Criminal Law Amendment (Sexual Assault and Other Matters) Bill 2004

Introduction Print

EXPLANATORY MEMORANDUM

This Bill amends **The Criminal Code** to allow multiple charges to be dealt with more readily on one indictment. This Bill also amends the **Evidence Act 1906** in relation to sexual assault matters, inter alia, to provide a legislative process for the protection and disclosure of confidential communications, to facilitate the visual recording of children and allow for such recordings to be admitted in court proceedings, to give automatic special witness status to all sexual assault complainants, and to extend the payment of fees and expenses to those who assist special witnesses, and child witnesses who suffer loss as a result of being involved in the criminal justice system.

Clause Notes

Part 1 – Preliminary

Clause 1. Short Title
Sets out the short title of the Bill.

Clause 2. Commencement
Provides that the Act comes into operation on a day fixed by proclamation, with different days being able to be fixed for different provisions.

Part 2 –Amendments to *The Criminal Code*

Clause 3. The Act Amended
Provides that the amendments are to *The Criminal Code.*

Clause 4. Section 585 amended
(1) makes stylistic amendments, and provides that a direction under this section may be made at a pre-trial hearing conducted under section 611A of the Code.

(2) inserts three new sub-sections.

Proposed section 585(5) provides that a Judge need not automatically order separate trials of different offences simply because the offences are of a particular

nature or because evidence in relation to some of the offences is not admissible in relation to others.

Proposed section 585(6) provides that a Judge considering whether to order separate trials is not permitted to consider that similar fact evidence that is otherwise probative loses its probative value because it could be the result of collusion or suggestion.

Proposed section 585(7) provides that charges of a sexual nature are presumed to be triable together, regardless of whether the evidence on one charge is admissible on the other charges. This displaces a common law rule to the contrary.

Clause 5. Section 611A amended
Inserts a new sub-section (5) into section 611A of the Code. Later amendments provide that a decision to order separate trials, or a refusal to order separate trials on the application of an accused, is capable of being reviewed and overturned on appeal. The proposed section 611A(5) obliges the Court to adjourn the trial of any such case until an appeal against that decision is determined.

Clause 6. Section 688 amended
(1) and (2) amend section 688 of *The Criminal Code* by providing that both the prosecution and the accused have a right to appeal against a decision made granting or refusing a separate trial.

Proposed sub-section (4) is also inserted. It provides that a person convicted of one or more offences in an indictment charging multiple offences cannot appeal against that conviction on any ground relating to the joinder of the charges if the person has already exercised a right of appeal against the joinder before his or her trial. This ensures that multiple appeals on the same issue are not permitted.

Clause 7. Section 690 amended
Inserts new sub-sections (4) and (5) into section 690 of the Code, providing for the powers of the Court of Criminal Appeal in the event of an appeal against a decision to order or refuse to order separate trials.

Clause 8. Section 695 amended
Provides that notice of an appeal against a decision to order or refuse to order separate trials must be given within 7 days of that decision having been made, rather than 21 days as is provided for in relation to other appeals. This provision is designed to ensure that issues related to such decisions are resolved as quickly as possible to avoid unduly delaying trials in such cases.

Part 3 – Amendments to the *Evidence Act 1906*

Clause 9. - The Act amended
The amendments made by Part 3 are made to the *Evidence Act 1906* (WA).

Clause 10. - Sections 19A to 19L inserted
Clause 10 inserts proposed sections 19A to 19M after existing section 19 of the *Evidence Act 1906* (WA) including the title of *Sexual assault communications privilege*.

Proposed section 19A. - Terms used in these provisions
Proposed subsection (1) sets out the definitions used in this section and sections 19B to 19M of the proposed Act as follows:

"application for leave" is defined to mean the application to seeking a protected communication in any criminal proceedings.

"counselling communication" is defined to mean any communication made in confidence to a counsellor in respect of a sexual assault. It also includes any communication made through an interpreter.

"counsels" is defined in the proposed subsection (2).

"disclose" in relation to a protected communication, is defined widely to include the adducing or producing of anything that would disclose a protected communication or the contents a document containing such a communication.

"harm" is defined to include actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm such as shame, humiliation and fear.

"protected communication" means any "counselling communication" made before the commission of a sexual assault and any related issues. This also includes communications made before the protection provisions were inserted into this proposed Act.

"**protected person**" is defined to mean the complainant, any person who made the protected communication and any interpreter through whom the protected communication was made.

"**require disclosure**" in relation to a protected communication includes requiring production of a document and seeking an order of a court that will result in the disclosure of the document.

"support person" is defined to mean a parent, carer or other supportive person who is present when a person counsels a complainant, to facilitate communication or to further the counselling process in some other way.

"**supporting affidavit**" means the affidavit accompanying an application for leave.

"**the protection provisions**" mean the provisions of proposed sections 19B to 19M.

Proposed subsection (2) is an extensive definition of **"counsels"**. A person "counsels" another person if the person has undertaken training or study or has experience relevant to the process of counselling persons who have suffered harm and the person listens to and gives verbal or other support or encouragement or advises, gives therapy to or treats a person whether or not for fee or reward.

Proposed subsection (3) ensures that in the protection provisions a reference to a document recording a "protected communication" includes a reference to any part of the document together with any report, observation, opinion, advice, recommendation or other matter that relates to the protected communication made by a protected person and includes any copy, reproduction or duplicate of the document.

Proposed subsection (4) provides that for the purposes of the definition of "counselling communication" in subsection (1), a communication can be regarded as being made in confidence even if it is made in the presence of a support person or in the presence of an interpreter.

Proposed section 19B. Protected communications recorded electronically

Proposed section 19B provides that if a protected document is stored electronically or a written document can be reproduced from an electronic storage system the document stored electronically is to be dealt with as if it were a written document. The proposed section therefore ensures that a document is protected even if it is stored electronically and can be printed.

Proposed section 19C. Protected communication not to be disclosed in criminal proceedings except with leave of the court

This proposed section is intended to create a procedure whereby counselling records will not be disclosed in relation to criminal proceedings without leave of the court. An application for leave to issue a subpoena must be in writing and accompanied by an affidavit stating why the applicant has a legitimate forensic purpose in seeking access to the documents in question. This affidavit must identify the relevant record and state the basis of the applicant's claim to having a legitimate forensic purpose.

Proposed subsection (1) is a general prohibition on the disclosure, or requiring the disclosure, of a protected communication in relation to criminal proceedings except with, and in accordance with, the leave of the court.

Proposed subsection (2) is a protective provision that provides that any subpoena seeking a protected communication that issues without leave of the court is of no effect.

Proposed subclause (3) provides that an application for leave must be in writing and accompanied by an affidavit setting out the reason – the legitimate forensic purpose – for being given leave to disclose or require the disclosure of the communication.

Proposed subclause (4) provides that if the court considers that there is a prima facie case that the applicant has a legitimate forensic purpose to obtain the documents, the court is to either fix a time for hearing the application or determine that the application will be heard during the criminal proceedings. If the court does determine that there is a prima facie case then it is to notify and send copies of the application and the affidavit to the parties, the protected person and any other person identified in the application or affidavit as a person to whom the protected communication was made.

Proposed subclause (5) provides that if the court does not consider that there is a prima facie case establishing a legitimate forensic purpose then the applicant is to be notified and the application is deemed to have been refused.

Proposed subclause (6) provides that proposed section 19E(2) and (3) dealing with what is a legitimate forensic purpose is to be applied in determining whether there is a legitimate forensic purpose.

Proposed subclause (7) defines **"party"** to mean a party to the criminal proceeding referred to in proposed subsection (1).

Proposed section 19D. Procedure on hearing of application for leave

Under proposed subsection (1) at a hearing of an application for leave the protected person and any other person identified in the application as having received the communication may appear in court in person or by their counsel. The person is to be advised of this right when they are sent the notification.

Proposed subsection (2) provides that any application is to be heard without a jury being present.

Proposed section 19E. Application for leave to be dismissed if there is no legitimate forensic purpose for it

This proposed section is designed to provide some guidance as to what will be considered by the courts as amounting to legitimate forensic purpose. It is intended to end the practice of defence counsel having very widely termed subpoenas issued to the holder of the relevant records. By setting out various assertions that will not themselves constitute legitimate forensic purpose, applicants will have to ensure that their application is specific in regards to the document it seeks and is founded on some reasonable basis.

Proposed subsection (1) provides that an application for leave to issue a subpoena is to be refused if the applicant does not satisfy the court that there is a legitimate

forensic purpose for having access to the protected document and that other evidence to the same effect as the protected document is not available.

Under proposed subsection (2) an applicant cannot simply assert, without proving it, that a protected communication discloses a prior inconsistent statement, relates to the credibility of the complainant or the reliability of the testimony in order to establish a legitimate forensic purpose in relation to a document. Additionally, it is not sufficient to prove that the protected communication exists, was made close to the time of the alleged offence, nor that the protected communication blames a different person for the alleged offence, or relates to the activity the subject of the criminal proceedings, to establish a legitimate forensic purpose.

The effect of proposed subsection (2) is that an applicant for disclosure of a protected communication must establish more than curiosity about a document before it will be released. There must be independent evidence that there is some probative value to the defence in the document.

Proposed subsection (3) provides that the court can consider matters beyond those set out in proposed subsection (2) in determining whether there is a legitimate forensic purpose in the application to issue a subpoena for the protected communication.

Proposed section 19F. Determination of application

Under proposed subsection (1) if the court is, or is not, satisfied about an application for leave to issue a subpoena it is to determine the application accordingly.

Proposed subsection (2) provides that the court may conduct a preliminary hearing on an application if it thinks that this is necessary.

Proposed subsection (3) provides that in a preliminary hearing the court may require a protected person to provide written answers to questions or appear for oral examination.

Proposed subsection (4) provides that a preliminary examination is to be conducted in the absence of the parties.

Proposed section 19G. Public interest test

Proposed section 19G sets out the factors to be used in determining whether there is a public interest that requires that a protected communication should be disclosed. These factors include some general issues common to determinations of the public interest in the context of releasing possible evidence and also some issues that may arise specifically in the context of the sexual assault victims.

Proposed subsection (1) provides that in determining an application for leave to issue a subpoena the court may grant leave or require the disclosure of the

communication only if the court determines that it is in the public interest to do so.

Proposed subsection (2) provides that for the purposes of proposed subsection (1) the court is to have regard to a number of particular matters such as the public interest in ensuring that complainants receive effective counselling. The concern here is that if complainants and counsellors are concerned that the record may be disclosed then the parties may not engage in full and frank counselling. Additionally, the records kept may deliberately be made inadequate to protect disclosure. Further considerations include harm to the complainant by disclosure, ability for the applicant to obtain leave to make full defence after disclosure, the probative value of the communication, and the likelihood that disclosure will affect the outcome of proceedings. The court is also able to consider any other matter it considers relevant.

Proposed section 19H. Effect of consent

Proposed subsection (1) provides that the complainant may waive the protection provisions of the proposed Act, provided the complainant is an adult.

Under proposed subsection (2) the consent to disclosure must be given in writing and expressly for the purposes of waiving the protection provisions.

Proposed subsection (3) provides that children are not able to consent to disclosure as there are concerns they may not be able to make that decision free from other influences, potentially even the alleged offender.

Proposed section 19I. Loss of sexual assault communications privilege: misconduct

Proposed subsection (1) provides that the provisions of the proposed Act do not prevent the disclosure or adducing of evidence of a communication if the communication was prepared in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty.

Proposed subsection (2) provides that if the commission of the fraud, offence or act is a fact in issue and the court finds that there are reasonable grounds for making such a finding and that the communication was prepared as part of that fraud, offence or act then the court may make that finding.

Proposed section 19J. Ancillary orders

Proposed section 19J provides that the court may make ancillary orders in relation to the disclosure of a protected communication. For example, some or all of the evidence about the communication may be heard in camera or evidence of the communication may be suppressed. The court is particularly able to make ancillary orders to ensure that the safety and welfare of a protected person is protected, for example, by suppressing their address.

Proposed section 19K. Inadmissibility of evidence that must not be adduced or given

Proposed section 19K is a safeguarding provision that provides that evidence that is protected because of the provisions of the proposed Act is inadmissible as evidence and cannot be disclosed or required to be disclosed in any proceedings.

Proposed section 19L. Application of common law

Proposed subsection (1) provides that the protection provisions do not effect the operation of any law in relation to evidence in criminal proceedings except to the extent that they expressly or necessarily have that effect under the proposed Act.

Proposed subsection (2) provides that the proposed Act does not have affect any rule of law in relation to the production of a document in any criminal proceedings.

Proposed subsection (3) provides that, subject to proposed subsection (4), sections 238 and 239 of the *Children and Community Services Act 2004* do not apply to the production or disclosure of a protected communication in criminal proceedings.

Proposed subsection (4) provides that if leave is given then subsections (5) to (8) of the *Children and Community Services Act 2004* apply to the records of that Department.

Proposed subsection (5) provides that the proposed Act does not apply to section 240 of the *Children and Community Services Act 2004*.

Proposed section 19M. Regulations as to disclosure of protected communications

Proposed section 19M provides that regulations can be made in relation to forms to be used, the content of affidavits, the matters to be included in applications for leave and the supporting affidavits, the procedure of the court and any other matters that are necessary.

Clause 11. Section 26 replaced

repeals section 26 of the Evidence Act and inserts a section entitled Improper Questions. Subsection (1) empowers the court to disallow a cross-examination question if it is misleading, or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive. Subsection (2) extends that power to cover the way the question is put to the witness. Subsection (3) states that the court may consider the characteristics of the witness when deciding whether to disallow a question.

Clause 12. Section 27 amended

Section 27 is amended to use the same language of "disallowing" a question and "informing" a witness as is set out in amended section 26.

Clause 13. Section 31A inserted
Inserts a new section 31A into the Act after section 31 regarding propensity evidence and relationship evidence. The proposed subsection (1) defines "propensity evidence" and "relationship evidence".

The proposed section 31A provides that such evidence is admissible if it has significant probative value, and the probative value of that evidence is such that fair-minded people would think that the public interest in adducing it must have priority over the risk that it will lead to an unfair trial.

Sub-section (3) of the proposed section 31A provides that the probative value of relationship or propensity evidence must be assessed without regard to the possibility that the evidence may be the result of collusion, concoction or suggestion.

Clause 14. Section 106A amended and consequential amendments
(1) amends section 106A of the *Evidence Act 1906* by adding a definition of "**serious sexual offence**", being offences with a maximum penalty of seven years imprisonment or more, to deal with the extension of "special witness" status under 106R. The definition ensures that repealed offences are covered.

"**visually recorded interview**" is defined by reference to section 106HA(3) of the *Evidence Act 1906.*

(2) and (3) amend various sections between 106A – 106T to modernise language by replacing video recording with "visual recording".

Clause 15. Section 106B amended
Removes the words "that is over and above the ordinary duty to tell the truth", because it is very difficult for a child who is brought up to tell the truth to his or her mother, to deal with a concept that it is more important to tell the truth in court than to his or her mother.

Clause 16. Section 106E amended
Amends section 106E by deleting "who is under the age of 16 years". Currently sections 106A to 106T of the *Evidence Act 1906* differentiate between children perse and children who are under 16, because the age of consent is 16 years old. Other jurisdictions dealing with children do not similarly differentiate, including the family law and care and protection jurisdictions. For this reason, and because the benefits in sections 106A to 106T are being extended to adults, this is the first of several provisions in this Bill that will remove the distinction between children under 16 and under 18.

Clause 17. Section 106F amended
Amends section 106F to remove the distinction between child and child under 16.

Clause 18. Section 106G amended

Amends section 106G to remove the distinction between child and child under 16.

(1) extends to a protected witness the protection provided by section 106G to a child under 16 years from being directly cross examined by an unrepresented defendant.

(2) provides that a "**protected witness"** who is not a child can consent to being directly cross examined by the defendant.

(3) defines "**protected witness**" as a child or a complainant alleging a serious sexual offence.

This clause acknowledges that being directly cross examined by an unrepresented defendant can be traumatic.

Clause 19. Section 106H amended
Amends section 106H to exclude a visually recorded interview, as the proposed sections 106HA to 106HD deal with such interviews.

Clause 20. Sections 106HA to 106HD inserted
Inserts sections 106HA to 106HB to establish a process regarding the visual recording of child interviews.

Proposed section 106HA - Visual recording of interviews with children
The proposed section 106HA(1) provides that section 106HB applies to a visual recording of an interview with a child conducted before or after the coming into operation of the Bill, if the interview were conducted by a person of a prescribed class and in a prescribed manner, who thought that the child or another child had or may have suffered physical or sexual abuse.

The proposed section 106HA(2) provides that an interview can be carried out, whether or not a parent or guardian consented. This is to cover the situation where a parent or guardian may be an alleged offender or may be protecting an alleged offender.

The proposed section 106HA(3) gives the nomenclature "visually recorded interview" to such interviews under section 106HB.

Proposed section 106HB – Admissibility in criminal proceedings of a visual recording of an interview with a child
The proposed section 106HB(1) enables the admission as evidence in chief of a "**visually recorded interview"**, regardless of the age, maturity or capability of the witness when the recording is used.

The proposed section 106HB(2) provides that admissibility is subject to the defendant being provided with a copy of the transcript of interview and the

defendant or his counsel being given a reasonable opportunity to view the recording subject to the regulations.

The proposed section 106HB(3) ensures that neither the defendant nor his counsel is ever entitled to possess a copy of the visual recording, even if it becomes part of the evidence of a pre-recording. This is to ensure that there is no opportunity for such a visually recorded interview to be used wrongly, given its sensitive contents.

The proposed section 106HB(4) provides that a visually recorded interview is admissible as though it were an oral statement and in accordance with usual rules and practice of the criminal court dealing with the matter.

The proposed section 106HB(5) provides that if a visually recorded interview is admissible, the judge may give directions as to (a) its presentation and excision of any matters and (b) the manner of any further evidence, including examination in chief, cross examination and re-examination. This is a standard provision for such a process and is similar to that regarding pre-recordings in section 106K.

The proposed section 106HB(6) prohibits admission of a visually recorded interview that has been altered or edited, other than in accordance with section 106HB(5)(a).

The proposed section 106HB(7) (a) provides that, where a visually recorded interview is admitted, a judge is to instruct the jury that no inference of guilt should be drawn from the use of the procedure. Section 106HB(7)(a) provides that if there is a large gap between the alleged offence and the proceeding, the existence of a visually recorded interview is not relevant, save that the length of time between the offence and the visually recorded interview may have affected the defendant's ability to test the witness' evidence: this is dealing with possible issues of fairness to the accused who, though a visual recording was taken at or near the time of the alleged offence, only becomes aware of this many years later and the ability to test the evidence is affected by effluxion of time.

The proposed section 106HB(7)(c) provides that if the prosecution does not use a visually recorded interview, it cannot be the subject of comment to the jury by the judge, the defendant or the defendant's counsel.

However, the prosecution would still be obliged to disclose the visually recorded interview.

Proposed section 106HC - Regulations about visual recording of interviews with children

The proposed section 106HC sets out the regulation making power.

The proposed section 106HC(1)(a) enables regulations prescribing the classes or persons who can carry out the interviews, by reference to their office or positions or training or experience, or a combination.

The proposed section 106HC(1)(b) enables regulations prescribing the manner in which the interview is recorded, which must be complied with if section 106HB is to apply.

The proposed section 106HC(1)(c) enables regulations prescribing the manner in which a visual recording of interview may be proved in proceedings.

The proposed section 106HC(1)(d) enables regulating the playing, broadcasting, custody, storage, copying, transcription, erasure or destruction of a visually recorded interview. This provision is necessary given the sensitive contents of any recording.

The proposed section 106HC(1)(e) provides for regulating the records that are to be kept regarding any pre-recordings.

The proposed section 106HC(1)(f) enables regulations providing for access to visually recorded interviews by the prosecution, for the purposes of criminal proceedings.

The proposed section 106HC(1)(g) enables regulations to facilitate use of visually recorded interviews in Children's Court and Family Court proceedings.

The proposed section 106HC(1)(h) provides for regulating access to a visually recorded interview other than for criminal, Family Court or Children's Court proceedings. These regulations will deal with, for example, access to a recording by a counsellor or other health specialist treating the child.

The proposed section 106HC(1)(i) is a general or catch all provision providing for any other regulation that may be necessary.

Proposed section 106HD - Admissibility of visually recorded interviews generally

The proposed section 106HD provides that section 106HB and regulations under section 106HC do not limit the operation or any other enactment or rule of law under which a visually recorded interview may be admissible. This is to ensure, for example, that the rules of evidence regarding children in the Family Court and Children's Court are not curtailed by section 106HB.

Clause 21. Section 106I amended

Deletes section 106I(1)(a) that provides for a child's evidence to be taken on video, as it is not used and in any event section 106HB as proposed makes it redundant.

Clause 22. Section 106J repealed and consequential amendments
Repeals section 106J with consequential amendments. Section 106J provides the powers for a judge hearing an application for a child's evidence to be taken on video under section 106I(1)(a). It is not used and in any event section 106HB as proposed makes it redundant.

Clause 23. Section 106K amended
(1) amends section 106K to accommodate the protection provided by section 106HB(3), precluding the defendant or his counsel having a copy of the visual recording.

(2) adds (4) to section 106K to accommodate a Section 106H
visually recorded interview being the whole or part of the evidence in chief for a pre-recording.

Clause 24. Section 106M amended
(1) changes "Judge" to "judge" in section 106M(1).

(2) repeals section 106M(3) and replaces it with the same provision set out in a more distinctive definition style.

Clause 25. Section 106Q amended
Amends section 106Q to extend the protection provided to a special witness, so that where identification is an issue, the special witness is not required to be in the presence of the defendant any longer than necessary, and any identification occurs after the giving of evidence.

The heading of the section 106Q will also be amended.

Clause 26. Section 106R amended
(1) provides that an order must be made declaring a complainant
of a serious sexual assault a special witness, unless the court is satisfied that the complainant does not have a physical or mental impairment or is not likely to suffer severe emotional trauma or be intimidated or distressed by giving evidence.

(2) provides that where a person is declared a special witness, the judge is to instruct a jury that it is routine practice.

Clause 27. Section 106S amended
Amends section 106S regarding special hearings to consider what orders should be made, to include the proposed section 106HB(5)

Clause 28. Section 119 amended
Section 119(2) of the *Evidence Act 1906* (WA) allows the Governor to make regulations with respect to fixing and requiring the payment of fees and expenses to witnesses called and interpreters arranged by the prosecution.

This section does not enable the making of regulations to provide for the payment of fees and expenses:

- for attendance at programs (such as witness preparation at the Child Witness Service); or
- to persons who necessarily accompany child and special witnesses to court or to programmes.

Clause 28(1) inserts a new provisions which enables regulations to be made to enable the payment of fees and expenses to persons referred to in sections 106E(1) and 104R(4)(a) of the *Evidence Act 2006* (WA). Section 106E(1) refers to a person, approved by the court, who may provide a child with support while he or she is giving evidence in any proceeding in a court. Section 104R(4)(a) refers to a person, approved by the court, who may provide a special witness with support while he or she is giving evidence.

Clause 28(2) inserts a new subsection that enables the Governor to make regulations authorising the payment of fees and expenses to:

- children and persons who are, or may be, declared special witnesses in relation to their attendance at programmes in preparation for giving evidence; and
- persons who necessarily accompany and assist children and persons who are, or may be, declared special witnesses to enable them to attend and give evidence at proceedings or to attend in preparation for giving evidence.

Clause 29. Schedule 7 amended

(1) Amends Schedule 7 clause 1(1)(b) by "affected child under the age of 16 years" and inserting "complainant was a child".
(2) Amends Schedule 7 clause 4(c) by deleting "child" and inserting "complainant".

Affected child is defined a person under 16 years of age, because the age of consent is 16 years old. Other jurisdictions dealing with children do not similarly differentiate, including the family law and care and protection jurisdictions. These amendment will remove the distinction between under 16 and under 18 years of age and treat all children the same.

Part 4 – Transitional and validation

Clause 30. Validation of Payments

As previously indicated, section 119(2) of the *Evidence Act 1906* (WA) enables the Governor to make regulations for the payment of fees and expenses to witnesses called by the prosecution. It does not enable the making of regulations to provide for the payment of fees and expenses to persons who necessarily accompany witnesses.

Regulation 6(2) of the Evidence (Witnesses' and Interpreters' Fees and Expenses) Regulations 1976 (WA) provides:

> A parent or guardian who necessarily accompanies a person referred to in subregulation (1) of this regulation shall be paid the fees prescribed by regulation 4.

Regulation 13 of the Evidence (Witnesses' and Interpreters' Fees and Expenses) Regulations 1976 (WA) provides:

> A parent or guardian who necessarily accompanies a witness under the age of 16 years shall be paid the expenses prescribed by regulations 8 to 12 (inclusive).

The State Solicitor's Office has advised that Regulations 6(2) and 13 are *ultra vires*.

Clause 30(2) retrospectively validates payments made under Regulations 6(2) and 13, so that any payments made under those regulations prior to commencement of clause 28 are taken to have been valid as if clause 28 had come into operation before those regulations had been made.