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Mr Jeremy Hanson CSC MLA
Chair
Justice and Community Safety Committee (Legislative Scrutiny)
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2600

Dear Chair *Jeremy*

Thank you for Scrutiny of Bills Report No. 4 of 4 May 2021. I offer the following response to the Committee's comments on the *Courts and Other Justice Legislation Amendment Bill 2021* (the Bill).

ACT Civil and Administrative Tribunal Act 2008 (ACAT Act), section 23

The Committee expressed concern about the scope of the proposed amendment to section 23 of the ACAT Act and that it may limit the right to a fair trial under section 21 of the *Human Rights Act 2004* (HRA). After careful consideration, the Explanatory Statement has been revised to include an analysis of the human rights impacts of the proposed amendment under the HRA.

The Committee also asked for further information on 'the intended operation of the amendment [and] the extent to which it is intended to authorise departure from procedures set out in the rules or as provided by authorising legislation.'

In considering the issues raised by the Committee, it is relevant to note the following general points about the legislation governing ACAT's procedures and processes. The [ACT Civil and Administrative Tribunal Procedures Rules 2020](#) (the Rules) are a notifiable instrument made pursuant to section 24 of the ACAT Act. The Rules were made in 2020 by the Presidential Members acting in concert. Prior to the current Rules, the ACAT's procedural framework was governed by the following notifiable instruments:

- The [ACT Civil and Administrative Tribunal Procedure Rules 2009 \(No 2\) \(repealed\)](#) (the Repealed Rules). The Repealed Rules were made shortly after the ACAT commenced operation in February 2009 and were limited to a small number of matters as well as the

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procedures that applied to the ACAT's appeal function. It should be noted that Rule 5 of the Repealed Rules was in almost identical terms to the proposed section 23(2).

- The [ACT Civil and Administrative Tribunal Procedural Directions 2010 \(No 1\) \(repealed\)](#) dated 28 September 2010. The procedural directions applied only if there was no procedure prescribed or contrary provision in the Act, authorising laws or in the Rules.

In relation to the specific issues raised by the Committee, I provide the following information.

The Committee expressed concern that the amendment will allow ACAT to depart from procedures set out in authorising legislation. The term 'Rules' is defined in the dictionary of the ACAT Act to mean the rules of the tribunal made under section 24. Accordingly, the reference in proposed section 23(2) to the rules only allows the ACAT to dispense with a provision of the ACAT Rules.

Further, section 27(2) of the ACAT Act provides that any procedure under an authorising law for dealing with an application prevails over the procedures set out in this Act or the rules for dealing with the application, to the extent of any inconsistency. It should be noted that procedures in authorising laws tend to be within Acts – for example, section 49C (3) of the *Residential Tenancies Act 1997*, which sets out procedural requirements the Registrar must follow when receiving an application for a termination and possession order.

The amendment will allow ACAT to make an order that a rule does not apply to a particular application. It is important to note that given the breadth of the ACAT's jurisdiction and the nature of disputes before it, the ability to dispense with a rule for a particular application is an important way that the ACAT complies with the requirement of natural justice and procedural fairness (s 7) and is enabled to decide its own procedure (s 23) and control proceedings (s24 (3)). The procedural flexibility provided by the proposed amendment extends to a party to a proceeding or another person by application of s 23 (3) allowing for the making of an application to the ACAT for an order dispensing with the application of a particular Rule.

The extent of the departure from the Rules will depend on the circumstances of the application before the ACAT. The ability to depart from the Rules recognises that not 'one size fits all' and procedural flexibility assists ACAT to achieve its objectives. An example, where the ACAT made orders disapplying particular rules occurred during the COVID-19 pandemic. During the period March to August 2020 in some civil dispute applications, the rules requiring a response to be provided within 21 days and enabling an applicant to apply for default judgment if no response was lodged were disappplied and each matter was listed for a directions hearing by telephone. This allowed the ACAT to determine the best way to proceed in the circumstances of each individual matter.

Judicial Commissions Act 1994, section 28

Public Trustee and Guardianship Act 1985, new sections 13 and 13A

I note the Committee's scrutiny of potential human rights implications arising from the amendments to the Judicial Commissions Act and Public Trustee and Guardianship Act.

I have considered the Committee's views regarding the potential engagement and limitation of human rights contained in the HRA by these amendments carefully and have revised the Explanatory Statement to address their compatibility with the HRA accordingly.

I thank the Committee for raising these matters with me. I enclose a revised version of the Explanatory Statement for the Committee's consideration which I intend to table in the Assembly.

Yours sincerely



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Attorney-General

27/5/21
Encl.