

# **Wills Amendment Bill 2006**

## **EXPLANATORY MEMORANDUM**

The Wills Amendment Bill 2006 ("the Bill") amends the *Wills Act 1970* ("the Act") to ensure the citizens of Western Australia have up-to-date and clear wills legislation. It also contains consequential amendments to other Acts.

The Bill also replaces existing sections of the Act with provisions from the Model Bill to improve expression and clarity. The intention in such cases is not to alter the meaning or effect of the existing sections

The explanatory memorandum will refer to recommendations made by:

- (a) the National Committee for Uniform Succession Laws in the "Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills" which included a draft Model Bill ("**the Model Bill**") (December 1997);
- (b) the Western Australian Law Reform Commission ("**WALRC**") in the *Report on Effect of Marriage or Divorce on Wills* (Project 76II - December 1991)
- (c) the New South Wales Law Reform Commission ("**NSWLRC**") in the report *Wills – Execution and Revocation 1986*; and
- (d) the Victorian Law Reform Committee ("**VLRC**") in the report *Reforming the Law of Wills, May 1994*.

### **PART 1**            **PRELIMINARY**

#### **Clause 1**            **Short title**

Clause 1 provides that the Act may be cited as the *Wills Amendment Act 2006* ("**the Amendment Act**").

#### **Clause 2**            **Commencement**

Clause 2 provides that the Act comes into operation on a day or days to be fixed by proclamation.

### **PART 2**            **WILLS ACT 1970 AMENDED**

#### **Clause 3**            **The Act amended**

Clause 3 provides that the Bill amends the *Wills Act 1970*.

#### **Clause 4**            **Section 4 amended**

Clause 4 amends section 4 of the *Wills Act 1970* by inserting a definition of "marriage" and amending the definition of "will". In relation to the later amendment there are some testamentary provisions which might not be a "disposition" as defined in the present Act. An example is the direction by will that is authorised by section 33 of the *Life Assurance Companies Act 1889*. The appointment of executors, or guardians or infant children, would be other examples. Also, there are many instances in the Act where "will" needs to cover the actual testamentary instrument rather than the operation or the instrument.

#### **Clause 5**            **Section 6 replaced**

Clause 5 repeals section 6 of the *Wills Act 1970* and inserts, in its place, proposed section 6.

**Proposed section 6** does not alter the meaning or effect of existing section 6. The only change of expression is by the insertion of paragraphing and gender neutral language.

#### **Clause 6**            **Section 7 amended**

Clause 6 amends section 7 of the *Wills Act 1970* by deleting "the provisions of Part IV," and inserts, in its place, "section 17" which is a consequential amendment of abolishing privileged wills for members of the armed forces - previously Part IV. Section 17 saves wills and revocations made under the former provisions of the *Wills Act 1970*.

#### **Clause 7**            **Section 8 amended**

Clause 7(a) amends section 8 of the *Wills Act 1970* by replacing "the provisions of Part VI," with "sections 17 and 20 and Parts X and XI," to accommodate the proposed replacement of sections 17 (*saves wills and revocations made under the former provisions of the Wills Act 1970*) and Part X (informal wills) and the proposed insertion of Part XI (wills for persons who lack testamentary capacity).

Section 20 (general rules as to formal validity) is referred to in this section to make it clear that the section applies.

Clause 7(b) amends section 8(b) of the *Wills Act 1970* by inserting gender neutral language.

#### **Clause 8**            **Section 9 amended**

Clause 8 repeals section 9(1) of the *Wills Act 1970* and inserts, in its place, proposed section 9(1).

**Proposed section 9(1)** adopts, in part, the wording of section 8(5) of the Model Bill but does not change the meaning or effect of existing section 9(1) of the Act except to insert the words "or permitted" to accommodate the proposed insertion of Part XI.

Clause 8 also amends section 9(2) of the *Wills Act 1970* by replacing "this Act." with "section 8." to accommodate the proposed insertion of Part XI.

#### **Clause 9            Section 10 replaced**

Clause 9 repeals section 10 of the *Wills Act 1970* and inserts, in its place, proposed section 10.

**Proposed section 10** adopts, in part, the wording of section 16 of the Model Bill but does not change the meaning or effect of existing section 10. The definition of "apparent" in existing section 10 is brought forward into proposed section 10 to ensure no new meaning or effect can be given to the provision.

#### **Clause 10            Section 11 is inserted**

Clause 10 inserts proposed section 11.

**Proposed section 11** provides that a person who is unable to see and attest that a testator has signed a document cannot act as witnesses. This confirms the common law position.

#### **Clause 11            Part IV is repealed**

Part IV is no longer required due to the abolition of the interested witness rule.

#### **Clause 12            Section 14 amended**

Clause 12(1) amends section 14(1)(a) of the *Wills Act 1970* by deleting "there is a declaration in the will that".

Clause 12(2) amends section 14(2) of the *Wills Act 1970* by deleting "expressed to be".

Clause 12(3) inserts proposed sections 14(3) and 14(4) after section 14(2) of the *Wills Act 1970*.

**Proposed section 14(3)** adopts the recommendation of the WALRC *Report on Effect of Marriage or Divorce on Wills* (Project 76II - December 1991) and sections 14(3) and 14(4) of the Model Bill that a will made in contemplation of a marriage should not be revoked, even where the contemplation is not expressed in the will. Where the contemplation is not expressed in the will, other evidence will be necessary to prove that a will is not to be revoked on marriage.

Proposed section 14(3) will only apply to the will of a person dying on or after the day section 11 of the Amendment Act comes into operation.

**Clause 13**      **Section 14A inserted**

Clause 13 inserts proposed section 14A after section 14 of the *Wills Act 1970*.

**Proposed section 14A** adopts, in part, the recommendation of the WALRC *Report on Effect of Marriage or Divorce on Wills* (Project 76II - December 1991) and the wording section 15 of the Model Bill, that there be total revocation of a will on divorce except where a contrary intention appears in the will or there is other evidence establishing such an intention. Proposed section 14A is in line with the effect of marriage on a will.

Proposed section 14A will apply to the will of a person dying on or after the day section 12 of the Amendment Act comes into operation.

Proposed section 14A adopts the wording of section 15(5) of the Model Bill which defines when a marriage ends.

**Clause 14**      **Section 15 replaced**

Clause 14 repeals section 15 of the *Wills Act 1970* and inserts, in its place, proposed section 15.

**Proposed section 15** has been consequentially redrafted but does not change the meaning or effect of existing section 15 of the *Wills Act 1970*.

**Clause 15**      **Section 16 amended**

Clause 15 (1) repeals section 16(1) of the *Wills Act 1970* and inserts, in its place, proposed section 16(1).

**Proposed section 16(1)** has been consequentially redrafted does not change the meaning or effect of existing section 16(1) of the *Wills Act 1970*.

Clause 15 (2) amends section 16(2) of the *Wills Act 1970* by deleting the comma after “revoked” to remove a grammatical error in existing section 16(2).

Clause 15 (3) inserts proposed section 16(3) after section 16(2) of the *Wills Act 1970*.

**Proposed section 16(3)** adopts section 17(4) of the Model Bill which provides that a will that has been revoked and later revived, either wholly or partly, is taken to have been executed on the day on which the will is revived.

Proposed section 16(3) is consistent with the common law.

**Clause 16            Section 17, 18 and 19 replaced by section 17**

Clause 16 repeals sections 17, 18 and 19 of the *Wills Act 1970* and inserts, in their place, proposed section 17.

**Proposed section 17** and the repeal of section 17, 18 and 19 adopts the recommendations of the Model Bill, the NSWLRC report *Wills – Execution and Revocation 1986*, at Chapter 11 and the VLRC report *Reforming the Law of Wills, May 1994* at pages 62 to 66, that privileged wills granted to persons involved in the armed services be abolished.

**Proposed section 17(1)** gives effect to all privileged wills made or revoked prior to the repeal of existing sections 17, 18 and 19.

**Proposed section 17(2)** provides that all privileged wills made prior to the repeal of existing sections 17, 18 and 19 may only be revoked after the repeal in accordance with proposed section 15.

**Clause 17            Sections 20, 21, 22 and 23 replaced by sections 20 and 21**

Clause 17 repeals sections 20, 21, 22 and 23 of the *Wills Act 1970* and inserts, in their place, proposed sections 20 and 21.

**Proposed sections 20 and 21** adopts the wording of sections 45 to 48 of the Model Bill but does not change the meaning or effect of existing sections 20, 21, 22 and 23 of the *Wills Act 1970*.

**Clause 18            Section 25 replaced**

Clause 18 repeals section 25 of the *Wills Act 1970* and inserts, in its place, proposed section 25.

**Proposed section 25** adopts the wording of section 28 of the Model Bill but does not change the meaning or effect of existing section 25 of the *Wills Act 1970*.

**Clause 19            Section 26 amended**

Clauses 19(1)(a) and 19 (1)(d) amend section 26 of the *Wills Act 1970* by inserting the subsection designation (1) and the necessary punctuation to accommodate the insertion of proposed sections 26(2) and 26(3).

Clause 19(1)(b) amends section 26(b) of the *Wills Act 1970* to refer to a disposition, other than the exercise of a power of appointment. If the exercise of the power of appointment is ineffective the property will pass in accordance with the provisions of the document creating the power.

Clause 19(c) amends section 26(d) of the *Wills Act 1970* by inserting gender neutral language.

Clause 19(e) inserts proposed sections 26(f) and 26(g) after section 26(e) of the *Wills Act 1970*.

**Proposed section 26(f)** adopts the wording of section 41(1) of the Model Bill which provides that a disposition of the residue of the estate of a testator, or of the whole of the estate of a testator, that refers only to the real estate of the testator, or only to their personal estate of the testator, is to be construed to include both the real and personal estate of the testator.

**Proposed section 26(g)** adopts section 41(2) of the Model Bill which provides that if any part of a disposition in fractional parts of the whole or of the residue of the estate of a testator fails, the part that fails passes to the part that does not fail, and, if there is more than one part that does not fail, to all those parts proportionately.

#### **Clause 20**      **Section 27 amended**

Clause 20 repeals section 27(1) of the *Wills Act 1970* and inserts, in its place, proposed section 27.

**Proposed section 27(1)** does not change the meaning or effect of existing section 27(1) of the *Wills Act 1970*. The only change of expression is by the insertion of paragraphing and the removal of a minor grammatical error in existing section 27(1).

#### **Clause 21**      **Section 28 amended**

Clause 21 amends section 28 of the *Wills Act 1970* by inserting gender neutral language.

#### **Clause 22**      **Section 28A inserted**

Clauses 22 inserts proposed section 28A after section 28 of the *Wills Act 1970*.

**Proposed section 28A** adopts the wording of section 31 of the Model Bill which allows the admission of extrinsic evidence to clarify a will. The object of the provision is to extend the admissibility of evidence of the testator's actual intention where a will or any part of a will is meaningless or ambiguous on the face of the will.

Proposed section 28A will only apply to the will of a person dying on or after the day section 21 of the Amendment Act comes into operation.

### **Clause 23            Sections 32, 33, 34, 35, 36 and 37 replaced by sections 32 and 33**

Clause 23 repeals sections 32, 33, 34, 35, 36 and 37 of the *Wills Act 1970* and inserts, in their place, proposed sections 32 and 33.

**Proposed section 32** adopts the wording of section 10 of the Model Bill but does not change the meaning or effect of existing sections 32, 33, 34, 35, 36 or 37 of the *Wills Act 1970* except for the definition of "document" and in deciding the deceased person's intentions, the Supreme Court may now have regard to statements made by the deceased person about their intentions. Proposed section 32 contains an expanded definition of "document" to recognise the modern role of video recording, tape recording and other forms of electronic recording devices.

**Proposed section 33** provides that proposed section 32 will only apply to the will of a person dying on or after the day section 22 of the Amendment Act comes into operation.

### **Clause 24            Parts XI and XII inserted**

Clause 24 inserts proposed Parts XI and XII after Part X of the *Wills Act 1970*.

#### **Proposed Part XI - Wills of persons who lack testamentary capacity**

##### **Division 1 – Jurisdiction of Supreme Court to authorise the making, alteration and revocation of wills**

Proposed Division 1 of Part XI contains proposed sections 39 to 49.

**Proposed sections 39 to 44** empower the Supreme Court to make wills on behalf of persons who lack testamentary capacity. The Supreme Court may refuse to grant leave unless it is satisfied

- there is reason to believe that the person concerned is incapable of making a valid will or of altering or revoking the person's will, as the case may be; and
- the suggested will, alteration or revocation; or as revised, is one which could be made by the person concerned if the person were not lacking testamentary capacity.

Proposed section 40 outlines the matters which the applicant must furnish to the Court and proposed section 42 outlines certain criteria to be applied by the Court. Section

43 allows the Court to appropriately case manage applications, including appropriate orders as to cost. The Court is not bound by the rules of evidence.

**Proposed section 45** provides that access to Part XI wills can only be obtained with the leave of the Supreme Court.

**Proposed section 46** provides that Part XI wills can only be altered or revoked if the person on whose behalf they are made regains testamentary capacity.

**Proposed section 47** prescribes various ways for the privacy of persons to whom Part XI applications relate to be protected by the Supreme Court on its own initiative or on the application of a party to an application.

### **Division 2 – Wills of persons who lack testamentary capacity made under the law of another place**

Proposed Division 2 of Part XI contains proposed section 48.

**Proposed section 48(1)** adopts the definition of "statutory will" in section 26(2) of the Model Bill.

**Proposed section 48(2)** adopts the wording of section 26(1) of the Model Bill to allow a statutory will made under an equivalent provision in another jurisdiction to be accepted for probate.

**Proposed section 48(3)** provides that proposed section 50(2) will apply to statutory wills made before or after section 23 of the Amendment Act comes into operation.

### **Proposed Part XII – Rectification of wills by Supreme Court**

Proposed Part XII contains proposed section 49.

**Proposed section 49** inserts a definition of "Court".

**Proposed section 49(1)** adopts the wording of section 27(1) of the Model Bill to allow the Supreme Court to rectify a will where a clerical error is made or the will does not give effect to the testator's instructions. For example, where a testator has a series of wills and makes a new will it is possible for a solicitor to miss out a paragraph from one of the former wills intended by the testator to be included: see, for example, *Australian Executor Trustees Ltd & Ors v Peter Louis Casanova & Ord* [2005] SASC 93.

**Proposed section 49(2)** adopts the wording, in part, of section 27(2) of the Model Bill to require application under proposed section 49(1) to be made within six months of the death of the testator.



**Proposed section 49(3)** adopts the wording of section 27(3) of the Model Bill to allow extensions to the six month time limit in proposed section 49(2) but not if the final distribution of the estate has been made.

**Proposed section 49(4)** provides that a certified copy of an order made under proposed section 49(1) must be attached to the original will and to the probated copy of the will.

**Proposed section 49(5)** provides that subject to proposed section 49(2), the Supreme Court may rectify the will of a person who dies before section 23 comes into operation.

## **CONSEQUENTIAL AMENDMENTS TO OTHER ACTS**

### **Clause 25            Consequential amendments to other Acts**

This clause provides that each Act listed in Schedule 1 is amended as set out in that Schedule.

**Note** – Clauses 2 – 8 are necessary because of the proposed new provisions:

- the new Part XI ( ie, the fact that, for a person who lacks testamentary capacity, a will may be made by order of the Supreme Court or may be recognised by operation of the proposed section 50); and
- new Part XII (ie, the fact that, a will may have the effect as if it contained provisions that were not actually in the document signed by the testator).

## **SCHEDULE 1 AMENDMENTS TO VARIOUS ACTS**

### **Clause 1            *Guardianship and Administration Act 1990* amended**

Clause 1 amends the *Guardianship and Administration Act 1990* to ensure that a plenary guardian has authority to make an application for a proposed Part XI will.

### **Clause 2            *Inheritance (Family and Dependants Provision) Act 1972* amended**

Clause 2 amends the definition of “will” in section 4(1) of the *Inheritance (Family and Dependent Provisions) Act 1972* by replacing “instrument.” with “disposition.”.

**Clause 3**            ***Life Assurance Companies Act 1889* amended**

Clause 3 amends the second paragraph of section 33 of the *Life Assurance Companies Act 1889* by replacing “testamentary instrument executed by him,” with “instrument having testamentary effect in respect of his estate,”.

**Clause 4**            ***Property Law Act 1969* amended**

Clause 4 amends section 120(g) of the *Property Law Act 1969* by replacing “instrument.” with “disposition”.

**Clause 5**            ***Public Trustee Act 1941* amended**

Clause 5 amends section 32 of the *Public Trustee Act 1941* by inserting paragraphing and the proposed section 32(1) definition of “document”.

**Clause 6**            ***Stamp Act 1921* amended**

Clause 7 amends section 76D(2)(a) of the *Stamp Act 1921* by replacing “instrument” in both places where it occurs with “disposition”.

**Clause 7**            ***Supreme Court Act 1935* amended**

Clause 7 amends section 171(1)(c) of the *Supreme Court Act 1935* by inserting after “Court” - “or depositing a will or instrument under section 46 of the *Wills Act 1970*”.

**Clause 8**            ***Trustee Companies Act 1987* amended**

Clause 8 amends section 3(1) of the *Trustee Companies Act 1987* by deleting the definition of “will” and inserting instead – “ “**will**” includes a codicil or any other testamentary instrument or disposition.”.