

**ACTS AMENDMENT AND REPEAL (COURTS AND LEGAL PRACTICE)  
BILL 2002**

**EXPLANATORY MEMORANDUM**

This Bill achieves a number of different reforms affecting the courts and the regulation of the legal profession. The areas of reform are:

- Repeal of the *Legal Practitioners Act 1893* which will be replaced by the Legal Practice Bill 2002
- Make consequential amendments to other Acts flowing from the Legal Practice Bill 2002
- Amend the *Legal Contribution Trust Act 1967* and provide for transitional arrangements
- Amend the title of Crown Solicitor to State Solicitor in those Acts where this title appears
- Amendments to the *Judges' Salaries and Pensions Act 1950* in response to past changes to Commonwealth superannuation legislation
- Amend qualifications for appointments to various statutory and judicial positions
- Amendments to remove monarchistic nomenclature from a number of Acts relating to court procedures and administration

**PART 1 - Preliminary**

**1. Short title**

Citation of the Act as the *Acts Amendment and Repeal (Courts and Legal Practice) Act 2002*

**2. Commencement**

Clause 2 makes provision for the commencement of the Act to be by proclamation which may be on different dates for the various provisions.

**PART 2 – Repeal of *Legal Practitioners Act 1893* and transitional and savings provisions**

**Division 1 – Preliminary**

**3. Interpretation**

Stipulates that references to the commencement day refer to the commencement of the *Legal Practice Act 2002*, the “1893 Act” means the *Legal Practitioners Act 1893* and the “2002 Act” means the *Legal Practice Act 2002*.

**Division 2 – Repeal**

**4. *Legal Practitioners Act 1893* repeal**

Clause 4 repeals this Act.

**Division 3 – Transitional and savings provisions**

**5. Application of the *Interpretation Act 1984***

This clause ensures continuity of arrangements in place under the authority of the 1893 Act so that they continue to apply under the 2002 Act.

#### **6. Legal Practice Board: transitional and savings provisions**

This clause ensures continuity of the composition and functions of the Legal Practice Board, for example, those who were members under the 1893 Act retain their membership under the 2002 Act.

Sub-clause 6(4) introduces a new system of electing Board members which comes into effect at the next Board election. The number of Board members increases from 9 to 12 under the 2002 Act, and they are to have - year terms with half facing election each year. However, under this sub-clause, at the first election following the commencement of the 2002 Act, all 12 members will face election with the six receiving the greatest number of votes receiving a 2-year term, and the other six receiving a 1-year term and to face re-election the following year.

Sub-clauses 6(6) and (7) state that at the time of commencement, the chairperson and deputy chairperson of the Board retains these positions until the first election of a chairperson and deputy chairperson under the 2002 Act, something which, under subclause (8) must occur within 6 months of the commencement day.

#### **7. Articled clerks: savings and transitional provisions**

Articles which are in place under the 1893 Act continue upon commencement of the 2002 Act.

#### **8. Managing clerks: savings and transitional provision**

The 2002 Act repeals the provisions that enable managing clerks to be admitted to practice on the basis of their service as managing clerks. Clause 8 of this Bill ensures that those managing clerks who have so qualified prior to the commencement of the 2002 Act do not lose their qualification once the 2002 Act is commenced. If a managing clerk has had her or his application for admission refused and, prior to the commencement of the 2002 Act, has lodged an appeal against this refusal, the appeal continues despite the commencement of the 2002 Act.

#### **9. Review of legal costs determination**

Section 214 of the 2002 Act continues the requirement that the Legal Costs Committee reviews each legal costs determination at least every two years. Clause 9 of this of this Bill ensures that any costs determinations that pre-date the commencement of the 2002 Act will be reviewed within two years of the determination being made.

#### **10. Powers in relation to transitional provisions**

Should there be some deficiency in the transitional provisions relating to the repeal of the 1893 Act, the Governor can, up to 12 months after the commencement of the 2002 Act, make appropriate regulations for transitional purposes.

### **PART 3 – Amendments to other Acts consequential on enactment of *Legal Practice Act 2002***

#### **11. Power to amend regulations**

The Attorney General can recommend to the Governor to amendments of subsidiary legislation of another Act consequent to the *Legal Practice Act 2002*. The Governor can then act on the Attorney General's recommendation.

12. *Adoption Act 1994* amended
13. *Agricultural Practices (Disputes) Act 1995* amended
14. *Biological Control Act 1986* amended
15. *Builder's Registration Act 1939* amended
16. *Censorship Act 1996* amended
17. *Children's Court of Western Australia Act 1988* amended
18. *Chiropractors Act 1964* amended
19. *Coal Industry Tribunal of Western Australia Act 1992* amended
20. *Commercial Arbitration Act 1985* amended
21. *Commercial Tribunal Act 1984* amended
22. *Companies (Co-operative) Act 1943* amended
23. *Consumer Affairs Act 1971* amended
24. *Coroners Act 1996* amended
25. *The Criminal Code* amended
26. *Criminal Investigation (Exceptional Powers) and Fortification Removal Act 2002* amended
27. *Debt Collectors Licensing Act 1964* amended
28. *Declarations and Attestations Act 1913* amended
29. *Dental Act 1939* amended
30. *Director of Public Prosecutions Act 1991* amended
31. *District Court of Western Australia Act 1969* amended
32. *Equal Opportunity Act 1984* amended
33. *Evidence Act 1906* amended
34. *Finance Brokers Control Act 1975* amended
35. *Fish Resources Management Act 1994* amended
36. *Fisheries Adjustment Schemes Act 1987* amended
37. *Gas Pipelines Access (Western Australia) Act 1998* amended
38. *Gender Reassignment Act 2000* amended
39. *Guardianship and Administration Act 1990* amended
40. *Industrial Relations Act 1979* amended
41. *Juries Act 1957* amended
42. *Justices Act 1902* amended
43. *Land Valuers Licensing Act 1978* amended
44. *Law Reform Commission Act 1972* amended
45. *Law Society Public Purposes Trust Act 1985* amended
46. *Legal Aid Commission Act 1976* amended
47. *Legal Practitioners Act Amendment Act 1976* amended
48. *Local Courts Act 1904* amended
49. *Long Service Leave Act 1958* amended
50. *Mental Health Act 1996* amended
54. *Osteopaths Act 1997* amended
55. *Psychologists Registration Act 1976* amended
57. *Racing Penalties (Appeals) Act 1990* amended
58. *Real Estate and Business Agents Act 1978* amended
59. *Registration of Deeds Act 1856* amended
60. *Residential Tenancies Act 1987* amended

- 61. Retirement Villages Act 1992 amended**
- 62. Royal Commission (Police) Act 2002 amended**
- 63. Sale of Land Act 1970 amended**
- 64. Security and Related Activities (Control) Act 1996 amended**
- 65. Settlements Agents Act 1981 amended**
- 66. Strata Titles Act 1985 amended**
- 67. Suitors' Fund Act 1964 amended**
- 68. Supreme Court Act 1935 amended**
- 69. Town Planning and Development Act 1928 amended**
- 70. Women's Legal Status Act 1923 amended**
- 71. Workers' Compensation and Rehabilitation Act 1981 amended**
- 72. Young Offenders Act 1994 amended**

Clauses 12 to 50 and 54 to 72 amend the named Acts by way of replacing references to the *Legal Practitioners Act 1893* with the *Legal Practice Act 2002*, and citing the latter Act as the basis for defining terms such as “lawyer”, “legal practitioner”, “certificated practitioner” or “articled clerk” as the case may be. These amendments only occur in those Acts which contain a definition of terms such as “lawyer”. Where an Act uses the term but does not define it, the term will continue to have its ordinary meaning.

Clause 46 further amends the *Legal Aid Commission Act 1976*. Section 4(1) of that Act is amended to replace a reference to the Barristers' Board with the Legal Practice Board, and to include incorporated legal practices in the definition of “private practitioner”. Section 40(4) is also amended to take account of incorporated legal practices.

Clause 56 and 57 also amend the *Public Notaries Act 1979* and the *Racing Penalties (Appeals) Act 1990* to change the definition of costs determination from that appearing in the *Legal Practitioners Act 1893* to that as defined in the *Legal Practice Act 2002*

Clause 67 amends the *Suitors Fund Act 1964* to replace a reference to the Barristers' Board with the Legal Practice Board.

- 51. Mining Act 1978 amended**
- 52. Motor Vehicle (Third Party Insurance) Act 1943 amended**
- 53. Official Prosecutions (Defendants' Costs) Act 1973 amended**

Clauses 51 to 53 amend these Acts to change the definition of costs determination from that appearing in the *Legal Practitioners Act 1893* to that as defined in the *Legal Practice Act 2002*.

**PART 4 – Legal Contribution Trust Act 1967 amended and transitional provisions**

**73. The Act amended**

Clause 73 simply states that Part 4 amends the *Legal Contribution Trust Act*

**74. Section 4 amended**

Section 4 is the interpretation section. Most of the amendments are of a technical nature such as changing references to the *Legal Practitioners Act 1893* to references to the *Legal Practice Act 2002*.

A more substantive amendment is that which adds the definition of “bank” so that a bank can be a financial institution which complies with either the definition of an authorised deposit-taking institution (ADI) contained in the *Banking Act 1959* (Cth) or one that is established through some other State or Commonwealth law. An ADI is a body corporate, not necessarily a “bank”, which is authorised by the Australian Prudential Regulation Authority to operate as a banking institution. This provides greater flexibility in the types of financial institutions in which trust funds can be deposited beyond the traditional banks.

**75. Sections 4A and 4B inserted**

The new section 4A will ensure that the same provisions of the Act relating to legal practitioners in general will also apply to incorporated legal practices and multi-disciplinary partnerships. Similarly, the new section 4B brings interstate legal practitioners who have an office in Western Australia and practice here and local practitioners who practice interstate under the coverage of the *Legal Contribution Trust Act 1967*. Interstate practitioners with an office in Western Australia will be required to establish trust accounts in relation to their Western Australian clients’ funds.

**76. Heading to Part III replaced**

This simply replaces the existing heading (“Legal contributions”) with a new heading (“Interest on trust accounts paid to Fund”).

**77. Sections 10, 11 and 12 repealed and transitional provision**

The three sections which are repealed under this clause relate to the requirement for legal practitioners to maintain two separate trust accounts. The main intent of the amendments to the *Legal Contribution Trust Act* is to do away with the need to have two accounts and instead only require one trust account to be maintained. This makes these three sections redundant. However, section 10 allows claims to be made against a practitioner with respect to a trust account, and subclause 77(2) enables claims that have commenced prior the commencement of subclause (1), that is, once section 10 has been repealed, to continue.

**78. Section 13 replaced**

Clause 78 introduces a new section 13 headed “Bank to pay interest on trust accounts to Trust”.

This clause sets out the process by which interest on a practitioner’s (single) trust account is paid to the Legal Contribution Trust and sets the rate of interest to be one determined by regulation (and in the absence of a regulation by agreement between the bank and the Legal Contribution Trust).

**79. Section 14 amended**

This clause is a minor amendment which specifies moneys “received” rather than the previous reference which was to moneys “resulting from investments made”. The new wording is less prescriptive.

**80. Section 16 amended**

This clause simply changes a reference to the *Legal Practitioners Act 1893* with one to the *Legal Practice Act 2002*.

**81. Section 17 replaced**

This new section will provide greater flexibility for where the funds of the Guarantee Fund can be invested by enabling them to be deposited with a bank or in the form of a Treasury loan. The previous section 17 provided only for investment in accordance with Part III of the *Trustees Act 1962* (which remains an option under the new section 17).

**82. Section 18 amended**

This clause simply changes a reference to the *Legal Practitioners Act 1893* with one to the *Legal Practice Act 2002*.

**83. Section 28 amended**

Section 28 deals with legal practitioners being able to make claim against the Guarantee Fund in certain circumstances. It simply replaces the word “practitioner” with the word “person” as the individual concerned may or may not still be a legal practitioner at the time she or he makes the claim.

**84. Section 51 amended**

This clause deals with the limitation of actions under the *Legal Contribution Trust Act 1967* and simply takes account of the repeal of section 11. It ensures that a legal practitioner is not liable for any action taken in order to comply with the new section 13.

**85. Section 56 amended**

Section 56 deals with the making of regulations, and this clause simplifies the wording of this section.

In sub-clause 85(2) it extends the provision regarding the making of regulations to include incorporated legal practices and multi-disciplinary practices, and enables regulations to be made prescribing matters such as the percentage interest payable to the Legal Contribution Trust, when the interest is payable, the rate payable and how this is determined, and the relevant period for the interest payable.

**86. Transitional provisions**

Clause 86(1) sets the commencement date for these amendments to the commencement date for the *Legal Practice Act 2002*. Sub-clause (2) ensures continuity of the management of trust funds held by the Legal Contribution Trust, especially those held under the to-be-repealed section 11.

**PART 5 – Amendments relating to State Solicitor and savings provision**

**87. *Bail Act 1982* amended**

**88. *The Criminal Code* amended**

**89. *Crown Suits Act 1947* amended**

**90. *Escheat (Procedure) Act 1940* amended**

**91. *Financial Administration and Audit Act 1985* amended**

**92. *The Grand Jury Abolition Act Amendment Act 1883* amended**

**93. *Law Reform Commission Act 1972* amended**

**94. *Public Trustee Act 1941* amended**

**95. *Workers' Compensation and Rehabilitation Act 1981* amended**

**96. References to Crown Solicitor**

Clauses 87 to 95 replace any references in these Acts to the “Crown Solicitor” with “State Solicitor”. Clause 96 applies the same change to any other Act where there is such a reference but has not been specified in Part 5 of this Bill. These clauses are in accordance with the Government’s policy to remove unnecessary references to the Crown and replace them with terms such as “State”. Under these clauses, the position of Crown Solicitor is effectively becomes the State Solicitor.

**PART 6 – Amendments to the *Judges' Salaries and Pensions Act 1950***

**97. The Act Amended**

This clause simply states that Part 6 amends this Act with the exception of clause 105 which amends the *State Superannuation (Transitional and Consequential Provisions) Act 2000*.

**98. Section 2 amended**

Clause 98 adds the term “actuary” to the interpretation and defines the term as a Fellow or Accredited Member of The Institute of Actuaries of Australia. It also simplifies the meaning of the term “Index” (that is, consumer price index) without changing its meaning.

**99. Section 6 amended**

Under this clause, a Judge who is removed from her or his office is not entitled to a pension, although there is scope for the Governor to grant a pension. Removal of a Judge is usually the result of some form of misconduct or inappropriate behaviour. This means that a Judge who has not acted in accordance with the requirements of her or his office does not benefit from being able to access a pension upon the termination of her or his appointment as a judge.

**10. Section 8B amended**

The section 8B deals with the annual adjustment of judicial pensions, and the current wording states that it is the Treasurer who determines what the percentage increase should be. The amendment in clause 100 sets that the consumer price index for Perth as the annual rate of increase in judicial pensions.

**101. Section 11 amended**

Section 11 sets the frequency of payments of pensions and allowances at monthly intervals. The amendment contained in clause 101 allows for this to be changed at the discretion of the Minister which allows for more flexibility.

**102. Section 14 repealed**

This section is repealed as its subject matter is now included in section 6 through clause 99 (see above).

**103. Sections 16 to 18 inserted**

Amendments to the *Judges Salaries and Pensions Act 1950* have lagged behind other legislative reform consequent upon earlier amendments to Commonwealth

superannuation legislation introducing the Commonwealth superannuation surcharge tax. Clause 103 deals with this anomaly.

The new section 16 (Commutation of pension to meet surcharge debt) will enable Judges to commute part of their pensions in order to pay the superannuation surcharge tax that will become payable as a lump sum at the time of their retirement. Western Australian Judges have, until now, been the only Judges in Australia who could not commute their pension and the requirement to pay a large lump sum surcharge can be financially prohibitive. The Government Employees Superannuation Board has estimated that these lump sum payments can be up to \$500,000.

A similar arrangement will apply if a Judge or former Judge dies and the pension becomes payable to a surviving spouse or de facto partner. In this case, this person can also commute part of their pension and in doing so will be paying the surcharge on behalf of the executor or administrator of the estate.

The new section 17 (Benefit if no pension payable) ensures that Judges who do not qualify for a judicial pension on ceasing to hold office (see clause 100), will still receive the minimum level of employer superannuation contributions required by the Superannuation Guarantee. This will ensure that these Judges receive that to which they are legally entitled.

Section 18 (Administration costs) determines that the cost of administering the Judges' salaries and pensions scheme are to be met from the Consolidated Fund. There is likely to be some cash flow effect from allowing Judges commutation rights.

#### **104. Second Schedule amended**

This clause amends Item 2 of this Schedule which provides for the Treasurer to make provision for a Judge's child to be paid an allowance. Clause 104 changes this responsibility from lying with the Treasurer to the Minister responsible.

#### **105. *State Superannuation (Transitional and Consequential Provisions) Act 2000* amended**

By introducing a new section 8A of this Act, clause 105 ensures that a spouse or de facto partner of a Judge cannot claim both a pension under the *Judges Salaries and Pensions Act 1950* and the *State Superannuation Act 2000* ie it prevents double-dipping on the part of a spouse or de facto partner.

### **PART 7 – Amendments about qualifications for appointment**

#### **106. *Children's Court of Western Australia Act 1988* amended**

Clause 106 extends the definition of "legal experience" for the purpose of qualifying for appointment as a Judge of the Children's Court. The definition now recognises experience as a solicitor or barrister in another State or Territory as well as experience as a legal practitioner in Western Australia, and it also recognises experience obtained through judicial service. The previous definition did not recognise judicial experience so that, for example, service as a magistrate would not count.

#### **107. *Commercial Tribunal Act 1984* amended**

Clause 107 amends this Act by changing the definition of a legal practitioner from someone so defined in the *Legal Practitioners Act 1893* to someone either so defined

under the *Legal Practice Act 2002* or someone who is admitted as a barrister or solicitor in another State or Territory

**108. *Criminal Injuries Compensation Act 1985* amended**

Clause 108 amends this Act by changing the definition of a qualified person from someone defined as a legal practitioner under the *Legal Practitioners Act 1893* to either someone so defined under the *Legal Practice Act 2002* or someone who is admitted as a barrister or solicitor in another State or Territory.

**109. *Director of Public Prosecutions Act 1991* amended**

Clause 109 amends this Act by changing the definition of a legal practitioner from someone so defined in the *Legal Practitioners Act 1893* to someone either so defined under the *Legal Practice Act 2002* or who is admitted as a barrister or solicitor in another State or Territory.

**110. *District Court of Western Australia Act 1969* amended**

Clause 110 extends the definition of “legal experience” for the purpose of qualifying for appointment as a District Court Judge. The definition now recognises experience as a solicitor or barrister in another State or Territory as well as experience as a legal practitioner in Western Australia, and it also recognises experience obtained through judicial service. The previous definition did not recognise judicial experience so that, for example, service as a magistrate would not count. .

**111. *Equal Opportunity Act 1984* amended**

Clause 111 amends this Act by including admittance as a barrister or solicitor in another State or Territory as part of the definition of a legal practitioner.

**112. *Fisheries Adjustment Schemes Act 1987* amended**

**113. *Land Valuation Tribunals Act 1978* amended**

**114. *Land Valuers Licensing Act 1978* amended**

**115. *Racing Penalties (Appeals) Act 1990* amended**

**116. *Small Claims Tribunal Act 1974* amended**

**117. *Solicitor- General Act 1969* amended**

Clauses 112 to 117 deal with the appointment of individuals to bodies or positions created under these Acts. The clauses amend the named Acts by changing the definition of a legal practitioner from someone so defined in the *Legal Practitioners Act 1893* to someone either so defined under the *Legal Practice Act 2002* or someone who is admitted as a barrister or solicitor in another State or Territory.

**118. *Supreme Court Act 1935* amended**

Clause 118 has the same effect on this Act as clause 106 has on the *Children’s Court Act of Western Australia 1988* and clause 110 has on the *District Court of Western Australia Act 1969*. It extends the definition of “legal experience” for the purpose of qualifying for appointment as a Supreme Court Judge. The definition now recognises experience as a solicitor or barrister in another State or Territory as well as experience as a legal practitioner in Western Australia, and it also recognises experience obtained through judicial service. The previous definition did not recognise judicial experience so that, for example, service as a magistrate would not count.

**119. *Transfer of Land Act 1893* amended**

Clause 119 amends the named Acts by changing the definition of a legal practitioner from someone so defined in the *Legal Practitioners Act 1893* to someone either so defined under the *Legal Practice Act 2002* or someone who is admitted as a barrister or solicitor in another State or Territory.

**PART 8 – Amendments about the Crown**

**120. *Bail Act 1982* amended**

**121. *Children’s Court of Western Australia Act 1988* amended**

**122. *The Criminal Code* amended**

**123. *Director of Public Prosecutions Act 1991* amended**

**124. *District Court Act of Western Australia Act 1969* amended**

**125. *Juries Act 1957 Act* amended**

**126. *Justices Act 1902* amended**

**127. *Local Courts Act 1904* amended**

**128. *Supreme Court Act 1935* amended**

The effect of clauses 120 to 128 is to remove monarchistic nomenclature from legislation affecting the courts except where there is an underlying and historical complexity. For example, as a result of these amendments indictments will issue in the name of the State and a summons will issue in the name of the court. In each case the new titles will replace the words “Queen” and “Crown”. Clause 128 has an additional amendment that will see the Royal Arms being replaced by the State Arms in the seal of the Supreme Court.