

2021

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

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2021

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by
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Attorney-General**

JUSTICE AND COMMUNITY SAFETY 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 *Justice and Community Safety Legislation Amendment Bill 2021* as presented to the Legislative Assembly. It has been prepared 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 is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill.

OVERVIEW OF THE BILL

The Bill is an omnibus bill which amends a range of legislation, primarily in the Attorney-General's portfolio, including:

- *Administration and Probate Act 1929*;
- *Births, Deaths and Marriages Registration Act 1997*;
- *Crimes (Assumed Identities) Act 2009*;
- *Crimes (Controlled Operations) Act 2008*;
- *Crimes (Protection of Witness Identity) Act 2011*;
- *Crimes (Surveillance Devices) Act 2010*;
- *Family Provision Act 1969*;
- *Freedom of Information Act 2016*;
- *Guardianship and Management of Property Act 1991*;
- *Land Titles Act 1925*;
- *Legal Aid Act 1977*;
- *Liquor Act 2010*;
- *Magistrates Court (Infringement Notices) Amendment Act 2020*;
- *Public Trustee and Guardian Act 1985*;
- *Trustee Act 1925*; and
- *Wills Act 1968*.

CONSULTATION ON THE PROPOSED APPROACH

A number of ACT Government Directorates and independent agencies were consulted on the amendments in the *Justice and Community Safety Legislation Amendment Bill 2021*.

The ACT Law Society and the ACT Bar Association were also consulted on the draft Bill.

The proposed amendments reflect comments and feedback received from these stakeholders.

SUMMARY OF AMENDMENTS

Administration and Probate Act 1929

Section 64 of the *Administration and Probate Act 1929* provides the public notice requirements that an executor or administrator must issue to distribute a deceased estate. The proposed amendments redraft section 64 to modernise and clarify the notice required to be issued by an executor or administrator in the distribution of a deceased estate.

Births, Deaths and Marriages Registration Act 1997

The Bill amends the *Births, Deaths and Marriages Registration Act 1997* (BDMR Act) to clarify that an integrated birth certificate includes information about an adopted person's date of adoption, and details about their birth and adoptive siblings as at the adopted person's date of birth and adoption. The amendment will ensure that this information, which is significant to an adopted person, is included on an integrated birth certificate and that it accurately reflects the adopted person's family history and birth and adoption records.

The Bill also makes a range of technical amendments to the BDMRA in relation to applications made by transgender, intersex and gender diverse young people to the Registrar-General and to the ACT Civil and Administrative Tribunal (ACAT) to change their given names and/or registered sex on the ACT Register of births or on recognised details certificates. The amendments will clarify procedural matters of an application before ACAT, and remove barriers which impede vulnerable transgender, intersex and gender diverse young people from applying to ACAT for a grant of leave under section 29E of the BDMR Act.

Crimes (Assumed Identities) Act 2009, Crimes (Controlled Operations) Act 2008, Crimes (Protection of Witness Identity) Act 2011, and Crimes (Surveillance Devices) Act 2010

The amendments to these Acts facilitate and reflect recent structural changes within the Australian Federal Police (AFP).

Internal organisational changes in the AFP have resulted in the creation of a new rank of Assistant Commissioner held by the Deputy Chief Police Officer (DCPO)

(formerly, the DCPO held the rank Commander) and a change in title of an ACT Policing officer holding a Commander rank.

Several ACT legislative provisions provide that the Chief Police Officer (CPO) may delegate their functions to a 'senior officer', and 'senior officer' is defined to mean a DCPO in relation to the AFP rank. Legislative amendments are therefore required to ensure that the CPO delegation references the new changes.

Family Provision Act 1969

The amendment is consequential to the amendment to the *Administration and Probate Act 1929* and makes clear that before making distribution under section 21 of the *Family Provision Act 1969*, a public notice given under section 64 (1) (a) of the *Administration and Probate Act* is required.

Freedom of Information Act 2016

The Bill amends the definition of 'open access information of a Minister' to remove reference to Triple Bottom Line (TBL) Assessment for a decision and substitute the Wellbeing Impact Assessment for the decision. This amendment reflects changes to the documentary requirements supporting Cabinet decision-making from 1 January 2022.

Guardianship and Management of Property Act 1991

The Bill amends section 15 of the GMP Act to remove the capacity for a private guardian to charge fees for the role of decision-making. Removing this capacity will mean there will be no fee payable to any guardians within the Territory, private or public. This measure will not change a guardian's entitlement to reimbursement for reasonable expenses incurred in acting as a guardian such as the costs associated with a decision-making role, e.g. costs associated with attending a medical appointment with the protected person.

By removing the entitlement of guardianship fees, this amendment will update the Territory's guardianship legislation in line with current thinking across Australian jurisdictions about the nature of the role of guardians. This approach will also update the legislation to reflect the nature of guardians currently within the Territory, with the Public Trustee and Guardian not charging a fee for exercising the guardian decision-making function and most ACT private guardians not charging a fee due to being familiar relations.

The role of a guardian is a privileged position where the guardian makes decisions as a substitute decision maker in line with protected persons' wishes and their interest, where the protected person does not have decision-making capacity. It is different from professional roles such as a financial manager, that provide specialist skills and expertise in performing their functions, which may warrant payment of a fee for the provision of such a service.

By removing the fee component for guardians, the amendment will also provide greater protection for vulnerable persons preventing potential abuse of the scheme by unscrupulous private guardians who might charge fees that are inappropriate and disproportionate to the role of a guardian.

Land Titles Act 1925

Section 48BC requires the Registrar-General to verify the identity of a self-represented party when lodging an instrument purporting to transfer, deal with, or affect an interest in land. That verification must be undertaken in accordance with the *Land Titles (Verification of Identity) Rules 2020* (the Rules).

The Bill amends section 48BC to provide that the Registrar-General must not register an instrument unless *reasonably satisfied* that the party's identity has been verified in accordance with the verification of identity rules as in force at the time of verification. This amendment is being made to clarify that identify verification does not require the Registrar-General or their delegate to personally verify the identity of the party. Instead, this requirement may be satisfied when verification is performed by an identity agent contracted by the Land Titles Office for the purposes of undertaking the identity verification process for self-represented parties, such as, for example, Australia Post.

Legal Aid Act 1977

Section 92 of the Legal Aid Act 1977 (LA Act) provides that the affairs of a client cannot be either directly or indirectly disclosed by the Legal Aid Commission (the Commission). Information or data may only be shared for the purposes of facilitating an investigation under the LA Act, with the express or implied consent of the client or, in certain circumstances, to respond to a subpoena in relation to an application to the ACAT under the *Legal Profession Act 2006*.

The amendment retains the existing exceptions and provides two new exceptions by inserting new section 92AAA. Specifically, the chief executive officer of the Commission may authorise the disclosure of data or information concerning the affairs of client to:

- A Commonwealth entity for the purposes of complying with a national agreement in relation to the provision of national legal assistance services such as the National Legal Assistance Partnership; or
- An entity for the purposes of conducting researching in relation to improving access to justice or the provision of legal assistance services.

The amendment also provides the Minister with the power to make guidelines concerning how the chief executive officer authorises the disclosure of information or data under the exceptions. It also expressly provides that disclosure of information or data under both exceptions is only permitted if authorised by the chief executive officer in accordance with the disclosure guidelines.

Liquor Act 2010

The Bill amends the *Liquor Act 2010* to facilitate the recognition of interstate Responsible Service of Alcohol (RSA) certificates. Section 193 of the Liquor Act provides for the recognition of interstate RSA certificates. Section 193(2) of the Liquor Act defines an ‘interstate RSA certificate’ as a certificate that certifies when the person satisfactorily completed a course about the responsible service of alcohol and when the certificate expires. The purpose of this requirement is to allow for mutual recognition of interstate RSA certificates. The requirement for an expiry date is intended to ensure the certificates are current and allow compliance checks to be conducted.

However, the requirement in the definition for an expiry date has created issues with recognition of some interstate RSA certificates. In some Australian jurisdictions, such as Queensland and South Australia, RSA certificates do not expire. This means that these certificates do not meet the definition in the Liquor Act of an interstate RSA certificate, creating an impediment for these interstate certificate holders being employed in the ACT. Section 193 of the Liquor Act also does not address the changing nature in which data is stored about a person’s completion of an RSA course. For example, NSW issues physical and digital competency cards with expiry dates rather than physical certificates.

The amendments remove the requirement for an expiry date from the definition of an interstate RSA certificate. The proposed amendments also update section 193 to reflect the acceptance of physical and digital forms of interstate RSA certificates in the ACT if the Commissioner FOR Fair Trading can determine that the accreditation is valid and current.

Magistrates Court (Infringement Notices) Amendment Act 2020

The policy objective of this amendment is to extend the commencement date of the *Magistrates Court (Infringement Notices) Amendment Act 2020* (Amendment Act).

The *Justice and Community Safety Legislation Amendment Bill 2021* amends the commencement provisions of the Amendment Act, to extend commencement by two years to February 2024.

The Amendment Act amends Part 3.8 of the *Magistrates Court Act 1930* (ACT) (Magistrates Court Act) to create an extended range of options for discharging penalties for infringement notices issued under the Magistrates Court Act. This includes enabling a person to:

- a. enter into an infringement notice management plan to
 - i. pay by instalments; or
 - ii. participate in an approved community work or social development plan.

If the individual has an infringement notice management plan, to add the infringement notice penalty for the offence to the existing plan.

- b. seek to have the penalty waived.

The amendments aim to ensure the payment system for infringements can consider the circumstances of people on low incomes or who are otherwise disadvantaged.

While the Government supports the policy intention behind the amendments, in order to fully implement the additional discharge options under the Amendment Act further resourcing, ICT infrastructure and lead time is required. Consequently, it is necessary to amend the commencement provisions of the Amendment Act.

Public Trustee and Guardian Act 1985

The *Courts and Other Justice Amendment Act 2021* made amendments to the Public Trustee and Guardian Act (PTG Act) to provide the Public Trustee and Guardian with the authority to dispose of unclaimed deceased persons bodies and the option to discretionally administer the deceased person's estate. In order to register a death under the *Births, Deaths and Marriages Registration Act 1997* (BDMR Act), certain particulars must be provide including place and manner of disposal of remains. While it is possible to register a death without all the relevant particulars being recorded, it is the administrative preference to avoid doing so until after a funeral or disposal has occurred and associated documentation has been received. This amendment will clarify section 13A (5) (a) of the PTG Act so that an unclaimed deceased person is defined as a person whose death is 'registerable' rather than 'registered' under the BDMR Act.

Trustee Act 1925

Section 60 of the *Trustee Act 1925* provides the notice requirements a trustee must meet prior to conveying or distributing any property to or among the persons entitled to it. Subsection (3) allows an interested person to send particulars in respect of their claim to the property to the trustee within a specified time period determined by the trustee that cannot be less than 2 months long.

The notice requirements under section 60 (3) of the Act have been amended to provide that 1 month rather than 2 months must elapse after public notice is made, prior to disbursement of the trust. This is considered a more reasonable timeframe, noting electronic notice is now available, and will bring the ACT in line with other jurisdictions including New South Wales.

Wills Act 1968

Section 12A of the *Wills Act 1968* deals with applications to the Supreme Court for an order for rectification of a testator's will where the court is satisfied that the will is expressed in such a way that it fails to carry out the testator's intentions. Subsection (4) and (5) relate to the notice required to be given by a personal representative of

the deceased person of their intention to distribute all or part of the deceased person's estate, so as to allow a person who wishes to make an application for an order for rectification can do so within a period of 2 months.

The notice requirements under section 12A (4) and (5) have been amended to provide that 1 month rather than 2 months must elapse after public notice is made, prior to disbursement of the estate. This is considered a more reasonable timeframe, noting electronic notice is now available, and will bring the ACT in line with New South Wales

CONSISTENCY WITH HUMAN RIGHTS

International human rights law places obligations on governments to “respect, protect and fulfil” rights. The obligation to respect means governments must ensure its organs and agents do not commit violations themselves; the obligation to protect means governments must protect individuals and groups from having rights interfered with by third parties and punish perpetrators; and the obligation to fulfil means governments must take positive action to facilitate the full enjoyment of rights.

The European Court of Human Rights has considered the positive obligation of governments to uphold rights in depth, noting governments must put in place legislative and administrative frameworks to deter conduct that infringes rights, and to undertake operational measures to protect an individual who is at risk of rights infringement.^[1]

Rights engaged

The Bill engages and may promote the following rights under the *Human Rights Act 2004* (HRA) and is discussed under Rights Promoted in detail:

- Section 8 – Recognition and equality before the law
- Section 9 – Right to life
- Section 11 – Protection of the family and children
- Section 12 – Right to privacy and reputation
- Section 27B – Right to work and other work-related rights

The bill engages and may limit the following rights under the HRA and is discussed under Rights Limited in detail:

- Section 8 – Recognition and equality before the law
- Section 11 – Protection of the family and children
- Section 12 – Right to privacy and reputation
- Section 18 – Right to liberty and security of person

Rights Promoted

Births, Deaths and Marriages Registration Act 1997

The amendments to the BDMRA Act promote the following rights:

- The right of a child to protection without distinction or discrimination of any kind
- The right to privacy of transgender, intersex or gender diverse people
- The right to privacy of adopted people
- The right of transgender, intersex or gender diverse people to the equal protection of the law without discrimination
- The right to life of transgender, intersex or gender diverse people
- The right of adopted people's family to protection by society.

Guardianship and Management of Property Act 1991

By removing the capacity for a private guardian to charge fees for the role of decision-making the amendment will promote the right to equality of people with impaired capacity who require the support of a guardian for decision making, by reducing unnecessary costs that might be incurred if a private guardian is appointed. Following the amendment neither private nor public guardians will be able to charge fees for decision making services. This will not prevent guardians from being able to seek reimbursement of legitimate expenses.

Liquor Act 2010

The amendments to section 193 (2) of the Liquor Act will support the right to work in section 27B of the HRA. The amendments remove administrative barriers to the recognition of interstate RSA certificates in the ACT. This supports the ability of interstate certificate holders to be employed in the ACT.

Rights Limited

The preamble to the HRA notes that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. Section 28 (2) of the HRA contains the framework that is used to determine the acceptable limitations that may be placed on human rights.

Section 28 of the HRA requires that any limitation on a human right must be authorised by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate. Proportionality can be understood and assessed as explained in *R v Oakes*.^[2] A party must show that:

[f]irst, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".^[3]

Births, Deaths and Marriages Registration Act 1997

The nature of the right affected and the limitation (s 28 (2) (a) and (c))

The right to liberty

Section 18(2) of the HRA provides that no one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.

Young people may apply to ACAT under section 29E of the BDMR Act for an order granting leave to apply to the Registrar-General to change their given names and/or registered sex on the ACT Register of births or on a recognised details certificate.

Clause 8 of the Bill provides ACAT the power under section 29G(8) of the BDMR Act to give directions, by order, prohibiting or restricting the disclosure by a person who attends a hearing of, or makes a submission for, an application under section 29E of any evidence given at the hearing, or of a matter contained in a document lodged with ACAT or received by ACAT for the hearing.

The right to liberty is engaged and limited by the amendment to section 29G(10) of the BDMR Act in clause 8, as it provides a maximum penalty of 6 months' imprisonment where there is a breach of an order made by ACAT under section 29G(8).

The rights to protection of the family, privacy and equality

Section 11(1) of the HRA provides that the family is the natural and basic group unit of society and is entitled to be protected by society. Section 12(a) of the HRA provides that a family must not be interfered with unlawfully or arbitrarily. These two rights are engaged when a policy affects the exercise of parental responsibility for young people.

The amendment to section 20 (2) (c) of the BDMR Act in clause 4 of the Bill limits the discharge of parental responsibility in change of given name applications under section 19 of the BDMR Act. It introduces section 20 (2) (d) which requires a parent or person with parental responsibility to obtain a young person's consent for an application they make under section 19 to change the young person's given name, where the young person has an order from ACAT granting leave under section 29H of the BDMR Act.

Section 8 (3) of the HRA provides that every individual is equal before the law and is entitled to the equal protection of the law without discrimination. It prohibits any distinction, exclusion, restriction or preference based on personal attributes like race, colour, sex, language, religion, national or social origin, property of birth. However,

the principle of equality also requires the Government to take positive action so as to diminish or eliminate conditions which cause or help to perpetuate discrimination.¹

The amendment to section 20 (2) (c) limits the right to equality as, in an application to change a young person's given name under section 19, parents or persons with parental responsibility are not required to obtain the consent of young people without a grant of leave under section 29H. As a result, parents or persons with parental responsibility may make an application under section 19 without the consent of the relevant young person.

Legitimate purpose (s 28 (2) (b)) and rational connection between the limitation and the purpose (s 28 (2) (d))

The right to liberty

The legitimate purpose of the amendment is to protect the health, safety and privacy of vulnerable transgender, intersex and gender diverse young people.

The 6 months imprisonment maximum penalty is rationally connected to the legitimate purpose as it will assist to protect the identity and personal information of transgender, intersex and gender diverse young people in an application made to ACAT by the young people under section 29E of the BDMR Act and deter any non-parties from disclosing any evidence or matters lodged in documents for the application.

Evidence given at a hearing or any matter in a document lodged or received in evidence by ACAT for a hearing will contain highly personal and sensitive information about transgender, intersex and gender diverse applicants. This includes records about their transition to the sex or gender with which they currently identify.

It cannot also be discounted that transgender, intersex and gender diverse young people may face violence, aggression or harassment during or after the ACAT process by persons who become aware of a young person's application under section 29E.

Accordingly, any disclosure of this information without the consent of affected young people may infringe their privacy and may pose a potential risk to their health and safety.

The rights to protection of the family, privacy and equality

The legitimate purpose of the amendment is to protect the health, safety and privacy of vulnerable transgender, intersex and gender diverse young people.

¹ Human Rights Committee, *General Comment No. 18: Non-discrimination*, 37th session (1989), at para. [10].

Transgender, intersex and gender diverse young people are only able to access the ACAT pathway to change their given names under Part 4A of the BDMR Act where they are:

- between 12 to 15 years old and are unable to obtain the consent of their parents or persons with parental responsibility for them under sections 19A (b) (ii) (A)-(C) of the BDMR Act and section 8 of the *Births, Deaths and Marriages Regulation 1998*; or
- under the age of 12 and have the consent of at least one parent or person with parental responsibility for them and exceptional circumstances apply (sections 29E (3) (a)-(b) of the BDMR Act).

Section 20 (2) (d) protects the privacy of vulnerable transgender, intersex and gender diverse young people as a young person who has been granted leave by ACAT under section 29H is considered to have agency to understand the effect of a change of their given names. This is important where a parent or person with parental responsibility did not support the application to ACAT and seeks to change the given name without the young person's consent after a change has been made by the Registrar-General upon the young person's request.

Further, the amendment protects the health and safety of transgender, intersex and gender diverse young people. The inability of transgender, intersex and gender diverse young people to obtain identification documents that accurately reflect their gender identity may create a range of difficulties and increase the chance of their subjection to discrimination, prejudice or bullying.

Proportionality (s 28 (2) (e))

The right to liberty

The limitation on the right to liberty is proportionate to the legitimate purpose.

The maximum imprisonment term is only for 6 months, and it will be for the Court to determine whether imprisonment generally and the term of imprisonment is suitable based on the circumstances of an offence under section 29G (10).

There are also no less restrictive means available to achieve the legitimate purpose.

The rights to protection of the family, privacy and equality

The limitation on the rights to protection of family, privacy and equality is proportionate to the legitimate purpose.

The amendment only applies to young people who have been granted an order for leave by ACAT under section 29H of the BDMR Act to apply to the Registrar-General to change their given name.

Further, young people who do not identify as transgender, intersex or gender diverse do not generally face the same difficulties and issues experienced by transgender, intersex and gender diverse young people in relation to their given names.

There are also no less restrictive means available to achieve the legitimate purpose.

Legal Aid Act 1977

The nature of the right affected and the limitation (s 28 (2) (a) and (c))

The amendment engages and may limit the right to privacy in section 12 of the HR Act which provides that everyone has the right to not have their privacy interfered with unlawfully or arbitrarily. The amendment may impact this right as it permits the disclosure of unit level data to the Commonwealth and other entities and due to the small population size of the Territory, persons may be identifiable from certain combinations of datasets.

The amendment further engages this right as it permits under the new exceptions the disclosure of data or information collected from 1 July 2021.

Legitimate purpose (s 28 (2) (b)) and rational connection between the limitation and the purpose (s 28 (2) (d))

The amendment seeks to achieve the legitimate purpose of improving access to justice outcomes for vulnerable members of the ACT community. For example, the amendment ensures the Legal Aid Commission (the Commission) can fulfil their reporting obligations under the *National Legal Assistance Partnership 2020-2025* which provides significant legal assistance funding to the Commission. Similarly, enabling the Commission to actively engage in national research projects will support a more accurate understanding about the areas of greatest legal need in both the Territory and generally across Australia. By having a clearer understanding of the ACT community's legal needs, both the Territory and Commonwealth Governments will be supported to make more informed evidence-based decisions about future legal assistance funding.

There is a clear connection between the limitation and legitimate purpose as the disclosure of data to Commonwealth under agreements and to other entities for the purposes of research facilitates evidenced based decision making about legal assistance funding. The disclosure of this information is important in improving access to justice outcomes as without accurate data regarding the Territory's legal need, the Territory and Commonwealth's ability to provide sufficient funding for targeted service delivery to the community is compromised.

Proportionality (s 28 (2) (e))

The amendment has been constructed to include safeguards to protect the Commission clients' right to privacy. For example, it is intended that the guidelines made by disallowable instrument, as facilitated by this amendment, will provide

transparency to the Canberra community on how disclosure decisions to both the Commonwealth and other entities are made. The guidelines recognise that persons accessing the Commission's services often represent some of the most vulnerable members of the Canberra community and that these clients have a reasonable expectation that their privacy will be upheld.

Consequently, the guidelines will be developed from an informed human rights perspective to mitigate the risk of a client being identifiable through disclosed data. Pursuant to the guidelines, the Chief Executive Officer may only authorise the disclosure of information or data if satisfied that disclosure is in accordance with considerations under the guidelines and may refuse a request should data or information likely identify a person and impinge on their right to privacy.

Specifically, it is intended that the guidelines will require the Commission to be satisfied that the external organisation requesting the data has a clear end project with a legitimate objective relating to increasing access to justice. The use and presentation of the data must have a rational connection to the objective and be proportionate to the limitation on the right to privacy. The Commission must further be satisfied that any sensitivities or potential breaches of privacy are addressed. The Commission must then be satisfied that the external organisation has appropriate data security safeguards and protocols in place to protect the data and consider any further limitations or conditions upon the disclosure of the data necessary to ensure its safe, proportionate, and appropriate use.

As a statutory authority, the Commission is also obliged to act and make decisions in accordance with the HR Act.

Furthermore, all personal information collected by Commonwealth entities as a result of the amendment will also be handled and stored in accordance with the Australian Privacy Principles (APP) as provided for in the *Privacy Act 1988* (Cth). Consequently, section 92AA explicitly provides that should a Commonwealth agency request data or information, the Chief Executive Officer must be satisfied that the data will be managed in accordance with the APP, including APP 6 which limits how sensitive personal information may be used.

Magistrates Court (Infringement Notices) Amendment Act 2020

The nature of the right affected and the limitation (s 28 (2) (a) and (c))

The amendments to the *Magistrates Court (Infringement Notices) Amendment Act 2020* in the Bill may engage and limit the right to equality and non-discrimination as

the Bill will delay the introduction of measures that would be available to individuals who are on low income or who are otherwise disadvantaged.

Legitimate purpose (s 28 (2) (b)) and rational connection between the limitation and the purpose (s 28 (2) (d))

The purpose of the limitation is to enable the ACT Government sufficient time to scope and resource implementation of the measures in the *Magistrates Court (Infringement Notices) Amendment Act 2020*, preferably in a centralised manner with appropriate ICT systems. Currently agencies that issue infringement notices under the Magistrates Court Act do so individually. In order to realise the full benefits of the Amendment Act, including the ability to add infringements to cross-agency infringement management plans, a centralised system is required. This would provide a more user-friendly experience for individuals and enable a whole of government approach to the issuance of infringement notices under the Magistrates Court Act. Further lead time and resourcing is required to realise this goal.

There is a rational connection between the limitation and the purpose, as extending the commencement of the *Magistrates Court (Infringement Notices) Amendment Act 2020* by a period of two-years will enable the required scoping work to be undertaken on a centralised infringement management system, to better position the ACT Government to implement the reforms.

Proportionality (s 28 (2) (e))

The limitation is considered to be the least restrictive possible limitation to achieve the aim of developing a centralised system for managing infringements under the *Magistrates Court (Infringement Notices) Amendment Act 2020*. The effect of the amendment is to extend the commencement of the Amendment Act by two years, which is considered the shortest appropriate time to undertake the required scoping work on the centralised system. The delayed commencement will have no impact on any existing means of discharging infringement notices and does not limit any existing options available to individuals. For example, an individual may still seek an extension of time to pay an infringement or dispute an infringement.

The potential limitations on human rights in the Bill are reasonable and demonstrably justified pursuant to section 28 of the HR Act, because they are the least restrictive means available to achieve the purpose of the amendments.

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT Bill 2021

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Justice and Community Safety Legislation Amendment Bill 2021**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly **is** consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA
Attorney-General

CLAUSE NOTES

Part 1 Preliminary

Clause 1 Name of Act

This clause is a formal provision setting out the name of the Act as the *Justice and Community Safety Legislation Amendment Bill 2021* (the Act).

Clause 2 Commencement

This clause provides for commencement of different provisions in the Act.

The provisions in the Act, except for those outlined below, commence on the 7th day after the Act's notification day.

Part 2 which relates to the *Births, Deaths and Marriages Registration Act 1997* will commence on the 21st day after the Act's notification day to allow for an implementation period.

Part 9 which relates to the *Freedom of Information Act 2016* commences on the later of either 1 January 2022 or the commencement of section 3 of the Act.

Part 10 which relates to the *Guardianship and Management of Property Act 1991* commences 3 months after the Act's notification day to allow for an implementation period.

Part 15 which relates to the *Public Trustee and Guardian Act 1985* will commence on the later of the commencement of the *Courts and Other Justice Legislation Amendment Act 2021*, part 9, or the commencement of section 3 of the Act.

Clause 3 Legislation amended

This clause is a formal provision identifying that the Act amends the following legislation:

- *Administration and Probate Act 1929*;
- *Births, Deaths and Marriages Registration Act 1997*;
- *Crimes (Assumed Identities) Act 2009*;
- *Crimes (Controlled Operations) Act 2008*;
- *Crimes (Protection of Witness Identity) Act 2011*;
- *Crimes (Surveillance Devices) Act 2010*;
- *Family Provision Act 1969*;
- *Freedom of Information Act 2016*;
- *Guardianship and Management of Property Act 1991*;

- *Land Titles Act 1925*;
- *Legal Aid Act 1977*;
- *Liquor Act 2010*;
- *Magistrates Court (Infringement Notices) Amendment Act 2020*;
- *Public Trustee and Guardian Act 1985*;
- *Trustee Act 1925*; and
- *Wills Act 1968*.

Part 2 Administration and Probate Act 1929

Clause 1 Section 64

This clause substitutes the current section 64 (1) (a) and provides that an executor or administrator of an estate of a testator or an intestate may distribute the estate only if they gave prior public notice, as defined by the Legislation Act 2001, in accordance with section 64 (2).

The note following section 64 (2) (b) makes clear that a public notice given under section 64 (1) (a) applies to distributions made under the section 21 of the *Family Provision Act 1969* and section 60 of *Trustee Act 1925*.

Subsection (3) continues the protection from liability to an executor or administrator where they have complied with the requirement to search the Births, Deaths and Marriages register for information about parents or children of the deceased, or any other known person relevant to the distribution of the estate assets, and had taken into account any relevant information obtained from the Registrar-General as a result of the search.

Part 3 Births, Deaths and Marriages Registration Act 1997

Clause 5 Registration of change of name

Section 20 (2) (c)

Section 20 (2) (c) of the BDMR Act provides that the Registrar-General must not register a change of name unless satisfied that, where a young person is at least 14 years old, the young person consents to the change of name or cannot understand the meaning or implications of the change of name.

This clause substitutes section 20 (2) (c) of the BDMR Act to insert subsection 20 (2) (d). Section 20 (2) (d) provides that the Registrar-General must not register a change of given name of a young person who has been granted an order of leave by ACAT under section 29H (1) of the BDMR Act where a parent or person with parental responsibility for the young person has applied under section 19 to change the given name of the young person without the young person's consent. The clause also

makes minor amendments to section 20 (2) (c) as a result of new subsection 20 (2) (d).

As a young person is recognised to have agency to understand the effect of a change of their given names where they are granted an order of leave by ACAT under section 29H (1) of the BDMR Act to apply to the Registrar-General to change their given name under section 19A (b) (iii), the intent of the clause is to ensure that, where a parent or person with parental responsibility seeks to make a later application under section 19 to change the given name of the young person, they must have the consent of the young person to do so. This is particularly important as a young person between the ages of 12 and 15 years old will seek leave from ACAT to apply to the Registrar-General for a change of given names where they do not have the consent of parents or persons with parental responsibility in accordance with sections 19A (b) (ii) (A)-(C) to make an application directly to the Registrar-General.

Clause 6 Application by young person for leave to apply for change of given name or sex etc

Section 29E (1), new note

This clause inserts a note in section 29E (1) that if leave is granted to a young person by ACAT under Part 4A of the BDMR Act, then no further leave is needed by the young person for any further application of the same kind.

The intent of the clause is to indicate that section 29H (3) provides how an order from ACAT granting leave under section 29H (1) of the BDMR Act may be used for any subsequent applications a young person wishes to make to the Registrar-General to further change their given names and/or registered sex in the ACT Register of births or on a recognised details certificate.

Clause 7 New section 29EA

This clause inserts a new section 29EA in the BDMR Act to provide ACAT the power to ask the Registrar-General for a copy of the birth certificate of the young person who has applied to ACAT for leave under section 29E of the BDMR Act. It also requires the Registrar-General to provide ACAT a copy of the birth certificate if asked.

The intent of the clause is to allow ACAT to access information from the Registrar-General about a young person, which will assist ACAT to exercise its function to decide whether to grant leave to a young person to apply to the Registrar-General under section 29H of the BDMR Act. For example, it will assist where ACAT requires the birth certificate and a young person who has applied to ACAT for an order granting leave under section 29H does not possess or is unable to access a copy of their birth certificate to provide to ACAT.

Clause 8 Notification about application

New section 29F (4)

This clause inserts a new section 29F (4) to provide which documents and information ACAT must or may respectively give the Public Advocate or a parent or person with parental responsibility for a young person who has made an application to ACAT under section 29E of the BDMR Act. The clause also inserts a note in section 29F (4) that section 29F(4) (b) (i)-(ii) provides ACAT is to also give the Public Advocate other material in addition to the material under section 29F (4).

The intent of the clause is to clarify the documents and information ACAT is to give the Public Advocate and parents or persons with parental responsibility for a young person as part of a notification under section 29F(1) (a) (i)-(ii).

It also recognises the special role of the Public Advocate in an application before ACAT to advocate for the rights and interests of the young person and, in assuming this role, the Public Advocate should be provided with all documents and information for it to effectively perform its function.

The clause also recognises that, due to the sensitivities of a young person's ACAT application and the young person's relationship with their parents or persons with parental responsibility for them, ACAT should have a discretionary power to decide which documents and information is appropriate in the circumstances to give a parent or person with parental responsibility.

Clause 9 Section 29G

This clause substitutes section 29G in the BDMR Act to make several amendments in relation to an application made by a young person under section 29E of the BDMR Act proceeding before ACAT.

Section 29G (1) (b)

The clause amends section 29G (1) (b) to provide that ACAT may proceed to a hearing of an application for leave under section 29E of the BDMR Act 14 days after the application is lodged, if a submission under section 29E (4) (b) is not made by the young person.

The intent of the amendment is to clarify when ACAT may proceed an application to a hearing where a submission under section 29E (4) (b) is not made by a young person in their application.

Sections 29G (4) and 29G (5) (a)-(b)

The clause requires ACAT to give the Public Advocate under section 29G (4) a copy of any document lodged with ACAT or received in evidence by ACAT for a hearing of an application made by a young person under section 29E.

The clause also provides the Public Advocate under section 29G (5) (a)-(b) the discretionary power to attend the hearing of an application by a young person under section 29E at any stage and in whole or in part, and to make submissions at the hearing about any matter relating to the application or the hearing.

The clause further inserts a note in section 29G (5) about the Public Advocate's obligation to report to ACAT about a matter before ACAT if asked by ACAT under section 27BA of the *Human Rights Commission Act 2005* (HRCA).

The intent of the amendments is to ensure the Public Advocate is provided with appropriate documents and powers to effectively perform its function to advocate for the rights and interests of a young person in an application before ACAT under section 29E of the BDMR Act, and to indicate the operation of section 27BA of the HRCA and its possible use by ACAT in a young person's application before ACAT under section 29E of the BDMR Act.

Sections 29G (8)-(10)

The clause gives ACAT the discretionary power under sections 29G (8)-(9) to make non-disclosure orders on application by a young person or on its own initiative which are binding on non-parties who attend a hearing, or who make submissions under sections 29G (5) and (6), of evidence given at the hearing, or of a matter contained in a document lodged with ACAT or received in evidence by ACAT for the hearing.

Under section 29G (1), an offence by a person against section 29G (8) carries a maximum penalty under section 29G (10) of 50 penalty units, imprisonment for 6 months, or both.

The intent of the amendment is to protect any information from being disclosed in a young person's application under section 29E and the integrity of the pathway for young people to apply to ACAT under section 29E for an order granting leave to apply to the Registrar-General to change their given names and/or registered sex in the ACT Register of births, or for a recognised details certificate. Highly personal and sensitive information about a young person may be given as evidence at a hearing or be in documents lodged at ACAT in an application by a young person under section 29E. ACAT also does not currently have such a power to make non-disclosure orders on non-parties under section 39 of the *ACT Civil and Administrative Tribunal Act 2008*. If no legislative safeguards are in place to protect the information from by non-parties, young people may ultimately be deterred from accessing the ACAT pathway in order to change their given names and/or registered sex in the ACT Register of births or on a recognised details certificate.

Clause 10 ACAT deciding an application for leave

New section 29H (3)

This clause inserts a new section 29H (3) in the BDMR Act to allow a young person to use an order made by ACAT under section 29H (1) to make the same type of application to the Registrar-General for any subsequent change to their given names and/or registered sex in the ACT Register of births or on a recognised details certificate.

A young person's gender identity is not fixed during adolescence, and under section 29H (1) of the BDMR Act ACAT will already consider whether a young person has sufficient decision-making ability to understand the meaning and legal implication of the changes they are seeking and whether they believe the changes would better reflect their gender identity.

Further, it is a barrier and burdensome on young people to require them to re-apply to ACAT for leave to apply to the Registrar-General for any subsequent application of the same type. This is exacerbated where an order granting leave specifies the given names and/or registered sex to which the young person may use in an application to the Registrar-General.

The intent of the clause is to therefore remove any barriers and permit young people who have an ACAT order granting under section 29H (1) to use the order for any subsequent application of the same type to the Registrar-General, without the requirement to obtain an additional ACAT order granting leave. They will be able to use the order notwithstanding any given names and/or registered sex specified in the ACAT order.

Clause 11 Issue of certificates

Section 45(4)

This clause amends the definition of an IBC in section 45 (4) of the BDMR Act to allow the Registrar-General to include information on an IBC about an adopted person's date of adoption, and their biological and adoptive siblings as at the date of the adopted person's birth and adoption, respectively. The clause also inserts a provision to allow any other information to be included on an IBC to be prescribed by regulation.

The intent of this clause is to ensure information important to an adopted person is recorded on an IBC, and accurately reflects the information held on the ACT Register of births and adoptions about an adopted person.

Part 4 Crimes (Assumed Identities) Act 2009

Clause 12 Delegation

Section 42(4), definition of *senior officer*, paragraph (a)

This clause substitutes the previous meaning of ‘senior officer’ for a new definition: ‘in relation to the Australian Federal Police—a police officer of the rank of commander (or a more senior rank)’, for the purposes of delegating the chief officer’s functions under this Act.

Part 5 Crimes (Controlled Operations) Act 2008

Clause 13 Delegation

Section 33 (3), definition of *senior officer*, paragraph (a)

This clause substitutes the previous meaning of ‘senior officer’ for a new definition: ‘in relation to the Australian Federal Police—a police officer of the rank of commander (or a more senior rank)’, for the purposes of delegating the chief officer’s functions under this Act relating to the authorisation of controlled operations.

Part 6 Crimes (Protection of Witness Identity) Act 2011

Clause 14 Delegation

Section 23 (3), definition of *senior officer*, paragraph (a)

This clause substitutes the previous meaning of ‘senior officer’ for a new definition: ‘in relation to the Australian Federal Police—a police officer of the rank of commander (or a more senior rank)’, for the purposes of delegating the chief officer’s functions under this Act.

Part 7 Crimes (Surveillance Devices) Act 2010

Clause 15 Delegation

Section 44 (3), definition of *senior officer*, paragraph (a)

This clause substitutes the previous meaning of ‘senior officer’ for a new definition: ‘in relation to the Australian Federal Police—a police officer of the rank of

commander (or a more senior rank)', for the purposes of delegating the chief officer's functions under this Act.

Part 8 Family Provision Act 1969

Clause 16 Protection of administrator

Section 21 (b)

Section 21 of the *Family Provision Act 1969* provides protection from liability to an administrator where the distribution of an estate is done in accordance with a Supreme Court order under the Act or was done before notice of an application for a Supreme Court order and the notice requirements under the AP Act had been met.

This clause substitutes the current section 21 (b) in consequence to the amendment made to section 64 of the Administration and Probate Act to update the reference to public notice requirements under that Act.

Part 9 Freedom of Information Act 2016

Clause 17 What is *open access information*?

Section 23 (1), definition of *open access information*, of a Minister, paragraph (b) (i) (D)

This clause substitutes the current section 23 (1) (b) (i) (D) to remove reference to Triple Bottom Line Assessments in the definition of *open access information* of a Minister and replace it with reference to Wellbeing Impact Assessment for the decision on ACT Government priorities and emerging issues.

Part 10 Guardianship and Management of Property Act 1991

Clause 18 Section 15

This clause substitutes section 15 of the GMP Act to clarify that guardians are not entitled to any fees for performance of their role as guardian. A guardian is still entitled to reimbursement of the reasonable expenses incurred in acting as a guardian such as the costs associated with a decision-making role.

Clause 19 Determination of fees Section 75 (1) and note

This clause substitutes section 75(1) and note and removes reference to fees payable to guardians. This is in light of the amendment to section 15.

Part 11 Land Titles Act 1925

Clause 20 Lodgement of instruments by self-represented parties – verification of identity and authority

Section 48BC (2) (a)

This clause substitutes the current section 48BC (2) (a) and creates a reasonable threshold on which basis the Register-General must be satisfied of a person's identification prior to registering an instrument purporting to transfer, deal with, or affect an interest in land. This amendment will allow for certified identity agents to undertake the scanning and record keeping process and provide an authorised and recognised form for the party to present to Land Titles Office.

Part 12 Legal Aid Act 1977

Clause 21 Section 92AA

The clause substitutes section 92AA to clarify and expand the exceptions to the secrecy provisions in the Act.

The clause maintains the existing exceptions to sections 13 and 92 to permit disclosure of information concerning the affairs of a person:

- For the purposes of facilitating the investigation or prosecution of an offence against the Act; or
- with the express or implied consent of the person; or
- in response to a subpoena in relation to an application to the ACAT under the *Legal Profession Act 2006*.

Subsection 92AA (2) provides a new exception to the section 92 to permit the chief executive officer to authorise, in accordance with considerations under the disclosure guidelines, the disclosure of data or information to Commonwealth entities for the purposes of complying with a national agreement regarding the provision of legal assistance services. In order for the chief executive officer to authorise disclosure they must also be satisfied that the Commonwealth entity to which the disclosure is made is required to apply the Australian Privacy Principles in relation to the disclosed material.

Similarly, subsection 92AA (3) specifies that the section 92 secrecy provisions do not apply where the chief executive officer has authorised, pursuant to the disclosure guidelines, the disclosure of information or data to a third party entity for the purposes of conducting research in relation to improving access to justice outcomes or the provision of legal assistance services. This provision explicitly provides that if a Commonwealth entity makes a request under this subsection, the information must only be disclosed if the chief executive officer is satisfied that the Commonwealth

entity to which the disclosure is made is required to apply the Australian Privacy Principles in relation to the disclosed material.

Both subsections 92AA (2) and (3) provide that disclosure is limited to documents produced and information collected on or after 1 July 2021.

Subsections 92AA (4) and (5) provide the Minister with the power to make disclosure guidelines in the form of a disallowable instrument about the matters the chief executive officer must consider before authorising the disclosure of information or data pursuant to section 92AA (2) and (3).

It is intended that the guidelines will provide further safeguards to minimise any impacts on the right to privacy and provide a transparent process for how disclosure requests will be assessed. The guidelines will be developed from a human rights perspective and require the chief executive officer to consider the full life cycle of the data including being satisfied that the requesting entity has a clear and legitimate purpose for requesting the data, any limitations on the right to privacy are proportionate, any sensitivities or risks are addressed, and the requesting agency has appropriate data security and management practices.

Subsection 92AA (6) clarifies the definition of Australian privacy principles, Commonwealth entity, disclosure guidelines.

This amendment is considered necessary to support the improvement of access to justice outcomes for vulnerable and disadvantaged Canberrans who rely on the Commission's services to assert and understand their legal rights. Notably, the amendment will allow the Commission to comply with their reporting requirements under the NLAP. Without the introduction of this clause, the Commission risks exposing their officers to penalties or compromising their Commonwealth assistance funding and in turn their capacity to assist vulnerable members of the Canberra community with their legal needs. Similarly, the amendment will also facilitate greater engagement in national research projects to support more informed understandings of legal need in the Territory.

Part 13 Liquor Act 2010

Clause 22 What is an *RSA certificate*?

Section 193 (1), definition of *RSA certificate*, paragraph (a)

This clause amends the definition of an RSA certificate at section 193(1)(a) of the Liquor Act. The clause omits the phrase 'a certificate by' and substitutes 'a certificate issued by'. This editorial amendment makes the wording of the definition consistent with the wording of the amendment to the definition of an 'interstate RSA certificate' in clause 27 below.

Clause 23 Section 193 (2), definition of *interstate RSA certificate*

This clause substitutes the definition of ‘interstate RSA certificate’ in section 193 (2) of the Liquor Act. The new section 193 (2) (a) provides that an interstate RSA certificate for a person means a certificate issued by an interstate RSA training provider, or under a law in force in Australia, relating to the supply or consumption of liquor certifying that the person satisfactorily completed, on a stated day, a course about the responsible service of alcohol. The new section 193 (2) (b) provides that an interstate RSA certificate includes a digital version of the certificate, provided that the Commissioner for Fair Trading verifies the certificate’s validity and currency.

The purpose of this amendment is to remove the requirement for an RSA certificate to include an expiry date, as other jurisdictions do not require this, and to recognise certificates in digital form.

Part 14 Magistrates Court (Infringement Notices) Amendment Act 2020

Clause 24 Commencement

Section 2 (2)

This clause states that section 2 (2) of the *Magistrates Court (Infringement Notices) Amendment Act 2020* will be amended to substitute reference to commencement occurring in 2 years, to 4 years.

Part 15 Public Trustee and Guardian Act 1985

Clause 25 Appointment as a person responsible for disposal of unclaimed deceased person

Section 13A (5), definition of *unclaimed deceased person*, paragraph (a)

This clause omits the word ‘registered’ and substitutes it with ‘registerable’ in section 13A (5) (a) of the *Public Trustee and Guardian Act 1985*. As the *Births, Deaths and Marriages Registration Act 1997* provides that prior to registering a death, certain particulars must be provided including place and manner of disposal of remains, the provision will clarify that an unclaimed deceased person’s body may be disposed of by the Public Trustee and Guardian where the death of a deceased person is ‘registerable’, ie prior to disposal, rather than ‘registered’.

Part 16 Trustee Act 1925

Clause 26 Distribution after notice

Section 60 (3)

This amendment changes the notice requirements under section 60 (3) of the *Trustee Act 1925* from 2 months to 1 month.

Part 17 Wills Act 1968

Clause 27 Rectification

Section 12A (4) and (5) (a)

This amendment changes the notice requirements under section 12A (4) and (5) (a) of the *Wills Act 1968* from 2 months to 1 month.