

EXPLANATORY MEMORANDUM

COURTS LEGISLATION AMENDMENT (MAGISTRATES) BILL 2021

Overview of the Bill

The Courts Legislation Amendment (Magistrates) Bill 2021 (the Bill) will amend the *Children's Court of Western Australia Act 1988* (Children's Court Act) and the *Magistrates Court Act 2004* (Magistrates Court Act) to clarify the powers of the President of the Children's Court and the Chief Magistrate in respect of the administration and allocation of the workload of the Children's Court of Western Australia (the Children's Court).

Part 2 of the Bill contains amendments to the Children's Court Act to formalise the process by which a dually-appointed magistrate may be required to perform Children's Court functions. Part 2 also sets out the scope of powers of the President of the Children's Court and the Chief Magistrate to give directions to magistrates.

Part 3 of the Bill contains amendments to the Magistrates Court Act to clarify that the Chief Magistrate must not issue a direction to a magistrate in respect of their functions as a magistrate of the Children's Court. Part 3 also provides that where a dually-appointed magistrate resigns from one office, they will be taken to have resigned from both offices.

All references in the Bill to magistrates include magistrates of other participating jurisdictions appointed as cross-border magistrates of the Magistrates Court and the Children's Court under the *Cross-Border Justice Act 2008* sections 136 and 137 and the *Cross-Border Justice Regulations 2009* Part 3 Divisions 4 and 9.

Part 1 – Preliminary

This Part deals with preliminary and commencement matters.

Clause 1 Short Title

Clause 1 provides that the Bill, once enacted, will be known as the *Courts Legislation Amendment (Magistrates) Act 2021*.

Clause 2 Commencement

Clause 2 provides for the commencement of the Act.

Part 1 will come into operation on the day the Act receives Royal Assent. The rest of the Act will come into operation on the day after that day.

Part 2 – *Children's Court of Western Australia Act 1988* amended

This Part deals with amendments to the Children's Court Act.

Clause 3 Act amended

Clause 3 provides that the Act will amend the Children's Court Act.

Clause 4 Section 3 amended

Clause 4 amends section 3(1) to provide that *Chief Magistrate* means the Chief Magistrate of the Magistrates Court.

Clause 5 Part 2 Division 2 heading replaced

Clause 5 deletes the heading to Part 2 Division 2 and inserts a new heading: 'Division 2 – Judges and magistrates'.

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Clause 6 Section 10 amended

Clause 6 amends the deeming provision in section 10(5) of the Children's Court Act. Section 10(5) has the effect of applying certain sections of the Magistrates Court Act, with modifications, to the Children's Court and magistrates performing functions in the Children's Court.

Clause 6 makes consequential amendments to section 10(5)(a) and (b) of the Children's Court Act to provide that the deeming effect of clause 10(5) does not apply to the new clauses 12(6) and (7) of Schedule 1 of the Magistrates Court Act inserted by clause 12 of the Bill. This is because new clauses 12(6) and (7) of Schedule 1 of the Magistrates Court Act intentionally distinguish between the Magistrates Court and the Children's Court.

Clause 6 inserts new subsections 10(5)(d) and 10(5)(e) into the Children's Court Act. Subsection (d) provides that the reference in Schedule 1 clause 14(1)(c) of that Act to section 25(3) of that Act is taken included a reference to section 12A(4) of this Act. This amendment is to ensure that a magistrate faces the same possible consequence for contravening a direction of the President of the Children's Court that they could face for contravening a direction of the Chief Magistrate: namely, that the magistrate may face suspension.

New subsection 10(e) is for the purpose of ensuring that if a magistrate is appointed to the Children's Court, the Attorney General must consult with the President of the Children's Court and the Chief Magistrate prior to issuing a show cause notice in respect of a proposed suspension.

Clause 7 Section 11 inserted

Clause 7 inserts a new section 11 in the Children's Court Act.

Proposed section 11 of the Children's Court Act prescribes a process whereby the President may inform the Chief Magistrate that a particular magistrate is required to deal with the workload of the court, either on a part-time or full-time basis.

If the President no longer requires a particular magistrate to perform Children's Court functions, or requires the magistrate on a reduced basis, the President may inform the Chief Magistrate accordingly.

The President will have absolute discretion in determining which particular magistrate is, or is not, necessary or desirable for the time being to deal with workload of the Children's Court. However, the magistrate will only be made available to perform Children's Court duties if the Chief Magistrate consents.

The provisions will apply to magistrates who have performed functions in the Children's Court prior to commencement of the amendments. This is to ensure the President is not required to lodge a notice in respect of each dually appointed magistrate already performing functions in the Children's Court.

Proposed section 11(1) provides that 'Children's Court functions' means functions of a magistrate of the Children's Court.

A 'dually-appointed magistrate' is defined as a person who holds office as a magistrate of both the Magistrates Court and the Children's Court. The words 'holds office' have been used instead of 'is appointed' to clarify that this does not include a person who was appointed but whose office has ceased.

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Proposed section 11(2) provides that the President may, by written notice, inform the Chief Magistrate that he or she considers it is necessary or desirable for a particular dually-appointed magistrate to perform Children's Court functions for the time being to deal with the resourcing requirements of the Children's Court. This may be on a full-time basis or on a part-time basis as specified in the notice.

The power to request a particular magistrate is to enable the President to operate the Children's Court in the manner which appears to be best to the President, with a view to ensuring that there is an appropriate allocation of judicial resources. This might include a request that a particular regional or remote magistrate, who may be already located in a court location where there is a resourcing need, also perform Children's Court functions.

Proposed section 11(3) provides that the Chief Magistrate may consent or refuse to consent to the request specified in the notice. Where the Chief Magistrate consents to a dually-appointed magistrate performing Children's Court functions for the time being, proposed section 11(3)(b) requires the Chief Magistrate to take that into account when issuing directions to the magistrate pursuant to section 25 of the Magistrates Court Act.

Proposed section 11(4) provides a process whereby the President may advise the Chief Magistrate that a particular dually-appointed magistrate is no longer required to perform Children's Court functions at all or is required to perform functions on a reduced basis.

Proposed section 11(5) provides that if a notice is given under subsection 11(4), the Chief Magistrate must take account of the basis upon which the magistrate is now required to perform Children's Court functions, if any.

The power contained in proposed section 11(6) is expressed to be available to the President in his or her absolute discretion. The reason for the breadth of the discretion is to enable the President to operate the Children's Court in the manner which appears to be best to the President, without any person having an expectation that they will remain in the Children's Court upon the basis of their past service.

Proposed section 11(7) provides that a notice given under subsection (2) or (4) will be subject to any subsequent notice that is given.

The transitional provisions at clause 9 make clear that the President is not required to give a notice in respect of a magistrate who is currently performing, or has performed Children's Court functions, prior to the commencement of the amendment Act.

Clause 8 Section 12A inserted

Clause 8 inserts a new section 12A to the Children's Court Act which will provide the President with the power to give directions to a magistrate in respect of the magistrate's functions in the Children's Court. This power is broadly consistent with the powers available to the Chief Magistrate in directing magistrates and reflects that the Children's Court is a separate court to the Magistrates Court, and the President is the head of jurisdiction.

The provisions will provide a clear delineation between the powers of the President and the Chief Magistrate to direct magistrates to the extent they are performing functions in their respective Courts.

Proposed section 12A(1) will provide the President of the Children's Court with powers similar, but not identical, to those of the Chief Magistrate under section 25 of the Magistrates Court Act. This is because where a magistrate holds other offices, such as, as an industrial

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magistrate or a warden of mines, the power to direct a magistrate in the performance of those judicial functions rests with the Chief Magistrate.

Subsection 12A(2) provides that the President has the power to direct a person only in relation to their functions as a magistrate of the Children's Court.

Subsection 12A(3) ensures any direction does not limit the functions of the magistrate.

Subsection 23A(4) and (5) are consistent with the Magistrates Court Act and require a magistrate to comply with a direction; however, contravention of a direction is not an offence.

Subsection 12A(6) provides that the Chief Magistrate is not entitled, under the Magistrates Court Act or any other law, to direct a person to perform functions as a magistrate of the Children's Court or in relation to the performance of those functions.

Clause 9 Part 8 inserted

Clause 9 inserts a new Part 8 after section 53, which contains transitional provisions to the Children's Court Act amendments.

Proposed section 54 applies to a dually-appointed magistrate who has performed Children's Court functions on a full-time or part-time basis before the day on which the *Courts Legislation Amendment (Magistrates) Act 2021* Part 2 comes into operation.

Proposed section 54(3) ensures that the President may give a notice under proposed sections 11(2) or (4) if the magistrate has performed Children's Court functions prior to the commencement of Part 2 of the amendment Act.

Proposed section 54(4) makes clear that proposed section 11 applies to the relevant magistrate as if a subsection (2) notice had been given and the Chief Magistrate had given consent under subsection (3)(a). These provisions ensure section 11 will operate effectively in respect of magistrates performing Children's Court functions prior to the commencement day.

Part 3 – Magistrates Court Act 2004 amended

Clause 10 Act amended

This Part amends the *Magistrates Court Act 2004*.

Clause 11 Section 25 amended

Clause 11 inserts a new subsection (6) in section 25 to provide that where a person holds office both as a magistrate of the Magistrates Court and as a magistrate of the Children's Court, the Chief Magistrate must not give a direction under subsection (1) in relation to the person's functions as a magistrate of the Children's Court.

Clause 12 Schedule 1 clause 12 amended

Clause 12 amends Schedule 1 clause 12 to insert two new subclauses.

Proposed new subclause (6) provides that where a person holds office both as a magistrate of the Magistrates Court and as a magistrate of the Children's Court, and the person resigns from only one of those offices, the resignation is taken to be a resignation from both offices. This provision does not affect the operation of subclauses (3) and (4).

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Subclause (3) provides that resignation is not effective until the Governor has accepted it and subclause (4) provides that if a resignation is accepted, it takes effect when it is accepted or at any later date stated in the letter.

Proposed new subclause (7) provides for where resignation from one office (the *first office*) occurs prior to the day on which Part 3 commences.

New subsection (7)(a) provides that resignation from the first office is taken to have been a resignation from both the first office and the other office.

New subclause (7)(b) provides that the resignation from the other office is taken to take effect on the later of commencement day and the day on which the resignation from the first office takes effect under subclause (4). This is to cover the scenario where a person resigned from one office prior to commencement day however the resignation does not take effect before that day (either because it has not been accepted or the effective date of the resignation has not yet occurred). In this case, the deemed resignation will not take effect until the resignation from the first office takes effect.