

DANGEROUS SEXUAL OFFENDERS LEGISLATION AMENDMENT BILL 2017

EXPLANATORY MEMORANDUM

Overview of the Bill

The Dangerous Sexual Offenders Legislation Amendment Bill 2017 seeks to amend the *Dangerous Sexual Offenders Act 2006* (WA) (DSO Act) and *Bail Act 1982* (WA) (Bail Act).

Part 2 of the Bill contains the amendments to the Bail Act which seek to strengthen the overall Dangerous Sexual Offender (DSO) regime by introducing a presumption against bail for dangerous sexual offenders who are charged with breaching a DSO supervision order.

Part 3 of the Bill sets out the amendments to the DSO Act. A number of sections are amended to require a court to be satisfied, on a balance of probabilities, that the offender will substantially comply with all 'standard conditions' placed on them before making a community supervision order and the dangerous sexual offender will bear the onus of proving this. The standard conditions are defined as those conditions which are required to be imposed on a supervision order under section 18(1) of the DSO Act.

The Bill proposes a new section 27A which relates to interim supervision orders. This amendment is in part required as a result of issues raised in *State of Western Australia v Narkle [No 5]* [2017] WASC 46; that is, to deal with circumstances where a further application against a person under a DSO supervision order is not yet disposed of and the current supervision order is due to expire.

The Bill also seeks to clarify the definition of 'commit a serious sexual offence' in the DSO Act; ensures that where an offender is not already before the court, only a warrant and not a summons may be used to bring the offender before the court to face contravention proceedings; and to facilitate applications for section 23 orders when a charge has already been laid against an offender for breach of a supervision order.

Part 1 - Preliminary

Clause 1 Short title

Clause 1 provides that the Bill, once enacted, will be known as the *Dangerous Sexual Offenders Legislation Amendment Act 2017*.

Clause 2 Commencement

Clause 2 provides for the commencement of the Act.

Part 1 comes into effect on the day the Act receives Royal assent. The rest of the Act will come into operation on a day fixed by proclamation. Different days may be fixed for different provisions of the Act.

Part 2 - *Bail Act 1982* amended

Clause 3 Act amended

This clause provides that Part 2 will amend the *Bail Act 1982* (Bail Act).

Clause 4 Section 6 amended

Clause 3A of Schedule 1 Part C of the *Bail Act 1982* provides for a presumption against bail for an accused charged with a serious offence committed while on bail or early release for another serious offence. For consistency, reference to the proposed clause 3D is inserted where there is currently reference to clause 3A.

Clause 4 of the Bill thus provides that the reference to “clause 3A” in section 6(2)(b) of the Bail Act is deleted and replaced with a reference to clause 3A and proposed clause 3D. This emphasises that the considerations under proposed clause 3D must be taken into account by anyone considering an accused’s bail in compliance with section 6.

Clause 5 Section 7 amended

Clause 5, similarly to clause 4, deletes the reference to ‘clause 3A’ in section 7(5) of the Bail Act and replaces it with a reference to clauses 3A and 3D. In addition to confirming the considerations that must be taken into account in the circumstances contemplated by proposed clause 3D, this amendment serves to confirm that, except under certain circumstances, once a bail decision has been made under clause 3D, it does not have to be revisited under section 7(1) of the Bail Act.

Clause 6 Section 26 amended

This clause amends both sections 26(1)(ba) and 26(2)(aa) of the Bail Act. Section 26 requires a record of bail decisions and reasons to be kept in relation to certain matters and pursuant to the amendment will include grants of bail in cases to which proposed clause 3D applies.

Clause 7 Schedule 1 Part C clause 1 amended

Clause 7 amends clause 1 of Schedule 1 Part C to the Bail Act to cross-reference new clause 3D in that Schedule. To effect this the reference to ‘clauses 3A and 3C’ is deleted and replaced with ‘clauses 3A, 3C and 3D,’.

Clause 8 Schedule 1 Part C clause 2 amended

Clause 8 amends clause 2(3)(a) to Schedule 1 Part C of the Bail Act to cross-reference new clause 3D in that Schedule. To effect this, the reference to 'clauses 3A and 3C; and' is deleted and replaced with 'clauses 3A, 3C and 3D; and'.

Clause 9 Schedule 1 Part C clause 3D inserted

Clause 9 inserts new clause 3D into Schedule 1 Part C to the Bail Act.

Proposed clause 3D(1) sets out the terms to be used in this clause providing the link to the DSO Act:

'section 40A offence' means the offence under the DSO Act section 40A of contravening a requirement of a supervision order; and

'victim' has the meaning given in section 3(1) of the DSO Act; that is, 'a person upon whom a serious sexual offence has been committed by a person who is or has been an offender'.

Proposed clause 3D(2) provides confirmation that clause 3D applies where an accused is in custody awaiting an appearance in court before conviction for a section 40A offence; or waiting to be sentenced or otherwise dealt with for a section 40A offence of which the accused has been convicted.

Proposed clause 3D(3) provides for the presumption against bail. It obliges the judicial officer or authorised person (the decision-maker) to refuse to grant bail for the section 40A offence unless satisfied that there are exceptional reasons why the accused should not be kept in custody; and is satisfied that bail may properly be granted having regard to the usual bail provisions.

Proposed clause 3D(4)(a) sets out those matters which the decision-maker must have regard to; that is, any history of proven or alleged contraventions of supervision orders by the accused; and any adverse effect that a grant of bail to the accused would have on a victim of the accused.

Under proposed clause 3D(4)(b) and (c) the decision-maker is also required to consider whether it would be appropriate to refuse bail and make a hospital order under the *Criminal Law (Mentally Impaired Accused) Act 1996* section 5; and whether the conduct alleged to amount to the contravention in itself appears to be minor or trivial.

Proposed clause 3D(5) provides that the decision-maker, in determining whether there are exceptional reasons and in considering the usual bail provisions, may take additional matters into account over and above those in clause 3D(3). It is important to note that under section 22 of the *Bail Act 1982* the decision-maker '...may in considering any case for bail receive and take into account such information as he thinks fit whether or not the same would normally be admissible in a court of law'.

Proposed clause 3D(6), cross-referenced in the amendment to section 7(5) under clause 5 of the Bill, provides that once a bail decision has been made under clause 3D, it does not have to be revisited unless the accused satisfies the judicial officer who may order detention that - (a) new facts have been discovered, new circumstances have arisen or the circumstances have changed since bail was refused; or (b) the accused failed adequately to present the case for bail on the occasion of that refusal.

Proposed clause 3D(7) provides that a child accused who is refused bail under subclause (3) must be dealt with in accordance with the *Young Offenders Act 1994* section 19(2) which relates to being taken to and placed in a detention centre.

Clause 10 Schedule 1 Part C clause 4 amended

Clause 10 amends clause 4(1) of Schedule 1 Part C to the Bail Act to cross-reference new clause 3D in that Schedule. The reference to 'clauses 3A and 3C' is deleted and replaced with 'clauses 3A, 3C and 3D,'.

Part 3 - *Dangerous Sexual Offenders Act 2006* amended

Clause 11 Act amended

Clause 11 provides that Part 3 will amend the *Dangerous Sexual Offenders Act 2006*.

Clause 12 Section 3 amended

Clause 12(1) seeks to insert a new definition of 'standard condition' in section 3(1). The purpose of this is to clarify that a 'standard condition' in relation to a supervision order, means a condition which must be placed on the order under section 18(1) of the DSO Act.

Clause 12(2) seeks to amend the definition of 'supervision order' in section 3(1). It is proposed that the term is to include reference to the proposed new section 27A(5), which is an interim supervision order that may be imposed by a court in circumstances where there has never been a supervision order imposed on the offender under the DSO Act.

Clause 13 Section 4A replaced

Clause 13 deletes current section 4A of the Act and inserts a new section 4A. The proposed section 4A seeks to clarify what is meant by the term 'commit a serious sexual offence' and ensures that there is no implication that it applies only to sexual offences actually committed. It now clearly also applies to potential or hypothetical conduct.

Clause 14 Section 8 amended

Section 8(4A) of the DSO Act currently provides that in the circumstances of that section, the DPP may only file an application with the Supreme Court seeking a further supervision order. Clause 14(1) amends section 8(4A) so as to provide that the full range of orders under Division 2 may be sought by the DPP.

Due to the range of orders which would be available to the DPP under new section 8(4A), clause 14(2) inserts new section 8(4B) to provide that an application made under section 8(4A) must make clear whether the Division 2 order sought in that application is a continuing detention order or a supervision order.

Clause 15 Section 17A amended

Clause 15 amends section 17A(2)(a) and deletes section 17A(2)(b) of the DSO Act so as to include reference to an application for a Division 2 order made under section 8(4A) of the Act. These amendments are consequential on that proposed at clause 14.

Clause 16 Section 17 amended

Clause 16 is the first of a number of proposed amendments which seek to place the onus of proof on the offender in relation to satisfying the court that they will comply with the conditions of a supervision order if one is granted.

Clause 16(1) deletes the words 'In deciding' at section 17(2) of the DSO Act and replaces them with 'Subject to subsection (3), in deciding'. The effect of this amendment is to clarify that while the paramount consideration for Division 2 orders is the need to ensure adequate protection of the community, a court cannot make a supervision order unless satisfied, on the balance of probabilities, that the offender will comply with the conditions stated in the order.

Clause 16(2) deletes current section 17(3) and inserts new sections 17(3) and 17(4).

Section 17(3) is deleted as a consequence of the amendments proposed at clause 14.

The proposed new section 17(3) provides that a court cannot make a supervision order for an offender under section 17(1)(b) of the DSO Act unless satisfied on the balance of probabilities that the offender will substantially comply with the standard conditions stated in that order. Note the definition of 'standard condition' contemplated at clause 12 of the Bill.

The use of the phrase 'substantially comply' affords the court discretion to make a supervision order even if it comes to the conclusion that the offender may commit a trivial breach of the standard conditions. This wording is used throughout the Bill to ensure that this requirement is met in all cases where the court is considering making a supervision order or amendments to supervision orders.

The new section 17(4) is inserted to provide that the offender bears the onus of proof to satisfy the court under section 17(3).

Clause 17 Section 20 amended

Clause 17 deletes current section 20(2) of the DSO Act and proposes a new section 20(2). Where an application is made under section 19 by a person who is subject to the supervision order the proposed amendment will have the effect of requiring the court to be satisfied that the person will substantially comply with the standard conditions as amended.

The proposed new section 20(3) is also inserted by clause 17. Section 20(3) provides that the onus of proof in satisfying the court that amended standard conditions of a supervision order will be complied with rests on the person who is subject to the order, and emphasises what is in effect the usual onus of proof under proposed section 20(2)(c).

Clause 18 Section 21 amended

Clause 18(1) proposes the deletion of the words ‘summons or’ from section 21(1) thereby providing that where a person is suspected of an actual or likely contravention of a supervision order, that person can only be brought to court under section 21 by a warrant of arrest and not a summons.

Clause 18(2) provides for a new section 21(2) and (3).

Proposed section 21(2) does not contain the provisions of section 21(2)(a) which are no longer required, and it consolidates the remainder of the current section 21(2).

Proposed section 21(3) provides that a warrant must state the suspected or anticipated contravention of a supervision order condition for which the warrant is sought, and may state it in general terms. This amendment ensures that the person who is subject to the supervision order is advised of the nature of the allegations.

Clause 18(3) deletes current section 21(4) which is required as a consequence of the proposed amendment under clause 18(1) removing the ‘summons option’.

This clause also includes a note to change the heading of section 21 to read “Warrant because of contravention”.

Clause 19 Section 22 replaced

Clause 19 replaces section 22 of the DSO Act to reflect that:

summons are no longer available to require an offender to attend court under sections 21 and 24A(5)(d) of the DSO Act as set out in the proposed new section 22(1)(a); and

the DPP may apply for orders under section 23 in relation to a person who is charged with an offence under section 40A for breach of a supervision order, in

which case the section 40A proceedings will be transferred to the Supreme Court in accordance with section 40B.

The proposed new section 22(2)(b) confirms that in all cases where an application for an order under section 23 is made, the DPP may apply for an order for the person to be detained in custody while proceedings on the application for an order under section 23 are pending. This provision reflects the availability of such an order under section 24A which is discussed under clause 21 below. An application for such a custody order may be required when a section 21 warrant is exhausted or where an offender has been released from custody under the section 40A proceedings.

Note that current section 45 provides that where the court orders that a person be detained in custody, it must issue a warrant for the person's apprehension if necessary.

Clause 20 Section 23 amended

Clause 20(1) deletes section 23(1) and (2A) of the DSO Act and inserts a new section 23(1), (1A), (1B) and (1C).

Proposed section 23(1) will provide for the orders available to a court when satisfied, on the balance of probabilities, that the person to whom the application relates has contravened or is contravening a condition of a supervision order.

Proposed section 23(1A) will provide for the orders available to a court when satisfied, on the balance of probabilities, that the person to whom the application relates is likely to contravene a condition of a supervision order.

This restructure allows for a clear indication of the circumstances under which a court must be satisfied, on the balance of probabilities, that the person will substantially comply with the standard conditions or amended standard conditions of the supervision order, as set out under the proposed section 23(1B).

In conformity with other amendments under the Bill the proposed section 23(1C) places the onus of proof on the person to whom the application relates.

Clause 20(2) amends section 23(2) to clarify that the court will be required to make an order and that the paramount consideration is the need to ensure adequate protection of the community in all cases.

Clause 21 Section 24A amended

Clause 21(1) amends section 24A(2)(a) and (b) of the DSO Act in order to clearly set out the two orders that can be made:

- (a) if the person is detained in custody, an order that the person be released, subject to proposed 24A(3); and

- (b) if the person is not detained in custody, an order that the person be detained in custody.

Clause 21(2) deletes section 24A(3). Section 24A(3)(b) is not re-inserted in any form, thus removing the ability for the DPP to consent to release and requiring the court to consider the 'exceptional circumstances' requirement in all cases under section 24A.

Clause 21(2) inserts proposed new section 24A(3) and (3A) which sets out the requirements that the court must take into account when considering release. The requirement under section 24A(3)(a) restates the current section 24A(3)(a).

Proposed section 24A(3)(b) provides that, before ordering release, a court must be satisfied, on the balance of probabilities, that the person will substantially comply with the standard conditions or amended standard conditions of the supervision order.

In conformity with other amendments under the Bill the proposed section 24A(3A) places the onus of proof on the person to whom the order relates.

Clause 22 Section 27A inserted

Clause 22 inserts proposed new section 27A into the DSO Act at the end of Part 2 Division 6 titled 'Interim supervision orders'.

The proposed new section 27A provides for the making of an interim supervision order in all circumstances where an application under section 8(1) or (4A), 19 or 22 of the DSO Act is pending, the person to whom the pending proceedings relate is not in custody, and the court is satisfied that, to ensure adequate protection of the community, it is desirable to make an order under this section.

The proposed new section 27A(3), (4) and (5) sets out the different scenarios under which an interim supervision order may be required:

27A(3) relates to the situation where a person is subject to a supervision order which may otherwise expire before the pending proceedings are finally determined;

27A(4) relates to the situation where a person has been subject to a supervision order which has expired; and

27A(5) relates to the situation where a person has never been subject to a supervision order.

The interim supervision order will continue until the pending proceedings are finally determined or until another date specified by the court.

This will also cover the situation that occurred in *State of Western Australia v Narkle [No 5]* [2017] WASC 46; that is, where a further application against a person under a

DSO supervision order is not yet disposed of and the current supervision order is due to expire, an interim supervision order can be sought under this new section 27A.

Clause 23 Section 33 amended

Clause 23 amends section 33 of the DSO Act so that upon a review of a person's continuing detention order and where a court is considering making a supervision order, it cannot do so unless it is satisfied, on the balance of probabilities, that the person will substantially comply with the standard conditions stated in the order.

In conformity with other amendments under the Bill the proposed section 33(5) places the onus of proof on the person who is being detained.