

**Statutory review of the Prohibited Behaviour Orders Act
2010**

Department of the Attorney General

August 2015

1. Introduction

The development of the *Prohibited Behaviour Orders Act 2010* fulfilled a key Liberal Party commitment given during the lead-up to the 2008 State election. The *Prohibited Behaviour Orders Act 2010* and the Prohibited Behaviour Orders Regulations 2011 were proclaimed on 23 February 2011.

The purpose of the *Prohibited Behaviour Orders Act 2010* (the Act) is to provide courts with a mechanism to restrict a person who has a history of anti-social behaviour related offences from specified behaviours with the intent of preventing that person from engaging in future anti-social behaviour.

The application for a prohibited behaviour order (PBO) is initiated on application by a prosecutor or by the court on its own initiative. The decision to grant a PBO and its terms and conditions is made at the discretion of the judge or magistrate hearing the case and is decided following sentencing. The constraints imposed by a PBO include activities and behaviour of a person that would otherwise be lawful. A PBO cannot be made against a child under the age of 16 years.

The Act provides that details of a PBO can be published. The judge or magistrate can order that all details or certain specified details relating to the restrained person must not be published if it is believed there are circumstances justifying suppression. In the case of a youth aged 16-17 years, the judge or magistrate must have regard for the wellbeing of the youth when deciding whether to publish the details of the PBO.

Details of a PBO are published by the chief executive officer of the Department of the Attorney General on the PBO website and may include the name of the constrained person, a photograph of the constrained person, the town or suburb where the constrained person lives, and the constraints imposed by the PBO.

A breach of a constraint imposed on a person by a PBO is an offence and can result in a fine or imprisonment.

2. Section 40 – Review of Act

Section 40 of the *Prohibited Behaviour Orders Act 2010* required a statutory review of the operation and effectiveness of the Act:

40. Review of Act

- (1) The Minister must carry out a review of the operation and effectiveness of this Act as soon as is practicable after the expiry of 3 years from the commencement of this section.
- (2) The Minister is to prepare a report based on the review and, as soon as is practicable after the report is prepared, cause it to be laid before each House of Parliament.

3. Terms of reference

The Department of the Attorney General assisted the Hon Michael Mischin MLC, Attorney General to conduct his statutory review. The terms of reference for the statutory review state that it would examine:

The operation and effectiveness of the Act, including, but not limited to:

- The interpretation of the definition of anti-social behaviour, as captured in section 3 of the Act, and the offences involving anti-social behaviour prescribed in Schedule 1 of the Prohibited Behaviour Orders Regulations 2011; and
- The circumstances to be considered in determining whether a PBO application is appropriate.

4. Consultation process

On 26 March 2014 the Department wrote to the Chief Magistrate, the Chief Judge of the District Court, the President of the Children's Court, the Public Advocate, WA Police, the State Solicitor, Legal Aid Commission Western Australia, the Aboriginal Legal Service of Western Australia Inc, the Law Society of Western Australia and the Mental Health Law Centre (WA) Inc inviting submissions to the statutory review. The closing date for submissions was 9 May 2014. The Department received submissions from:

- Aboriginal Legal Service of Western Australia Inc
- Chief Magistrate
- Law Society of Western Australia
- Legal Aid Western Australia
- Mental Health Law Centre (WA) Inc
- Public Advocate
- WA Police

5. Interpretation of the definition of anti-social behaviour and offences taken to involve anti-social behaviour

The terms of reference sought comment on the interpretation of the definition of anti-social behaviour, as captured in section 3 of the Act, and the offences involving anti-social behaviour prescribed in Schedule 1 of the Prohibited Behaviour Orders Regulations 2011.

Subsection 3(1) of the Act defines anti-social behaviour and a relevant offence:

anti-social behaviour, by a person, means behaviour that causes or is likely to cause —

- (a) harassment, alarm, distress, fear or intimidation to one or more persons; or
- (b) damage to property;

relevant offence means an offence involving anti-social behaviour;

Subsection 3(2) defines a prescribed offence as:

A prescribed offence is to be taken to involve anti-social behaviour in the absence of proof to the contrary.

Schedule 1 of the Prohibited Behaviour Orders Regulations 2011 prescribes the offences to be taken to involve anti-social behaviour. See attachment 1.

Agencies which have been representing PBO respondents submitted that the definition of anti-social behaviour is vague and does not identify whether the assessment is based on objective or subjective criteria or identify the point in time at which the assessment is to be made. Because the test to be applied is unclear, there is concern that the enquiry will shift from whether the behaviour actually caused harassment, alarm, distress, fear or intimidation to one or more persons, to whether the behaviour might have become anti-social behaviour.

It was also submitted that the concept of anti-social behaviour is quite broad and looking at the definition itself, the Act could potentially apply to any offence that occurs in sight or hearing of the public, or which has an identified victim, regardless of the motivations of the offender.

Further, the use of the Regulations to prescribe certain offences as involving anti-social behaviour was seen to place respondents at a significant and unnecessary disadvantage. It was submitted that the presumption has been justified on the basis it provides guidance as to the kind of offences that should ordinarily be taken to involve anti-social behaviour without further inquiries in to the sorts of offences that were intended to be targeted by the Act. If the offences intended to be covered by the Act 'ordinarily', 'plainly' or 'inherently' involve anti-social behaviour, no particular evidential advantage is gained. The presumption merely facilitates what can already be proven. It was noted that the applicant must put evidence of the circumstances of the offences before the court, so it can assess whether or not a PBO is appropriate and in deciding what constraints are reasonably necessary to impose. Substantially the same evidence would be led if the prosecution were first required to prove that the relevant offences involved anti-social behaviour. For these reasons it was submitted that the presumption does not actually create any real gains in efficiency to the applicant in terms of the preparation of the application and the conduct of the case.

Further it was submitted that the main impact of the presumption is that it introduces an evidentiary advantage in favour of the prosecution, commonly found in criminal proceedings, into what has been emphasised to be a civil law jurisdiction. Additionally, the task of rebutting the presumption is made more difficult because of the imprecise definition of anti-social behaviour. It is questioned how a respondent can satisfy the court, on the balance of probabilities, that their behaviour did not involve anti-social behaviour, when it is not clear what constitutes anti-social behaviour in the first place. It was submitted that the presumption in the Act goes beyond the normal scope of the civil law and undermines the protection that should be offered to respondents, bearing in mind that a breach of the PBO is a criminal offence. Comparison was made with the *Restraining Orders Act 1997* which operates without any presumptive rules in favour of the party seeking to benefit from the order. The *Restraining Orders Act* goes even further to ensure a level playing field between applicant and respondent by clarifying that certain matters do not give rise to any presumption in favour of a party.

The second reading speech for the PBO Act states that the legislation was intended to assist the court in dealing with low-level volume offending, where "the manner in which police, courts and corrective services can presently deal with such offending is limited." In part, that was said to arise because the circumstances of an isolated charge were unlikely to be serious enough in itself to warrant a sentence of imprisonment, having regard to appropriate sentencing principles. Despite that rationale, it was put to the review that a significant proportion of the offences listed in the Regulations as 'relevant offences' carry maximum penalties that mean that a sentence of imprisonment is likely to be available, even for a first offence. Whilst some of those offences may properly be regarded as being 'anti-social', the

courts are sufficiently equipped to deal with those offences in a way that adequately protects the community within a framework of current sentencing principles.

Further, it was submitted that the vast majority of the offences from *The Criminal Code, Misuse of Drugs Act 1981* and the *Prostitution Act 2000* that are listed in the Regulations are designated as crimes; some are so serious that they can only be dealt with on indictment. Where the prosecution believes that the summary jurisdiction penalty that is likely to be imposed will not adequately reflect the criminality involved, it is already an option to apply to have the charge dealt with on indictment. Given the basis put forward for the PBO Act, to address low-level high-volume offences, it was submitted that a PBO is not an appropriate control mechanism to deal with offences of such a serious nature (as reflected in their maximum penalties), where it is expected that the court would impose a sentence of imprisonment.

Another submission drew attention to the fact that, at the time of writing, there were a large number of applications to be determined pending a number of appeals to the District Court which were understood to relate to the interpretation of the definition of anti-social behaviour. Further, it was noted that the factors contained in the Act provide for a number of matters to be taken into account but leave to the Court a discretionary decision faced with what can be competing considerations. Such legislation inevitably has the potential for long and difficult hearings and numerous appeals until some precedents are established.

Conclusion

In his second reading speech for the introduction of the Prohibited Behaviour Orders Bill 2010, the former Attorney General, the Hon Christian Porter MLA, confirmed the definition of anti-social behaviour and stated that:

“Antisocial behaviour is...defined as behaviour that causes, or is likely to cause, harassment, alarm, distress, fear or intimidation to one or more persons; or damage to property. To assist the courts in their understanding of how this definition should be applied, and to enhance the efficacy of the bill, offences may be prescribed by regulation as being presumed to involve antisocial behaviour in the absence of proof to the contrary. It should be noted that these prescribed offences are not the only offences that might, in specific instances, involve antisocial behaviour; rather, this list exists to provide guidance as to the kind of offences that should ordinarily be taken to involve antisocial behaviour without further inquiries and are of the nature of offending that Parliament seeks to target with this bill.”

The second reading speech indicates that the Government's intent is that the offences listed in Schedule 1 of the Prohibited Behaviour Orders Regulations 2011 should provide guidance regarding what offences are to be taken to involve anti-social behaviour. Further, on 19 August 2010, during debate in the Legislative Assembly, Mr Porter stated:

“If it were to be proved that an offence was not an antisocial behaviour offence, then for the purpose of the court and the act it would not be an antisocial behaviour offence. To the extent that there will be prescription by regulations, these will be as a matter of evidentiary assistance. For instance, if a person was caught doing graffiti on a piece of public property, there could be a great deal of argument as to whether or not that was an offence that is likely to cause harassment, alarm, distress, fear or intimidation; or damage to property. ...

“What we are looking at putting on the prescribed offences list are those offences that, in the overwhelming majority of circumstances, are likely to cause harassment, alarm, distress, fear or intimidation, as a means of easing the procedural burden on the courts and the prosecution. ...

“This is clearly designed to make the proceedings quicker and more efficient.”

While the differing positions on the definition are noted, the current definition continues to meet its original purpose and no changes to the definition of anti-social behaviour are recommended.

6. Comments by section

6.1 Section 5 Application for PBO

Section 5 provides that a prosecutor in criminal proceedings may make an application for a PBO against the accused person at any time:

- (a) after the court has convicted the person; and
- (b) before the court has sentenced the person.

Section 3 provides the definition of prosecutor:

prosecutor, in relation to PBO proceedings, means —

- (a) if the related prosecution was in the Supreme Court, the District Court or the Children’s Court exercising jurisdiction under *Children’s Court of Western Australia Act 1988* section 19B(4) — the authorised officer (as defined in the *Criminal Procedure Act 2004* section 80) who commenced the prosecution or another such authorised officer; or
- (b) if the related prosecution was in a court of summary jurisdiction — the person referred to in the *Criminal Procedure Act 2004* section 20(3) who commenced the prosecution or another such person.

WA Police submit that the use of the term ‘make’ means ‘sign’. At the time of the statutory review, the State Solicitor’s Office (SSO) prepared all applications for a PBO on behalf of WA Police and forwarded the application to an internal PBO unit within WA Police for the application to be signed and dated. WA Police advised that the preferred practice, due to the definition of ‘prosecutor’ in section 3, has been that the application is signed by the prosecution notice prosecutor (ie the last charging officer). In many cases, the person to be constrained is due in court the following day and the charging officer cannot be located due to leave or work commitments to sign the document. In these circumstances the application is signed and dated by the police prosecutor.

From 30 June 2014, the responsibility for the preparation of applications for a PBO falls to individual police districts. WA Police submit that it should be determined if the officer preparing the application in each district within WA Police is able to sign on behalf of the last charging officer in instances where the charging officer cannot be readily located.

The Department of the Attorney General sought advice from the State Solicitor’s Office in relation to this matter and it has been determined that the current definition of ‘prosecutor’ in the Act may be construed to provide that another police officer can sign a completed PBO application, but, to avoid doubt, legislative amendment may be preferred.

Recommendation 1: That the *Prohibited Behaviour Orders Act 2010* is amended to make it clear that another police officer can sign a completed prohibited behaviour order application on behalf of the charging officer who commenced the application.

6.2 Section 6 Court may make PBO after sentencing

Relevant offence

Subsection 6(1) provides that:

Subject to subsection (4) and section 17, a court that has sentenced a person for an offence may, after imposing the sentence, make a PBO against the person.

Subsection 8(2) provides that:

Grounds for making a PBO exist if –

- (a) the person-
 - (i) committed and was convicted of a relevant offence; and
 - (ii) during the period of 3 years after that conviction again committed, and was convicted of, a relevant offence;

The Department of the Attorney General is aware that when considering an application for a PBO in the Perth Magistrates Court on 8 August 2013, Magistrate Scaddan remarked that:

The Applicant submits that s.5(1) of the PBO Act does not expressly require the 'grounding offence' for an application to be a 'relevant offence' and that s.6(2) of the PBO Act provides that a court may make a PBO after sentencing a person for 'an offence' rather than for a 'relevant offence'. Further, given the PBO Act uses 'relevant offence' is (sic) some sections and 'offence' in others, the omission of the word 'relevant' in s.6 must have meaning.

For clarity, the Department submits that subsection 6(1) should be amended to insert the word 'relevant' before the word 'offence' as it is the intention of the Act to provide a mechanism to prevent offenders who have been convicted of an offence involving anti-social behaviour from engaging in further anti-social behaviour offences.

Recommendation 2: That subsection 6(2) is amended to make it clear that a court must have sentenced a person for a *relevant* offence before making a PBO against a person.

Serving hearing notices

Subparagraph 6(4)(d)(ii) provides that a court that has sentenced a person for an offence may make a PBO against a person if the person 'has personally been given a hearing notice at least 7 days before the PBO proceedings'.

At the time of the statutory review, police personally served hearing notices under section 6(4)(d)(ii). WA Police submit that as a PBO is a civil order made in a civil court, this function may be more appropriately carried out by the Sheriff's Office. WA Police also notes that there is no substitute clause or delegation from the service by the Registrar and no indemnity for the Sheriff's Office staff in the Act as in the *Civil Judgment Enforcement Act 2004*.

Conclusion

The issue of serving documents was examined following the enactment of the *Prohibited Behaviour Orders Act 2010*. It was determined that a registrar must give a hearing notice to each party of the adjourned hearing date, although the registrar can either serve this personally or by post. In considering the matter of personal service of a hearing notice, the validity of regulation 10 of the Restraining Orders Regulations 1987 was considered, which allows personal service to be effected by the registrar, a police officer, a prison officer or a person authorised by the registrar. That regulation is consistent with section 10 of the *Restraining Orders Act 1997*.

The issue of whether service of documents in relation to the PBO Act could be undertaken by a bailiff contractor was also examined. However, in the absence of protections for delegates of the Sheriff under the PBO Act and the restrictive processes, such arrangements could not be made at that time. Even if protections are provided under the PBO Act to enable the Sheriff and his delegates to serve PBO documents, there would be no guarantee that a suitable contract could be secured with a service provider.

Consequently, it may be preferable to amend the PBO Act to provide that the service of documents, including a hearing notice under section 6, can be undertaken by the prosecutor which will enable police officers to serve such documents.

Recommendation 3: That the *Prohibited Behaviour Orders Act 2010* is amended to provide that the service of all documents under the Act can be undertaken by police officers as the prosecuting agency.

6.3 Section 9 Matters to be considered by court

The terms of reference sought comment on the circumstances to be considered in determining whether a PBO application is appropriate. Section 9 provides that:

- (1) When considering whether to make a PBO against a person, a court must have regard to —
 - (a) the desirability of protecting other persons and property from acts that constitute relevant offences; and
 - (b) the degree of hardship that may be caused to the person if the PBO is made.
- (2) A court must have regard to the matter set out in subsection (1)(a) as being of primary importance.
- (3) When considering whether to make a PBO against a person, a court may have regard to all or any of the following —
 - (a) other current legal proceedings involving the person;
 - (b) any criminal record of the person;
 - (c) any sentence to which the person is subject;
 - (d) any order, made under a written law, that applies to the person or, if the person is a youth, a person responsible for the care, welfare or development of the person;
 - (e) any previous behaviour of the person that is similar to the behaviour in relation to which the PBO is being considered by the court;
 - (f) the extent to which the person complied with any previous PBO;
 - (g) other matters the court considers relevant.

The ALSWA submits that to date, PBO applications that it defended against have been predominantly made against socio-economically disadvantaged, poorly-educated, unemployed, poly-drug addicted, mentally ill, homeless Aboriginal people and that many respondents have little capacity to understand what the application means, let alone comply with an order if it is made. The ALSWA provided nine case studies to demonstrate the nature of PBO applications they consider inappropriate; three have been summarised as follows;

- a homeless, alcoholic Aboriginal man who has cognitive impairment as a result of sniffing solvents, has a PBO restricting him from the Perth CBD and Northbridge for 18 months which he has breached on two occasions;
- a homeless, alcoholic Aboriginal woman who has experienced domestic violence, and has several serious health issues has a PBO restricting her from the Perth CBD and Northbridge and therefore preventing her access to homeless services in Northbridge and programs to assist her alcohol issues; and the publication of her personal details on the website could compromise her safety as a victim of domestic violence; and
- a homeless Aboriginal man who suffers for cognitive impairment and serious psychological problems who has abused alcohol and drugs from an early age and has recently been admitted to Graylands Hospital. He was in custody in relation to criminal matters at the time of the PBO application hearing and appeared in court in a distressed condition and not wearing a shirt. A PBO was granted for 18 months restricting him from Northbridge.

The ALSWA notes that the object of the Act is 'to make orders that constrain offenders who have a history of anti-social behaviour and for related purposes' and that courts have been urged to have regard to the entirety of a respondent's criminal history when considering a PBO application. As most Aboriginal respondents have criminal histories spanning a number of years comprising numerous prescribed offences, ALSWA submits it is gravely prejudicial and borders on the impossible if an Aboriginal respondent is asked to provide instructions on each and every prior conviction which may qualify as a prescribed offence under the PBO Act. In the unlikely event that an Aboriginal respondent gave evidence at a PBO application hearing, based on ALSWA experience, their capacity to give coherent evidence in relation to their criminal history is likely to be minimal or non-existent.

It was further submitted that subsection 9(3) makes a person's entire criminal record relevant to the court when considering whether to make a PBO against a person, however, section 7(2) of the *Sentencing Act 1995* provides that a person's criminal record is not an aggravating factor in sentencing. In a similar vein, section 7(2) of the *Sentencing Act* provides that a previous sentence which has not achieved the purpose for which it was imposed is also not to be regarded as an aggravating factor for sentencing purposes. The ALSWA submits these important principles are ignored in the PBO Act.

Other stakeholder input noted that section 9 sets out matters to which the court must or may have regard in considering whether to make a PBO against a person which includes the extent to which the person complied with any previous PBO. However the Act is silent in relation to an assessment of whether the person is likely to comply with a PBO if one is made by the court. This reveals an undesirable departure from the established practice of the court's criminal jurisdiction when considering whether or not to impose orders against a person. It was also noted that before imposing specific court orders on a person when sentencing that person, there is a legislative requirement for the court to consider or receive information that it is suitable to do so. Further, a recommendation about the suitability for a court order is made based on the assessment of the offender's criminal history, compliance with any previous court or parole orders, risk of reoffending, motivation to address any factors that contribute to their offending behaviour, and capacity to comply with a proposed court order.

In relation to the issue of the likely extent of compliance, it was noted that the court's civil jurisdiction is engaged to impose constraints, the breach of which attracts criminal penalties including imprisonment, in circumstances where there is evidence before the court that the constrained person will not be able to comply with the order. In addition, it was submitted that some decisions in PBO applications have treated the likely extent of compliance with the proposed PBO as a minor consideration in whether or not to make a PBO against a person. As a consequence, it is submitted that the personal circumstances and antecedents of many PBO respondents are such that, notwithstanding a finding of capacity, there can be no confidence that the PBO will have the intended effect of protecting the public.

Further it was submitted that in deciding whether making a PBO is 'appropriate in the circumstances' as required under section 8(2)(c), the court should give greater weight to whether the PBO or constraint is actually likely to reduce the likelihood of the person committing a relevant offence. That is consistent with section 26(1)(b) of the Act which empowers the court to receive evidence on whether the PBO should be made in order to reduce the likelihood of the person committing a relevant offence. It was submitted that section 26 indicates that whilst compliance is not relevant to whether there are grounds under section 8(2) for a PBO to be made, the likely effectiveness of the PBO is a significant matter to be considered in deciding whether or not to exercise the power conferred by section 8.

It was also noted that under section 9(3)(f) a court can consider a person's compliance with previous PBO's and submitted that the court should also consider the defendants compliance with other court or parole orders as this is relevant to an assessment of whether a PBO will be appropriate in reducing the likelihood of the constrained person committing another relevant offence.

The Public Advocate advised that the Office of the Public Advocate (OPA) has been involved with four represented persons where the police have made applications for PBOs to constrain access to specified geographical areas, most commonly the Perth CBD. Two of these persons have a history of violence and have been imprisoned for extended periods, with one person's imprisonment arising from the breach of a PBO on a number of occasions. Legal representation for the four represented persons was provided by Legal Aid WA or the Aboriginal Legal Service.

The Public Advocate consulted with Legal Aid and confirmed that their submission would cover the issues of concern in relation to represented persons under the *Guardianship and Administration Act 1990*. In view of the complexity about the legal argument covered by Legal Aid, the Public Advocate reframed from replicating those issues but provided a case study of a represented person to illustrate the ineffectiveness of placing constraints on a person with a decision making disability.

Person A

Person A is considered to be institutionalised having been incarcerated over 100 times as an adult. The represented person has an intellectual disability, has a personality disorder and a history of self-harm with extensive presentation to emergency and mental health services in crisis but is reluctant to engage with community mental health services. Person A is eligible for services by the Disability Services Commission (DSC) and lives in supported accommodation provided by DSC. The Consultant Forensic Psychiatrist identified that while person A could understand the basic concept of the proposed PBO, person A would not be able to comply with a PBO given the history of breaching many legal orders. Following the making of a PBO in June 2012, person A was:

- remanded in custody within a couple of weeks of the making of the PBO;
- released from prison in October 2012 following the initial three month imprisonment for breaching the PBO and spent approximately 1 month in the community;
- returned to prison until June 2013 having committed 3 breaches of the PBO and after committing other offences;
- released from prison but breached the PBO within 8 days;
- placed in custody for 7 days before being released back into the community on a suspended imprisonment order;
- remanded in custody and imprisoned following a further 3 breaches of the PBO with a release date due in May 2014.

The Public Advocate submits that the key issue is whether a person's capacity to understand and comply with a PBO is a relevant factor for consideration in relation to subparagraph 9(3)(g) which provides that when considering whether to make a PBO against a person a court may consider 'other relevant matters'. As highlighted in the above case study, a person with a decision-making disability or a guardianship order may not be able to comply with the PBO although the represented person may appear to understand it. The intended effect of the constraints in the order may therefore be lost on the person and be ineffective in forcing them to manage their behaviour.

The Public Advocate notes that the court must have regard to the protection of other persons and property in the making of a PBO, under section 9(1)(a), and also the degree of hardship that may be caused to the person if the PBO is made, under section 9(1)(b). However the Act does not contemplate that the penalty of imprisonment may be an inappropriate hardship for a person with a decision-making disability.

The Public Advocate submits the Act should contain a specific provision dealing with persons who have a decision-making disability arising from their disability or mental illness and provisions which require consideration of a person's ability to comply with the proposed constraints.

Additionally, as a precaution which is consistent with the confidentiality provisions of the *Guardianship and Administration Act 1990*, the Public Advocate submits that the Act should include a provision that excludes anything that identifies, or is capable of identifying, a person who is subject to a guardianship and/or administration order made under *Guardianship and Administration Act*, including a specific reference in section 34.

Conclusion

Proceedings under the PBO Act are civil proceedings, therefore the *Criminal Law (Mentally Impaired Accused) Act 1996*, which applies to any accused before a court exercising criminal jurisdiction, does not apply. However, a breach of a PBO is an offence and subject to a fine or a term of imprisonment. The Act does not contain any specific provisions dealing with persons who have a decision making disability or a mental illness.

Section 6(4) of the Act provides that a court must not make a PBO against a person unless the court is satisfied that there are grounds for making the PBO under section 8 and the court has had regard to the matters set out in section 9. Of relevance is subsection 9(3).

Although a court may consider other relevant matters under section 9(3)(g), the court is not compelled to consider the person's capacity to understand the terms of the PBO or their capacity to be able to comply with a PBO due to intellectual disability or mental illness.

Additionally, the court is not compelled to consider whether or not the person has complied with any other court order, other than a previous PBO under paragraph 9(3)(f).

Section 14 of the Act provides that the court, *inter alia*, must explain to the constrained person the purpose, terms and effects of the PBO and consequences for the person if they contravene the constraints. However, there is nothing to ensure that the court must be satisfied that the constrained person understood the explanation other than at subsection 14(3) if the constrained person does not readily understand English.

The Department of the Attorney General is aware that WA Police has adopted a revised PBO policy in relation to PBO applications which includes *inter alia* that consideration be given to the offender's capacity to understand and comply with a PBO and their history of compliance, or non-compliance, with other police and court orders. Nevertheless, the Department of the Attorney General sought advice from the State Solicitor's Office (SSO) regarding appropriate amendments to the Act to address the concerns raised by stakeholders about a person's capacity to understand the terms of a PBO made against them and their capacity to comply with the constraints of a PBO and compliance or non-compliance with other court orders made against the respondent.

Although not strictly necessary, SSO concluded that it would be beneficial to amend the PBO Act to make it clear that a court must consider a respondent's capacity to understand and comply with a PBO.

In relation to whether it will be practicable for the court in relation to PBO hearings to have regard to the extent to which the person complied with any other court orders made against the person, and whether this would add an administrative burden to the work of the prosecutor, SSO considers that it would not, provided that section 9(3) remains discretionary as opposed to mandatory.

In relation to the issue of being consistent with the confidently provisions of the *Guardianship and Administration Act 1990* if a person under a guardianship order has a PBO made against them as raised by the Public Advocate, it has been established that the Public Advocate is willing to receive enquiries from WA Police to determine if a potential PBO respondent is the subject of a guardianship order and the State Solicitor's Office has confirmed that no legislative amendment will be required to support this information sharing arrangement. Such information provided to WA Police at the application stage may assist in reducing the number of people who have a decision making disability being subject to a PBO application and will avoid wasted time and resources associated with bringing applications to court that involve a represented person who may lack the capacity to comply with a PBO.

Given that there may be situations where the prosecutor proceeds with an application for a PBO despite the person being a represented person, or where a person with a decision making disability is not subject to a plenary guardianship order, it will be useful to ensure that the court is aware of the outcome of an enquiry made by WA Police to the Public Advocate. This will assist the court to determine its decision regarding the making of the PBO, the constraints to be imposed and if the person will be able to comply with those constraints, and whether the identifying details of the person are to be published on the PBO website. Advice received from the State Solicitor's Office confirms that this can be achieved through a legislative amendment to the PBO Act to make it necessary to require a prosecutor to enquire about the capacity of the person, or alternatively, by ensuring the court is aware of whether such an enquiry has been made. This can be achieved by amending the 'approved form' that is required to be completed by the prosecutor to indicate that an enquiry has been made as to whether the respondent is subject to a guardianship order. This would not make the enquiry mandatory, but will be a useful trigger to the applicant and the court. Additionally, section 9(3) of the PBO Act could be amended to expressly include reference to whether a person is subject to a guardianship order.

Recommendation 4: That the *Prohibited Behaviour Orders Act 2010* is amended to provide that when considering whether to make a PBO against a person, a court may have regard to the extent to which the person complied with any other court order made against the person.

Recommendation 5: That section 9 of the *Prohibited Behaviour Orders Act 2010* is amended to provide that when considering whether to make a PBO against a person, the court may have regard to whether that person is subject to a guardianship order under the *Guardianship and Administration Act 1990*.

Recommendation 6: That the Chief Magistrate is asked to consider amending the approved form under the *Court (Civil Proceedings) Rules 2005* Rules to include a check box to indicate if the prosecutor has made enquiries as to whether the respondent is subject to a guardianship order under the *Guardianship and Administration Act 1990* to act as a trigger to the applicant to contact the Public Advocate.

6.4 Section 10 Constraints imposed by PBO

The PBO Act provides prosecutors an opportunity to present to the court, by way of a PBO application, a mechanism to modify an offender's behaviour to prevent further offending.

Section 10(2) of the PBO Act provides that:

In making a PBO a court may impose such constraints on otherwise lawful activities and behaviour of a person as the court considers reasonably necessary to reduce the likelihood of the person committing a relevant offence.

Section 10(3) provides a list of constraints that may be imposed under section 10(2). These include:

- (a) entering or remaining on, or being near, specified premises or a specified locality or place;
- (b) engaging in behaviour of a specified kind, either at all or in a specified place, at a specified time or in a specified manner;
- (c) approaching within a specified distance of a specified person;
- (d) communicating, or attempting to communicate, (by a specified means or by whatever means) with a specified person;
- (e) being in possession of a specified thing or a specified class of thing;
- (f) causing another person to engage in conduct of a type referred to in paragraphs (a) to (e).

These constraints are considered to be precursor acts to prevent the offender from commissioning further anti-social type offences.

Stakeholders noted that applications for PBOs instituted by WA Police in the Perth Magistrates Court have repeatedly sought orders constraining respondents from entering the Perth CBD, East Perth, and Northbridge, and such restrictions create great hardship because these are precisely the public places the respondents identify as their home base. It was submitted that many respondents have little capacity to understand what the application means, let alone comply with an order if it is made. Further, that the majority of respondents are homeless and the urban architecture of the Perth CBD and Northbridge areas are commonly the only practical shelter a homeless person can seek when sleeping rough and homeless support services and agencies such as soup kitchens and drop in centres are located in these areas.

The review was advised that typically constraints sought through a PBO include a description of the exclusion area bounded by a list of various streets which is difficult to understand and requires the capacity to visualise the geography of the inner city and specific parts of streets. Such constraints are often expressed as 'commencing from the southern corner of Barrack Street and St George's Tce, continuing west along the southern border of St George's Tce to William Street, north along the western boundary of William Street to Wellington Street...'. Such constraints present almost insurmountable problems of comprehension and understanding for unsophisticated, poorly educated respondents with low levels of literacy and impaired cognitive skills.

Stakeholders noted that the categories of constraints contained in each of the PBO's published on the PBO website in April 2014 included:

1. entering public property or areas – 12 (individuals)
2. entering or conducting business in pawn brokers – 4
3. associating with specific individuals – 2
4. behaviour that is or can be prohibited without a PBO – 54

Stakeholders submitted that the fourth category could be divided into five subcategories:

- i. entry to private property – 11
- ii. anti-graffiti constraints – 9
- iii. disorderly conduct and being intoxicated in public – 20
- iv. stealing, fraud and burglary offences – 9
- v. matters within the *Liquor Control Act 1988* – 5

Noting that a constraint in a PBO can only extend to constrain otherwise lawful activity and cannot seek to constrain activity that is already unlawful, stakeholders submitted that some PBOs include constraints that seem to be directed towards existing offences. Where a constraint does seek to apply to unlawful activity, the constraint could be argued to be invalid as going beyond the scope of the PBO Act, duplicative with the existing criminal law; could not be said to be 'reasonably necessary' to reduce the likelihood of the commission of a relevant offence; and undermines the view that the PBO is 'appropriate in the circumstances' given it may seek to do no more than prohibit what is already prohibited. Examples given included:

- *The Criminal Code* criminalises the possession of graffiti implements under sections 557A and 557G. Given section 557A and section 31A of the *Evidence Act 1906*, the element of intention in section 557G (which is not included in the PBO constraint) is unlikely to create any real obstacle to obtaining a conviction in circumstances where the constrained person has a significant history of committing graffiti offences.
- A constraint against being in company with another person with graffiti implements does not add much to the operation of section 557G, when read with section 7 and 8 of *The Criminal Code*.
- Possession of tools and housebreaking implements is dealt with in sections 407, 557A, 557E and 557F in *The Criminal Code*.
- Constraining persons from being 'noticeably impaired by alcohol' in a public place – the behaviour of public drunkenness would be considered disorderly conduct within the scope of section 74A of *The Criminal Code*. Some constraints extend to the consumption of alcohol in public and outside licensed premises which is already prohibited by section 119 of the *Liquor Control Act 1988*.

It was also submitted that some PBOs have been designed to target specific relevant offences, but have been expressed in a sufficiently general way to potentially cover both lawful and unlawful activity, and that PBOs are being used in circumstances where there are existing mechanisms that can prevent or criminalise the same behaviour.

Conclusion

The Department of the Attorney General sought advice from the State Solicitor's Office regarding the concerns raised by stakeholders regarding PBOs being made to constrain a person from unlawful activities and behaviours. Having considered various examples provided by the Department, SSO confirmed that a PBO would be invalid if it imposed a constraint on a respondent's unlawful activities and behaviours, but where a PBO constraint is sufficiently broad and covers both unlawful and lawful activities, it is considered that a PBO would be valid to the extent that it has work to do to restrain lawful activity. Consequently, it is considered that the operation of section 10 of the PBO Act is working as intended.

6.5 Section 11 When PBO comes into force

Section 11 provides that:

If a court makes a PBO, it comes into force-

- (a) if the related sentence is not a term of imprisonment, or is a term of imprisonment that is suspended –
 - (i) at the conclusion of the proceedings in which the PBO is made; or
 - (ii) if a later time is specified in the PBO – at that time;
- (b) if the related sentence is a term of imprisonment that is not suspended –
 - (i) when the constrained person is released from custody in respect of the sentence or any other sentence of imprisonment the constrained person has to serve concurrently or cumulatively with that sentence; or
 - (ii) if a later time is specified in the PBO – at that time.

WA Police notes that subsection 11(b) provides that if a court makes a PBO and the related sentence is a term of imprisonment, then the PBO comes into force when the constrained person is released from custody or at a later time specified in the PBO. WA Police submit that the Act should be amended to provide that where a person subject to a PBO is imprisoned for another offence that is an offence not related to a breach of a PBO, the period of duration of the PBO should stop when the constrained person is received into prison and commence again once that sentence has been completed.

Conclusion

The proposal to suspend a PBO while a constrained person is in prison for an offence not related to the breach of a PBO and to restart the PBO upon release from prison may add unnecessary complexity to the PBO scheme. At this stage there has not been evidence identified which would indicate that such a change is necessary or would be beneficial.

6.6 Section 26 – Evidence in PBO proceedings

The ALSWA submits that most Aboriginal respondents are completely incapable of providing instructions in relation to alleged offending constituting anti-social behaviour by dint of their social and health circumstances and therefore it is almost impossible for Aboriginal respondents to discharge the reverse onus of proving to the contrary that an offence does not involve anti-social behaviour. The ALSWA submit that no witnesses, including police officers, have been called to a PBO application hearing to give *viva voce* evidence in relation to offending alleged to constitute anti-social behaviour and therefore, no witness has been cross examined as to whether the offending is truly anti-social in character. Rather, statements of material facts are relied upon as proof of offending constituting anti-social behaviour which are, by definition, limited to a summary of alleged offending only and are notorious for being inaccurate or incomplete. The ALSWA is strongly of the view that, on almost every level, the PBO Act itself, along with the way PBO applications are conducted, is inherently procedurally unfair.

Conclusion

While the view of the ALSWA regarding PBO proceedings is noted, this relates to the application procedures adopted by the prosecutors and therefore no changes to the PBO Act are recommended.

6.7 Section 34 Publication of details of constrained people

It was submitted to the review that publication of a person's name, photograph, place of residence and the nature of the constraint imposes a serious encroachment on the privacy of a citizen, especially where no criminal offence has been committed and where these details could be republished by anyone in any manner. There is concern that the publication of personal details and photograph of the constrained person contributes to the negative stereotyping and racial vilification and the risk of vigilantism in these circumstances cannot be underestimated. Further, it was submitted that homeless people who are the subject of PBOs are in almost daily contact with police, making enforcement of PBOs through publication on the website otiose.

Stakeholders also noted that the use of the PBO website was established as a tool to encourage compliance with a PBO and to assist in the enforcement of breaches of a PBO. However, it was suggested that there is no information that indicates a constrained person has been identified by police through contact from a member of the public solely due to the publication of the details of their PBO on the website and that in most cases, breaches are the result of a member of the public seeking police assistance in relation to some other reason relating to the constrained person's behaviour. Further, it was submitted that:

- the publication of details of juvenile offenders is an undesirable exception to laws designed to protect the identity of children involved in criminal proceedings;
- the website reveals the outcome but does not provide information about what offences were committed, frequency of the offences, the personal circumstances of the offender or what opportunities the offender had to be rehabilitated; and
- publication may further entrench anti-social behaviour and run contrary to the goal of rehabilitation and affect prospects for gaining employment.

As mentioned earlier in this report in relation to section 9, the Public Advocate submits that as a precaution which is consistent with the confidentiality provisions of the *Guardianship and Administration Act 1990*, the PBO Act should include a provision that excludes anything that identifies, or is capable of identifying, a person who is subject to a guardianship and/or administration order made under *Guardianship and Administration Act*, including a specific reference in section 34.

Conclusion

The publication of the details of persons that have a PBO made against them is an important aspect of the PBO scheme. Although there was no strong evidence provided in the submissions to support amendments to section 34 in relation to its operation and effectiveness, there is merit in considering providing stronger protections for people with a decision making disability as proposed by the Public Advocate. The recommendations made earlier in this report aim to assist the prosecutor and the court in determining whether a person has the capacity to understand the terms of a PBO or would be able to comply with the constraints of a PBO made against them and will assist in addressing the concerns raised about people with a decision making disability having their details published on the PBO website.

Photographs

WA Police submit that section 34(2)(b) places a mandatory obligation on the CEO (of the Department of the Attorney General) to publish a photograph of the constrained person. Subsection 34(6) provides that the CEO may request the Commissioner of Police to provide the most recent photograph of the constrained person in the Commissioner's possession, unless otherwise ordered by a court not to publish a photograph. Although it would be unlikely that WA Police would not have a photograph, WA Police notes there is no power in the Act to take a photograph once the matter has been dealt with by the court and submit that the Prohibited Behaviour Orders Regulations 2011 be amended to provide WA Police with the power to take a photograph once the matter has been dealt with by the court if a recent photograph is not available and that WA Police should be provided with the power to detain the constrained person for the purpose of taking the photograph and for other law enforcement purposes to be served by the photograph.

Conclusion

Providing powers to WA Police to detain a constrained person once a matter has been dealt with by a court would be unreasonable. As it has been indicated that there would be few circumstances where a photograph is not in the possession of police it is suggested that this matter could be dealt with administratively by WA Police by determining if a photograph is in their possession following the arrest of an offender and prior to applying for a PBO using existing powers.

6.8 Section 35 Breach of PBO

Penalties

The Penalty for a breach of a PBO is provided in section 35 as follows:

- (a) if the PBO was made by the Children's Court — a fine of \$2 000 or imprisonment for 2 years or both;
- (b) if the PBO was made by the Magistrates Court — a fine of \$6 000 or imprisonment for 2 years or both;
- (c) if the PBO was made by the Supreme or District Court — a fine of \$10 000 or imprisonment for 5 years or both.

In their submission, WA Police advised that as at 7 May 2014 there had been 121 breaches of PBOs by 19 constrained persons. Of these persons, 15 had breached on multiple occasions. One offender breached 27 times and another offender breached 12 times and both received penalties of fines only. A further offender breached 20 times with a penalty

ranging from a fine of \$50 to suspended imprisonment. Only 4 of the offenders who breached on multiple occasions received a term of imprisonment. Whilst acknowledging that the particular circumstances of each individual case is not known, WA Police submit that on face value acceptance of the PBO Act seems to have been varied among Magistrates. WA Police considers that the penalties in section 35 relating to breaches of PBOs are adequate but notes that in the second reading speech it was stated that "...it is expected that a breach of a PBO will be recognised as a serious matter by courts, which will result in very significant penalties up to the statutory maximums...".

WA Police submit that, subject to further examination of the circumstances of each particular case, consideration is given to implementing a mechanism to have the Act applied more consistently.

Agencies representing defendants noted that one way a PBO can be effective is by giving police the power to arrest a constrained person for breaching the PBO before they have committed a relevant offence but question whether the PBO has helped address the recidivist behaviour of the constrained person. For instance where a PBO constrains entry to certain places, it was suggested that the PBO may have the effect of simply diverting the constrained person's criminal behaviour to other locations. Therefore, whilst there was compliance with a PBO, it could not be said that it was completely effective in reducing the person's reoffending.

Conclusion

The issues raised in relation to breaches of PBOs illustrate the need for more judicious consideration of the appropriateness of making a PBO against an offender who has a history of anti-social offences and breaches of other court orders to ensure that the most vulnerable members of the community are not inappropriately criminalised.

This can be addressed by assessment by prosecutors when considering applying for a PBO about the capacity of the offender in being able to comply with constraints of a PBO and by amending the PBO Act to provide that a court may give consideration to the capacity of the offender to understand the terms of a PBO sufficiently to enable them to comply with the constraints of a PBO made against them and the extent to which the person complied with any other court orders made against the person as recommended earlier in this report.

In relation to the concern of WA Police that the Act should be applied more consistently this issue can be raised directly by WA Police with the Chief Magistrate.

7. Summary

The statutory review into the operation and effectiveness of the *Prohibited Behaviour Orders Act 2010* was undertaken three years after it came into operation. During that time only a few issues were identified by stakeholders that could be addressed by making amendments to the Act.

These include the need to provide certainty that another police officer can sign a completed PBO application on behalf of another police officer and that police officers can serve all documents relating to PBOs, despite PBO matters being part of civil proceedings.

The third issue is in relation to the term 'relevant offence' and the fact that section 6(2) refers only to an 'offence'. Amending section 6(2) to include the term 'relevant offence' will remove any doubt that the person must have been sentenced for an offence involving anti-social behaviour in order for a PBO to be made against that person.

While the issue of the definition of ‘anti-social behaviour’ was raised in the review with comments including that the term is vague, the concept broad, that the term could potentially apply to any offence, and the task of rebutting the presumption is made more difficult because of the imprecise definition of anti-social behaviour, the review concludes that the current definition of anti-social behaviour continues to meet its original purpose and therefore, no recommendations for amendment are made in this regard.

The review also makes three recommendations to amend the Act to provide better protection for vulnerable members of the community from having a PBO made against them when it is highly likely that they will be unable to comply with the constraints of a PBO due to cognitive impairment. The recommended amendments will provide that a court may have regard to the extent to which a person complied with any other court orders; that a court may have regard to whether the person is subject to a guardianship order under the *Guardianship and Administration Act 1990*; and that the Chief Magistrate is asked to consider amending the form under the *Court (Civil Proceedings) Rules 2005* to include a check box to indicate if the prosecutor has made enquiries as to whether the person is subject to a guardianship order which will act as a trigger to the prosecutor to make such an enquiry to the Public Advocate.

8. Recommendations

Recommendation 1: That the *Prohibited Behaviour Orders Act 2010* is amended to make it clear that another police officer can sign a completed prohibited behaviour order application on behalf of the charging officer who commenced the application.

Recommendation 2: That subsection 6(2) is amended to make it clear that a court must have sentenced a person for a *relevant* offence before making a PBO against a person.

Recommendation 3: That the *Prohibited Behaviour Orders Act 2010* is amended to provide that the service of all documents under the Act can be undertaken by police officers as the prosecuting agency.

Recommendation 4: That the *Prohibited Behaviour Orders Act 2010* is amended to provide that when considering whether to make a PBO against a person, a court may have regard to the extent to which the person complied with any other court order made against the person.

Recommendation 5: That section 9 of the *Prohibited Behaviour Orders Act 2010* is amended to provide that when considering whether to make a PBO against a person, the court may have regard to whether that person is subject to a guardianship order under the *Guardianship and Administration Act 1990*.

Recommendation 6: That the Chief Magistrate is asked to consider amending the approved form under the *Court (Civil Proceedings) Rules 2005* Rules to include a check box to indicate if the prosecutor has made enquiries as to whether the respondent is subject to a guardianship order under the *Guardianship and Administration Act 1990* to act as a trigger to the applicant to contact the Public Advocate.

Offences to be taken to involve anti-social behaviour

<i>Bush Fires Act 1954</i>	
Provision	Description of offence
s. 32	Offences of lighting or attempting to light fire likely to injure

<i>The Criminal Code</i>	
Provision	Description of offence
s. 68B	Being armed in or near place of public entertainment
s. 68C	Being armed in public in company
s. 68	Being armed in a way that may cause fear
s. 69	Forcibly entering land
s. 70A	Trespass
s. 71	Fighting in public causing fear
s. 74	Threatening violence
s. 74A	Disorderly behaviour in public
s. 74B	Causing fear or alarm to people in conveyances and others
s. 77	Conduct intended to incite racial animosity or racist harassment
s. 78	Conduct likely to incite racial animosity or racist harassment
s. 80A	Conduct intended to racially harass
s. 80B	Conduct likely to racially harass
s. 171	Creating false belief
s. 172	Obstructing public officers
s. 202	Obscene acts in public
s. 203	Indecent acts in public
s. 204	Indecent act with intent to offend

<i>The Criminal Code</i>	
Provision	Description of offence
s. 204A	Showing offensive material to children under 16 years of age
s. 313	Common assaults
s. 317	Assaults occasioning bodily harm
s. 318	Serious assaults
s. 338A	Threats with intent to influence
s. 338B	Threats
s. 338E	Stalking
s. 378	Stealing a motor vehicle on conviction for which a summary conviction penalty is imposed under <i>The Criminal Code</i> section 426(3)
s. 378	Stealing a thing having a value that does not exceed \$1 000 on conviction for which a summary conviction penalty is imposed under <i>The Criminal Code</i> section 426(4)
s. 392	Robbery
s. 393	Assault with intent to rob
s. 401	Burglary on conviction for which a summary conviction penalty is imposed under <i>The Criminal Code</i> section 401
s. 444	Criminal damage
s. 445A	Breaching a duty under s. 444A
s. 445	Damaging property

<i>Criminal Investigation Act 2006</i>	
Provision	Description of offence
s. 153	Failure to comply with an officer's order under the <i>Criminal Investigation Act 2006</i>

<i>Liquor Control Act 1988</i>	
Provision	Description of offence
s. 115(6)	Remaining in an area adjacent to licensed premises after having been refused entry to, or required to leave, the premises
s. 115(7)	Re-entering licensed premises within 24 hours of being refused entry to, or required to leave, the premises
s. 119(1)	Consuming liquor in a place or premises without the consent of the occupier or person having control of the place or premises
s. 119(2)	Bringing liquor into, or possessing or consuming liquor in, a sports ground or stadium
s. 119(4)	Consuming liquor in a public place except under an exemption, licence or permit
s. 121(3)	Purchasing or obtaining liquor on licensed premises on behalf of a juvenile
s. 123(1)	Juvenile purchasing, obtaining or consuming liquor on, or bringing liquor onto, licensed or regulated premises
s. 123(2)	Juvenile possessing liquor in a public place
s. 124	Sending a juvenile to licensed or regulated premises for the purpose of obtaining liquor
s. 126(4)	Re-entering licensed or regulated premises within 24 hours of being required to leave, or removed from, the premises under section 126
s. 126(5)	Remaining in an area adjacent to licensed premises after having been required to leave, or being removed from, the premises

<i>Misuse of Drugs Act 1981</i>	
Provision	Description of offence
s. 5	Offences concerned with prohibited drugs and prohibited plants in relation to premises and utensils
s. 6	Offences concerned with prohibited drugs generally
s. 7	Offences concerned with prohibited plants generally

<i>Prostitution Act 2000</i>	
Provision	Description of offence
s. 5	Seeking prostitute in or in view or within hearing of public place
s. 6	Seeking client in or in view or within hearing of public place

<i>Public Transport Authority Act 2003</i>	
Provision	Description of offence
s. 64B	Contravention of a prohibition order

<i>Public Transport Authority Regulations 2003</i>	
Provision	Description of offence
r. 7	Interfering with Authority property
r. 13	Causing nuisance or annoyance to persons in or on a conveyance or facility
r. 15	Damaging a conveyance or facility
r. 40	Obstructing an authorised person

<i>Road Traffic Act 1974</i>	
Provision	Description of offence
s. 59	Dangerous driving causing death, injury etc.
s. 59A	Dangerous driving causing bodily harm
s. 60	Reckless driving
s. 61	Dangerous driving
s. 62	Careless driving
s. 62A	Causing excessive noise, smoke
s. 63	Driving under the influence of alcohol etc.
s. 64	Driving with blood alcohol content of or above 0.08

<i>Road Traffic Act 1974</i>	
Provision	Description of offence
s. 64AA	Driving with blood alcohol content of or above 0.05

<i>Weapons Act 1999</i>	
Provision	Description of offence
s. 6	Prohibited weapons
s. 7	Controlled weapons
s. 8	Other articles carried or possessed as weapons