2012

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

COURTS LEGISLATION AMENDMENT BILL 2012

EXPLANATORY STATEMENT

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Overview

Background

On 16 December 2011 the Supreme Court announced that it will change aspects of its case management and listing practices with a view to reducing the time taken to finalise matters lodged in or committed to the Court.

The Supreme Court's decision to adopt a new approach to case management arose from the review of case management and listing procedures conducted by Justice Hilary Penfold of the Supreme Court and the Director-General of Justice and Community Safety. The purpose of the review was to identify case management practices that could be used to reduce delays in the Supreme Court.

The review was informed by a Reference Group, comprising of the Director of Public Prosecutions, the CEO of Legal Aid ACT, the President of the Bar Association, and the President of the Law Society. Justice Penfold and the Director-General also consulted current and retired Judges from other jurisdictions, including experts who had undertaken reviews of case management elsewhere in Australia.

The consultation with other jurisdictions and discussions by the Reference Group identified areas for improvement in criminal and civil case management in the ACT Supreme Court. The review identified a number of measures to improve efficiency into the long term and to address the current backlog.

A discussion paper was prepared to elicit information from all interested stakeholders. Following the release of the paper in August 2011, Justice Penfold and the Director-General met regularly with Legal Aid ACT, the Director of Public Prosecutions, the Bar Association, the Law Society, and individual legal practitioners to further discuss the issues raised and to achieve consensus on how to improve case management and listing procedures in the Supreme Court.

New approach to case management in the Supreme Court

The main change announced by the Supreme Court was the adoption of a docket case management system, covering both civil and criminal matters. Under the docket system each judicial officer will manage their 'docket' with a view to encouraging early and efficient resolution of matters.

The adoption of a docket system will assist the Court to take control of cases to make the best use of the time and resources of the Court. Consultation with other jurisdictions during the review confirmed that judicial control over case management functions, including listing, is essential to court efficiency.

Docket systems have been successfully implemented in the United States and locally in the Federal Court, the Family Court and the Federal Magistrates Court, where they have been proven to improve efficiency.

Another major change announced by the Court was an expansion of the existing requirements for the exchange of material in criminal matters. The new requirements are designed to ensure that the prosecution has properly considered its position, and that the defence is fully aware of the prosecution case, before the matter is assigned to a docket judge.

This Bill makes the following legislative amendments to assist the new docket system to be implemented by the Supreme Court:

- Amendments to the *Supreme Court Act 1933* to provide that the election for a judge alone trial must be made prior to the identity of the trial judge being known to the accused or to his or her legal representatives and before any time limit prescribed under the Court Procedures Rules. The amendments also remove the existing requirement for the election to be made before the court allocates a date for the person's trial has been removed as this is not consistent with the Court's proposed new docket system.
- Amendments to the *Crimes (Sentencing) Act 2005* to clarify that the Magistrates Court can order a pre-sentence report at the time they commit an offender to be sentenced in the Supreme Court. The amendments also remove a provision in the Act dealing with the distribution of pre-sentence reports from the courts to the parties. This is a procedural matter which would more appropriately be dealt with in the Court Procedures Rules.
- Amendments to *the Crimes (Sentencing) Act 2005* to permit a reduced sentence to be imposed where an offender has facilitated the administration of justice by cooperating to ensure that the trial is focused as efficiently as possible on the real issues in dispute.

Human Rights Implications

The Bill contains a number of provisions which engage rights under the *Human Rights Act 2004*.

The policy behind this Bill is to support changes that the Supreme Court will make to its practices that will support the right to be tried without unreasonable delay (section 22(2)(c) of the *Human Rights Act 2004*).

The amendments do not substantially interfere with the human rights in the *Human Rights Act 2004*, however the amendments to section 68B of the *Supreme Court Act 1933* gives rise to consideration of human rights, specifically the right to fair trial in section 21 of the Act.

The amendment does not limit the right to a fair trial including the right to equal access, the right to legal advice and representation and the right to procedural fairness. The amendment does not affect a person's ability to have their criminal charges 'decided by a competent, independent and impartial court or tribunal after a fair and public hearing (section 21(1) of the *Human Rights Act 2004*). The amendment is solely concerned with ensuring that the timing of an election for a judge alone trial is more appropriately matched to processes that will exist under the Court's proposed new docket system.

Clause Notes

Clause 1 Name of Act – states the title of the Act as the *Courts Legislation Amendment Act 2012.*

Clause 2 Commencement – provides that the Act will commence on the date decided by the Minister and notified on the Legislation Register. If the Minister has not fixed a date within twelve months beginning on the day of notification of the Act, the Act will commence on the first day after this period.

Providing for the Minister to determine commencement allows sufficient flexibility in the timing of the commencement of the Act. The Act contains amendments to legislation that will support the Supreme Court to implement a new docket case management system and make other changes to operating procedures with a view to reducing the time taken to finalise matters lodged in or committed to the Court.

The operation of section 79 of the *Legislation Act 2001* (6 month default commencement) has been removed in relation to the Act to ensure that the amendments do not commence until the changes proposed by the Supreme Court have been made. 12 months is considered an appropriate period of time to enable practice directions to be developed and to allow the sub-committee of the rules-making committee to develop rules to implement the changes.

Clause 3 Legislation amended – provides that the Act amends the legislation mentioned in schedule 1.

Schedule 1 Legislation amended

Part 1.1 Crimes (Sentencing) Act 2005

Clause 1.1 New section 33(1)(ka) – inserts new paragraph (ka) into section 33(1) of the *Crimes (Sentencing) Act 2005.*

Section 33(1) of the Act provides a list of matters that the court must consider in deciding how an offender should be sentenced, if at all, for an offence.

This clause inserts a new matter into this list; new paragraph (ka). The new paragraph requires the court to consider any assistance by the defence in the administration of justice.

The amendment is a consequence of the amendment made in clause 1.3 below which enables the court to impose a lesser penalty on an offender having regard to the degree of assistance provided in the administration of justice.

Clause 1.2 Section 35(7), definition of *defence* – replaces the definition of ***defence*** in section 35(7) of the *Crimes (Sentencing) Act 2005.*

Defence is defined to mean either the offender, or any lawyer representing the offender.

This definition is replaced for consistency with the definition of ***defence*** in new section 35A.

Clause 1.3 New section 35A – inserts new section 35A into the *Crimes (Sentencing) Act 2005*.

New section 35A enables a court to impose a lesser penalty, including a shorter non-parole period, on an offender than it would otherwise have imposed having regard to the degree of assistance provided in the administration of justice. The provision is designed to encourage cooperation in ensuring that the trial is focused as efficiently as possible on the real issues in dispute. The provision will extend to allowing a reduced sentence to be imposed where an offender, while maintaining a not guilty plea through to trial has nevertheless facilitated the administration of justice through pre-trial disclosures, disclosures made during trial or otherwise.

An example is provided in the new section of the type of matter that may be considered by the court as assisting in the administration of justice; an admission made by the defence pre-trial or during a trial.

A similar provision exists in New South Wales in section 22A of the *Crimes (Sentencing Procedure) Act 1999*. The case law that exists on this provision in New South Wales will serve as a guide to the ACT judiciary in applying new section 35A.

New section 35A ensures that a lesser penalty imposed must not be unreasonably disproportionate to the nature and circumstances of the offence. The new section also clarifies that the power is not intended to limit the operation of existing sections 35 and 36 which allow for reduced sentences in certain circumstances. While a plea of guilty or assistance provided to law enforcement agencies can be considered to meet the requirements of facilitating the administration of justice, new section 35A(4) is designed to provide that other actions are required to trigger the reduction under the new section.

Clause 1.4 Section 37(1) – inserts the words ‘, section 35A (Reduction of sentence – assistance in administration of justice)’ after the words ‘section 35 (Reduction of sentence – guilty plea) in section 37(1) of the *Crimes (Sentencing) Act 2005*.

Section 37 of the Act sets out the requirements for the court to give a statement where it imposes a lesser penalty for an offence under specified provisions of the Act. The court must state the penalty it would have imposed, and, in relation to sentence reductions for providing assistance to law enforcement authorities, the reason for the imposition of the lesser penalty.

The clause amends section 37 to ensure that the requirement for the court to give a statement where it imposes a lesser penalty for an offence applies in relation to new section 35A.

This clause, in combination with clause 1.5 below, ensures the visibility of reductions for two reasons:

- to ensure that the community is able to satisfy themselves that sentences continue to reflect the seriousness of offences; and
- to ensure that defence counsel can advise their clients of the benefits of pre-trial and trial co-operation which ultimately may facilitate greater efficiency in cases before the courts.

Clause 1.5 Section 37(2)(b) – inserts 'section 35A or' before 'section 36' in section 37(2)(b) of the *Crimes (Sentencing) Act 2005*.

The clause amends section 37 to ensure that where the court states the penalty it would have imposed under new section 35A, it must also give the reason for the imposition of the lesser penalty.

Clause 1.6 Section 41(1) and note – substitutes new subsection (1) into section 41 of the *Crimes (Sentencing) Act 2005*.

Currently, section 41(1) of the Act provides that a court may order the director-general to prepare a pre-sentence report for an offender before sentencing, and provides that the court may adjourn the proceeding for the report to be prepared.

The clause remakes subsection (1) and inserts new subsections (1A) and (1B) to clarify the operation of the provision. Revised subsection (1) and new subsection (1A) clarifies that the Magistrates Court can order a pre-sentence report at the time it commits an offender to be sentenced in the Supreme Court.

The new subsections also maintain the current situation that:
- the Magistrates Court can order a pre-sentence report for sentencing in the Magistrates Court; and
- the Supreme Court can order a pre-sentence report for sentencing in the Supreme Court.

The amendment will assist in facilitating the early ordering of pre-sentence reports, supporting the Court's proposed pre-sentence disclosure requirements.

Clause 1.7 Section 45 – removes section 45 from the *Crimes (Sentencing) Act 2005*.

Section 45 of the Act obliges the court to make a copy of a pre-sentence report available to parties two days before the sentencing hearing where it has been made available to the court by this timeframe.

The clause removes section 45 from the Act to facilitate the court introducing pre-sentence disclosure requirements. These will require the prosecution and the defence to disclose any disputed facts, witnesses they seek to call, and any other submissions that will be made at the sentencing hearing, to each other and to the court in advance of the sentencing date.

A pre-sentence report is one of the documents that would be required to be lodged with the court and made available to parties to ensure that they are in a position to meet the above proposed pre-sentence disclosure requirements.

The section is being removed as it is a procedural matter which would more appropriately be dealt with in the Court Procedures Rules. This will provide the Court with the flexibility of developing procedures for distribution that is consistent with the proposed new docket system.

Clause 1.8 Dictionary, definition of *pre-sentence report* – amends the definition of ***pre-sentence report*** in the dictionary of the Act to reflect the amendments made by clause 1.6 above. The new definition accords with current drafting practice in the ACT.

Part 1.2 Supreme Court Act 1933

Clause 1.9 Section 68B(1)(c)(i) and (ii) – inserts new section 68B(1)(c)(i) and (ii) into the *Supreme Court Act 1933*.

Section 68A of the Act provides that the usual method of trial on criminal charges in the Supreme Court is by judge and jury. However, this is subject to section 68B which provides that an accused person can elect, in writing, to be tried by judge alone.

Section 68B(1)(a) and (b) provides that an election must be made by a person in writing and be accompanied by a certificate signed by a legal practitioner stating that the legal practitioner has advised the person in relation to the election, and the person had made the election freely.

Section 68B(1)(c) provides that the election and certificate must be filed in the Court before two matters occur. The two matters are the allocation of a date for the person's trial, and knowledge of the trial judge's identity by the person, or the person's legal representative.

This clause maintains the existing requirement for an election to be made prior to the identity of the trial judge being known to the accused or to his or her legal representatives. The clause removes the existing requirement for the election to be made before the court allocates a date for the person's trial as the timing for this will be affected by the Court's proposed new docket system. The clause adds a new requirement to provide that the election for a judge alone trial must also be made before any time limit prescribed under the Court Procedures Rules to ensure consistency with the new processes that will exist under the proposed docket system.