

**2014**

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

**JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2014**

**EXPLANATORY STATEMENT**

**Presented by  
Simon Corbell MLA  
Attorney General**



# JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2014

## Overview of the Bill

The Justice and Community Safety Legislation Amendment Bill amends a number of Acts and two Regulations. Each amendment is listed and described below. The amendments are intended to improve the operation of each amended law without amounting to a major change in policy.

## Summary of amendments

### *Agents Act 2003*

Changes are made to the *Agents Act 2003* and the *Agents Regulation 2003* to remove provisions relating to the regulation and licensing of travel agents in the Territory.

The current regulatory framework for travel agents was introduced in 1986. Since then, the rapid rise of new and online business models, coupled with technological advancements and a growth in direct bookings, has gradually reduced the relevance and effectiveness of the existing system. The changing market place has also disadvantaged local travel businesses, which must compete with offshore providers operating outside the regulatory framework.

Amendments will reduce ‘red tape’ and other regulatory constraints associated with the need to obtain a licence and maintain Travel Compensation Fund (TCF) membership, resulting in significant financial and time savings for travel agents.

The amendments give effect to the decision by Ministers for Fair Trading and Consumer Affairs to phase out the existing travel agent industry regulatory framework and initiate the Travel Industry Transition Plan (Transition Plan). The Transition Plan includes winding down the TCF, the repeal of Travel Agents legislation by mid-2014 and the introduction of a voluntary industry accreditation scheme.

Consumers buying goods and services, including travel, will be protected under the Australian Consumer Law (ACL), which has applied since 1 January 2011. The ACL applies to all Australian businesses and imposes the same obligations on travel agents no matter where they operate in Australia. Under the ACL, travel products or services automatically come with a range of consumer guarantees and other protections. The consumer guarantees require travel agents to provide services with an acceptable level of skill and technical knowledge, and to take all necessary care to avoid causing loss or damage to their customers. Travel agents (and other travel intermediaries) must also provide services that are reasonably fit for purpose or that give the result paid for.

Provisions relating to the Travel Compensation Fund and the travel agents' board of trustees are preserved until the Fund's termination date, on 31 December 2015, or as soon after 30 June 2015 as the obligations of the Trust are discharged, whichever occurs first.

All rights to appeal a compensation decision of the trust board are also preserved. The savings provisions will ensure that key synergies between the Act and the trust deed are not disrupted while the Travel Compensation Fund remains on foot.

### ***Coroners Act 1997***

An amendment to the *Coroner's Act 1997* seeks to ensure that any coroner who is satisfied under section 16(b) that there is no reason why the body of the deceased should not be buried, cremated or taken out of the ACT for burial or cremation may issue a certificate authorising the release of the body under section 16. The amendment removes an unnecessary limitation in the legislation and reduces the likelihood of unnecessary delay before the body of a deceased person can be released to their family for burial or cremation.

An amendment to section 102 of the Coroners Act will reverse an amendment of that section by the *Justice and Community Safety Legislation Amendment Act 2013 (No 3)*. The first amendment resulted in the subsumption of the Chief Coroner's Annual Report into the JACS Annual Report. This amendment reverses that subsumption, which was intended to reduce work for the Chief Coroner but in practice did not meet her operational needs.

### ***Director of Public Prosecutions Act 1990***

A single amendment is made to section 6 of the *Director of Public Prosecutions Act 1990* to ensure that the DPP has an express function of conducting a proceeding for a forensic procedure order on behalf of an applicant, whether or not a prosecution is on foot or was initiated by the Director.

### ***Family Provision Act 1969***

The Bill amends section 9(1) of the *Family Provision Act 1969* to reduce the time in which a family provision claim may be made against a deceased estate. Currently, eligible applicants have 12 months after the date when administration in respect of the estate of the deceased person has been granted to make a claim. The amendment reduces this period to 6 months.

In the ACT, the Family Provision Act allows certain classes of people to make a claim against a deceased estate if they consider that they have not been adequately provided for in the deceased's will or under the laws of intestacy. They can do this by applying to the Supreme Court for a share (or an increased share) of the estate. Under section 9(1) of the Act an application must be made within 12 months after the date when administration in respect of the estate of the deceased person has been granted.

An executor or administrator who is aware of a potential family provisions claim may be personally liable if they distribute the estate before the period for making a claim expires. It can take several months to obtain a grant in an estate. As a consequence finalisation of an estate can be delayed to well in excess of 12 months from death. Delays of this magnitude can cause considerable hardship to beneficiaries of the estate who may be the partner or a minor child of the deceased. When considering the appropriate time limit in which to bring a claim, there is a need to balance the interests of the potential claimants and the interests of the estate beneficiaries who are entitled to expect that an estate is administered as expeditiously and efficiently as possible. The current 12-month time limit is extremely generous to potential claimants, may cause hardship to estate beneficiaries and is not consistent with other jurisdictions.

Reducing the period in which a claim may be made from 12 to 6 months will give potential claimants adequate time to obtain legal advice and commence proceedings while still allowing the estate to be wound up within a reasonable time.

New South Wales and the Northern Territory allow 12 months after the date when administration in respect of the estate of the deceased person has been granted to lodge a claim for further provision from an estate. Queensland allows 9 months. South Australia, Victoria and Western Australia allow 6 months and Tasmania allows 3 months.

Under section 9(2) of the Family Provision Act, the Supreme Court has authority to extend the time within which an application may be made under section 8. A 6-month limit will balance the interests of potential claimants and estate beneficiaries who are entitled to expect that an estate is administered as expeditiously and effectively as possible.

### ***Legal Profession Act 2006***

The Bill amends the Legal Profession Act and Regulations to transfer responsibility for barristers licensing and disciplinary matters from the Law Society to the Bar Association. The amendments will better align responsibility and function. At present, the Bar Council informs the Law Society's assessment, compliance and disciplinary processes for barristers, but the Bar Association does not have formal responsibility for matters concerning barristers. It is intended that the Bar Council will continue in its assessment and advisory/reporting functions, but will now advise the Bar Association, not the Law Society, in relation to barristers.

The Bill also amends section 222 of the Legal Profession Act to address an issue identified by the ACT Law Society in relation to trust accounts. Section 222 currently provides that a law practice is not obliged to deposit trust money into a general trust account of the practice where the practice has a written direction to deal with the money otherwise than by depositing it in the account.

Section 211(a) and (b) define the purpose of part 3.1 (Trust money and trust accounts) to include consideration of the interests of people, law practices and legal services both within and outside the ACT. When these provisions are read together, there is scope for interstate law practices to seek written direction from their clients that trust money be held in trust accounts outside the ACT. The interest earned on these deposits by clients for ACT matters is being directed towards the interstate's purpose fund, not the ACT's.

The Statutory Interest Account, administered by the Law Society, provides financial support to the ACT's legal assistance programs, including Legal Aid, the Welfare Rights and Legal Centre, the Women's Legal Centre and the Environmental Defender's Office. From time to time it is used to supplement the fidelity fund, and may be used to pay or reimburse the law society or bar council in relation to certain costs specified under section 253 of the Legal Profession Act. A reduction in deposits into this account has adverse implications for the ACT. The proposed amendments are necessarily different to other jurisdictions' provisions for legal trust accounts to protect the Territory's sources of legal assistance funding.

A new subsection (2A) provides that where a law practice operates both within and outside the ACT, the law practice must not do anything that would result in trust money from ACT matters being directed out of the Territory, without good reason. A limited exemption from this general rule is available, at the discretion of the Law Society, in the unlikely event that cross-border litigation requires an ACT firm to place client funds outside the ACT. In such situations the Law Society can specifically authorise the client trust funds to be kept outside the ACT while requiring the law practice to abide by any conditions or directions of the authorisation. The revised provision is modelled on an existing provision (s228) in the Legal Profession Act.

### ***Public Trustee Act 1985***

The Bill makes two changes to the *Public Trustee Act 1985*. The Bill amends section 25A(1) of the Act to remove the reference to section 25, to provide that if an amount is paid to, or property is accepted by, the public trustee on behalf of a person under disability, the public trustee must hold the amount of property on trust for the person.

The public trustee administers trusts for beneficiaries with legal disability under various authorities including court orders, wills, trust deeds and legislation. Section 25A of the Public Trustee Act empowers the public trustee to advance the whole of trust funds under administration for the maintenance of the beneficiary where needed. However, the power is limited to trusts established under direction of the court. Intestate estates with infant children, victims of terrorism and superannuation trusts with no advancement provisions are becoming more common. These are not administered by courts.

The most common circumstance where the Public Trustee will hold an amount in trust for a minor and there is no trust instrument is where a parent of the minor dies intestate. In this

case it may be very important for the child to be able to access all of the capital of the trust for educational, medical or other similar purposes. The absence of a standard authority to make advances to beneficiaries is disadvantageous to those beneficiaries.

Prior to 1985, all Court Trusts were managed by the Master of the Supreme Court. On the establishment of the Public Trustee in 1985 these trusts were transferred to the public trustee. It is unlikely that, at the time the Public Trustee Ordinance was passed, it was envisaged that the public trustee would undertake the role of trustee in such a wide variety of trusts. The proposed amendment will standardise processes for trust fund advances and ensure all beneficiaries have equal access to trust funds in times of need.

The Bill also amends section 33 to reduce the time available to creditors to make a claim against an estate. Presently, any creditor who has a claim against the estate of a deceased person has 6 months after the public trustee has provided notice to notify the public trustee in writing. The public trustee has expressed concern that the present 6-month period is delaying the finalisation of estates and causing distress and financial hardship to estate beneficiaries, particularly if they have been reliant on the deceased for financial support. The public trustee has proposed that 3 months would provide adequate time for creditors to obtain legal advice and commence proceedings while still allowing the estate to be wound up within a reasonable time. Queensland provides 3 months for creditors to make a claim against an estate. Tasmania allows 1 month for claims.

The proposed amendments will not adversely affect potential claimants. The public trustee fully reviews all claims against an estate and only rejects those which cannot be substantiated. If the claimant, after having been given notice, then provides further evidence of the merits of the claim it will be reviewed and admitted as a liability of the estate if appropriate.

### **Human Rights Implications**

Transitional amendments to the Agents Act preserve consumers' rights to apply to the ACT Civil and Administrative Tribunal (ACAT) for review of decisions made by the Travel Compensation Fund. This action reflects the protection of the right to have criminal charges and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing (section 21 of the *Human Rights Act 2004*). This is the preservation of an existing right during the winding down of national regulation, rather than the direct engagement of a right.

### **Climate Change Impacts**

This Bill has no identified climate change impacts.

## CLAUSE NOTES

### **Part 1 Preliminary**

#### **Clause 1 Name of Act**

This clause names the Act.

#### **Clause 2 Commencement**

This clause provides for the commencement of the Act.

Schedule 1, parts 1.1 and 1.2 commence on 1 July 2014.

Schedule 1, parts 1.6 and 1.7 commence 30 days after the Act's notification day.

The remaining provisions commence on the day after the Act's notification day.

#### **Clause 3 Legislation Amended**

This clause provides that the Act amends the legislation mentioned in schedule 1.

### **Schedule 1**

#### **Part 1.1 *Agents Act 2003***

##### **Amendments 1.1 — 1.9**

Amendments 1.1 to 1.9 remove provisions relating to the regulation and licensing of travel agents in the Territory from sections 11, 13 (d), 21, 24 (1) (d), 24 (4), 26, 41 (1) (e), 70 (4) (a) and division 5.7 of the Agents Act.

##### **Amendment 1.10**

Amendment 1.10 removes the reference to travel agent from section 130 (1).

##### **Amendment 1.11**

Amendment 1.11 inserts transitional amendments to preserve the operation of the travel compensations scheme during the winding down of the travel compensation scheme. These provisions will continue the travel agents board of trustees and preserve certain review rights to ensure people can apply to ACAT for review of a decision of the board of trustees until 31 December 2015.

From 1 July 2014, the Travel Compensation Fund's operations will be significantly reduced as it begins the process of closing down. From this date, a person will have one year to lodge

a claim for compensation if they have suffered financial loss because of a travel agent's failure. The failure must have occurred on or before 30 June 2014.

The transitional provisions will expire on 31 December 2015. Consumers of travel services will not be disadvantaged by the expiry of these transitional provisions. Since 2011, travel products and services have automatically come with a range of consumer guarantees and protections under the Australian Consumer Law. People can apply to a court or tribunal for damages to cover any financial losses suffered as a result of a travel agent's breach of the Australian Consumer Law.

### **Amendments 1.12 — 1.17**

Amendments 1.12 to 1.17 remove references to the regulation and licensing of travel agents in the Territory from dictionary definitions in the Agents Act.

#### **Part 1.2**                      *Agents Regulation 2003*

### **Amendments 1.18 — 1.19**

Amendments 1.18 and 1.19 remove references to the regulation and licensing of travel agents in the Territory from sections 5A, 5B and 6 (6) of the Agents Regulation.

#### **Part 1.3**                      *Coroners Act 1997*

### **Amendment 1.20**

Amendment 1.20 substitutes sections 15 and 16 of the Coroners Act with a new section that provides that any coroner who is satisfied that there is no reason why the body of the deceased should not be buried, cremated or taken out of the ACT for burial or cremation may issue the certificate under this section to release the body. The amendment removes an unnecessary limitation in the legislation and reduces the likelihood of unnecessary delay before the body of a deceased person may be released to their family for burial or cremation.

### **Amendment 1.21**

Amendment 1.21 reverses an amendment of that section by the *Justice and Community Safety Legislation Amendment Act 2013 (No 3)*. The first amendment resulted in the subsumption of the Chief Coroner's Annual Report in the JACS Annual Report. This amendment reverses that subsumption, which was intended to reduce work for the Chief Coroner but in practice did not meet her operational needs.

**Part 1.4**                      *Director of Public Prosecutions Act 1990*

**Amendment 1.22**      **New section 6 (1) (ga)**

Amendment 1.22 inserts a new provision to ensure that the DPP has an express function of conducting proceedings for a forensic procedure order on behalf of applicant, whether or not a prosecution is on foot or the application was initiated by the Director.

**Part 1.5**                      *Family Provision Act 1969*

**Amendment 1.23**

Amendment 1.23 amends section 9 (1) of the Family Provision Act, which provides for the time in which a family provision claim may be made against a deceased estate. Currently, eligible applicants have 12 months after the date when administration in respect of the estate of the deceased person has been granted to make a claim. The amendment reduces this period to 6 months.

**Part 1.6**                      *Legal Profession Act 2006*

**Amendments 1.24, 1.26 — 1.32**

Amendments 1.24, 1.26 — 1.32 omit references to *licensing body* and substitute these for references to *relevant council*. The changes reflect a request by the ACT Law Society and ACT Bar Association to transfer responsibility for barrister licensing and disciplinary matters from the Law Society to the Bar Association, to better align responsibility and function.

**Amendment 1.25**

Amendment 1.25 omits note 2 from section 36 (2) (f), which defined *relevant council*. The definition is amended and the note is no longer needed.

**Amendment 1.33**

Amendment 1.33 sets out the procedures by which the Bar Council must assess and determine applications for the grant or renewal of a barrister practising certificate. This amendment replicates the criteria previously assessed by the Law Society when deciding an application for a grant or renewal, including the circumstances when a practising certificate must or must not be granted or renewed.

**Amendments 1.34 – 1.36**

Amendments 1.34 -1.36 substitute references to the *licensing body* and substitute these for references to *relevant council*. The changes reflect a request by the ACT Law Society and ACT Bar Association to transfer responsibility for barristers licensing and disciplinary

matters from the Law Society to the Bar Association, to better align responsibility and function.

#### **Amendment 1.37**

Amendment 1.37 reframes existing s 47 (2) of the Legal Practitioner Act to take account of the change of responsibilities made by these amendments.

#### **Amendment 1.38 – 1.41**

Amendments 1.38 – 1.41 substitute references to the *licensing body* and substitute these for references to *relevant council*. The changes reflect a request by the ACT Law Society and ACT Bar Association to transfer responsibility for barristers licensing and disciplinary matters from the Law Society to the Bar Association, to better align responsibility and function.

#### **Amendment 1.42**

Amendment 1.42 reframes existing s 63 (1) of the Legal Practitioner Act to take account of the change of responsibilities made by these amendments.

#### **Amendments 1.43, 1.45-1.52**

Amendments 1.43, 1.45-1.52 substitute references to the *licensing body* and substitute references to *relevant council*. The changes reflect a request by the ACT Law Society and ACT Bar Association to transfer responsibility for barristers licensing and disciplinary matters from the Law Society to the Bar Association, to better align responsibility and function.

#### **Amendment 1.44**

Amendment 1.44 reframes existing s 63 (3) of the Legal Practitioner Act to take account of the change of responsibilities made by these amendments.

#### **Amendment 1.53**

Amendment 1.53 omits a provision that is unnecessary if the Bar Association is a relevant council.

#### **Amendment 1.54**

Amendment 1.54 updates a reference to a section heading as a result of other changes in these amendments.

#### **Amendments 1.55 – 1.58**

Amendments 1.43, 1.45-1.52 substitute references to the *licensing body* and substitute these for references to *relevant council*. The changes reflect a request by the ACT Law Society and ACT Bar Association to transfer responsibility for barristers licensing and disciplinary matters from the Law Society to the Bar Association, to better align responsibility and function.

### **Amendment 1.59**

Amendment 1.59 removes the ability of the Law Society determine fees for applications to the *licensing body*, as the functions of the licensing body will be transferred to the Bar Association, and the ability for the Bar Association to determine fees for services it provides in relation to the grant or renewal of barristers' certificates, as opposed to the grant or renewal of certificates.

### **Amendments 1.60 -1.61**

Amendments 1.60 -1.61 substitute the section 89 requirement that the licensing body give notice to other jurisdictions of a decision to refuse to grant or renew, or suspend or cancel a practising certificate, or if a person successfully appeals against action taken with a requirement that the relevant council give this notice to reflect the change in responsibilities.

### **Amendment 1.62**

Amendment 1.62 removes the definition of licensing body in section 152.

### **Amendments 1.63 – 1.77**

Amendments 1.63 – 1.77 substitute references to the *licensing body* and substitute references to *relevant council*, *law society council* or *a council* as appropriate to give effect to the transfer of responsibility for barristers licensing and disciplinary matters from the Law Society to the Bar Association, to better align responsibility and function.

### **Amendment 1.78**

Amendment 1.78 inserts the words 'kept in the ACT' in section 222 to confirm a requirement that where a law practice operates both within and outside the ACT, the law practice must not do anything that would result in trust money from ACT matters being directed out of the Territory, without good reason. This has generally been adhered to in practice to date.

### **Amendment 1.79**

Amendment 1.79 provides that a limited exemption from the general rule about trust money being kept in the Territory at the discretion of the Law Society, in the unlikely event that cross-border litigation requires an ACT firm to place client funds outside the ACT. In such situations the Law Society can specifically authorise the client trust funds to be kept outside the ACT while requiring the law practice to abide by any conditions or directions of the

authorisation. The revised provision is modelled on an existing provision (s228) in the Legal Profession Act.

### **Amendments 1.80-1.91**

Amendments 1.80-1.91 substitute references to the *licensing body* and substitute these for references to *relevant council, law society council or a council* as appropriate to give effect to the transfer of responsibility for barristers licensing and disciplinary matters from the Law Society to the Bar Association, to better align responsibility and function.

### **Amendment 1.92**

Amendment 1.92 inserts a new ‘Chapter 12 - Transitional—Justice and Community Safety Legislation Amendment Act 2014’. This new chapter contains transitional provisions that ensure there are clear provisions that set out the process to hear any applications for grant or renewal of a practising certificate that may have been lodged with the licensing body before the amendments commence, but which have not been finalised. The Bar Association has requested a transitional period of 2 years for certainty and effectiveness which will deem applications in this transitional period to have been made under the amended law and actions taken by the licensing body to have been taken by the Bar Council. These provisions will allow the Bar Council to proceed to receive and determine pre-existing applications made to the Licensing Body without disruption or prejudice to applicants falling within the transitional period.

### **Amendment 1.93**

Amendment 1.93 removes the definition of *licensing body* from the dictionary.

### **Amendment 1.94**

Amendment 1.94 inserts a new definition of *relevant council*. The relevant council is:

- a) for a barrister related matter - the ACT Bar Council;
- b) for a solicitor or overseas practitioner related matter – the ACT Law Society Council;  
and
- c) for an employee of a solicitor - the ACT Law Society Council.

## **Part 1.7**

## ***Legal Profession Regulation 2007***

### **Amendment 1.95**

Amendment 1.95 removes section 11 as this required the licensing body to give an application for grant or renewal of a barrister practising certificate to the ACT Bar Council. This regulation is no longer required as the application will be lodged with the Bar Council in the first instance under the amendments to the *Legal Profession Act 2006*.

### **Amendments 1.96, 1.97**

Amendments 1.96-1.97 substitute references to the *licensing body* for references to *relevant council*. The changes reflect a request by the ACT Law Society and ACT Bar Association to transfer responsibility for barristers licensing and disciplinary matters from the Law Society to the Bar Association, to better align responsibility and function.

### **Amendment 1.98**

Amendments 1.98 merges 2 subsections that had previously been required because the Bar Association was not a relevant council, but now need not be treated differently. The changes reflect a request by the ACT Law Society and ACT Bar Association to transfer responsibility for barristers licensing and disciplinary matters from the Law Society to the Bar Association, to better align responsibility and function.

### **Amendment 1.99**

Amendments 1.99 omits the requirement for the Law Society to consult with the Bar Association when setting fees as the Bar Association can now set fees directly.

### **Amendment 1.100**

Amendment 1.100 substitutes references to the *licensing body* for references to *relevant council*. The changes reflect a request by the ACT Law Society and ACT Bar Association to transfer responsibility for barristers licensing and disciplinary matters from the Law Society to the Bar Association, to better align responsibility and function.

### **Amendment 1.101**

Amendment 1.101 substitutes references to the *licensing body* for references to *law society council*. The changes reflect a request by the ACT Law Society and ACT Bar Association to transfer responsibility for barristers licensing and disciplinary matters from the Law Society to the Bar Association, to better align responsibility and function.

### **Amendment 1.102**

Amendment 1.102 omits section 84 as this provision related to the Law Society accepting evidence from the Bar Council because of the previous responsibility for issuing certificates. This is no longer required as this function will be undertaken in the first instance by the Bar Council as the relevant council.

### **Amendment 1.103**

Amendment 1.103 omits a note directing readers to the definition of *licensing body* in the Dictionary to the Act as the definition has been omitted.

**Amendment 1.104 Section 25A (1)**

Amendment 1.104 omits the reference to section 25 from section 25A (1). The amendment removes an unintended limitation on the public trustee's authority to advance the whole of trust funds under administration for the maintenance of the beneficiary where needed. The amendment is necessary to accommodate a broader range of trusts than those contemplated when section 25 drafted. Section 25 refers to trusts established under direction of a court. This provision reflects the practice that existed before the office of the Public Trustee was established. Prior to 1985, trusts were administered by the Master of the Supreme Court. Intestate estates with infant children, victims of terrorism and superannuation trusts with no advancement provisions are becoming more common and are not administered by courts.

The amendment will draw the Public Trustee Act into line with present practices, standardise processes for trust fund advances and ensure all beneficiaries have equal access to trust funds in times of need.

**Amendment 1.105 Section 33 (2) (e)**

Amendment 1.105 will reduce the time available to creditors to make a claim against an estate from 6 months to 3 months. The present 6-month period is delaying the finalisation of estates and causing distress and financial hardship to estate beneficiaries, particularly if they have been reliant on the deceased for financial support. Three months provides adequate time for creditors to obtain legal advice and commence proceedings while still allowing the estate to be wound up within a reasonable time.