

# ACTS AMENDMENT (DOMESTIC VIOLENCE) BILL 2004

## EXPLANATORY MEMORANDUM

### Overview of Bill

The Acts Amendment (Domestic Violence) Bill 2004 amends the *Restraining Orders Act 1997* (WA), *The Criminal Code* (WA), and the *Bail Act 1892* (WA) to afford greater protection to victims of family and domestic violence.

### CLAUSE NOTES

#### Part 1 – Preliminary

##### Clause 1 – Short title

Citation of the Act.

##### Clause 2 – Commencement

The proposed Act will come into operation on a day fixed by proclamation. Different days may be fixed for different provisions.

#### Part 2 – *Restraining Orders Act 1997* amended

##### Clause 3 – The Act amended

This clause provides that the amendments in Part 2 are to the *Restraining Orders Act 1997*.

##### Clause 4 – Long Title amended

This clause amends the long title of the *Restraining Orders Act 1997* to reflect the overall changes to that Act.

##### Clause 5 – Section 3 amended

This clause inserts several new definitions into the Interpretation section of the *Restraining Orders Act 1997*. The following definitions are of particular interest:

“**act of abuse**” means an act of domestic violence or an act of personal violence;

“**act of domestic violence**” has the meaning given in the new section 6;

“**act of personal violence**” has the meaning given in the new section 6;

“**domestic relationship**” has the meaning given by the new section 4;

“**exposed**”, in relation to an act of abuse, includes —

(a) to see or hear the act of abuse; or

(b) to witness physical injuries resulting from the act of abuse;

“**property**”, in relation to a person means property —

- (a) owned by the person;
- (b) in the care or custody of the person;
- (c) used or enjoyed by the person, or available for the person’s use of enjoyment; or
- (d) at premises where the person lives or works.

The inclusion of a definition of property simplifies the *Restraining Orders Act 1997* as it eliminates the need to refer to property owner by, or in the possession of, a person.

Sub clause (2) deletes the definitions of “person to be protected” and “person protected” in the *Restraining Orders Act 1997* and replaces them with the following:

“**person protected**” means a person named in an order made under this Act as a person for whose benefit the order is made;

“**person seeking to be protected**” means —

- (a) the person who has applied for a violence restraining order or a misconduct restraining order; or
- (b) if an application for a violence restraining order or a misconduct restraining order has been made on behalf of another person, the person on behalf of whom the application is made;

Sub clause (3) deletes the definitions of “applicant” and “on behalf of” in the *Restraining Orders Act 1997*.

Sub clause (5) amends the definition of “corresponding law” to include the law of another State or Territory, in addition to the law of a foreign country.

Sub clause (6) amends the definition of “final order” in the *Restraining Orders Act 1997* to include a final order made at a mention hearing with the consent of the respondent or a restraining order made subsequent to the conviction of a person for a violent personal offence.

#### **Clause 6 – Section 4 replaced**

Clause 6 repeals section 4 of the *Restraining Orders Act 1997* and replaces it with definitions. Note that section 4 currently provides when a restraining order may be made; this provision will appear at section 7A (see clause 8).

Sub clause (1) defines “**domestic relationship**” as a relationship between 2 persons: who are, or were, married, in a de facto relationship, or related; one of whom is a child who ordinarily or regularly resides or resided with the other person, or a child of whom the other person is a guardian; or who have, or had, an intimate or other personal relationship with each other.

Sub clause (2) defines “**related**” to account for cultural, social or religious backgrounds, and “**other personal relationship**” to cover relationships of a domestic nature, falling outside the scope of the other definitions, where the lives of the two persons are or were interrelated and their actions affect, or affected, each other.

This method of defining a domestic relationship avoids the need to list every type of relative, and enables recognition of differing cultural and religious concepts of relatives.

### **Clause 7 – Section 6 replaced**

Clause 7 repeals section 6 of the *Restraining Orders Act 1997* and replaces it with definitions. Section 6 defines the meaning of an application “on behalf of”. Section 6 is repealed because it is no longer necessary.

Subsection (1) defines “act of domestic violence” to largely conform to the acts that constitute an act of abuse under the 1999 Model Domestic Violence Laws. The definition includes, with respect to people in a domestic relationship, assaulting or causing injury, kidnapping, damaging a person’s property (including the injury or death of an animal the property of the person), or threatening to commit any of these acts. Further, the definition includes, with respect to people in a domestic relationship, both stalking (pursuing with intent to intimidate) and behaving in an on going manner that is intimidating, offensive or emotionally abusive.

Subsection (2) defines “act of personal violence” to include all acts, committed in the non-domestic circumstance, that constitute an “act of domestic violence”, except damaging a person’s property and behaving in an intimidating, offensive or emotionally abusive way.

The differences between sub section (1) and sub section (2) recognise that certain behaviours are more serious and dangerous in the domestic context than outside the domestic situation because of the potential for escalation. In addition, sub section (1) gives legislative recognition to the profile of domestic violence by highlighting abusive behaviour that can sustain significant psychological damage and may be a precursor to physical harm. This will have the ultimate effect of affording greater protection to victims of domestic violence whilst not diminishing the protection currently afforded to other victims.

Further, the list of acts that constitute an “act of domestic violence” or an “act of personal violence” will make the *Restraining Orders Act 1997* more “user-friendly”. It will no longer be necessary to refer to Part V of *The Criminal Code* to ascertain what constitutes a “violent personal offence”, which previously stipulated the behaviours that warranted a violence restraining order. Many of the offences contained in the relevant Chapters of Part V were not applicable to restraining order proceedings, and so “violent personal offence” has been replaced by a concise list of behaviours, some of which are defined by reference to specific sections of *The Criminal Code*.

Subsection 3 provides that a person who procures another person to commit an act of domestic violence or personal violence is taken to have committed the act him or herself. This ensures that perpetrators of violence cannot escape sanction by utilising third parties.

Subsection 4 defines various acts that constitute either an “act of domestic violence” or an “act of personal violence” to conform to the definitions of these acts as provided in *The Criminal Code*. As such, “assaulting” is defined by reference to both the definition of assault and the definition of indecent dealing in *The Criminal Code*; “kidnapping or depriving the person of his or her liberty” by reference to section 332 of *The Criminal Code*; and the constituent elements of stalking (“pursuing” with intent to “intimidate”) by reference to section 338D of *The Criminal Code*.

## **Clause 8 – Section 7 replaced by section 7 and 7A**

This clause repeals section 7 and replaces it with new sections 7 and 7A. Section 7 currently defines “applicant” where an application is made on behalf of another person, such that in certain sections, “applicant” means a person who is not the applicant. This is confusing and unwieldy, and has been replaced by simpler terminology throughout the *Restraining Orders Act 1997*.

The new section 7 provides that only natural persons may be protected or bound by an order. This prevents a corporation from applying for, or being bound by, a restraining order.

The new section 7A replicates the repealed section 4, with an amendment to accommodate the new police orders under Part 2 Division 3A of the *Restraining Orders Act 1997*.

## **Clause 9 – Section 8 repealed and Part 1A inserted**

This clause repeals section 8 and inserts a new Part relating to restraining orders generally.

The definitions from section 8 are reworked and inserted into section 3 by clause 5.

The new section 8(1) sets out the information that the court making to order is to explain to the person bound by the order and either the person protected by the order, or the parent or guardian of the person on whose behalf the application is made. The court will not have to make an explanation to a police officer applicant or a child welfare officer applicant, but will have to make an explanation to a person protected by an order made on the application of those officers.

The purpose, terms and effects of the order are to be explained, as well the consequences of a breach, the need to vary or cancel the order if the parties want to reconcile, how the order may be varied, cancelled or extended, and the effects of firearms’ provisions. Further, the court is to provide information relating to available counselling and support services.

This provision recognises the importance of all parties being fully aware of the meaning and consequences of an order, and aims to encourage respect for the terms of a restraining order. Particularly important is the requirement that the court explain the consequences and terms of the order to both the person protected by the order and the person bound by the order. This requirement is aimed at ensuring that both parties, not just the person bound by the order, understand the seriousness and terms of the order made, and at recognising that both parties have obligations under the order.

The new section 8(2) provides for the court to arrange, as far as practicable, for someone else to give the explanation referred to above if the person does not readily understand English, or if the court is not satisfied that the person has understood the explanation.

The new section 8(3) provides for either delivery or service of a document containing the explanation where the person bound, the person protected, or the parent or guardian of the person protected, is not present in court when the order is made, or if it is not practicable to give the explanation at when the court makes the order.

The new section 8(4) preserves the validity of an order in the absence of an explanation.

### **Clause 10 – Section 10 amended**

This clause amends section 10 to account for the repeal of section 7 by clause 8.

### **Clause 11 – Section 11 replaced by sections 11, 11A and 11B**

This clause replaces section 11 with sections 11, 11A and 11B. Section 11 currently provides the grounds for a violence restraining order, which will now be found in section 11A.

The new section 11 provides that a violence restraining order specify the person restrained by the order, and the person protected by the order. This is necessary for the definitions of “person who is bound” and “person protected” in the amended section 3 of the *Restraining Orders Act 1997*.

The new section 11A details the grounds upon which a violence restraining order can be granted using the new nomenclature of “act of abuse” instead of “violent personal offence”, and incorporates both a ‘likely act’ and ‘reasonable fear’ test.

The new section 11B details the grounds upon which a violence restraining can be granted to protect a child from exposure to domestic violence, and again incorporates both a ‘likely act’ and ‘reasonable fear’ test.

This section recognises the damage that can be done to children by exposure to domestic violence and the risk of perpetuating a cycle of intergenerational violence. Currently, while an order can be granted where a child is, or is at risk of, being a primary victim of violence, there is no provision protecting children from exposure to domestic violence.

### **Clause 12 – Section 12 amended**

Sub clauses (1) and (2) change the reference to “applicant” to the “person seeking to be protected”. This change is made pursuant to the repeal of sections 7 and 8, and the amendment to the definition of “person seeking to be protected” in section 3.

The term “personal violence” is also changed by sub clauses (1) and (2) to “act of abuse”. This change is made pursuant to the new nomenclature of “act of abuse”, as inserted by sections 3 and 11A.

Sub clause (3) and (4) insert two more matters for the court to consider in making a violence restraining order.

Sub clause (3) inserts (ba) into section 12(1) and requires consideration of the need to ensure that children are not exposed to domestic violence. This new consideration emphasises the harm that may be suffered by children who are exposed to domestic violence and is consistent with section 11B.

Sub clause (4) requires consideration of past applications made under the *Restraining Orders Act 1997* relating to the respondent or person seeking to be protected. Both persons protected and persons bound by orders have complained of the other party making frequent applications under the *Restraining Orders Act 1997* as a form of harassment. A court should take this potential harassment into account, and should also consider whether certain restraints had been successful or unsuccessful in the past. Previous conduct may also be a strong indicator of future behaviour.

Sub clause (5) is amended to include the proposed section 12(1)(ba) as a consideration of primary importance, reflecting the critical need to protect children from exposure to domestic violence.

### **Clause 13 – Section 13 amended**

Sub clause (1) deletes part (a) of section 13(1) and inserts a new part (a) and a part (aa).

The new section 13(1)(a) changes various references to “applicant” to “person seeking to be protected”. This change is made pursuant to the deletion of the section 7, which gave a special meaning to applicant in certain sections, including section 13. The term “violent personal offence” is changed to “act of abuse”. This change is made pursuant to the new definitions of “domestic violence” and “personal violence”, collectively defined as an “act of abuse”.

The new section 13(1)(aa) allows the court to place restraints on the respondent (as part of the violence restraining order) to prevent the exposure of a child to an act of abuse, where the person to be protected by the order is a child. This section again emphasises the deleterious consequences that may result when children are exposed to domestic violence.

Sub clause (2) deletes part of section 13(1)(b) thereby making the provision simpler and easier to understand.

Sub clause (3) amends a previous drafting anomaly and inserts “obtaining”, which is logically prior to using.

Sub clause (4) specifically enables the court to provide for the respondent to recover personal or other prescribed property, including when he or she is restrained from entering a certain place where the property is located. This clause also provides for the person seeking to be protected to recover property. This would be necessary where, for example, it is the person seeking protection who has left the place of residence. The manner of retrieval is to be set out by the court in the order, or in accordance with the regulations.

### **Clause 14 – Section 16 amended**

This clause corrects a grammatical error in section 16(5)(c).

### **Clause 15 – Section 27 amended**

This clause inserts section 27(4) and 27(5).

The new sub section (4) provides that a hearing in the absence of the respondent under section 26(2) is to be held in a closed court. The person seeking to be protected is entitled to have

near him or her one or more persons to provide support. This provision is inserted to lessen the stress and fear experienced by many applicants for a violence restraining order.

The new sub section (5) provides that a person providing support is to be approved by the court, and is not to be a person part to, or a witness in, the proceedings.

#### **Clause 16 – Section 28 amended**

This clause amends section 28(1) by providing that at a hearing fixed under section 26(2) the court is to accept evidence by affidavit if the applicant chooses to provide evidence in this manner. This amendment will remove the court's discretion to accept such evidence.

#### **Clause 17 – Section 29 amended**

Sub clause (1)(d) is inserted to remove any doubt that a court hearing an application under section 26(2) may, at the request of the applicant, discontinue the application rather than proceed by summons in the event that the ex parte application is unsuccessful.

#### **Clause 18 – Division 3A inserted in Part 2 and consequential amendments**

Sub clause (1) inserts a new division that provides for police powers to make orders in situations of domestic violence. The telephone application process under the *Restraining Orders Act 1997* has been largely ineffective in providing a mechanism for emergency orders. The issue of providing a power for police to make orders has been under consideration for some time and was a recommendation of the Report of the Ombudsman in September 2003: *An Investigation into Police Response to Assault in the Family Home*.

The new section 30A(1) allows a police officer to make a police order on the same grounds that warrant a restraining order under sections 11A and 11B, if the officer reasonably believes that it is necessary to ensure the safety of a person.

The new sub section (2) provides that an order of this type may be made regardless of whether an application for a restraining order has been made to the court.

The new sub section (3) provides that a police order cannot be made if, on the same facts, a telephone order has been dismissed under section 23(1)(b).

The new section 30B sets out the matters to be considered by the police officer, which are substantially similar to the matters that a court is directed to consider when making a restraining order (section 12 of the *Restraining Orders Act 1997*).

The new section 30C sets out the restraints that may be imposed by a police order. This section contains fewer specified restraints than section 13 of the *Restraining Orders Act 1997*, which is consistent with making police orders as least restrictive on the personal rights and liberties of the respondent whilst still ensuring the protection of the person for whose benefit the police order is made.

The new section 30D provides that a police order can not restrain a child.

The new section 30E sets out the requirements for preparation, service and explanation of the order. This provision is consistent with sections 8 and 11 of the *Restraining Orders Act 1997*.

The new section 30F provides for the duration of police orders. Under this section, police may make a 24-hour police order without the consent of the person for whose benefit the order is made. Alternatively, police may make an order for 72 hours or such shorter time as will enable an application for a restraining order to be made to the court. A 24 hour order lapses if not served on the person bound by the order within 2 hours of the order being made and a 72 hour order lapses if it is not served on the person bound by the order within 24 hours of the order being made.

The new section 30G provides that a 72 hour order cannot be made without the consent of the person for whose benefit the order is to be made or the parent or guardian of the person to be protected.

The new section 30H provides that a police order cannot be renewed or extended, and that another police order cannot be made in relation to the same facts.

The new section 30I provides for a review of the new police orders as soon as practicable following the first two years of operation.

Clause 18(2) provides for the insertion of the definition of “police order” in section 3 of the *Restraining Orders Act 1997*.

Clause 18(3) provides for the insertion of sub section (4) into section 10, which sets out the requirements for preparation and service of a police order.

Clause 18(5) amends section 20(3) so that the failure of a police officer to make a police order does not prevent an application for a violence restraining order in relation to the same facts.

Sub clause (7) clarifies the heading of Part 2 Division 3.

#### **Clause 19 – Section 35 amended**

Sub clause (1) provides that “any family orders” be deleted as a matter for consideration with respect to an application for a misconduct restraining order under section 34(a)(i) or (ii). This is consistent with clause 20, which provides that a misconduct restraining order can not be made if the person seeking the order and the respondent are in a domestic relationship.

Sub clause (2) provides that “any family orders” be deleted as a matter for consideration with respect to an application for a misconduct restraining order under section 34(a)(iii). Family orders are not relevant to the decision of the court to issue a misconduct restraining order on the grounds of a breach of peace.

#### **Clause 20 – Section 35A inserted**

This clause provides that misconduct restraining orders can not be made if the person seeking to be protected by the order and the respondent are in a domestic relationship.

#### **Clause 21 – Section 36 amended**

This clause removes a restraint that relates to the domestic circumstance, and is thus no longer applicable to misconduct restraining orders as a result of clause 20.

#### **Clause 22– Heading to Part 4 amended**

This heading is amended so that it is consistent with the amendments to Part 4.

#### **Clause 23– Section 42 amended**

Sub clause (1) amends section 42(2) to incorporate the creation of sub section (3).

Sub clause (2) inserts a new section 42(3). This proposed sub section sets out a procedure for making a final order where the applicant appears at a final hearing but the respondent does not. In this situation, where the court is satisfied of section 42(2)(a), and there is already an interim restraining order in force with regard to the matter, the court will make a final order on the same terms as the order in force provided that no new ground or matter is raised.

Sub clause (2) also inserts section 42(3), which deals with evidence at final order hearings. Where the applicant and respondent attend, or where only the applicant attends, a final order hearing, the court is to receive as evidence any record of evidence given at a prior hearing in relation to the same matter, subject to the rules of evidence. This includes any affidavit that was filed, but an affidavit cannot be received as evidence if the deponent is not available to be cross-examined.

#### **Clause 24 – Section 43 amended**

Clause 24 repeals section 43(2) and inserts new sub sections (2) and (3).

This clause provides that courts may make orders by consent at a final hearing and thus rectifies an anomaly under the *Restraining Orders Act 1997*, whereby courts could only grant orders by consent at a mention hearing.

The new sections 43(2) and (3) are consistent with sections 41(1) and (2).

#### **Clause 25 – Division 3 inserted in Part 4 and consequential amendments**

This clause inserts “Division 3 – Evidence” after section 44.

The new section 44A provides that the rules of evidence are not to apply at an ex-parte hearing. The section allows the court to inform itself on any matter it considers appropriate, and provides that the court is not bound by the rule against hearsay. This is consistent with the 1999 Model Domestic Violence Laws and practice in several other Australian jurisdictions.

The new section 44B provides that, subject to section 70 (which restricts information on the whereabouts of certain persons), a party to an application will be able to obtain a copy of an affidavit received in evidence in relation to the application.

The new section 44C provides that where a respondent is not represented the court may make an order preventing the respondent from directly cross-examining a person with whom they have a domestic relationship. In this situation, the respondent may put questions to a judicial officer or person approved by the court, who will then put the question to the person being examined. This section will not apply if the person to be cross-examined requests that an

order not be made and the court considers it appropriate for the order not to be made or if the court considers that it is not just or desirable for such an order to be made.

#### **Clause 26 – Section 45 amended**

Currently, only final restraining orders can be varied or cancelled. Sub clauses (1) and (2) will enable applications to vary or cancel interim restraining orders.

Sub clause (3) provides that where an application to vary or cancel a restraining order is made before the order has lapsed or expired, the restraining order is to continue until the application is determined, so long as a copy of the application has been given to the person bound by the order.

#### **Clause 27 – Section 45A inserted**

This clause provides that where an application is made by the CEO (Child Welfare) to vary or cancel a violence restraining order under Section 50D, the clerk is to fix a hearing and to notify the parties. This application is to be heard as soon as possible if the CEO (Child Welfare) specifies that the application needs to be heard as a matter of urgency.

#### **Clause 28 – Section 46 amended**

Section 46 sets out the process of fixing a leave hearing for an order to be varied or cancelled on the application of a person bound by a restraining order.

Subsection 46(4) provides that the court may grant leave for the person to continue an application to vary or cancel an order if it is satisfied that: the person had a reasonable cause not to attend a prior hearing at which a final order was made; if there is evidence to support a claim that the person protected by the order has persistently invited or encouraged the applicant to breach the order or attempted to ensure the applicant breached the order; there has been a substantial change in the circumstances that led to the order being made or the respondent has suffered unnecessary hardship as a result of the order

#### **Clause 29 – Section 47 amended**

This clause deletes “final order” in section 47(2) and inserts instead “a restraining order”. This is consistent with the change to section 45 under clause 26 and enables applications to be made for variation of not only final orders as is the present position under the *Restraining Orders Act 1997* but interim orders as well.

#### **Clause 30 – Section 48 amended**

This clause repeals section 48(3) and replaces with a new section 48(3) consistent with the new section 42(4).

#### **Clause 31 – Section 48A inserted**

This clause allows a person protected by a violence restraining order to apply for an ex parte hearing to cancel the order.

### **Clause 32 – Section 49 amended**

This clause makes amendments to section 49 consequential to the insertion of section 48A by clause 31. At a hearing fixed under section 48A, the court may cancel the original restraining order.

### **Clause 33 – Section 49A inserted**

This clause makes provision for the clerk, on the application of the person protected by the order or the person bound by the order, to correct minor errors such as clerical mistakes, errors arising from an accidental slip, or a material mistake in the description of any person or thing referred to in the order. It provision does not apply if the correction to be made would affect the interest of the party to be protected, or the party bound, by the order.

### **Clause 34 – Heading to Part 6 Division 1 replaced**

This heading is amended to reflect the changes implemented by Part 6 Division 1.

### **Clause 35 – Sections 50A, 50B, 50C and 50 D inserted**

The new section 50A provides that a final restraining order made against a child is not to exceed 6 months. The reason for the time limit is that children have a different concept of time to adults and that the present period of two years is a particularly long time for a child, especially when the applicant is a parent.

The new section 50B(1) provides that a court is not to make an order in relation to a child where the child is under the control or in the care of a person under a child welfare law. The exceptions to this rule are where an order is sought by the CEO (Child Welfare) or an order is made during proceedings instigated or continued with the written consent of a person who has responsibility for the control or care of the child under the relevant child welfare law.

The new section 50B(2) provides that a restraining order made under the *Restraining Orders Act 1997* does not affect the operation of any child welfare laws, or the jurisdiction of a court or the power of an authority under such laws, in relation to the child.

The new section 50B(3) provides that a court may adjourn restraining order proceedings in relation to a child if it appears to the court that another court or authority proposes to make an order or take action under a child welfare law.

The new section 50B(4) provides that “child welfare law” has the same as the meaning as in the *Family Court Act 1997*.

The new section 50C(1) provides that if, in violence restraining order proceedings, the person who is to be bound by the order is under 16 years of age and the person seeking protection is a parent of the child, the court is to notify the CEO (Child Welfare) that such an order may be made. This amendment addresses the incongruity between the ability of a parent to seek a restraining order against their child, which may have the effect of rendering the child homeless, and the responsibilities of a parent under the *Child Welfare Act 1947* and *The Criminal Code*.

Sub Section 50C(2) provides that, if a violence restraining order is made pursuant to section 50C (1), the CEO (Child Welfare) is to make such enquiries considered necessary in respect to the child's circumstances to determine whether action is required to safeguard the child's wellbeing.

The new section 50D provides that if in proceedings under the *Restraining Orders Act 1997* the court considers the welfare of a child may be affected, the CEO (Child Welfare) may be asked to intervene in proceedings and may intervene in response to that request.

The CEO (Child Welfare) may intervene where it appears the child may be in need of care and protection within the meaning of the *Child Welfare Act 1947*, or if the restraining order has affected or may affect the welfare of the child.

Where the CEO (Child Welfare) intervenes, the CEO (Child Welfare) is to be treated as a party to the proceedings.

Clause 35 also amends sections 16(4), 16(5) and 37(2) by inserting reference to section 50A, which restricts the duration of a restraining order made against a child to 6 months.

#### **Clause 35 – Sections 53A, 53B, 53B, 53C, 53D, 53E, 53F and 53G inserted**

The new section 53A provides that children are not to give evidence oral evidence in restraining order proceedings unless the court makes an order allowing the evidence, or the evidence is given in the Children's Court. A court is only to make such an order in exceptional circumstances.

The new section 53B provides that if the court has made an order allowing the child to give evidence, or the evidence is given in the Children's Court, and the necessary facilities exist, the child is to give oral evidence by video-link from outside the courtroom but within the court precincts. The evidence is to be visually recorded.

The new section 53C enables children giving oral evidence to have near him or her a person to provide support. That person is to be approved by the court and is not to be a witness or a party to the proceedings.

The new section 53D provides that an unrepresented person in a restraining order proceeding is not entitled to cross-examine a child directly, but may put their question to the judicial officer or a person approved by the court, who will then accurately repeat the question to the child. The purpose of this provision is to eliminate as much as possible the intimidation of children who are witnesses.

The new section 53E provides that evidence of a representation made by a child, relevant to the proceedings, is admissible as evidence despite the rule against hearsay. This is consistent with similar provisions that apply in family law and child welfare proceedings.

The court may give this evidence such weight as it thinks fit. The making and content of the child's representation is to be given to the court by any person to whom the affected child made the statement.

The new section 53G provides that a child is not to be summonsed to a hearing unless a court makes an order, and the court is only to make such an order in exceptional circumstances.

This provision recognises that it is not generally appropriate for children to be called as witnesses in restraining order proceedings.

#### **Clause 37 – Section 55 amended**

This clause rectifies an anomaly in the *Restraining Orders Act 1997* and allows an order to take effect from the time that it is made and confirmed in court, so long as the respondent is present at that time.

Section 55(5)(d) is added to so that where oral service of an order is given, advice as to where a document containing the explanation given under section 8(1) can be obtained.

#### **Clause 38 – Section 59 amended**

This clause rectifies a previous grammatical error in the *Restraining Orders Act 1997*.

#### **Clause 39 – Heading to Part 6 Division 3 amended**

This heading is updated to reflect the amendments to Part 6 Division 3.

#### **Clause 40 – Section 61 amended**

This clause increases the penalty for breach of a violence restraining order from \$6,000 or imprisonment for 18 months to \$6,000 or imprisonment for 2 years or both. The same penalty applies for a breach of a police order. This increase reflects community attitudes toward people who breach restraining orders and emphasises the seriousness of domestic and personal violence.

Subsection (4) is inserted into section 61 to further recognise the serious harm that may result when children are exposed to domestic violence. This is achieved by amending section 7(1) of the *Sentencing Act 1995*, such that if a person, in committing an offence, exposes a child with whom the person has a domestic relationship to an act of abuse, that fact is a potential aggravating factor for the purposes of determining the offender's sentence.

#### **Clause 41 – Section 62 replaced**

Section 62 of the *Restraining Order Act 1997* provides that consent is a defence to a breach of a restraining order. A similar provision was expressly rejected by the 1999 Model Domestic Violence Laws, which considered that the provision failed to recognise that an order is an order of the court and not an agreement between two individuals.

This clause removes consent as a defence to a charge of breaching a restraining order. Instead, the clause provides that it is a defence to a charge if the person bound by the order can satisfy the court when carrying out the act or omission that constituted the offence, the person was: using a primary dispute resolution method; using conciliation, mediation or other consensual dispute resolution provided by a legal practitioner; acting in accordance with an action taken by a person or authority under a child welfare law; or acting as the result of an emergency, where an ordinary person in the same circumstances would have acted the same way.

The removal of consent as a defence brings Western Australia into line with other Australian jurisdictions and acknowledges the difficulty in ascertaining bona fide consent in the emotion-

charged domestic environment. It also reduces the potential for parties to abuse the restraining order process by giving, and then withdrawing consent, or by asserting consent as a reason for a breach of the order.

#### **Clause 42 – Division 3A inserted in Part 6 and consequential amendments**

Section 62A of the *Restraining Orders Act 1997* provides police officers with sufficient powers to respond effectively to matters involving or related to domestic violence. Currently, the only reference to police powers in the *Restraining Orders Act 1997* is to the ability of police officers to require respondents to remain in a designed place for up to two hours during the application for a restraining order and to seize firearms. Other State jurisdictions provide for more expansive police powers, which increases the protection that can be afforded to victims of domestic violence.

The new section 62A, which reflects a provisions of the 1999 Model Domestic Violence Laws, is specifically intended to ensure that where there is a reasonable suspicion that a person has committed or is committing an act of domestic violence that is also a criminal offence, or where the safety of a person is at risk, that the police investigate the matter.

The new section 62B, also adapted from the 1999 Model Domestic Violence Laws, provides that if a police officer reasonably suspects that a person is committing an act of domestic violence, or that such an act was committed prior to the officer's arrival, the officer may, with the approval of a senior police officer, enter and search the premises.

The powers of search are restricted to matters relevant to the purpose of entry and the officers may remain on the premises so long as necessary to investigate whether an act of domestic violence has been committed, to ensure that there is no imminent danger of a person committing an act of domestic violence and to render such assistance as may be necessary. In doing so a police officer may use such force or assistance as is necessary and reasonable in the circumstances.

Under section 62C, a police officer must, following an investigation pursuant to section 62A, or after entering premises under section 62B, make application for a restraining order, make a police order, or make a written record of the reasons why no action was taken to make an application or an order.

Section 62D sets out the process for obtaining the approval of a senior officer including the provision of the address of the premises and the grounds for entering the premises. The senior officer may approve the entry and searching of the premises if satisfied that there are reasonable grounds or conversely, not approve entry if the grounds are considered to be insufficient.

If in circumstances described in section 62B it is considered necessary for an officer to be able to enter premises to ensure the safety of a person or persons, it would seem inappropriate for the officer concerned to go through a time consuming process of obtaining a warrant from some higher authority. To ensure that timely entry is achieved in appropriate circumstances, it is considered that an appropriate safeguard was the obtaining of either the verbal or written authority of a senior police officer to ensure the integrity of the process.

“Senior officer” is defined to mean an officer who is senior to the officer making the application and is above the rank of inspector.

A record must be kept of the particulars of the approval and the approval may be given by remote communication.

Section 62E provides that where a person who is bound by a violence restraining order fails to give up possession of a firearm, a police officer may, without a warrant enter a place where it is suspected a firearm or firearm license is in the possession of the person and may seize the firearm or firearm license and deliver it to the Commissioner of Police. This new section replicates section 15 of the *Restraining Orders Act 1997*, and hence section 15 is deleted.

Section 62F provides that a police officer may, without warrant, require a person to remain in a place while a police officer applies for a telephone order or makes a police order, so as to facilitate service of the order being sought or made. If the police officer does not believe the person will remain in that place the officer may arrest and detain the person in custody for up to 2 hours. This new section incorporates section 22 of the *Restraining Orders Act 1997*, and hence section 22 is deleted.

Section 62G provides that where an applicant for a restraining order requests that a police officer conduct proceedings on their behalf, the police officer may do so at any stage of the proceedings.

#### **Clause 43 – Section 63A, 63B and 63C inserted**

Clause 43 inserts a new section 63A, which provides for a life long restraining order to be made against a person convicted of a violent personal offence for the protection of the victim of that offence. This measure protects the victim from the ordeal of having to relive the circumstances of the offence when giving evidence in another court, at another time, to support an application for a violence restraining order. Although it is presently possible pursuant to the *Restraining Orders Act 1997* for a restraining order to be made during criminal proceedings, the court has power to make a final order only if the respondent does not object to the order being made. If an objection is lodged, then the order can only be an interim order and is subject to a further hearing before the order can be made final.

For the purposes of this section a “violent personal offence” is defined to mean an offence against the following sections of *The Criminal Code*:

- s283 Attempt to murder;
- s297 Grievous bodily harm;
- s325 Sexual penetration without consent;
- s326 Aggravated sexual penetration without consent;
- s327 Sexual coercion;
- s328 Aggravated sexual coercion

Clause 43 inserts also a new section 63B which provides that a domestic relationship with the victim is relevant factor in determining the seriousness of the offence, where the court is sentencing a person who has committed a “violent personal offence”.

For the purposes of this section a “violent personal offence” is defined to mean an offence against the following sections of *The Criminal Code*:

- those included in section 277 (Unlawful homicide) other than infanticide;
- s332 Kidnapping;

s333 Deprivation of liberty;  
s338A Threats with intent to influence;  
s338B Threats;  
s338C Statements or acts creating false apprehension as to the existence of threats or danger; or  
s338E Stalking.

This provision does not affect the discretion of a court regarding whether or not to take into account a domestic relationship as a factor in sentencing an offender for any other offence.

This clause also inserts section 63C which provides that the court may make or vary a restraining order even though the respondent has been charged with, or convicted of, an offence arising out of the same matter. This provision makes it clear that an application for, or the granting of a, restraining order does not affect the civil or criminal liability of the respondent for his or her actions.

#### **Clause 44 – Section 67 amended**

This clause repeals section 67(1) which provides that a court may adjourn a hearing when, and for what period, the court considers appropriate.

Clause 44 inserts a new section 67(1) which enables the court to grant an adjournment at a final hearing if satisfied an injustice would result if an adjournment were not granted, or at another hearing if satisfied that there is good reason for doing so.

Clause 44 also inserts section 67(1a), which provides that if the court grants an adjournment, it must make a written record of the reasons for the adjournment. This ensures that any other judicial officer dealing with the matter at a later date is aware of the reasons for the adjournment.

The amendments to section 67 seek to reduce the number of adjournments and ensure that final order hearings proceed, except in exceptional circumstances. The changes also aim to ensure that adjournments are not used by parties to harass the other party.

#### **Clause 45 – Section 69 amended**

This clause inserts a new section 69(2) which clarifies that a court is not to order the applicant to pay costs to the respondent unless it considers that the application was frivolous or vexatious.

Clause 45 also inserts a new section 69(3) which expressly provides that the court is not to order costs to be paid by the applicant, if the applicant is a police officer who makes an application under the *Restraining Orders Act 1997*, represents another officer at the hearing or conducts the hearing at an ex parte hearing, and acts in good faith in making the application or appearing in the hearing. This provision ensures that a police officer should not be liable for costs when acting in good faith when assisting a victim of domestic violence.

### **Clause 46 – Section 70 replaced by sections 70 and 70A**

Clause 46 repeals section 70, which provides that the court is to ensure that the whereabouts of a person protected by a restraining order is not revealed to a respondent unless the respondent already knows those details or that it is necessary to do so in order to ensure that the restraining order will be effective. Clause 46 replaces section 70 with two new sections.

The new section 70(1) extends the protection afforded to the person protected by a restraining order under the current section 70 to all parties to the proceedings and to the witnesses who gave evidence at the proceedings. As such, a party to the proceedings will not receive information enabling them to ascertain the whereabouts of the other party or witnesses to the proceedings.

The new section 70(2) prohibits, subject to sub section (3), the publishing of information that would, or would likely to, reveal or lead to the revelation of the whereabouts of a party to the proceedings or any person who gives evidence in proceedings, and provides a maximum penalty of a fine of \$6,000 or imprisonment for 18 months.

The provision aims to enable proceedings to be published for public education purposes while affording safeguarding protected parties.

Section 70(3) prevents the operation of section 70(1) and 70(2) where information as to the whereabouts of a party or witness is already known by the other party, or where the party or witness who would be protected agree that section 70(1) and 70(2) will not apply.

The new section 70A provides that the Commissioner of Police, the Chief Executive Officer of the Department of Justice and the Chief Executive Officer of the Department for Community Development may exchange information, where it is agreed that it is necessary to do so to ensure the safety of a protected person or a child affected by such an order. It provides statutory protection to officers who act in confidence and good faith, and restricts the use of the information for any other purpose. This provision ensures that relevant authorities can work cooperatively to safeguard protected persons and children affected by such orders.

### **Clause 47 – Section 73 amended**

This clause deletes paragraph (g) of sub section (2), consistent with the amendment to section 74 in clause 48.

This clause inserts a new sub section (3), which provides that the forms prescribed for a restraining order and a telephone order are to contain a brief summary of the effect of section 44B, which relates to accessing affidavit evidence.

### **Clause 48 – Section 74 amended**

This clause amends the meaning of “interstate order” by deleting “law prescribed for the purposes of this definition” and inserting “corresponding law of that State or Territory”. This definition avoids the necessity of having to prescribe statutes from other States and Territories in the *Restraining Orders Regulations 1997*.

### **Clause 49 – Section 75 amended**

This clause removes reference to person “protected by the order” in section 75 which deals with the application for the registration of interstate orders. The clause replaces it with “named in the order for whose benefit the order is made”. The terminology is consistent with the new definition of “person protected” in section 3.

### **Clause 50 – Section 79B amended**

This clause removes reference to person “protected by the order” in section 79B which deals with the application for the registration of foreign restraining orders. The clause replaces it with “named in the order for whose benefit the order is made”. The terminology is consistent with the new definition of “person protected” in section 3.

### **Clause 51 – Part 8 repealed**

Part 8 is spent and therefore repealed.

### **Clause 52 – Various references to “applicant” amended**

This clause is necessary to give effect to the repeal of section 7 of the *Restraining Orders Act 1997*, which contains a confusing special definition of “applicant” that applies to the sections set out in the Table contained in this clause. “Applicant” is replaced by “person seeking to be protected” in these sections.

### **Clause 53 – References to “person to be protected” amended**

This clause deletes the word “person to be protected” where it occurs and replaces it with “person seeking to be protected” in the various sub sections of the *Restraining Orders Act 1997* referred to in the Table contained in this clause. This change ensures consistency in terminology.

### **Clause 54 – Notes about applicants under various sections removed**

Sections 11, 12, 13, 34, 35 and 36 contain a note: “In this section “applicant” may have a special meaning given by section 7”. Section 7 has been repealed to remove reference to the meaning of applicants if the application is made on behalf of another person.

Clause 54 removes the notes in these sections.

## **Part 3 – *The Bail Act 1982* amended**

### **Clause 55 – *Bail Act 1982* amended**

This clause provides that the amendments in this part are to the *Bail Act 1982*.

### **Clause 56 – Section 16A amended**

Clause 56 ensures that section 16A includes offences for breaches of police orders (created in this Bill under clause 30), and not only offences for breaches of violence restraining orders, as is currently the case.

### **Clause 57 – Schedule 1 amended**

Clause 57 ensures that clause 3B of Schedule 1 includes police orders (created in this Bill under clause 30), and not only violence restraining orders, as is currently the case.

### **Clause 58 – Schedule 2 amended**

Clause 58 ensures that a breach of a police order is a serious offence in the same category as a breach of a violence restraining order.

## **Part 4 – *The Criminal Code* amended**

### **Clause 59 – *The Criminal Code* amended**

The amendments in this Part refer to *The Criminal Code*.

### **Clause 60 – Heading to Chapter XXVI amended**

The current form of heading is styled “Assaults and violence to the person generally: Justification and excuse.”

Clause 60 introduces “circumstances of aggravation” to the heading.

### **Clause 61 – Section 221 inserted.**

Clause 61 introduces the concept of “circumstances of aggravation” with respect to a range of offences that are discussed in the following clauses. Currently certain provisions of *The Criminal Code* provide for a longer sentence if the crime is committed against a person of, or over, the age of 60 years.

New section 221 expands upon the category of a victim of, or over, the age of 60 years by introducing, four categories which can constitute “circumstances of aggravation”:

- the offender is in a domestic relationship with the victim of the offence;
- a child was present when the offence was committed;
- the conduct of the offender in committing the offence constituted a breach of an order made or registered under the *Restraining Orders Act 1997* or to which that Act applies; and
- the victim is of, or over, the age of 60 years.

For the purposes of this section “domestic relationship” has the same meaning as it has in section 4 of the *Restraining Orders Act 1997* as amended by clause 6 of this Bill.

Whilst continuing to reflect societal abhorrence for crimes of violence against the aged and more vulnerable members of our society, these amendments afford greater protection to victims of family and domestic violence and reflect the increased recognition of the harm that exposure to violence can cause children. These changes also reinforce the sanction effect of a restraining order.

### **Clause 62 – Section 297 is amended**

Section 297 of *The Criminal Code* deals with the offence of grievous bodily harm and provides that if the person harmed is of or over the age of 60 years, the offender is liable to imprisonment for 14 years.

Clause 62 deletes the reference to “if the person harmed is of or over the age of 60 years” and substitutes “if the offence is committed in circumstances of aggravation”.

The effect of this amendment is to increase the circumstances that can attract a longer term of imprisonment for grievous bodily harm.

### **Clause 63 – Section 301 amended**

Section 301 of *The Criminal Code* deals with the offence of unlawful wounding and provides that if the person harmed is of or over the age of 60 years, the offender is liable to imprisonment for 7 years.

Clause 63 deletes the reference to “if the person harmed is of or over the age of 60 years” and substitutes “if the offence is committed in circumstances of aggravation”.

The effect of this amendment is to increase the circumstances that can attract a longer term of imprisonment for unlawful wounding.

### **Clause 64 – Section 313 amended**

Section 313 of *The Criminal Code* deals with the offence of common assault and provides that if the person harmed is of or over the age of 60 years, the offender is liable to imprisonment for 3 years.

Clause 64 deletes the reference to “if the person harmed is of or over the age of 60 years” and substitutes “if the offence is committed in circumstances of aggravation”.

The effect of this amendment is to increase the circumstances that can attract a longer term of imprisonment for common assault.

### **Clause 65 – Section 317 amended**

Section 317 of *The Criminal Code* deals with the offence of assault occasioning bodily harm and provides that if the person harmed is of, or over, the age of 60 years, the offender is liable to imprisonment for 7 years.

Clause 64 deletes the reference to “if the person harmed is of or over the age of 60 years” and substitutes “if the offence is committed in circumstances of aggravation”.

The effect of this amendment is to increase the circumstances that can attract a longer term of imprisonment for assault occasioning bodily harm.

### **Clause 66 – Section 317A amended**

Section 317A of *The Criminal Code* deals with the offence of assault with intent and provides that if the person harmed is of or over the age of 60 years, the offender is liable to imprisonment for 7 years.

Clause 64 deletes the reference to “if the person harmed is of or over the age of 60 years” and substitutes “if the offence is committed in circumstances of aggravation”.

The effect of this amendment is to increase the circumstances that can attract a longer term of imprisonment for assault with intent

### **Clause 67 – Section 319 amended**

Section 319 of *The Criminal Code* is an interpretation section, which lists specific circumstances of aggravation that are applicable to sexual offences dealt with under Part V Chapter XXXI of *The Criminal Code*. These circumstances are in addition to those introduced under new section 221, which also applies to sexual offences under Part V Chapter XXXI.

The amendment is consequential to the earlier amendment by way of clause 58 and its effect is to delete reference to “if the victim is of or over the age of 60 years” which is superfluous in section 319, as that category is now included in the definition inserted by section 221.

### **Clause 68 – Section 338D amended**

Section 338D of *The Criminal Code* is an interpretation section, which lists specific circumstances of aggravation that are applicable to stalking offences dealt with under Part V Chapter XXXIIB of *The Criminal Code*. These circumstances are in addition to those introduced under new section 221, which also applies to stalking offences under Part V Chapter XXXIIB

The amendment is consequential to the earlier amendment by way of clause 58 and its effect is to delete reference to “the conduct of the offender in committing the offence constituted a breach of an order made or registered under the *Restraining Orders Act 1997* or to which that Act applies;” which is superfluous in section 338D as that category is now included in the definition inserted by section 261A.