schedule amends legislation governing certain Tribunals to provide, so far as possible, a set of standardised provisions to deal with their administration and membership. This will foster greater efficiency in the way the Tribunals function by removing pointless and confusing differences between the existing range of provisions.

The substantive law governing the operation of the several Tribunals will not be greatly affected by the amendments. While large parts of the various Acts have been repealed, their provisions have been rearranged into a coherent and consistent order and replaced. Changes have also been made to ensure that terminology is used consistently between the Acts. Affected Tribunals and the Acts that establish them are:

- Credit Tribunal (*Consumer Credit (Administration) Act 1996*);
- Discrimination Tribunal (*Discrimination Act 1991*);
- Guardianship and Management of Property Tribunal (*Guardianship and Management of Property Act 1991*);
- Mental Health Tribunal (*Mental Health (Treatment and Care) Act 1994*);
- Tenancy Tribunal (*Tenancy Tribunal Act 1994*).

This memoranda will use the following abbreviations throughout: Credit Act and Credit Tribunal; Discrimination Act and Discrimination Tribunal; Guardianship Act and Guardianship Tribunal; Mental Health Act and Mental Health Tribunal and Tenancy Act and Tenancy Tribunal.

The first section sets out the template provisions introduced by the Schedule. Unless otherwise noted, these provisions are intended to be adopted uniformly.

The second section lists proposed amendments which are unique to a particular Act.

Terms describing Tribunal members:

This provision will standardise the variety of terms presently used to describe the different classes of Tribunal members. The nomenclature used by all five Acts will be as follows:

- "president" means the president of the tribunal. Presiding members of the Tribunals are already entitled president save for the "Chairperson" of the Credit Tribunal. This provision addresses that anomaly;
- "deputy president" means a deputy president of the Tribunal. Deputy president is a new designation. Presently, the Tribunals are served by "Acting Presidents". All ACT Magistrates hold appointments as Acting Presidents (or, in the case of the Credit tribunal, an Acting Chairperson) of all Tribunals except the Tenancy Tribunal. The redesigned Acts will provide that persons holding appointments as Acting Presidents under existing legislation will be reappointed as deputy presidents upon transition. This will avoid confusion by providing for consistency in nomenclature. Under the present system it is also unclear as to when an acting appointment is triggered to allow for an acting appointee to sit. This difficulty will be removed by the new arrangements;
- "presidential member" means the president or deputy president;
- "member" of the tribunal means the president, a deputy president, or a non-presidential member;
- "non-presidential member" means a member of the Tribunal who is not a presidential member. As was formerly the case, all Tribunals except the Discrimination Tribunal have non-presidential members. The Guardianship and Tribunal has only one class of non-presidential members. The Consumer Credit and Tenancy Tribunals have two classes of members who represent opposing interests in matters dealt with by the Tribunals. The Mental Health Tribunal has four classes of expert members who are variously drawn upon according to the appropriateness of their expertise.

The following definitions, therefore, appear alongside those shown above in the following Acts:

- "consumer member" and "industry member" (*Consumer Credit (Administration) Act 1996*);
- "community member", "mental health services member", "psychiatrist member" and "psychologist member" (*Mental Health (Treatment and Care) Act 1994*);
- "owner member" and "tenant member" (*Tenancy Tribunal Act 1994*).

Functions and powers of Tribunal

This provision states that the Tribunal has the functions and powers given to it under its Act, including the power to do everything necessary or convenient to be done in relation to the carrying out of its functions. It will standardise equivalent provisions which presently exist in all Acts except the Mental Health Act which, because of the peculiarly sensitive nature of its work, assigns highly specific functions to the Mental Health Tribunal.

Membership

This provision states that the Tribunal consists of the president, the deputy president and the non-presidential members, or, in the case of the discrimination Tribunal, the president and deputy-presidents. It will also standardise equivalent provisions dealing with Tribunal membership.

Appointment by Executive

This provision states that members of the Tribunal are to be appointed by the Executive. At present, members of the Credit and Tenancy Tribunals are appointed by the responsible Minister. This is inconsistent with appointments to the other Tribunals which are already made by the Executive. There is no relevant difference in the nature of the appointments to warrant this inconsistency. Further, as Tribunal members can be considered quasi-judicial officers, their appointments are most appropriately made by the Executive.

President

This provision states that a person is eligible to be appointed president only if the person is a Magistrate as is presently the case with the Discrimination and Tenancy Tribunals. The remaining three tribunals allow the president to be a magistrate or a legal practitioner of at least five years standing. This provision will reflect the importance of the presidential role.

Deputy president

This provision states that a person is eligible to be appointed deputy president only if the person is a magistrate or a lawyer of at least five years standing. As noted at paragraph A.2, the Bill will replace acting presidents with deputy presidents. Acting Presidents are presently required to have the same qualifications as the presidents of each of the tribunals (although this fact is differently expressed throughout the several Acts). This provision will allow for more flexibility in the appointment of presidential members while clarifying the envisaged Tribunal hierarchy .

Non-presidential members

This provision states that the Executive must appoint non-presidential members who are relevantly qualified to serve on the Tribunal. The Bill does not alter the classes of non-presidential members to be appointed or the qualifications required of them. It will, however, remove existing limits on the number of non-presidential members able to be appointed to the Tribunals. The Credit Tribunal is currently limited to one member of each of its two membership classes, the Guardianship Tribunal to two members, and the Mental Health Tribunal to nine members each of its four classes of members.

This inconsistency is based on no particular policy. In the case of the Guardianship and Management of Property Tribunal, the limit has led to the appointment of acting members (of which there are presently 14) to meet operational needs. As members and acting members are called upon equally to sit on the Tribunal and perform identical duties, this has created an artificial delineation of status between them. The Bill will allow any number of tribunal members which is thought appropriate, as determined at a policy level. The flexibility of this approach will ensure that the tribunals always have sufficient membership levels to properly perform their functions.

Full and part-time appointments

This provision deals with full-time versus part-time appointments to the Tribunals. Presently, all appointments to the Mental Health and Guardianship Tribunals may be full or part-time. All members of the Credit Tribunal must be appointed on a part-time basis only. The Discrimination and Tenancy Acts do not address the issue. The Bill will provide that all Tribunal members who are not Magistrates may be appointed as full-time or part-time members. This allows for flexibility in the appointment of members.

Terms of appointment generally

This provision allows that a member holds office on the terms not provided in the relevant Act that are decided by the Executive. There is no reference to the setting out of conditions of appointment in the Discrimination or Tenancy Acts and this provision formally prescribes the manner in which the terms of a member's appointment are already established in practice, under these Acts. The Credit, Mental Health and Guardianship Acts provide for terms and conditions of membership to be as shown in an instrument of appointment. Under the Bill, certain matters will continue to be set out in an instrument of appointment. Greater flexibility and reduced administration costs will flow, however, from removing the general requirement to set out conditions of appointment not shown in the Act in an instrument.

Non-application to Magistrates

The provisions outlined at paragraphs 8 and 9 do not apply to Magistrates. Magistrates are appointed as such under separate legislation. They fulfil the role of tribunal presidents as part of their magisterial functions and it would be inappropriate to provide separate terms and conditions for their appointment to the Tribunals.

Instrument of appointment

This provision requires two matters to be stated in an instrument of appointment: a member's period of appointment; and, whether the member is appointed as a full-time or part-time member. It ensures that evidence of these matters, which is the most significant aspect of an appointment, is readily available and verifiable.

Duration of appointment

Current maximum appointment periods vary between the Acts and between non-presidential and presidential members. The amendments will uniformly provide that all members may be appointed for maximum five year terms. This will allow appointments to a Tribunal to be arranged so that all fall due together, making the appointment process far simpler to administer.

Termination of appointment

The Tenancy Tribunal is alone in setting out comprehensive provisions for the termination of members' appointments. The Mental Health Tribunal makes some provision for the termination of the chief psychiatrists appointment, while other Tribunals do not address the issue. The Bill will provide the following bases for termination of appointments. Like other changes to be effected, uniform termination provisions will assist in the smooth administration and running of all Tribunals:

- the Bill provides that the Executive *may* terminate the appointment of a member for misbehaviour or physical or mental incapacity, or if the member becomes bankrupt or becomes involved in related proceedings;
- the Bill provides that the Executive *must* terminate appointment of a person convicted of an offence punishable by imprisonment of 1 year or longer;
- the two preceding provisions will not apply to a member who is a Magistrate. Magistrates fulfil the role of Tribunal presidents as part of their magisterial functions. The removal of a magistrate from that office is dealt with under the *Judicial Commissions Act 1994*, making it an inappropriate subject for the Bill;

- the Bill provides that the Executive *must* terminate the appointment of any member (including a Magistrate) who no longer possess the qualifications required of a particular membership class.

Constitution of Tribunal

The Tribunals have different requirements as to how they are constituted, owing to the differing matters with which they deal. The substantive arrangements governing how the tribunals are to be constituted for their various purposes will not be altered by the Bill with the following two exceptions:

- references to the president will be replaced with references to a presidential member. A presidential member will thereby be able to act in situations where the president alone is presently empowered to do so. However, the president alone remains ultimately responsible for a Tribunal's business;
- this provision states that if a non-presidential member of the tribunal ceases to be a member during the course of a proceeding, the remaining members may finish the proceeding if the presidential member considers it desirable. This will clarify the course to be taken should such a situation arise and enable the proceeding to be concluded without interruption or the need for rehearing. The Mental Health and Guardianship Tribunals already have similar provisions. The provision is not applicable to the Discrimination Tribunal, which is constituted by a single member.

Provision for acting members

The Bill will repeal existing provisions allowing for the appointment of acting members (however, see the amendments to sections 28 and 28A of the *Interpretation Act 1967* discussed below). The removal of upper limits on tribunal membership will significantly reduce the need for acting appointments by ensuring that a sufficiently large pool of members proper is always available. If exceptional circumstances require an acting appointment, it can in any case be made under sections 28 and 28A of the *Interpretation Act 1967*.

Role of president

This provision states that the president is responsible for ensuring the orderly and prompt discharge of the Tribunal's business. It is a new provision, intended to clarify the nature and paramountcy of the presidential role. It counterbalances another provision which allows deputy presidents to perform functions which are exclusively presidential. As part of this responsibility, the president may give directions about the members who are to constitute the Tribunal for a particular proceeding or matter and, where relevant, about how the Tribunal is to be constituted for a particular matter.

Transitional provisions

The Bill includes transitional provisions to ensure that the administration of the various Tribunals is not disrupted by the changes made to their governing enactments. It provides that:

- incumbent presidents of the several Tribunals will continue in this office upon the passage of the Bill;
- incumbent Acting Presidents of the several tribunals will be taken, upon commencement, to have been re-appointed as deputy presidents of the same tribunals. Acting presidential appointments have until now been made for an unspecified period. The Bill will provide that, upon transition, acting presidents will hold office as deputy presidents for a period of five years, beginning upon commencement. Thereafter, the appointment of deputy presidents will be subject to the same five year maximum term applicable to all other members;
- the Bill makes similar provision for the re-appointment of incumbent members in terms of the new titles given to them; (where applicable, as members of a particular class).

All transitional provisions will expire three months after commencement. This allows Parliamentary Counsel to remove them from later reprints of the Acts in which they appear after they have served their purpose. This ensures that the Acts remain free of unnecessary clauses.

Consumer Credit (Administration) Act 1996

Following the template provision concerning the role of the president, this Bill will insert a further provision to the effect that the presidential member must preside at a proceeding. While this already happens in practice, the matter is put beyond doubt.

Guardianship and Management of Property Tribunal Act 1991

The Guardianship and Management of Property Tribunal was partially amended, in line with the objects of the present amendments, by the Law Reform (Miscellaneous Provisions) Act 1999. Present amendments will complete the fulfilment of those objects.

The Schedule reduces the maximum penalty units which may punish an offence created under the Regulations. This will bring the Act into line with the Penalty Guidelines applied throughout other ACT legislation.

Mental Health (Treatment and Care) Act 1994

The Mental Health Act is unique in stipulating that a person is not eligible to be appointed as presidential or non-presidential member of the Tribunal if the person has been the subject of a mental health order or proceeding within the previous 12 months. This preserves the present situation.

Other amendments

Interpretation Act 1967

A further series of changes are made to the *Interpretation Act 1967*, continuing the task of bringing this law up to date.

A number of changes are made to the Dictionary. The provision of definitions of officials and organisations continues the trend begun with the *Law Reform (Miscellaneous Provisions) Act 1999*. The proposed definition of "body" is intended to enable corresponding definitions (and equivalent provisions) to be repealed. The proposed definition of "designation" would broaden the replacement definition of "name". The proposed definition of "exercise" is intended to allow the use of composite phrases such as "exercise a function or power" and remove the artificial distinction between performing a function and exercising a power. The proposed definition of "occupy" would foster the change which began with the *Law Reform (Miscellaneous Provisions) Act 1999* to use of the term "position" rather than the more formal term "office".

Sections 28 and 28A (dealing with acting appointments) are remade to simplify, clarify, broaden scope and allow more flexible operation. The new sections would enable appointment provisions in other Acts to be shortened and simplified and acting appointment provisions to be progressively repealed. New section 28 would apply to all appointments including acting appointments. The notion of appointment has been broadened. The section would enable appointments to be made by name or by virtue of another position occupied by the appointee (including a public service position identified by its local designation). Power to make a substantive appointment would now automatically carry with it the power to make acting appointments. Appointments would need to be in writing or evidenced in writing. Provision would be made for resignation by notice in writing and for resignation from an Executive appointment to be made to a Minister. New section 28A is intended to dovetail with new section 28 but otherwise broadly parallels existing section 28A. An acting appointment made because the substantive occupant was unable to carry out his or her duties would come to an end automatically on resumption of those duties. The new section makes clear that the substantive position held by a person is not affected by the fact that they are acting in another position. The new provisions also save appointments and acting appointments from defects or irregularities in the making of an appointment.

Section 23A remakes paragraph 25(1)(a) and subsection 25(2) and incorporates a new provision to simplify references to bodies whose name includes "Australian Capital Territory". Section 31AA incorporates the effect of existing subsection 26(3) with a number of new provisions intended only to restate the common law.

Stylistic changes are made to simplify subsections 13B(1), 13B(2) and 25(3). Section 7A is amended with a "tidy-up" change from the *Law Reform (Miscellaneous Provisions) Act 1999*—the Acts in the schedule are "former" acts of the relevant jurisdiction. Schedule 2 is amended in relation to former UK laws in parallel to the proposed amendments of section 26.

Various other amendments are also included to ensure that terms throughout the Act will be consistent with the language of the terms defined in the Dictionary and the changes commenced with the *Law Reform (Miscellaneous Provisions) Act 1999*.

- Section 7(5) consequential on new definition of "exercise" (see comments on Dictionary amendments).
- Subsections 25A(1) and (2): continue changes begun with the *Law Reform (Miscellaneous Provisions) Act 1999* (see also comments on Dictionary amendments).
- Subsection 26(1) consequential on new definition of "exercise" (see comments on Dictionary amendments).
- Subsection 26(2) continues changes begun with the *Law Reform (Miscellaneous Provisions) Act 1999* (see also comments on Dictionary amendments).

- Section 29A continues changes begun with the *Law Reform (Miscellaneous Provisions) Act 1999* (see also comments on Dictionary amendments).
- Section 29B consequential on new definition of “exercise” (see comments on Dictionary amendments).
- Section 57 consequential on new definition of “exercise” (see comments on Dictionary amendments).

Juries Act 1967

The Bill amends section 42C of the *Juries Act 1967* to permit a juror to disclose protected information to a legal practitioner for the purposes of obtaining advice where the jury deliberations are in issue, or where information is sought by a legal practitioner if the juror becomes involved in court proceedings, a criminal investigation or a Royal Commission. These amendments replace earlier proposed amendments to the Act in the light of comments by the Standing Committee on Justice and Community Safety.

Parole Orders (Transfer) Act 1983

The Bill amends the *Parole Orders (Transfer) Act 1983* to expressly permit a delegation of a Ministerial power. This is already permitted under section 5 of the *Administration Act 1989* but it is necessary to include an express power within the Act to satisfy the requirements of parole order laws in other jurisdictions.