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

**JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2016
(No 3)**

EXPLANATORY STATEMENT

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JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2016 (No 3)

Introduction

This Explanatory Statement is for the Justice and Community Safety Legislation Amendment Bill 2016 (No 3) (the Bill) as presented in the ACT Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Overview of the Bill

The Bill makes amendments to nine Acts in the Justice and Community Safety portfolio. The amendments are intended to improve the operation of each amended law without amounting to a major change in policy.

Summary of amendments

Civil Unions Act 2012

The *Civil Unions Act 2012* allows people who are unable to marry under the Commonwealth *Marriage Act 1961* to enter into a legally recognised relationship. A civil union is different from a marriage, but is treated for all purposes under Territory law in the same way as a marriage.

In February 2016, the Victorian Parliament passed the *Relationships Amendment Act 2016* (VIC), which recognised an overseas relationship not between a man and women as a ‘domestic partnership’. The amendments inserted a new chapter into the *Relationships Act 2008* (VIC), which provides a broad and inclusive mechanism to recognise corresponding law relationships.

Section 27 of the Civil Unions Act allows for the recognition, by regulation, of corresponding law relationships, being civil unions under corresponding laws of a State, external territory or foreign country.

The Bill amends section 27 to recognise an overseas or interstate relationship not between a man and a woman as a civil union under Territory law. Like the Victorian amendments, this amendment directly recognises a corresponding law relationship under the legislation, rather than requiring recognition by regulation. This improves the capacity for corresponding law relationships to be recognised under Territory law, by giving these relationships the same status as civil unions formed within the Territory.

The new section 27 also includes requirements that the corresponding law must meet in order for the relationship to be recognised under the Civil Unions Act. These requirements are the same requirements imposed on civil unions entered into within the Territory, for example, the corresponding law must require the relationship to be between two consenting adults.

Coroners Act 1997

The Bill makes amendments to section 57 (Report after inquest or inquiry) of the *Coroners Act 1997*.

Section 57(4) of the Coroners Act provides that if a coroner reports to the Attorney-General in relation to an inquest or inquiry into a fire or a disaster, the coroner must also give a copy of the report to the responsible Minister. The responsible minister is the Minister responsible for the subject matter of the inquest or inquiry. Section 57 reports are tabled in the ACT Legislative Assembly by the responsible Minister because they contain public safety concerns and it is in the public interest to know about these. The responsible Minister must also table a response to the report in the Assembly.

The Bill clarifies that a report under section 57(4) must raise issues of public safety if it is to be tabled in the ACT Legislative Assembly. This provides clarity on what types of coronial reports should be presented in the Assembly.

The amendments also give the responsible Minister the discretion to remove sensitive, personal information that is likely to identify the deceased, after considering the concerns of immediate family.

While the default position with section 57 reports is not to redact information in every instance, this discretion works to protect personal information of the deceased when the family wants it to be protected and it is appropriate to do so.

In all cases, however, redaction should only occur to the extent that it does not compromise the release of the public safety information in the report. The responsible Minister's decision to remove information must be made in the context of the public interest to release information about matters of public safety.

Guardianship and Management of Property Act 1991

Section 62 of the *Guardianship and Management of Property Act 1991* (GMP Act) sets out orders the ACT Civil and Administrative Tribunal (ACAT) can make in relation to an enduring power of attorney (EPOA), including the power to revoke an EPOA.

The Bill includes an amendment to the GMP Act that allows the ACAT to suspend an EPOA, instead of revoking it entirely. This amendment recognises that it is not always appropriate to revoke an EPOA in its entirety, for example when the ACAT exercises its power to temporarily appoint the Public Trustee and Guardian (PTG) under an emergency order.

Human Rights Act 2004

The amendments to the *Human Rights Act 2004* (HRA) remove some references to the Attorney-General and replace them with ‘Minister’. These amendments support the *Administrative Arrangements 2016 (No 4)*, which allocate responsibility for the HRA to the Minister for Justice and Consumer Affairs.

However, sections 32, 33, 34, 35 and 37 of the HRA remain with the Attorney-General as the first law officer of the Territory. These provisions of the HRA deal with legislative compatibility with human rights and legal proceedings the Government may have an interest in.

Human Rights Commission Act 2005

The amendments to the *Human Rights Commission Act 2004* (HRC Act) remove a reference to the Attorney-General and replaces it with ‘Minister’. These amendments support the *Administrative Arrangements 2016 (No 4)*, which allocate responsibility for the HRC Act to the Minister for Justice and Consumer Affairs.

Information Privacy Act 2014

Section 21 of the *Information Privacy Act 2014* (IP Act) contains privacy protection requirements for government contracts. The provision states that an ACT government directorate must not enter into a government contract unless the contract contains appropriate contractual measures to ensure that the contractors do not do an act, or engage in a practice, that breaches a Territory Privacy Principle (TPP) or a TPP code.

Section 21 is amended to recognise privacy protection measures in contracts that do not make specific reference to the TPPs. New section 21 provides that privacy protection can also come from a “corresponding privacy law”. A “corresponding privacy law” means Australian Privacy Principles in the *Privacy Act 1988* (Cwlth) or privacy laws from a different jurisdiction (either interstate or overseas), if prescribed by regulation.

The amendments will assist ACT Government directorates to take full advantage of accessing new cloud technologies, and work efficiently and effectively with contracting parties, while providing a flexible mechanism for privacy protection.

Juries Act 1967

The amendment to the *Juries Act 1967* allows airline operating staff to claim an exemption from jury duties under schedule 2, part 2.2 of the Juries Act.

This exemption was formerly available under the *Air Navigation Regulations 1947* (Cwlth) regulation 150, which was specified in the Juries Act. The Air Navigation Regulations has been repealed, so reference to the provision in the Juries Act must be removed and replaced with a specific exemption for airline operating staff.

Residential Tenancies Act 1997

The *Residential Tenancies Legislation Amendment Act 2016* (RTA Amendment Act), which is not yet commenced, will make a raft of amendments to the *Residential Tenancies Act 1997* (RTA).

One of the changes in the RTA Amendment Act is to allow the applicant for a protection order to apply to the ACAT for an order to terminate their residential tenancy agreement with the respondent named in the protection order. The RTA Amendment Act inserts ACAT's new power to make these orders into the RTA under a new division 6.5A.

However a corresponding ground for terminating a residential tenancy agreement is not included in section 36 of the RTA, which provides an exhaustive list of grounds on which a residential tenancy agreement may be terminated.

This amendment inserts an order under division 6.5A as a ground for terminating a residential tenancy agreement into section 36 of the RTA. This amendment supports the ACT Government's commitment to supporting victims and families of domestic violence.

Terrorism (Extraordinary Temporary Powers) Act 2006

The amendment to the *Terrorism (Extraordinary Temporary Powers) Act 2006* replaces "Attorney-General" with "Minister". This amendment is consequential on the amendments to the HRA and HRC Act.

Human Rights Implications

Civil Unions Act 2012

The amendments to the Civil Unions Act engage the right to recognition and equality before the law (s 8) under the HRA.

The amendment to section 27 of the Civil Unions Act improves the capacity of the Civil Unions Act to recognise overseas relationships not between a man and a woman as civil unions. This amendment engages and promotes the right to recognition and equality before the law under section 8 of HRA.

Section 8 provides that:

1. Everyone has the right to recognition as a person before the law.
2. Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
3. Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

By recognising overseas relationships not between a man and a woman as civil unions for the purposes of ACT law, the amendment promotes equal treatment for same-sex relationships registered or formally recognised in a jurisdiction outside of the ACT. In order to gain recognition, these relationships must conform to the same requirements as civil unions entered into within the ACT.

The ACT is not able to recognise marriages other than between a man and woman because of the constraints of the *Marriage Act 1961*(Cwlth) confirmed in the *Commonwealth of Australia v the Australian Capital Territory* [2013] HCA 55. Although the amendment does not give overseas marriages not between a man and a woman the status of “marriage”, strengthening recognition of these relationships promotes equality.

Coroners Act 1997

The amendments in the Coroners Act engage the right to privacy and reputation (s 12) and freedom of expression (s 16) under the HRA.

Section 12 of the HRA provides for the right to privacy and reputation and gives effect to article 17 of the International Covenant on Civil and Political Rights (ICCPR). Article 17 protects individuals from unlawful and arbitrary interference with privacy relating to their family, home or correspondence. An interference that is lawful may still be arbitrary if it is unreasonable or unjustified in all the circumstances of the case.

Section 12 of the HRA 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 right to privacy incorporates the protection of information privacy which can be summarised as “the ability to keep from others information about oneself”.¹

The amendments to the Coroners Act engage and promote the right to privacy and reputation under section 12 of the HRA. The amendments give the responsible Minister the discretion to redact information in a coroner’s report that is likely to identify the deceased, after considering the concerns of immediate family in the context of the public interest to release this information about matters of public safety.

This also reduces additional media coverage of the death, which may cause trauma to immediate family members.

The right to privacy is also limited, as publication of a deceased’s name is still possible. This limitation is reasonable and proportionate, as the amendments narrow the circumstances in

¹ Bararic Mirko, Faris P, Alexander T, Australian Human Rights Law CCH Australia Limited 2011 P274.

which such publication can take place, including where the responsible Minister believes on reasonable grounds that:

- (a) it is in the public interest to do so; or
- (b) de-identifying the information may be a risk to public safety.

These protections also reduce the limitation on the right to freedom of expression in section 16 of the HRA, which includes a right to receive information. The Bill seeks to strike a balance between the right to privacy of the deceased and their family and the right of the broader community to receive information in the public interest.

Information Privacy Act 1997

The amendments in the IP Act engage the right to privacy and reputation (s 12) under the HRA.

The amendments to the IP Act engage the right to privacy by recognising measures in contracts other than the TPP as suitable for protecting individual privacy. There is no substantive change to existing rights as the amendments in the IP Act recognise compliance with the Commonwealth Privacy Act. The requirements of the Commonwealth Privacy Act, including the Australian Privacy Principles, are broadly similar to the requirements of the IP Act. The Minister responsible for the IP Act can further recognise privacy measures in other jurisdictions by regulation, which would require a risk assessment and compliance with the HRA.

Climate Change Impacts

This Bill has no identified climate change impacts.

CLAUSE NOTES

Clause 1 **Name of Act**

This clause names the *Justice and Community Safety Legislation Amendment Act 2016 (No 3)*.

Clause 2 **Commencement**

This clause provides for the commencement of this Act.

The provisions relating to the RTA commence on the commencement of the relevant amendments in the RTA Amendment Act, or the commencement of this Act, whichever is later.

The remaining provisions commence on the seventh day after this Act is notified on the legislation register.

Clause 3 **Legislation Amended**

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

Schedule 1 **Legislation Amended**

Part 1.1 *Civil Unions Act 2012*

Amendment 1.1 **Section 27**

Amendment 1.1 makes amendments to section 27 of the Civil Units Act to improve the capacity to recognise an overseas relationship not between a man and a woman as a civil union under territory law. This is achieved by including reference to a ‘corresponding law relationship’ in section 27.

Section 27 (1) states that a “corresponding law relationship” is a civil union for Territory law.

Section 27 (2) provides that a “corresponding law relationship” must either comply with subsection (3) or be prescribed as an eligible relationship by regulation.

Section 27 (3) provides that a relationship will comply with section 27(2) if the relationship:

- a) is one where the people cannot marry each other, or the relationship can be validly recognised, under the *Marriage Act 1961* (Cwlth); and

- b) is registered or formally recognised under a law of the State, external territory or foreign country, where the law of the foreign country includes the following requirements:
- i. the relationship must be between two adults;
 - ii. the relationship must be entered into consensually;
 - iii. the relationship must not be a ‘prohibited relationship’ as defined in section 7 of the Civil Unions Act;
 - iv. the relationship must not be entered into by a person who is already married; and
 - v. the relationship must not be entered into by a person already in a relationship recognised under that law.

Part 1.2 *Coroners Act 1997*

Amendment 1.2 Section 57 (5)

Amendment 1.2 clarifies that a coroner’s report must be tabled in the ACT Legislative Assembly if it contains findings about any serious risks to public safety.

Amendment 1.3 New section 57 (5A)

Amendment 1.3 inserts new section 57 (5A) into the Act.

Subsection (5A) states that if the report includes information that could reasonably identify the deceased person, the responsible Minister may redact this information, having regard to the interests of immediate family members, the risk to public safety and the public interest.

The responsible Minister may refuse to de-identify information about the deceased where it is in the public interest to do so or de-identifying the information may be a risk to public safety.

This amendment does not mean every report tabled under section 57 will have identifying information redacted.

Part 1.4 *Guardianship and Management of Property Act 1991*

Amendments 1.4 to 1.6 Section 8B

Amendments 1.4 to 1.6 are consequential on new section 62 (2) (ca), which gives the ACAT the power to suspend an EPOA.

Amendment 1.7 New section 62 (2) (ca)

Amendment 1.7 inserts a new power into section 62 (2) of the Act, allowing the ACAT to make a direction to suspend an EPOA.

The purpose of this amendment is to give the ACAT the power to suspend an EPOA when revoking an EPOA is not appropriate. For example, the ACAT has advised that an EPOA does not necessarily need to be revoked when an emergency order to temporarily appoint the PTG is made, and a more suitable alternative may be to temporarily suspend the EPOA in these and similar circumstances.

Amendment 1.8 New section 62 (5)

Amendment 1.8 is consequential on Amendment 1.7 and allows the ACAT to appoint a guardian or a manager while the EPOA is suspended.

Part 1.4 (*Human Rights Act 2004*) and part 1.5 (*Human Rights Commission Act 2005*)

Amendments 1.9 to 1.12

These amendments reflect the transfer of functions from the “Attorney-General” to the “Minister” responsible for the Act in:

- section 41 and the dictionary note 2 of the HRA; and
- section 27 (2)(b) of the HRC Act.

These amendments support the Administrative Arrangements, which allocate responsibility for the HRA and HRC Act to the Minister for Justice and Consumer Affairs. Responsibility for provisions in the HRA relating to legislative compatibility with human rights and the power to intervene in a proceeding before a court remain with the Attorney-General as the first law officer of the Territory.

Part 1.6 *Information Privacy Act 2014*

Amendment 1.13 Section 21 (1)

Amendment 1.13 substitutes a new section 21 (1) into the IP Act.

Section 21 sets out the privacy protection requirements for government contracts, being that a public sector agency may enter into a government contract only if the contract contains appropriate contractual measures to ensure that the contract services provider, or subcontractor, does not engage in conduct that breaches either a TPP or TPP code that binds the agency.

New section 21(1) provides an additional contractual measure that will meet this requirement, being compliance with “a corresponding privacy law” applicable to the contracted service provider or subcontractor.

These amendments recognise that disclosing information through technology may give rise to privacy concerns. However it is essential to provide a flexible approach to ensure maximum

protection while allowing the ACT Government freedom to contract with interstate and overseas providers. The capacity to contract in this way is essential in the technological space.

Amendment 1.14 Section 21 (4)

Amendment 1.14 inserts a definition for ‘corresponding privacy law’ to mean:

- a) the *Privacy Act 1988* (Cwlth); or
- b) a law of a State, external territory or foreign country as prescribed by regulation.

This amendment is consequential on amendment 1.13.

Part 1.7 *Juries Act 1967*

Amendment 1.15 Schedule 2, part 2.1, column 2, third dot point

Amendment 1.15 removes from schedule 2 the exemption given to a person from serving as a juror under the *Air Navigation Regulations 1947* (Cwlth) as those regulations have been repealed.

Amendment 1.16 Schedule 2, part 2.2, new item 5A

Amendment 1.16 provides that a person regularly employed by an airline as crew staff may claim an exemption from serving as a juror.

The amendment provides flexibility for airline crew members who may be available to participate in jury service.

Part 1.8 *Residential Tenancies Act 1997*

Amendment 1.17 Section 8 (2), definition of *break lease clause*

Amendment 1.17 makes a minor amendment to the wording of section 8 (2) of the TRA.

Section 8 (2) explains how the “break fee” is calculated if a fixed term residential tenancy agreement is terminated early. The tenant must pay this where they terminate the tenancy agreement for a reason not “permitted” by the RTA. The amendment changes the words from “permitted” to “provided” by the RTA.

The minor word change is for the purpose of accuracy; permitted implies that the RTA authorises certain grounds of termination, whereas “provided by” implies that there are grounds available for termination which must be made out.

The operation and content of the provision are not changed.

Amendment 1.18 Section 36 (c)

Amendment 1.18 is consequential on the addition of division 6.5A into the RTA under the RTA Amendment Act.

Section 36 provides an exhaustive list of circumstances under which a residential tenancy agreement can be terminated.

Amendment 1.18 inserts into section 36 of the RTA that a termination order made by the ACAT under division 6.5A is a ground for terminating a residential tenancy agreement.

Part 1.9 *Terrorism (Extraordinary Temporary Powers) Act 2006*

Amendments 1.19 and 1.20 Section 98 (2) (d) and Dictionary, note 2

Amendments 1.19 and 1.20 are consequential on the amendments to the HRA and reflect the change of responsibility for certain functions under that Act from the Attorney-General to the Minister responsible for the Act under the Administrative Arrangements.