

2004

**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

**JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT
BILL 2004**

EXPLANATORY STATEMENT

**Circulated by authority of the
Attorney General
Mr Jon Stanhope MLA**

Overview of Bill

The Justice and Community Safety Legislation Amendment Bill 2004 amends a number of laws administered by the ACT Department of Justice and Community Safety. The laws amended include:

- *Agents Act 2003*;
- *Civil Law (Sale of Residential Property) Act 2003*;
- *Civil Law (Wrongs) Act 2002*;
- *Cooperatives Act 2002*;
- *Crimes Act 1900*;
- *Crimes (Forensic Procedures) Act 2000*;
- *Domestic Relationships Act 1994*;
- *Justices of the Peace Act 1989*;
- *Legislation Act 2001*;
- *Ombudsman Act 1989*;
- *Security Industry Act 2003*; and the
- *Trade Measurement Act 1991*.

The amendments are detailed below.

Agents Act 2003

This amendment prevents agents from making payments in the form of ‘cash cheques’, in order to limit the possibility of theft from trust accounts. The new section 107 (3A) provides that where a licensed agent pays money by cheque out of a trust account, the cheque must be made payable to a specified person and be crossed and marked ‘not negotiable’. Breaching this new provision will be a strict liability offence.

Civil Law (Sale of Residential Property) Act 2003

This amendment clarifies the definition of an energy efficiency rating statement in section 20. The definition previously made reference to "the energy guidelines adopted under the Territory plan". Currently, there is more than one energy guideline under the Territory plan. To avoid confusion section 20 has been amended to make reference to “the energy guidelines adopted under the Territory plan that apply to residential premises”.

Civil Law (Wrongs) Act 2002

This amendment to section 68(2)(b) of the *Civil Law (Wrongs) Act 2002* corrects a minor error in the section, where the Act refers to *claimant*, rather than *respondent*.

There is also an amendment which inserts transitional provisions in the *Civil Law (Wrongs) Act 2002*. These provide the appropriate time limit for plaintiffs to provide a notice of claim. This replaces an identical transitional regulation which was created to address the possibility that the pre-court procedures would apply to existing cases, where the plaintiff did not consult a lawyer before the commencement of the provisions, and that in these cases the time limits in the Act for submitting a notice of claim may not be met.

Cooperatives Act 2002

Section 451(2) of the *Cooperatives Act 2002* provides that a person, other than a cooperative (including building societies, credit unions, and other exempted bodies) must not trade or carry on business under any name or title that includes the word ‘cooperative’ or a word of a similar meaning. Section 451 of the Act has been amended to provide that, where there appears to the Registrar that there is a breach of subsection 451(2) the Registrar may by notice in writing to the entity apparently committing the breach, identify the apparent breach and require the entity to restructure as a cooperative. The amendment provides that where an entity restructures as a cooperative within six months of the notice, no criminal proceedings shall be taken in relation to the breach and the Registrar may waive registration costs under the Act occasioned by the restructure.

Crimes Act 1900

This amendment is designed to ensure that minor assault allegations (those at the lowest end of the scale) do not delay more serious cases by reaching the ACT Supreme Court. It changes the offence of common assault under the *Crimes Act 1900* that is indictable at the election of the accused, as it attaches a maximum penalty of two years imprisonment. This amendment duplicates the common assault provision found at section 26 of the *Crimes Act 1900* but attracts a maximum penalty of six months imprisonment and as such will be dealt with, as a pure summary offence, by the ACT Magistrates Court. The ability to have more serious common assault allegations tried on indictment has been retained under the current provision.

Crimes (Forensic Procedures) Act 2000

The *Crimes (Forensic Procedures) Act 2000* enables police to take samples from volunteers, suspects and serious offenders to extract a DNA profile. The Act also authorises matching between DNA profiles from crime scenes, victims, serious offenders, etc for the purposes of criminal investigations. Section 97 of the Act includes a table which sets out the law on matching different types of DNA profiles. Anomalies in the table have rendered the table ineffectual in providing a clear statement on what is a lawful match, and what is not a lawful match. The amendments eliminate the anomalies in the table.

Domestic Relationships Act 1994

The amendment to the *Domestic Relationships Act 1994* repeals the definition of a ‘solicitor’ under section 31, as a ‘legal practitioner who practices as a solicitor, either on his or her own account or as a member of a partnership’. There has been some confusion about whether the definition includes solicitors employed by a partnership as well as the partners in a partnership. By repealing the definition in the *Domestic Relationships Act 1994*, the more appropriate definition of ‘solicitor’ in the *Legislation Act 2001* will apply.

Specific attention should be drawn to the amendment at section 33 that also allows for the new definition of ‘solicitor’ to apply to certificates that have been furnished prior to the commencement of the amendment. This retrospective effect is necessary to save the operation of various Domestic Relationship Agreements which were made in good faith before commencement of this provision. Inclusion of this retrospective clause prevents unmeritorious and technical attacks on agreements where an employee solicitor, rather than an unqualified solicitor, has provided a certificate.

Justices of the Peace Act 1989

Currently, the *Legislation Act 2001* provides that appointments and revocation of appointments require consultation with the Standing Committee on Legal Affairs and are disallowable instruments. The *Legislation Act 2001* dictates that these requirements apply to Justices of the Peace by default, due to the absence of requirements in the *Justices of the Peace Act 1989*. The procedure is unnecessary and impractical for Justice of the Peace appointments and revocations. This amendment rectifies the absence, by providing that appointments and revocations do not require consultation and are notifiable instruments.

Legislation Act 2001

The amendment to section 192 varies when a prosecution may be commenced against a corporation or a person who aids and abets a corporation. Presently offences with a maximum penalty below 150 penalty units must be commenced within 12 months of the offence. This can have an anomalous effect because many offences, including offences in the *Criminal Code 2002*, provide for a maximum penalty of 100 penalty units or imprisonment for one year. This means for an individual a prosecution can be commenced at any time but for a corporation (and individuals who aid and abet a corporation) the prosecution must begin within 12 months. This amendment places the parties on a more equal footing.

Ombudsman Act 1989

This amendment will restrict the Ombudsman from investigating actions taken by a quasi-judicial body when performing a deliberative function. The power for the Ombudsman to investigate these actions has been deemed unnecessary, as there are already adequate protection measures for individuals in place.

Security Industry Act 2003

The *Security Industry Act 2003* regulates the ACT security industry. The Security Industry Regulations 2003 include a requirement that applicants for a master licence (except locksmiths) must be members of an industry association approved by the Commissioner for Fair Trading. The amendment duplicates this regulation into the Act to remove any doubt of the requirements for master licence applicants.

The Bill provides that the Commissioner for Fair Trading may exempt people from the requirements to associate. The Commissioner does not need to require membership of an approved industry association where there is a religious or conscientious objection to associating.

Also, section 21 of the Act has been amended to ensure that the Commissioner for Fair Trading does not need to consider competency standards in deciding on licence applications unless standards are prescribed.

Trade Measurement Act 1991

The *Utilities (Consequential Provisions) Act 2000* omitted subsection 6(2)(a) of the *Trade Measurement Act 1991*. The effect of the omission is that the *Trade Measurement Act 1991* applied to electricity, gas and water meters. This was intended to ensure that there were appropriate consumer protection mechanisms in place. The consumer protection measures in the *Trade Measurement Act 1991* are no longer necessary, as National Codes called up under the Utilities Regulatory Framework provide consumer protection. Therefore subsection 6(2)(a) has been reinserted into the *Trade Measurement Act 1991*.

Outline of Provisions

PART 1 Preliminary

Clause 1 – Name of Act – provides that the Act is the *Justice and Community Safety Legislation Amendment Act 2004*.

Clause 2 – Commencement – provides that the Act commences on the 14th day after its notification day.

PART 2 Agents Act 2003

Clause 3 – Legislation amended – pt 2 – provides that Part 2 amends the *Agents Act 2003*.

Clause 4 – Dealing with trust money – New section 107 (3A) – provides that when a licensed agent pays a cheque out of a trust account maintained by the agent, the cheque must be payable to a specific person and clearly crossed and marked ‘not negotiable’.

The clause also provides that breaching this provision is a strict liability offence with a maximum penalty of 100 units. Section 23 of the Criminal Code provides that if a law that creates an offence provides that the offence is one of strict liability, there are no fault elements for any of the physical elements of the offence. Essentially this means that conduct alone is sufficient to make the defendant culpable.

However, under the Criminal Code, all strict liability offences will have a specific defence of mistake of fact. Clause 23(3) of the Criminal Code makes it clear that other defences may still be available for use in strict liability offences.

Clause 5 – Section 107 – provides for the renumbering of subsections when the Act is next republished under the *Legislation Act 2001*.

PART 3 Civil Law (Sale of Residential Property) Act 2003

Clause 6 – Legislation amended – pt 3 – provides that Part 3 amends the *Civil Law (Sale of Residential Property) Act 2003*.

Clause 7 – Definitions for pt 3 – Section 20, definition of *energy efficiency rating statement*, paragraph (a) – substitutes paragraph (a) with ‘a statement prepared in accordance with the energy guidelines adopted under the Territory plan that apply to residential premises’. This specifically identifies the residential energy guidelines as the appropriate guide, preventing confusion with the other types of energy guidelines that are under the Territory plan.

PART 4 Civil Law (Wrongs) Act 2002

Clause 8 – Legislation amended – pt 4 – provides that Part 4 amends the *Civil Law (Wrongs) Act 2002*.

Clause 9 – Respondent to give documents etc to claimant, Section 68 (2) (b) – replaces the word ‘claimant’ with ‘respondent’.

Clause 10 – Application provision for Civil Law (Wrongs) Amendment Act 2003 – Section 225 – provides that for plaintiffs who have not consulted their lawyers before the commencement of this provision, the appropriate time limit to provide a notice of claim is the lesser of nine months after 8 March 2004, or four months after they consult a lawyer. This provision is extracted from the Civil Law (Wrongs) Regulations 2003.

Clause 11 – Section 225 – Provides for the renumbering of subsections when the Act is next republished under the *Legislation Act 2001*.

PART 5 Civil Law (Wrongs) Regulations 2003

Clause 12 – Legislation amended – pt 5 – provides that Part 5 amends the *Civil Law (Wrongs) Regulations 2003*.

Clause 13 – Modification of Act, ch 16 – Act, section 231 Regulation 13 – allows for the omission of regulation 13, which has been inserted into the *Civil Law (Wrongs) Act 2002* under Clause 10.

PART 6 Cooperatives Act 2002

Clause 14 – Legislation amended – pt 6 – provides that Part 6 amends the *Cooperatives Act 2002*.

Clause 15 – New Section 451A – inserts a new provision into the Act. This provision gives the registrar of cooperatives the power to issue a written notice on person(s) who are contravening section 451(2) of the Act, asking them to apply for an exemption under section 451 (if applicable), or register as a cooperative in the ACT within six months of the notice.

PART 7 Crimes Act 1900

Clause 16 – Legislation amended – pt 2 – provides that Part 7 amends the *Crimes Act 1900*.

Clause 17 – New section 26A – inserts a new section 26A into the Act. This section duplicates the common assault provision found at section 26 of the *Crimes Act 1900* but attracts a maximum penalty of six months imprisonment or 50 penalty units (or both), and as such will be dealt with, as a pure summary offence, by the ACT Magistrates Court.

PART 8 Crimes (Forensic Procedures) Act 2000

Clause 18 – Legislation amended – pt 8 – provides that Part 8 amends the *Crimes (Forensic Procedures) Act 2000*.

Clause 19 – Permissible matching of DNA profiles, Section 97 (1) – amends section 97 by including subsection (1A), which is the positive case for what constitutes a lawful match of DNA profiles. The original Bill should have included the negative and positive case for matching profiles in the table provided in section 97. However, the positive case was mistakenly left out.

Clause 19 also amends the matching table to resolve contradictions in relation to matching for volunteers (limited purposes).

The Act authorises the matching of DNA discovered during a criminal investigation with DNA profiles from volunteers who have volunteered to have their profiles matched for the purposes of the particular criminal investigation.

The amendments address anomalies in the table that provided contradictory answers on what is a lawful match and what is not a lawful match in relation to volunteers (limited purposes) and hence rendered the table ineffectual.

Clause 19 amends the table by ensuring that all matches with volunteers (limited purposes) can only be made if the match is for the purpose that the volunteer provided a forensic sample.

Clause 20 – Section 97 – provides for the renumbering of subsections when the Act is next republished under the *Legislation Act 2001*.

PART 9 Domestic Relationships Act 1994

Clause 21 – Legislation amended – pt 9 – provides that Part 9 amends the *Domestic Relationships Act 1994*.

Clause 22 – Section 31 – amends the section by removing the definition of ‘solicitor’ from the Act. The definition of ‘solicitor’ under the *Legislation Act 2001* will automatically apply.

Clause 23 – New section 33 (3), (4) and (5) – provides that certificates mentioned in subsection (1) (d) of the Act are taken to be valid even if they were furnished before the commencement of this amendment, provided that they would be valid had they been furnished after the commencement of the amendment. It also provides that subsections (3) and (4) expire on the day of commencement, however under the *Legislation Act 2001*, repeal does not end effect of the provision.

PART 10 Justices of the Peace Act 1989

Clause 24 – Legislation amended – pt 10 – provides that Part 10 amends the *Justices of the Peace Act 1989*.

Clause 25 – Title – the title provides that the Act is about Justices of the Peace.

Clause 26 – Section 1 – Name of Act – provides that this Act is the *Justices of the Peace Act 1989*.

Clause 27 – Sections 3 and 3A – Appointments – provides a substitute section 3 which states that the Minister may appoint a person as a Justice of the Peace, and that an appointment under this section is a notifiable instrument. The *Legislation Act 2001* consequently does not apply to an appointment under this section. The clause also provides that a Justice of the Peace must take an oath or affirmation of office before a judge before beginning to perform the duties of office.

Clause 28 – Section 4 – omits the word *shall* and replaces with *must*. This provides that the Registrar of the Supreme Court must keep a register to be known as the Register of Justices of the Peace of the Australian Capital Territory

Clause 29 – Sections 5 and 6 – provides for the omission of sections 5 and 6 from the Act. These provisions were savings provisions that were created to facilitate the introduction of the Act. They are no longer deemed necessary and will remain effective under section 88 of the *Legislation Act 2001* (Repeal does not end effect of transitional laws etc).

Clause 30 – New section 7 – Application of Legislation Act section 88 - inserts a new section 7 that provides that section 88 of the *Legislation Act 2001* (Repeal does not end effect of transitional laws etc) applies to the omission of sections 5 and 6 from the Act.

PART 11 Legislation Act 2001

Clause 31 – Legislation amended – pt 11 – provides that Part 11 amends the *Legislation Act 2001*.

Clause 32 – When must prosecutions begin? Section 192 (1) – provides a new section 192 (1) that states that a prosecution for an offence against a Territory law may be begun at any time if the offence attracts a maximum penalty for more than six months imprisonment (for individuals), or a fine of more than 100 penalty units (for corporations or individuals that aid and abet a corporation), or an offence against the Criminal Code, section 321 (Minor theft).

PART 12 Ombudsman Act 1989

Clause 33 – Legislation amended – pt 12 – provides that Part 12 amends the *Ombudsman Act 1989*.

Clause 34 – Functions – New Section 5 (2) (ca) – inserts a new section that provides that the Ombudsman is not authorised to investigate any action taken by a tribunal, a member of a tribunal, or a member of the staff of a tribunal, in the exercise of the tribunal's deliberative functions.

Clause 35 – Section 5 (2) – provides for the renumbering of paragraphs when the Act is next republished under the *Legislation Act 2001*.

PART 13 Security Industry Act 2003

Clause 36 – Legislation amended – pt 13 – provides that Part 13 amends the *Security Industry Act 2003*.

Clause 37 – General suitability criteria – Section 21 (1) (a) (iii) – inserts a new subsection (iii) that provides that the Commissioner for Fair Trading must not issue or vary a licence unless satisfied that the applicant satisfies a condition prescribed under the regulations for the licence.

Clause 38 – Section 21 (1) (b) (ii) – substitutes a new subsection (ii) to provide that the Commissioner for Fair Trading must not issue or vary a licence unless satisfied that the applicant has satisfied any competency standards that may be prescribed under the regulations, if such standards have been prescribed.

Clause 39 – Section 52 heading – provides a new heading for section 52 - ‘Regulation-making power’.

Clause 40 – Section 52 (2) (f) – provides that the Regulations for the Act may make provision in relation to anything relating to licences, including qualifications and conditions for licences, details to be included on licences, and notification by licensees of any change in details.

PART 14 Security Industry Regulations 2003

Clause 41 – Legislation amended – pt 14 – provides that Part 14 amends the Security Industry Regulations 2003.

Clause 42 – Regulation 7 – substitutes a new regulation 7 and 7A. Regulation 7 governs prescribed information to accompany a licence application under section 17 (3) of the Act. It provides that for an application for a master licence by a person who is not a locksmith, the prescribed information in the Regulations is evidence of membership of an industry association approved by the Commissioner for Fair Trading under Regulation 14A.

Regulation 7A sets out the conditions for certain master licences under section 21 (1) (a) (iii) of the Act. It provides that an applicant for a master licence (who is not a locksmith) must be a member of an approved industry association, unless the Commissioner believes on reasonable grounds that the person has a conscientious or religious objection to membership of an industry association (in which case, the Commissioner may exempt the person from the requirement).

For this section, an *approved industry association* is one approved by the commissioner in writing. The approval is a notifiable instrument.

PART 15 Trade Measurement Act 1991

Clause 43 – Legislation amended – pt 15 – provides that part 15 amends the *Trade Measurement Act 1991*.

Clause 44 – Exemptions from Act – New section 6 (2) (a) – inserts a new section into the Act that provides that the Act does not apply to a measurement, or an instrument used for the purposes of a measurement, to determine a quantity of reticulated electricity, gas or water.