

2008

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

**JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT
BILL 2008 (No 2)**

EXPLANATORY STATEMENT

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JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2008 (No 2)

Overview of Bill

The Justice and Community Safety Legislation Amendment Bill 2008 (No 2) (the Bill) amends a number of laws administered by the Department of Justice and Community Safety. The laws amended include the:

- *Administration and Probate Act 1929*;
- *Agents Act 2003*;
- *Civil Law (Sale of Residential Property) Regulation 2004*;
- *Civil Law (Wrongs) Act 2002*;
- *Crimes Act 1900*;
- *Crimes (Restorative Justice) Act 2004*;
- *Discrimination Act 1991*;
- *Legal Profession Act 2006*;
- *Legal Profession Regulation 2007*;
- *Magistrates Court Act 1930*; and
- *Regulatory Services Legislation Amendment Act 2008*.

The proposed amendments are detailed below.

Administration and Probate Act 1929

An amendment has been made to paragraph 25(1)(a) of the Act. The amendment has extended the timeframe within which a will must be proved or probate renounced before the court intervenes from three months to six months, in accordance with the *Court Procedures Rules 2006*.

Amendments have been made to sections 44(1) and 45A(1) and the heading to section 45A of the Act. The amendments insert the phrase 'or civil partner' to equate the status of a civil partner with a spouse upon intestacy as a consequence of the *Civil Partnerships Act 2008*. The amendments will ensure that if one of the partners in a civil partnership (registered under the *Civil Partnerships Act 2008*) dies without an existing will, the surviving partner will have the same entitlement to benefits which a married person would have in the same circumstances.

Agents Act 2003

An amendment has been made to subsection 162(2) of the Act. The amendment will require the relevant Minister to only make an annual determination to increase the amount of money held in the agents occupational registration consumer compensation fund when necessary. This will avoid the making of a nil determination where the fund already contains sufficient money to meet any likely claims during a financial year.

Civil Law (Sale of Residential Property) Regulation 2004

An amendment has been made to section 7(8) of the Act. Section 7(8) currently defines AS 4349.1 to mean the Australian Standard AS 4349.1 – 1995 as in force from time to time. AS 4349.1 – 1995 has recently been superseded by AS 4349.1 – 2007. The amendment ensures that the definition will always refer to the most updated version of the standard. Consequential amendments have been made to subsection 7(7) of the Act to remove the need for inspectors to provide information in the inspection report on minor cosmetic matters and to remove the provisions relating to inspection agreements and the provisions relating to reporting on minor defects (unrelated to major defects). This ensures that the obligations on ACT inspectors in relation to reporting do not change under the new standard.

In addition, a similar amendment has been made to section 10(6) of the Act, which defines AS 4349.3 to ensure that the definition will always refer to the most updated version of the standard.

Civil Law (Wrongs) Act 2002

Amendments have inserted new part 2.2A into the Act. New part 2.2A will provide protection from civil liability to businesses that donate food for charitable purposes. The proposed amendment will provide significant protection against civil action if they handle the food appropriately.

The protection, however, will only apply in certain circumstances:

- if the food is donated to a not-for-profit charity and distributed as free food to those in need;
- the food is safe to eat at the time it left the possession or control of the donor; and
- the donor informs the charity receiving the food of appropriate arrangements for the safe storage and processing of the food after donation.

The proposed amendment will still enable legal action to be taken against the business or organisation, where a person is harmed by the consumption of the donated food, if the food was unsafe when it was received from the donor. The protection does not extend to charities or other organisations responsible for the distribution of donated food. Therefore, where a person is harmed by the consumption of the donated food, the person will be able to take legal action against the charity that distributed the food. The proposed amendment is consistent with amendments made in New South Wales, Victoria and Western Australia.

Crimes Act 1900

An amendment to the *Crimes Act 1900* reconciles the operation of sections 54(1) and (2) dealing with sexual intercourse without consent with the common law. The amendment resolves the interpretative contradiction raised

in *R v Maddison* [2007] ACTCA 18 where the court inferred that section 54 offences had two separate elements and insisted that the prosecutor nominate which element to proceed with. The prosecutor nominated the reckless version and the indictment was altered. The Court of Appeal identified that the statement of facts clearly indicated that the accused had knowingly admitted to having non-consensual intercourse with the victim and this sat in contrast to the element of the altered charge on which he was convicted being reckless as to whether she had consented.

The original trial and the Court of Appeal proceedings did not explore the common law informing the creation and interpretation of section 54 of the *Crimes Act 1900*. The original intent of the offences in section 54 was to enable a jury, or a judge, to decide on the facts that either the mental element of knowledge or recklessness was satisfied. It was never intended that the prosecution would have to nominate in advance of the trial the prosecution's determination of what mental element the evidence would prove. Evidence that might prove knowledge or recklessness, or both could be tendered. It would then be up to the judge or jury to determine whether the evidence meets either test.

The Full Court of the Supreme Court in *R v Daly* [1968] VR 257 discussed the common law position:

. . . the learned judge in his charge omitted to tell the jury that one of the elements of the crime of rape is an intention on the part of the accused to have intercourse without the woman's consent.

. . . in this Court it must accordingly be taken to be the law that one of the elements to be established by the Crown on a charge of rape is an intention to in the accused to have intercourse without the woman's consent.

Furthermore, this involves, as it appears to us, that the Crown must establish beyond reasonable doubt that the accused either was aware that the woman was not consenting, or else realised she might not be, and determined to have intercourse with her whether she was consenting or not.

... the jury must be taken to have found by their verdict that it was established beyond reasonable doubt that the accused did not honestly believe on reasonable grounds the girl was consenting. There are, therefore, two possible interpretations of the verdict as a whole. One is that the jury was satisfied beyond reasonable doubt that the girl did not consent and that the accused did not believe that she was consenting. The other is that the jury was satisfied beyond reasonable doubt that the girl did not consent and that the accused had no reasonable grounds for believing that she was consenting. On either of those interpretations, it seems clear that the jury must have rejected the accused's account of the circumstances in which the intercourse took place. Moreover, when one looks at the rest of the evidence in conjunction with the findings involved in either of the interpretations to which the verdict is open, it seems plain that the jury, even if properly directed on the matter of intent must inevitably have found that at the least the accused here must have realised that the girl might not be consenting and must have decided to proceed to have intercourse with her whether she was consenting or not. [pp. 258–259]

It is clear from *Daly* that the jury could decide either knowledge or recklessness was met based on the evidence. It was not a requirement that

the evidence be classified as meeting recklessness or knowledge for the purposes of trying the offence.

A statutory expression of the offence was created in section 61D of the NSW *Crimes Act 1900* and tested by the NSW Court of Criminal Appeal in *R v Hemsley* (1988) 36 A Crim R 334. The Court found that the NSW *Crimes Act 1900* section should be interpreted that a finding of recklessness would equate to a finding of knowledge: “. . . the statutory provision in section 61D(2) that a person who is reckless as to whether his victim consents shall be deemed to know that she does not.” [p.337]

In *Hemsley* the Court of Criminal Appeal approved the trial judge’s directions which enabled the jury to determine whether the evidence satisfied either the accused’s knowledge that the victim did not consent to sexual intercourse, or the accused’s recklessness as to whether the victim consents or not.

In 1985 the Commonwealth Parliament amended the ACT’s *Crimes Act 1900*, to include the offence which is now section 54, being ‘Sexual intercourse without consent’. The intention was to construct an offence, which would be applied in a manner consistent with the common law position.

It is the Government’s intent that the threshold of knowledge or recklessness in relation to consent would be a matter for the trier of fact to determine.

The effect of the amendment means that the Director of Public Prosecutions can lead evidence, which satisfies knowledge or recklessness, without having to conduct separate prosecutions and without having to elect the mental element in advance of the trial, consistent with the common law and the Criminal Code.

Crimes (Restorative Justice) Act 2004

Amendments have been made to the *Crimes (Restorative Justice) Act 2004* to remove a referring entity’s obligation, currently existing in section 25, to explain restorative justice to eligible victims or parents before the entity refers the offence for restorative justice. Referring entities lack the financial resources to properly train staff in the dynamics of the restorative justice process and the potential consequences for victims. Amendments will instead place the obligation on the chief executive of the restorative justice unit who is better equipped to provide an adequate explanation. The explanation will be provided before an eligible victim or parent gives written consent to take part in the restorative justice process.

In addition, an amendment has been made to Division 8.2 of the *Crimes (Restorative Justice) Act 2004*. The amendment will ensure that where a non-lawyer has been appointed as a convenor under the Act, they will only be required to have or receive sufficient legal training to advise participants of their rights and duties in relation to the restorative justice process. Currently non-lawyers would have to be sufficiently trained to advise participants of their rights and duties at law – this is too onerous a burden to place on non-lawyer

convenors and is unnecessary for the purposes of their role in restorative justice.

Discrimination Act 1991

Amendments have been made to insert new section 121A into the *Discrimination Act 1991*. New section 121A replicates a vicarious liability provision, which existed in the Act until 2004, before it was erroneously amended and inadvertently removed in 2005 (updated in accordance with current ACT drafting practice). New section 121A provides that unlawful conduct engaged in by an employee or agent of a person within the scope of their actual or apparent authority is taken to have been engaged in by the person, unless they took all reasonable steps to prevent the employee or agent from engaging in the unlawful conduct.

Legal Profession Act 2006

Amendments have been made to the *Legal Profession Act 2006* to insert new sections 428, 428A and 428B into the Act. The new sections provide the disciplinary tribunal with powers to require witnesses to attend the tribunal to give evidence and issue arrest warrants where such witnesses fail to attend, consistent with the powers in the ACT Civil and Administrative Tribunal Bill.

Amendments have also been made to the *Legal Profession Act 2006* to replace numerous definitions of **government agency** featured throughout the Act with a single definition in the Dictionary. The new definition will be slightly altered to replace references to 'the ACT' with references to 'the Territory' to accord with current ACT drafting practice. The definition of **government lawyer** in the dictionary will also be amended in an identical manner.

Legal Profession Regulation 2007

Amendments have been made to the *Legal Profession Regulation 2007* as a consequence of amendments made to the definition of **government agency** in the *Legal Profession Act 2006* by this Bill.

Magistrates Court Act 1930

An amendment has been made to section 216(2) of the *Magistrates Court Act 1930* to ensure that where a convicted person is lodging an appeal against their conviction or sentence, the court will be able to remand a convicted person in custody where bail has not been granted.

Regulatory Services Legislation Amendment Act 2008

An amendment has been made to the *Regulatory Services Legislation Amendment Act 2008* to delay the commencement of the amendments to the *Door-to-Door Trading Act 1991*. The amendments to the Door-to-Door Trading Act will commence on a day fixed by the Minister by written notice, or

automatically on 15 October 2009. The amendments need to be delayed in order to address concerns about the application of the Act to telemarketers, which were raised in the final stages of debate on the amendments. Consultation is planned with consumer and business groups to determine whether further legislative amendments are needed before the amendments in the *Regulatory Services Legislation Amendment Act 2008* commence.

Clause Notes

Clause 1 Name of Act – states the title of the Act as the *Justice and Community Safety Legislation Amendment Act 2008 (No 2)*.

Clause 2 Commencement – sets out the commencement date for the Act, which is the fourteenth day after its notification day.

Clause 3 Legislation amended – sch 1 – notes that the legislation amended by this Act is listed in schedule 1.

Schedule 1 – Legislation amended – sets out the legislation amended by this Act.

PART 1.1 – Administration and Probate Act 1929

Amendment 1.1 – Section 25(1)(a) – amends paragraph (a) by replacing the reference to ‘3 months’ with a reference to ‘6 months’.

Amendment 1.2 – Section 44, definition of *eligible partner* – amends the definition of *eligible partner* in subsection (1) to insert the words ‘or civil partner’ after the word ‘spouse’.

Amendment 1.3 – Section 44, definition of *partner*, paragraph (a) – amends the definition of *partner* in paragraph (a) to insert the words ‘or civil partner’ after the word ‘spouse’.

Amendment 1.4 – Section 45A heading – amends the heading to section 45A as a consequence of amendment 1.5.

Amendment 1.5 – Section 45A(1) – amends subsection (1) to insert the words ‘or civil partner’ after the word ‘spouse’.

PART 1.2 – Agents Act 2003

Amendment 1.6 – Section 162(2) – amends subsection (2) to provide that the Minister must make a determination to increase the amount of money in the compensation fund, to meet the likely claims against the fund during a financial year, only when it is considered necessary.

PART 1.3 – Civil Law (Sale of Residential Property) Regulation 2004

Amendment 1.7 – Section 7(7) – amends subsection (7) as a consequence of amendment 1.8. The amendment modifies the AS 4349.1 (Inspection of buildings – Pre-purchase inspections – Residential buildings) to remove the need to provide information in the inspection report on minor cosmetic matters and to remove the provisions relating to inspection agreements and the provisions relating to reporting on minor defects.

Amendment 1.8 – Section 7(8), definition of AS 4349.1 and note – amends the definition of **AS 4349.1** in subsection (8) to ensure that it refers to the latest version of the standard as it is revised over time. The amendment also updates the website from which the standard can be obtained.

Amendment 1.9 – Section 10(6), definition of AS 4349.3 and note – amends the definition of **AS 4319.3** in subsection (6) to ensure that it refers to the latest version of the standard as it is revised over time. The amendment also updates the website from which the standard can be obtained.

PART 1.4 – Civil Law (Wrongs) Act 2002

Amendment 1.10 – New part 2.2A – inserts a new part 2.2A into the Act.

New part 2.2A inserts new sections 11A and 11B into the Act.

New section 11A contains the definitions of words and phrases that are used in new part 2.2A.

New section 11B provides that a donor does not incur civil liability for any personal injury that results from the consumption of food donated by the donor if:

- the food was fit for human consumption when it left the possession or control of the donor; and
- the donor told the person to whom the donor gave the food about the handling requirements for the food to ensure that it remains fit for human consumption; and
- the donor told the person to whom the donor gave the food about the time limit on the consumption of the food before it becomes unfit for human consumption.

PART 1.5 – Crimes Act 1900

Amendment 1.11 – Section 54(1) – amends subsection 54(1) by omitting a reference to the mental element of knowledge of consent in the subsection and retaining the mental element of recklessness as to consent by that other person.

Amendment 1.12 – Section 54(2) – amends subsection 54(2) by omitting a reference to the mental element of knowledge of consent in the subsection and retaining the mental element of recklessness as to consent by that other person.

Amendment 1.13 – New section 54(3) – inserts a new subsection (3) which removes any doubt that proving recklessness in relation to consent can also be achieved by proving that the accused knew the victim did not consent.

PART 1.6 – Crimes (Restorative Justice) Act 2004

Amendment 1.14 - Section 24(1)(c) (except note) – amends paragraph (c) as a consequence of amendment 1.13. Paragraph (c) will continue to provide that an explanation must be given to an eligible offender under section 25 before the offender agrees to take part in restorative justice.

Amendment 1.15 – Section 25 – amends section 25 to remove a referring entity’s obligation to explain the restorative justice process to all eligible victims and parents. Section 25 will continue to list the matters that must be explained by the referring entity to an eligible offender.

Amendment 1.16 – Section 25(c) – amends subsection (c) to replace the word ‘person’ with the word ‘offender’, as a consequence of amendment 1.13.

Amendment 1.17 – Section 27(1)(c)(ii) – amends subparagraph (ii) to remove the reference to a victim or parent as a consequence of amendment 1.13.

Amendment 1.18 – Section 28(3) and (5)(a) – amends subsection (3) and paragraph (5)(a) to replace the phrase ‘victim and parent mentioned in section 27(1)(c)(ii)’ with the phrase ‘person of whom the court is aware who is a victim, or a parent of a child victim, of the offence’ as a consequence of amendment 1.15.

Amendment 1.19 – Section 32(3) – amends subsection (3) to replace the phrase ‘If the’ with the phrase ‘Subject to section 32A, if the’ as a consequence of amendment 1.18.

Amendment 1.20 – New section 32A – inserts a new section 32A into the Act to provide that the chief executive must ensure that reasonable steps are taken to explain the restorative justice process to each eligible victim and parent before obtaining their written consent to participate in the process.

Amendment 1.21 – Section 40(2)(b)(i) – amends subparagraph (i) to replace the phrase ‘at law and’ with the phrase ‘in relation to restorative justice’.

PART 1.7 – Discrimination Act 1991

Amendment 1.22 – New section 121A – inserts a new section 121A into the Act to provide that unlawful conduct engaged in by an employee or agent of a person within the scope of their actual or apparent authority is taken to have been engaged in by the person, unless they took all reasonable steps to prevent the employee or agent from engaging in the unlawful conduct.

PART 1.8 – Legal Profession Act 2006

Amendment 1.23 – Section 21(5), definition of *government agency* and note – removes the definition of *government agency* and the note from subsection (5) as a consequence of amendment 1.25.

Amendment 1.24 – Section 38(2)(a) – amends paragraph (a) to replace the words ‘legal officer’ with the word ‘lawyer’ as a consequence of amendment 1.26.

Amendment 1.25 – Section 390(8), definition of *government agency* – removes the definition of *government agency* from subsection (8) as a consequence of amendment 1.25.

Amendment 1.26 – Section 428 – inserts new section 428, 428A and 428B into the Act.

New section 428 provides that the disciplinary tribunal may subpoena a person to appear before the tribunal at a stated time and place to produce a document or other relevant thing, and/or to give evidence.

New section 428A sets out the procedure in the event that a person subpoenaed under section 428 fails to appear. The procedure involves a judicial member issuing a warrant to arrest the person and bring the person before the tribunal. The judicial officer may only issue a warrant where reasonable practical steps have been taken to contact the person, and it is in the interests of justice.

New section 428B sets out the procedures to be followed by a police officer in exercising the power to issue a warrant under section 428A. New section 428B provides that if the police officer believes on reasonable grounds that the person arrested cannot be brought immediately before a judicial member, the police officer must immediately release the person.

Amendment 1.27 – Dictionary, new definition of *government agency* – inserts a new definition of *government agency* into the Dictionary of the Act.

Amendment 1.28 – Dictionary, definition of *government lawyer* – inserts a new definition of *government lawyer* into the Dictionary of the Act.

PART 1.9 – Legal Profession Regulation 2007

Amendment 1.29 – Section 8(2), definition of *government agency* – removes the definition of *government agency* from subsection (2) of the regulation as a consequence of amendment 1.29.

Amendment 1.30 – Section 16 heading – amends the heading to section 16 as a consequence of amendment 1.26.

Amendment 1.31 – Dictionary, note 3, new dot point – inserts a new dot point in the Dictionary to recognise the new definition of *government agency* in the *Legal Profession Act 2006* as a consequence of amendment 1.25.

PART 1.10 – Magistrates Court Act 1930

Amendment 1.32 – Section 216(2) – amends subsection (2) to insert the words ‘or sentence’ after the word ‘conviction’.

PART 1.11 – Regulatory Services Legislation Amendment Act 2008

Amendment 1.33 – Section 2 – inserts a new section 2 into the Act. The new section provides that part 5 of the *Door-to-Door Trading Act 1991* commences on a day fixed by the Minister by written notice. The amendment ensures that if part 5 has not commenced before 15 October 2009, part 5 will automatically commence on that day.