

# DANGEROUS SEXUAL OFFENDERS LEGISLATION AMENDMENT BILL 2015

## EXPLANATORY MEMORANDUM

### Overview of the Bill

The proposed amendments are consistent with the outcomes of the 2011 and 2014 Reviews of the *Dangerous Sexual Offenders Act 2006* (DSO Act), and will improve its ability to adequately protect the community from known dangerous sexual offenders. Two reviews of the legislation have been conducted in recent years, leading to the amendments set out in the Bill.

The Bill also amends legislation which relates to the operation of the DSO Act, in furtherance of the aim of strengthening the legislation to continue to ensure adequate protection of the community from risks posed by known dangerous sexual offenders.

A clause by clause commentary of the Bill is as follows:

### Part 1 - Preliminary

#### Clause 1: Short Title

Clause 1 provides that the title of the proposed Act is the *Dangerous Sexual Offenders Legislation Amendment Act 2015*.

#### Clause 2: Commencement

Clause 2 provides that sections 1 and 2 will come into operation on the day that the Act receives Royal Assent. The balance of the Act will commence on a day fixed by proclamation, and different days may be fixed for different provisions.

### Part 2 – *Dangerous Sexual Offenders Act 2006* amended

#### Clause 3: Act amended

Clause 3 provides that Part 2 of the proposed Act amends the DSO Act.

#### Clause 4: Section 3 amended

Definitions of terms used in the DSO Act appear in section 3 of that Act.

Clause 4 proposes to delete the following definitions: *commit a serious sexual offence, continuing detention order, Division 2 continuing detention order, Division 2 order, Division 4 continuing detention order, psychiatrist, serious sexual offence, supervision order and under sentence of imprisonment*.

Clause 4 proposes to insert the following definitions into the DSO Act:

- a) a new definition of *Board*, meaning the Prisoners Review Board established by the *Sentence Administration Act 2003* (SA Act) section 102 – the Board will be included within the (proposed new) exchange of information provision in section 46B of the DSO Act;
- b) a replacement definition of *commit a serious sexual offence*, to have the meaning given in (the proposed new) section 4A of the DSO Act;
- c) a replacement definition of *continuing detention order*, meaning an order made under section 17(1)(a) of the DSO Act;
- d) a replacement definition of *Division 2 order*, meaning either a continuing detention order (as per the replacement definition of this term), or a supervision order made under section 17(1)(b) of the DSO Act;
- e) a replacement definition of *psychiatrist*, and a new definition of *psychologist*, to both have the meaning given in the *Mental Health Act 2014* section 4;
- f) a new definition of *qualified expert*, meaning either a psychiatrist or a qualified psychologist;
- g) a new definition of *qualified psychologist*, meaning a psychologist holding a qualification or accreditation prescribed for the purposes of the definition;
- h) a replacement definition of *serious sexual offence*, meaning:
  1. a serious sexual offence as defined in the *Evidence Act 1906* section 106A; or
  2. an offence of conspiracy or incitement to commit such an offence – this provides clarification that the DSO Act covers conspiracy and incitement to commit offences; or
  3. an offence against a law of the Commonwealth, or of another State or Territory that is prescribed to correspond such an offence – this widens the definition of *serious sexual offence* to clearly cover Commonwealth, State and Territory sexual offences as equivalent to those in the *Evidence Act 1906* section 106A. These offences will be prescribed in regulations;
- i) a replacement definition of *supervision order* to simply change a cross-referenced provision in the definition (from 33(2)(b) to 33(1)(b)(ii));
- j) a new definition of *under a custodial sentence* (replacing ‘under sentence of imprisonment’), meaning:
  1. under a sentence of imprisonment by a court of Western Australia (including an indefinite sentence imposed under the *Sentencing Act 1995* section 98(1)) or an indeterminate sentence imposed under the *Criminal Code* section 661 or 662 – this provides clarification that the DSO Act covers those serving an indefinite sentence of imprisonment;
  2. under a sentence of imprisonment imposed under a law of the Commonwealth – the DSO Act now clearly covers

those serving a sentence of imprisonment under Commonwealth law; or

3. under a sentence of imprisonment that under the *Prisoners (Interstate Transfer) Act 1983* section 25(1) is deemed to have been imposed by a court of Western Australia – the DSO Act now clearly applies to an interstate transfer prisoner; or
4. under a sentence of detention under the *Young Offenders Act 1994* (YO Act) for an offence committed after the offender had reached 16 years of age, the term of which has not elapsed – the DSO Act applies to those under a sentence of detention under the YO Act, but not for offences committed by persons under the age of 16. (To note: see clauses 57 to 59 for proposed amendments to the YO Act to facilitate this proposed amendment to the definition of *under a custodial sentence* in the DSO Act);

k) a new definition of *victim*, meaning, in relation to an offence committed by a person who is or has been an offender, a person upon whom that person has committed a serious sexual offence; and

l) a new definition of *victim submission*, meaning a submission made under (the proposed) section 17A of the DSO Act.

It is noted generally in relation to clause 4 that the proposed deletions of the definitions of *continuing detention order*, *Division 2 continuing detention order*, *Division 2 order*, *Division 4 continuing detention order*, and the proposed insertion of new definitions of *continuing detention order* and *Division 2 order* (and other consequential amendments proposed to terminology in other clauses of the Act) have the effect of clarifying references to various types of orders in the DSO Act.

#### **Clause 5: Section 4A inserted**

Clause 5 inserts a new section 4A, which introduces new matters to be disregarded in the DSO Act in relation to *commit a serious sexual offence*: that is, whether the offender would be charged, or found mentally fit to stand trial, or whether the offender may be acquitted if tried for the offence. The DSO Act will continue to define *commit a serious sexual offence* to in effect include the doing of an act or the making of an omission outside this State or outside Australia that, if it were done or made in this State, would constitute a serious sexual offence.

(As set out in clause 37 below, the Act also proposes to insert a new provision – section 40AA – into the DSO Act. The proposed section 40AA provides that a court may make an order under the DSO Act in respect of an offender even if the offender has been found not mentally fit to stand trial, or, if charged with an offence, would be likely to be found not mentally fit to stand trial.)

#### **Clause 6: Section 4 amended**

Clause 6 proposes to re-cast the objects set out in section 4 of the DSO Act as being to ensure the adequate protection not only of the community, but also to ensure the adequate protection of victims (as defined in the proposed new definition of *victim* in the DSO Act, being a victim of a serious sexual assault by the offender) through providing for the detention in custody or the supervision of persons of a particular class.

**Clause 7: Section 7A inserted**

Clause 7 proposes to insert a new section 7A into the DSO Act - headed "DPP may take proceedings in the name of the State" - which provides that proceedings and applications under the DSO Act taken by the Director of Public Prosecutions (DPP) may be made in the name of the State of Western Australia. This is appropriate given that the DPP takes proceedings under the DSO Act on behalf of the State of Western Australia.

**Clause 8: Section 7 amended**

Clause 8 proposes to insert a new section 7(4) into the DSO Act to clarify that when the court is considering whether it is satisfied that there is an unacceptable risk that the person would commit a serious sexual offence (if the person were not subject to a continuing detention order or a supervision order), the court must disregard the possibility that the person might be temporarily prevented from committing a serious sexual offence by imprisonment, by remand in custody or by the imposition of bail conditions.

**Clause 9: Section 8 amended**

Clause 9 proposes to delete section 8(1) of the DSO Act, replacing it with sections 8(1) and 8(2A), and amend sections 8(2) and 8(3).

Proposed sections 8(1) and 8(2A), and the amendments to sections 8(2) and 8(3) of the DSO Act provide for the following:

- a) clarify that the whole term of being 'under a custodial sentence' is attributable to a serious sexual offence even if another offence or other offences comprised part of the offender being 'under a custodial sentence' (to deal with aggregate terms of imprisonment);
- b) does not require the applicant to specify which Division 2 order under the DSO Act (that is, either a continuing detention order or a supervision order) is sought - given that this continues to be a matter for determination by the court; and
- c) extends the time allowed for making an application under (the proposed new) section 8(1) of the DSO Act from a period of six months before the possibility of release from custody, to a period of one year before the possibility of release from custody.

In addition, clause 9 proposes to delete section 8(4) of the DSO Act, replacing it with a new section 8(4A) and section 8(4). These proposed sections 8(4A) and 8(4) allow the court to make a further supervision order which is to take effect on the expiry of a supervision order. This will in effect mean that a new application can be brought to have the effect of extending the duration of a supervision order. (This differs to the proposed new power in section 23 of the DSO Act to amend the duration of a supervision order in response to breach of the supervision order – see clause 20 below, or the proposed amendment to section 24 of the DSO Act to ensure that supervision orders are extended in respect of all sentences of imprisonment, not excluding serious sexual offences – see clause 22 below.)

**Clause 10: Section 10A inserted**

Clause 10 proposes to insert a new section 10A into the DSO Act that will require the offender, within certain time frames, to make disclosure of expert evidence material in their possession, or file notice of objection to documents to be adduced or evidence to be called by the applicant at the hearing. The court has discretion to dispense with or modify these requirements as is just. This new provision reflects the duty of disclosure borne by the applicant for a Division 2 order under the DSO Act.

**Clause 11: Section 10 replaced**

Clause 11 proposes to replace section 10 of the DSO Act to state that an application for orders under either (the proposed replacement) section 8(1) or (the proposed new) section 8(4A) of the DSO Act may be dealt with even if, while the application is pending, the offender ceases to be under a custodial sentence, or their existing supervision order expires.

**Clause 12: Section 11 amended**

Clause 12 proposes to delete section 11(2) of the DSO Act. This removes the 14 day timeline in which the preliminary hearing of an application filed under section 8 of the DSO Act is to be held. Other matters relating to the concept of preliminary hearing under section 11 of the DSO Act, including as to the purposes of a preliminary hearing, remain unchanged.

**Clause 13: Section 14 amended**

Clause 13 proposes to amend section 14 of the DSO Act, including to insert a new section 14(2A). Section 14(2A) provides that the court may defer or adjourn fixing of a day for the hearing of an application for a Division 2 order under the DSO Act, if an offender has been charged with a further offence which has not yet been dealt with, and the court considers deferral or adjournment to be in the interests of justice. The interests of justice may well be invoked by evidentiary considerations, for instance.

Clause 13 also proposes to delete section 14(2)(a) of the DSO Act and replace it as follows: to allow suitably qualified psychologists to conduct examinations and provide reports, in addition to requiring that at least one of the qualified experts that the court orders the offender to undergo examination by (for the purpose of preparing reports to be used on the hearing of the application) must be a psychiatrist. (The current formulation is for two psychiatrists to examine and provide reports.)

Clause 13 further proposes to insert a new section 14(2)(ba) into the DSO Act to allow the court a broader power to order that a range of expert reports (not only psychiatrist and psychologist reports) be prepared to be used on the hearing of the application. Both the applicant and the offender can seek that the court order such reports to be prepared.

(See clauses 32 to 36 below in relation to the proposed Part 5 – Reports – which is proposed to contain provisions relating to the details of preparation of court-ordered reports by psychiatrists, psychologists and other persons or bodies for use in DSO Act proceedings, and the provision of copies of those reports to parties to the proceedings. Clause 43 below proposes to amend section 46A of the DSO Act to extend protection against civil action to qualified experts and other reporters, given the proposed wider powers of the court to order reports.)

**Clause 14: Section 15 deleted**

Clause 14 proposes to delete section 15 of the DSO Act. Section 15 provides an authority for psychiatrists to examine and report on offenders. See proposed related amendments described below in relation to clauses 33 and 34 as to authority for qualified experts to examine offenders and to report.

**Clause 15: Section 16 amended**

Clause 15 contains a proposed replacement provision for section 16(3) of the DSO Act, which relates to the process for discontinuing applications for Division 2 orders. Section 16(3) currently provides that, in circumstances where the DPP discontinues an application for a Division 2 order (that is, a supervision order or continuing detention order) under the DSO Act, and if the offender has been detained in custody under section 14(2) of the DSO Act pending determination of the application for a Division 2 order, then the DPP must apply to the court for the custody order to be rescinded. The proposed replacement section 16(3) provides a simpler procedure for discharge of the custody order when the court orders that the application is taken to be dismissed (upon provision of notice by the applicant).

**Clause 16: Section 17A inserted**

Clause 16 inserts a proposed new provision (section 17A) into the DSO Act, allowing a victim of a serious sexual assault by the offender (or a person who can make a submission for the victim of serious sexual assault, as set out in the section) to make a written victim submission that the court may have regard to in relation to the offender in certain circumstances.

Proposed new section 17A(2) sets out the types of proceedings under the DSO Act in relation to which a victim submission may be had regard to, which are:

- an application for Division 2 supervision orders or continuing detention orders – section 8(1), and under section 17(1)(b); or
- an application for subsequent supervision orders – section 8(4A); or
- an application to amend the conditions of a supervision order – section 19; or
- an application under section 22 for orders under section 23 in relation to contravention of a supervision order; or
- an application for the review of continuing detention: sections 29 and 30.

The victim submission must be in writing: proposed new section 17A(5).

The proposed new sections 17A(1), 17A(6) and 17A(8) to 17A(10) inclusive in effect seek to protect the privacy of the victim submission, while meeting natural justice requirements.

Other matters in the Act relevant to this clause 16:

- As set out above in relation to clause 4 of the proposed Act, a new definition – *victim* - is proposed to be inserted into the DSO Act (meaning a victim of a serious sexual offence by the offender).
- Clause 18, as set out below, also proposes to amend section 18 of the DSO Act to provide that a court may include any conditions in a supervision order that the court thinks appropriate to ensure the adequate protection of victims of offences committed by the person subject to the order.
- Clauses 50 and 51 as described below seek to facilitate the making of victim submissions by making a proposed amendment to the *Prisons Act 1981* section 113B(1)(ba). The proposed amendment will, in effect, allow a victim of a serious sexual offence to register to receive notice that an application under the DSO Act is being made in relation to the offender.

**Clause 17: Section 17 amended**

Clause 17 proposes to make amendments to section 17 of the DSO Act. A proposed amendment to section 17(1) requires that a court hearing an application for a Division 2 order (a continuing detention order or a supervision order) **must** make orders if it finds that the offender is a serious danger to the community.

Section 17(1)(b) is proposed to be replaced to include a 21-day deferral of the start of a supervision order, if made on first application under the DSO Act. The proposed inclusion of the words “subject to section 18” puts beyond doubt that the court must impose the standard conditions of section 18(1) of the DSO Act on any offender subject to a supervision order made under section 17(1)(b) of the DSO Act.

In addition, clause 17 also proposes to insert a new section 17(3) to clarify that a court hearing an application for an order under proposed new section 8(4A) - allowing the court to make a further supervision order which is to take effect on the expiry of a supervision order – can only make a further supervision order, not a continuing detention order.

**Clause 18: Section 18 amended**

Clause 18 proposes to amend section 18 of the DSO Act. Section 18 sets out both the conditions that a court must include in a supervision order made under section 17(1)(b) of the DSO Act, and also the conditions that a court may include in a supervision order. The proposed amendments to section 18 of the DSO Act – inserting sections 18(2A) and 18(2B) - will allow the court, at its discretion, to make a condition of a supervision order that the person not “make public” information or opinion in relation to a victim of serious sexual offences by the offender.

The proposed amendments to section 18 insert a new definition of *make public*, meaning to provide to any representative of the news media for publication or broadcast, or make publicly available by means of the internet. Proposed section 18(2B) of the DSO Act sets out factors for the court to consider in relation to whether to make a condition under the proposed section 18(2A), including having regard to:

- a) the gravity and nature of the person's offences; and
- b) the likely impact on the victims of the person providing or making available any information or opinion; and
- c) the public interest generally.

Clause 18 also proposes to amend the DSO Act by inserting a new section 18(2)(c) to provide that a court may include any conditions in a supervision order that the court thinks appropriate to ensure the adequate protection of victims of offences committed by the person subject to the order.

This is in addition to the existing power of the court to include any condition in a supervision order to ensure adequate protection of the community, or for the rehabilitation or care or treatment of the offender.

(Related to clause 18 is the discussion above in relation to clause 16. Clause 16 inserts a proposed new provision (section 17A) into the DSO Act, allowing a victim of a serious sexual offence (or a person who can make a submission for the victim of a serious sexual offence, as set out in the section) by the offender to make a written victim submission to the court to take into account in relation to the offender in certain circumstances.)

**Clause 19: Section 23A replaced**

Clause 19 proposes to replace section 23A of the DSO Act, which is currently titled "Psychiatric reports". The proposed replacement section 23A is to be titled "Reports", and will allow the court to order that a report be prepared by one or more qualified experts (meaning either psychiatrists or psychologists), or other reports (on either the application of the applicant or the offender) in relation to contravention of supervision order proceedings under section 22 of the DSO Act.

(See clauses 32 to 36 below in relation to the proposed Part 5 – Reports – which is proposed to contain provisions relating to the details of preparation of court-ordered reports by psychiatrists, psychologists and other persons or bodies for use in DSO Act proceedings, and the provision of copies of those reports to parties to the proceedings. Clause 43 below proposes to amend section 46A of the DSO Act to extend protection against civil action to qualified experts and other reporters, given the proposed wider powers of the court to order reports.)

**Clause 20: Section 23 amended**

Clause 20 proposes to amend section 23 of the DSO Act. Section 23 relates to the orders the court can make in relation to contraventions of a supervision order. The amendment clarifies that the orders that the court can make are: to amend the conditions of, or extend the period of, the supervision order; if the court is satisfied that there is an unacceptable risk that, if a continuing detention order were not made, the person would commit a serious sexual offence, make a continuing detention order; or, make no order.

Clause 20 also proposes to amend section 23 of the DSO Act to put beyond doubt that, when the court is considering, in relation to contravention of supervision order proceedings, whether it is satisfied that there is an unacceptable risk that the person would commit a serious sexual offence (if the person were not subject to a continuing detention order), the court must disregard the possibility that the person might be temporarily prevented from committing a serious sexual offence by imprisonment, by remand in custody or by the imposition of bail conditions.

(Clause 9 – as described above - also proposes to clarify the same issue in relation to applications made under section 8 of the DSO Act – that is, that when considering risk, the court is to disregard any future terms of imprisonment, or remand in custody, or imposition of bail conditions).

**Clause 21: Section 24A amended**

Clause 21 proposes to amend section 24A of the DSO Act. Section 24A allows the court to detain an offender in custody if a person who is subject to a supervision order under the DSO Act is also the subject of pending contravention proceedings under the DSO Act. The proposed amendment inserts a new section 24A(4A) which allows the court to inform itself on the basis of any information put before it that it sees fit as to whether or not there are exceptional circumstances (as set out in the current section 24A(3) of the DSO Act) that would justify the offender's release.

**Clause 22: Section 24 amended**

Clause 22 proposes to amend section 24 of the DSO Act. The proposed amendment to section 24(1) will have the effect that, if a person who is subject to a supervision order is sentenced to a term or period of imprisonment for any offence, then this extends the period of the supervision order. Currently, section 24 of the DSO Act excludes serious sexual offences from terms or periods of imprisonment that extend a supervision order.

**Clause 23: Section 27 amended**

Clause 23 proposes to amend section 27 of the DSO Act, to require that a court must only give reasons – to replace the current requirement for the court to give **detailed** reasons – for making a continuing detention order or supervision order.

Clause 23 also proposes to amend section 27 of the DSO Act so that reasons do not have to be given at the time the order is made.

**Clause 24: Part 3 heading amended**

Clause 24 proposes to amend the DSO Act by replacing the current heading of Part 3 – “Annual reviews” – with a new heading – “Reviews”.

(As set out in relation to clauses 25 and 26 below, the DSO Act is proposed to be amended to extend the period of continuing detention that must occur prior to a review of detention occurring under section 29 of the DSO Act, from the current annual review, to 2 yearly reviews, once the first 1 year review of continuing detention has occurred.)

**Clause 25: Section 29 amended**

Clause 25 proposes to amend section 29 of the DSO Act. Section 29 provides for periodic reviews that must be carried out of any continuing detention order made under the DSO Act. The proposed amendment to section 29 has the effect of - after the first review, which must occur 1 year after the continuing detention order is made - extending the period that the offender is detained before a review must be made, from the current 1 year to 2 years.

The proposed amendments to section 29 of the DSO Act also clarify that the 1 year time period for the first review only starts to run once the continuing detention order is made: that is, if an offender has spent time in custody pending determination of an application – for instance, under section 24A – that time is not counted toward the 1 year period before the first review under section 29.

Clause 25 further proposes to amend section 29 of the DSO Act to clarify that the time periods for review of a continuing detention order under section 29 are extended by any period during which the person is in custody serving a sentence of imprisonment.

**Clause 26: Section 30 amended**

Clause 26 proposes to amend section 30 of the DSO Act. Section 30 provides for an offender who is subject to a continuing detention order to apply for a review of the order if the court provides leave to do so. The court must only grant leave if there are exceptional circumstances, and - under the proposed amendment to section 30 - if more than 1 year has elapsed since a “subsequent” (as opposed to a “first”) review of detention has occurred under section 29(1)(b) of the DSO Act.

**Clause 27: Section 31 amended**

Clause 27 proposes to amend section 31 of the DSO Act. Section 31 relates to court procedure for dealing with reviews of continuing detention orders under section 29 of the DSO Act, with the requirement that reviews must be carried out as soon as practicable after an application for review is made. The proposed amendment to section 31 provides a new power for the court to adjourn the hearing of a review application where good cause is shown.

**Clause 28: Section 32 replaced**

Clause 28 proposes to delete section 32 of the DSO Act, which is currently titled “Psychiatrists’ report to be prepared for review”. The proposed replacement section 32, to be titled “Reports”, describes the reports that must or may be prepared for regular review of detention proceedings under Part 3 of the DSO Act. The proposed replacement section 32 will (unless the court orders otherwise) require at least one qualified expert in accordance with the proposed new section 37 of the DSO Act to prepare a report for the regular review of detention proceedings, and will allow the applicant and the offender to apply to the court for it to order other reports to be prepared.

(See clauses 32 to 36 below in relation to the proposed Part 5 – Reports – which is proposed to contain provisions relating to the details of preparation of court-ordered reports by psychiatrists, psychologists and other persons or bodies for use in DSO Act proceedings, and the provision of copies of those reports to parties to the proceedings. Clause 43 as described below proposes to amend section 46A of the DSO Act to extend protection against civil action to qualified experts and other reporters, given the proposed wider powers of the court to order reports.)

**Clause 29: Section 33 amended**

Clause 29 proposes to amend section 33 of the DSO Act. Section 33 provides for the orders a court can make following a review of a continuing detention order under section 31 of the DSO Act.

The proposed amendments replace sections 33(1) and 33(2) with an amended section 33(1) which clarifies that, if the court finds that the person remains a serious danger to the community, the court must continue to detain the offender, or rescind the continuing detention order and make a supervision order.

Proposed section 33(1)(b)(ii) now provides that, if, following a review, the court rescinds the continuing detention order and makes a supervision order, the supervision order does not come into effect for at least 21 days until after the review is concluded.

Clause 29 also amends section 33(2) simply to change a cross-referenced provision (from section 33(2) to section 33(1)(b)).

**Clause 30: Section 34 amended**

Clause 30 proposes to amend section 34 of the DSO Act. Section 34 provides for appeals from decisions under the DSO Act. The proposed amendment to section 34 is to provide that an appeal must be commenced within 21 days of reasons for decision having been given, in the case of a decision to make a continuing detention order or supervision order, and in the case of any other decision, the date of the decision. Under the DSO Act, the court is only required to give reasons in relation to a decision on a continuing detention order or a supervision order (see section 27 of the DSO Act, and see proposed amendment to section 27 as set out above in relation to clause 23).

**Clause 31: Section 35 amended**

Clause 31 proposes an amendment to section 35 of the DSO Act (which makes provision that an appeal does not stay a decision). The amendment to section 35 only proposes a re-wording for the sake of clarity.

**Clause 32: Part 5 heading replaced**

Clause 32 proposes to delete the heading of Part 5 of the DSO Act, which reads “Examination by psychiatrist”.

Clause 32 further proposes to replace the heading of Part 5 of the DSO Act so that it reads “Reports”. It is proposed that Part 5 – Reports will contain provisions which relate to the details of preparation of court-ordered reports by psychiatrists, psychologists and other persons or bodies for use in DSO Act proceedings, and the provision of copies of those reports to parties to the proceedings.

(To note: clause 43 as set out below proposes to amend section 46A to extend protection from civil liability to qualified experts and other reporters, given the proposed wider powers of the court to order reports.)

**Clause 33: Sections 37A and 37B inserted**

Clause 33 proposes to insert two new provisions into the DSO Act in relation to the preparation of reports for hearings under the DSO Act.

The first proposed new provision is section 37A, which defines terms to be used in Part 5 of the DSO Act in relation to the preparation of reports. The terms are *report*, *reporter* and *subject*, and make reference to the proposed new definition (described in clause 4 above) of *qualified expert* (meaning a psychiatrist or qualified psychologist).

The other proposed new provision is section 37B, which provides a *reporter* (being any person who prepares a court-ordered report under the DSO Act) with authority to examine a subject and report under the proposed amended section 37 and proposed new section 38A of the DSO Act (see clause 34 below in relation to sections 37 and 38A).

**Clause 34: Section 37 replaced**

Clause 34 proposes to delete section 37 of the DSO Act (which is headed “Preparation of psychiatric report”).

Clause 34 further proposes to replace section 37 with a provision headed “Preparation of report by qualified expert”. The proposed section 37 deals with the required contents and manner of preparation of court-ordered psychiatrist and qualified psychologist reports for DSO Act proceedings. For example, section 37(2)(a) requires that the report assess the level of risk that the subject would commit a serious sexual offence.

Clause 34 also proposes to insert a new section 38A to be titled “Preparation of other report”. The proposed section 38A deals with the required contents and manner of preparation of court-ordered reports, other than psychiatrist or qualified psychologist reports, for DSO Act proceedings. For example, section 38A(2)(a) requires that the report set out the reporter’s opinion on all questions and topics specified in the order or engagement for its preparation.

**Clause 35: Section 38 amended**

Clause 35 proposes to amend section 38 of the DSO Act, including the amendment of the heading of section 38 from “Providing information for psychiatrist” to “Providing information to reporter”.

Clause 35 proposes to replace section 38(1) of the DSO Act with section 38(1) and a new section 38(2A), which relate to the information that the chief executive officer is required to provide to qualified experts or other reporters who are preparing court ordered reports (including medical, psychiatric, prison or other relevant reports or information relating to the subject of the report). Only 'relevant' information is required to be provided to reporters other than qualified experts – that is, there is a broader duty for the chief executive to provide information for reports by qualified experts.

Clause 35 also proposes to replace section 38(2) to allow the chief executive officer to redact or edit documents to be provided to reporters in certain circumstances (for example, a document can be edited to remove material that would identify a person other than the subject of the report).

The current section 38(3) to section 38(6) inclusive of the DSO Act remain with minor amendment only. These facilitate the provision of information by the chief executive officer as required by the DSO Act.

**Clause 36: Section 39 replaced**

Clause 36 proposes to replace section 39 of the DSO Act, which sets out requirements of the time in which court-ordered reports must be made available to parties to proceedings under the DSO Act.

**Clause 37: Section 40AA inserted**

Clause 37 proposes to insert a new provision – section 40AA – into the DSO Act. The proposed section 40AA provides that a court may make an order under the DSO Act in respect of an offender even if the offender has been found not mentally fit to stand trial, or, if charged with an offence, would be likely to be found not mentally fit to stand trial. Section 40AA(1) inserts a definition of *found not mentally fit* for the purpose of section 40AA, with the following meaning: found not mentally fit to stand trial under the *Criminal Law (Mentally Impaired Accused) Act 1996*.

(It is noted that, as set out in clause 5 above, that the Act proposes to insert a new section 4A into the DSO Act. The proposed section 4A includes new matters to be disregarded in relation to the meaning *commit a serious sexual offence*: including, whether the offender would be found mentally fit to stand trial, or whether the offender may be acquitted if tried for the offence.)

**Clause 38: Section 40 amended**

Clause 38 proposes to amend section 40 of the DSO Act to insert a new section 41(2). Section 40 provides that proceedings under the DSO Act are criminal proceedings; the proposed section 40(2) clarifies that the standard of proof under the DSO Act does not require anything to be evidenced to a higher standard than in section 7(2) of the DSO Act. Section 7(2) provides that the applicant under the DSO Act has the onus of satisfying a court by acceptable and cogent evidence, and to a high degree of probability.

**Clause 39: Section 41 amended**

Clause 39 proposes to amend section 41 of the DSO Act. Section 41 provides for the court, in deciding matters at preliminary hearings (under section 14(1)), and for amendment of conditions of supervision orders (under section 20), under the DSO Act to decide entirely or partly on the papers. The proposed amendments to section 41 extend the types of material that are included in the evidence that the court may receive.

**Clause 40: Section 42 amended**

Clause 40 proposes to amend section 42 of the DSO Act. Section 42 provides for the manner in which evidence is to be received by the court in relation to: applications for a Division 2 order (a continuing detention order or supervision order), an application for review of continuing detention, and an application for an order in relation to contravention of a supervision order. The proposed amendments to section 42 extend the types of material that are included in the evidence that the court may receive.

**Clause 41: Section 43 amended**

Clause 41 proposes to amend section 43 of the DSO Act. Section 43 provides for the court to give directions in relation to the conduct of proceedings under the DSO Act. The proposed amendments clarify that the court can also give directions with respect to evidence.

**Clause 42: Section 44 amended**

Clause 42 proposes to amend section 44 of the DSO Act. Section 44 provides for appearances at hearings under the DSO Act. The proposed amendment to section 44 will allow the court to direct that a person entitled to appear can appear by audio link or video link. (See the description below of clauses 46 and 47, which propose to make related amendments to the *Criminal Procedure Act 2004*.)

**Clause 43: Section 46A amended**

Clause 43 proposes to amend section 46A of the DSO Act. Section 46A provides for the protection from personal liability of persons performing certain functions under the DSO Act. The proposed amendments to section 46A of the DSO Act are as follows:

- a) protection under section 46A is to be extended to qualified experts and other reporters, given the proposed wider powers of the court to order reports (including as set out in the proposed amended Part 5 – Reports); and
- b) a proposed amendment to section 46A(3) proposes to in effect provide that protection from personal liability under section 46A is protection from “a civil action” rather than the current formulation of “an action in tort”.

**Clause 44: Section 46B**

Clause 44 proposes to insert a new section 46B into the DSO Act. The proposed section 46B will facilitate integrated management by State Government departments and agencies of offenders subject to orders under the DSO Act.

The proposed section 46B will allow properly delegated officers from the Department of Corrective Services, the Department of the Attorney General, the Office of the DPP, the Police Service and the Police Force of Western Australia provided for by the *Police Act 1892* and the Prisoners Review Board to exchange information for the purposes of implementing the provisions of the DSO Act. A properly delegated officer disclosing information under the proposed section 46B does not incur civil or criminal liability as a result of the disclosure.

**Clause 45: Various uses of term “has to” amended**

Clause 45 contains a table setting out a number of proposed replacements of references to the term “has to” in the DSO Act with references to the word “must”.

**Part 3 – *Criminal Procedure Act 2004* amended**

**Clause 46: Act amended**

Clause 46 provides that Part 3 proposes to amend the *Criminal Procedure Act 2004*.

**Clause 47: Section 51 amended**

Clause 47 proposes to amend section 51 of the *Criminal Procedure Act 2004* to allow appearances by audio link or video link for DSO Act proceedings where there is an entitlement to appear in person.

(To note: clause 42 as discussed above proposes to amend section 44 of the DSO Act. Section 44 provides for appearances at hearings under the DSO Act. The proposed amendment to section 44 will allow the court to direct that a person entitled to appear can appear by audio link or video link.)

**Part 4 – *Evidence Act 1906* amended**

**Clause 48: Act amended**

Clause 48 provides that Part 4 proposes to amend the *Evidence Act 1906*.

**Clause 49: Section 36C amended**

Clause 49 proposes to amend the *Evidence Act 1906* to put it beyond doubt that DSO Act proceedings are included in the types of proceedings in relation to which section 36C of the *Evidence Act 1906* operates to prohibit publication leading to identification of a complainant in relation to allegations of sexual assault.

## **Part 5 - Prisons Act 1981 amended**

### **Clause 50: Act amended**

Clause 50 provides that Part 5 of the Act proposes to amend the *Prisons Act 1981*.

### **Clause 51: Section 113B amended**

Clause 51 proposes to insert a new provision – section 113B(1)(ba) - into the *Prisons Act 1981*. Section 113B(1)(ba) seeks to facilitate the proposed new capacity for victims of serious sexual offences by an offender to make victim submissions in relation to DSO Act proceedings. Section 113B(2) of the *Prisons Act 1981* allows the chief executive officer to disclose information of a prescribed kind regarding a prisoner to a victim of the prisoner or a person acting on a victim's behalf. The proposed section 113B(1)(ba) will, in effect, allow a victim of a serious sexual offence to register to receive notice from the chief executive officer that an application under the DSO Act is being made in relation to the offender.

## **Part 6 - Sentence Administration Act 2003 amended**

### **Clause 52: Act amended**

Clause 52 proposes to amend the SA Act.

### **Clause 53: Section 50 amended**

Clause 53 proposes to amend section 50(b) of the SA Act to exclude offenders subject to orders under the DSO Act from making application for re-entry release orders under the SA Act.

## **Part 7 – Sentencing Act 1995 amended**

### **Clause 54: Act amended**

Clause 54 proposes to amend the *Sentencing Act 1995*.

### **Clause 55: Section 8 amended**

Clause 55 proposes to amend section 8 of the *Sentencing Act 1995* to provide that the possibility that an order might be made in respect of the offender under the DSO Act is not a mitigating factor.

### **Clause 56: Section 98 amended**

Clause 56 proposes to amend section 98(3) of the *Sentencing Act 1995* to in effect provide that the possibility of orders being made in relation to an offender under the DSO Act should not be determinative of whether or not an offender should be ordered to be imprisoned indefinitely under section 98 of the *Sentencing Act 1995*.

## **Part 8 – Young Offenders Act 1994 amended**

### **Clause 57: Act amended**

Clause 57 proposes to amend the YO Act.

### **Clause 58: Section 189 amended**

Clause 58 proposes to amend section 189 of the YO Act to facilitate the DSO Act now being applicable to those under a sentence of detention under the YO Act, but not for offences committed by persons under the age of 16. Section 189 of the YO Act otherwise provides that certain young offenders be regarded as not convicted for certain purposes.

(To note: see clause 4 above in relation to the proposed amendment in section 3 of the DSO Act to the definition of *under a custodial sentence*, which is to include: under a sentence of detention under the YO Act for an offence committed after the offender had reached 16 years of age, the term of which has not elapsed.)

### **Clause 59: Section 190 amended**

Clause 59 proposes to amend section 190 of the YO Act to facilitate the DSO Act now being applicable to those under a sentence of detention under the YO Act, but not for offences committed by persons under the age of 16. Section 190 of the YO Act otherwise provides that certain convictions of young offenders are not to be disclosed.

(To note: see clause 4 above in relation to the proposed amendment in section 3 of the DSO Act to the definition of *under a custodial sentence*, which is to include: under a sentence of detention under the YO Act for an offence committed after the offender had reached 16 years of age, the term of which has not elapsed.)

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