

OATHS, AFFIDAVITS AND STATUTORY DECLARATIONS BILL 2005

EXPLANATORY MEMORANDUM

Overview of Bill

The *Oaths, Affidavits and Statutory Declarations Bill 2005* consolidates all WA legislation dealing with the manner of taking oaths, affidavits and statutory declarations.

The Bill proposes that oaths may be made to a religious deity or may be religiously neutral, reflecting Western Australia's increasingly multicultural society. The Bill provides that an oath requires a person to swear an oath to "Almighty God", the religious deity they recognise or "according to the religion and the beliefs (he or she) profess(es)". The latter words are taken from a recommendation made by the Chief Justice following a review of oaths made by a multicultural Committee created by His Honour. In addition the Bill proposes that in any case where an oath is to be taken a person is entitled to affirm instead.

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.

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 2005*.

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 an Australian Diplomatic Officer within the meaning of the *Consular Fees Act 1955* (Commonwealth),

a British consul or vice consul, or an official prescribed by the regulations 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 beginning of any oath. The general form takes three alternatives and an individual taking an oath may choose which alternative they prefer. The first recognises the current oath and provides that a person may swear to “Almighty God”. The second alternative provides that a person can swear by the name of a deity recognised by his or her religion. The third alternative provides that a person may more generally swear “according to the religion and the beliefs (he or she) profess(es)”. The third alternative oath is neutral in terms of religion and was recommended following the *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 an 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.

Subclause (2) provides that a person may be required to affirm instead of taking an oath where the taking of an oath is contrary to the person’s religious belief or conscience, it is not reasonably practicable to administer to the person an oath in a manner that will bind the person’s conscience or for any other sufficient reason the taking of an oath is found not to be appropriate.

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

Subclause (4) provides that the form of the affirmation is, “I sincerely declare and affirm”, which words are used in place of the opening words prescribed in clause 4(1).

Clause 6 – Oaths and affirmations, who may administer

Clause 6(1) provides who may administer an oath or take an affirmation for 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 instead take the affirmation of the person.

Clause 7 – Oaths and affirmations, how administered

Clause 7(1) provides how an oath is administered; subclause (2) provides how an affirmation is administered. It is not necessary for a person making an 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 provides 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 or affirmed.

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 his or hers and that any attachment is the attachment referred to in the affidavit.

Subclause (4) clarifies that the signature or mark required under proposed subsection (3)(a) need not be complied with in the presence of an authorised witness.

Subclause (5) sets out the obligations of an authorised witness in relation to an affidavit.

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 participated in any way in preparing the affidavit – subclause (7)), a public notary, a registrar, clerk of court or mining registrar.

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 an affidavit to be made before a person other than a person referred to in the subsections.

Clause 10 – Court authorised witness may witness affidavit for use in court

Subclause 10(1) defines “**chief judicial officer**” and “**court staff**”.

Subclause (2) provides that the chief judicial officer of a court may appoint a member of the court’s staff, who is not otherwise authorised to witness an affidavit (e.g. a Justice of the Peace), to be a court authorised witness for the court. The chief judicial officer may cancel the appointment at any time. Under subclause (3) the appointment must be in writing and kept in the court’s records.

Subclause (4) provides that such an appointment ceases when the person ceases to be on the court’s staff or the chief judicial officer cancels it.

Subclause (5) provides that a court authorised witness is an authorised witness for any affidavit that is made for use in the court for which the officer is appointed and that clause 9, with any necessary changes, applies accordingly.

Part 4 - Statutory declarations

Clause 11 – When a statutory declaration may be made

Clause 11(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 requires a person to make a statutory declaration for a purpose.

Clause 12 – Statutory declarations, how made

Clause 12 provides how a statutory declaration may be made. Under subclause (1) a statutory declaration must be made in accordance with proposed section 12 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 13 – Affidavits and declarations by blind or illiterate persons

Subclause 13(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 14 – Affidavits and declarations by people not conversant with English

Subclause 14(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 15 – Rubber stamp signatures not to be used

Subclause 15(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 16 – Non-compliance with form or procedure, effect of

Clause 16 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 17 – Pretending to be an authorised witness, offence of

Clause 17 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 18 - Regulations

Clause 18 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 12(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.