

2015

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

COURTS LEGISLATION AMENDMENT BILL 2015 (No 2)

EXPLANATORY STATEMENT

**Presented by
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Introduction

This explanatory statement relates to the *Courts Legislation Amendment Bill 2015 (No 2)* (the Bill) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The statement is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill.

Outline

Purpose of the Bill

The Bill will amend a number of Acts, Regulations and Rules to create further improvements and efficiencies in ACT court and tribunal structures and processes, and the operation of the ACT justice and coronial systems.

The Acts, Regulations and Rules amended are the *ACT Civil and Administrative Tribunal Act 2008*, *Civil Law (Wrongs) Act 2002*, *Coroners Act 1997*, *Court Procedures Act 2004*, *Court Procedures Rules 2006*, *Domestic Violence and Protection Orders Act 2008*, *Freedom of Information Act 1989*, *Freedom of Information Regulation 1991*, *Judicial Commissions Amendment Act 2015*, *Juries Act 1967*, *Legal Aid Act 1977* and *Magistrates Court Act 1930*.

In summary, the Bill makes amendments to:

- a) ensure there is no legislative impediment to the efficient sharing of court room facilities between the ACT Civil and Administrative Tribunal (ACAT) and the Magistrates Court;
- b) make changes as a result of the repeal of the *Mediation Act 1997*;
- c) streamline the referral of health-care related deaths to the Coroner;
- d) provide that Special Magistrates do not automatically become Coroners unless they are appointed as such by the Chief Coroner;
- e) include an 'overriding objective' provision for the application of legislative provisions to civil proceedings in the courts;
- f) clarify the provision for recovery of court or tribunal fees from an unsuccessful party in civil proceedings;
- g) clarify the application of the Freedom of Information Act to the courts;
- h) defer the commencement of the new judicial complaints handling mechanism from 26 February 2016 until 1 February 2017 (or by the provision of earlier notice by the Minister);
- i) allow potential jurors to be identified by a number rather than by name and occupation;
- j) simplify the process for the reappointment of a Law Society, Bar Association or ACT Council of Social Services nominee to the Legal Aid Board;
- k) introduce a committal waiver provision for criminal proceedings;

- l) make consequential amendments to reflect changes made in the *Local Court Bill 2015* (NT); and
- m) make the position of Principal Registrar of the ACT Courts and Tribunal a statutory appointment.

Human Rights Considerations

The right to fair trial

The Bill may engage the right to fair trial (s21) in the *Human Rights Act 2004* (the HRA), which provides that “everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.” Section 21 gives effect to article 14 of the International Covenant on Civil and Political Rights and promotes procedural fairness and natural justice in proceedings against a person.

The right to fair trial is a fundamental, but not absolute, human right and can be subject to reasonable limitations that can be demonstrably justified in a free and democratic society (HRA, s28). The possible perceived limits on human rights – by introducing a committal waiver provision for criminal proceedings, by introducing an ‘overriding objective’ provision for the application of legislative provisions to civil proceedings, and by deferring the commencement of the new judicial complaints handling mechanism – are reasonable and justifiable in a free and democratic society for the purposes of section 28 of the HRA having regard to the factors set out below.

The amendment introducing a committal waiver provision for criminal proceedings does not limit the right to fair trial. The purpose of this amendment is to allow a Magistrate, on application by the accused person and with the consent of the prosecution, to commit the accused for trial without a committal hearing. A form will be required to be submitted by the accused to apply for a committal waiver. It will require the accused to consent to the waiver and their legal representative to acknowledge that there is a case to answer. The form will require a list of the documents contained in the committal brief to ensure both parties understand the extent of the case at the time the committal hearing is waived. Legal representatives will be required to advise their clients of the case against them so the accused can make an informed decision on whether to waive the committal hearing. In cases where an application is filed, the magistrate has a discretion whether or not to waive committal proceedings. In the case of an application from an accused person who is representing themselves, the safeguard in such cases is that the magistrate has a discretion to refuse the application.

The amendment introducing an ‘overriding objective’ provision for the application of legislative provisions to civil proceedings in the courts does not limit the right to fair trial. The purpose of the amendment is to provide that the main purpose of the civil procedure provisions is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. This will have the effect of streamlining court processes, which increases the likelihood that all matters will be heard more promptly, without affecting a person’s rights in relation to the ‘just resolution’ of the matter.

The amendment deferring the commencement of the new judicial complaints handling mechanism (introduced in the *Judicial Commissions Amendment Act 2015*) from 26 February 2016 to 1 February 2017 does not limit the right to fair trial. The existing system for complaints will continue to operate, and existing appeal rights will continue to apply in all civil and criminal proceedings in the ACT.

For these reasons, any possible perceived limitations on the right to fair trial are reasonable and justifiable.

Courts Legislation Amendment Bill 2015 (No 2)

Detail

Part 1 - Preliminary

Clause 1 (Name of Act) names the Act the *Courts Legislation Amendment Act 2015 (No 2)*.

Clause 2 (Commencement) provides that clauses 5, 6, 7 and 21 of the Bill will commence on 7 April 2016. These provisions contain amendments being made as a result of the repeal of the *Mediation Act 1997*, which takes effect on 7 April 2016. All other provisions commence 14 days after notification of the Act.

Clause 3 (Legislation amended) specifies that the Act amends the following Acts, Regulations and Rules:

- *ACT Civil and Administrative Tribunal Act 2008*;
- *Civil Law (Wrongs) Act 2002*;
- *Coroners Act 1997*;
- *Court Procedures Act 2004*;
- *Court Procedures Rules 2006*;
- *Domestic Violence and Protection Orders Act 2008*;
- *Freedom of Information Act 1989*;
- *Freedom of Information Regulation 1991*;
- *Judicial Commissions Amendment Act 2015*;
- *Juries Act 1967*;
- *Legal Aid Act 1977*; and
- *Magistrates Court Act 1930*.

Part 2 – ACT Civil and Administrative Tribunal Act 2008

Clause 4 (Time and place of proceedings) omits section 28(2). This will ensure there is no legislative impediment to the efficient sharing of court room facilities between ACAT and the Magistrates Court, if agreed by the General President of ACAT and the Chief Magistrate.

Clause 5 (Definitions – div 5.3) omits section 30A, which is an as yet uncommenced section of the ACT Civil and Administrative Tribunal Act (ACAT Act) inserted by the *Courts Legislation Amendment Act 2015*. The definitions are instead inserted by clause 21 which amends the Court Procedures Act. The repeal of the *Mediation Act* drew attention to the protections provided to mediators and as a consequence, the provisions have been broadened to apply to mediators in the courts more generally, rather than just the ACAT.

Clause 6 (Mediation for applications) inserts a new note to section 35(3) that provides that part 5A of the Court Procedures Act (inserted by clause 21) applies to a mediation ordered under section 35.

Clause 7 omits sections 35A (**Admissibility of information given at mediation**), 35B (**Secrecy**) and 35C (**Protection from defamation**), which are as yet uncommenced sections of the ACAT Act inserted by the Courts Legislation Amendment Act. The new provisions are instead inserted by clause 21. See also the commentary on clause 5.

Clause 8 (Functions of registrar – other) inserts a note to section 112(2) (Functions of registrar – other) to clarify that the Principal Registrar of the ACT Courts and Tribunal may direct the Registrar in relation to the exercise of a function other than a judicial function. This amendment is related to the main amendment inserted by clause 19 (Principal registrar of courts).

Part 3 – Civil Law (Wrongs) Act 2002

Clause 9 (Referral by tribunal for mediation or neutral evaluation) inserts a new note to section 195(2) to direct the reader to new part 5A (Mediation) of the Court Procedures Act, which is inserted by clause 21.

Part 4 – Coroners Act 1997

Clause 10 (Objects of Act) replaces current section 3BA(1)(b) with a section that provides that one of the main objects of the Coroners Act is to provide that a person who is a magistrate (other than a special magistrate) is also a coroner, to provide that the Chief Coroner may appoint a special magistrate as a coroner, and to provide for the appointment of deputy coroners. This amendment is consequential on the amendment in clause 11 which, in effect, provides that special magistrates are not automatically coroners.

Clause 11 replaces current section 5 (**A magistrate is a coroner**) with a section that provides that a magistrate, other than a special magistrate, is a coroner for the ACT, and that the Chief Coroner may appoint a special magistrate as a coroner for the ACT. This change means that a special magistrate no longer automatically becomes a coroner, but must separately be appointed to be one by the Chief Coroner. This will ensure that people appointed as coroners have the necessary experience and expertise to deal with coronial matters, which can be particularly complex and sensitive. A transitional provision is inserted by clause 16.

Clause 12 (Coroner’s jurisdiction in relation to deaths) omits the words *during or within 24 hours after, or* from section 13(1)(c) (Coroner’s jurisdiction in relation to deaths). This removes the obligation for a coroner to hold an inquest into the manner and cause of death of a person only because the person dies within a set time (24 hours) after a medical procedure that precedes the death. In the ACT this time-related referral obligation is not a useful measure of deaths that should be investigated by a coroner.

Clause 13 inserts *or Chief Coroner* in section 13(1)(g) (**Coroner’s jurisdiction in relation to deaths**). This provides the Chief Coroner with an own motion power to investigate where a person dies, or is suspected to have died, in circumstances that, in the opinion of the Chief Coroner, should be better ascertained. This would include the

power to hold an inquest into a health care-related death that in the Chief Coroner's opinion should be investigated.

Clause 14 inserts new section 99B (**Protection if information given to coroner**). Section 99B(1) provides that an entity may give information to a coroner if a coroner asks the entity for the information in connection with the exercise of the coroner's functions, or the entity believes on reasonable grounds that the information is relevant to the exercise of the coroner's functions. An example is provided under section 99B(1) of information from a theatre nurse who was present during an operation where the patient dies unexpectedly. Appropriate protections for third parties who make such disclosures are set out in section 99B(2).

Clause 15 (Annual report of court) replaces an incorrect reference to *Chief Magistrate* with *Chief Coroner* in section 102(9).

Clause 16 inserts new part 12 (**Transitional – Courts Legislation Amendment Act 2015 (No 2)**). Section 120 provides that a special magistrate under the Magistrates Court Act who is a coroner immediately before the commencement of part 12 continues to be a coroner as if the *Courts Legislation Amendment Act 2015 (No 2)* had not been enacted. This transitional provision ensures that the amendment is not retrospective in operation, but will apply to future appointments.

Part 5 – Court Procedures Act 2004

Clause 17 inserts new section 5A (**Main purpose of civil procedure provisions**) to provide an 'overriding objective' for the application of the civil proceedings provisions in the Court Procedures Act. The amendment is modelled on rule 21 of the *Court Procedures Rules 2006* and section 37M (The overarching purpose of civil practice and procedure provisions) of the *Federal Court of Australia Act 1976*.

Clause 17 inserts new sections:

- 5A(1), which provides that the main purpose of the civil procedure provisions is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible;
- 5A(2), which provides that, without limiting section 5A(1), the main purpose includes the just resolution of the real issues in civil proceedings, the efficient use of courts resources, including administrative resources, the efficient disposal of a court's overall caseload, the timely disposal of civil proceedings, and the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute;
- 5A(3), which provides that the civil procedure provisions must be interpreted and applied, and any power or duty imposed by them (including the power to make rules) must be exercised or carried out, in the way that best promotes the main purpose;
- 5A(4), which provides that the parties to a civil proceeding must help the court to achieve the objectives; and
- 5A(5), which defines *civil procedure provision* and *court*.

Clause 18 (Advisory committee) inserts new section 11(2)(ca), which adds the Principal Registrar to the list of members of the advisory committee.

Clause 19 inserts new part 2A (**Principal registrar of courts**) which makes the position of Principal Registrar of the ACT Courts and Tribunal a statutory appointment. The position of Principal Registrar is responsible to:

- the Chief Justice – for the administrative affairs of the Supreme Court;
- the Chief Magistrate – for the administrative affairs of the Magistrates Court;
- the General President of ACAT – for the administrative affairs of ACAT; and
- the Executive – in relation to compliance with the legislation governing the management of staff, expenditure of public monies and related matters.

Clause 19 inserts new sections:

- 11A (Appointment of principal registrar), which provides that the Executive must appoint a person to be the Principal Registrar and Chief Executive Officer of the ACT Courts and Tribunal. The Executive must not make such an appointment without first considering any recommendation made by the Chief Justice, the Chief Magistrate and the General President, and unless the Executive is satisfied the person has the experience or expertise to qualify the person to exercise the functions of the position. The Principal Registrar must be appointed for a term of not longer than five years, although may be reappointed if the person is eligible to be appointed to the position under the *Legislation Act 2001*. The appointment is a notifiable instrument;
- 11B (Administrative functions of principal registrar), which sets out the functions the Principal Registrar may carry out in relation to the administration of the Supreme Court, Magistrates Court and ACAT; and
- 11C (Ending principal registrar’s appointment), which sets out the grounds on which the Executive may end the Principal Registrar’s appointment.

Clause 20 (Recovery of fees in civil proceedings if fees not otherwise payable) replaces section 16(2). Section 16 provides that where a successful party in civil proceedings has had the benefit of a fee reduction or waiver under part 3 (Court and tribunal fees), court and tribunal fees are payable by the unsuccessful party where a costs order has been made against that party. Clause 20 substitutes section 16(2) to provide that the court or ACAT may order this party to pay to the registrar of the court or ACAT the amount of this fee.

This change will provide the option of recovering the full fees, while ensuring there is no strict legislative requirement for the recovery of the full fee to be enforced and collected by the court or ACAT. This will give the court and ACAT the discretion to decide if it is not worth pursuing the fee in a particular case, for example in a minor matter where it would become a competing party for recovery against an enforcement creditor.

Clause 21 inserts new part 5A (**Mediation**) to make changes following the repeal of the Mediation Act by the *Courts Legislation Amendment Act 2015*, with effect from 7 April 2016. The as yet uncommenced changes made in that Act as a result of the repeal of the Mediation Act are now contained in new part 5A. Clause 21 inserts new sections:

- 52A (Definitions – pt 5A) that sets out the definitions of *accredited mediator*, *mediation*, *mediation material*, and *Mediator Standards Board*;
- 52B (Admissibility of information given at mediation) that governs the admissibility of mediation material in court and ACAT proceedings.

Section 52B(1) provides that evidence of mediation material is not admissible in a proceeding before a court, an entity authorised to hear and receive evidence, or an entity authorised by the consent of the parties to hear evidence, except in accordance with section 131 of the *Evidence Act 2011* (Exclusion of evidence of settlement negotiations). Section 52B(2) provides that evidence of mediation material is not admissible in a proceeding under the ACAT Act unless all parties agree to the giving of the evidence. This replaces the as yet uncommenced new section 35A of the ACAT Act, and will ensure that a strict reading of that section (that refers to the *Evidence Act 2011* which does not apply to ACAT proceedings), will not result in an interpretation which restricts its intended application. It is in line with the *Victorian Civil and Administrative Tribunal Act 1998* (Vic);

- 52C (Secrecy) that imposes secrecy obligations surrounding mediation and mediation material; and
- 52D (Protection of accredited mediator from liability) that provides that an accredited mediator is not civilly liable for anything done or omitted to be done honestly for the purpose of a mediation (s 52D(1)), and applies the same privilege in relation to defamation that applies in judicial proceedings, to mediation and mediation material (s 52D(2)).

Clause 22 (Dictionary, new definition of *principal registrar*) inserts the definition of *principal registrar*.

Part 6 – Court Procedures Rules 2006

Clause 23 (Purpose of ch 2 etc) omits rule 21 as a result of the amendment inserted by clause 17.

Part 7 – Domestic Violence and Protection Orders Act 2008

Clause 24 (Referrals to mediation) inserts a new note to section 25(2) to direct the reader to new part 5A (Mediation) of the Court Procedures Act, which is inserted by clause 21.

Part 8 – Freedom of Information Act 1989

Clause 25 inserts new section 5A (**Act to apply to courts in relation to administrative matters**) to clarify that the Freedom of Information Act does not apply to any request for access to a document of a court unless the document relates to matters of an administrative nature.

Clause 26 inserts *a court* in new paragraph (aa) (**Dictionary, definition of *prescribed authority***).

Clause 27 (Dictionary, definition of *principal officer*) inserts in new paragraph (b)(ia) the principal registrar as the principal officer in the case of a court.

Part 9 – Freedom of Information Regulation 1991

Clause 28 inserts new item 6 in schedule 2 (**Agencies exempt in respect of**

particular documents), which lists the Justice and Community Safety Directorate as exempt from the operation of section 6(4) of the Freedom of Information Act in relation to documents relating to a court unless the documents relate to matters of an administrative nature.

Part 10 – *Judicial Commissions Amendment Act 2015*

Clause 29 (Commencement) substitutes section 2(2) to provide that if the Judicial Commissions Amendment Act has not commenced before 1 February 2017, it automatically commences on that day. The Act creates a new statutory framework for the handling of complaints against judicial officers in the ACT.

Part 11 – *Juries Act 1967*

Clause 30 inserts a new heading for section 27 (**Preparation of panel of jurors, list of jurors excused and jury cards and allocation of identifying numbers**).

Clause 31 substitutes section 27(3) to provide that the sheriff must allocate a unique identifying number to each person name in the panel of jurors, and prepare a card for each person named in the panel that states the identifying number for the person. This amendment introduces an ‘identifying number’ system to change the treatment of potential jurors to allow them to be identified by a number rather than by name and occupation. This system is modelled on the jury system in New South Wales, and mitigates against the possibility of jurors being identified later by people on whose case they were sitting. It is designed to protect the privacy of individuals, reduce any fears of reprisals and reinforce the confidential nature of the deliberations of a jury.

Clause 32 inserts new section 27A (**Record of identifying numbers**). It provides that the sheriff must keep a record of identifying numbers for each panel of jurors, and that the record of identifying numbers for a panel of jurors must not be kept in the panel.

Clause 33 (Sheriff’s return to precept) substitutes section 28(1)(c) to provide for the Sheriff returning to the jury precept the *jury cards for the people named in the panel* rather than *the jury cards prepared in relation to the persons whose names appear on the jury panel*.

Clause 34 (Informalities etc not to invalidate verdict) amends section 30 to omit *or occupation* and substitute *occupation or identifying number*.

Clause 35 substitutes a new part 6 (**Empanelling jury for criminal trial**). Part 6 sets out the process for empanelling a jury, and new part 6 takes into account the new system of using identifying numbers for potential jurors.

Clause 36 (Standing persons by) amends section 33(1) (Standing persons by) to omit *cards* and substitute *jury cards*.

Clause 37 amends section 33(2) (**Standing persons by**) to provide for the returning to the ballot box of the *jury cards* instead of *the cards bearing the names* for those people who have been ordered to stand by.

Clause 38 (Dictionary, definition of jury card) substitutes section 31(4)(b) for section 31(3).

Clause 39 (Dictionary, new definition of *identifying number*) amends the Dictionary to provide that the term *identifying number* is defined in sections 27(3)(a) and 31(4).

Clause 40 (Dictionary, definition of *person called*) amends the Dictionary to substitute a new definition of *person called*.

Part 12 – *Legal Aid Act 1977*

Clause 41 (Constitution of Board) substitutes ‘Australian Capital Territory Council of Social Service Inc’ (ACTCOSS) for ‘Council of Social Service of the Australian Capital Territory’ in section 16(1)(c)(iv). This reflects the Council’s correct name on the ASIC database.

Clause 42 inserts new section 16(5), which provides a new simplified process for the reappointment of nominees of the Council of the Law Society, Bar Association, or ACTCOSS to the Legal Aid Commission Board. It provides that the Minister may reappoint these members without needing to choose from a panel of not less than three people (as set out in section 16(1)(c)(ii)-(iv)) if the entity that nominated the member recommended the reappointment, and the Minister consulted the President of the Legal Aid Commission about the recommendation. If the Minister does not agree to reappoint the member nominated by the entity, the ‘three nominee appointment process’ in section 16(1)(c)(ii)-(iv) applies.

Part 13 – *Magistrates Court Act 1930*

Clause 43 inserts new division 3.5.1A (**Waiver of committal proceedings**), which inserts new section 88B (Court may waive committal proceedings). This amendment provides that the court may commit an accused person to trial, on application by the accused person and with the consent of the prosecution, without a committal hearing. A magistrate still has discretion whether or not to waive committal proceedings, and will need to consider the matter before agreeing the committal hearing should be waived.

A form similar to the form that is required in the New South Wales Local Court Rules will be required to be submitted by the accused to apply for a committal waiver in the ACT. It will require the accused to consent to the waiver and their legal representative to acknowledge that there is a case to answer. The form will also require an index or list of the documents contained in the committal brief to ensure both parties understand the extent of the case at the time the committal hearing is waived. Legal representatives will be required to advise their clients of the case against them so the accused can make an informed decision on whether to waive the committal hearing. A self-represented accused person may also apply for a committal waiver. The safeguard in such cases is that the magistrate has discretion to refuse the application.

The committal waiver process will have the benefit of increasing efficiencies in the court system, and speeding the court process in cases where the accused makes the

waiver application, the prosecution consents to it, and the magistrate agrees to the application.

This amendment has been modelled on the committal waiver provision in the *Criminal Procedure Act 1986* (NSW). The committal waiver process is a routine part of the committal process in New South Wales.

Clause 44 omits the reference in schedule 2, item 1, column 3 to the *Alcohol Court of the Northern Territory*. The Northern Territory legislation that established the Alcohol Court has been repealed.

Clause 45 omits the reference in schedule 2, item 1, column 3 to the *Court of Summary Jurisdiction of the Northern Territory*. The Northern Territory has consolidated this Court into the Local Court of the Northern Territory.