

1995

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

MAGISTRATES COURT (AMENDMENT) BILL (NO 2) 1995

EXPLANATORY MEMORANDUM

Circulated by authority of

**GARY HUMPHRIES MLA
ATTORNEY-GENERAL**

MAGISTRATES COURT (AMENDMENT) BILL (No 2) 1995

BACKGROUND

The *Magistrates Court Act 1930* (the Principal Act) provides for the procedures to be followed in the Magistrates Court. The Magistrates Court (Amendment) Bill (No 2) 1995 (the Bill) will insert a new procedure for bringing a witness to Court and revise the requirements relating to the remunerative employment of a Magistrate other than in the duties of that office. Many of the provisions in the Principal Act have not been altered since the Act came into force and amendments to the Principal Act over time have produced duplications and overlapping provisions. The Bill provides for minor amendments to revise, up-date and correct such provisions.

FINANCIAL CONSIDERATIONS

The amendments in the Bill are not expected to have a financial impact.

SUMMARY

The intention of the Bill is to amend the *Magistrates Court Act 1930* to provide:

- that a person may be requested to appear as a witness by means of a letter containing notice of the time and place of the hearing, a returnable undertaking to appear and a form for a claim for the reasonable expenses of the person sent by the informant and delivered by a means of postal transmission which requires that the recipient sign for the receipt of the letter;
- that a Magistrate, in coming to a decision to issue a witness summons, may take into account the response of the person to an earlier request to appear;
- that service of a summons on a person to attend to give evidence may be made by a means of postal transmission which requires that the recipient sign for the receipt of the item, by personal service or by leaving a copy of the summons with a responsible adult at the last known place of residence of the person, and accompanied by a returnable undertaking to appear, and that service may be proved by the oath of the person who served it, by affidavit or otherwise;
- that, where a person has been notified of the time and place of the hearing and has been requested, has given an undertaking or has been summoned to appear, and does not appear, a warrant may be issued by the Court to have the person brought before the Court to give evidence;
- for a witness to be entitled to claim the reasonable expenses of his or her appearance;

- that a Magistrate may not engage in remunerative employment (other than that of a Magistrate as appointed) without the approval of the Attorney-General;
- that a Magistrate may not accept appointment to another office under a law of the Territory, the Commonwealth, including a Defence Force appointment or commission, a State or another Territory without the consent of the Attorney-General;
- that a special Magistrate may hold office only until he or she attains the age of 70 years;
- that a reference to "Clerk of Petty Sessions" be substituted for the reference to "Registrar of Petty Sessions" in subsection 12(2) to be retrospective to the date of the commencement of the *Magistrates and Coroner's Courts (Registrar) Act 1991*;
- that every summons, warrant, conviction or order is to be in writing, signed by the issuing officer and stamped with the Court's official seal;
- that a Magistrate presiding over a hearing, where of the opinion that it is desirable in the public interest or in the interests of justice to do so, may require any person to leave and remain outside the room or the building where the hearing is being held;
- that a Magistrate presiding over a hearing, where of the opinion that it is desirable in the public interest or in the interests of justice to do so, may order that no report or publication be made of the proceedings and a penalty be able to be imposed for contravention of such an order;
- that where the defendant but not the informant is before the Court, the Court may dismiss an information;
- for the swearing of a written statement of evidence before a legal practitioner, the Registrar of the Court, a Justice of the Peace or a person prescribed for the purpose;
- that notice is to be given to a defendant, or to a person affected, as to a conviction, order or penalty and the means by which any penalty may be discharged;
- for minor technical amendments including the replacement of references to "barrister", "solicitor", "counsel", "attorney", etc with a reference to a "legal practitioner"; and

to amend section 181 of the *Magistrates Court (Civil Jurisdiction) Act 1982* to keep the procedure for the conduct of a hearing under that Act in line with that proposed in the Bill.

DETAILS OF THE BILL

Clauses 1 and 3 provide for the citation of the amending Act and the Principal Act.

COMMENCEMENT

Clause 2 provides for commencement of the amending Act.

Subclause 2(1) provides for commencement of clauses 1, 2 and 3 on Gazettal.

Subclause 2(2) provides that paragraph 7(b) (see below) is to be taken to have commenced on 25 September 1991. This is the date of the commencement of the *Magistrates and Coroner's Courts (Registrar) Act 1991* which amended the *Magistrates Court Act 1930* and the *Coroners Act 1956* to delete references to the 'clerk' of each of those Courts and to substitute references to the 'Registrar' of the Court subsequent to the change in the title of that office.

Subsection 12(2) of the Principal Act provides that, where legislation provides for acts which may be done by 'a Court, a Justice of the Peace or a Registrar of Petty Sessions', those acts may be done by a Magistrate or the Registrar of the Magistrates Court. There may be some Commonwealth, Imperial or New South Wales legislation still operational which provides for acts to be done by a 'Clerk of Petty Sessions' and the reference to such an officer in section 12 of the Principal Act is, therefore, changed back to that title and any acts done by a Magistrate or the Registrar in the interim protected by the back-dated commencement.

Subclause 2(3) provides that the remaining provisions are to commence on a day or on the respective days fixed by notice in the *Gazette*. This provision allows commencement of either all the remaining provisions together, or the commencement of the remaining provisions on different days.

Subclause 2(4) provides for the automatic commencement at the end of a period of 6 months from the day on which the amending Act is notified in the *Gazette* of the provisions referred to in subclause 2(3) if they have not been commenced within that time.

MAGISTRATES NOT TO UNDERTAKE OTHER WORK

Clause 4 amends section 10E of the Principal Act which provides that a Magistrate is not to undertake other paid employment without the written approval of the Minister with the exception of any office, appointment, or commission held in the Defence Forces of the Commonwealth. This exception may have been appropriate when a Magistrate of the Court was a Commonwealth judicial officer; Magistrates are now officers appointed by the Government of the Australian Capital Territory and it is appropriate

that the provision is amended to bring it into line with current requirements for officers of the Territory such as are provided for under the *Public Sector Management Act 1994*.

Subclause 4(b) amends subsection 10E(2) of the Principal Act to replace the requirement that a Magistrate obtain the approval of the Minister with the requirement that a Magistrate obtain the consent of the Attorney-General before undertaking remunerative employment otherwise than in connection with his or her duties of office as a Magistrate.

Subclause 4(c) removes the exception to the requirement to obtain the consent or approval of the Attorney-General in respect of an office, appointment, or commission held in the Defence Forces of the Commonwealth.

Subclause 4(d) amends subsection 10E(3) of the Principal Act to require that the Attorney-General consult with the Chief Magistrate before giving consent.

APPOINTMENT OF SPECIAL MAGISTRATES

Clause 5 amends section 10J of the Principal Act. Section 10J provides for the tenure of office of a special magistrate. The intention is that a special magistrate not serve beyond the age of 70 years. The Standing Committee on Scrutiny of Bills and Subordinate Legislation has suggested that, given the way in which paragraph 10J(1)(a) is cast, this intention could be frustrated if a term of appointment is expressed to extend beyond the retiring age of 70 years.

Subclause 5(1) inserts new subsection 10J(3) to provide that a person shall not be appointed as a special Magistrate for a period which would extend beyond the date on which the person reaches 70 years.

Subclause 5(2) provides that a special Magistrate appointed before the commencement of subclause 5(1) will not be affected even though his or her appointment does not comply with the new requirement as to such appointments.

AUTHENTICATION OF ACTS OF A MAGISTRATE OR THE REGISTRAR

Clause 6 amends section 11 of the Principal Act, which provides for the authentication of acts done by a Magistrate or the Registrar, that is, the form in which written instruments of the Court are required to be issued. Sections 40, 46 and 152 which also provide for the form of court instruments are repealed by the Schedule to the Bill (sections 40 and 46) and by clause 15 (section 152).

Subclause 6(a) provides that every summons, warrant, writ, conviction or order not authorised to be given orally, shall be in writing signed by the Magistrate or Registrar issuing it and sealed with the Court's seal (that is, stamped with the official Court stamp).

Subclause 6(b) inserts new subsection 11(2) to provide that no document relating to Court process shall be signed 'in blank', that is, such a document may not be signed by a Magistrate or Registrar without the details necessary to give force to the instrument first being written or entered on the instrument.

ACTS OF A MAGISTRATE OR REGISTRAR

Clause 7 amends section 12 of the Principal Act to delete references to the 'Registrar of Petty Sessions' and to substitute references to the 'Clerk of Petty Sessions' to ensure that acts which may be done under legislation providing for a 'Clerk of Petty Sessions' and which were done by a Magistrate or the Registrar under section 12 are protected from the time of the commencement *Magistrates and Coroner's Courts (Registrar) Act 1991* which amended the *Magistrates Court Act 1930* and the *Coroners Act 1956* to delete references to the 'clerk' of each of those Courts and to substitute references to the 'Registrar' of the Court subsequent to the change in the title of that officer.

Clause 8 repeals sections 51 and 52 of the Principal Act which provide that a hearing in the Magistrates Court shall be in open Court (that is, a public hearing) and for the power of a Magistrate to exclude strangers from the Court during a hearing and substitutes new section 51. New section 51 is inserted to provide that a hearing in the Magistrates Court is to be in public except in special circumstances, to provide for those circumstances and to create an offence of the contravention of a direction of a Magistrate as to the closing of the Court or the disclosure of evidence.

New subsection 51(1) provides that, subject to subsection 51(2) a hearing of the Magistrates Court shall be in public.

New subsection 51(2) provides that, where the presiding Magistrate considers that it is in the public interest or the interests of justice to do so, the Magistrate may, by order -

- (a) direct that the hearing or part of the hearing shall take place in private, and may give directions as to the persons who may be present;
- (b) give directions prohibiting or restricting the publication of evidence given at the hearing; and

- (c) give directions prohibiting or restricting the disclosure to some or all of the parties to the proceeding of evidence given at the hearing or of a matter in a document lodged with the Court or received in evidence in relation to the hearing.

New subsection 51(3) creates an offence of, without reasonable excuse, contravention of an order made by a Magistrate as to a restriction on the persons who may be present at a hearing, or an order as to the publication or disclosure of evidence given at a hearing.

Clause 20 repeals section 181 of the *Magistrates Court (Civil Jurisdiction) Act 1982* and substitutes a new section 181 into that Act which replicates that inserted into the Principal Act by clause 8. The intention is that the provisions in the two Acts dealing with the same procedure in respect of the Magistrates Court are kept in line.

BRINGING A WITNESS TO COURT

INFORMANT MAY REQUEST A WITNESS TO ATTEND

Clause 9 repeals sections 61, 62 and 63 of the Principal Act and substitutes new sections 60A, 61, 62, 62A and 63. These provisions deal with the attendance of a person to give evidence at a hearing.

New section 60A provides for the means by which an informant may request a person to appear to give evidence for the prosecution.

New subsection 60A (1) provides that an informant may request the appearance of a person to give evidence at a hearing of an information by a letter sent by post which requires that the recipient sign for it.

New subsection 60A (2) provides that the letter of request shall -

- (a) give the time and place of the hearing;
- (b) be accompanied by an undertaking to appear which undertaking is to be signed and returned by the person; and
- (c) be accompanied by a claim form in which the person may claim the reasonable costs and expenses of attendance at the hearing.

POWER OF MAGISTRATE TO SUMMON A WITNESS

New section 61 provides for a power in a Magistrate to issue a summons to a person to attend Court for the purpose of giving evidence. New subsection 61(1) replicates section 61 of the Principal Act. The provision

applies to bringing either a prosecution or a defence witness to attend the hearing of an information.

New subsection 61(1) provides that, if it appears to a Magistrate that a person is likely to have material evidence and will not voluntarily appear before the Court to give evidence, the Magistrate shall issue a summons requiring that person to appear.

New subsection 61(2) provides that, in considering whether a person is likely to appear a Magistrate may take into account any response of the person to a request made to the person to appear.

SERVICE OF A SUMMONS ON A WITNESS

New section 62 provides for the service of a summons on a person requiring the person attend a hearing to give evidence.

New subsection 62(1) provides that a summons may be served on a person -

- (a) personally;
- (b) by sending it to the person's last known residential or employment address by post which requires that the recipient to sign for it; or
- (c) by leaving it with a responsible adult at the person's last known residential or employment address.

New subsection 62(2) provides that a summons served on a witness shall be accompanied by -

- (a) an undertaking to appear which is to be signed by the person and returned by a specified date; and
- (b) a claim form in which the person may claim the reasonable costs and expenses of attendance at the hearing.

New subsection 62(3) provides that the service of a witness summons may be proved by the person who served the summons swearing an oath or making an affidavit as to the service of the summons.

WITNESSES TO BE ENTITLED TO CLAIM REASONABLE EXPENSES

New section 62A provides for a person who is requested or required to appear as a witness by the Court, to claim the reasonable costs and expenses of appearing to give evidence. This approach removes the need to pay 'conduct money' in advance of an appearance before the Court.

New subsection 62A(1) provides that any notice requiring a person to appear as a witness is to be accompanied by a claim form for the reasonable costs and expenses of appearing to give evidence.

New subsection 62A(2) provides that, if the form does not accompany the request to appear to give evidence, this is not a reason for the person to refuse to appear as required.

WARRANT TO BRING A WITNESS TO COURT

New section 63 provides for a warrant to be issued to bring a person to Court to give evidence if the person -

- (a) has been informed of the time and place of the hearing;
- (b) has been requested, has given an undertaking or has been summoned to appear to give evidence; and
- (c) does not so appear and does not provide the Court with a reasonable explanation for his or her non-appearance.

PERSON ABOUT TO LEAVE THE TERRITORY MAY BE ORDERED TO BE EXAMINED OR TO PRODUCE DOCUMENTS TO THE COURT

Clause 10 inserts new subsections 67(1A) and (1B) into the Principal Act to provide for a person who has been ordered to be examined as to evidence or to produce documents material to any information or claim before the Court under section 67 of the Principal Act to claim the reasonable costs and expenses of attending an examination or of the production of documents under section 67.

New subsection 67(1A) provides that, when an order for the taking of evidence or the production of documents is made in respect of a person who may be able to give material evidence or produce relevant or material documents, that order is to be accompanied by a form for the claim of the reasonable costs and expenses of attending the examination or the production of the documents.

New subsection 67(1B) provides that the person is not entitled to refuse to comply with the order because it is not accompanied by the claim form.

Clause 19(a) inserts the new forms set out in Schedule 2 of the Bill into the First Schedule of the Principal Act. The forms are for the purposes of the new procedure for bringing a witness to Court. A new Form 9, 'UNDERTAKING TO ATTEND AS A WITNESS' and a new Form 10, 'CLAIM FOR EXPENSES BY WITNESS' are inserted.

DISMISSAL OR ADJOURNMENT IN THE ABSENCE OF THE INFORMANT

Clause 11 repeals section 109 of the Principal Act and substitutes a new section 109 to re-draft the section in plain English and include a provision

that an information may be dismissed or adjourned where the defendant has appeared voluntarily but the informant is absent. Section 109 provides that, where the defendant appears in response to a summons, or is brought before the Court by a warrant, and the informant does not appear, the information may be dismissed or adjourned. No provision is currently made for the situation where a defendant has appeared before the Court in consequence to an agreement to attend Court voluntarily. New section 109 includes that situation.

New subsection 109(1) provides that, subject to subsection (2), the Court shall dismiss the information where:

- (a) the defendant appears, whether voluntarily, or in response to a summons, or by warrant, at the time and place for the hearing of an information in respect of an offence punishable summarily; and
- (b) the informant, having been notified of the time and place for the hearing, does not appear.

New subsection 109(2) provides that the Court, as an alternative to dismissing the information under subsection 109(1), may adjourn the hearing to another day if it thinks fit.

EX PARTE HEARING IN THE ABSENCE OF THE DEFENDANT

Clause 12 amends section 110 of the Principal Act to bring the persons before whom a written statement must be sworn before the statement will be admitted as evidence in Court into line with the persons before whom a plea of guilty must be signed in the 'Pleas by Post' procedure provided for under Part VIIA of the Principal Act. Those persons are a legal practitioner, a Justice of the Peace, the Registrar of the Court or a person prescribed for the purpose. (Currently there are no persons prescribed for the purpose.)

NOTICE TO A DEFENDANT

Both section 116I and section 141 provide for notice of a conviction or order to be given to a defendant. Section 116I applies in the 'Pleas by Post' procedure provided under Part VIIA of the Principal Act and section 141 in other cases.

Subclauses 13(b) and 14(a) amend sections 116I and 141, respectively, to include a requirement that the notice of a conviction or order, where a penalty is imposed, is to include notification of the penalty and the means by which and the time in which that penalty is required to be discharged.

TECHNICAL AMENDMENTS

Subclause 4(a) changes the references to a 'barrister, a solicitor or a barrister and solicitor' to a 'legal practitioner'.

Subclause 13(a) amends section 116I of the Principal Act to correct a 'hanging'(1).

Clause 14(b) omits subsection 141(1A) which refers to a repealed provision in the *Motor Traffic Act 1936*.

Clause 15 repeals section 152 of the Principal Act and substitutes a new section 152. The provision is re-drafted in plain English with no substantive change other than that the prison officer receiving the prisoner is to report on the prisoner's apparent physical condition and state of health. The reference to light or hard labour is removed.

Clause 16 repeals section 242 of the Principal Act and substitutes a new section 242. The provision is re-drafted to remove a 'hanging' (c) and to remove the reference to a notice which is no longer relevant, but the provision is otherwise of the same effect.

Clause 17 amends section 248F of the Principal Act which provides for review of decisions relating to the remission or refund of a fee or charge. The provision allows for review of a decision either to allow the remission or refund of a fee or charge or to refuse the remission or refund of a fee or charge. The intention is that only a decision refusing the remission or refund of a fee or charge is to be reviewable. Paragraphs 248F(1)(a), (b) and (c) are amended accordingly.

Clause 18 provides that the Principal Act is amended as set out in Schedule 1. Schedule 1 provides for a range of minor and technical amendments to the Principal Act.

Clause 19 amends the First Schedule to the Principal Act. The First Schedule contains the forms prescribed for use in the Magistrates Court.

Clause 19(a) inserts Forms 9 and 10 into the First Schedule. These Forms are noted in relation to the procedures for bringing a witness to Court as discussed above.

Clause 19(b) omits form 35A from the First Schedule as its subject matter is now dealt with under the *Motor Traffic (Alcohol and Drugs) Act 1977*.