

2012

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

**JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2012
(No. 2)**

EXPLANATORY STATEMENT

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JUSTICE & COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2012 (No. 2)

Overview of the Bill

The Justice and Community Safety Legislation Amendment Bill 2012 (No. 2) (the Bill) amends a number of laws administered by the Justice and Community Safety Directorate.

Human Rights implications

There are no human rights implications associated with this bill.

Civil Law (Wrongs) Act 2002

Approval of Professional Standards Schemes

All States and Territories have enacted legislation which enables the establishment of a national Professional Standards Council which is made up of individual jurisdictional councils. Jurisdictions have adopted mutual recognition provisions in relation to professional standards.

The professional standards legislation (PSL) constitutes the creation of schemes to limit the civil liability of professionals and others, to facilitate the improvement of occupational standards, and to protect consumers. The ACT's PSL is contained in schedule 4 to the *Civil Law (Wrongs) Act 2002*. Division 4.2.1 sets out the framework for the making, amendment and revocation of schemes.

PSL in all jurisdictions except the ACT provides that the Minister can authorise the gazettal (notification) of a scheme approved by the Professional Standards Council (the Council). The ACT PSL additionally requires the Minister's approval of a scheme that has been approved by the Council, prior to notifying the scheme (see schedule 4 part 4.2). This additional requirement in the ACT is inconsistent with other jurisdictions.

The JACS Bill removes this requirement from the Civil Law (Wrongs) Act, and provides that professional standards schemes can be approved or amended by the Council, with the Minister notifying the scheme subsequently. This will align the ACT's PSL with PSL in other jurisdictions.

Emergencies Act 2004

Clarification of relationship with *Environment Protection Act 1997* – burning off provisions

There is a substantial overlap between provisions in the Emergencies Act and the *Environment Protection Act 1997* (the EP Act) with regard to 'burning off'. Section 42 of the EP Act provides that a person must not conduct an activity listed in Schedule 1 as a class A activity unless that person holds an environmental authorisation in relation to that activity.

One such class A activity appears at item 28 of schedule 1:

- Lighting, using or maintaining a fire in the open air, or causing or permitting a fire to be lit, used or maintained in the open air, for the purposes of burning plant matter –
 - to reduce a fire hazard; or
 - to clear the land; or
 - to conserve biological diversity or ecological integrity.

This activity substantially overlaps with the description of ‘burning off’ provided in section 123 of the Emergencies Act.

There are differences in the requirements under each Act with regard to substantially the same activity. The EP Act requires an environmental authorisation for burning off, while the Emergencies Act allows fires for burning off in some situations, and requires a permit or the Commissioner’s approval for burning off in other circumstances.

For example, an individual may have obtained an approval under section 123(5) of the Emergencies Act and thereby be acting in accordance with the Emergencies Act if the individual engaged in burning off specified materials. However, if the individual had not received an environmental authorisation under the EP Act, they would be committing an offence (under the EP Act) if they conducted burning off activities.

To avoid the perception that fulfilling the requirements for burning off under one Act authorises burning off under the other, the JACS Bill amends section 123 of the Emergencies Act to directly refer to the additional duty in section 42 of the EP Act that must be fulfilled in addition to those set out in section 123.

To this end, the Bill also amends the EP Act to make reference to the requirements for burning off contained in section 123 of the Emergencies Act.

Inconsistency between Emergencies Act and Environment Protection Regulation – cooking fires

There is an inconsistency between the operation of section 125 of the *Emergencies Act 2004* and the *Environment Protection Regulation 2005* with regard to backyard cooking fires.

Section 125 provides that a person commits an offence if:

- they -
 - intentionally light, maintain or use a fire in the open air, or burn flammable material, on any land; or
 - engage in conduct reckless about whether the conduct would cause a fire to be lit or maintained in the open air, or flammable material to be burnt, on any land; and
- the lighting or burning is not permitted under this Act or done for fire prevention by anyone acting under this Act.

Sections 122 and 123 of the Act permit a limited range of fires, including the use of electrical or gas appliances for cooking food or heating liquids on certain land.

Unless a fire falls within the types of fire permitted under sections 122 or 123, the fire will not be permitted under the Act. Further, as backyard fires (i.e. fires on leased Territory land) are not specified in these sections, any backyard cooking fires will be considered an offence under section 125, whether or not the fire is for the purpose of cooking or heating food or drink.

The inconsistency arises with section 9 of the Environment Protection Regulation which provides that it will be an offence if a person lights, uses or maintains a fire in the open air *unless* it is listed as an item in schedule 1.2.

Schedule 1.2 includes open air fires for the purpose of cooking and heating food or drink as an item that will not constitute an offence under section 9. On this basis, the Environment Protection Regulation purports to ‘allow’ fires in backyards for the purposes of cooking or heating food or drink while they are an offence under the Emergencies Act.

The JACS Bill amends the Emergencies Act so that fires for the purposes of cooking or heating food or drink will be permitted under section 125.

Public Trustee Act 1985

Court directions to pay money to Public Trustee

Section 25 of the *Public Trustee Act 1985* sets out the circumstances in which money awarded by a court to a person under a disability can be directed to the Public Trustee. Currently, due to the definition of ‘court’ in the Public Trustee Act, the section only applies to money awarded by the Supreme Court to a person under a disability. On this basis, the section will not apply to money awarded to a person under a disability by the Magistrates Court or the ACT Civil and Administrative Tribunal. The JACS Bill amends the Public Trustee Act to rectify this.

Advancing funds for investment into superannuation

Section 25A(1) of the Public Trustee Act currently provides that the Public Trustee is to hold all money or property accepted by the Public Trustee on behalf of a person under a disability pursuant to section 25 on trust for that person.

Section 25A(2) sets out the things that the Public Trustee may do with the money or property held on behalf of the person under a disability. This list is quite broad, and covers any payment or use of the money or property that the Public Trustee considers appropriate for the maintenance, education, advancement or benefit of the person or a dependant of a person.

However, it does not specifically allow the Public Trustee to access the modern investment of superannuation. Superannuation can be an essential investment for people under disabilities, not only because of the significant taxation benefits available to an awardee but also particularly for people who are forced into retirement because of their disability.

The Bill amends section 25A(2) of the Public Trustee Act to allow the Public Trustee to invest in superannuation when dealing with money or property held on trust for a person with a disability.

Unit Titles (Management) Act 2011

The *Unit Titles (Management) Act 2011* commenced on 30 March 2012. The Act relocated the provisions dealing with the management of units plans out of the *Unit Titles Act 2001* into the new statute.

The *Unit Titles (Management) Act 2011* revised the sinking fund provisions by making the link between sinking fund plans and contributions to the sinking fund clearer. Sinking fund plans are now required to include estimates of amounts required each year to meet the ongoing maintenance and renewal of the common property and any other property held by the owner's corporation. The year-to-year total sinking fund amount set out in the sinking fund plan is the basis on which contributions are to be set each year.

The Bill amends the *Unit Titles (Management) Act 2011* to include examples regarding the operation of the sinking fund provisions to assist the reader to understand these requirements.

Victims of Crime Act 1994

Appointments to Victims Advisory Board

Section 22D of the *Victims of Crime Act 1994* sets out who must be appointed to the Victims Advisory Board.

Subsection 22D(1)(a) provides that the Attorney-General must appoint representatives from several different public sector entities to be members of the Victims Advisory Board. These entities are:

- the Director of Public Prosecutions;
- the Australian Federal Police;
- ACT courts;
- the administrative unit allocated responsibility for the administration of corrective services;
- the administrative unit allocated responsibility for the administration of youth justice; and
- the administrative unit allocated responsibility for restorative justice.

Non-public servant members are appointed under sections 22D(1)(b) – (d).

Part 19.3.3 of the *Legislation Act 2001* applies to appointments to the Victims Advisory Board other than public servant appointments. Under section 227(2)(a) of the *Legislation Act*, there is a requirement to consult with the relevant Legislative Assembly Standing Committee when making statutory appointments. The relevant Standing Committee for the Victims Advisory Board is the Standing Committee on Justice and Community Safety.

Under section 228(3) of the *Legislation Act*, the Standing Committee effectively has a maximum of 30 days to consider the appointment once consultation with the committee has begun.

Section 227(2)(a) removes the requirement to consult with the Standing Committee in circumstances in which the proposed statutory appointment is a public servant.

Members of administrative units and the DPP are public servants.

However the representative from the Australian Federal Police will be a Commonwealth Public Servant and therefore not exempt under section 227(2)(a).

Further, while the vast majority of the employees of ACT Courts are public servants, judicial officers are not. Consequently the consultation requirement in section 227(2)(a) will apply when judicial officers are proposed to be appointed to the Victims Advisory Board, and when any AFP member is appointed.

This has the effect of imposing a delay on the appointment of members of the AFP and the ACT judiciary to the Board with no benefit, when the majority of public sector members are not subject to this requirement.

Part 19.3.3 of the *Legislation Act 2001* was based on the *Statutory Appointments Act 1994*. Consideration of the debate on that original bill indicates that it was a reaction to a risk of partisan appointments. For this reason, an exemption for public servants was included as they are already subject to a merit process. The appointments to the Victims Advisory Board relating to the courts and the AFP are not susceptible to partisanship. Appointments can only be made from a limited group of people who are, as it were, preselected, whether by way of appointment to the AFP or to the judiciary or magistracy.

The JACS Bill inserts a provision that provides that the *Legislation Act 2001*, part 19.3.3 will not apply for the appointment of representatives from the entities listed in section 22D(1)(a) of the *Victims of Crime Act 1994* to the Victims Advisory Board, thereby removing the need to consult with the Standing Committee on Justice and Community Safety regarding these appointments.

Committee consultation will still be required for non-public servant appointments to the Victims Advisory Board under sections 22D(1)(b) – (d).

CLAUSE NOTES

Clause 1 Name of Act

This Act is the *Justice and Community Safety Legislation Amendment Act 2012 (No. 2)*.

Clause 2 Commencement

This clause provides for the commencement of the Act. The Act will commence the day after the Act's notification day.

Clause 3 Legislation amended-sch 1

This clause provides that the legislation mentioned in schedule 1 is amended by the Act.

Schedule 1 Legislation amended

Part 1.1 Civil Law (Wrongs) Act 2002

Clause 1.1 Schedule 4, section 4.4 heading

This clause substitutes a new heading for section 4.4 of schedule 4. This new heading reflects the change that the Professional Standards Council may now approve a scheme for limiting the occupational liability of members of an occupational association as opposed to recommending a scheme to the Minister for approval.

Clause 1.2 Schedule 4, section 4.4 (3)

This clause removes the elements of section 4.4 (3) that relate to the Professional Standards Council, recommending a scheme to the Minister for approval. The clause will provide that the Council may approve a scheme prepared under section 4.4 on the application of an occupational association.

Clause 1.3 Schedule 4, section 4.5 (1)

This clause removes the word 'recommending' and replaces it with 'approving' in section 4.5, consequential to the amendment made in clause 1.2 above.

Clause 1.4 Schedule 4, section 4.7 (1)

This clause removes the elements of section 4.7 (1) that relate to the Professional Standards Council recommending a scheme to the Minister for approval. Section 4.7 sets out the matters that the Council must take into account before recommending a scheme. This clause amends section 4.7 to provide that those items must be considered prior to the council's *approval*, consequential to the amendment made in clause 1.2 above.

Clause 1.5 Schedule 4, section 4.9 (1)

This clause substitutes a new section 4.9 (1) to provide that the Professional Standards Council must submit a scheme it approves to the Minister. The amendment to section 4.9 (1) reflects the new process that the Council will approve schemes and the Minister will give notice of approved schemes.

Clause 1.6 Schedule 4, section 4.9 (2)

The clause replaces ‘may’ with ‘must’ in section 4.9 (2) for consistency with the amendment made in clause 1.5 above.

Clause 1.7 Schedule 4, section 4.10 heading

This clause amends the heading of section 4.10 to more accurately reflect the content of the section.

Clause 1.8 Schedule 4, section 4.10

This clause amends section 4.10 to provide that the Minister must give notice of the Professional Standards Council’s approval of a scheme or, in the case of interstate schemes, the approval of a scheme by the appropriate council for the jurisdiction in which the scheme was prepared.

The clause provides that the approved scheme should be included in the notice and that the notice will be a disallowable instrument within the meaning of the *Legislation Act 2001*.

Clause 1.9 Schedule 4, section 4.11 (1)

This clause substitutes the current section 4.11 (1) with a new provision that sets out when schemes will commence. This clause sets out that when a Minister gives notice of an approved scheme under section 4.10, the scheme commences either on the date or time (after its notification day) provided for in the notice or, if the date or time is not provided for in the notice – 2 months after its notification day.

Clause 1.10 Schedule 4, section 4.12 (1)

This clause replaces references to schemes approved by the Minister in section 4.12 (1) with references to schemes included in a notice under section 4.10. This amendment is consequential to the amendment made in clause 1.2 above.

Clause 1.11 Schedule 4, section 4.14 (6)

This clause amends section 4.14 (6) to replace the reference to section 4.9 with a reference to section 4.9 (2). This change clarifies that only section 4.9 (2) will be disapplied for the purposes of any necessary changes, to the revocation of scheme by an instrument under section 4.14.

Clause 1.12 Schedule 4, section 4.14A (1)

This clause replaces references to schemes approved by the Minister in section 4.12 (1) with references to schemes included in a notice under section 4.10. This amendment is consequential to the amendment made in clause 1.2 above.

Clause 1.13 Schedule 4, section 4.14B (5)

This clause amends section 4.14B (5) to remove redundant words that describe the effect of section 4.9 (2).

Clause 1.14 Schedule 4, section 4.32 (1)

This clause amends section 4.32 (1) to remove the reference to the Professional Standards Council recommending a scheme, and replaces it with a reference to the Council approving a scheme. This amendment is consequential to the amendment made in clause 1.2 above

Clause 1.15 Schedule 4, section 4.37 (1) (a) (i)

This clause includes amendments to section 4.37 (1) (a) (i) to change the matters to which the council should give advice to the Minister about, consequential to the amendment made in clause 1.2 above. The clause amends the section to provide that the Professional Standards Council has the function of giving advice to the Minister about ‘giving notice of the approval of schemes, and their amendment and revocation’.

Clause 1.16 Schedule 4, section 4.50 (1) (b)

This clause amends section 4.50 (1) (b) to remove the reference to occupational associations seeking the Professional Standards Council’s recommendation to the Minister to approve a scheme, consequential to the amendment made in clause 1.2 above.

Part 1.2 Emergencies Act 2004

Clause 1.17 New section 122 (5) and (6)

This clause inserts new subsections (5) and (6) to section 122 of the *Emergencies Act 2004*. Subsection (5) provides that a person may light, maintain or use a fire in the open air on residential land for heating or to cook food or heat liquids if three safety precautions are all in place with regard to that fire.

The precautions that must be present for such fires to be allowed under this section are:

- the area around the place where the fire is to be lit maintained or used is cleared of flammable material for at least 3 metres in every direction; and
- the fire is under the control of a responsible adult; and
- an adequate means of putting out the fire is available for use.

Subsection (6) sets out that, for the purposes of this section, ‘residential land’ means land leased for a residential purpose.

This amendment provides that the *Emergencies Act 2004* is consistent with the *Environment Protection Regulation 2005* with regard to the lawfulness of such fires.

Clause 1.18 Section 123 (6)

This clause substitutes a new section 123 (6) of the Emergencies Act.

Section 123 currently sets out the requirements for and circumstances in which ‘burning off’ can take place.

Section 123(5) of the Emergencies Act currently provides that the Commissioner may give an approval for subsection (4) – that is, for an owner of land to burn material on any day (whether in or outside the bushfire season) if the commissioner considers it is reasonable because of the nature or small amount of the material to be burned.

Further, there is an additional approval that may be provided under section 123(3) to burn material on any day in the bushfire season if the owner does so in accordance with a written permit given by the commissioner under section 124.

These ‘authorisations’ give the potentially misleading impression that these forms of approval by the Commissioner provide a definitive authorisation to conduct burning off activities.

However, to engage in burning off type activities, an individual may also require an environmental authorisation under section 42 of the *Environment Protection Act 1997*.

Section 123(6) currently states that the duties of a person under the *Environment Protection Act 1997*, section 22 (General environmental duty) are not affected by section 123, but does not specifically alert readers to obligations under the Environment Protection Act, section 42. The new subsection makes clear that being authorised to conduct a burn off under section 123 of the Emergencies Act does not affect any obligation to hold an authorisation under section 42, or any other obligation under the Environment Protection Act.

To this end, the Bill also includes an amendment to section 42 of the Environment Protection Act to similarly clarify the concurrent requirement in section 123 of the Emergencies Act with regard to burning off.

Clause 1.19 New section 160A (3A)

This clause inserts a new subsection (3A) in section 160A of the Emergencies Act.

Section 160A sets out the powers of an emergency controller where a declaration of a state of emergency is in force. This new subsection sets out that the Chief Minister may provide the following directions in writing:

- the emergency controller is not to have a power (or part of a power) mentioned in subsection (2) (a range of powers that allow an emergency controller to ensure the safety of people and property during an emergency); or
- the emergency controller has another stated power.

This amendment brings section 160A into line with section 150C of the Emergencies Act, which sets out the powers of an emergency controller where an emergency controller has been appointed when a disaster has occurred but a state of emergency has not been declared.

Part 1.3 Environment Protection Act 1997

Clause 1.20 Schedule 1, section 1.2, item 28

This clause inserts a note stating that the *Emergencies Act 2004* contains an offence about lighting etc fire during a total fire ban – section 116. The note also sets out that the Act may also require the owner of land to obtain a permit or approval before lighting a fire on the land as provided for in sections 123 and 124 of the Emergencies Act.

This note clarifies the relationship between the separate requirements under each legislative scheme.

Part 1.4 Public Trustee Act 1985

Clause 1.21 New section 25 (8)

This clause inserts a new subsection (8) in section 25 of the *Public Trustee Act 1985*. Section 25 sets out the circumstances in which money, which is awarded by a court to a person under a disability can be directed to the Public Trustee.

Currently the definition of court only extends to Supreme Court, which essentially precludes money awarded to a person under a disability under to this provision, from being directed to the Public Trustee, if the money is awarded by the Magistrates Court or a tribunal.

New subsection (8) sets out that for the purposes of this section, ‘court’ will include the Magistrates Court and a tribunal.

This expanded definition will allow money awarded to a person under a disability by the Magistrates Court and a tribunal to be directed to the Public Trustee.

Clause 1.22 New section 25A (2) (c)

This clause inserts a new subsection (2) (c) in section 25A of the Public Trustee Act. Section 25A(1) of the Public Trustee Act currently provides that the Public Trustee is to hold all money or property accepted by the Public Trustee on behalf of a person under a disability pursuant to section 25 on trust for that person.

Section 25A(2) sets out the things that the Public Trustee may do with the money or property held on behalf of the person under a disability. This list is quite broad, and covers any payment or use of the money or property that the Public Trustee considers appropriate for the maintenance, education, advancement or benefit of the person or a dependant of the person.

However, this list does not specifically allow the Public Trustee to access the modern investment of superannuation. This amendment adds payment or giving of property to a superannuation fund on behalf of the person under a disability to the list of things that the

Public Trustee can do with money or property held by the Public Trustee on behalf of the person.

Clause 1.23 New section 25A (4)

This clause inserts a new subsection (4) in section 25A of the *Public Trustee Act 1985*. This clause is consequential on the amendment provided for in clause 1.21 and sets out that in this section, ‘superannuation fund’ will mean a complying superannuation fund for the *Income Tax Assessment Act 1997* (Cwlth).

Clause 1.24 Dictionary, note 2

This clause adds the term ‘tribunal’ to the terms in the dictionary, consequential on the amendment in clause 1.20.

Part 1.5 Unit Titles (Management) Act 2011

Clause 1.25 Section 82(2), new example

Section 82(2) requires that sinking fund plans include yearly estimates of expenditure.

This clause inserts an example into section 82(2) of the Act to assist the reader to understand the intended meaning of ‘expected sinking fund expenditure’ for each year in the sinking fund plan.

Clause 1.26 Clause 86, new example

Section 86 of the Act provides for the owners corporation to amend the sinking fund plan as needed to ensure that it reflects expected sinking fund expenditure.

This clause inserts an example into the section to assist the reader to understand the intention behind this provision.

Part 1.6 Victims of Crime Act 1994

Clause 1.27 New section 22D (4)

This clause inserts a new subsection (4) in section 22D of the *Victims of Crime Act 1994*. Section 22D sets out the composition of the Victims Advisory Board.

Subsection 22D(1)(a) provides that the Attorney-General must appoint representatives from several different entities to be members of the Victims Advisory Board. These public sector entities are:

- the Director of Public Prosecutions;
- the Australian Federal Police;
- ACT courts;
- the administrative unit allocated responsibility for the administration of corrective services;

- the administrative unit allocated responsibility for the administration of youth justice; and
- the administrative unit allocated responsibility for restorative justice.

Non-public sector appointments to the Victims Advisory Board are made under section 22D(1)(b) – (d).

As a statutory appointment, part 19.3.3 of the *Legislation Act 2001* applies to the appointments to the Victims Advisory Board.

Under section 227(2)(a) of part 19.3.3 of the Legislation Act, there is a requirement to consult with the relevant Legislative Assembly Standing Committee when making statutory appointments.

The new section 22D (4) sets out that the *Legislation Act 2001*, part 19.3.3 will not apply to the appointment of representatives from the entities listed in section 22D(1)(a) of the *Victims of Crime Act 1994* to the Victims Advisory Board, removing the need to consult with the Standing Committee on Justice and Community Safety regarding these appointments.

Part 19.3.3 already does not apply to members of the DPP and other administrative units. Nor does it apply to public servants appointed to represent the courts. However, without amendment the part does apply to appointments of judges, magistrates and members of the AFP to the Board. As the intention of part 19.3.3 is to avoid partisan appointments, and it is not possible to make partisan appointments when the pool to make selections is the courts and AFP, the part is disapplied.

Non-public sector appointments to the Victims Advisory Board under section 22D(1)(b) – (d) will still be subject to the Committee consultation requirement in part 19.3.3 of the Legislation Act.