

2004

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

COURTS PROCEDURES BILL 2004

EXPLANATORY STATEMENT

Circulated by authority of the
Attorney General
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Outline

The Court Procedures Bill 2004 (the Bill) is intended to significantly reduce differences in practice and procedure in ACT courts. The Bill creates a rule-making power for both the ACT Supreme Court and ACT Magistrates Court, allowing for the harmonisation of court rules.

In doing so the Bill and the associated Court Procedures (Consequential Amendments) Bill 2004 amends the *Supreme Court Act 1933*, the *Magistrates Court (Civil Jurisdiction) Act 1982* and the *Magistrates Court Act 1930*. It also incorporates and amends a range of other legislation with provisions that impact on the practice and procedure of the courts.

The objects of this Bill include:

- (a) recognising the importance of court procedures in our system of justice and
- (b) facilitating cooperation between ACT courts in the common goals of:
 - improved access to justice through the development of procedures that are, as far as practicable, the same for all ACT courts; and
 - better court procedures.

Currently, the procedures and rules for the Magistrates Court are contained in the *Magistrates Court Act 1930* and the *Magistrates Court (Civil Jurisdiction) Act 1982*. These procedures and rules may only be changed by amending the legislation. The current situation results in legislatively entrenched procedures and rules in the Magistrates Court which are difficult to change and reduce flexibility in the operation of the court.

In contrast, the ACT Supreme Court has had a rule-making power since 1937 giving the court the ability to make rules about its procedures. The *Supreme Court Rules* are developed by an administrative committee. The rules are disallowable instruments.

The Bill establishes a rule-making power which will be vested in a Rule-making Committee comprised of the Chief Justice, Chief Magistrate, President of the Court of Appeal (or Justice if this is the same person as the Chief Justice), a Justice and a Magistrate.

The Rule-making Committee will be assisted by an Advisory Committee. The Bill specifies the membership of the Advisory Committee which will be comprised of representatives from the courts, court Registrars, ACT Law Society, ACT Bar Association, the Director of Public Prosecutions, Parliamentary Counsel and public servants nominated by the Chief Executive of the Department of Justice and Community Safety.

The Bill provides a template for the new harmonised rules – this is contained as subject matter for rules in Schedule 1 of the Bill. It includes the jurisdiction of Territory courts, service of documents, evidence, admission of lawyers and a number of other matters. The Bill also creates the *Magistrates (Civil Jurisdiction) Rules 2004* which will contain the rules removed from the *Magistrates Court Act 1932* and *Magistrates (Civil Jurisdiction)*

Act 1982. This document will exist as interim rules along with other rule documents such as the *Supreme Court Rules*. Under the Bill, these Rules will expire on 1 July 2006 or when replaced by the Rule-making Committee.

There are currently a large number of Acts that contain provisions which impact on the operation of the courts. Maintaining multiple Acts regulating the operation of the courts would be inconsistent with the objective of more closely integrating the rule-making powers and operation of the courts. Separate Acts governing the operations of the courts will undermine the objective of improved access to justice and improved court procedures.

The Bill therefore consolidates under one piece of legislation a range of provisions relating to court rules and procedures, such as the *Court Security Act 2001* and the *Crown Proceedings Act 1992*.

The benefits of consolidation include:

- enhancing accessibility to the rules and procedures of the courts, by both the legal profession and the community;
- assisting the removal of duplication;
- simplifying the package of legislation;
- providing an opportunity to make minor policy changes to the existing legislation; and
- providing a base for later review and improvement of the substantive content of the consolidated legislation.

Part 1 of the Bill deals with preliminary matters such as commencement of the Act and sets out the objects of the Act.

Part 2 of the Bill deals with the rule-making power, which includes a power to make forms. The part establishes the Rule-making Committee and the Advisory Committee and prescribes some aspects as to their operation.

Part 3 of the Bill relates to court and tribunal fees. It prescribes that the Minister in writing will determine fees for the courts and tribunals. It also prescribes how and when fees will be paid and allows the power for remission, refund, deferral, waiver and exemption of fees. This part also provides for review of decisions relating to waived or exempt fees.

Part 4 incorporates provisions currently located in the *Crown Proceedings Act 1992*. It provides that proceedings may be brought by or against the Crown in the same way as proceedings between subjects; and that the same procedural and substantive law applies to such proceedings as in the case of proceedings between subjects. It also provides that subject to the regulations, proceedings may be brought by or against the Crown for the Territory Crown—under the name of the ‘Australian Capital Territory’; or in any other case—under the name in which the Crown could sue or be sued in the courts of its own jurisdiction.

Part 5 incorporates the provisions of the *Court Security Act 2001*. The provisions cover the rights of entry to the courts by people and the powers of authorisation that court security personnel hold in carrying out their duties.

Part 6 makes miscellaneous provision, including a regulation making power.

Part 7 Division 7.1 reflects the objects of the Act by providing a timeframe for the harmonisation of existing court procedures and rules to occur over the next two years. It will allow time for the Rule-making Committee to integrate and harmonise the two separate sets of rules. These rules include, the *Supreme Court Rules* and the newly created (under part 8 of this Bill) *Magistrates Court (Civil Jurisdiction) Rules 2004*. The expiry date of the current separate rule documents will occur on 1 July 2006 (*existing rules expiry day*) but there is provision for this day to be modified by regulation.

Division 7.2 to 7.6 provide that court procedures contained in provisions of other legislation are inserted into the Bill and will expire on the *existing rules expiry day*.

Part 8 provides transitional provisions. The part creates a new instrument called the *Magistrates Court (Civil Jurisdiction) Rules 2004* (the MC(CJ) Rules). The MC(CJ) Rules are taken to be rules made under the Act. These rules will be taken to have been notified but will not require to be presented to the Legislative Assembly under the *Legislation Act 2001*.

The framework for the new MC(CJ) Rules is at Schedule 2. The rules it will contain are currently located in the *Magistrates Court Act 1932* and the *Magistrates Court (Civil Jurisdiction) Act 1982*. The Court Procedures (Consequential Amendments) Bill 2004 further amends these laws, removing procedural provisions and placing the provisions into the MC(CJ) Rules.

This process in effect removes the Magistrates Court rules from statute.

Part 8 also provides that forms approved for use in the Magistrates Court by other specified legislation are taken to be forms approved under the new Act and that the existing *Magistrates Court Rules 1932* are taken to be made under the new Act.

In addition, this part provides that the current *Supreme Court Rules* and approved forms contained in Schedule 1 of the *Supreme Court Rules* are made under the new Act. This includes the *Supreme Court Rules* contained in the *Supreme Court (Admission of Legal Practitioners) Rules*. Forms approved under section 75 of the *Supreme Court Act 1933* are also taken to be approved under the new Act.

As transitional arrangements, these provisions will cease to exist after the day on which the Act commences.

There is provision for the regulations to modify Part 8. The regulations cannot make changes of a policy nature or changes to the Act which are more than savings or transitional matters. This section will expire with the expiration of part 8, two years after the day it commences.

Schedule 1 of the Bill provides the subject scope of the Rule-making Committee's authority to make rules. The scope of this power include the jurisdiction of the power which covers all Territory courts, prescribed tribunals under the legislation and the

jurisdiction of the Master, Registrars and Deputy Registrars. The scope of the power also covers rules relating to the service of documents, evidence, admission of lawyers and other matters. The part specifically provides rule-making powers on matters that fall to how proceedings in the civil and criminal jurisdictions will operate.

Schedule 2 is provided for under Part 8 of the Bill creating subordinate legislation called the *Magistrates Court (Civil Jurisdiction) Rules 2004*. Schedule 2 provides the framework for this document specifically the preliminary matters such as the name of the rules and application of rules, relevant definitions and the dictionary.

Clause Notes

Numeration note: Note that there are a number of gaps in the numeration of this bill. These gaps are to facilitate concurrent amendments by the associated Court Procedures (Consequential Amendments) Bill 2004 which reorganise various provisions of other laws into this Bill.

Clause 1 – Name of Act – states the title of the Act, which is the *Court Procedures Act 2004*.

Clause 2 – Commencement – states that the Act commences on a day fixed by the Minister by notice.

Clause 3 – Dictionary – provides that the dictionary at the end of the Act is part of the Act. The dictionary defines key words and expressions used in the Act, and includes references to other words and expressions defined in other parts of the Act or in other legislation.

Clause 4 – Notes – provides that notes included in this Act are only explanatory.

Clause 5 – Objects of Act – outlines the objects of the Act as including:

- recognition of the importance of court procedures in our system of justice; and
- facilitation of cooperation between ACT courts in the common goals of improved access to justice through the development of procedures that are, as far as practicable, the same for all ACT courts, and better court procedures.

The clause also provides that courts include tribunals prescribed under clause 6 of the Act.

Clause 6 – Definition for pt 2 – defines *prescribed tribunal* as a tribunal prescribed under the regulations for this part. While this provision would permit, in the future, the rules of a tribunal to be determined within the structure created by the Act, it is not intended to proceed immediately to take this approach.

Clause 7 – Rule-making power – provides for the rule-making power to be vested in a Rule-making Committee. The power relates to the making of rules for the practice and procedure of Territory courts, prescribed tribunals and registries. The additional subject matter for the rules is contained in Schedule 1. It also details when rules are taken to be made.

Clause 8 – Approved forms – provides that the Rule-making Committee may approve forms under the Act or for use in Territory courts, prescribed tribunals and registries. The form must be used for its intended purpose. The section details when a form is taken to be approved. An approved form is a notifiable instrument.

Clause 9 – Rule-making committee – provides that the Chief Justice; the President of the Court of Appeal (or if Chief Justice a resident judge appointed by the Chief Justice); a resident judge or if no appointment is made the Master; the Chief Magistrate; and, a magistrate appointed by the Chief Magistrate are the members of the Rule-making Committee. The clause provides for the Rule-making Committee to conduct proceedings how it decides and that the Chairperson of the Committee is the Chief Justice. The clause provides for a different Chairperson in specified circumstances. Under this clause, the Chief Justice must appoint a public servant as secretary of the Committee.

Clause 10 – Delegation by Chief Justice, President and Chief Magistrate – provides for the Chief Justice, President and Chief Magistrate to delegate their functions under Part 2 – Court rules and forms.

Clause 11 – Advisory committee – establishes an Advisory Committee and provides for twelve committee members who are representatives from the courts, ACT Law Society, ACT Bar Association and Government. The Chief Justice is required to appoint a resident judge as the Chairperson. The public servant appointed as secretary to the Rule-making Committee is also a member of the Advisory Committee. The clause also provides the functions of the Advisory Committee which are to:

- initiate, consider, develop, and advise the Rule-making Committee on proposals for making rules and approving forms under the Act; and
- make recommendations to the Rule-making Committee about the making of rules and approving of forms under the Act.

Clause 12 – Definitions for pt 3 – provides definitions relating to part 3 - Court and tribunal fees. It includes the relevant legislation and tribunals to be covered under this Part.

Clause 13 – Determination of fees – provides that the Minister, in writing may determine fees for the proceedings in a court or tribunal and matters incidental to the proceedings; and, for facilities and services provided by the court or tribunal in all relevant jurisdictions in which the court is convened. A determination may provide for a number of matters including the exempting from liability to pay fees or remitting, refunding, waiving or deferring of fees in particular circumstances by the court or Registrar. A determination under this clause is a disallowable instrument.

Clause 14 – Payment of fees – provides that a fee is payable in advance unless it is a fee determined by reference to expenses actually incurred, or in providing the facility or service, and is payable on notice from the Registrar of the court or tribunal.

Clause 15 – Remission, refund, deferral, waiver and exemption of fees – provides when a determined fee can be remitted, refunded, deferred, waived or where an exemption from payment is available.

Clause 16 – Recovery of fees in non-criminal proceedings if fees otherwise not payable – provides that in civil proceedings between at least two parties, if the first party's fees are covered by an exemption, remittance, refund or waiver, or the fee is not

otherwise payable but the first party's costs are payable by the second party, then the second party must pay to the Registrar of the court or tribunal the amount of the exemption, remission, refund or waiver.

Clause 17 – Recovery of fees in criminal proceedings if fees not otherwise payable – provides that in criminal proceedings before the Magistrates Court if the information fee is not payable, completely or partly, and the defendant is convicted and ordered to pay a fine then in addition to the fine the amount of the information fee waived is also payable.

Clause 18 – Review of decisions – provides that decisions made under this part by the Registrar of a court or tribunal refusing to remit, refund, defer, waive or exempt fees (completely or in part) is reviewable by the relevant court or tribunal. The clause also outlines the process the Registrar must follow in refusing an application and for review of that decision by the court or tribunal. There is no fee for an application under this clause.

Clause 19 – There is no clause 19 (see the numeration note).

Clause 20 – Definitions for pt 4 – provides definitions for part 4 dealing with Crown proceedings.

Clause 21 to 39 – there are no clauses 21 to 39 (see the numeration note).

Clause 40 – Definitions for pt 5 – provides definitions for part 5 dealing with Court security. These definitions (as amended) have been relocated from the dictionary of the *Court Security Act 2001*.

Clauses 41 to 52 – there are no clauses 41 to 52 (see the numeration note).

Clause 53 – Assignment of earnings not enforceable – provides that an assignment of earnings is not enforceable. It contains a definition of earnings as a sum payable to a person by way of wages or salary, including any fee, bonus, commission, overtime pay or other emolument payable in addition to wages or salary. This definition is relocated from the *Earnings (Assignment and Attachment) Act 1966*. The definition has been amended to exclude pension amounts and is now consistent with more widely used definitions of earnings.

Clause 54 – Regulation-making power – provides the Executive with the power to make regulations under the Act.

Clauses 55 to 59 – there are no clauses 55 to 59 (see the numeration note).

Clause 60 – Expiry of existing rules – provides that the rules contained in the *Supreme Court Rules*; the *Supreme Court (Admission of Legal Practitioners) Rules*; the *Magistrates Court Rules 1932*; and the *Magistrates Court (Civil Jurisdiction) Rules 2004* will expire on 1 July 2006. This expiry date can be changed by regulation. The clause expires on the day the last of the rules mentioned expire. It is envisaged that these documents will be replaced by a consolidated and harmonised rule document.

Clause 61 – References to Magistrates Court (Civil Jurisdiction) Act etc – provides a series of technical rules designed to save references to legislation.

Clause 62 – Definitions for Div 7.2 – provides the definitions for division 7.2 – Arrest on mesne process.

Clauses 63 to 74 – there are no clauses 63 to 74 (see the numeration note).

Clause 75 – Expiry of div 7.2 – provides that this division expires on the *existing rules expiry day* or if the rules fix an earlier expiry day for this division, that day.

Clause 76 – Definitions for div 7.3 – provides definitions for division 7.3.

Clause 77 – there is no clause 77 (see the numeration note).

Clause 78 – Expiry of div 7.3 – provides that this division expires on the *existing rules expiry day* or, if the rules fix an earlier expiry day for this division, that day.

Clauses 79 to 82 – there are no clauses 80 to 82 (see the numeration note).

Clause 83 – Expiry of div 7.4 – provides that this division expires on the *existing rules expiry day* or, if the rules fix an earlier expiry day for this division, that day.

Clauses 84 to 85 – there are no clauses 84 to 85 (see the numeration note).

Clause 86 – Expiry of div 7.5 – provides that this division expires on the *existing rules expiry day* or, if the rules fix an earlier expiry day for this division, that day.

Clauses 87 to 93 – there are no clauses 87 to 93 (see the numeration note).

Clause 94 – Expiry of div 7.6 – provides that this division expires on the *existing rules expiry day* or, if the rules fix an earlier expiry day for this division, that day.

Clauses 95 to 99 – there are no clauses 95 to 99 (see the numeration note).

Clause 100 – New Magistrates Court (Civil Jurisdiction) Rules – creates the *Magistrates Court (Civil Jurisdiction) Rules* (MC(CJ) Rules). The rules it contains are those provisions (as amended) in schedule 2 and are the *interim rules*. The section provides that the MC(CJ) Rules are rules made under the Act; have been notified; and, are not required to be presented to the Legislative Assembly under the *Legislation Act 2001* section 64 (1). The clause provides that the *interim rules* can be amended or repealed as if they were rules that the Rule-making Committee had made.

This section is an executory provision that expires on the day it commences.

Clause 101 – Rules and forms in force under Supreme Court Act – provides that rules under the *Supreme Court Rules* and *Supreme Court (Admission of Legal Practitioners)*

Rules immediately before the commencement of this section are taken to have been made under this Act by the Rule-making Committee. It also provides that a form in the *Supreme Court Rules* Schedule 1 or approved under the *Supreme Court Act 1933* section 75 immediately before the commencement of this section is taken to be a form approved under this Act by the Rule-making Committee.

This section is an executory provision that expires on the day it commences.

Clause 102 – Rules and forms in force under Magistrates Court Act – provides that the *Magistrates Court Rules 1932* which were in force immediately before the commencement of this section are taken to have been made under this Act by the Rule-making Committee. A form approved under the *Magistrates Court Act 1930* section 256 immediately before the commencement of this section is also taken to be a form approved under this Act by the Rule-making Committee.

This section is an executory provision that expires on the day it commences.

Clause 103 – Forms in force under Magistrates Court (Civil Jurisdiction) Act etc – saves the operation of existing forms.

Clauses 104 – Modification of pt 8’s operation – attention is drawn to this provision which permits the modification of part 8 for a period of two years. The provision is included to permit a fast remedy for any matter of a transitional matter overlooked in this package of legislation.

Clause 105 – Expiry of pt 8 – provides for the expiry of part 8.

Schedule 1 – Subject matter of rules – provides the scope of the Rule-making Committee’s power to make rules.

Schedule 2 – New Magistrates Court (Civil Jurisdiction) Rules 2004 – provides the framework for this document created under Clause 100 of the Bill.