

2015

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

COURTS LEGISLATION AMENDMENT BILL 2015

EXPLANATORY STATEMENT

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Introduction

This explanatory statement relates to the *Courts Legislation Amendment Bill 2015* (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 several pieces of legislation to make practical improvements to the courts and coronial systems in the ACT.

The legislation amended includes the *Magistrates Court Act 1930*, *Coroners Act 1997*, *Court Procedures Act 2004*, *Supreme Court Act 1933* and the *Oaths and Affirmations Act 1984*.

The Bill introduces efficiencies in court processes by clarifying and updating concepts, definitions and language.

The *Court Procedures Act 2004* has been amended to ensure that interlocutory orders made by the Supreme Court for the purposes of an indictable offence, which the court already has the power to make, are binding on subsequent judges. During a pre-trial hearing the court may make orders, determinations or findings, or give directions or rulings as it thinks appropriate for the efficient management and conduct of the trial. These orders will be binding on the trial judge in the proceedings unless, in the opinion of the trial judge, it would not be in the interests of justice.

A number of amendments have been made to the *Supreme Court Act 1933* including to:

- require appeals from interlocutory orders of the Master to be heard by the Court of Appeal, as is currently the case with orders of single judges;
- change the title of the Master of the Supreme Court to Associate Judge, providing appropriate gender neutrality and recognising the expansive civil jurisdiction of the role; and
- abolish the role of President of the Court of Appeal.

The *Magistrates Court Act 1930* has been amended to clarify the basis on which proceedings can be transferred to the Magistrates Court under section 268(3).

Amendments to the *Oaths and Affirmations Act 1984* have removed the requirement to use a religious text to take an oath.

The *Coroners Act 1997* has also been amended to:

- reduce the requirements for reporting fires to the Coroners Court;
- allow the coroner to establish a coronial investigation scene, and list the powers that a police officer has within that scene to collect and preserve evidence; and
- clarify some definitions in the Act, including the types of death that a coroner is required to investigate.

Human Rights Considerations

The right to fair trial

The Bill engages the right to fair trial (s 21) 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 the 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 limitations. The limits on human rights by making pre-trial orders binding unless the trial judge considers otherwise and by requiring pre-trial disclosure of expert evidence, 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.

Under human rights laws, States have an obligation to their citizens of putting in place legislative and administrative frameworks designed to deter conduct that infringes human rights, and to activate measures to protect an individual who is at risk of suffering treatment that would infringe their rights. Criminal justice in the ACT is an example of a system that engages and imposes reasonable limits on the right to fair trial in a demonstrably justifiable manner.

The amendments allowing pre-trial orders to be binding on a trial judge do not limit the right to a fair trial. The purpose of the amendments is to ensure that when initial proceedings happen in the Supreme Court before a judge who is not ultimately the trial judge, issues cannot be re-litigated by the parties simply because there is a new judge to test those arguments. The amendments do however include a safeguard that pre-trial decisions can be revisited where the trial judge determines it is in the interests of justice. The amendment will save time and costs by reducing the opportunity for trials to be delayed by issues that have already been considered by a judge.

The amendments requiring pre-trial disclosure of expert evidence by both parties do not limit the right to a fair trial. These amendments only apply to evidence that will be adduced at the trial. There is no impact on the rights and privileges that apply to the accused person in relation to self-incrimination - the disclosure provisions merely put a framework around the timing of the disclosure and require that both the prosecutor and the accused person give notice and copies of this evidence to each other within a reasonable timeframe. This will assist to reduce the lengthiness of

trials by removing the potential for adjournments if unforeseen expert evidence is presented after the trial has commenced. In most cases, shorter trials mean fewer resources expended by the accused person, the prosecutor and the courts. Also, streamlining trial processes increases the likelihood that all matters will be heard more promptly, protecting the human rights of those charged with offences.

The right to liberty and security of person / freedom of movement

Section 18 of the HRA provides that:

- (1) everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained; and
- (2) no-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.

Section 13 of the HRA provides that everyone has the right to move freely within the ACT and to enter and leave it, and the freedom to choose his or her residence in the ACT.

Human rights are subject to only reasonable limits which are demonstrably justifiable. Human rights may only be limited when the following relevant factors are considered:

- the nature of the right affected: The right to liberty and the right to freedom of movement are fundamental but not absolute rights. The amendments in the Bill giving police coronial investigation scene powers to stop and search and detain an individual will limit that person's right to liberty and security and free movement.
- the importance of the purpose of the limitation: The amendments providing for coronial investigation scenes arose from the lack of comprehensive powers for police or other authorised officers to manage and process a designated coronial investigation scene. Clear police powers at death scenes are important to avoid loss of evidence, delays in matters being heard and further distress for families of the deceased person.
- the nature and extent of the limitation: Under a coronial investigation scene order issued by a coroner, the amendments allow a police officer or other authorised person to take control of a coronial investigation scene and direct a person to leave the scene, remove a person from the scene who fails to comply with a direction to leave, prevent a person from entering the scene or removing evidence or otherwise interfering with the scene and for that purpose, detain and search the person. While these amendments limit the right to liberty and security of person and the right to freedom of movement, they are only available on the order of a coroner, or a senior police officer in limited circumstances. The power for a senior police officer to establish a coronial investigation scene for an expected investigation can only be exercised if a coroner is not available and on the basis of a test of reasonable belief, which requires the officer to have a clear evidential basis for believing that a coroner would make a coronial investigation scene order. This is a high threshold test and provides a level of protection from an unwarranted exercise of the power to establish a scene. A scene established by a senior police officer can only last for a maximum of 24 hours before the officer's declaration expires. In addition, a police officer may only exercise coronial scene investigation

powers if they have reasonable grounds for considering it is necessary to do so to preserve evidence related to the investigation.

- the relationship between the limitation and its purpose: The limitation on the right to liberty is targeted. It is only available by order of the coroner or declaration of a senior police officer. A prompt response to a death that is likely to require a coronial investigation is necessary to facilitate a high quality, robust and efficient coronial investigations. These amendments will apply in cases where there are no obvious criminal circumstances surrounding the death. In cases where the death is suspected to be a result of a crime, police can use their investigative powers under the *Crimes Act 1900*. The powers given to police by order of the coroner or following a declaration by a senior police officer are equivalent to those under the Crimes Act.
- the least restrictive means reasonably available to achieve the purpose the limitation seeks to achieve: Anecdotal evidence of senior police and coroners has indicated that the current uncertainty about the powers of police to respond to a death which does not appear to be a crime, but which is not the subject of a coronial scene investigation order, is hampering effective responses to secure evidence on such scenes. There is no less restrictive means to enable police to establish and manage coronial scenes in situations where a prompt response is required to preserve evidence related to the coronial investigation.

For these reasons the limitations on the right to liberty and security and freedom of movement in the Bill are reasonable, proportionate and justifiable.

Courts Legislation Amendment Bill 2015

Detail

Part 1 - Preliminary

Clause 1 (Name of Act) names the Act the *Courts Legislation Amendment Act 2015*.

Clause 2 (Commencement) provides that the repeal of the *Mediation Act 1997* will occur 1 year after the *Courts Legislation Amendment Act 2015* is notified. This will allow mediators who are currently registered under the *Mediation Act* to become registered mediators under the National Mediator Standards Board accreditation standards. All other provisions commence 14 days after notification.

Clause 3 (Legislation amended) specifies that the Act amends the following legislation:

- *ACT Civil and Administrative Tribunal Act 2008*
- *Civil Law (Wrongs) Act 2002*
- *Commissioner for Sustainability and the Environment Act 1993*
- *Cooperatives Regulation 2003*
- *Coroners Act 1997*
- *Court Procedures Act 2004*
- *Criminal Code 2002*
- *Judicial Commissions Act 1994*
- *Juries Act 1967*
- *Legislation Act 2001*
- *Magistrates Courts Act 1930*
- *Oaths and Affirmations Act 1984*
- *Ombudsman Act 1989*
- *Public Sector Management Act 1994*
- *Remuneration Tribunal Act 1995*
- *Supreme Court Act 1933*

Clause 4 (Legislation repealed) repeals the *Mediation Act* and all legislative instruments under it.

Part 2 – ACT Civil and Administrative Tribunal Act 2008

Clause 5 amends division 5.3 (Case management) by inserting new section 30A to define *mediation* and *mediation material*.

Clause 6 substitutes *an accredited mediator* for *a registered mediator* in section 35(2)(a).

Clause 7 omits the definition of registered mediator from section 35(4).

Clause 8 inserts new sections

- 35A (Admissibility of information given at mediation) that governs the admissibility of mediation material in ACAT proceedings;
- 35B (Secrecy) that imposes secrecy obligations surrounding mediation and mediation material; and
- 35C (Protection from defamation) that applies the same privilege in relation to defamation in judicial proceedings to mediation and mediation material.

Clause 9 (Protection of members etc from liability) has been amended to remove the reference in an example to a registered mediator and include a reference to an accredited mediator.

Clause 10 amends the **Dictionary** to insert a note indicating that the term Corporations Act is defined in the Legislation Act, and used in the ACT Civil and Administrative Tribunal Act.

Clause 11 amends the **Dictionary** to insert a new definition for *accredited mediator*, *mediation*, *mediation material* and *Mediator Standards Board*.

Part 3 – Civil Law (Wrongs) Act 2002

Clause 12 amends the description of who can be a mediator to refer to an accredited mediator instead of a mediator under the Mediation Act.

Clause 13 omits a note that refers to provisions under the Mediation Act that will be repealed.

Clause 14 amends the **Dictionary** to insert a note indicating that the term Corporations Act is defined in the Legislation Act, and used in the Civil Law (Wrongs) Act.

Part 4 - Commissioner for Sustainability and the Environment Act 1993

Clause 15 amends **section 12(2)(a)** by replacing *the master* with *the associate judge* to reflect the new name for the position formerly known as the master.

Part 5 - Cooperatives Regulation 2003

Clause 16 amends **schedule 5, clause 5.2, item 2** by replacing *master of the Supreme Court* with *associate judge of the Supreme Court*.

Part 6 – Coroners Act 1997

Clause 17 amends **section 13(1)(a) (Coroner’s jurisdiction in relation to deaths)** to require a coroner to hold an inquest into the manner and cause of a death of a person who *died in a violent or unnatural way* rather than ‘is killed’. This more clearly identifies the kinds of deaths intended to be further considered by way of an inquest.

Clause 18 deletes **sections 13(1)(b) and (c)** as those circumstances ('is drowned' and 'dies, or is suspected to have died, a sudden death the cause of which is unknown') are now covered by new section 13(1)(a).

Clause 19 (Coroner's jurisdiction in relation to fires) amends section 18(1) to require a coroner to hold an inquiry into the cause and origin of a fire that has destroyed or damaged property if asked to do so by the Attorney-General. The coroner may also (at the request of the owner or occupier of destroyed or damaged property or on the coroner's own initiative) hold an inquiry into the cause and origin of a fire if the coroner considers that an inquiry should be held. This removes the requirement for the coroner to consider every fire to decide whether to hold an inquest.

Clause 20 inserts a new **part 5A (Coronial investigation scenes)**

Section 68B (Definitions-pt 5A) inserts definitions for *coronial investigation scene*, *coronial investigation scene declaration*, *coronial investigation scene order* and *coronial investigation scene power*.

Section 68C (Coronial investigation scene order) provides that if a coroner is satisfied that an investigation for an inquest or inquiry should be carried out at a particular place, the coroner may issue an order to a police officer or other person to establish a coronial investigation scene at a stated place, exercise coronial investigation scene powers at the place stated in the order and enter and stay at the place for those purposes.

A coronial investigation scene order may be issued before the start of an inquest or inquiry, or after the start but before the end of an inquest or inquiry.

A coronial investigation scene order may be issued to a police officer in writing or orally or to anyone else in writing. However, an order that is issued to a police officer orally must, as soon as practicable, be given to the police officer in writing.

A police officer acting under a coronial investigation scene order may obtain the assistance of anyone else for the purpose of exercising powers under section 68E (Coronial investigation scene powers).

In this section, *place* means a place of any kind, whether or not a public place.

Section 68D (Establishment of coronial investigation scene) allows a police officer to establish a coronial investigation scene under a coronial investigation scene order in any way that is reasonably appropriate in the circumstances. A police officer who establishes a coronial investigation scene at a place must, if reasonably appropriate in the circumstances, give the public notice that the place is a coronial investigation scene.

Section 68E (Coronial investigation scene powers) allows a police officer to, in accordance with a coronial investigation scene order, exercise any of the following powers at, or in relation to, a coronial investigation scene if the police officer suspects

on reasonable grounds that it is necessary to do so to preserve evidence related to the coronial investigation:

- direct a person to leave the scene or remove a vehicle, vessel or aircraft from the scene;
- remove from the scene a person who fails to comply with a direction to leave the scene, or a vehicle, vessel or aircraft if a person fails to comply with a direction to remove it from the scene;
- direct a person not to enter the scene;
- prevent a person from entering the scene;
- prevent a person from removing evidence from, or otherwise interfering with, the scene or anything in it and, for that purpose, detain and search the person;
- remove an obstruction from the scene;
- perform any necessary investigation;
- conduct any necessary examination or process;
- open anything at the scene that is locked;
- take electricity, gas or any other utility, for use at the scene;
- photograph or otherwise record the scene and anything in it;
- seize and detain all or part of a thing that might provide evidence in relation to an inquest or inquiry or provide evidence of the commission of an offence;
- dig up anything at the scene;
- remove wall or ceiling linings or floors of a building, or panels of a vehicle;
- take possession of the remains of a deceased person on behalf of the coroner, including body tissue, clothing and items apparently in the possession of the deceased person;
- remove or cause the removal of the remains of a deceased person to any location nominated by the coroner; and
- anything else reasonably necessary or incidental to the investigation.

Section 68F (Senior police officer may establish scene for expected coronial investigation) inserts a provision to allow a senior police officer to issue a coronial investigation scene declaration in certain circumstances when a coroner is not available. The declaration ends when an order is issued by a coroner or after 24 hours has lapsed.

Section 68G (Exercise of investigation scene powers under pt 5A) inserts a provision to ensure that a police officer may only exercise powers in accordance with a coronial investigation scene order or coronial investigations scene declaration that applies. If a police officer secures a place, the police officer must, if reasonably appropriate in the circumstances, give the public notice that the place is a coronial investigation scene.

Section 68H (Part does not limit other powers) inserts a provision to make it clear that the power under this part are in addition to any other powers of police.

Clause 21 (Dictionary) inserts new definitions for *coronial investigation scene*, *coronial investigation scene declaration*, *coronial investigation scene order* and *coronial investigation scene power*.

Clause 22 (Dictionary, definition of *hearing*) amends the definition of *hearing* to mean a hearing for an inquest or inquiry under division 5.1 to link hearings to inquests and inquiries.

Part 7 – Court Procedures Act 2004

Clause 23 amends section 9(5) and (6) to remove reference to the *President of the Court of Appeal*.

Clause 24 amends section 76 (Supreme Court jurisdiction to make orders for conduct of indictable trials) to ensure that any order, ruling or direction that is made by the Supreme Court for the purposes of a trial for an indictable offence is binding on the trial judge, unless the trial judge determines it is not in the interests of justice. The amendment to section 76(5) also clarifies that a person may be re-arraigned as soon as practicable before a jury, even if they have been previously arraigned for that offence.

This provision ensures that issues that have already been heard and determined by a judge before the commencement of a trial are not re-litigated before the trial judge unless the trial judge thinks it is necessary in the interests of justice.

Clause 25 inserts a new division 8.3 – Pre-trial disclosure of expert evidence
This division does not affect privileges that apply to an accused person (such as privilege against self-incrimination) as it only applies to expert evidence that the accused person intends to rely on during the trial. The effect of this division is to require evidence that would be presented during the trial to be disclosed prior to the trial to ensure both parties have knowledge of what will be adduced and reduce the likelihood of adjournments to consider new expert evidence once the trial has commenced.

Section 77 (Application-div 8.3) provides that this division applies to indictable criminal proceedings prior to the trial commencing.

Section 78 (Mandatory pre-trial disclosure – expert evidence) provides that the prosecutor and the accused must give each other written notice about whether or not they will adduce expert evidence in the proceeding.

Section 79 (Prosecution notice –expert evidence) requires the prosecutor to provide written notice and copies of relevant expert evidence that will be adduced during the proceedings.

Section 79A (Accused person’s notice and reply – expert evidence) requires that the accused person must provide written notice and copies of relevant expert evidence to the prosecutor, and confirm receiving notice from the prosecutor.

Section 79B (Prosecution reply – expert evidence) requires the prosecutor to acknowledge and respond to the accused person’s notice.

Section 79C (Sanctions for non-compliance with pre-trial disclosure requirements) allows the court to refuse to admit expert evidence sought to be adduced that has not been disclosed in accordance with division 8.3. The court may

also grant an adjournment to the party who did not receive notice of the expert evidence if the non-disclosure would prejudice their case.

Section 79D (Disclosure requirement is ongoing) requires a party to inform the other party if they become aware of a notifiable development (which is defined in section 79D(5)). A party may only amend a notice given to another party with leave from the court.

Section 79E (Court may wave requirements) allows the court to waive the division 8.3 disclosure provisions if it considers that it would be in the interest of justice to do so.

Clause 26 (Dictionary, note 2) amends the dictionary to include *associate judge* as a term defined under the Legislation Act.

Clause 27 (Dictionary) omits the definition of *master* which will no longer be used.

Clause 28 (Further amendments, mentions of *master*) omits reference to *the master* and replaces it with *the associate judge* in sections 9(2)(c), 11, 18A(5)(a)(i), 40 and schedule 1, part 1.1, item 1(3).

Part 8 – Criminal Code 2002

Clause 29 (Definitions – ch 3, section 300, definition of *territory public official*, paragraph (d)) replaces *the master of the Supreme Court* with *the associate judge of the Supreme Court*.

Part 9 – Judicial Commissions Act 1994

Clause 30 (Dictionary, definition of *head of jurisdiction*) replaces *master* with *associate judge*.

Part 10 – Juries Act 1967

Clause 31 (Schedule 2, part 2.1, item 13) replaces *master* with *associate judge*.

Part 11 – Legislation Act 2001

Clause 32 (Dictionary, new definition of *associate judge*) inserts a new definition of *associate judge*.

Clause 33 (Dictionary, definition of *master*) omits the definition of *master*.

Part 12 – Magistrates Court Act 1930

Clause 34 (Transfer of action from Supreme Court) amends section 268(1) so it applies if a proceeding in the Supreme Court relates to a cause of action that is a prescribed action (as per section 268(4)).

Clause 35 omits section 268(3) as this is now covered by amended section 268(1).

Part 13 – Oaths and Affirmations Act 1984

Clause 36 (Oath or affirmation by spoken words or other means) amends section 17(1) to require a person taking an oath, if physically capable of doing so, in the presence of the person before whom the oath is taken, say the words of the oath.

Part 14 – Ombudsman Act 1989

Clause 37 (Functions – investigating complaints under Act) amends section 5(2)(b)(i) to replace *the master* with *the associate judge*.

Part 15 – Public Sector Management Act 1994

Clause 38 (Application) amends section 5 (b) to replace *master* with *associate judge*.

Part 16 – Remuneration Tribunal Act 1995

Clause 39 (Positions to which Act applies) amends schedule 1, part 1.1 to replace *master of the Supreme Court* with *associate judge of the Supreme Court*.

Part 17 – Supreme Court Act 1933

Clause 40 (Seniority of judges) omits section 5(2) which refers to the President.

Clause 41 amends section 5(5) to omit reference to the President.

Clause 42 omits reference to section 37G (Arrangement of business of court) which has been repealed.

Clause 43 amends section 8 (Exercise of jurisdiction) to replace *master* with *associate judge*.

Clause 44 amends section 9 (Exercise of jurisdiction by master) to replace *master* with *associate judge* and simplify the language.

Clause 45 amends section 14(a) (Full Court decisions – equal division of opinion) to replace *master* with *associate judge*.

Clause 46 amends section 37E(2)(a) (Appellate jurisdiction) to require that appeals against any orders of the associate judge be heard by the Court of Appeal.

Clause 47 amends section 37E(4) to ensure that an appeal against an interlocutory order of the associate judge may be brought only with leave of the Court of Appeal.

Clause 48 omits sections 37F (Appointment of President) and 37G (Arrangement of business of Court of Appeal).

Clause 49 amends section 37H(2) (Appeal bench) by replacing *President* with *Chief Justice*.

Clause 50 omits section 37UB (Salary of former President) as it only applies to current resident judges who were formerly Presidents of the Court of Appeal. There are no current resident judges who were formerly Presidents and the position is now abolished.

Clause 51 inserts a new section 45 that provides that the Master is to be known as the Associate Judge.

The Master of the ACT Supreme Court is referred to in the *Australian Capital Territory (Self-Government) Act 1988* (Cwlth) (the Commonwealth Act). Until amendments are made to the Commonwealth Act to change *master* to *associate judge*, and to ensure that the Master remains recognised by Commonwealth legislation, part 3 of the Supreme Court Act which contains the establishment provisions for the role of the Master has not been repealed.

Clause 52 amends section 60A (Completion of part-heard matters – end of term of office) to change *master* to *associate judge*.

Clause 53 inserts new **part 11 – Transitional – Courts Legislation Amendment Act 2015**

Section 110 (Meaning of commencement day – pt 11) sets out the meaning of *commencement day*.

Section 111 (Transitional regulations) allows for regulations to be made that prescribe any transitional matters necessary or convenient because of the enactment of the *Courts Legislation Amendment Act 2015*.

Section 112 (Expiry – pt 11) ensures that the transitional provisions in part 11 expire 2 years after commencement of the legislation.

Clause 54 (Dictionary, new definition of associate judge) inserts a new definition of *associate judge*.

Clause 55 (Dictionary, definition of President) omits the definition of *President*.