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

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2020

SUPPLEMENTARY EXPLANATORY STATEMENT

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INTRODUCTION

This supplementary explanatory statement relates to the Government amendments to the Justice and Community Safety Legislation Amendment Bill 2020 (the Bill) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Government amendments and help inform debate on them. It does not form part of the Bill and has not been endorsed by the Legislative Assembly.

This statement must be read in conjunction with the Government amendments and the Bill. It is not, and is not intended to be, a comprehensive description of the Bill and the Government amendments. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision.

OVERVIEW OF THE BILL

On 3 December 2020, the Bill was introduced in the Legislative Assembly.

The Bill makes amendments to a number of laws primarily within 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.

The explanatory statement accompanying the Bill provides a detailed account of the provisions contained in the Bill and can be accessed at:

https://www.legislation.act.gov.au/b/db_63529

OUTLINE OF GOVERNMENT AMENDMENTS

The Government amendments will make minor, technical or non-controversial amendments to the Bill, including to the *Civil Law (Wrongs) Act 2002* (CLW Act), the *Administration and Probate Act 1929* (AP Act) and the *Crimes Act 1900* (the Crimes Act).

Civil Law (Wrongs) Act 2002

The amendments to sections 4.38, 4.39 and 4.40 of schedule 4 to the CLW Act will disapply the requirement under division 19.3.3 of the *Legislation Act 2001* for the Attorney-General to consult the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) on certain interstate appointments to the ACT Professional Standards Council (ACTPSC). This includes appointments of a person who is a member of an interstate Professional Standards Council to the ACTPSC as a member, chairperson, deputy chairperson, or a person as a deputy of an interstate member.

All Australian jurisdictions agreed under the intergovernmental *Professional Standards Agreement 2011* to appoint the same 11 members to their Professional Standards Councils (10 members are interstate members and 1 member is from the Territory). Accordingly, the Attorney-General does not have a discretion to choose the 10 interstate members and this therefore renders the consultation requirement under sections 4.38, 4.39 and 4.40 of little value. It may also impact on the ACTPSC's capacity to reach a decision-making quorum if an appointment to the ACTPSC is subject to delay without a tangible benefit.

Administration and Probate Act 1929

The amendments to section 38A of the AP Act are technical amendments to clarify the policy intent of the amendments which were introduced through the Bill. That intent was to express the application and scope of the vesting of a deceased estate in the Public Trustee and Guardian (PTG) and the circumstances in which that occurs in plain English, consistent with the common law position (as per “the Ordinary in England”).

Crimes Act 1900

The amendment to the Crimes Act, section 13 (Trial for murder—provocation) will ensure the fault elements for the partial defence of provocation correspond with the alternative fault elements for the offence of murder in section 12 of the Crimes Act. Section 12 was amended in 2009 by the *Crimes (Murder) Amendment Act 2009* to include a further alternative fault element that allows an accused to be found guilty of murder if they caused the death of another person intending to cause serious harm to any person. Section 13 of the Crimes Act was not amended to reflect this change and this amendment addresses that omission.

CONSISTENCY WITH HUMAN RIGHTS

The amendment to the Crimes Act, section 13 engages and may promote the right to a fair trial (section 21, *Human Rights Act 2004*). Inserting a further alternative fault element may support a fair trial because it will potentially prevent an accused being convicted of the offence of murder where the intent was to cause serious harm. Without the amendment, the partial defence of provocation would not be available to the accused in such circumstances which could result in a conviction for murder rather than the lesser offence of manslaughter.

There are no human rights implications arising from the other Government amendments to the Bill.

CLAUSE NOTES—GOVERNMENT AMENDMENTS

Amendment 1

Clause 3

Page 2, line 17

This clause amends the list of legislation amended in the Bill to include the *Civil Law (Wrongs) Act 2002* (CLW Act) and the *Crimes Act 1900* (Crimes Act).

Amendment 2

Clause 6

Proposed new section 38A (1) (b)

Page 7, line 8

Subsection 38A(1) of the *Administration and Probate Act 1929* (AP Act) sets out the circumstances in which section 38A will apply. This clause amends paragraph (b) to read that the section will apply if a person dies, and “representation has not been granted.”

The amendment omits the previous paragraph, which read “no one is appointed as the executor or administrator of the person’s estate” and substitutes “representation has not been granted.” This change is made on the basis that the term “appointed” is not defined in the AP Act or used consistently, whereas, the granting of representation is a concept that is used consistently in the AP Act, including in section 39, which intersects with the application of section 38A.

The intent of the amendment is to ensure the scope and application of section 38A in relation to the vesting of a deceased estate in the PTG is clear and aligns with the common law principle from which it derives.

Amendment 3

Clause 6

Proposed new section 38A (2)

Page 7, line 10

Subsection 38A(2) of the AP Act indicates that if the preconditions in subsection 38A (1) are satisfied (that is, a person has died and representation has not been

granted), then “[t]he person’s real and personal estate vests in the public trustee and guardian”.

This clause amends the subsection from “real and personal **property**” (emphasis added) to make the wording consistent with the language used in section 39 and be more precise, noting that some property will automatically vest with another person. For example, where a house is owned by joint tenants, that property will automatically vest in the surviving joint tenant, rather than the PTG.

This clause also amends the subsection to remove the words “until the grant of representation,” following consultation with the PTG and confirmation that a grant of representation is not always made in relation to a deceased estate. This removes any implication that a grant of representation is inevitable. Section 39 intersects with section 38A to provide for the consequences that flow from the grant of representation.

Amendment 4

Proposed new part 5A

Page 9, line 8

This clause inserts a new Part 5A into the Bill to amend the CLW Act by inserting new sections 4.38(2), 4.39(1A) and 4.40(1A) in schedule 4 to the CLW Act.

The amendments disapply division 19.3.3 of the *Legislation Act 2001* in circumstances where a person:

- who is a member of an appropriate professional standards council in another jurisdiction is appointed as a member of the ACT Professional Standards Council (ACTPSC) under section 4.38;
- who is a member of an appropriate professional standards council in another jurisdiction is appointed as chairperson and deputy chairperson of the ACTPSC under section 4.39; and
- who is a deputy of a member of an appropriate standards council in another jurisdiction is appointed as a deputy of a member of the ACTPSC under section 4.40.

The intent of the clause is to remove any unnecessarily burdensome impediment which may affect the Territory’s implementation of the intergovernmental *Professional Standards Agreement 2011*.

Amendment 5

Proposed new part 5B

Page 9, line 8

This clause inserts a new Part 5B into the Bill to amend the Crimes Act by inserting new section 13(2)(b) (iii). This adds a third fault element to section 13(2)(b) of intent to cause serious harm to the deceased. Section 13(7) is also inserted to provide a reference to the definition of serious harm in the dictionary to the *Criminal Code 2002*.

The effect of this amendment is that fault elements for the partial defence of provocation correspond with the fault elements for the offence of murder in section 12 of the Crimes Act.

The general principle is that an amendment act will be assumed not to have retrospective application in the absence of a statement to the contrary. This principle does not apply to the amendment to section 13 as the amendment applies prospectively to facts which may have occurred prior to the amendment but are the subject of a trial after the commencement of the provision. This construction of the prospective application to facts that are tried after commencement is supported by the case of *R v Zuber* [2010] ACTSC 107.