

**2008**

**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY**

**COURT LEGISLATION AMENDMENT BILL 2008**

**EXPLANATORY STATEMENT**

Presented by the authority of  
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## COURT LEGISLATION AMENDMENT BILL 2008

### Overview of Bill

This Bill contains a number of reforms to the ACT's court legislation, which in many ways is outdated, inefficient and due for reform. Following consultation with court stakeholders, a number of amendments to court legislation have been introduced to better reflect evolving practice and to aid improved efficiency in the courts.

The proposed amendments are detailed below.

### Introduction of a Court Attendance Notice

Currently, commencement of proceedings must be carried out in accordance with Chapter 3 of the *Magistrates Court Act 1930*. The legislation requires police officers to attend court to 'lay information' before a magistrate so that the court can issue a summons for the attendance of the defendant on a particular date. This has resulted in great time and financial expenditure for the police, courts, Director of Public Prosecutions (DPP) and other court stakeholders. It has facilitated a high rate of poor attendance by defendants and inefficiently diverts court resources from attention to more substantive issues.

In line with other jurisdictions, the Bill implements a Court Attendance Notice (CAN) to address the inadequacies of the current commencement procedures. A CAN is issued at the time of charging and provides the following information to the defendant:

- the offence;
- a brief outline of the particulars of the offence;
- name of the police officer or person authorised under a law of the Territory;
- the time and date that the accused must appear in court;
- advises that non-attendance will result in a warrant for arrest; and
- explains that in non-attendance scenarios, the case may be heard in the defendant's absence.

The CAN system of commencement has many advantages over the current method of commencing proceedings. It will reduce the amount of time accused persons remain in police custody, as it will significantly simplify the process whereby their criminal matters are commenced. Another benefit to the accused is the receipt of more information about the charge at the point of release, and greater certainty about the nature of the charge. The system will lead to more efficient use of resources, as police are not required to attend court to "lay information", saving time and keeping more police on the street. It also allows more time for the courts to deal with substantive issues.

For transitional purposes and to allow flexibility for stakeholders, the CAN will supplement the existing commencement procedures during a 12 month trial of

the CAN, after which existing procedures will be repealed if the CAN process is found to be satisfactory.

### Reference Appeals

Section 37S of the *Supreme Court Act 1933* provides a means whereby the Court of Appeal may hear and decide a question of law arising at, or in relation to, a Supreme Court trial. The decision on the reference appeal does not invalidate or affect any verdict or decision given at the trial. Similarly, division 3.10.2A of the *Magistrates Court Act* deals with reference appeals from decisions of the Magistrates Court to the Supreme Court. Crucially, both Acts currently limit the availability of reference appeals to issues arising from a trial on indictment that resulted in an acquittal.

Important questions of law can arise in any criminal proceedings. If these questions remain unresolved, future prosecutions may be jeopardised due to uncertainty. Given the safeguard that a reference appeal decision cannot invalidate or affect the original verdict or decision in a case, reference appeals provide an important avenue for the DPP and the Attorney General to obtain guidance regarding interpretation of the law. Accordingly, the relevant sections of the Acts have been amended to delete the acquittal criterion. Importantly, the safeguard that a reference appeal decision cannot invalidate or affect the original verdict or decision in a case remains in both Acts.

### Changes to Requirements for Written Statements Admitted as Evidence

Currently, section 90AA(3)(a) of the *Magistrates Court Act* requires that a written statement admitted as evidence must be in the form of a statutory declaration. In practice, this means that after a document is prepared, it must be signed in the presence of a person authorised to witness a statutory declaration. The requirement for a witness is unnecessary and has been removed in New South Wales (in favour of rules setting out the formal requirements such a document must take). As the criminal law consequences of a false statement made to a court are equivalent under either process, this appears to be an appropriate change.

### Criminal Appeals Jurisdiction in the Court of Appeal

When the Supreme Court exercises appellate jurisdiction, it is known as the Court of Appeal. Part 2A of the *Supreme Court Act* sets out the court's appellate jurisdiction. It provides that orders of the court, including convictions, may be appealed. The High Court, in *R v Hillier*,<sup>1</sup> has given part 2A a broad definition (in line with its counterparts in other jurisdictions). To reflect the terms of this decision, part 2A has been amended to provide that an appeal:

- should be allowed if the verdict of the jury is unreasonable or cannot be supported;

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<sup>1</sup> (2007) 228 CLR 618.

- should be allowed if the order was wrong in law or a miscarriage of justice; and
- should be dismissed if no substantial miscarriage of justice has actually occurred.

### Representation of the DPP in the Magistrates Court

The *Director of Public Prosecutions Act 1990* has been amended to allow the DPP's non-legal practitioner staff to appear on the DPP's behalf in the callover list. The call-over list is the process by which the Registrar liaises with the DPP and the defence counsel to determine an appropriate date for proceedings to commence. This amendment is consistent with the Magistrates Court Practice Directions released in 2007, which permit a DPP paralegal to represent the DPP in the callover list, while the prosecutor appears in matters before the Magistrate. Practice Directions are designed to streamline the court's procedures and encourage best practice in the Magistrates Court. Allowing non-legal practitioner staff to appear in the callover list allows for more efficient use of the court and the DPP's time and resources, freeing prosecutors to work on technical legal matters.

## Clause Notes

### PART 1 – Preliminary

**Clause 1 – Name of Act** – names the Act as the *Court Legislation Amendment Act 2008*.

**Clause 2 – Commencement** – commences the Act on a day fixed by the Minister by written notice.

### PART 2 – Crimes (Restorative Justice) Act 2004

**Clause 3 – Legislation amended – pt 2** – states that this part amends the *Crimes (Restorative Justice) Act 2004*.

**Clause 4 – Referring entities, Section 22(2), definition of *prosecution referral*, paragraph (b)** – amends the list of forms of referral of the offender for prosecution to specifically refer to the new court attendance notice under the *Magistrates Court Act 1930*. The list already includes a court attendance notice, but has been updated to clarify that the reference is to the new court attendance notice under the *Magistrates Court Act 1930*.

### PART 3 – Director of Public Prosecutions Act 1990

**Clause 5 – Legislation amended – pt 3** – states that this part amends the *Director of Public Prosecutions Act 1990*.

**Clause 6 – Representation of Territory and Territory authorities, Section 11(3)** – this amendment is consequential to new section 16(d), which allows non-legal practitioner staff of the DPP to appear in the Magistrates Court callover list. The amendment confirms that only the legal practitioners listed in subsections 16(a)-(c) may represent the DPP in all other parts of the proceeding.

**Clause 7 – Appearances by director, New section 16(d)** – amends section 16 to allow non-legal practitioner staff of the DPP to appear in the Magistrates Court callover list on behalf of the DPP, consistent with Practice Direction 2 of 2007, paragraph 3.2.

**Clause 8 – Dictionary, note 2, new dot point** – this amendment is consequential to new section 16(d), and amends the dictionary to define ‘Magistrates Court’ for this purpose.

### PART 4 – Magistrates Court Act 1930

**Clause 9 – Legislation amended – pt 4** – states that this part amends the *Magistrates Court Act 1930*.

**Clause 10 New division 3.3.3A** – inserts a new division 3.3.3A, which introduces the Court Attendance Notice (CAN) method of commencing criminal proceedings in the Magistrates Court.

New section 41A includes definitions for new division 3.3.3A.

New section 41B states that a proceeding for an alleged offence may be commenced by the service and filing of a CAN under this division. Section 41B also sets out the required content of the CAN, which must:

- state the name of the person;
- describe the offence (it is sufficient to describe an offence in a CAN in the way the offence is described in the law that creates the offence);
- briefly state the particulars of the alleged offence;
- state the name of the police officer or person authorised under a law of the Territory; and
- require the defendant to appear before a Magistrates at a stated date, time and place, unless a warrant is issued for the person's arrest or the person is refused bail; and
- state, unless a warrant is issued for the person's arrest or the person is refused bail, that failure to appear may result in the person's arrest or in the proceeding being dealt with in the person's absence.

The date stated for the person to appear before a magistrate must be at least 14 days after the day the notice is served. The rules may prescribe additional matters that must be included in a court attendance notice. Any form that is approved under the *Court Procedures Act 2004* for this provision must be used.

New section 41C deals with the service requirements for the CAN. Section 41C states that if an authorised person suspects, on reasonable grounds, that a person has committed an offence, the authorised person may serve a court attendance notice on the person. The section requires personal service of a CAN, as defined in part 6.8 of the *Court Procedures Rules 2006*, with the exception of division 6.8.3 (Service – Magistrates Court), which is better suited to the service of documents for civil proceedings.

New section 41D deals with the filing requirements for a CAN. A copy of a court attendance notice served on a person must be filed as soon as practicable, but not less than 14 days before the day stated in the notice for the person to appear before a magistrate, or if the notice contains a consent signed by the person to appear before a magistrate at a date earlier than 14 days after service of the notice—as soon as practicable.

Section 41D also deals with the need for the information in the CAN to be filed with a sworn statement, in the event that a warrant is intended to be issued in the first instance against the person. The court may issue a warrant pursuant to section 89 in the event that a person disobeys a CAN (as a CAN is taken to be a summons for the purpose of section 89).

New section 41E explains the relationship between the CAN and the pre-existing information and summons method of commencing criminal proceedings. It confirms that the CAN is additional to, and does not limit, any other provision of a Territory law about an information or summons in relation to a criminal proceeding. This section ensures that the CAN clearly establishes a new procedure for the commencement of proceedings, whilst maintaining the current information and summons commencement procedures.

**Clause 11 Written statements may be admitted in evidence, Section 90AA (3) (a)** – changes the current requirement in paragraph 90AA(3)(a) that written statements admitted in evidence must be in the form of a statutory declaration. Instead of a statutory declaration, which must be witnessed by a qualified person, the statement must contain the endorsement set out in the amended paragraph. This amendment is consistent with the approach in New South Wales. This approach is more efficient and less time consuming, and is appropriate, given the criminal law consequences of a false statement made to a court are equivalent under either process. The requirements of paragraphs 90AA (3)(b) and (c) are maintained, which include that the written statement must include a statement about the age of the person making it, and a statement that, before the person signed it, the person who made it read the statement or had it read to the person.

The Rules Committee has broad rule-making powers under the *Court Procedures Act 2004* to determine additional appropriate requirements for written statements admitted in evidence.

**Clause 12 Section 219AB heading** – changes the heading of section 219AB from ‘reference appeal following acquittal on indictment’ to ‘reference appeal in relation to proceeding’, in line with the change to the requirement that a reference appeal may only be made in the event of an acquittal.

**Clause 13 Section 219AB(1)** – amends subsection 219AB(1) to allow the Magistrates Court, on application by the Attorney-General or the DPP, to hear and decide (by way of a reference appeal), any question of law arising at or in relation to the proceedings, irrespective of the outcome of the original proceedings. This amendment is appropriate, given that important questions of law may be raised in relation to any criminal proceedings, irrespective of the outcome of the original proceedings. Critically, the protection afforded to the defendant that a reference appeal does not affect the outcome of the original proceedings has been maintained (refer clause 16).

**Clause 14 Sections 219AB(2)** – the term ‘trial’ has been replaced with ‘proceeding’, to make it clear that the reference appeal option is not limited to matters where a plea of not guilty has been entered.

**Clause 15 Sections 219AC(1)(a)** – the wording ‘at the trial’ has been replaced with ‘in the proceeding’, to make it clear that the reference appeal process is not limited to matters where a plea of not guilty has been entered.

**Clause 16 Section 219AD** – the term ‘trial’ has been replaced with ‘proceeding’, to make it clear that the reference appeal process is not limited to matters where a plea of not guilty has been entered.

**Clause 17 Dictionary, note 2, new dot point** – inserts the term ‘proceeding’ into the dictionary as an example of a commonly used term that is defined in the dictionary of the *Legislation Act 2001*. This amendment is consequential to the other amendments to the *Magistrates Court Act 1930*.

**Clause 18 Dictionary, definition of *authorised person*** – amends the dictionary definition of ‘authorised person’ to include the meaning of ‘authorised person’ for the purposes of the new CAN commencement procedure.

**Clause 19 Dictionary, new definition of *court attendance notice*** – inserts a definition of ‘court attendance notice’ into the dictionary, referring the reader to new section 41B.

## PART 5 – Supreme Court Act 1933

**Clause 20 Legislation amended – pt 5** – states that this part amends the *Supreme Court Act 1933*.

**Clause 21 Appellate jurisdiction, Section 37E (2) (b)** – this amendment is consequential to the change of heading to section 37S (refer clause 23).

**Clause 22 Orders on appeal, New section 37O(1A) and (1B)** – inserts new sections 37O(1A) and (1B) to reflect the High Court’s decision in *R v Hillier*,<sup>2</sup> in which the High Court commented on pt 2A, which governs the jurisdiction of the Court of Appeal in appeals from convictions for indictable offences. The High Court noted that pt 2A “said nothing about the principles governing the exercise of the powers given by the Act [in relation to criminal appeals jurisdiction]”.<sup>3</sup> Despite the lack of explicit provision, the High Court determined that the criminal appeals jurisdiction in the ACT is as broad as that of equivalent courts of appeal in other jurisdictions, and interpreted pt 2A accordingly. This amendment brings the appeals jurisdiction in line with that of all other Australian jurisdictions,<sup>4</sup> by explicitly stating that the Court of Appeal, on an appeal against conviction, must allow the appeal if it considers that:

- the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence; or
- the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law; or
- on any other ground there was a miscarriage of justice.

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<sup>2</sup> (2007) 228 CLR 618.

<sup>3</sup> Ibid at 632.

<sup>4</sup> For example, refer *Criminal Appeal Act 1912* (NSW), s 6; *Crimes Act 1958* (Vic), s 568.



The Court of Appeal may also dismiss an appeal against conviction if it considers that the point raised by the appeal might be decided in favour of the appellant, but no substantial miscarriage of justice has actually occurred.

**Clause 23 Section 37S heading** – changes the heading of section 37S from ‘reference appeal following acquittal on indictment’ to ‘reference appeal in relation to proceeding’, in line with the change to the requirement that a reference appeal may only be made in the event of an acquittal (refer clause 28).

**Clause 24 Section 37S(1)** – amends subsection 37S(1) to allow the Supreme Court, on application by the Attorney-General or the DPP, to hear and decide (by way of a reference appeal), any question of law arising at or in relation to the proceedings, irrespective of the outcome of the original proceedings. This amendment is appropriate, given that important questions of law may be raised in relation to any criminal proceedings, irrespective of the outcome of the original proceedings. Critically, the protection afforded to the defendant that a reference appeal does not affect the outcome of the original proceedings has been maintained (see subsection 37S(6)).

**Clause 25 Section 37S (2) and (3)** – the term ‘trial’ has been replaced with ‘proceeding’, to make it clear that the reference appeal option is not limited to matters where a plea of not guilty has been entered.

**Clause 26 Section 37S (4) (a)** – the wording ‘at the trial’ has been replaced with ‘in the proceeding’, to make it clear that the reference appeal option is not limited to matters where a plea of not guilty has been entered.

**Clause 27 Section 37S (4) (b)** – the term ‘trial’ has been replaced with ‘proceeding’, to make it clear that the reference appeal option is not limited to matters where a plea of not guilty has been entered.

**Clause 28 Section 37S (6)** – the wording ‘at the trial’ has been replaced with ‘in the proceeding’, to make it clear that the reference appeal option is not limited to matters where a plea of not guilty has been entered.

**Clause 29 Dictionary, note 2, new dot points** – inserts the terms ‘indictment’ and ‘proceeding’ into the dictionary as examples of commonly used terms that are defined in the dictionary of the *Legislation Act 2001*. This amendment is consequential to the amendments to section 37S (reference appeals).