

ACTS AMENDMENT (JUSTICE) BILL 2007

EXPLANATORY MEMORANDUM

The courts reform program was the response of the Western Australia Government to various reform recommendations and initiatives proposed by the Law Reform Commission of Western Australia (LRCWA) and the Department of the Attorney General.

The principal reform drivers were:

- 1997 Court Services Report - "*Amalgamation of Courts of Summary Jurisdiction*".
- 1997 Court Services Report - "*Civil Judgment Debt Recovery System*".
- 1999 LRCWA Report 92 - "*Review of the Criminal and Civil Justice System*".

Secondary drivers were:

- 1983 Murray Report on the Review of the Criminal Code.
- 1986 LRCWA Report 55/2 - "*Report on Courts of Petty Sessions*".
- 1988 LRCWA Report 16/1 - "*Report on Local Courts: Jurisdiction, Procedures & Administration*".
- 2001 LRCWA Report 67 - "*Report on Writs and Warrants of Execution*".

On 1 May 2005 the new Magistrates Court became operative as did the courts reform legislation which comprised:

- *Magistrates Court Act 2004.*
- *Magistrates Court (Civil Proceedings) Act 2004.*
- *Justices of the Peace Act 2004.*
- *Civil Judgments Enforcement Act 2004.*
- *Courts Legislation Amendment and Repeal Act 2004.*
- *Criminal Procedure Act 2004.*
- *Criminal Appeals Act 2004.*
- *Criminal Procedure and Appeals (Consequential and Other Provisions) Act 2004.*

The reform of the Magistrates Court saw the repeal of Acts that had been in place for over 100 years (*Justices Act 1902* and *Local Courts Act 1904*). The total legislative package was also the largest single implementation of LRCWA recommendations to ever occur in WA as 221 recommendations were implemented.

The Attorney General commissioned a review of the courts reform program six months after it came into operation. The review, which included extensive judicial and stakeholder consultation, has identified opportunities to improve the effectiveness of the legislation.

The review also extended to:

- The *Criminal Injuries Compensation Act 2003*, which commenced on 1 January 2004.
- The *State Administrative Tribunal Act 2004*, which came into operation on 1 January 2005.
- Legislation that introduced reforms to the laws on sexual assault, domestic violence, and restraining orders.
- The creation of a Court of Appeal as a separate division of the Supreme Court that also became operative in May 2005.

This Bill is the primary legislative vehicle to progress proposed amendments identified in the review as well as proposed amendments to the following Acts that have been included because of their connection to the reform program, namely:

- *Corruption and Crime Commission Act 2003*;
- *Criminal Investigation Act 2006*;
- *Oaths, Affidavits and Statutory Declarations Act 2005*;
- *Pawnbrokers and Second-hand Dealers Act 1994*;
- *Sentencing Act 1995*;
- *Sentencing Legislation Amendment and Repeal Act 2003* and
- *Victims of Crime Act 1994*

Part 1-Preliminary matters

This Part contains the title of the Act and the relevant commencement provisions.

Clause 1. Short Title

Citation of the Act.

Clause 2. Commencement

With the exception of section 24 which is deemed to have come into effect on 1 May 2005, clause 2 makes provision for the commencement of the Act to be by proclamation. There is a need for subsidiary legislation to be drafted to accompany this Bill and for the Act and subsidiary legislation to come into effect simultaneously.

Clause 2(b) refers to clause 24 and relates to section 144 of the *Courts Legislation Amendment and Repeal Act 2004*. The wording of sections 145 and 146 of that Act relate to proceedings and processes to enforce a judgment pending prior to the commencement date of 1 May 2005. This wording makes it unnecessary to backdate the operation of the amendment carried by clause 24 of this Bill.

Clause 2(c) refers to clause 39 of this Bill and relates to section 113 of the *Criminal Investigation Act 2006* and deals with the disclosure of photographs. This clause addresses the fact that the *Criminal Investigation Act 2006* as enacted did not commence with the rest of the Act on 1 July 2007. This clause means that section 113 can be proclaimed at any time but if it is proclaimed after this Bill is enacted, the

version of section 113 in clause 39 of this Bill will in effect operate instead of the version originally enacted.

Part 2-Children's Court of Western Australia Act 1988 amended

Clause 3. The Act amended in this Part

This clause refers to the *Children's Court of Western Australia Act 1988*.

Clause 4. Section 21 amended

This clause will allow magistrates in the Children's Court to impose - sentences of detention in a detention centre of not longer than 12 months; sentences of imprisonment on child offenders of not longer than 3 months (if under 18 years old at the time of being sentenced); and sentences of not longer than 6 months (if offender is 18 years old at the time of being sentenced).

Clause 5. Section 39A inserted

This clause corrects a procedural void in the Act and provides for orders and judgments made in the Court's non-criminal jurisdiction to be enforced in accordance with the provisions of the *Civil Judgments Enforcement Act 2004*.

The *Civil Judgments Enforcement Act 2004* introduced a uniform scheme for the enforcement of civil judgments. This clause provides that judgments, orders and directions of the Children's Court that require the payment of money can be enforced by:

- lodging a certified copy of the order and an accompanying affidavit stating the extent of compliance with a court of competent jurisdiction (Magistrates, District or Supreme depending on the amount of the order); and
- that when lodged the order is to be taken to be a judgment of the court and may be enforced accordingly.

If the order does not require the payment of money, the clause provides that it shall be registered in the Magistrates Court.

The Court's criminal jurisdiction is excluded from this provision as it is adequately covered by section 119 of the *Sentencing Act 1995* and, amongst other provisions, by section 185 of the *Criminal Procedure Act 2004*.

Clause 6. Section 40 amended

This clause is a consequential amendment to clause 4 and is for drafting consistency.

Part 3-Civil Judgments Enforcement Act 2004 amended

Clause 7. The Act amended in this Part

This clause refers to the *Civil Judgments Enforcement Act 2004*.

Clause 8. Section 30 amended

Section 26 of the *Civil Judgments Enforcement Act 2004* speaks of a means inquiry being “an inquiry conducted before a court”. That language used in the Act is intentional as it reflected a requirement of the Chief Magistrate that at all times the inquiry would be conducted by the judgment creditor.

Because of the nature of the orders that are able to be made at a means inquiry it is still preferable that the judgment creditor does attend. However, the Chief Magistrate has had the opportunity to consider the effect of the section after 6 months of operation and has concluded that in many instances the distance required to attend a means inquiry is causing hardship for judgment creditors. To overcome this problem, which only affects the Magistrates Court, the Chief Magistrate has proposed that the Court be given authority to conduct the means inquiry in the absence of the judgment creditor where the judgment creditor so requests the court prior to the inquiry.

The amendment in new section 30(7) in effect reinstates the procedure for examining judgment debtors at the hearing of a judgment summons issued under the repealed *Local Courts Act 1904*. Similar provisions for the court to examine the debtor in lieu of the judgment creditor are also found in section 41(4) of the *Local Court (Civil Claims) Act 1970* (NSW).

New section 30(8) will enable the Court to conduct the examination in circumstances where the judgment creditor requests the Court to conduct the examination.

Clause 9. Section 62 amended

This clause introduces the term “operate” with respect to a property (seizure and sale) order in lieu of the term “have effect”.

The change is of a technical nature to facilitate an amendment to clause 10 of the Bill.

Clause 10. Section 72 amended

Section 72 of the *Civil Judgments Enforcement Act 2004* sets out a scheme for the Sheriff to allocate the proceeds of a sale under a property (seizure and sale) order to creditors in the order of their priority.

When land of a judgment debtor is to be executed against, it is necessary to register the property (seizure and sale) order against the relevant title or deed. Registration brings with it the right to deal with this order and obtain a priority of transfer during an ensuing sale period which is set at six months by section 133 of the *Transfer of Land Act 1893*.

The amendment recognises the importance attached to a judgment creditor exercising rights of sale during the sale period and penalises those judgment creditors who did not exercise that power of sale during the sale period or obtain an extension.

Consequently a judgment creditor, whose property (seizure and sale) order has ceased to operate when property is sold is denied a right to participate in the proceeds of sale, even if they served the order on the Sheriff and even if they registered the order under the *Transfer of Land Act 1893*.

Clause 11 Section 90 amended

Subclauses (1) and (2) amend subsections (3) and (4) of section 90. These amendments clarify the issue that the powers to punish contempt under the *Magistrates Court Act 2004* (i.e. to impose a fine) are available to punish contempts for procedures under the *Civil Judgments Enforcement Act 2004*.

Subclause (3) amends section 90(6) by aligning it to section 30(6) of the *Civil Judgments Enforcement Act 2004*.

Section 30(6) provides that at a means inquiry in the Magistrates Court a person who is an employee of, or under the control or direction of, the judgment creditor or the judgment creditor's lawyer may appear on behalf of the judgment creditor.

Section 30(6) continued the practice that was previously found in section 29 of the *Local Courts Act 1904*, and section 76 of the *Legal Practitioners Act 1893* that allowed a judgment creditor to be represented by a solicitor's clerk or his own clerk at a "Judgment Summons" hearing.

This amendment enables similar representation at a default inquiry in the Magistrates Court.

Clause 12. Section 102 amended

Similar to clause 9, this clause introduces the term "operate" with respect to a property (seizure and sale) order in lieu of the term "have effect". The change is of a technical nature to facilitate an amendment to clause 10 of the Bill.

Clause 13. Section 103 amended

This clause amends section 103 of the *Civil Judgments Enforcement Act 2004* which deals with amending and cancelling orders. Section 103(4)(b) details when an amending order takes effect and uses the words “that person”.

The amendment clarifies the intent of the provision by referring instead to “the person to whom the original order was addressed”.

Clause 14. Section 108 amended

Section 108 deals with the appointment of assistant bailiffs. While section 108(1) requires the Sheriff’s prior written approval for a bailiff to appoint an assistant bailiff, there is no requirement for the bailiff to actually confirm to the Sheriff that an appointment has in fact been made. Furthermore there is no requirement for bailiffs to advise the Sheriff when appointments are cancelled. The Sheriff needs to be aware of such appointments to efficiently manage the civil judgment enforcement system. The Sheriff also has oversight over enforcement officers and has the power to suspend or terminate an assistant bailiff’s appointment under section 108(2)(b).

This amendment provides that bailiffs must inform the Sheriff when a person is actually appointed as an assistant bailiff, an appointment is suspended or terminated and of the death of an assistant bailiff.

Clause 15. Section 109 amended

This clause amends section 109 so as to place beyond doubt the fact that section 109(3) applies for the purposes of the Act “other than section 111”.

Part 4 Commercial Tenancy (Retail Shops) Agreements Act 1985 amended

These amendments are at the initiative of the President of the State Administrative Tribunal and are supported by the Department of Consumer and Employment Protection.

Clause 16. The Act amended in this Part

This clause refers to the *Commercial Tenancy (Retail Shops) Agreements Act 1985*.

Clause 17. Section 7 amended

The change is a consequence of the proposed amendment in clause 18 of the Bill.

Clause 18 Part III heading deleted

The heading to Part III is deleted due to as section 16, as amended by clause 19 now sits better in Part II along with all the other sections dealing with retail shop leases.

Clause 19. Section 16 amended

This amendment removes the requirement to achieve a solution acceptable to the parties.

The change in clause 19(2) is a consequence of the proposed amendment in clause 22 of the Bill where section 27 is amended.

Clause 19(3) repeals section 16(3), the provisions of which are re-stated as section 25.

Clause 20. New heading and sections 24 and 25 inserted

The proposed Part III outlines the powers and procedures exercised by SAT in dealing with a “matter” as is defined in the new section 24. The definition is purposely broad and aims to cover anything over which SAT has jurisdiction under the Act.

The clause also introduces new section 25, dealing with compulsory conferences and mediation processes, that restates the provisions of section 16(3) which is repealed by clause 19.

Clause 21 Section 26 amended

The change in clause 21(1) is a consequence of the proposed amendment in clause 20 of the Bill where the term “matter” is redefined.

Clause 21(2) which amends section 26 by inserting a new subsection (4) addresses a concern raised by the President of SAT that nothing in the *State Administrative Tribunal Act 2004* expressly gives SAT the power to grant equitable relief, especially in the commercial tenancy context.

The President believes it would be unfortunate if some of the issues that may arise in respect of a matter that otherwise falls squarely within the SAT’s primary jurisdiction have to be decided separately in separate Supreme Court or District Court proceedings. This would not be conducive to meeting the expectations of parties that SAT is a “one stop” decision-making service.

If equitable issues can only be determined in the Supreme Court or the District Court, then some proceedings in SAT may well need to be adjourned indefinitely, or made subject to a determination of one or other of those Courts. This will only cause delay in the early determination of a proceeding and add to the costs of the parties.

The proposed amendment addressing the President’s concerns is supported by the Chief Justice and is modeled on provisions found in section 33 of the former *Local Courts Act 1904* and in section 55 of the *District Court of Western Australia Act 1969*.

Clause 22. Section 27 amended

Section 27 currently provides a mechanism where a court as well as SAT could exercise jurisdiction to determine a question referred to either body.

Clause 22 repeals the existing provisions in subsections 27(1), (2) and (3) then inserts new provisions which are essentially the same but refer to the new expanded definition of “matter” found in clause 20 instead of the current concept of “a question”. Additionally the new subsections also introduce a requirement that a court or SAT can only transfer a matter to each other if it is in the interests of justice to do so.

Part 5 Courts Legislation Amendment and Repeal Act 2004 amended

Clause 23. The Act amended in this Part

This clause refers to the *Courts Legislation Amendment and Repeal Act 2004*.

Clause 24. Section 144 amended

This clause corrects an omission. Section 144(a) refers to pending proceedings to enforce a judgment (as dealt with in section 145) and pending process to enforce a judgment (as dealt with in section 146). However, only section 145 is mentioned in section 144 and this clause corrects the omission by inserting new subsections (a) and (aa) that refer to both sections 145 and 146.

Part 6 Criminal Appeals Act 2004 amended

Clause 25. The Act amended in this Part

This clause refers to the *Criminal Appeals Act 2004*.

Clause 26. Section 10 amended

This clause removes duplication. Section 10(5)(a) requires an appellant to serve a copy of the appeal notice on the Magistrates Court or other court of summary jurisdiction. Rule 66(2) of the Criminal Procedure Rules 2005 provides that after an appeal notice is lodged, a registrar must give the primary court a copy of the appeal notice. The notification procedure is therefore duplicated.

Clause 27. Section 28 amended

Section 28 provides that criminal appeals must be initiated by filing an application for leave *with draft grounds of appeal*. The requirement to provide draft grounds at the time of filing the application/appeal notice cuts across the new procedure that has been adopted in relation to all other appeals under the Court of Appeal Rules 2005, namely that the grounds of appeal are formulated at the time that the appellant’s case

is filed. Under the new process, the question of leave is referred to a single judge of appeal after the appellant's case is filed. It therefore does not assist the Court to have the draft grounds filed with the appeal notice and the requirement requires unnecessary and duplicative work from counsel.

Clause 27(1) simply deletes the words "that sets out the grounds of the appeal" and consequently gives the Court flexibility in dealing with requirements for draft grounds in relation to the leave application. It also enables the Court to make the requirements for all appeals the same and thereby simplify the rules.

Clause 27(2) deals with section 28(5)(a) which requires an appellant to serve a copy of the appeal notice on the District Court if it relates to an appeal from the District Court. Rule 30 of the Supreme Court (Court of Appeal) Rules 2005 provides that after an appeal notice is filed with the Court of Appeal, the Registrar must give the primary court a copy of the appeal notice. The notification procedure is therefore duplicated.

Clause 27(2) removes the section 28(5)(a) requirement, as Rule 30 requires the Registrar to provide the District Court with a copy of the appeal notice.

Clause 28. Section 45 amended

This clause removes the requirement for "orders".

Part 7 Criminal Injuries Compensation Act 2003 amended

Clause 29. The Act amended in this Part

This clause refers to the *Criminal Injuries Compensation Act 2003*.

Clause 30. Section 3 amended

This clause amends the definition of "health professional" by not only referring to the *Dental Act 1939*, *Medical Act 1894* and the *Psychologists Act 2005* but also referring to the "law of another place that is substantially similar to" those Acts. This expanded definition of "health professional" therefore makes provision for reports from those practitioners in other States who are registered in accordance with their own State's legislation, and in the case of overseas practitioners, a practitioner who the assessor considers has equivalent qualifications.

Clause 31. Section 48 amended

Section 48 deals with the payment of future treatment expenses.

Paragraphs (a), (b) and (c) of this clause set out a procedure to be followed where an application for future loss is made with reference to new subsection (2), which is introduced by paragraph (d).

New section 48(2) imposes a time limit on the period within which claims for payment may be made for treatment expenses for which provision was made in a compensation award.

Proposed section 48(2)(a) addresses concerns of the DCD in respect of young children who may have been sexually assaulted and are in need of counselling at a later time. Subsection (2)(a) provides that where the applicant was a child at the date of the making of the compensation award, the limitation is imposed after 10 years from the date the applicant turned 18 or 10 years from the date of commencement of these amendments.

New section 48(2)(b) deals with applications not involving child victims and provides that where an award has been made before commencement of the amendments, the limitation is imposed from 10 years from the date of commencement and , otherwise within 10 years after the date of the award.

Clause 32. Section 56 amended

This clause, which deals with both the nature of the appeal and the material to which the Judge may have regard in determining it, restates the provisions of section 41(3) of the repealed *Criminal Injuries Compensation Act 1985*. This clause makes it clear that appeals should be resolved afresh, which has always been the intention of the Act.

Clause 33. Section 62A inserted

Section 63 deals with the assessor's powers when conducting the hearing of an “application” for a compensation award or an application for a compensation reimbursement order, and enables the assessor to issue a notice for the production of records at the hearing of the application. This limitation to an application restricts an assessor as from time to time an assessor has to determine issues which arise under other sections, such as section 64 with respect to publicity, section 45 which deals with orders barring or limiting recovery and section 30(2) which provides for directions as to payment of the award. There is no power for an assessor to hold a hearing and to issue notices for the production of records to determine these issues.

This clause inserts a new section 62A which enable an assessor to hold a hearing into any issue arising for determination under the Act, and for issue of a notice or notices for that hearing.

New section 62A is additional to section 24 which provided that an assessor may conduct a hearing of a compensation application if he or she thinks fit.

Clause 34. Section 63 amended

These amendments to section 63 remove reference to the term “application” as well as correcting an incorrect reference to a subsection. The effect of the amendments, which are complementary to clause 33 of this Bill, is that assessors will have the power to issue notices for the production of records to determine issues at any hearing over which they are presiding.

Part 8 *Criminal Investigation Act 2006* amended

Clause 35. **The Act amended in this Part**

This clause refers to the *Criminal Investigation Act 2006*.

Clause 36. **Section 27 amended**

Section 27 deals with the power of a police officer to order a person who is in a public place, or in a vehicle used for public transport, to leave it. Subsection (6) requires that any order given under section 27 must be in writing in a form approved by the Commissioner of Police.

The proposed amendment merely changes the form of written order from one “approved by the Commissioner of Police” to one that is “on a prescribed form”.

Clause 37. **Section 78 amended**

This amendment clarifies the point that Part 9 Division 6 of the Act only applies to living people.

Clause 38. **Section 102 amended**

This amendment corrects an ambiguity by making it clear that a dentist cannot conduct either an intimate forensic procedure (which involves the private parts of a suspect) or an internal forensic procedure. The clause also clarifies that a doctor or nurse can take a blood sample for forensic purposes.

Clause 39. **Section 113 replaced**

The purpose of section 113 is to create an offence for the improper use of photographs obtained during forensic procedures. The State Solicitor has formed an opinion that the section as currently drafted would unduly restrict the use of such photographs.

To overcome this problem the section has been repealed and a provision inserted in its place which continues to proscribe the improper use of photographs but is not unduly restrictive. The new section 113 is modeled on section 73 of the *Criminal Investigation (Identifying People) Act 2002* which sets out the circumstances where identifying information can be disclosed.

The penalty provision of \$24,000 or imprisonment for 2 years found in the new section is double the existing provision but is compatible with the penalty provided in section 73 of the *Criminal Investigation (Identifying People) Act 2002*.

Part 9 ***Criminal Procedure Act 2004* amended**

Clause 40. The Act amended in this Part

This clause refers to the *Criminal Procedure Act 2004*.

Clause 41. Section 23 amended

Section 23(5)(a) deals with the contents of a prosecution notice that need not be verified on oath or affirmation before a Justice of the Peace or a prescribed court officer unless an arrest warrant for the accused for the alleged offence is to be sought.

The clause deletes section 23(5)(a), thus leaving section 30 to deal with all matters relating to the application for an arrest warrant.

Clause 42. Section 42 amended

Section 42 requires prosecutors to make a full disclosure of evidence.

Clause 42(1)(a) amends section 42(1)(a)(iv) by extending the definition of ‘evidentiary material’ to include “every other recorded statement, whether oral or written” by persons able to give relevant evidence in replacement of “every other statement”.

Clause 42(1)(b) and clause 42(2)(a) amend the section by replacing the term ‘exhibit’ with the term ‘object’.

Clause 42(2)(b) clarifies and extends the meaning of ‘recording’ by referring back to the definition of “evidentiary material”.

Clause 42(3) provides that section 42(3) is subject to new section 137A that is set out in clause 45.

Clause 43. Section 61 amended

The Act currently requires the prosecution to provide pre-trial disclosure in Magistrates Court matters at least 14 days before the trial and, in cases where the accused must also provide pre-trial disclosure, the accused is required to provide that disclosure at least 14 days before the trial.

If prosecution pre-trial disclosure is not provided until 14 days before the trial, it is difficult for an accused to have time to consider the prosecution material before they have to make their own disclosure. It is clearly intended that the accused see the prosecution material first, as disclosure by the accused only follows once prosecution disclosure has been made.

This clause requires prosecution disclosure to be at least 28 days rather than 14 days before the trial.

This section is also subject to new section 137A that is set out in clause 45.

Clause 44. Section 95 amended

Section 95 deals with the disclosure requirement upon a prosecutor in superior court trials. This clause simply makes the section subject to new section 137A that is set out in clause 45.

Clause 45 Section 137A inserted

This proposed new section addresses concerns raised by the Director of Public Prosecutions about accused being given audio-visual recordings of child witnesses. Section 106HB(3) of the *Evidence Act 1906* disentitles an accused to such recordings but does so in tandem with section 106HB(2) which entitles an accused to a transcript instead and an opportunity to view the recording.

Clause 46. Section 138 amended

Applications are brought by Western Australia Police under section 138 of the Act for non-disclosure orders. These applications seeking an order not to disclose certain evidentiary material are a necessary precaution to safeguard 'at-risk' people and highly secure criminal investigations.

Hearing of applications in open court may result in vulnerable witnesses being placed in jeopardy, a reduction in confidence in witness protection programs and reduced effectiveness of covert criminal investigations.

This clause is modelled in part on section 103 of the repealed *Justices Act 1902* and provides for non disclosure applications to be made in chambers and limits the persons in attendance to those permitted by the court.

Clause 47. Section 175A inserted

This clause inserts a new section that provides for additional copies of documents served under the Act to be provided in the event the original document is lost, damaged or destroyed.

This clause addresses a problem with respect to section 35 of the Act that arises when the accused is served with the material facts while still unrepresented and then loses the facts before they can be provided to the lawyer who subsequently represents them. The new section extends to all documents that need to be served, not just section 35 matters, and also provides for the charging of a fee to be prescribed by regulations.

Clause 48. Schedule 2 amended

The legislation does not clearly provide for what should/may happen if prosecution notices and court hearing notices sent by post are returned 'return to sender' before the first mention date. Clauses 3(11) and 4(5) of Schedule 2 presume service has been effected, on individuals and corporations, 'unless the contrary is proved'. However, it is not clear, whether production of a 'return to sender' notice by the prosecution

(where the accused does not appear) should be regarded in itself sufficient "contrary proof" for the court to conclude that the clause 3(11) or 4(5) presumption of service is rebutted.

This clause amends Schedule 2 clauses 3(11) and 4(5) provides that a document or other thing is not served if the prosecution receives a 'return to sender' notice.

Part 10 *Equal Opportunity Act 1984* amended

Clause 49. **The Act amended in this Part**

This clause refers to the *Equal Opportunity Act 1984*.

Clause 50. **Section 134 amended**

For policy reasons consistent with equal opportunity policy elsewhere in Australia, this clause repeals subsection (1a) of section 134, leaving section 105(2) of the *State Administrative Tribunal Act 2004* as the operative provision.

Clause 51. **Section 136 replaced**

The President of SAT, supported by the Commissioner for Equal Opportunity, has raised a concern that section 136 of the *Equal Opportunity Act 1984* requires SAT to publish in the Government Gazette full details of an exemption decision made under the enabling Act. As SAT publishes all such decisions on its public website in full, the need for SAT or any party to incur the expense of having to publish an exemption decision in the *Gazette* seems quite unnecessary.

This clause addresses the abovementioned concern and new section 136 makes it a statutory requirement for SAT to publish exemption decisions but no longer requires publication specifically in the *Gazette*.

Part 11 *Evidence Act 1906* amended

Clause 52. **The Act amended in this Part**

This clause refers to the *Evidence Act 1906*.

Clause 53. **Section 119 replaced**

This clause inserts a new section 119 which, like the section it replaces, deals with the payment of fees to prosecution witnesses, interpreters or a person who accompanies a child witness at criminal trials, appeal proceedings and inquests.

Currently payments are made to witnesses on the basis that the recipients of loss of income payments are responsible for declaring payments in their annual tax returns. Consequently no tax is withheld nor Payment Summaries issued.

In May 2006 the Australian Tax Office advised the Department of the Attorney General that payments to witnesses for loss of income are deemed to be taxable income under Section 12.35 of the *Income Tax Act*. This means the Department would be responsible for withholding tax on all payments for loss of income made to witnesses, and subsequently required to issue Payment Summaries. Payments made to employers of witnesses would not be subject to withholding tax, provided the employer records the company's valid Australian Business Number on the claim form.

To obviate the need to withhold tax and issue Payment Summaries it is proposed to eliminate direct loss of income payments to any witnesses who are not self-employed. This will result in all loss of income payments, generated by witnesses giving evidence, being made to employers or self-employed jurors or witnesses.

Payments to witnesses are authorised by the *Evidence Act 1906* which does not provide for payment directly to their employer, thus the need for these amendments.

Subsection (1) sets out definitions and introduces the concept of "eligible service" and "liable person". Liable person is the initiating prosecuting authority and is either a local government or statutory body or the State. Subsections (2)–(4) detail how eligible service extends to service as a prosecution witness, interpreter or a person who accompanies a child witness at either criminal proceeding (which is now defined to include criminal appeals) and inquests. Eligible service also extends to child and special witnesses called by the accused.

Subsection (5) is the section that places the legal onus on an employer to continue to pay earnings to a person who is employed under a contract of service and who has carried out eligible service. The provision also carries a penalty of a fine of \$2000 which has been aligned to the fine provided in section 83(4) of the *Industrial Relations Act 1979* for the breach of an award or industrial agreement by an employer.

Subsection (6) provides for an employer to be reimbursed by the liable person and subsections (7) and (8) cater for payment to persons performing eligible service who are not paid by employers.

Subsection (9) states that a claim for payment must be in accordance with the regulations and subsection (10) is the regulation making power.

Subsection (11) provides for the Attorney General to authorise the State to reimburse witnesses for the accused in criminal proceedings.

Subsection (12) provides that payments under the section are charged to the Consolidated Account.

Clause 54. Section 121 amended

Section 121 of the *Evidence Act 1906* provides that a Western Australian court may take evidence or receive a submission by video or audio link. Section 121(2)(b) of the

Evidence Act 1906 provides that an application shall not be granted unless it is in the interests of justice to do so.

This clause reverses the current wording so that an application should be granted unless it is not in the interests of justice to do so. This still leaves a discretion with the Court to refuse an application but means that applications should be granted unless there is good reason not to do so. It is the Chief Magistrate's view that it is now widely accepted that there is no reason for a witness to appear in person in order for their evidence to be properly assessed.

Part 12 *Guardianship and Administration Act 1990* amended

Clause 55. The Act amended in this Part

This clause refers to the *Guardianship and Administration Act 1990*.

Clause 56. Section 5 repealed and consequential amendment to heading of Part 3 Division 1

Clause 56(1) provides for the repeal of section 5 of the *Guardianship and Administration Act 1990* thus allowing the provisions of section 11 of the *State Administrative Tribunal Act 2004* to be the operative provision. Under section 11 of the *State Administrative Tribunal Act 2004*, the President decides how many and which members are to constitute SAT. The general rule (section 11(2)) is that not more than 3 members can constitute SAT but exceptionally there can be 4 or 5 (section 11(3)). Section 107 provides for different kinds of members. Section 11 does not specify which kinds of members must sit.

This amendment does not affect section 56A of the *Guardianship and Administration Act 1990* which requires a "Full Tribunal" (i.e. a judicial member and 2 other members) to deal with sterilisation matters. A Full Tribunal is also required under section 17A (Review).

Clause 56(2) is a consequential amendment to the heading of the Division removing reference to the term "Constitution".

Clause 57 Section 43 amended and consequential amendment to s.4

A power to extend a wardship of a person beyond the age of 18 years existed under the *Community Services Act 1972* which has been repealed by the *Children and Community Services Act 2004*. Part 4 of the *Children and Community Services Act 2004* provides for four types of protection order (which has replaced a wardship), all of which cease to operate when a child turns 18.

The President of the State Administrative Tribunal (SAT) has observed that the *Children and Community Services Act 2004* is required to work in a complementary way with the *Guardianship and Administration Act 1990* which does not allow for the appointment of a guardian or administrator of a person unless they have attained the age of 18 years.

There is a concern that there may be a potential gap between a protection order expiring and a SAT appointment of a guardian or administrator for a person who was previously the subject of protection. If SAT cannot list a matter before a ward turns 18 years of age and cannot guarantee the hearing of an application immediately on or after the person attains the age of 18 (as the case may be), then that person who should either be the subject of protection or a guardianship order may not be protected during the “gap period”.

Proposed section 43(2a) overcomes the abovementioned problem by allowing an application to be made to SAT in the year before a child turns 18, as well as setting out the criteria for SAT to make a determination that the person will be in need of a guardian when that person attains 18 years. Proposed section 43(2a) also provides for SAT to appoint a plenary or limited guardian and alternate or joint guardians if SAT makes a determination that the person will be in need of a guardian when that person attains 18 years.

Proposed section 43(2b) requires SAT to declare which criteria was met in reaching a determination that the person will be in need of a guardian when that person attains 18 years.

Proposed section 43(2c) provides that guardianship appointments made under this section commence when the person attains 18 years.

Clauses 57(2) and (3) are consequential amendments brought about by the above changes.

Clause 58. Section 56A amended

This amendment is consequential to the repeal of section 5 by way of clause 54 and is necessary to ensure that the intent of section 56A is not compromised and that the functions of the State Administrative Tribunal relating to the sterilization of persons under guardianship may be performed only by a Full Tribunal.

Clause 59. Section 86 amended

Currently section 86 of the Act provides that either the Public Advocate, a represented person, a guardian or an administrator (or a person to whom leave has been granted under section 87) may apply as of right to SAT to review a guardianship order or an administration order. The Public Trustee is not included as of right and has to apply for leave under section 87.

This clause amends section 86(1) by including the Public Trustee.

The Public Trustee is regularly involved in matters of administration or reviewing the accounts of private administrators and there are circumstances where the Public Trustee has to apply for the review of both a guardianship order or an administration order. It is also not uncommon for the Public Trustee to be the first agency to note a particular problem that should be brought to the attention of SAT. The need for leave

is not appropriate in the case of the Public Trustee and only adds delay and expense to the process of obtaining review in an appropriate case.

Part 13 *Industrial Relations Act 1979* amended

The amendments to this Part have been suggested by the Registrar of the Industrial Court, the Department of Consumer and Employment Protection and Parliamentary Counsel.

Clause 60. The Act amended in this Part

This clause refers to the *Industrial Relations Act 1979*.

Clause 61. Section 81CA amended

Section 81CA differentiates between the “general jurisdiction” and the “prosecution jurisdiction” of industrial magistrate’s courts.

The amendments contained in this clause clarify that the *Criminal Procedure Act 2004* applies to any exercise of prosecution jurisdiction and that section 185 of the *Criminal Procedure Act 2004* will apply to orders to pay money other than fines, which are covered by the *Fines, Penalties and Infringement Notices Enforcement Act 1994*. The amendment in clause 61(2) needs to be read in conjunction with that to section 83D by way of clause 63.

As to the general jurisdiction of an industrial magistrates court refer to clause 62 and proposed section 81CB.

Section 81CA(7) is repealed as it is redundant.

Clause 62. Section 81CB inserted

An unintended consequence of the drafting of section 81CA(4) in the *Courts Legislation Amendment and Repeal Act 2004*, is that a judgment of the industrial magistrate’s court is required to be registered in the Supreme Court. Prior to May 2005, orders of the industrial magistrate’s court were enforced in a Local Court of Western Australia, now the Magistrate’s Court. It is proposed section 81CA(4) be repealed by clause 61(1) and the enforcement provisions be contained in the proposed new section 81CB which deals with judgments in the general jurisdiction of the court. This amended provision deliberately does not mention judgments given in the exercise of prosecution jurisdiction which is proposed to be covered in clause 61.

This clause recognises it is preferable if orders of the industrial magistrate’s court are enforced by a court of competent jurisdiction as opposed to the Supreme Court. As most of the orders made by the industrial magistrate’s court are less than \$50,000 they will be registered in the Magistrates Court, rather than the Supreme Court as currently required. The Magistrates Court is familiar with “in person” applicants, whom comprise the greatest proportion of parties in the industrial magistrates court. Further, the Magistrates Court is seen to be the least daunting jurisdiction for lay persons.

Section 81CB therefore provides that when recovering a monetary judgment; judgments, orders, directions and decisions of the industrial magistrate's court can be enforced by lodging a certified copy of the order and an accompanying affidavit stating the extent of compliance with a court of competent jurisdiction (Magistrates, District or Supreme depending on the amount of the order) and that when lodged the order is to be taken to be a judgment of the court and may be enforced accordingly. A non-monetary judgment is to be registered with the Magistrates Court.

Clause 63. Section 83D amended

This clause amends section 83D by removing the reference to the *Criminal Procedure Act 2004* as it is unnecessary given section 81CA(5). The clause also removes potential confusion when it comes to exercising prosecution jurisdiction to deal with a *Children and Community Services Act 2004* offence.

Clause 64. Section 113 amended

Section 113 includes the power of an industrial magistrates court to make regulations about enforcement which are no longer necessary as the amendments in the previous clause apply the uniform procedures under the *Civil Judgments Enforcement Act 2004* to the enforcement of judgments of an industrial magistrates court

Uniform regulations are contained in the Civil Judgments Enforcement Regulations 2005.

Part 14 Juries Act 1957 amended

Clause 65. The Act amended in this Part

This clause refers to the *Juries Act 1957*.

Clause 66. Section 44 replaced

Section 44 deals with the payment for juries in civil trials and should be considered in the light of the Government's policy of full cost recovery.

The intent of section 44 is to get in advance each day the money that will be needed to pay jurors their allowances which are borne by the party seeking the civil trial. Currently this money is the prescribed sum as determined by Regulation 9 of the Juries (Allowances to Jurors) Regulations. The prescribed sum appears to have been set in 1975 and seems to have been based on the average daily earnings at the time (\$180 per week). The amount of the prescribed sum runs the risk of not retaining parity with wages in the community unless the regulations are amended regularly. Furthermore, being a prescribed sum the amount is set and therefore does not allow flexibility to cater for varying levels of income in the community.

This clause replaces section 44 with a new section that provides for prescribed amounts for actually summoning the jury and for a Sheriff's Officer to attend on the

jury, but includes a requirement that the party applying for or requiring a jury in a civil trial shall deposit with the summoning officer an amount determined by the summoning officer having regard to the actual daily fees and expenses of the jurors. The new section authorises the summoning officer to demand these deposits on a daily basis.

New sections 44(2) and 44(4) replicate the existing provisions of section 44(3) which provides for trial by judge alone if the deposits and prescribed amounts required by the summoning officer are not paid.

Clause 67 Section 58B inserted

Currently payments are made to jurors on the basis that the recipients of loss of income payments are responsible for declaring payments in their annual tax returns. Consequently no tax is withheld nor Payment Summaries issued.

In May 2006 the Australian Tax Office advised the Department of the Attorney General that payments to jurors for loss of income are deemed to be taxable income under Section 12.35 of the *Income Tax Act*. This means the Department would be responsible for withholding tax on all payments for loss of income made to jurors and subsequently required to issue Payment Summaries. Payments made to employers of jurors would not be subject to withholding tax, provided the employer records the company's valid Australian Business Number on the claim form.

To obviate the need to withhold tax and issue Payment Summaries, the Attorney General has agreed with the proposal to eliminate direct loss of income payments to any jurors who are not self-employed. This will result in all loss of income payments, generated by jurors, being made to employers or self-employed jurors.

This clause inserts a new section 58B implementing this proposal.

Subsection (1) introduces the concept of "jury service" and subsection (2) sets out the entitlement for jurors to be paid allowances and expenses by the State.

Subsection (3) is the section that places the legal onus on an employer to continue to pay earnings to a person who is employed under a contract of service and who has carried out jury service. The provision also carries a penalty of a fine of \$2000 which has been aligned to the fine provided in section 83(4) of the *Industrial Relations Act 1979* for the breach of an award or industrial, agreement by an employer.

Subsection (5) provides for an employer to be reimbursed by the State and subsection (6) caters for payment to persons performing jury service who are not paid by employers.

Subsection (7) states that a claim for payment must be in accordance with the regulations.

Subsection (8) provides that payments under the section in respect of a juror for a criminal trial are charged to the Consolidated Account.

Clause 68 Section 62 amended

This amendment to the regulation making power is a consequence of the amendment in the previous clause.

Clause 69 Second Schedule amended

This amendment to the schedule deletes reference to a Member of the Children’s Court as a judicial officer ineligible to serve as a juror. The office of Member of the Children’s Court was abolished by the *Courts Legislation Amendment and Repeal Act 2004*.

Part 15 Magistrates Court Act 2004 amended

Clause 70. The Act amended in this Part

This clause refers to the *Magistrates Court Act 2004*.

Clause 71. Section 33 amended

Sections 33(5) and (6) are modelled on provisions previously contained in the *Justices Act 1902*. The prime purpose of sections 33(5) and (6) was to extend access to records, in criminal proceedings, to a “party interested therein” which is a wider concept than “a party to a case”, which section 33 refers to in subsections (3) and (4).

Subclause (1) removes inconsistencies by repealing sections 33(5) and 33(6).

Subclause (2) repeals section 33(8) which provides for rules of court to prescribe access and also repeals section 33(9) which allows for electronic documents. Section 33(9) is re-enacted as new section 33(11) – see clause 71(3).

Access to records for “parties to a case” continues to be covered by sections 33(3) and (4). Proposed new section 33(8) revisits the area vacated by repealed sections 33(5) and (6) and provides for persons, other than “parties to a case”, who can satisfy the Court they have a good reason to access the Court’s records. This requirement for leave for non-parties brings the Magistrates Court into line with the procedures in the Supreme and District Courts.

Proposed new section 33(9) re-enacts and expands upon the repealed section 33(8) and deals with the power of the court to make rules that also create entitlements to access records.

Subclause (3) re-enacts repealed section 33(9) as new section 33(12).

Clause 72 Schedule 1 amended

Schedule 1 contains provisions with respect to the appointment, conditions of service, resignation, suspension and removal from office of magistrates.

The amendments correct an oversight by ensuring that acting magistrates enjoy the same protection and immunity as permanent magistrates.

Part 16 ***Magistrates Court (Civil Proceedings) Act 2004* amended**

Clause 73. The Act amended in this Part

This clause refers to the *Magistrates Court (Civil Proceedings) Act 2004*.

Clause 74. Section 3 amended

The inclusion of “the State of Western Australia” in the definition of “public authority” corrects a deficiency noted by Parliamentary Counsel.

Clause 75. Section 7 amended

This amendment confirms the original intention of the legislation in relation to section 7 (consumer/trader claims) by confining the definition of a consumer/trader claim to a claim between a consumer on one part and a trader on the other part.

Clause 76. Section 14 amended

The clause ensures that the Court has the discretion to direct that the Magistrates Court (Civil Proceedings) Rules 2005 do not apply and to order that the procedure for the purposes of a particular case is to be that decided by the Court.

Clause 77. Section 30 amended

The insertion of the word “or” at the end of subsection (4)(a) corrects an omission.

Clause 78 Section 31 amended

The power to award costs is dealt with in section 25 of the Act and there is no difficulty with a claim in excess of \$7,500 as party/party costs are contemplated under section 25. The problem arises with claims less than \$7,500 where section 31 only allows the Court to award a party’s allowable costs (“allowable costs” being defined to include fees and disbursements, but not party/party costs). However section 31(3) allows the Court to make an order under section 25(1) as to the payment of the party’s other costs (i.e. party/party costs) by another party if it is satisfied that because of the existence of exceptional circumstances an injustice would be done to the successful party if that party’s other costs were not ordered to be paid.

“Exceptional circumstances” are not defined in the Act and it is for the Court to interpret and determine in each individual case what constitutes exceptional circumstances. This has created difficulties for lawyers to inform their clients as to likely costs they will have to bear and for litigants to make informed decisions on the future conduct of pending cases.

This clause which amends section 31 is designed to allow costs in circumstances where costs would have been payable if the matter had been concluded prior to 1 May 2005 (when *Magistrates Court (Civil Proceedings) Act 2004* came into effect) but are not now payable due to the increase in the jurisdiction of a minor case.

Clause 79. Section 44 amended

A corporation may be represented by an “officer” of the corporation under both the general and minor cases procedure of the *Magistrates Court (Civil Proceedings) Act 2004*.

Section 44(2)(b) provides that if a party is a corporation, it may be represented by “one of its officers whom it has authorised to do so”.

This amendment to section 44 enables a corporation to also be represented by one of its employees who does not fall under the category of “officer”. The employee has to be authorised in writing by one of the corporation’s officers to appear before the court and represent the corporation.

Part 17 Oaths, Affidavits and Statutory Declarations Act 2005 amended

Clause 80. The Act amended in this Part

This clause refers to the *Oaths, Affidavits and Statutory Declarations Act 2005*.

Clause 81 Section 6 amended

Section 6(1)(a) of the Act provides that an oath may be administered or affirmation taken in the case of a witness before a court, by the judicial officer who is presiding in the court, by a person on the staff of the court or by the judicial officer authorised to do so.

Section 121 of the *Evidence Act 1906* provides that a Western Australia Court may direct that evidence be taken by video audio link from a person outside that courtroom, whether they are in or outside Western Australia.

For example, if the Supreme Court were sitting in Perth and evidence was being taken by video link from a witness present in Kununurra, there would be no one at Kununurra who came under the classes prescribed in section 6(1)(a). The Registrar of the Kununurra Court is appointed as both a Registrar of the Magistrates Court and a Deputy Registrar of the District Court and while on the staff of both those courts, the Registrar is not an officer of, or on the staff of, the Supreme Court.

Following consultation with the Chief Justice, this clause has been drafted so as to expand those persons who can be authorised to administer or take an oath or affirmation. For instance, it will allow a Supreme Court judge to authorise a Magistrates Court officer or some person in another jurisdiction.

This clause also allows persons acting judicially to authorise another to take an oath. Parliamentary Counsel has suggested that a judicial officer being asked to issue a warrant is a person acting judicially as opposed to exercising a court's jurisdiction and hence could not use paragraph (a) of section 6(1). In such cases, paragraph (b) will apply and the person will be able to authorise someone. This could be useful when remote communication is being used.

Similar provisions can be found in section 102J of the *Family Law Act 1975* (Cth), section 50EE of the *Crimes Act 1914* (Cth), section 5D(1) of the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) and section 42Y of the *Evidence Act 1958* (Vic).

Clause 82 Section 7 amended

This clause deals with the courts' ability to conduct proceedings by video and audio links.

Similar provisions can be found in section 102J of the *Family Law Act 1975* (Cth), section 50EE of the *Crimes Act 1914* (Cth), section 5D(1) of the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) and section 42Y of the *Evidence Act 1958* (Vic).

Part 18 Planning and Development Act 2005 amended

The amendments in this Part are at the initiative of the President of the State Administrative Tribunal and are supported by the Department of Planning and Infrastructure.

Clause 83. The Act amended in this Part

This clause refers to the *Planning and Development Act 2005*.

Clause 84. Section 237 amended

Section 237 contains definitions of terms used in the *Planning and Development Act 2005*. This clause inserts definitions of "judicial member" and "Tribunal member" by reference to the *State Administrative Tribunal Act 2004*. The amendments are a consequence of the insertion of new section 237A in clause 85 and amendments to section 244 in clause 87.

Clause 85. Section 237A inserted

New section 237A clarifies the relationship between the *Planning and Development Act 2005* and the *State Administrative Tribunal Act 2004* and deals with similar issues to those currently set out in sections 238(3) and (4) of the *Planning and Development Act 2005*.

The proposed amendment will provide SAT with greater flexibility in dealing with applications made under planning legislation. Further it will better enable SAT to meet its objectives (outlined in section 9 of the *State Administrative Tribunal Act*

2004) of fairness, dealing with matters quickly, minimising costs to the parties and utilising the appropriate experience of members of SAT.

Clause 86. Section 238 amended

Sections 238(3) and (4) are repealed as a consequence of new section 237A.

Clause 87 Section 239 amended

This amendment is a consequence of the amendments in clauses 85 and 86.

Clause 88. Section 244 amended

Section 244 provides for reviews of decisions of SAT by the President when the original decision was made by the Tribunal constituted without a legally qualified member.

Subclauses (1) and (2) substitute the term “a judicial member” for the term “the President”.

Section 244(4) provides that the President is not to review a direction, determination or order upon a matter involving a question of law if the President has given an opinion on that question of law.

Subclause (3) repeals the above subsection which is considered superfluous as the review power in section 244(1) is exercisable only if SAT was constituted without a “legally qualified member” and cannot be exercised if the President constituted SAT.

Part 19 Restraining Orders Act 1997 amended

Clause 89. The Act amended in this Part

This clause refers to the *Restraining Orders Act 1997*.

Clause 90 Section 3 amended

This clause is complementary to clause 98 which amends section 49.

The current provisions in section 49 interact with the definition of “final order” in section 3 and create a situation where presently under the definition of “final order” any variation of an interim order creates a final order. This was not the intention of the Act and this clause clarifies the relationship between a final order and an interim order when read with new section 49.

Clause 91. Section 6 amended

Sections 6(1)(e) and 6(2)(c) relate to ‘causing a person or a third person to be pursued’. This clause ensures that the section includes the circumstances of a person personally pursuing a person.

Clause 92. Section 10 amended

This clause addresses the concern of Parliamentary Counsel that section 10(4)(a) needs clarifying and the proposed amendment replaces the concept of “giving” with “personal service”.

Clause 93. Section 27 amended

Section 27(4) provides that an ex parte hearing shall be conducted in closed court save for the entitlement of applicants to have a person or more than one person to provide support.

This clause introduces an amendment to section 27(4) which provides for a hearing fixed under section 26(4) to be in closed court, allows the person seeking to be protected to have support persons but also allows the court a discretion to permit the presence of other persons. This would allow, for example, a Duty Lawyer sitting in the back of the court to provide assistance if needed or staff members from Victim Support Services or other support services for family and domestic violence victims.

Similar provisions are found in section 83 of the *Domestic Violence Act 1995* (NZ); section 81 of the *Domestic Violence Protection Act 1989* (Qld) and section 31 of the *Family Violence Act 2004* (Tas).

Clause 94. Section 30E amended

Subclause (1) contains an amendment to allow for more than the one person to be included in the one order. This will allow a female adult and her children who need protection to be included in one order rather than separate orders.

Subclauses (2) and (3) make it clear that the specific police officer who made the police order is not required himself/herself to serve the order (and provide an explanation of the order) on both the person bound by the order and the person for whose benefit the order is made.

Clause 95 Section 42 amended

Section 42(4) is amended to allow for the admission of the record of evidence without the need for the person to attend to be cross-examined in the Court’s discretion or in some defined circumstances. Circumstances may arise where it is desirable for the record of evidence to be admitted without the person being available to be cross-examined because, for example, the witness has died, is unfit to give evidence or no party wishes to cross-examine the witness.

Clause 96 Section 43 amended

This clause provides specific power to the Court to make a misconduct restraining order on an application for a violence restraining order and the converse.

Clause 97 Section 48 amended

This clause amends section 48(3) to allow for the admission of the record of evidence without the need for the person to attend to be cross-examined in the Court's discretion or in some defined circumstances.

Clause 98. Section 49 amended

The amendments contained in this clause ensure that where an interim order has been varied then any objection lodged remains extant.

Clause 99. Section 53E amended

Section 53E deals with the admissibility of evidence of representations made by children.

This clause provides an amendment to ensure the admissibility of a child's representation by a witness who heard the representation notwithstanding that the child had not made the representation directly to the witness called to give evidence of that representation.

Clause 100. Section 59 replaced

This clause repeals sub section (b) and instead provides that the court is to notify the applicant that service of the order has been effected.

Clause 101. Section 62B amended

This section deals with the power to enter and search premises if family and domestic violence is suspected.

This clause proposes an amendment to provide an exception in cases where the urgency of the situation demands immediate entry but at the time the officer does not have facilities to communicate with a senior officer. A requirement to report to a "senior officer" as soon as possible subsequent to the exercise of the section 62B power has been included as a safeguard.

Clause 102. Section 62E amended

This clause amends section 62E to provide for the use of reasonable force when seizing a firearm.

Clause 103. Section 62F amended

Section 62F deals with the power to detain a respondent during a telephone hearing or while a police order is being made. The Western Australia Police have proposed that consideration should be given to a new provision allowing Police to detain a person for the purpose of serving a violence restraining order (VRO) and/or have telephone access to magistrate/court officer after hours to provide instant oral service. In many

instances Police have located respondents for unserved VROs but are unable to effect service due to the lack of this power.

This clause amends the *Restraining Orders Act 1997* to include a service provision to the effect that where a Police Officer reasonably believes that a restraining order remains unserved that the respondent can be held for two hours for service to be effected.

Clause 104 Section 63 amended

This new subsection (3b) allows for the making of a concurrent order but provides that it cannot become operative until the earlier order expires. It is the result of a case where a District Court judge was of the view that section 63 did not expressly permit the making of a second concurrent order, and that to do so could potentially render the offender open to punishment under two orders for a single act.

Clause 105 Section 70 amended

This clause corrects an omission identified by Parliamentary Counsel and substitutes the term “registrar” for “clerk” which is a consequence of new titles adopted in the *Magistrates Court Act 2004*.

Part 20 Sentencing Act 1995 amended

Clause 106. The Act amended in this Part

This clause refers to the *Sentencing Act 1995*.

Clause 107. Section 37 amended

Section 37 of the *Sentencing Act 1995* is designed to allow a Court to correct sentences which have not been made in accordance with the law. It provides a convenient method to correct errors without obliging one or other of the parties to lodge an appeal. Such errors normally occur as a result of a mistake on the part of the judicial officer or because the prosecution do not have correct details in relation to an offender’s prior record at the time of sentence.

This clause validates the procedure adopted by the Magistrates Court of backdating a sentence or disqualification after an order has been recalled.

Part 21 Sentencing Legislation Amendment and Repeal Act 2004 amended

Clause 108. The Act amended in this Part

This clause refers to the *Sentencing Legislation Amendment and Repeal Act 2003*.

Clause 109. Schedule 1 amended

This amendment allows the Minister for Corrective Services to discharge a person sentenced before the legislative changes in 2003 (that abolished one third remission) to a parole term if, on the recommendation of the Prisoners Review Board, the person has effectively served at least two thirds of the sentence.

Part 22 State Administrative Act 2004 amended

Clause 110 The Act amended in this Part

This clause refers to the *State Administrative Act 2004*.

Clause 111. Section 11 amended

This clause details those occasions under section 11(5) where section 11(4) does not apply.

Section 11 (4) makes it mandatory for SAT to be comprised of three persons (four in relation to matters arising under the *Medical Act 1894*) when the SAT is dealing with a decision of a vocational regulatory body or by another person under a vocational Act. This means that even in cases in which a stay order is sought under section 25 or an interim injunction is sought under section 90, SAT must be comprised of three (or four) members. In such cases the question often involves (though may not be limited to) a question of law. Having to convene a full tribunal to deal with these urgent matters pending a final hearing and determination can produce delay in the determination of the preliminary matter.

Clause 112. Section 42 amended

Section 42 deals with commencing proceedings.

The President of SAT has pointed out that the Act is deficient in that whilst SAT has the power under section 38 of the Act to join a person as a party to a proceeding and has the power under section 51 to consolidate various proceedings, the Act does not entertain joint applications.

This clause addresses that deficiency and by adding new section 42(4) provides for joint applications in circumstances where the issues to be decided by SAT are the same or related in respect of the joint applicants.

Clause 113. Section 51A inserted

This clause is complementary to the proposed section 42(4) in the preceding clause and provides SAT with the power to split proceedings or any aspect of proceedings.

Clause 114. Section 66 amended

This clause amends section 66 so that the SAT does not have to authorise every summons requiring the production of documents and to leave any questions of alleged abuse of process to parties or persons to raise on separate application to the Tribunal.

Clause 115. Section 171 amended

Section 171 provides that the regulations or rules may require the payment of fees relating to proceedings and hearings.

New sections 171(3) and (4) not only allow the executive officer of SAT to decide if a fee is payable or applicable but also allow for any person affected by the decision of the executive officer under this regulation to apply to have the decision of the executive officer reviewed by the President.

The provision is modelled on section 171(3) and (4) of the *Supreme Court Act 1935*.

Part 23 Supreme Court Act 1935 amended

Clause 116. The Act amended in this Part

This clause refers to the *Supreme Court Act 1935*.

Clause 117. Section 9A amended

This clause provides for the President and judges of the Court of Appeal to continue to hear and determine matters that were pending before them at the time of their resignation providing they still retain their commission as a judge.

Clause 118. Section 60 amended

This clause amends section 60(1)(e) to conform with section 60(1)(f) relating to interlocutory orders so that leave may be obtained either from the Judge or Master who made the order, or from the Court of Appeal itself.

Clause 119. Section 155 amended

Clause 118 amends section 155 to specifically authorise the exercise of powers by the acting registrar.

Clause 120 Section 156 amended

This clause remedies a deficiency in the Act by inserting section 156(3) to enable the Sheriff to delegate to bailiffs a power or a duty the Sheriff has under section 156 that relates to the pre judgment service of process and execution of warrants.

By inserting subsection (4), the clause also provides that legislative provisions applying to delegations to bailiffs under the *Civil Judgments Enforcement Act 2004* apply with any necessary changes to duties delegated under section 156 of the *Supreme Court Act 1935*.

Part 24 *Transfer of Land Act 1893* amended

Clause 121. The Act amended in this Part

This clause refers to the *Transfer of Land Act 1893*.

Clause 122. Section 133 amended

Section 133 deals with the registration of a property (seizure and sale) order by the Sheriff against a debtor's interest in land.

Subclauses (1), (2) and (3) are amended to provide for the all applications under the section to utilise an "approved form" as defined in section 4(1). The majority of forms used under the Act are approved by the Registrar of Titles. This creates the ability to change as circumstances require and with more flexibility than applies when regulations need to be made.

Subclause (4) addresses the concern raised with respect to subsection (8) by including a subsequent property (seizure and sale) order as an excepted instrument for the purpose of the subsection.

Subclause (5) corrects an omission, identified by Parliamentary Counsel, in section 133(11) by inserting the word "and".

subclause (6) provides for the repeal of section 133(12) and its replacement with a similar section that more clearly sets out the Registrar of Titles' obligations.

Subclause 7 provides an amendment to subsection (13) by specifically referring in the subsection to the "sale period" and requiring the court to consider whether there is a good reason why the sale under the property (seizure and Sale) order will not occur during the sale period.

Subclause 8 repeals subsection (14) and reinserts a similar but more extensive subsection which is complementary to subsection (13).

Subclause (9) is a minor amendment to the tense of the word "expire" and is a consequence of subclauses (7) and (8).

Subclause 10 repeals subsection (17) and reinserts a similar but more extensive subsection which clarifies the procedure to extend the sale period of land that has been seized.

Clause 123. Section 138 amended

This clause amends 138 to provide that a notice of caveat should be sent by the Registrar of Titles to the person against whose application to be registered, the caveat has been lodged or the proprietor of the saleable interest and the judgment creditor.

Clause 124. Section 139 amended

Section 139 provides that no entry is to be made in the Register affecting land in respect to which a caveat continues in force.

This clause sets out the circumstances when an instrument or dealing may be lodged notwithstanding a caveat remaining in force. Those circumstances include a transfer of the saleable interest pursuant to a sale of it by the Sheriff under a property (seizure and sale) order where the matter subject of the caveat does not prevail, under section 133(7), against the Sheriff's dealing.

Part 25 Victims of Crime Act 1994 amended

Clause 125. The Act amended in this Part

This clause refers to the *Victims of Crime Act 1994*.

Clause 126. Section 6 amended

Section 6(1) of the Act requires a review of the operation and effectiveness of the Act to be carried out annually and for a report to be prepared for tabling before each House of Parliament.

The Act was comprehensively reviewed during 2004/2005 resulting in a report, "Review of the *Victims of Crime Act 1994* (WA) – a Report of the Act's Operation and Effectiveness Pursuant to Section 6(1) of the *Victims of Crime Act 1994* (WA)", that was tabled in the Legislative Assembly on 4 May 2006 and in the Legislative Council on 9 May 2006.

This clause implements recommendation 6 of that Report which suggests that section 6 of the Act be amended to alter the frequency of the review from annually to every five years, with the first of the five year reviews being commenced as soon as practicable after 1 January 2010.

The amendment recognises that an annual review effectively placed the administering body (the Victim Support Service) in a continuous review mode that hampered the consolidation of past achievements.

Part 26 Various Acts amended

Clause 127. Community Protection (Offender Reporting) Act 2004 amended

Subclause 1 refers to the *Community Protection (Offender Reporting) Act 2004*.

Subclauses 2 and 3 are necessary amendments that reflect the coming into operation of the Court of Appeal as a division of the Supreme Court.

Clause 128. *Corruption and Crime Commission Act 2003* amended

Subclause 1 refers to the *Corruption and Crime Commission Act 2003* (CCC Act).

Clause 127(2) will correct a drafting error in the *Criminal Investigation (Consequential Provisions) Act 2006* section 11 which amends the CCC Act section 184 and inserts a new section 184(3). The new section 184(3) mentions all of the sections in the *Criminal Investigation Act 2006* which require a “senior officer” to be prescribed but omits to mention section 140.

Clause 129. *Criminal Code* amended

Subclause 1 refers to *The Criminal Code*.

The amendment in subclause 2 removes reference to offences relating to “marriage” as this is now the province of Commonwealth legislation. The amendment in subclause 3 corrects a reference to “defendant” which is a term no longer used in the *Criminal Procedure Act 2004*.

Clause 130. *Pawnbrokers and Second-hand Dealers Act 1994* amended

Subclause 1 refers to the *Pawnbrokers and Second-hand Dealers Act 1994*.

This clause corrects a drafting omission in the *Criminal Investigation (Consequential Provisions) Act 2006*. Section 4 of the *Criminal Investigation (Consequential Provisions) Act 2006* will replace section 6 of the *Bail Act 1982* but omits to consequentially amend section 83(3) of the *Pawnbrokers and Second-hand Dealers Act 1994* which refers to section 6 of the *Bail Act 1982*.

Section 83 deals with the power of pawnbrokers and second-hand dealers to arrest a person where they suspect the person has committed an offence in relation to the goods.

Subclause (2) repeals section 83(3) and replaces it with a new section 83(3) that sets out a different approach to arrests made under the section in that it proposes to treat them in the same way as citizen’s arrests under section 25 of the *Criminal Investigation Act 2006*. Given private prosecutions are now no longer possible, this approach is more appropriate.

Clause 131. *Road Traffic Act 1974* amended

Subclause 1 refers to the *Road Traffic Act 1974*.

Subclause 2 corrects an incorrect cross reference noted by Parliamentary Counsel.

Clause 132. *Young Offenders Act 1994* amended

Subclause 1 refers to the *Young Offenders Act 1994*.

Subclauses 2 and 3 are necessary consequential amendments to clause 4 of this Bill which amends section 21 of the *Children’s Court of Western Australia Act 1988*.