

2022

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

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2022 (No 2)

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

**Presented by
Shane Rattenbury MLA
Attorney-General**

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2022 (No 2)

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 2022 (No 2)* 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 in the Attorney-General and Minister for Consumer Affairs' portfolios, including:

- *Agents Act 2003*
- *Agents (Transitional Provisions) Regulation 2022*
- *Evidence (Miscellaneous Provisions) Act 1991*
- *Guardianship and Management of Property Act 1991*
- *Justices of the Peace Act 1989*
- *Land Titles Act 1925*
- *Land Titles Regulation 2015*
- *Liquor Act 2010*
- *Powers of Attorney Act 2006*
- *Security Industry Act 2003*

CONSULTATION ON THE PROPOSED APPROACH

A number of ACT Government Directorates and independent agencies were consulted on the amendments in the Bill.

The following stakeholders have been consulted on the amendments to the *Evidence (Miscellaneous Provisions) Act 1991*:

- ACT Bar Association
- ACT Courts and Tribunal
- ACT Human Rights Commission
- ACT Law Society
- ACT Department of Public Prosecutions
- Legal Aid ACT

In relation to the amendments to the *Powers of Attorney Act 2006* and *Guardianship and Management of Property Act 1991*, specific consultation was undertaken with the following ACT Directorates via the legislation review working group:

- Canberra Health Services
- Calvary Public Hospital Bruce
- ACT Health – Human Research Ethics Committee
- ACT Human Rights Commission

The Justice of the Peace Association was consulted in relation to *the Justice of the Peace Act 1989* amendments and comment was sought from the United Workers Union on the *Security Industry Act 2003* amendments, however, no response was received.

The ACT Law Society and the ACT Bar Association were also consulted on the draft Bill in relation to all the amendments.

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

SUMMARY OF AMENDMENTS

Evidence (Miscellaneous Provisions) Act 1991

The Bill amends the *Evidence (Miscellaneous Provisions) Act 1991* so that section 69 of the Act applies to a witness in a relevant proceeding who is ordered to give evidence in court under section 68(3) in the same way that it applies to witness who gives evidence in a relevant proceeding by audio visual link under section 68.

Division 4.3.5 of the Evidence (Miscellaneous Provisions) Act relates to the giving of evidence via audiovisual link (AVL) in sexual, violent and family violence proceedings. Section 68(2) provides that some witnesses in a relevant proceeding are to give evidence via AVL unless the court orders otherwise. Section 68(3) provides the factors the court must be satisfied of to make an order that the witness give evidence in the courtroom. These include a witness's preference to provide evidence in the court room opposed to via audio visual link.

Section 69 applies if a witness gives evidence in a relevant proceeding by AVL under section 68. Section 69 provides for the recording of evidence that is given via AVL to be admissible in a related proceeding such as a retrial.

Currently, section 69 of the Act does not allow for the recorded evidence of a witness who is ordered to provide their evidence in the courtroom under section 68(3) to be admissible as the witness's evidence in a related proceeding. This is in contrast to the recorded evidence of a witness who delivers their evidence by audiovisual link.

Agents Act 2003 and Agents (Transitional Provisions) Regulation 2022

The Bill amends the *Agents Act 2003* (Agents Act) and the *Agents (Transitional Provisions) Regulation 2022* (Agents (Transitional Provisions) Regulation) to move two measures in the

Agents (Transitional Provisions) Regulation and one subsection in the Agents Act, to Part 22 of the Agents Act to ensure that all transitional measures are in one place.

The *Fair Trading and Other Justice Legislation Amendment Act 2022* (Amendment Act) amended the licensing framework for property agents under the Agents Act and Agents (Transitional Provisions) Regulation.

The amendment means that property agents and assistant agents who transitioned to the new licensing framework can easily identify the laws that apply to the exercise of functions under their relevant licence or registration. No substantive changes to the provisions are made through this amendment – they are simply being relocated for ease of reference.

The Agents (Transitional Provisions) Regulation is repealed as there are no remaining provisions in the Regulation.

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

The *Guardianship and Management of Property Act 1991* in section 32D allows a health attorney appointed for a protected person to consent to the person participating in ‘low-risk research’. Section 41A (1) of the *Powers of Attorney Act 2006* (PoA Act) defines low risk research as:

- (a) research carried out for medical or health purposes that—
 - (i) poses no foreseeable risk of harm to the person, other than any harm usually associated with the person’s condition; and
 - (ii) does not change the treatment appropriate for the person’s condition.
- (b) does not include any activity that is part of a clinical trial.

Many low-risk studies are conducted as clinical trials. The term ‘clinical trial’ refers to a research methodology and is not an indicator of the level of risk associated with the research project. The effect of the exclusion of any form of medical research conducted via clinical trial, even if low risk, being consented to by a health attorney has meant that ACT Health has not been able to participate in a range of low-risk research, particularly in the emergency care setting.

The Bill amends the definition of low-risk research in the PoA Act so that instead of completely excluding clinical trials from the definition of low-risk research, the amendments provide that low-risk research does not include research that is part of a clinical trial, *unless* the trial is evaluating a health care product, procedure, process or technique that is included in the Australian Register of Therapeutic Goods or has gained the support of a substantial number of practitioners in that field of health care.

This amendment is intended as a safeguard in the legislation to allow clinical trials to take place as low-risk research, provided they are for approved products procedures, processes or techniques or if they have the support of a substantial number of practitioners in that field of health care.

The Bill also amends sections 32D of the Guardianship and Management of Property Act which allows a health attorney to consent to the protected person participating in low-risk research. The Bill amends section 32D and 32G to provide a safeguard in the legislation by requiring the health professional to give the health attorney access to an independent doctor to provide further information and answer any questions the health attorney has about the clinical trial before consent is sought to participation in the low-risk research.

The above amendments should preserve the original intent of the legislation and allow for low-risk research studies to be undertaken, including in critical care settings, with appropriate safeguards to ensure that the amendment is consistent with the rights of people with impaired decision-making capacity.

Justices of the Peace Act 1989

The Bill amends the *Justices of the Peace Act 1989* (JP Act) to insert a new provision in the JP Act to allow retired Justices of the Peace (JPs) to have authority to use the 'JP (retired)' title.

Under the amendment the Commissioner for Fair Trading will be able to authorise an appointed Justice of the Peace to use a JP (retired) title if the person's appointment has ended, and the person was appointed as a JP for at least 10 years. This will ensure the transition from a JP appointment to the JP (retired) title is viable and efficient.

The introduction of this title will provide retiring JPs with appropriate recognition and acknowledgement of the work and assistance they have provided the Canberra community. The amendment is also intended to support the integrity of JP officer framework by requiring those authorised to use the title continue to be of good character and encouraging those who may not have the necessary capacity to continue to carry out the JP functions to give up their appointment by providing a title which recognises their community service.

The Commissioner may cancel the authority to use the title if the Commissioner is satisfied that the person is not of good character or the person notifies the Commissioner in writing that they no longer wish to use the title.

The amendment brings the ACT into line with New South Wales, South Australia and Victoria which have also introduced the JP (retired) title.

Land Titles Act 1925 and Land Titles Regulation 2015

The Bill amends the *Land Titles Act 1925* (Land Titles Act) and *Land Titles Regulation 2015* (Regulation) to provide consistency between the Regulation and the *Land Titles (Verification*

of Identity) Rules 2020 (the Rules) regarding the documents which are permitted to be used to verify an individual's identity in certain land titles transactions.

The amendment rectifies an inconsistency between the Regulation and the Rules relating to the status of a foreign passport (current or expired) as the Rules allow for use of an expired passport to verify identity, but the Regulation requires that a passport is current. Having identity documents accepted at one stage of a land purchase but not at another creates problems in the efficient completion of land titles transactions.

To reduce the potential for conflict, the Bill amends section 178B(2)(k) of the Land Titles Act to provide that the Registrar-General must accept any identity document that has been verified in accordance with the Rules.

This will ensure that once identity has been established at one stage of the transaction process, that verification is accepted at all stages of the transaction process.

Liquor Act 2010

The Bill amends the section 216 of the *Liquor Act 2010* (Liquor Act) relating to the membership of the Liquor Advisory Board, to provide that the member representing the Australian Federal Police is an ex-officio appointment.

Section 216 (1) (d) (i) of the Liquor Act refers to membership of Liquor Advisory Board and provides that one member will be appointed by the Minister to represent the Australian Federal Police (AFP). Accordingly, an AFP appointment for an individual must be made by the Minister each term.

The amendment provides that a police officer, nominated in writing by the chief police officer is appointed to the Board in an ex-officio capacity on an ongoing basis, rather than as an appointment by the Minister each term. This means that a public expressions of interest process is no longer required for this appointment.

Security Industry Act 2003

The Bill amends the *Security Industry Act 2003* (Security Act) relating to the period of time for which the Commissioner for Fair Trading (the Commissioner) is able to suspend a security licence, and to confirm that the ACT Civil and Administrative Tribunal (ACAT) is empowered to further suspend a licence.

Under section 29B Security Act, if the Commissioner intends to apply or has applied to the ACAT for an occupational disciplinary order with respect to a security industry licensee, the Commissioner may immediately place a temporary suspension on a security licence if it is in the public interest.

Currently, a suspension will lift at the earlier of the following events: the date an order of the Tribunal comes into effect, the date the Tribunal decides it will not make an order, or 30 days has passed since the security licence was suspended.

The Bill amends section 29B because under the current legislation it is impractical for the ACAT to grant interim or final orders for an occupational disciplinary matter within a 30-day period. As such, there is a risk that a security industry professional, who was the subject of a section 29B suspension because the Commissioner held the belief that they posed a safety risk to the public, can return to work after 30 days because their occupational disciplinary matter has not been considered.

The amendment to section 29B of the Security Act empowers the Commissioner to suspend a security licence for a period of up to 60 days to both allow the Commissioner greater opportunity to apply to ACAT and for any resulting proceedings to be finalised within the suspension period.

To mitigate a risk of the Commissioner suspending a licensee for a period that ACAT would not have deemed warranted or appropriate, section 37 of the Act provides that a decision by the Commissioner to suspend a security licence is reviewable.

Further, under section 53 of the *ACT Civil and Administrative Tribunal Act 2008* (ACAT Act), the ACAT can make an interim order if it is satisfied that if an order was not made, the party applying for the order would be disadvantaged or suffer harm.

The amendment to the Security Act also explicitly confirms that the ACAT is empowered to further suspend a licence. While this is unlikely to make substantial shift in trends of decision making, it will lead to greater clarity and consistency.

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 and promoted

Evidence (Miscellaneous Provisions) Act 1991

Rights engaged and promoted

- Right to liberty and security of persons
- Protection of the family and children

The amendment promotes the right to liberty and security of persons in section 18 of the Human Rights Act. Section 18 of the HRA provides that everyone has the right to liberty and security of person, and no-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law. Section 18 of the HRA is sourced from article 9 of the International Covenant on Civil and Political Rights, and the United Nations Human Rights Committee states in their general comment that the security of person noted in article 9 includes ‘freedom of injury to the body and the mind, or bodily and mental integrity’. This right to security protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained.

The amendment promotes the right to security by ensuring that vulnerable witnesses, who gave their evidence in court, are not re-traumatised in a subsequent proceeding by providing them with the opportunity to have their evidence recorded and used in a related proceeding such as a re-trial. In so doing, it extends the protections already offered to witnesses who give their evidence via audio-visual link, under section 69.

The amendments also promote the protection of family and children under section 11 of the HRA. Section 11 provides that every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

The amendment promotes the right to protection of the family and children to the extent that it facilitates the protection of child witnesses who give evidence in the courtroom by reducing the need for child witnesses to give their evidence again in a related proceeding.

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

Rights engaged

- Right not to be subject to medical or scientific experimentation or treatment without free consent (s 10)

This Bill amends the definition of ‘low risk research’ in the *Powers of Attorney Act 2006* to allow a health attorney (usually the person’s domestic partner or close family member or friend) to consent to the person’s participation in low risk approved clinical trials of approved healthcare, where the person is not able to consent for themselves.

This amendment is intended to allow people who are not able to give consent to have an option to participate in a low-risk clinical trial with the informed consent of their health attorney and subject to safeguards. This amendment will allow important but low-risk research to be able to be conducted in an emergency care context where patients may be unconscious or incapacitated, to enable health treatments to be studied and improved.

This amendment corrects an anomaly created by a previous amendment, which allowed health attorneys to approve participation in low-risk research but precluded any research that was part of a clinical trial. As most research in the emergency care context involves clinical trial methodology, even for low-risk comparative studies of approved treatments, this blanket prohibition effectively prevents health attorneys from consenting to most low-risk research.

Rights engaged and limited

Evidence (Miscellaneous Provisions) Act 1991

Rights engaged and limited:

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

Rights in criminal proceedings

Section 22 of the HRA provides that anyone charged with a criminal offence is entitled to examine prosecution witnesses, or have them examined, and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as prosecution witnesses. The amendment limits this right in criminal proceedings as it limits the ability for prosecution witnesses to be examined in related proceedings such as a re-trial, if the court orders that the witness's evidence given in court is to be recorded and used in a related proceeding under section 68.

Right to a fair trial

Section 21 of the HRA protects the right to a fair trial. The right to a fair trial means that each party must have access to the same procedural rights, unless distinctions are based on law and can be justified on objective and reasonable grounds, and do not entail actual disadvantage or other unfairness to the parties. The amendments relate to special procedures for witnesses to give evidence which may limit the right of the accused to a fair trial.

Right to privacy

Section 12 of the HRA provides that everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily. The amendments limit the right to privacy as they provide for the audio-visual recording of witnesses in the courtroom.

Legitimate purpose and rational connection (s28(b) and s28(d))

The legitimate purpose of this amendment is to reduce the risk of re-traumatising a vulnerable witness giving evidence in a related proceeding by allowing their evidence given in the courtroom to be recorded and used in a subsequent proceeding if the witness consents to this process.

The legislation as currently drafted provides that in the case of a retrial, the power to rely on the recorded evidence is limited to where a relevant witness does not elect to give evidence in the courtroom. This has the potential to lead to a structural cost to a witness choosing to give evidence in a courtroom under s68(3)(a), in that in the event of a re-trial, they must give evidence all over again. Remedying this anomaly is rationally connected to legitimate purpose identified above.

Proportionality (s28 (e))

Rights in criminal proceedings and right to a fair trial

A range of safeguards have been included in the amendments to *the Evidence (Miscellaneous Provisions) Act 1991* to be the least restrictive limitation on the rights in criminal proceedings and the right to a fair trial.

For example, the new section 69 (2A) provides that unless the court orders otherwise, evidence given in the courtroom must be recorded only if the witness consents. Accordingly, the use of the recording will not be mandatory but a decision to be made by the relevant party.

Additionally, the Court in the related hearing will have discretion to refuse to admit any part of the recording in evidence. A party to a proceeding may apply for an order that the witness attend the hearing to give further evidence.

Notwithstanding their lawful prospective operation, an accused who objects to the tendering (in a related proceeding such as a retrial) of a witness's recorded evidence given in the courtroom in the first trial (where that trial occurred before the commencement of the proposed amendments) may make interlocutory application(s) relating to the impact of the amendments (if made) on the evidence to be admitted at their re-trial.

Right to privacy

This is the least restrictive limitation of the right to privacy as the Bill includes safeguards such as seeking the witness's consent to the recording, or in circumstances where the court orders the recording, that the witness's wishes are considered.

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

The amendments engage the right in section 10 of the HR Act not to be subject to medical experimentation without free consent. The right is engaged but not limited by these provisions, which provide for substituted consent with appropriate safeguards.

Nature of the right and the limitation (s28(a) and (c))

The right not to be subject to medical experimentation without consent is recognised as part of the right to protection against torture, cruel inhuman and degrading treatment. It is

considered absolute at international law, meaning that no limitation of this right can be considered reasonable.

The right does preclude valid consent being provided by a substitute decision maker where the person themselves is unable to consent, but this does require special protection to guard against abuse.

The UN Human Rights Committee in General Comment No. 20 noted that:

The Committee also observes that special protection in regard to such experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment. Such persons should not be subjected to any medical or scientific experimentation that may be detrimental to their health.

Legitimate purpose (s28(b))

The amendment serves an important purpose in ensuring that clinical research is able to be undertaken in settings where people may not be able to consent for themselves, or to have executed a power of attorney in advance, usually due to the seriousness and sudden onset of their medical condition.

A number of prominent Canberra specialists in the intensive care field and medical research field have advocated for this amendment, noting that the current exclusion of health attorney consent for low-risk research involving a clinical trial has meant that the ACT has not been able to participate in important research in the emergency care context.

A range of benefits flow from research to others in the community, nationally and internationally. Incremental improvements in treatment developed through low-risk research, such as comparative trials of approved products, can be lifesaving in an emergency context.

The ability to be able conduct research would assist Canberra hospitals to attract and retain eminent emergency care specialists to ensure that Canberrans have access to the highest standards of healthcare.

Rational connection (s28(d))

Currently a health attorney may consent to the person participating in 'low-risk research' but this specifically excludes clinical trials, even where the clinical trial is otherwise low risk.

The bill would amend the definition of low-risk research to include approved clinical trials of approved health care, being drugs or devices already fully approved or exempted under therapeutic goods legislation, or procedures or processes that are accepted treatments for the patient's condition.

This change would allow research to be undertaken in emergency care and other contexts where it is possible to obtain direct consent from participants.

Proportionality (s28 (e))

A range of safeguards have been included in this provision and in associated amendments to the *Guardianship and Management of Property Act 1991* to ensure that it is appropriately targeted and that it does not amount to a limitation on the right to protection against medical experimentation without free consent.

The definition of low-risk research will include a clinical trial only if:

- The research poses no foreseeable risk of harm to the person, other than any harm usually associated with the person's condition; and
- does not change the treatment appropriate for the person's condition
- the clinical trial is approved by an ethics committee
- the clinical trial is of a therapeutic good (such as a drug or device) that is fully approved and registered under the *Therapeutic Goods Act 1989* (Cth) or is of a process, procedure or technique that supported by a substantial number of practitioners in the relevant field of health care.

These constraints will assist to ensure that any participation in a clinical trial is genuinely low risk, and that a health attorney will not be able to consent to the person participating in a clinical trial that would potentially be detrimental to their health.

The definition ensures that low-risk research will not include trials of novel drugs or devices that have not yet completed the full safety assessment, or new techniques, processes or procedures that are not already supported by medical practitioners.

Under the *Guardianship and Management of Property Act* a health practitioner may only ask a health attorney to consent to a person participating in low-risk research where the health practitioner reasonably believes that the person would benefit from the low risk research.

In addition, this bill will insert a new safeguard into the *Guardianship and Management of Property Act* to provide that where a health attorney is asked to consent to a person participating in a low-risk clinical trial, an independent doctor not involved in the clinical trial must be made available to provide information to the person's health attorney about any benefits and risks of the person participating in the trial. This safeguard assists to ensure that the health attorney is able to provide free and informed consent on behalf of the person.

These safeguards are in addition to existing decision-making principles for health attorneys and health practitioners in the *Guardianship and Management of Property Act 1991*.

Land Titles Act 1925 and Land Titles Regulation 2015

Section 178 (2) of the *Land Titles Act 1925* (Land Titles Act) outlines the type of information which the registrar-general is authorised to collect in certain land transactions.

The amendment to section 178 (2) may limit the right to privacy in section 12 of the *Human Rights Act 2004* (HRA). Section 12 of the HRA provides that everyone has the right to not have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily, and not to have his or her reputation unlawfully attacked.

The amendment to section 178 (2) provides that the registrar-general is authorised to collect any documents used to verify the purchaser's identity in accordance with the verification of identity rules as in force at the time of verification. The ability of the registrar-general to collect documents to verify identity has the potential to limit a person's right to privacy because it requires an individual to forgo transacting anonymously and consent to the collection and retention of private identity documents for the purposes of identifying themselves as having authority to participate in the transaction.

The amendment ensures that once a person's identity is established at one stage of the land titles transaction it is accepted at all stages of the transaction process. As such, the limitation on the right to privacy can be considered reasonable and proportionate because the amendment reduces the number of times a person's identity needs to be verified and therefore imposes a lesser limit on their right to privacy.

Security Industry Act 2003

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

The right to work

Section 27B of the *Human Rights Act 2004* (HRA) provides that everyone has the right to work, including the right to choose their occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

The amendment to s 29B (4) in the *Security Industry Act 2003* (Security Industry Act) empowers the Commissioner to increase the period of time which a security professional's licence is suspended, from 30 days to 60 days. This amendment limits the right to work, as a security industry professional cannot work while their license is suspended.

Rights in criminal proceedings and the right to liberty

Section 22 (1) of the HRA provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

Additionally, section 18 of the HRA provides that everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained, and no-one may be

deprived of liberty, except on the grounds and in accordance with the procedures established by law.

The amendment engages the right to presumption of innocence and right to liberty, as it extends the period that a security industry professional could be liable for the offence of carrying on unauthorised security activity under section 10 of the Security Industry Act, which is a strict liability offence with monetary and/or imprisonment penalties.

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

The legitimate purpose of this amendment is to protect the safety of members of the ACT public and to ensure a fair hearing for the person whose licence is suspended.

The amendment is rationally connected to the legitimate purpose as it helps to mitigate the risk that a security industry professional, who was the subject of a section 29B suspension because the Commissioner held the belief that they posed a safety risk to the public, can return to work after 30 days because their occupational disciplinary matter has not been considered.

Additionally, extending the suspension period to 60 days should help to ensure a fair hearing for the person whose licence is suspended. The objects of the *ACT Civil and Administrative Tribunal Act 2008* (ACAT Act) include ensuring that the decisions of the tribunal are fair, and fair and enhancing the quality of decision making under legislation (section 6). However, ensuring a fair hearing, particularly in circumstances where the matter is complex, may mean that ACAT requires a reasonable period of time in which to hear the matter, including allowing adequate time for the parties to prepare and respond to any directions made by the Tribunal. In such circumstances ACAT may not be able reasonably to grant interim or final orders for an occupational disciplinary matter within a 30-day period. Therefore, increasing the suspension period to 60 days provides additional time for ACAT to consider and make a decision. This helps to ensure that the ACAT can be effective in this function by making a decision in relation to an occupational discipline order within the suspension period.

Proportionality (s 28 (2) (e))

The amendment is the least restrictive approach to achieving the public safety objective and the objective of ensuring a fair hearing and is balanced by protections for licensees subject to a suspension.

A suspension will lift at the *earlier* of the following events: the date an order of the ACAT comes into effect, the date the ACAT decides it will not make an order, or 60 days has passed since the security licence was suspended. Therefore, the occupational disciplinary matter may be resolved earlier if ACAT considers the matter and makes occupational disciplinary orders in less than 60 days.

Further, a decision by the Commissioner to suspend the licence under section 29B is a reviewable decision which allows the licensee or a person whose interests are affected by the decision, to apply to the ACAT for the decision to be reviewed (Security Industry Act section 37).

Additionally, under section 53 of the ACAT Act, the ACAT can make an interim order if it is satisfied that if an order was not made, the party applying for the order would be disadvantaged or suffer harm.

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

Justice and Community Safety Legislation Amendment Bill 2022 (No 2)

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 2022 (No 2)**. 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 provides that the name of the Act is the *Justice and Community Safety Legislation Amendment Act 2022 (No 2)*.

Clause 2 Commencement

This clause provides for the commencement of the Act. The Act commences on the day after its notification day.

Clause 3 Legislation amended

This clause identifies the legislation that will be amended is the:

- *Agents Act 2003*
- *Guardianship and Management of Property Act 1991*
- *Justices of the Peace Act 1989*
- *Land Titles Act 1925*
- *Land Titles Regulation 2015*
- *Liquor Act 2010*
- *Powers of Attorney Act 2006*
- *Security Industry Act 2003*.

Clause 4 Legislation repealed

This clause identifies the legislation which is being repealed by the Act. The Act repeals the *Agents (Transitional Provisions) Regulation 2022 (SL2022-9)*

Part 2 Agents Act 2003

Clause 5 Land auctioneers must be licensed

Section 21 (2) and (4)

This clause omits sections 21 (2) and (4) from the Agents Act. However, the substantive content from sections 21 (2) and (4) are moved to the new section 237A (see clause 8 below).

The intent of this amendment is to ensure that all the relevant transitional provisions relating to the licensing framework for real estate and stock and station agents are located together in Part 22 of the Agents Act. This is to enable property agents and assistant agents who transitioned to the new licensing framework to easily identify the laws that apply to the exercise of functions under their relevant licence or registration.

Clause 6 Displacement of Corporations legislation

Section 175 (1), note

This clause corrects a minor drafting error in the reference to Commonwealth legislation by replacing the word investment with the word investments.

Clause 7 Experienced property agents who elect to become class 1 licensed property agent

Section 231 (3)

This clause corrects a minor drafting error to bring the format of the period of time referred to in this section in line with other sections of the Agents Act. It amends the reference to ‘on or before 30 June 2024’ so that it refers to ‘before 1 July 2024’.

Clause 8 New sections 237A to 237C

This clause inserts 3 new sections into Part 22 of the Agents Act (ss 237A, 237B and 237C). The content of these newly inserted sections has been relocated either from elsewhere in the Agents Act or from the Agents (Transitional Provisions) Regulation, however, the substantive content of these relocated sections remains unchanged. This is so that all transitional provisions are located in one section of the Agents Act. The purpose of this amendment is to enable property agents and assistant agents who transitioned to the new licensing framework to easily identify the laws that apply to the exercise of functions under their relevant licence or registration. These relocations also allow for the repeal of the Agents (Transitional Provisions) Regulation.

237A Offence against s 21 (1) (b) (i)—exception for licensed real estate, stock and station agents

New section 237A takes the content from current sections 21 (2) and (4) of the Agents Act, which have been omitted by this Bill (see clause 5 above) and moves it into a new section 237A of the Act.

Current section 21 makes it an offence for a person who is not a licensed land auctioneer to carry on business as a land auctioneer or to pretend to be a licensed land auctioneer. Subsections (2) and (4) provide transitional provisions. Subsection (2) disapplies the offence provision to class 1 and class 2 real estate agents and class 1 and class 2 stock and station agents. This is so that existing real estate agents or stock and stations agents (who are currently permitted to conduct auctions) can continue to conduct auctions during the transition period while they undertake the necessary additional training to hold a separate land auctioneer's licence. Subsection (4) provides for the expiry of the disapplication provision at the end of the transitional period on 30 Jun 2024.

The content from sections 21 (2) and (4) (i.e., the disapplication of the offence provision for class 1 and class 1 real estate or stock and station agents during the transition period) has been moved to new section 237A in Part 22 of the Agents Act to ensure that all the relevant transitional provisions relating to the licensing framework for real estate, stock and station agents are in Part 22 of the legislation.

237B Offence against s 21 (1) (b) (i)—exception for registered assistant real estate, stock and station agents

New section 237B takes the content which was previously in section 3 of the Agents (Transitional Provisions) Regulation and moves it into Part 22 of the Act to ensure all transitional provisions are in one place.

The *Fair Trading and Other Justice Legislation Amendment Act 2022* (Fair Trading Amendment Act) inserted a new licence for land auctioneers.

Under section 21 of the Agents Act, a person commits an offence if they conduct an auction, or otherwise represent themselves to be an auctioneer if they do not hold an appropriate licence.

New section 237B provides that a registered assistant real estate agent, or a registered assistant stock and station agent (who could previously conduct auctions under their pre -1 July 2022 real estate or stock and station salesperson registration) can continue to conduct auctions until 30 June 2023 (inclusive), to allow an appropriate period of time for affected persons to obtain the required qualifications and licences to conduct auctions under the new licensing framework.

237C Class 1 licensed property agents—equivalent additional class 1 training

New section 237C moves the content from section 4 of the Agents (Transitional Provisions) Regulation into Part 22 of the Act to ensure all transitional provisions are in one place.

Under section 230 of the Agents Act (introduced by the enactment of the Fair Trading Amendment Act), an agent who is licensed before the commencement day and was at any time responsible for the day-to-day management of a relevant place of business, is taken to be a class 1 licensed agent. However, a class 1 licence granted under this section is automatically subject to the condition that the agent completes additional class 1 training requirements before 1 July 2024.

Under section 231 of the Agents Act (also introduced by the enactment of the Fair Trading Amendment Act), an agent who is licensed before the commencement day and has at least two years' experience as an agent (but who was not responsible for the day-to-day management of a relevant place of business), may elect to be transitioned to a class 1 licence. However, a class 1 licence granted under this section is automatically subject to the condition that the agent completes additional class 1 training requirements before 1 July 2024.

However, new section 237C empowers the Commissioner for Fair Trading to decide that an agent's higher, equivalent, or substantially equivalent qualification, including one obtained prior to the commencement of the new regulatory scheme, satisfies the requirement to complete additional class 1 training under sections 230 and 231.

The intent of this is to ensure that licensed agents who have undertaken suitable formal study and training are not required to unnecessarily retrain.

It also provides that section 237C expires on 30 June 2024.

Part 3 Evidence (Miscellaneous Provisions) Act 1991

Clause 9 Special requirements—particular proceedings

Tables 43.1 and 43.2, items 1 and 2, column 3

This clause amends tables 43.1 and 43.2 in the *Evidence (Miscellaneous Provisions) Act 1991*. The tables outline the provisions relevant to certain types of witnesses in family violence proceedings and less serious violent offence proceedings, respectively.

This clause updates the reference to section 69 of the Act within tables 43.1 and 43.2 to replace 'recording evidence given by audiovisual link' with 'recording evidence given by audiovisual link or in courtroom'.

This amendment reflects the change made to the heading of section 69 provided in clause 10.

Clause 10 Section 69 heading

This clause amends the heading in section 69 so that it relates to both recording evidence given by audiovisual link as well as in the courtroom. This is to ensure the heading is consistent with the amendments made to section 69 (1) and (2) outlined in clause 11.

Clause 11 Section 69 (1) and (2)

This clause provides that a witness who gives evidence in the courtroom may be recorded and given as evidence in a relevant proceeding. The amendment is intended to ensure that witnesses who give evidence in the courtroom under division 4.3.5 of the Act are not treated differently to witnesses who give evidence by audiovisual link.

The clause provides that, unless the court orders otherwise, the evidence given in the courtroom may only be recorded if the witness consents. It also provides that, in deciding whether to make an order to record the evidence given in the courtroom, the court must consider the wishes of the witness. This is intended to help ensure vulnerable witnesses are not unnecessarily retraumatised giving evidence in a subsequent proceeding.

Clause 12 Section 69 (3)

This clause amends section 69 (3) to provide that the recording of evidence given by a witness in a relevant proceeding under section 68 (whether by audiovisual link or in the courtroom)

is admissible as the witness's evidence in a related proceeding unless the court in the related proceeding otherwise orders.

Clause 13 Section 69 (7), definition of *related proceeding*

This clause omits the reference to audiovisual link to reflect the amendments made to section 69 and clarify that the definition of 'related proceeding' applies to evidence recorded both in the courtroom and by audiovisual link.

Part 3 Guardianship and Management of Property Act 1991

Clause 14 Health attorney may give consent

Section 32D (4)

Section 32D of the *Guardianship and Management of Property Act 1991* (Guardianship and Management of Property Act) provides the legislative framework to allow a health attorney to consent to a protected person participating in low-risk research if the research is approved.

Section 32D (4) of the Act provides that the health professional need not obtain any other consent for the low-risk research if the health attorney has received relevant information outlined in section 32G of the Act.

In amending section 32D (4), this clause makes it a requirement for the health attorney to also have access to an independent doctor in addition to the relevant information in section 32G where the research involves a clinical trial.

The intent of this amendment is to require an independent doctor be made available to the decision maker to answer any questions and provide unbiased information about any risks of participation in a low-risk clinical trial.

Clause 15 Health professional must give information to health attorney

New section 32G (2) and (3)

Section 32G of the Act outlines the information which a health professional is required to give the health attorney if the health professional asks a health attorney to consent to a protected person participating in low-risk research.

This clause amends section 32G to require the health professional to give the health attorney access to an independent doctor to provide further information and answer any questions the health attorney has about the clinical trial.

It also includes a definition of an independent doctor in relation to the low-risk research to provide that an independent doctor means a doctor who is not involved in, or connected to, the research, other than in having a professional interest in the area of the research.

Part 4 Justices of the Peace Act 1989

Clause 16 When does a person stop being a justice of the peace?

Section 3B (2)

This clause corrects a minor drafting error in the legislation, to replace ‘member’s functions’ in section 3B (2) with ‘person’s functions as a justice of the peace’.

Clause 17 New section 8

This clause inserts new section 8 into the JP Act to provide that a person may apply to the Commissioner for Fair Trading (Commissioner) for permission to use the ‘JP (Retired)’ title if the person’s appointment as a justice of the peace has ended, and the person was appointed for ten years.

New section 8 also provides that the Commissioner must be satisfied that the person is of good character and standing in the ACT community, and that the Commissioner may cancel the permission to use the title if satisfied that the person is not of good character.

New section 8 allows the Commissioner to make guidelines in relation to the use of the JP (Retired) title. This guideline is a notifiable instrument.

New section 8 includes a note which provides that the Commissioner may delegate its functions under this section to a public servant.

Part 5 Land Titles Act 1925

Clause 18 Registrar-general must give information about certain transactions and instruments to revenue commissioner

Section 178B (2) (k)

This clause amends section 178B (2) (k) to provide that, the registrar-general is authorised to collect the kind of documents used to verify the purchaser’s identity in accordance with the verification of identity rules as in force at the time of verification.

This clause rectifies an inconsistency between the *Land Titles Regulation 2015* (Regulation) and the *Land Titles (Verification of Identity) Rules 2020* (the Rules) relating to documents used to verify identity in certain land transactions. The purpose of this amendment is to ensure that if an identify document is accepted to verify a person’s identity at one stage of the land titles transaction process, it can be accepted at other stages of the process as well.

Part 6 Land Titles Regulation 2015

Clause 19 Sections 1A and 3 etc

This clause omits section 3 and schedule 1 from the Land Titles Regulation to remove the inconsistency between the Act and Regulation in the identification documents required for certain land transactions. As a result, section 1A and the dictionary are also omitted as they

are no longer required if section 3 and schedule 1 are removed from the Land Titles Regulation.

Part 7 Liquor Act 2010

Clause 20 Membership of liquor advisory board

New section 216 (1) (ca)

This clause inserts a new section 216(1) (ca) into the Act to provide that the membership of the Liquor Advisory Board includes a police officer, nominated in writing, by the chief police officer.

This clause has been inserted into section 216 (1) at (ca) so that the member who is a police officer is an ex-officio appointment, which means this member is not appointed by the Minister.

Clause 21 Section 216 (1) (d) (i)

This clause removes section 216 (1) (d) (i) from the Act. Section 216 (1) (d) (i) of the Act provides that the Liquor Advisory Board is made up of a member appointed by the Minister to represent the Australian Federal Police. This section has been omitted from the Act as the member who is a police officer is addressed in the new section 216 (1) (ca) to facilitate an ex-officio appointment.

Clause 22 New part 25

This clause inserts a transitional provision into the Act at Part 25 to provide that until the chief police officer nominates a member to be appointed under section 216 (1) (ca) (the new provision), the member representing the Australian Federal Police under the current section is taken to be the member nominated under the new provision.

This part has been added to the Act to ensure that the current appointee to this position, made under the *Liquor Advisory Board Appointment 2021 (No 1)*, being “the person occupying the position of Commander (Operations) at ACT Policing”, can remain in the role for the remainder of the Term of Appointment set out in that instrument. This term concludes on 15 March 2025. Future appointments to the role shall be in accordance with the new section 216 (1) (ca) inserted into the Liquor Act by the Bill.

This clause provides that the transitional provision expires 12 months after it commences.

Part 8 Powers of Attorney Act 2006

Clause 23 Definitions – pt 4.3A

Section 41A (1), definition of *low-risk* research

This clause amends the definition of low-risk research to provide that low-risk research does not include research that is part of a clinical trial, unless the trial is evaluating only a therapeutic good that is included in the Australian Register of Therapeutic Goods (other than the part of the Register for goods known as provisionally registered goods) or a health care procedure, process or technique supported by a substantial number of practitioners in the relevant field of health care.

The purpose of this amendment is to allow low-risk research to include research that is part of a clinic trial provided that it is for an approved, procedure, process or technique. This is intended to ensure that low-risk research does not occur for unapproved products such as those not listed on the Australian Register of Therapeutic Goods.

Where the clinical trial relates to a procedure process or technique rather than a registerable therapeutic good, this clause provides that it must have gained the support of a substantial number of practitioners in that field of health care.

This clause provides that some examples of low-risk research include a comparative assessment of the effects of different methods of drug administration proven to be beneficial in the treatment of a condition, a comparative assessment of the angle at which to set a tilt bed to best assist a person's breathing, and research comparing the effectiveness of paracetamol and ibuprofen during routine health care.

Clause 24 Section 41A (2), new definitions

This clause inserts a definition of 'Australian Register of Therapeutic Goods' and 'therapeutic goods' into the Act.

It also provides a note advising how the Australian Register of Therapeutic Goods can be accessed.

Part 9 Security Industry Act 2003

Clause 25 Immediate suspension of licence

Section 29B (4)

This clause amends section 29B (4) of the *Security Industry Act 2003* to provide that, if a license is suspended under the section, the suspension ends 60 days after the day the immediate suspension notice is given to the licensee, rather than 30 days after the notice is given (as is currently the case). This amendment reflects the policy decision to extend the suspension period to provide additional time for occupational disciplinary matters to be heard by the ACT Civil and Administrative Tribunal (ACAT).

Clause 26 Section 29B (4), new note

This clause inserts a note into the section to provide that the ACAT may make interim orders extending the suspension of a licence. This amendment is to explicitly confirm that the ACAT is empowered to further suspend a licence under section 53 of the ACAT Act.