

COURTS LEGISLATION AMENDMENT BILL 1999
Explanatory Notes

Part 1 – Preliminary

Clause 1 Short title

Short title of the Act.

Clause 2 Commencement

The amendments to the *Supreme Court Act* and *District Court of Western Australia Act* relating to fees will come into operation on such day, or days, as are fixed by proclamation, as subordinate legislation will be required to facilitate the amendments.

All other amendments will come into operation on the day the Act receives Royal Assent.

Part 2 – Amendments to the *District Court of Western Australia Act 1969*

Clause 3 The Act amended

The amendments proposed in this Part relate only to the *District Court of Western Australia Act 1969*.

Clause 4 Section 24 amended

There is presently a difference between the qualification requirements for appointment as a Judge of the District Court and a Commissioner of the Court. This amendment will remove the difference by providing that the qualification requirements to be appointed as a Commissioner will be the same as for a Judge.

Clause 5 Section 27A inserted

The Act is presently silent with regard to the power to appoint Associates, Orderlies and other assistants to the District Court Judges. Their appointment in the past has been made on a very broad interpretation of legislation specifically addressing the appointment of Registrars, which has led to a degree of uncertainty with regard to identifying who is their employer and their employment status.

This new section specifies that they will be employed under a contract with the Attorney General, and that they will not be subject to the provisions of the *Public Sector Management Act*. This will also remove the conflict presently being experienced with regard to supervision and control.

Because there are occasions where a public service officer is seconded to fill one of the specified positions, it is necessary to make provision for an arrangement, as provided in the *Public Sector Management Act*, to be entered into between the employing authority and the Attorney General to cover the engagement of that person.

Clause 6 Section 88 amended

Subsection (2) (f) of Section 88 is deleted and subsection (3) is repealed as a consequence of the new provisions contained in section 89A as inserted under Clause 6 of this Bill.

Clause 7 Section 89A inserted

This new section provides for the Governor, by regulation, to prescribe or provide for the fees payable in the District Court. Under the existing provisions, deleted by Clause 5 of this Bill, fees were fixed or provided for by the majority of the Judges of the Court in Rules of Court. This amendment places the fee making and review authority in the hands of the Executive Government, by regulation, in lieu of the Judiciary.

Regulations made in accordance with this authority will contain provisions for the waiver, reduction, refund or deferral of payment by a Registrar of the Court. The Principal Registrar will decide questions as to the application of any fee, and a Judge of the Court may review determinations in a summary manner.

Part 3 – Amendments to the *Liquor Licensing Act 1988*

Clause 8 The Act amended

The amendments in this Part are to the *Liquor Licensing Act 1988*.

Clause 9 Section 3 amended

Section 3, relating to the definition of “Acting Judge”, is repealed as that situation is now addressed in the new provisions inserted under Clause 10 of this Bill. The definition of “the Judge” is substituted with a new definition as a result of the new provisions.

Clause 10 Section 8 amended

Subsections 8(3) and 8(4) are amended by deleting the words “an Acting Judge” and substituting them with a new description as a result of the new provisions contained in clause 10 of this Bill.

Clause 11 Section 9 replaced

On 1 July 1998 administrative responsibility for the Liquor Licensing Court was transferred from the Ministry of Racing and Gaming to the Ministry of Justice with the Court being appended as an adjunct, for administrative purposes, to the District Court of Western Australia.

To formalise this process, the present provisions of the Act relating to the appointment and conditions of the Judge, or Acting Judge, of the Liquor Licensing Court as contained in sections 9 and 10 of the Act are repealed. The new provisions provide for the Chief Judge of the District Court to nominate a Judge or Commissioner of that Court to be the Liquor Licensing Court Judge.

A savings provision is included to protect the present Judge of the Liquor Licensing Court by deeming him to have been nominated as the Judge of that Court. The present protection and immunity clause, relating to a Judge exercising the duties of the office, is included in the amendment.

Clause 12 Sections 10 and 11 repealed

Section 10, relating to the appointment of Acting Judges, is repealed as that situation is now addressed in the new provisions inserted under Clause 10 of this Bill.

Section 11, providing for the taking of an oath of office is repealed as the nominated Judge, or Commissioner, will have already taken an oath of office on their appointment to the District Court.

Clause 13 Section 16 amended

Section 16(7) is amended by removing the reference to "an Acting Judge" as a result of the new provisions inserted under Clause 10 of this Bill.

Clause 14 Transitional provisions

In the unlikely event that an Acting Judge may be dealing with an application on the day on which this Bill, if passed, comes into operation then the Acting Judge may continue to hear the matter although the position of "Acting Judge" would no longer exist.

Part 4 – Amendments to the *Local Courts Act 1904*

Clause 15 The Act amended

The amendments in this Part are to the *Local Courts Act 1904*.

Clause 16 Section 91 amended

The present provisions of this section provide that where a judgment debtor pays the debt, or instalments in reduction of the debt, they must be made to the Local Court. Due to the volume of payments now being made to the Local Courts, this process is becoming resource intensive both with regard to staff to receipt and process the payments and costs associated with the production of cheques and postage. Delays also occur in the receipt of payment by the judgment creditor due to the double handling of the payments.

This amendment removes the obligation to make payments to the Court and provides that payments are to be made direct to the plaintiff or plaintiff's solicitor.

Part 5 – Amendments to the *Supreme Court Act 1935*

Clause 17 The Act amended

The amendments in this Part are to the *Supreme Court Act 1935*.

Clause 18 Part VI inserted

This new Part, containing sections 69 to 72, is inserted to address issues of mediation in the Court.

Section 69 provides two definitions to confine the provisions of mediation;

- “Mediation under direction” is defined to mean a mediation conducted pursuant to a court direction under the Supreme Court Rules. Under the existing Rules, the Judges, Masters and Registrars of the Court have power to order parties to mediation without their consent. While parties are able to select a private mediator of their choice, the Court will only order mediation without the parties consent where the parties will not become liable to remunerate a mediator. In these cases a Registrar of the Court usually conducts the mediation.
- “Mediator” is defined to ensure control is placed over those who can conduct a mediation under direction of the Court. Only formerly trained and accredited mediators will be approved to conduct the mediation where the parties cannot agree. Where the parties do agree they can nominate a person of their choice to conduct the mediation.

Section 70 provides that a mediator carrying out mediation under direction will have the same privileges and immunities as a Judge of the Court has in the performance of judicial duties. Mediation is a difficult process usually involving parties that are deeply entrenched in positions of conflict and sometimes involving emotional and volatile confrontations. This provision reflects the policy that the mediator should not be at risk of liability in relation to the conduct of the mediation.

Section 71 provides for the protection of evidence given or statements made during the course of a mediation, or documents prepared for the purpose of mediation. Subsections (1) and (2) have a two-fold effect. They impose on participants in the mediation, a statutory duty of confidence and create a statutory evidentiary privilege that is essential to the mediation process. It thus means that the parties to the mediation cannot disclose to others what was said or occurred at the mediation. It also prevents facts being proved at trial by evidence of statements made during the course of resolving the dispute.

The section also acknowledges that the duty of confidence and evidentiary privilege cannot be absolute. Subsection (3) provides exclusion from the inadmissibility provision where the parties consent, if there is a dispute as to whether or not the parties entered into a binding agreement at the mediation, the proceedings relate to a costs application or to proceedings concerning an act or omission in connection with a disclosure by a mediator. Subsection (4) provides that a mediator cannot be compelled to give evidence or produce documents the subject of a mediation unless the proceedings relate to an authorised disclosure made by a mediator or relate to costs.

Section 72 imposes on a mediator a statutory duty of confidence and requires that a mediator must keep confidential all information obtained in the course of the mediation. Confidentiality on all persons, including the mediator, is the essential cornerstone of the mediation process. Exceptions are acknowledged however, where the disclosure relates to a report to the Court of a failure of a party to cooperate, or is by consent, or is necessary to prevent injury or damage to property or is authorised by another law.

Clause 19 Section 155 amended

Subsection (4) is repealed as a consequence of the new section 155A being inserted by Clause 15 of this Bill.

Clause 20 Section 155A inserted

Subsection (1) and (2) of this section restates the provisions of the former section 155 (4) with the addition of the words "and other assistants" to address the issues pertaining to the appointment of judicial support staff other than Associates and Orderlies.

Subsection (3) provides for an arrangement, as provided for by section 66 of the *Public Sector Management Act*, to be entered into where public service officers are seconded into the positions, as sometimes occurs.

Clause 21 Section 163 amended

These amendments are consequential to the new provisions contained in section 171 as inserted by Clause 20 of this Bill, where the fee making power is transferred from the Judges of the Court (rule making power) to the Executive (by way of regulations).

Clause 22 Section 167 amended

This amendment provides the Judges of the Court with rule making powers to enable the provisions relating to mediation, as inserted by Clause 13 of this Bill, to be implemented and managed.

Although the new provision contains a general power, it also particularises certain matters to put beyond doubt the power of the Court to make rules in respect to matters contemplated by the new Part VI as inserted by Clause 13 of this Bill.

Clause 23 Section 169 repealed

Section 169, which presently gives the Judges of the Court the rule making power to fix and vary fees payable in the Court, is repealed as a consequence of the insertion of the new section 171 as is provided for in Clause 20 of this Bill.

Clause 24 Section 170 amended

These amendments are also consequential on the insertion of the new section 171 as is provided for in the following Clause.

Clause 25 Section 171 inserted

These amendments provide for the new system of fees being fixed or varied by the Executive Government, through regulation rather than by the Judges of the Court through Rules of Court. The same provisions relating to the waiver, reduction, refund or deferral of fees, the determination of application of fees to be made by the Principal Registrar and review of those determinations by a Judge or Master in a summary matter, as are provided for in the District Court (see Clause 6 of this Bill) apply.

Part 6 – Validation

Clause 26 Validation

As a result of the change in the rule making power, it is necessary to validate any Rules of Court made and anything done, or purported to be done, under the repealed rule making provisions.