



Australian Capital Territory

Public Advocate Act 2005

A2005-47

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Australian Capital Territory

Public Advocate Act 2005

A2005-47

An Act to provide for the appointment of a public advocate, and for related matters

The Legislative Assembly for the Australian Capital Territory enacts as follows:

2005 145B

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

Part 1 Preliminary

1 Name of Act

This Act is the *Public Advocate Act 2005*.

2 Commencement

This Act commences on the commencement of the *Human Rights Commission (Children and Young People Commissioner) Amendment Act 2005*.

Note The naming and commencement provisions automatically commence on the notification day (see Legislation Act, s 75 (1)).

3 Dictionary

The dictionary at the end of this Act is part of this Act.

Note 1 The dictionary at the end of this Act defines certain terms used in this Act.

Note 2 A definition in the dictionary (including a signpost definition) applies to the entire Act unless the definition, or another provision of the Act, provides otherwise or the contrary intention otherwise appears (see Legislation Act, s 155 and s 156 (1)).

4 Notes

A note included in this Act is explanatory and is not part of this Act.

Note See the Legislation Act, s 127 (1), (4) and (5) for the legal status of notes.

5 Offences against Act—application of Criminal Code etc

Other legislation applies in relation to offences against this Act.

Note 1 Criminal Code

The Criminal Code, ch 2 applies to all offences against this Act (see Code, pt 2.1).

The chapter sets out the general principles of criminal responsibility (including burdens of proof and general defences), and defines terms used for offences to which the Code applies (eg *conduct*, *intention*, *recklessness* and *strict liability*).

Note 2 Penalty units

The Legislation Act, s 133 deals with the meaning of offence penalties that are expressed in penalty units.

Part 2 Office of public advocate

6 Public advocate—appointment

- (1) The Executive must appoint a person to be the Public Advocate.

Note For the making of appointments (including acting appointments), see the Legislation Act, pt 19.3.

- (2) The public advocate must not be appointed for a term of longer than 5 years.

Note A person may be reappointed to a position if the person is eligible to be appointed to the position (see Legislation Act, s 208 and dict, pt 1, def *appoint*).

- (3) The conditions of appointment of the public advocate are the conditions agreed between the Executive and the public advocate, subject to any determination under the *Remuneration Tribunal Act 1995*.

7 Ending appointment

- (1) The Executive may end the appointment of a person as the public advocate—
- (a) if the person contravenes a territory law; or
 - (b) for misbehaviour; or
 - (c) if the person becomes bankrupt or executes a personal insolvency agreement; or
 - (d) if the person is convicted, in the ACT, of an offence punishable by imprisonment for at least 1 year; or
 - (e) if the person is convicted outside the ACT, in Australia or elsewhere, of an offence that, if it had been committed in the ACT, would be punishable by imprisonment for at least 1 year.

- (2) The Executive must end the person's appointment—
- (a) if the person is absent, other than on approved leave, for 14 consecutive days or for 28 days in any 12-month period; or
 - (b) for physical or mental incapacity, if the incapacity substantially affects the exercise of the person's functions.

Note A person's appointment also ends if the person resigns (see Legislation Act, s 210).

8 Staff of public advocate

The public advocate's staff must be employed under the *Public Sector Management Act 1994*.

9 Delegation by public advocate

- (1) The public advocate may delegate to a member of the public advocate's staff any function under this Act or another territory law.
- (2) However, the public advocate may only delegate a function under the following provisions to a person exercising the duties of deputy public advocate in the public service:
 - (a) section 10 (h) (which is the public advocate's function of acting as guardian or manager when appointed by the guardianship tribunal);
 - (b) section 12 (b) (which is about applying to the guardianship tribunal for an appointment of a person as guardian or manager).

Note For the making of delegations and the exercise of delegated functions, see the Legislation Act, pt 19.4.

Part 3 Functions of public advocate

10 Functions of public advocate

The public advocate has the following functions:

- (a) acting as advocate for the rights of people with a disability and, as part of acting as advocate for those rights, doing the following:
 - (i) fostering the provision of services and facilities for people with a disability;
 - (ii) supporting the establishment of organisations that support people with a disability;
 - (iii) encouraging the development of programs that benefit people with a disability (including advocacy programs, educational programs and programs to encourage people to act as guardians and managers);
 - (iv) promoting the protection of people with a disability from abuse and exploitation;
- (b) representing people with a disability at inquiries before the guardianship tribunal;
- (c) representing forensic patients before the guardianship tribunal or a court;
- (d) acting as advocate for the rights of children and young people and, as part of acting as advocate for those rights, doing the following:
 - (i) fostering the provision of services and facilities for children and young people;
 - (ii) supporting the establishment of organisations that support children and young people;

- (iii) promoting the protection of children and young people from abuse and exploitation;
- (e) monitoring the provision of services for the protection of children and young people;
- (f) dealing, on behalf of people with a disability and children and young people, with entities providing services;
- (g) investigating, reporting and making recommendations to the Minister on anything relating to the operation of this Act referred to the public advocate by the Minister;
- (h) acting as a guardian or manager when appointed by the guardianship tribunal;
- (i) promoting community discussion, and providing community education and information, about—
 - (i) the functions of the public advocate; and
 - (ii) the operation of this Act; and
 - (iii) the functions of the guardianship tribunal;
- (j) exercising the functions given to the public advocate under the *Children and Young People Act 1999*, the *Guardianship and Management of Property Act 1991* and the *Mental Health (Treatment and Care) Act 1994*;
- (k) exercising any other function given to the public advocate under this Act or another territory law.

Note A provision of a law that gives an entity (including a person) a function also gives the entity powers necessary and convenient to exercise the function (see Legislation Act, s 196 and dict, pt 1, def *entity*).

11 Investigations etc

- (1) The public advocate may—
 - (a) listen to concerns from children and young people about the provision of services for the protection of children and young people; or
 - (b) investigate concerns raised under paragraph (a); or
 - (c) investigate complaints and allegations about—
 - (i) matters in relation to which the public advocate has a function; or
 - (ii) the actions of a guardian or manager or a person acting or purporting to act under an enduring power of attorney.
- (2) The public advocate must refer systemic matters relating to people with a disability and children and young people to the human rights commission for consideration.
- (3) The public advocate must report to the guardianship tribunal about a matter before the tribunal if asked by the tribunal.

12 Guardian etc of last resort

If the public advocate is appointed as a guardian or manager under the *Guardianship and Management of Property Act 1991*, the public advocate must—

- (a) endeavour to find a suitable person to be appointed as the guardian or manager; and
- (b) if a suitable person is found—apply to the guardianship tribunal for the appointment of the person as guardian or manager.

13 Engagement of lawyer

The public advocate may engage a lawyer to appear before a court or tribunal in relation to the exercise of the public advocate's functions under this Act.

Part 4 Miscellaneous

14 Protection of officials from liability

- (1) In this section:

official means—

- (a) the public advocate; or
 - (b) a member of the staff of the public advocate; or
 - (c) a person who exercises a function under this Act.
- (2) An official, or anyone engaging in conduct under the direction of an official, is not personally liable for anything done or omitted to be done honestly and without recklessness—
- (a) in the exercise of a function under this Act; or
 - (b) in the reasonable belief that the conduct was in the exercise of a function under this Act.
- (3) Any civil liability that would, apart from subsection (2), attach to an official attaches instead to the Territory.

15 Giving of information protected

- (1) This section applies if any information is given honestly and without recklessness to the public advocate.
- (2) The giving of the information is not—
- (a) a breach of confidence; or
 - (b) a breach of professional etiquette or ethics; or
 - (c) a breach of a rule of professional conduct.
- (3) Civil or criminal liability is not incurred only because of the giving of the information.

16 Secrecy

- (1) In this section:

court includes a tribunal, authority or person having power to require the production of documents or the answering of questions.

divulge includes communicate.

person to whom this section applies means a person who—

- (a) is or has been—
 - (i) the public advocate; or
 - (ii) a member of the staff of the public advocate; or
- (b) exercises, or has exercised, a function under this Act.

produce includes allow access to.

protected information means information about a person that is disclosed to, or obtained by, a person to whom this section applies because of the exercise of a function under this Act by the person or someone else.

- (2) A person to whom this section applies commits an offence if—

- (a) the person—
 - (i) makes a record of protected information about someone else; and
 - (ii) is reckless about whether the information is protected information about someone else; or
- (b) the person—
 - (i) does something that divulges protected information about someone else; and

- (ii) is reckless about whether—
 - (A) the information is protected information about someone else; and
 - (B) doing the thing would result in the information being divulged to someone else.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

- (3) Subsection (2) does not apply if the record is made, or the information is divulged—
 - (a) under this Act or another territory law; or
 - (b) in relation to the exercise of a function, as a person to whom this section applies, under this Act or another territory law.
- (4) Subsection (2) does not apply to the divulging of protected information about someone with the person's consent.
- (5) A person to whom this section applies need not divulge protected information to a court, or produce a document containing protected information to a court, unless it is necessary to do so for this Act or another territory law.

17 Disclosure of information about investigations

- (1) Section 16 does not prevent the public advocate from disclosing information to a person (including members of the public) about an investigation by the public advocate if the public advocate is satisfied that the disclosure is necessary and reasonable in the public interest.
- (2) The public advocate must not make a disclosure mentioned in subsection (1) that is likely to prejudice the investigation.

- (3) In a disclosure mentioned in subsection (1), the public advocate must not—
- (a) express an opinion that is (expressly or impliedly) critical of a person or body unless the public advocate has given the person, or the principal officer of the body, an opportunity to answer the criticism; or
 - (b) identify the complainant (directly or indirectly) unless it is necessary and reasonable to do so.

18 Regulation-making power

The Executive may make regulations for this Act.

Note A regulation must be notified, and presented to the Legislative Assembly, under the Legislation Act.

Part 5 Transitional

19 Definitions for pt 5

In this part:

commencement day means the day this part commences.

community advocate means the community advocate under the *Community Advocate Act 1991* as in force at any time before commencement day.

20 Conduct engaged in by community advocate

- (1) This section applies to conduct engaged in by the community advocate before commencement day.
- (2) The conduct is also taken to have been engaged in by the public advocate when the conduct was engaged in by the community advocate.

21 Application of Act to pre-existing appointments

- (1) This section applies if—
 - (a) the community advocate was appointed as a guardian or manager before commencement day; and
 - (b) the appointment was in force immediately before commencement day.
- (2) For this Act, a reference to the public advocate being appointed as a guardian or manager includes a reference to the community advocate being appointed as a guardian or manager.

22 Application of s 16 (1) to previous people

In section 16 (1):

person to whom this section applies includes—

- (a) a person who was the community advocate; and
- (b) a person who was a member of the staff of the community advocate; and
- (c) a person who exercised a function under the *Community Advocate Act 1991*.

23 References to community advocate

In an Act, a reference to the community advocate includes a reference to the public advocate.

Note A reference to an Act includes a reference to the statutory instruments made or in force under the Act, including any regulation (see Legislation Act, s 104).

24 Community advocate is public advocate

- (1) The person who was the community advocate immediately before commencement day is taken to be the public advocate appointed under this Act.
- (2) To remove any doubt, the person is taken to have been appointed public advocate on the day the person was appointed community advocate.

25 Transitional regulations

- (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of this Act.
- (2) A regulation may modify this part (including its operation in relation to another territory law) to make provision in relation to anything that, in the Executive's opinion, is not, or not adequately or appropriately, dealt with in this part.

Part 5 Transitional

Section 26

- (3) A regulation under subsection (2) has effect despite anything elsewhere in this Act or another territory law.

26 Legislation amended—sch 1

This Act amends the legislation mentioned in schedule 1.

27 Legislation repealed

The *Community Advocate Act 1991* A1991-64 is repealed.

28 Expiry of pt 5

This part expires 1 year after commencement day.

Schedule 1 Consequential amendments

(see s 26)

Part 1.1 Adoption Act 1993

[1.1] Section 4, definition of *community advocate*

omit

[1.2] Section 26 (10)

substitute

(10) In this section:

prescribed person, in relation to an application for a discharging order for a child, means the Minister, the chief executive, the public advocate, the child, an adoptive parent or a person whose consent to the adoption was required.

[1.3] Section 103

omit

Part 1.2 Children and Young People Act 1999

[1.4] Section 405

omit

A person who is

substitute

(1) A person who is

[1.5] Section 405

omit

Community Advocate Act 1991

substitute

Public Advocate Act 2005

[1.6] New section 405 (2)

insert

(2) In this section:

public advocate includes a person who has been the community advocate under the *Community Advocate Act 1991*, as in force at any time.

(3) Subsection (2) is a law to which the Legislation Act, section 88 (Repeal does not end effect of transitional laws etc) applies.

(4) Subsections (2) and (3) and this subsection expire 1 month after the day they commence.

[1.7] Mentions of *community advocate*

omit

community advocate

substitute

public advocate

in

- section 40
- section 42 (1) (e)
- sections 44 to 46
- section 61 (e)
- section 75

- section 117 (2) (a)
- section 121 (b)
- section 138 (b)
- section 159 (1) (j)
- section 162 (2)
- section 164
- section 175 (5)
- section 176 (3) (b)
- section 196 (3)
- section 205 (1) (a)
- section 205A (1) (a)
- section 205C (3)
- section 226 (1) (b)
- section 231 (2) (d)
- section 239 (1) (d)
- section 241
- section 243
- section 248 (2) (b)
- section 267 (2) (d)
- section 269
- section 280 (2)
- section 283 (2)
- section 290 (b)
- section 302 (1) (c)
- section 311 (c)
- section 323E
- section 403B (b)
- section 405
- section 409 (1)
- schedule 1, column 3, items 1 to 11

Part 1.3 Crimes (Child Sex Offenders) Act 2005

[1.8] Dictionary, definition of *forensic patient*

substitute

forensic patient—see the *Public Advocate Act 2005*, dictionary.

Part 1.4 Domestic Violence and Protection Orders Act 2001

[1.9] Section 11 (4)

substitute

- (4) Further, if the aggrieved person is a person with a legal disability, the public advocate may make an application as the person's next friend.

[1.10] Section 101 (2) (d)

substitute

- (d) information from being given to the public advocate in relation to the exercise of the public advocate's functions; or

Part 1.5 Domestic Violence and Protection Orders Regulation 2002

[1.11] Section 54 (2) (c)

substitute

- (c) tell the public advocate that the proceeding has been adjourned so the person can get representation.

Part 1.6 Legislation Act 2001

[1.12] Dictionary, part 1, definition of *community advocate*

omit

[1.13] Dictionary, part 1, new definition of *public advocate*

insert

public advocate means the Public Advocate under the *Public Advocate Act 2005*.

Part 1.7 Mental Health (Treatment and Care) Act 1994

[1.14] Section 4A, note 1, new dot point

insert

- s 45 (Communication during detention)

[1.15] Section 20

substitute

20 Public advocate and person's lawyer to have access

- (1) If a person is admitted to a facility under an order under section 16, the public advocate and the person's lawyer are entitled to have access to the person at any time.
- (2) The person in charge of a facility must, if asked by the public advocate or the person's lawyer, give any reasonable assistance that is necessary to allow the public advocate or lawyer to have access to the person.

[1.16] Section 36I

substitute

36I Communication with public advocate and person's lawyer

- (1) If the relevant official has imposed limits on communication by a person under section 36H, the official must ensure that the person has reasonable access to facilities, and adequate opportunity, to contact the public advocate and the person's lawyer.
- (2) The relevant official must, if asked by the public advocate or the person's lawyer, give any reasonable assistance necessary to allow the public advocate or lawyer to have access to the person.
- (3) In this section:
relevant official—see section 36H (8).

[1.17] Section 45

substitute

45 Communication during detention

- (1) A person commits an offence if—
 - (a) the person is in charge of a mental health facility; and
 - (b) a person (the *detainee*) is detained at the facility; and
 - (c) the person does not ensure that, during the detention, the detainee has reasonable access to facilities, and adequate opportunity, to contact the public advocate and the detainee's lawyer.

Maximum penalty: 20 penalty units.

- (2) A person commits an offence if—
 - (a) the person is in charge of a mental health facility; and

- (b) a person (the *detainee*) is detained at the facility; and
- (c) the public advocate or the detainee's lawyer asks the person to give any reasonable assistance necessary to allow the public advocate or lawyer to have access to the detainee; and
- (d) the person does not ensure that the assistance is given.

Maximum penalty: 50 penalty units.

- (3) An offence against this section is a strict liability offence.

[1.18] Section 122B (3)

substitute

- (3) If an official visitor visits a mental health facility under section 122, the visitor must report, in writing, to the Minister and public advocate in relation to the exercise of the visitor's functions under section 122 or section 122A.

[1.19] Further amendments, mentions of *community advocate*

omit

community advocate

substitute

public advocate

in

- section 16 (6)
- section 19 (b)
- section 22 (c)
- section 32 (6)
- section 34 (2)
- section 35 (4) (b)
- section 36D
- section 36F (2)

- section 36G (5) (b)
- section 36K
- section 42 (1)
- section 50 (4)
- section 51 (d) (iv)
- section 71 (c)
- section 87 (2) (b)
- section 89 (1) (e)
- section 90 (5) (d)
- section 94 (f)
- section 95 (3) (e)
- section 122B

Part 1.8 Ombudsman Act 1989

[1.20] Section 6B (1) (c)

substitute

- (c) the essential services consumer council;
- (d) the public advocate.

Part 1.9 Remuneration Tribunal Act 1995

[1.21] Schedule 1, part 1.2

omit

- community advocate

[1.22] Schedule 1, part 1.2

insert

- public advocate

Dictionary

(see s 3)

Note 1 The Legislation Act contains definitions and other provisions relevant to this Act.

Note 2 For example, the Legislation Act, dict, pt 1, defines the following term:

- body
- entity
- function
- guardianship tribunal
- lawyer
- mental health tribunal.

child means a person who is under 12 years old.

disability means—

- (a) either of the following conditions:
- (i) a physical, mental, psychological or intellectual condition;
 - (ii) a condition that would make a person a forensic patient; if
- (b) the condition gives rise to a need for protection from abuse, exploitation or neglect, or a combination of those things.

forensic patient includes a person who has been—

- (a) apprehended by a police officer because the person's behaviour or statements indicate to the officer that the person may be suffering from a mental dysfunction or mental illness; or
- (b) found by a court or the mental health tribunal to be unfit to plead; or
- (c) acquitted of a criminal charge because of mental impairment; or

- (d) found guilty of a criminal offence and is mentally dysfunctional or mentally ill, or has become mentally dysfunctional or mentally ill while serving a sentence of imprisonment.

mental dysfunction means a disturbance or defect, to a substantially disabling degree, of perceptual interpretation, comprehension, reasoning, learning, judgment, memory, motivation or emotion.

mental illness means a condition that seriously impairs (either temporarily or permanently) the mental functioning of a person and is characterised by the presence in the person of any of the following symptoms:

- (a) delusions;
- (b) hallucinations;
- (c) serious disorder of thought form;
- (d) a severe disturbance of mood;
- (e) sustained or repeated irrational behaviour indicating the presence of the symptoms mentioned in paragraph (a), (b), (c) or (d).

public advocate means the Public Advocate under section 6.

staff, in relation to the public advocate, means the staff mentioned in section 8.

young person means a person who is 12 years old or older, but not yet an adult.

Endnotes

1 Presentation speech

Presentation speech made in the Legislative Assembly on 30 June 2005.

2 Notification

Notified under the Legislation Act on 2 September 2005.

3 Republications of amended laws

For the latest republication of amended laws, see www.legislation.act.gov.au.

I certify that the above is a true copy of the Public Advocate Bill 2005, which was passed by the Legislative Assembly on 25 August 2005.

Clerk of the Legislative Assembly

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