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**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

**JUSTICE AND COMMUNITY SAFETY LEGISLATION
AMENDMENT BILL 2015**

EXPLANATORY STATEMENT

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JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2015

Overview of the Bill

The Justice and Community Safety Legislation Amendment Bill 2015 contains amendments to a number of Acts in the Justice and Community Safety Directorate portfolio. The amendments are 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

Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 – consequential amendments

The Bill contains minor and technical amendments to the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (the Classification Enforcement Act), resulting from amendments to the *Classification (Publications, Film and Computer Games) Act 1995* (Cwlth) (the Commonwealth Classification Act).

The Commonwealth Classification Act provides for the classification of publications, films and computer games while States and Territories are responsible for the enforcement of classification decisions.

Amendments to the Commonwealth Classification Act were made by the *Classification (Publications, Films and Computer Games) Amendment (Classification Tools and Other Measures) Act 2014* (Cwlth) (the Commonwealth Amendment Act) to implement the first wave of reforms based on recommendations of the Australian Law Reform Commission in its report titled, ‘Classification-Content Regulation and Convergent Media’ (ALRC Report 118).

The Commonwealth Classification Amendment Act amends the Commonwealth Classification Act by:

- broadening exempt film categories and streamlining exemption arrangements for festivals and cultural institutions;
- allowing the use of classification tools (for example, questionnaires) to simplify the classification process;
- creating an explicit requirement to display classification markings;
- expanding exceptions to modification rules to reduce the need for reclassification; and
- empowering the Commonwealth Attorney-General’s Department to notify law enforcement authorities of potential Refused Classification content without having the content classified first in order to expedite the removal of extremely offensive or illegal content from distribution.

Consequential amendments to the Classification Enforcement Act are required as a result of these Commonwealth amendments, in particular to provide for the new conditional cultural exemption grounds and for the new modification provisions.

As a result of provisions contained in the Commonwealth Classification Amendment Act, these amendments have a staggered commencement.

Commercial Arbitration Act 1986

Section 53 of the *Commercial Arbitration Act 1986* provides that a party to an arbitration agreement may apply to a court to stay proceedings brought by another party to that agreement in relation to matters agreed to be referred to arbitration. ‘Court’ is currently defined as the Supreme Court or the Magistrates Court and excludes a tribunal. This results in a party being able to commence proceedings in the ACT Civil and Administrative Tribunal (ACAT) for the determination of the same issue.

The amendments contained in the Bill insert ‘tribunal’ into the definition of a ‘court’ for the purposes of section 53. This is aimed at preventing a party from commencing proceedings in the ACAT where there is an agreement to refer the matter to arbitration to resolve the same dispute.

Coroners Act 1997

Part 5 of the Coroners Act currently provides for Coroners inquests and inquiries, including provisions relating to witnesses in coronial hearings. Under section 47 of the Coroners Act, the rules of evidence do not apply to a proceeding before the Coroner’s Court. As a result, section 128 of the *Evidence Act 2011*, which provides for the privilege in relation to self-incrimination in other proceedings, does not apply to witnesses to a coronial inquest or inquiry.

The Bill will insert a new provision into part 5 of the Act to provide witnesses in coronial inquests and inquiries with the privilege against self-incrimination. It is intended that the new section 51B will have the same operation as that of section 128 of the Evidence Act.

This amendment is consistent with provisions contained in the statutes of other jurisdictions.

Court Procedures Act 2004

Section 45 provides that court security officers may require a person to undergo a search where the officer believes it to be prudent for court security and is of general application. Section 45(2)(c) provides that the officer conducting the search must comply with any written policy of the Chief Justice or the Chief Magistrate in relation to searches under section 45. It does not provide for written policies applicable to the ACAT.

The Bill amends section 45(2)(c) to require compliance with any written policy made by the General President of the ACAT.

Electoral Act 1992

Section 243 provides that the Electoral Commissioner must make available for public inspection a copy of each return given under divisions 14.4, 14.5 and 14.6 (Annual returns). Section 143(3) provides that under division 14.6 the annual return must be available for inspection from the beginning of September.

Amendments to the Electoral Act, introduced in December 2014, moved the deadline for annual returns to 31 August. The requirement that the annual return must be made available by the beginning of September does not allow sufficient time for the Electoral Commission to comply with the Act.

To address this, the Bill amends section 243(3) to provide that annual returns submitted under division 14.6 must be made available for public inspection by 7 September after the end of the financial year to which the return relates.

This allows sufficient time for the Electoral Commissioner to meet the legislative timeframe while still ensuring that annual returns are available prior to an election.

Guardianship and Management of Property Act 1991

The Bill inserts new section 27AA into the *Guardianship and Management of Property Act 1991* to require the Public Trustee to provide an annual statement of account to the protected person, or their guardian, where a Court or Tribunal has appointed the Public Trustee as a financial manager.

This amendment will increase transparency and assist with guarding against the misuse of funds held on trust.

Legal Profession Act 2006

Section 281A is contained in division 3.2.4 (Legal Costs Generally). The intention of the section is to extend the requirements for disclosure contained in division 3.2.3 (Costs Disclosure) to any third party payer for a client.

However, the section incorrectly provides that it applies to disclosure required ‘under this division’, therefore applying it to division 3.2.4 rather than division 3.2.3. Division 3.2.4 does not of itself impose any disclosure requirements on a law practice but sets out the basis on which legal costs are recoverable, security for legal costs and interest on unpaid costs.

The Bill relocates section 281A to division 3.2.3 as section 278A.

Public Trustee Act 1985

Section 25A sets out the things the public trustee may do with the funds or property held on trust for a person under a disability under section 25 (Payment of money etc to public trustee on behalf of person under disability).

Section 25(2)(c) provides that, in dealing with amounts paid to the public trustee as trustee for a person under a disability, the public trustee may pay an amount, or give property, into a superannuation fund on behalf of the person.

The authority provided to the Supreme Court in section 25A(2)(c) is not sufficiently wide to allow the public trustee to invest into superannuation in the client's name and retain control to administer and protect those funds on the client's behalf, in the capacity of trustee.

The Bill inserts into section 25A a provision to allow the public trustee to manage, on behalf of the person, the funds or property that is invested in a superannuation fund.

Utilities Act 2000

Section 51 of the *Utilities Act 2000* sets out how a utility provider is to deal with personal information gained in the provision of a utility service. Part 12 of the Act vests dispute resolution jurisdiction for ACT utility services in the ACAT.

Utilities in the ACT are classified as organisations for the purposes of the *Privacy Act 1988* (Cwlth), and so are required to comply with the credit reporting protections in part IIIA the Privacy Act and the Credit code registered under section 26M(1) of the Privacy Act when providing credit to customers in the ACT.

The Bill amends sections 51(2) and 51(3) to clarify that a utility must deal with personal information in accordance with the Australia Privacy Principles in relation to the handling of personal information, but also the credit reporting principles, and the Credit Reporting Code made under the *Privacy Act 1988* (Cwlth) in relation to credit information. The intention is to make clear the authority of the ACAT to consider credit reporting provisions when resolving a complaint about the handling of personal credit information by a utility service provider.

Human Rights Implications

The amendments to the *Coroners Act 1997* and the *Utilities Act 2000* engage, but do not limit, the following rights under the *Human Rights Act 2004* (the HR Act):

- the right to privacy and reputation (s 12);
- the right to a fair trial (s 21); and
- rights in criminal proceedings (s 22).

Coroners Act 1997

The insertion of new section 51B into the Coroners Act provides privilege in relation to self-incrimination to witnesses before a coronial inquest or inquiry. This amendment engages the right to a fair trial and rights in criminal proceedings.

Right to a fair trial

The right to a fair trial provides that “everyone has 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 HR Act gives effect to article 14 of the International Covenant on Civil and Political Rights and promotes the procedural fairness and natural justice in proceedings against a person.

The right to a fair trial is central to the operation of a democratic society based on the rule of law. It is not simply an individual right but protects the broader public interest in the proper administration of justice. The right to a fair trial guarantees access to the court and a fair and public hearing.

The right to a fair trial is concerned about the quality of the process and imposes certain requirements on the system of justice, as well as guaranteeing a series of individual rights to achieve its purpose.

Rights in criminal proceedings

Section 22 of the HR Act provides that ‘everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.’ The rights in criminal proceedings provides for a number of minimum guarantees, including the right to silence, that is, the right not to give evidence that is self-incriminating.

The insertion of section 51B into the Coroners Act supports these rights by providing the privilege in relation to self-incrimination to witnesses before a coronal inquest or inquiry where previously they did not have this privilege.

Utilities Act 2000

The amendment to the Utilities Act engages the right to privacy and reputation as set out in section 12 of the HR Act. That section provides that:

Everyone has the right—

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- (b) not to have his or her reputation unlawfully attacked.

The amendment to the Utilities Act supports the right to privacy by clarifying that utility providers within the ACT must deal with personal information in accordance with the Australia Privacy Principles, and the credit reporting principles, and Credit Reporting Code made under the *Privacy Act 1988* (Cwlth) in relation to credit information.

CLAUSE NOTES

Clause 1 Name of Act

This clause names the Act as the *Justice and Community Safety Legislation Amendment Act 2015*.

Clause 2 Commencement

This clause provides for the commencement of the Act.

Schedule 1, part 1.1, clauses 1.1 and 1.16 to 1.20 are to commence on the later of:

- the commencement of the Commonwealth Classification Amendment Act, schedule 3, part 3; and
- the commencement of this Act, section 3.

Schedule 1, part 1.1, clauses 1.2, 1.3 and 1.11 are to commence on the later of:

- the commencement of the Commonwealth Classification Amendment Act, schedule 4; and
- the commencement of this Act, section 3.

The staggered commencement of the above clauses is designed to coincide with the staggered commencement of the corresponding schedules and parts of the Commonwealth Classification Amendment Act.

If the commencement of this Act occurs at a later time than the commencement of the corresponding provision(s) of the Commonwealth Classification Amendment Act, the commencement of the relevant clauses will be the day after notification of the Act.

The remaining provisions commence on the day after its notification day.

This clause also provides that section 79 (Automatic commencement of postponed law) does not apply to this Act. This is designed to allow for the possible commencement of schedule 1, part 1.1, clauses 1.1 and 1.16 to 1.20 later than 6 months after notification.

Clause 3 Legislation amended

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

Schedule 1 Legislation amended

Part 1.1 *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995*

Amendment 1.1 New section 6 (c)

Amendment 1.1 inserts into section 6 (Application of Act) a provision to ensure that the Act does not apply to publications, films or computer games that are subject to a conditional cultural exemption made under the Commonwealth Classification Act.

Amendment 1.2 Section 7 (3) (b)

Amendment 1.3 Section 17 (2) (b)

Amendments 1.2 and 1.3 insert into section 7(3)(b) and section 17(2)(b) a reference to section 21(3) of the Commonwealth Classification Act.

Section 21(3) of the Commonwealth Classification Act allows the Commonwealth Minister, via legislative instrument, to specify additional kinds of modifications which are exceptions to the rule that classified films or computer games, as modified, become unclassified when a modification is made.

This consequential amendment means that a person will not commit an offence against section 7(2) or 17(1) of the Classification Enforcement Act if the film is exhibited with modifications mentioned in section 21 of the Commonwealth Classification Act.

Amendment 1.4 Section 19 (4) (a)

Amendment 1.5 Section 29 (4) (a)

Amendment 1.6 Section 29 (4) (b)

Amendment 1.7 Section 30 (7) (a)

Amendment 1.8 Section 30 (7) (b)

Amendment 1.9 Section 34 (4) (a)

Amendment 1.10 Section 34 (4) (b)

Amendments 1.4-1.10 insert references to new section 22CH (Revocation of classification by approved classification tool) of the Commonwealth Classification Act into sections 19 (Films to display determined markings and consumer advice), 29 (Category 1 restricted publications), 30 (Category 2 restricted publications), and 34 (Misleading or deceptive markings) of the Classification Enforcement Act.

Section 22CH(1) allows the Classification Board to revoke an incorrect classification decision produced by an approved classification tool. Under section 22CH(4), if the Board decides to revoke the classification of the material under 22CH(1), the Board must classify the relevant material itself.

The inclusion of references to new section 22CH(1) and 22CH(4) into relevant sections of the Classification Enforcement Act is a consequential amendment which adds to existing provisions in those sections relating to reclassification or revocation of classifications provisions in the Commonwealth Classification Act.

The provisions provide that for a 30 day period it is not an offence if the relevant material has a classification marking or consumer advice and the classification, made by a classification tool, has been revoked or reclassified by the Board.

Amendment 1.11 Section 38 (3)

Amendment 1.11 provides that a person does not commit an offence against section 38(1) or 38(2) by reason only that the computer game that is to be sold or demonstrated in a public place has a modification referred to in section 21(2) or 21(3) of the Commonwealth Classification Act.

This recognises the effect of the extended modification provisions in the Commonwealth Classification Act which may cause a person to inadvertently commit an offence against section 38 of the Classification Enforcement Act (for example, where a person sells or demonstrates a computer game which has been changed from 2D to 3D and would not, as modified, likely require a different classification under the amended Commonwealth Classification Act).

Adding this clause is a minor and consequential amendment which reflects the new and extended modification provisions in the Commonwealth Classification Act.

- Amendment 1.12 Section 44 (7) (a)**
- Amendment 1.13 Section 53B (3) (a)**
- Amendment 1.14 Section 53C (5) (a)**
- Amendment 1.15 Section 53C (5) (b)**

Amendments 1.12-1.15 insert references to new section 22CH (Revocation of classification by approved classification tool) of the Commonwealth Classification Act into sections 44 (Computer games to display determined marking and consumer advice), 53B (Advertisement to contain determined markings and consumer advice), and 53C (Misleading or deceptive advertisements) of the Classification Enforcement Act.

Section 22CH(1) allows the Classification Board to revoke an incorrect classification decision produced by an approved classification tool. Under section 22CH(4), if the Board decides to revoke the classification of the material under 22CH(1), the Board must classify the relevant material itself.

The inclusion of references to new section 22CH(1) and 22CH(4) into relevant sections of the Classification Enforcement Act is a consequential amendment which adds to existing provisions in those sections relating to reclassification or revocation of classifications provisions in the Commonwealth Classification Act.

The provisions make it not an offence, for a 30 day period, against the relevant sections in the Classification Enforcement Act if the relevant material has a

classification marking or consumer advice and the classification, made by a classification tool, has been revoked or reclassified by the Board.

Amendment 1.16 Sections 56 and 57

Amendment 1.16 removes section 56 (Exemption – approved organisation) and section 57 (Organisations may be approved) from the Act.

The amendments to the Commonwealth Classification Act provide for simplified exemptions for registered events in new sections 6C (Conditional cultural exemptions – registered events), 6D (Registered events), and 6F (Approved cultural institutions).

Accordingly, sections 56 and 57 are now redundant provisions.

Amendment 1.17 Section 57A

Amendment 1.17 substitutes section 57A with section 56 (Ministerial directions and guidelines) which provides that in exercising any power under section 55 (Exemption – publications, films, computer games or advertisements), the director of the Classification Board must give effect to any directions or guidelines issued by the Minister in relation to the application of section 55.

Amendment 1.18 New part 15

Amendment 1.18 inserts transitional provisions in relation to the repeal of sections 56 and 57.

An exemption in force under the repealed sections immediately before the commencement day will remain in force and the repealed sections remain in effect in relation to the exemption.

Where a decision has not been made in relation to an application for exemption under repealed section 56 or 57 prior to the commencement date, the application is taken to never have been made and any fee relating to the application must be refunded.

A person will be able to rely on the expanded exemptions under the Commonwealth Classification Act and will no longer need to apply to the Minister or Director under section 56 or 57 of the Classification Enforcement Act.

The transitional provisions will provide for exemptions already in place before commencement and applications received before commencement.

The transitional provisions expire 1 year after the commencement day.

Amendment 1.19 Schedule 1, items 11 to 16

Amendment 1.19 omits from the table in schedule 1 (Reviewable decisions) items 11 to 16. These items relate to decisions under repealed sections 56 and 57.

Amendment 1.20 Dictionary, new definition of *subject to a conditional cultural exemption*

Amendment 1.20 inserts into the Dictionary the definition of “*subject to a conditional cultural exemption*” and refers the reader to the relevant sections in the Commonwealth Classification Act for when a publication, film or computer game is subject to a conditional cultural exemption.

Part 1.2 *Commercial Arbitration Act 1986*

Amendment 1.21 New section 53 (4)

Amendment 1.22 Dictionary, note 2

Amendments 1.21 and 1.22 insert references to a tribunal into the definition of ‘court’ for the purposes of section 53 of the Act.

The amendment will extend section 53 to prevent a party from commencing proceedings in the ACAT where there is an existing agreement to refer the same matter to arbitration.

Part 1.3 *Coroners Act 1987*

Amendment 1.23 New section 51B

Amendment 1.23 inserts new section 51B (Privilege in relation to self-incrimination in coronial inquest or inquiry) into division 5.3 of the Act.

This new section sets out the process that the Coroners Court is to undertake when a witness objects to giving particular evidence, or evidence on a particular matter, on the grounds that the evidence may tend to prove that the witness has committed an offence or is liable to a civil penalty.

The coroner for the inquest must determine whether there are reasonable grounds for the objection and if it is found that there are, the coroner is to advise the witness that they do not need to give the evidence unless required to do so. In such circumstances, where the witness gives the evidence, whether required to by the coroner or otherwise, the coroner is to give the witness a certificate.

The coroner may require the witness to give the evidence if the evidence does not tend to prove the witness has committed an offence or may be liable to a civil penalty under the law of a foreign country and the interests of justice require that the witness give the evidence.

A certificate makes the evidence (and evidence obtained as a consequence of its being given) inadmissible in any proceeding, except a criminal proceeding in respect of the falsity of the evidence.

This provision is intended to have the same operation as section 128 of the *Evidence Act 2011*.

Part 1.4 *Court Procedures Act 2004*

Amendment 1.24 **Section 45 (2) (c)**

Amendment 1.24 amends section 45(2)(c) to provide that a security officer who is requiring a person entering or on court premises to undergo a search, must comply with any written policy of the Chief Justice, Chief Magistrate or the General President of the ACAT.

Part 1.5 *Electoral Act 1992*

Amendment 1.25 **Section 243 (3)**

Amendment 1.25 provides that a copy of an annual return provided to the Electoral Commission under division 14.6 (Annual returns) must be made available for public inspection from 7 September after the end of the financial year to which the return relates.

Part 1.6 *Guardianship and Management of Property Act 1991*

Amendment 1.26 **Section 26 heading**

Amendment 1.26 amends the heading of section 26 (Accounts) to make clear that the section applies only to managers other than the public trustee. This is a consequential amendment to amendment 1.28 below, which inserts new reporting requirements for the public trustee when appointed as a manager of a person's property.

Amendment 1.27 **New section 27AA**

Amendment 1.27 inserts a provision to require the public trustee, when appointed as a manager of a person's property, to provide a statement of accounts to the person or, where a guardian has been appointed, to their guardian.

Part 1.7 *Legal Profession Act 2006*

Amendment 1.28 **Section 278, note**

Amendment 1.28 removes the note from section 278 from the Act.

The note is removed as amendment 1.29 of this Bill places the relevant section (281A) within the correct division, therefore making the note unnecessary.

Amendment 1.29 **Section 281A**

Amendment 1.29 relocates existing section 281A to division 3.2.3 (Costs disclosure) as section 278A.

This movement corrects an error which placed the section in the wrong division.

Part 1.8 *Public Trustee Act 1985*

Amendment 1.30 New section 25A (2) (d)

Amendment 1.30 provides that where the public trustee holds on trust an amount, or property, on behalf of a person under disability, and pays into a superannuation fund an amount or property on behalf of that person, the public trustee may manage that superannuation fund on behalf of that person.

Part 1.9 *Utilities Act 2000*

Amendment 1.31 Section 51 (2) and note and (3)

Amendment 1.31 provides that a utility provider must deal with personal information in accordance with the Australian Privacy Principles, part 3A of the *Privacy Act 1988* (Cwlth), and the registered CR Code.

The registered CR Code is a written code of practice about credit reporting registered under the Privacy Act.