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

COURTS AND OTHER JUSTICE LEGISLATION AMENDMENT BILL 2021

REVISED EXPLANATORY STATEMENT

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COURTS AND OTHER JUSTICE LEGISLATION AMENDMENT BILL 2021

The Bill is not a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

This explanatory statement relates to the *Courts and Other Justice Legislation Amendment Bill 2021* as presented to the 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 primarily includes a range of amendments which are intended to improve the efficiency of court and tribunal operations and processes, and technical amendments to clarify provisions which have caused uncertainty.

The Bill also includes key reforms to enhance access to justice for victims of financial abuse by substitute decision-makers by providing the ACT Civil and Administrative Tribunal (ACAT) with new powers to award certain remedies.

Furthermore, the Bill proposes reforms to other justice legislation to support the functions of the Public Trustee and Guardian (PTG) and the ACT Judicial Council.

The Bill contains amendments to the following laws:

- a. *ACT Civil and Administrative Tribunal Act 2008* (ACAT Act) to support the efficient operation of the ACAT, clarify wording of provisions, and make it easier for people to participate in ACAT processes;
- b. *Common Boundaries Act 1981* to simplify notice requirements in the ACAT in relation to applications for 'dividing fences' and to increase the efficiency of the ACAT in considering fence line determinations;
- c. *Coroners Act 1997* to remove confusion around powers to search for and remove a body to a place of post-mortem examination;
- d. *Judicial Commissions Act 1984* to expressly provide that referrals from the ACT Judicial Council to the ACT Integrity Commission in accordance with section 59 of the *Integrity Commission Act 2018* will not constitute an offence;

- e. *Magistrates Court Act 1930* to clarify that the *Magistrates Court (Magistrates Appointment Requirements) Determination 2009* does not apply to the appointment of an Acting Chief Magistrate;
- f. *Powers of Attorney Act 2006* and *Guardianship Management of Property Act 1991* to improve accessibility of redress for older persons experiencing financial abuse by providing the ACAT with the same powers as the ACT Supreme Court to award certain remedies for abuse of powers by substitute decision-makers;
- g. *Public Trustee and Guardian Act 1985* to give the Public Trustee and Guardian (PTG) the function of making necessary arrangements for the disposal of the remains of unclaimed bodies; and
- h. *Supreme Court Act 1933* to allow conditions of appointment for Acting Judges to be determined by the Executive, and to improve the framework for the completion of part-heard matters at the end of a judge's or associate judge's term of office.

CONSULTATION ON THE PROPOSED APPROACH

The proposed amendments are the result of consultation with and input from a range of stakeholders.

CONSISTENCY WITH HUMAN RIGHTS

ACT Civil and Administrative Tribunal Act 2008, section 23 and new section 47A

Section 23

Section 23 of the ACAT Act provides the tribunal with the ability to decide its own procedures when dealing with an application where no procedure is prescribed under the Act or an authorising law. The amendment to section 23 will allow the ACAT to dispense with an application of a provision of the rules to a particular proceeding on any conditions it considers appropriate. An order to dispense with a provision of the rules may be undertaken on application of a party, another person or on its own initiative.

The amendment engages the right to a fair hearing protected by section 21 of the HRA insofar as a tribunal may dispense with a procedure set out in the rules to the possible detriment of one or more parties before it. However, the measure may also promote the right to a fair hearing as it provides the ACAT with the procedural flexibility necessary to dispense with any procedure the application of which may cause an outcome contrary to the tribunal principles of natural justice and procedural fairness.

New section 47A

Section 44 of the ACAT Act currently provides the powers and procedures that the tribunal may utilise where a party fails to appear at a time set for the hearing of an application. The

section applies narrowly to a hearing of an application. However, failures to appear can occur in any tribunal event, from preliminary conferences, to mediations, to directions hearings. The tribunal principles contained in section 7 of the Act are constrained by the ACAT's inability to deal appropriately with instances of non-attendance in these other tribunal events. To alleviate this constraint, the Bill omits section 44 and substitutes it with new section 47A, which clearly sets out the procedure that the ACAT can follow if a party fails to appear at other tribunal events.

By broadening the procedures to all tribunal events, the measure engages the right to a fair hearing in section 21 of the *Human Rights Act 2004* (HR Act) insofar as a tribunal may dismiss proceedings or determine the matter in the absence of a party due to non-attendance. This amendment may also engage the right to equality in section 8 of the HR Act to the extent were to disproportionately impact on particular grounds of discrimination in practice (for example, those who experience language barriers).

However, as the measure requires ACAT to follow a clearly defined procedure in all events before it, such clarity can also promote the right to a fair hearing by ensuring all parties are aware of their rights and obligations throughout the process. Similarly, safeguards in relation to the tribunal's processes requiring procedural fairness ensure compatibility with human rights including the right to equality and non-discrimination.

Section 28 analysis

Even if there were a limitation on these rights by the amendments to the above sections, any limitation on these rights would be reasonable and demonstrably justified in accordance with section 28 of the HR Act. The measures seek to achieve the legitimate purpose of providing ACAT with powers to ensure that, in undertaking its role, it meets its objective of providing access to justice to the community that is simple, quick, inexpensive and informal under section 7(a) of the ACAT Act. The measures are rationally connected to this legitimate purpose as they allow ACAT to:

- tailor procedures to the circumstances of particular applications where doing so will ensure that natural justice and procedural fairness is preserved (section 23); and
- follow a defined procedure and to exercise flexible powers to appropriately deal with an application where a party is absent in a range of circumstances, including in applications involving vulnerable and disadvantaged parties (new section 47A).

The measures are proportionate to the legitimate purpose and the least restrictive measures available as ACAT must exercise its powers consistently with the ACAT principles identified in section 7 of the ACAT Act, including that natural justice and procedural fairness must be observed.

Common Boundaries Act 1981

The amendments to sections 8, 9 and 15 of the Common Boundaries Act address problems identified by ACAT, relating to applicants misunderstanding or failing to abide by the strict notice requirements in the Act. This restricts the Tribunal's ability to deal with the matter, even if both parties appear at a preliminary hearing and agree to the notice requirements being waived or altered. The amendments seek to increase flexibility and improve access to justice by allowing ACAT to waive compliance with notice requirements, including to accept certain documents as notice, to correct defects in a notice, and to allow applications to proceed in their usual manner as if notices were compliant.

The repeal of current sections 9 and 15 of the Common Boundaries Act removes restrictive and limiting provisions as to ACAT processes; processes which ACAT advised were impeding the swift and fair resolution of disputes in accordance with broader ACAT principles. The amendment seeks to provide flexibility for ACAT to determine the best method for resolving a dispute, with reference to the parties involved and the issues in dispute. The removal of these provisions therefore engages and promotes the right to fair hearing under section 21 of the HR Act. The intention of the amendment is to facilitate a fast resolution of the dispute to the benefit of the parties. This right to a fair hearing is promoted by increasing flexibility for ACAT to resolve disputes in a manner which is appropriate to the issue and parties of the dispute.

The amendment to section 11 of the Common Boundaries Act provides ACAT with the power to adjust the line for a fence being repaired in conjunction with the power to compel an occupier to repair a fence when a repair determination application is made. This amendment seeks to create efficiencies, streamline the processes and reduce costs for applicants. The amendment engages and may limit the right to privacy in section 12 of the HR Act, specifically the right not to have privacy, family, home or correspondence interfered with unlawfully or arbitrarily, by expanding ACAT's powers to make a new fence determination when assessing a dispute for a repair determination. The Act already provides ACAT with the power to determine a new fence line when considering a new fence determination under section 4 and 10. The amendment allows this determination to also be made when assessing a repair determination under section 5 and 11. This limitation is reasonable and demonstrably justified under section 28 of the HR Act, as it seeks to achieve the legitimate purpose of creating time and cost efficiencies for parties by dealing with two related issues in the one application, rather than requiring two applications and hearing processes to occur. This measure is rationally connected to this legitimate aim and is a reasonable and proportionate method to achieve the aim of increasing time and cost efficiencies for parties.

Judicial Commissions Act 1994

Under section 59 of the *Integrity Commission Act 2018*, the Judicial Council is an entity that may refer corruption complaints to the ACT Integrity Commission. Section 28 of the Judicial Commissions Act provides that it is an offence for a current or past member of the Council to divulge information acquired by them by virtue of their role with the Council.

The amendment to the Judicial Commissions Act clarifies that the Council may refer corruption complaints to the Integrity Commission under section 59 of the Integrity Commission Act without committing an offence under section 28 of the Judicial Commissions Act.

By permitting disclosure of potentially personal or prejudicial information between entities, the amendment engages and may limit the right to the protection of privacy and reputation in section 12 of the HR Act. Under the *Integrity Commission Act* there are certain exceptions to the common law privileges against self-incrimination and the Integrity Commission has a range of evidence gathering powers. Accordingly, the provision of prejudicial information to the Integrity Commission in this context may engage the right to a fair trial in section 21, and the rights in criminal proceedings outlined in section 22 of the HR Act. However, any limitation is reasonable and demonstrably justified under section 28 of the HR Act as it has the legitimate purpose of clarifying that an entity authorised by law to refer complaints to the prescribed investigative body is able to do so without concern that they are committing an offence. This supports the overall legitimate objective of ensuring that issues of potential corruption or misconduct are referred appropriately. This measure is rationally connected to this legitimate aim, as the clarification provided by this amendment will ensure that oversight bodies are able to work collaboratively and comprehensively to address complaints, as intended by the legislature. In relation to the proportionality of the limitations, the *Integrity Commission Act* has a range of safeguards including use and derivative use immunities in respect of self-incrimination and restrictions regarding use of information.

Powers of Attorney Act 2006 and Guardianship Management of Property Act 1991

The amendments to the POA Act and GMP Act which provide ACAT with the same powers as the ACT Supreme Court to award certain relief or equitable remedies for abuse of powers by substitute decision-makers, engages and promotes the right to a fair hearing in section 21 of the HR Act.

Currently, there are limited options for principals of enduring powers of attorney or protected persons subject to a guardian or financial management orders to seek redress from their attorneys, guardians and managers. These amendments promote the right to a fair hearing by providing a more accessible, less complex and less costly alternative to seeking redress through the ACT Supreme Court.

Public Trustee and Guardian Act 1985

The amendment to the PTG Act provides the PTG with the power to dispose of the remains of unclaimed bodies and the ability to investigate and administer the deceased person's estate, as necessary. Human rights law generally only apply to a person while they are living and this amendment only affects the process of disposing of the person's remains after death. However, the rights of other surviving members of the deceased's family or kinship group may be affected.

The amendments engage and may limit the right to freedom of thought, conscience, religion and belief under section 14 of the HR Act, as well as the cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities under section 27 of the HR Act. The amendments may limit those rights in relation to the surviving members of the deceased person's estate depending on the method of disposal of the unclaimed body or administration of the deceased's estate.

Any limitation is reasonable and demonstrably justified under section 28 of the HR Act, as the limitation has the legitimate purpose of enabling for the appropriate disposal of unclaimed bodies. The limitation is rationally connected (that is, effective to achieve) this purpose by providing lawful authority to the Public Trustee and Guardian to undertake this function. The amendments are proportionate to the legitimate purpose, as the rights engaged under the HR Act are restricted only to circumstances where the next of kin or executor are unknown, unable to be located, or unwilling to participate in the disposal of the body or administration of the estate. Further, guidelines made by disallowable instrument, empowered by this amendment, will facilitate the disposal of the person's body in a respectful way, and, where possible, in a manner consistent with the cultural or religious beliefs of both the deceased person, and of any next of kin or family that is identified but is unwilling or unable to make funeral arrangements.

Supreme Court Act 1933

Section 60A of the Supreme Court Act provides that where a judge or the associate judge retires at a time where proceedings are being heard by the judge and have not been finally determined, they may continue to hold office for the purposes of determining those proceedings.

The Bill replaces section 60A to clarify the process and conditions relating to instances where a judicial officer ceases to hold office before a matter before them has been finally determined. Revised section 60A engages and promotes the right to a fair hearing at section 21 of the HR Act as it addresses the concern that under the current provision there is no incentive for judicial officers to finalise matters pending before them prior to cessation of office, thereby creating a possibility that justice may be delayed in these cases.

The revised provision also engages the right to work and work-related rights, specifically the right to the enjoyment of just and favourable conditions of work in section 27B of the HR Act. It does so by making clear that in enabling judicial officers to complete minor unfinished aspects of a case, such work does not attract additional remuneration. However, the right is unlikely to be limited in this case as it does not impact upon the judicial pension that the relevant judicial officer would receive upon retirement and allows for the possibility of retired judicial officers being appointed as Acting Judges where more substantial matters remain uncompleted or where the Court may require additional judicial resourcing. Even if there were to be a limitation, any limitation on this right would be reasonable and demonstrably justified in accordance with section 28 of the HR Act. The measure seeks to achieve the legitimate purpose of ensuring access to justice is not delayed and that the right to a fair hearing is maintained, by encouraging judicial officers nearing cessation of office to finalise their case load ahead of their retirement to ensure matters before them are considered in a timely fashion. The provision is reasonable and proportionate because, as noted above, it does not impact on the judicial pension that the relevant judicial officer would receive upon retirement and allows for the possibility of retired judicial officers being appointed as Acting Judges where more substantial matters remain uncompleted or where the Court may require additional judicial resourcing. It is the least restrictive measure available to achieve the legitimate aim as such appointments would receive the remuneration, entitlements and allowances applicable to Acting Judges under the Supreme Court Act and *Remuneration Tribunal Act 1975*.

CLAUSE NOTES

Part 1 Preliminary

Clause 1 Name of Act

This is a technical clause setting out the name of the Act as the *Courts and Other Justice Legislation Amendment Act 2021* (the Act).

Clause 2 Commencement

This clause provides information about the commencement of different provisions in the Act.

Part 5 (*Guardianship and Management of Property Act 1991*) and Part 8 (*Powers of Attorney Act 2006*) commence 3 months after the Act's notification day. Part 9 (*Public Trustee and Guardian Act 1985*) will commence on a day fixed by the Minister by written notice. The Legislation Act, section 79, applies to this part. Accordingly, if a provision has not commenced within six months from the notification day, it will automatically commence on the first day after that six-month period.

All other provisions in this Act will commence on the 7th day after the Act's notification day.

Clause 3 Legislation amended

This clause outlines the legislation that is amended by the Act. The Act amends the following:

- *ACT Civil and Administrative Tribunal Act 2008*
- *Common Boundaries Act 1981*
- *Coroners Act 1997*
- *Guardianship and Management of Property Act 1991*
- *Judicial Commissions Act 1994*
- *Magistrates Court Act 1930*
- *Powers of Attorney Act 2006*
- *Public Trustee and Guardian Act 1985*
- *Supreme Court Act 1933*.

Part 2 ACT Civil and Administrative Tribunal Act 2008

Clause 4 Section 7

Tribunal Principles

This clause substitutes section 7 of the ACAT Act to amend the principles the tribunal must have regard to in exercising its functions. The clause inserts a requirement for the tribunal to facilitate the resolution of issues between parties in such a way that the cost to the

parties and the tribunal is proportionate to the importance and complexity of the subject matter of the proceedings. This provision makes clear that the tribunal has the flexibility to have different procedures and case management processes in place if a matter becomes more or less complex as it progresses to ensure that other tribunal principles continue to be observed.

Duties of parties, authorised representatives and others

This clause also inserts new section 7A to place a duty on parties and their authorised representatives to give effect to the objectives and principles of the ACAT Act at section 7. This provision provides clear expectations of co-operation and engagement on parties, their representatives and other anyone else accompanying parties or allowed to participate in a proceeding in a manner consistent with the tribunal's objects and principles. The intention is to encourage parties to focus on the real issue in dispute and present their case at hearing effectively and avoiding delay wherever possible.

Clause 5 Section 23

Section 23 of the ACAT Act provides the tribunal with the ability to decide its own procedures when dealing with an application where no procedure is proscribed under the Act or an authorising law. This clause amends section 23 to allow the tribunal to dispense with an application of a provision of the rules to a particular proceeding on any conditions it considers appropriate. An order to dispense with a provision of the rules may be undertaken on application of a party, another person or on its own initiative.

This amendment will allow the ACAT to make an order that a rule does not apply to a particular application. The ability to depart from the Rules provides procedural flexibility to the ACAT, recognising that the breadth of its jurisdiction and the nature of disputes before it may, from time to time, require a different procedural approach.

Clause 6 Mediation for applications

Section 35 (1)

This clause amends section 35 (1) of the ACAT Act to ensure the tribunal has the power to refer matters to mediation at any time before an application is determined.

Clause 7 Section 35 (2) (a)

This clause is a consequential amendment resulting from the amendment of section 35 (1).

Clause 8 Procedure in absence of party

Section 44

This clause omits section 44 of the ACAT Act, which is being replaced with the new section 47A (clause 9).

Clause 9 New section 47A

This clause inserts a new section 47A in to the ACAT Act to replace current section 44 (Procedure in absence of party).

Section 44 of the ACAT Act sets out the procedure the tribunal may take where a party fails to appear at a time set for a hearing of an application. New section 47A will allow the tribunal to take steps where a party fails to appear at any tribunal event, not just a hearing.

A note has been included to provide that, in exercising a power under section 47A, the procedures of the tribunal must be consistent with tribunal principles set out at section 7 of the ACAT Act.

Clause 10 Interim orders

Section 53 (1)

This clause substitutes subsection 53 (1) to allow the tribunal to make interim orders at any stage before an application is finalised. This expands the tribunal's current power which is limited to the ability to make interim orders *before the hearing* of an application.

Clause 11 Section 53 (3)

This clause amends section 53 (3) of the ACAT Act to provide that an interim order will remain in force until the tribunal orders otherwise or the application is finalised in the tribunal.

Clause 12 Decisions without hearing

New section 54 (1A)

This clause inserts new section 54 (1A) into the ACAT Act to provide that the tribunal may decide an application based on documents and in the absence of the parties. The tribunal may decide this on application by a party or on its own initiative.

Clause 13 Section 54 (1)

This clause amends section 54 (1) of the ACAT Act to remove the requirement that notice to parties of a decision made under new section 54 (1A) be in writing. This amendment provides the tribunal with alternate sources of notice, including electronic. This amendment aligns with the tribunal principles of simplicity, speed, and informality.

Clause 14 Section 54 (1) (a)

This clause amends section 54 (1) (a) to reflect amendments made in new section 54 (1A) that a decision without hearing is a decision made by the tribunal based on documents and in the absence of the parties.

Clause 15 Powers of the tribunal if parties reach agreement

Section 55 (1) (b)

This clause amends section 55 (1) (b) to remove the requirement that agreed terms be reduced to writing and signed by the parties. This amendment will reflect current tribunal practices and is in line with the tribunal principles of simple, efficient processes. The amended provision will allow for agreed terms to be recorded, but not necessarily in writing, and lodged with the tribunal.

Clause 16 Other actions by tribunal

Section 56 (c) (i), note

This is a technical clause to reflect the substitution of section 44 with new section 47A.

Clause 17 Section 56 (d), new example

This clause inserts a new example under section 56 (d) of the ACAT Act to show that the power to take any other action in relation to an application includes an action to stay an order pending an appeal.

Clause 18 Section 82

Rule 91 of the ACAT Rules current sets out the powers of the tribunal to hear appeals. This rule purports to confer jurisdiction and is more appropriately placed within the Act. This clause substitutes section 82 of the ACAT Act with one that mirrors rule 91 so it is located within the authorising legislation.

Part 3 Common Boundaries Act 1981

Clause 19 Section 4 (3) (b) and section 5 (3) (b)

The amendments to section 4 (3) (b) and section 5 (3) (b) are technical amendments to ensure the time period is stated in terms of a specific number of days, rather than using the term “month”. The amendment replaces the words “1 month has”, with the words “30 days have”. This seeks to improve clarity in determining the required length of notice, with “30 days” being more precise and consistent in application than “1 month”, noting the variable numbers of days in any given month.

Clause 20 Application to ACAT – repair cost determination

Section 6(4)(b)

The amendment to section 6 (4) (b) corrects a grammatical error in the Act by replacing “14 days *has*” with “14 days *have*” (emphasis added).

Clause 21 Parties to applications

New section 8(e)

The new clause at section 8 (e) identifies the parties to an application where new section 9 has been applied. That is, where ACAT makes an order pursuant to section 9 to waive compliance with the notice requirements, the applicant is the applicant who made the application to ACAT under section 9, and the respondent is either:

- A. the person given a document under section 9 (2) (a), (b) or (c), or
- B. the person declared by order under section 9 (2) (d).

This ensures that ACAT can appropriately determine who the parties to an application are, in circumstances where notice requirements have been varied under the powers in section 9.

Clause 22 Section 9

This clause replaces current section 9, which set out how ACAT can deal with applications and variations. These rules were rigid and out of step with other Tribunal processes as determined by the *ACT Civil and Administrative Tribunal Act 2008* (ACAT Act). The removal of these rules provides ACAT with flexibility to determine, in accordance with ACAT processes under the ACAT Act, how and when to proceed with matters relating to dividing fences. For example, the removal of these rules means that ACAT can now decide to proceed to a hearing by consent of both parties. This reflects ACAT processes in similar jurisdictions, which are governed by the ACAT Act.

Section 9 has been replaced with new provisions which provide ACAT with discretion to waive compliance with relevant notice requirements, including the power to accept certain documents as notice, to correct defects in a notice, and to deal with the application in its usual manner as if notices were compliant. It also provides ACAT with the power to declare who the respondent is by order, consistent with new section 8 (e) (ii) (B).

The amendments to section 9 address problems identified by ACAT with applicants’ misunderstanding or failing to comply with the notice requirements, which in many cases results in the application being delayed or dismissed. The amendments seek to increase the flexibility of the process for applicants, by giving ACAT the power to waive compliance with notice requirements, in certain circumstances, to prevent applications being dismissed on

the basis of non-compliance with a notice requirement, if the purpose of the notice requirement has otherwise been served. For example, an applicant may have had a number of in-person discussions with the respondent about the dispute, including providing all relevant information for the dispute, so that the respondent would not otherwise be disadvantaged if the formal notice requirements are not met.

Clause 23 ACAT powers – repair determination

New section 11 (3) (ba)

This new section allows for ACAT to determine the line where a new fence should be erected when ACAT is holding a hearing on an application for a repair determination.

Section 4 allows an applicant to seek a ‘new fence determination’ from ACAT for the purpose of erecting a fence where no fence currently exists between adjoining land. Under section 10, ACAT may determine the line where the fence should be erected. However, where a fence already exists and an applicant seeks a determination under section 5 for a repair of the fence, ACAT could not make a determination on the line of the fence under section 11. This would result in the need for multiple applications to ACAT regarding the one fence and with reference to the same parties.

The policy intent of new section 11 (3) (ba) is to rectify this issue, as the existing legislative framework creates cost and time inefficiencies for the parties. Under the amended section, the process is streamlined as ACAT can deal with both issues in one application. In line with this policy intent, it is anticipated that ACAT will only use this power where there is a dispute involving the line of the fence in an application for a repair determination, that is, where a fence is already erected. It is not anticipated that ACAT will use this power in a repair determination where there is no dispute on the line of the fence. That is, the parties to a repair determination application will be able to identify whether there is also a dispute as to the line of the fence, and if so, both issues can be dealt with by ACAT concurrently.

Clause 24 Dealing with variations

Section 15

This clause repeals section 15, which set out the process for ACAT when dealing with variations to determinations. Consistent with the removal of section 9, the rules in section 15 were unduly restrictive and did not always facilitate the flexible or timely resolution of issues in a manner consistent with the aims and objectives of ACAT. The removal of these rules provides ACAT with flexibility to determine how and when to proceed with matters relating to variations of determinations for dividing fences, as long as those processes are authorised by the ACAT Act. This change is consistent with the means for determining ACAT processes in similar jurisdictions.

Part 4 Coroners Act 1997

Clause 25 Removal of body to place of post-mortem examination

Section 26

This clause omits section 26. Section 26 (1) of the Coroners Act currently provides that if the coroner reasonably believes that the person died in circumstances in relation to which the coroner has jurisdiction to hold an inquest, the coroner may issue a warrant to a police officer to take and remove a body to a place for post-mortem examination. The Coroners Court advises that, as a matter of practice, police exercise their common law powers to move a body to the Forensic Medical Centre (FMC) for post-mortem examination and as a result this provision is not utilised.

Section 26 (2) provides police named in a warrant with the powers to search for and remove the body of a person whom the coroner reasonably suspects has died in circumstances in relation to which the coroner has jurisdiction to hold an inquest. This amendment has been consequentially repealed as the provision is not used in practice and similar search powers are available under section 68C of the Coroners Act.

Part 5 Guardianship and Management of Property Act 1991

Clause 26 New subdivision 2.2.1 heading

This clause inserts a new subdivision heading “Subdivision 2.2.1 General”. The existing sections 16, 17, 18 and 19 will fall under this heading.

Clause 27 New subdivision 2.2.2

This clause inserts a new subdivision heading “Subdivision 2.2.2 If guardians or manager do not comply with Act”. This clause also inserts new sections 19A, 19B and 19C under this new subheading.

New section 19A is intended to provide ACAT with the same powers as the Supreme Court to award certain remedies for abuse of powers by a guardian or manager for a protected person under the GMP Act.

Section 19A (1) states that the ACAT may order a guardian or manager to pay an amount to the protected person, or their estate if deceased, to compensate for a loss caused or to account for any profits they have made because of their failure in this substitute decision-making role in exercising a power, or exercising a purported power, under the GMP Act. New section 19A (1) is intended to provide the ACAT with the same powers as the Supreme Court to award certain remedies for abuse of powers by a guardian or manager for a protected person under the GMP Act.

Section 19A (2) specifies that the ACAT can only make an order for either compensation for a loss caused, or to account for any profits the guardian or manager has made, because of their failure in this substitute decision-making role in exercising a power or purported power under the GMP Act. The ACAT cannot make an order for both compensation and to account for any profits. The intention of this insertion is to mirror the new section 50A (2) of the POA Act under clause 35, but in relation to abuse of power by a guardian or manager.

The intention of section 19A (3) is to make clear that ACAT's new powers under section 19A (1) may apply regardless of whether the guardian or manager is convicted of an offence in relation to their abuse of power. The intention of this provision is to reflect section 50 (2) of the POA Act, but in relation to abuse of power by a guardian or manager and ACAT's powers. It is also intended to reflect the new section 50A (3) under clause 35, but in relation to abuse of power by a guardian or manager.

The intention of section 19A (4) is to make it clear that the ACAT may award certain remedies for abuse of powers by a guardian or manager for a protected person under the GMP Act, either on their own initiative or application by an interested person.

Section 19A (5) requires that if the protected person or the guardian or manager dies, any application to the ACAT to award certain remedies for abuse of powers by a guardian or manager for a protected person must be made within a certain timeframe. The intention of this provision is to mirror sections 50 (3) and 50 (4) of the POA Act.

Section 19B requires payment of compensation to be considered in assessing damages in the civil proceeding when compensation for the failure of a guardian or manager to comply with the GMP Act is paid in accordance with an order under section 19A and a later civil proceeding is brought in relation to the same failure. The intention of this provision is to mirror section 51 of the POA Act, but in relation to awards by the ACAT for abuse of power by a guardian or manager under the GMP Act.

Sections 19C (1) and 19C (2) provide that if an application has been for alleged abuse of power by a guardian or manager, the court may find that the guardian or manager is not personally liable if found to have "acted honestly and reasonably and ought fairly to be excused for the contravention". Section 19C (3) provides that "in deciding whether the guardian or manager should be relieved of liability, the court must consider the extent to which the guardian or manager has acted consistently with the decision-making principles". The intention of this clause is to mirror section 52 of the POA Act. This insertion is consistent with the purpose of the Bill in providing the ACAT the same powers as the Supreme Court in awarding certain remedies for abuse of power by substitute decision makers.

The intention of section 19D is to provide ACAT with a clear power to refer applications made for certain remedies for abuse of powers by an attorney under section 50A of the Act to the Supreme Court. A note outlining that the referral powers of the ACAT to the Supreme

Court are outlined under section 83 and 84 of the ACAT Act, has been included to provide further clarity.

Clause 28 Section 32JB (2) and 37 (2)

This clause omits section 32JB (2) and 37 (2) of the GMP Act. Both these sections define “interested person” in relation to section 32JB and 37, sections within part 3 of the GMP Act. The intent of the clause is for the term “interested persons” to apply to the entire GMP Act and not just sections 32JB and 37. A new definition of “interested persons” is substituted in the Dictionary section under clause 30.

Clause 29 Dictionary, note 2

This clause inserts “Supreme Court” under Note 2 of the Dictionary. The intention of this clause is to outline that the definition of “Supreme Court” can be found in the *Legislation Act 2001*.

Clause 30 Dictionary, definition of *interested person*

This clause substitutes the definition of interested persons which specifically relates to part 3 of the GMP Act. The definition defines “interested persons” as defined under section 74 of the POA Act. The intent of the clause is for the term “interested persons” to apply to the entire GMP Act and not just sections 32JB and 37, under part 3.

Part 6 Judicial Commissions Act 1994

Clause 31 Offence—disclosure of information by members etc
Section 28 (2)

This clause amends section 28 (2) to provide clarity to members of the ACT Judicial Council so that they may discharge their obligations under the *Judicial Commissions Act 1994* and the *Integrity Commission Act 2018*. Section 28 of the Act provides that it is an offence for a current or past member of the Council to divulge information acquired to them by virtue of their role with the Council. This provision may be construed as being at odds with Council members obligation to refer complaints about ACT judicial officers to the Integrity Commission.

Accordingly, this clause amends section 28 (2) to ensure the offence under section 28 does not apply to the referral of matters from the Council to the Commission done in accordance with section 59 of the Integrity Commission Act.

Part 7 Magistrates Court Act 1930

Clause 32 Acting Chief Magistrate

New section 7E (3)

Section 7E of the Magistrates Court Act provides that the Executive may appoint a magistrate to act as the Chief Magistrate.

Section 209 (2) of the Legislation Act provides that the power to appoint a person to act is exercisable in the same way, and subject to the same conditions, as the power to make an appointment.

This clause inserts new section 7E (3) to clarify that despite section 209 (2) of the *Legislation Act 2001*, the determination setting out the criteria and process for appointment as a magistrate in section 7AA of the Magistrates Court Act does not apply to the appointment of an acting Chief Magistrate.

Part 8 Powers of Attorney Act 2006

Clause 33 Section 50 heading

This clause substitutes section 50 heading “Compensation for failure to comply with Act” with new heading “Compensation for failure to comply with Act – Supreme Court Order”.

Clause 34 Section 50 (1)

This clause substitutes “exercise of a power” with “exercise, or purported exercise, of a power”. This is a consequential amendment to the new section 50A of the POA Act, outlined in clause 35.

The intention of this clause is to make it clear that the Supreme Court’s power to award certain remedies for abuse of powers by an attorney under section 50, is the same as the new powers of the ACAT. It is also intended to clarify that both the ACAT and the Supreme Court have the power to award certain remedies for abuse of powers by an attorney, in circumstances where an attorney has not only exercised a power under the POA Act, but also when the attorney has done an action in excess of their power under the POA Act. This is not an expansion of the Supreme Court’s current powers, however, does make this power explicit in the POA Act.

Clause 35 New section 50A

This clause inserts new section 50A. This insertion is intended to provide the ACAT with the same powers as the Supreme Court to award certain remedies for abuse of powers by an attorney for a principal under the POA Act.

Section 50A (1) states that the ACAT may order an attorney to pay an amount to the principal, or their estate if deceased, to compensate for a loss caused or to account for any profits they have made because of their failure in this substitute decision-making role in exercising a power, or exercising a purported power, under the POA Act. New section 50A (1) is intended to provide the ACAT with the same powers as the Supreme Court to award certain remedies for abuse of powers by an attorney for a principal under the POA Act.

Section 50A (2) specifies that the ACAT can only make an order to either, compensation for a loss caused, or to account for any profits the attorney has made, because of their failure in this substitute decision-making role in exercising a power or purported power under the POA Act. The ACAT cannot make an order for both compensation and to account for any profits. The intention of this insertion is to mirror the new section 19A (2) of the GMP Act under clause 27, but in relation to abuse of power by an attorney.

The intention of section 50A (3) is to make clear that ACAT's new powers under section 50A (1) may apply regardless of whether the attorney is convicted of an offence in relation to their abuse of power. The intention of this provision is to reflect the current section 50 (2) of the POA Act, but in relation to the ACAT's powers and not the Supreme Courts powers.

The intention of section 50A (4) is to make it clear that the ACAT may award certain remedies for abuse of powers by an attorney under the POA Act, either on their own initiative or application by an interested person.

Section 50A (5) requires that if the principal or the attorney dies, any application to the ACAT to award certain remedies for abuse of powers by an attorney for a principal must be made within a certain timeframe. The intention of this provision is to mirror sections 50 (3) and 50 (4) of the POA Act, but in relation to the ACAT and not the Supreme Court's powers.

Section 50A (6) indicates that the definition of "interested persons" can be found at section 75 of the POA Act.

Clause 36 Section 52 heading

This clause substitutes section 52 heading "Relief from personal liability by court" with new heading "Relief from personal liability". The intention of this clause is to reflect the changes under clause 37 that broaden section 52 to apply to both the Supreme Court and the ACAT.

Clause 37 New section 52 (4)

This clause inserts a new section 52 (4). This section specifies that for section 52 of the POA Act, "court" includes the ACAT.

Section 52 provides that if an application has been for alleged abuse of power by an attorney, the court may find that the attorney is not personally liable if found to have "acted honestly and reasonably and ought fairly to be excused for the contravention". Section 52

also provides that “if the attorney is an attorney under an enduring power of attorney, in deciding whether the attorney should be relieved of liability, the court must consider the extent to which the attorney has acted consistently with the general principles”.

The intention of this clause is for section 52 to apply to both applications to the Supreme Court and the ACAT, where the principal is seeking remedy or relief for misconduct by their attorney under section 50 and new section 50A of the POA Act. Clause 37 is consistent with the purpose of the Bill in providing the ACAT with the same powers as the Supreme Court in awarding certain remedies for abuse of power by substitute decision makers.

Clause 38 New part 7.2

Clause 38 inserts new part ‘Part 7.2 ACAT referral’ containing new section 75.

The intention of this part is to provide ACAT with a clear power to refer applications made for certain remedies for abuse of powers by an attorney under section 50A of the Act to the Supreme Court. A note outlining that the referral powers of the ACAT to the Supreme Court are outlined under section 83 and 84 of the ACAT Act, has been included to provide further clarity.

Clause 39 Dictionary, note 2

This clause inserts “Supreme Court” under Note 2 of the Dictionary. The intention of this clause is to outline that the definition of “Supreme Court” can be found in the *Legislation Act 2001*.

Part 9 Public Trustee and Guardian Act 1985

Clause 40 Capacities in which public trustee and guardian may act

New section 13 (1) (i)

This clause introduces a new paragraph into section 13 (1) which adds a function to the roles that the public trustee and guardian can be appointed to act under. The new function is described as “the person responsible for the disposal of the body of an unclaimed deceased person”. To date, there has been no ACT agency with specific authority to exercise powers required to take on the function of disposing of unclaimed bodies in the Territory. The inclusion of this clause provides clear legislative authority for the public trustee and guardian to take on this role. The legislature has determined that the public trustee and guardian is the most appropriate agency to exercise the function.

The term “unclaimed deceased person” has been defined in new section 13A. The term includes a requirement that reasonable inquiries have been undertaken to locate a next of kin or executor of the person’s estate, and either no next of kin or executor have been located, or the next of kin or executor are unable or unwilling to make funeral arrangements

for the person. In these circumstances, the PTG will have the discretion to assume responsibility for disposal of the person's remains.

Clause 41 New section 13A

The insertion of new section 13A clarifies the scope of the new role in section 13 (1) (i). Section 13A (2) (a) allows the public trustee and guardian, when acting as a person responsible for the disposal of the body of an unclaimed deceased person, to:

- make arrangements for disposal of the body of the unclaimed deceased person;
- investigate whether the unclaimed deceased person has a solvent estate; and
- administer the unclaimed deceased person's estate.

Section 13A (2) (b) clarifies that the public trustee and guardian, when acting in the role outlined in 13 (1) (i), is not responsible for arranging the removal of the unclaimed deceased person's body from the place where the person died. This is because there are other, more appropriately equipped entities who perform this function. The public trustee and guardian will assume responsibility for the body once it is located in an appropriate holding facility, such as a morgue or hospital.

The note under section 13A (2) clarifies that the public trustee and guardian will be responsible for the person's estate from the time the person dies until someone is appointed as administrator of the estate or a grant of representation if made, consistent with section 38A of the Administration Act.

Section 13A (3) and (4) are relevant if the Minister makes a guideline in relation to section 13A, and require the public trustee and guardian to comply with the guideline, which will be a disallowable instrument.

Section 13A (5) provides a definition for an unclaimed deceased person, which is a person who satisfies all of the following criteria:

- a) whose death is registered under the *Births, Deaths and Marriages Registration Act 1997*
- b) the executor of whose estate, or whose next of kin, either:
 - i. has not been found, despite reasonable inquiries by the police, or
 - ii. is unwilling or unable to make funeral arrangements for the person.
- c) whose body
 - i. is held at a place in the ACT, and
 - ii. has not been claimed by anyone who has a right to claim the body under the law of another State.

The scope of the definition in subsection 13A (5) is intended to include the bodies of people whose deaths occur in the ACT, and deaths which occur outside the ACT, in particular circumstances. For example, where a person dies in New South Wales, the registration of the person's death occurs in the ACT and the body is held in an ACT facility, it may be

appropriate for the public trustee and guardian to assume responsibility, should the person's body be unclaimed. The section is not intended to prevent another State, such as New South Wales, from claiming the body and moving it into New South Wales facility.

Part 10 Supreme Court Act 1933

Clause 42 Section 37V

This clause amends section 37V of the Supreme Court Act to provide that the Executive may decide the conditions of appointment for acting judges, subject to a provision under the Supreme Court Act and any determination made by the ACT Remuneration Tribunal.

The provision provides flexibility to the Executive to determine conditions where the Supreme Court Act or the *Remuneration Tribunal Act 1995* is silent.

A determination made by the Executive under this section would apply to an acting judge to the extent that it did not diminish the remuneration or allowances of a person holding this office prior to the commencement of the Bill for the remainder of their term of appointment. Current section 37V provides that acting judges are entitled to the same entitlements, other than leave or pension, as resident judges. New section 37V effectively repeals current section 37V. Section 84 (Saving of repealed and amended laws) of the *Legislation Act 2001* makes clear that the amendment or repeal of a law does not affect 'an existing right, privilege or liability acquired, accrued or incurred under the law' (see s 84 (1) (c)). Section 84 operates to preserve the rights and privileges that current acting judge appointees have accrued under current section 37V and their instruments of appointment.

Clause 43 Section 41B

This clause amends section 41B of the Supreme Court Act to clarify that the Executive may determine the masters' entitlements and allowances subject to the Supreme Court Act and any determination made by the ACT Remuneration Tribunal. The provision is intended to make clear that any determination made under the section is subject to any determination made under the Remuneration Tribunal Act.

Clause 44 Section 60A

This clause replaces section 60A of the Supreme Court Act to clarify the process and conditions relating to instances where a judicial officer ceases to hold office before a matter before them has been finally determined.

This provision is intended provides judges who have ceased to hold office with the power to complete matters that were part-heard or had a pending determination or decision when their appointment or commission ceased.

The intent behind this amendment is to encourage judicial officers approaching the end of their term to complete any outstanding matters as soon as possible. The proposed provision

is similar to section 81GA of the *Constitution Act 1975 (Vic)*. The provision enables judicial officers to complete minor unfinished aspects of a case and makes clear that such work does not attract remuneration. If more substantial matters remain uncompleted, it would be possible for the judicial officer, if eligible, to be appointed as an Acting Judge under section 4B of the Act and thereby receive the remuneration, entitlements, and allowances of an Acting Judge.

The clause provides that the judicial officer is taken to continue to hold office, only for the purposes of determining the proceeding and that they are taken to have ceased holding office when the matter is finally determined. A judge acting in the capacity provided by section 60A cannot commence new matters under this section.