

# OATHS, AFFIDAVITS AND STATUTORY DECLARATIONS BILL 2003

## EXPLANATORY MEMORANDUM

### Overview of Bill

The Oaths, Affidavits and Statutory Declarations Bill 2003 consolidates all WA legislation dealing with the manner of taking oaths, affidavits and statutory declarations.

Amongst other things the Bill proposes the any oaths to be taken are religiously neutral. This reflects that WA is increasingly a multicultural society. The legislations therefore provides that an oath requires a person to swear “according to the religion and the beliefs” they profess. The words are taken from a recommendation made by the Chief Justice following a review of oaths taken by a multicultural Committee created by His Honour.

The Bill also provides for the swearing of affidavits and who they may be made before. The making of statutory declarations is also consolidated in Part 4 of the Bill. The lists of occupations and professions of persons before whom statutory declarations may be made is also revised and extended to make it consistent, as far as possible, with the persons before whom a statutory declaration may be made under Commonwealth law. The result will be that persons who are authorised under the laws of the Commonwealth will also be authorised under State law. Accordingly, any doubt as to whether Commonwealth or State law is applicable to any particular matter is removed.

## CLAUSE NOTES

### Part 1 - Preliminary

#### Clause 1 – Short title

Clause 1 provides that the title of the proposed Act is the *Oaths, Affidavits and Statutory Declarations Act 2003*.

#### Clause 2 – Commencement

Clause 2 provides that the proposed Act will come into operation on a day fixed by proclamation.

#### Clause 3 – Interpretation

Clause 3 provides that unless a contrary intention appears in the Act the term “**prescribed consular official**” means an Australian Consular Officer or Australian Diplomatic Officer within the meaning of the *Consular Fees Act* (Clth), a British consul

or vice consul, or an official prescribed by the regulation to be a prescribed consular official.

## **Part 2 – Oaths and related matters**

### **Clause 4 – Oaths, general form of**

Clause 4(1) provides the general form of words that are to be used at the commencement of any oath. The general form provides that a person swears “according to the religion and the beliefs (they) profess” . . . The oath is neutral in terms of religion and is recommended following a *Review of Oaths and Affirmations* undertaken by His Honour, the Chief Justice. The report of the Review was circulated to the WA Criminal Lawyers Association, the WA Police Ethnic Advisory Council, The Law Society of WA, the Department of Justice, the Chief Judge of the District Court and the Chief Stipendiary Magistrate.

Subclause (2) provides that the validity of the oath is not affected even if the person has no religious belief. This ensures that the matter sworn cannot be later impugned.

Subclause (3) allows a person to take an oath in another form if the person before whom the oath is taken is satisfied that it will bind the person’s conscience and the person understands the consequences of taking an oath. Under subclause (4) an oath taken under subclause (3) has the same force and effect as the formal oath taken under subclause (1).

### **Clause 5 – Affirmation may be made instead of oath**

Clause 5(1) provides that in any case where an oath is to be taken a person is entitled to affirm instead. Under subclause (2) affirmation may be made instead of an oath where an oath is contrary to the person’s religious belief or conscience, it is not reasonably practicable to administer the in a manner that will bind the conscience or for any other sufficient reason the taking of an oath is found to be inappropriate.

Subclause (3) provides an affirmation has the same force and effect as an oath.

The form of an affirmation is set out in subclause (4). The words “I sincerely declare and affirm . . . are used in place of the opening words prescribed in subclause 4(1).

### **Clause 6 – Who may administer oaths and take affirmations**

Clause 6(1) provides that any court may administer an oath to or take an affirmation from any person appearing as a witness. Subclause (2) provides that a registrar or clerk of court and any mining registrar appointed under the *Mining Act 1978* (WA) may administer an oath or take an affirmation. Subclause (3) makes it clear that any person who can lawfully administer an oath may also take the affirmation of the person.

### **Clause 7 – Oaths and affirmations, how administered**

Clause 7(1) provides that the person who is to take the oath or make affirmation is to raise their hand and repeat or read the words administered by the person taking the oath or affirmation. Under subclause (2) it is not necessary for the person making the oath to hold or touch any religious text while doing so.

## **Part 3 - Affidavits**

### **Clause 8 – Definitions**

Clause 8 provides that for the purposes of this Part “**experienced lawyer**” means a person who has held and holds a practice certificate for at least 2 years. The phrase “**practice certificate**” has the meaning given in the *Legal Practice Act 2003*.

### **Clause 9 – Affidavits, how made**

Subclause 9(1) provides that unless another written law requires otherwise an affidavit must be made in accordance with this clause. Subclause (2) provides that the affidavit must conclude with a statement saying it is sworn or affirmed by the person making it in the presence of an authorised witness and when and where it is sworn.

Under subclause (3) the person making the affidavit must personally sign or mark the statement required by subclause (2) and each other page of the affidavit. The person making the affidavit must also say orally on oath or affirm that they are the person making the affidavit, that the contents are true, that the signature or mark is theirs and that any attachment is the attachment referred to in the affidavit.

Subclause (4) provides that the signature or mark required under proposed subsection (3)(a) need not be complied with in the presence of an authorised witness. Subclause (6) provides that an authorised witness for an affidavit made in Western Australia is a Justice of the Peace, an “experienced lawyer” (unless the lawyer participating in any way in preparing the affidavit – subclause (7) refers), a public notary or a registrar or clerk of court.

Subclause (5) provides that after the person making the affidavit affirms it in the presence of an authorised witness, the authorised witness must, at or near the statement of attestation, sign or personally mark the affidavit and imprint or clearly write his or her name and qualification as an authorised witness and sign or personally mark each other page of the affidavit.

Subclause (8) provides that an authorised witness for an affidavit made outside Western Australia is a judge, magistrate or justice of the peace of or for that place, a notary public, a prescribed consular official who is performing official functions at that place or a

person who has authority under the law of that place to administer an oath to another person.

Subclause (9) provides that provisions of proposed subsections (6), (7) and (8) do not affect any other written law that expressly provides for the making of an affidavit.

#### **Part 4 - Statutory declarations**

##### **Clause 10 – When a statutory declaration may be made**

Clause 10(1) provides that a person may make a statutory declaration about any matter at any time for any purpose and without the need for any legal authority to do so. Subclause (2) provides that proposed subsection (1) does not affect the operation of any law that specifically requires a person to make a statutory declaration for a purpose.

##### **Clause 11 – Statutory declarations, how made**

Clause 11 provides how a statutory declaration may be made. Under subclause (1) a statutory declaration must be made in accordance with proposed section 11 unless another written law provides otherwise. Subclause (2) provides that the declaration must be in the form set out in the Schedule 1. Subclause (3) provides that the person making the statutory declaration must sign or personally mark it and in the presence of an authorised witness declare that the contents of the declaration are true, the signature or mark is his or her as and, if necessary, that any attachment to the statutory declaration is the attachment referred to you need.

Subclause (4) provides that the signature or personal mark on the statutory declaration is not necessary if the statutory declaration is completed in the presence of an authorised witness. Subclause (5) provides that, after the person making the statutory declaration has declared its truth, the authorised witness must sign or mark the statutory declaration and imprint or clearly write his or her name and qualification as an authorised witness.

Subclause (6) provides that an authorised witness for a statutory declaration made in Western Australia is any person described in the second column of Schedule 2 of the proposed Act. For a statutory declaration that is made outside Western Australia but within Australia an authorised witness is any person who under the law of that place, or the *Statutory Declarations Act 1959* (Clth), has authority to take or received a statutory declaration. For a statutory declaration made outside Australia an authorised witness is a prescribed consular official, a justice, notary public or commissioner for oaths under the law of that place, or a person who under the law of that place has authority to take, receive or witness a statutory, solemn or other declaration.

Subclause (7) provides that regulations may be made amending Schedule 2 by adding or deleting or amending any item in it.

## **Part 5 - Miscellaneous**

### **Clause 12 – Affidavits and declarations by blind or illiterate persons**

Subclause 12(1) provides that if the person making an affidavit or statutory declaration is blind or illiterate the authorised witness must read the document aloud to the person, or cause it to be read aloud to the person in the authorised witness's presence, satisfy himself or herself that the person understood what was read aloud and certify on the document that the document was read aloud to be person and the authorised witness was satisfied that person understood what was read aloud.

Subclause (2) provides that proposed subsection (1) is additional to proposed sections 9 or 11 as the case may be.

### **Clause 13 – Affidavits and declarations by people not conversant with English**

Subclause 13(1) provides that if the person making an affidavit is not sufficiently conversant with English, the person may make the affidavit in another language but the affidavit is not admissible in a court or by person acting judicially unless the affidavit is translated into written English by a suitably qualified translator and the translator makes an affidavit that sets out his or her qualifications as a translator and certifies as to the accuracy of the translation. The affidavit must also have the English translation attached to it.

Subclause (2) provides that proposed subsection (1), with any necessary changes, applies to and in respect of a statutory declaration as if each reference in the subclause to "affidavit" were a reference to "statutory declaration".

### **Clause 14 – Rubber stamp signatures not to be used**

Subclause 14(1) provides that the maker of, or the witness to, an affidavit or a statutory declaration must not use a rubber or other stamp to make the person's signature or personal mark. Subclause (2) provides that proposed subsection (1) does not prevent a person from using a rubber or other stamp to imprint the persons name near the person's signature or mark to identify the signature or mark. Subclause (3) provides that an affidavit or statutory declaration that is signed by the maker or witnessed with a rubber stamp is not admissible in a court or by person acting judicially.

### **Clause 15 – Substantial compliance with form is sufficient**

Clause 15 provides that substantial compliance with the form of words of an oath, affirmation or statutory declaration does not adversely affect the validity if the words used do not materially affect the substance and are not likely to mislead.

### **Clause 16 – Pretending to be an authorised witness, offence of**

Clause 16 provides that if a person who is not an authorised witness pretends to be, or asserts that he or she is such an authorised witness in the knowledge that they are not, commits an offence punishable by imprisonment for 12 months.

### **Clause 17 - Regulations**

Clause 17 provides that the Governor may make regulations prescribing all matters that are required or permitted by the proposed Act to be prescribed or are necessary or convenient for giving effect to the purposes of the proposed Act.

### **Schedule 1 - Form of Statutory Declaration**

Schedule 1 sets out the standard form of statutory declaration required under proposed section 11.

### **Schedule 2 - Authorised Witnesses for Statutory Declarations**

Schedule 2 lists the persons who are authorised witnesses for the purposes of making statutory declarations pursuant to proposed section 11(6)(a). The list is similar in material aspects to the list in the *Statutory Declarations Act 1959* of the Commonwealth. The list includes most professional persons particularly those with tertiary qualifications.