

PROHIBITED BEHAVIOUR ORDERS BILL 2010

EXPLANATORY MEMORANDUM

Overview of the Bill

The purpose of the *Prohibited Behaviour Orders Bill 2010* 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 restricted behaviours will relate to offences involving anti-social behaviour and will be stated so that the person restricted understands the restriction placed upon them to ensure effective enforcement.

The Bill provides that the issuing of a Prohibited Behaviour Order (PBO) will be initiated on application by the prosecution or by the court on its own initiative. The ultimate decision as to the granting of a PBO and its terms and conditions would be at the discretion of the judge or magistrate hearing the case and will be decided following sentencing. Before issuing a PBO, the judge or magistrate will need to ensure that:

- The person has been convicted of an offence in which anti-social behaviour has been an element;
- The person has a history of previous convictions in which anti-social behaviour has been an element during the past three years;
- A PBO is appropriate for the purpose of preventing a person from engaging in further anti-social behaviour.

The Bill also provides that details of a PBO can be published and that breaches of the Order can result in imprisonment and/or a fine. In making a PBO, the judge or magistrate can order that all details or certain specified details relating to the restrained person must not be published if it is believed there are circumstances justifying suppression.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, 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 the PBO will be published by the chief executive officer of the Department of the Attorney General. The details will include:

- The name of the constrained person;
- A photograph of the constrained person;
- The town or suburb where the constrained person lives;
- The constraints imposed by the PBO on the otherwise lawful activities and behaviour of the person.

Clause notes

Part 1 – Preliminary

Clause 1. Short Title

The Short Title of the proposed Act is the *Prohibited Behaviour Orders Act 2010*.

Clause 2. Commencement

Clause 2 sets out the commencement provisions.

Proposed sections 1 and 2 of the proposed Act will come into operation on the day on which the Act receives the Royal Assent.

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

Clause 3. Terms used

Sub clause (1) defines certain terms used in the proposed Act to ensure the provisions of the Act are applied as intended. The more important terms are:

In the proposed Act *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.

constrained person in the proposed Act will mean the person who has been convicted of an offence in which anti-social behaviour is an element and the court has imposed a PBO to prevent that person from engaging in specified behaviours that would otherwise be lawful in order to prevent that person from engaging in further anti-social behaviour.

firearm will have the meaning given in the *Firearms Act 1973* section 4.

firearm licence in the proposed Act will mean a licence, a Firearms Act Extract or Licence or permit, issued under the *Firearms Act 1973*, entitling a person to be in possession of a firearm.

party, to PBO proceedings, in the proposed Act will mean the prosecutor or the person against whom the PBO is sought.

PBO proceedings in the proposed Act will mean:

- any court proceedings where a PBO is considered or imposed to restrict specified behaviours of a convicted person;
- any court proceedings where the restrictions of a PBO are varied or considerations are given to varying the PBO; and
- any court proceedings where a PBO is cancelled or considered to be cancelled.

prohibited behaviour order or *PBO* in the proposed Act will mean an order made by a court that constrains a person from specified behaviours that are otherwise lawful.

prosecutor in the proposed Act will mean (a) the authorised officer, as defined in the *Criminal Procedure Act 2004* section 80, who commenced the prosecution or another such

authorised officer if the PBO proceedings are in the Supreme or District Court; and will mean the DPP; or (b) the authorised person as defined in the *Criminal Procedure Act 2004* section 20 who commenced the prosecution or another such authorised person if the related prosecution was in a court of summary jurisdiction.

related prosecution in the proposed Act will mean the prosecution that led to the PBO proceedings.

related sentence in the proposed Act will mean the sentence imposed by the court on the person who has committed an offence that had an anti-social element which has led to the consideration of a PBO or where a PBO has been imposed.

relevant offence means an offence involving anti-social behaviour.

wellbeing in the proposed Act will mean the same as the meaning in the *Children and Community Services Act 2004* section 3.

Sub clause (2) provides that in the Act PBO will be used as the abbreviation for a prohibited behaviour order.

Sub clause (3) provides that a prescribed offence is to be taken to involve anti-social behaviour unless it can be proved otherwise.

youth means a person who has reached the age of 16 years of age but who is under the age of 18 years.

Clause 4. Constrained person to be natural persons

Clause 4 provides that PBOs can only be made against an individual person.

Part 2 – Prohibited behaviour orders

This Part provides for the process for considering and issuing a PBO generally; issues to be considered where the prohibited person is a child; the process for varying or cancelling PBOs; and proceedings related to PBOs.

Division 1 – Making PBOs, general

This division provides the process for issuing a PBO against a person.

Clause 5. Application for PBO

Sub paragraphs (1)(a) and (1)(b) provides direction about when a prosecutor in criminal proceedings can make an application for a PBO against the accused person – which is at any time after the court has convicted the person and before the court has sentenced that person.

Subclause (2) provides directions that the application will be made in accordance with the rules of the court in which the case is being dealt.

Clause 6. Court may make PBO after sentencing

Sub paragraph (1)(a) defines the meaning of *sentence* for an adult person within the proposed Act which will mean a sentence imposed under the *Sentencing Act 1995* section 39(2).

Sub paragraph (1)(b) defines the meaning of *sentence* for a youth within the proposed Act which will mean a sentence imposed under the *Young Offenders Act 1994*.

Subclause (2) provides that a court can impose a PBO after sentencing a person for an offence subject to proposed subsection (4) of this clause, which states when a PBO must not be made against a person, and proposed section 17 of the proposed Act which provides that a PBO cannot be made against a youth under the age of 16 years of age, and proposed section 18 of the proposed Act which provides that a PBO cannot be imposed against a youth if the related sentence involves the exercise of power under the *Young Offenders Act 1994* Part 7 Division 2, 3, or 4.

Sub paragraph (3)(a) provides that an application for a PBO can be made by the prosecutor subject to proposed section 5 of the proposed Act.

Sub paragraph (3)(b) provides that an application for a PBO can be made on the initiative of the court. No other person can make an application for a PBO against a person other than the prosecutor or the court.

Sub paragraph (4)(a) provides that when imposing a PBO against a person a court must not make a PBO unless the court is satisfied there are grounds for making a PBO, which are outlined under proposed section 8.

Sub paragraph (4)(b) provides that when imposing a PBO against a person a court must not make a PBO without considering matters set out in proposed section 9 of the proposed Act and, in the case of a youth, proposed section 19 of the proposed Act which states that the court must be guided by sections 46(1) and (2) of the *Young Offenders Act 1994*. Section 46(1) and (2) of the *Young Offenders Act 1994* provides the principles for consideration to be applied to young offenders found guilty of an offence.

Sub paragraph (4)(c) provides that a court must not make a PBO against a person unless that person has reached 16 years of age.

Sub subparagraph (4)(d)(i) provides that the person must be present when the PBO is made and the person must be given an opportunity to be heard on whether or not the court should make the PBO. This will provide an opportunity for the person to state any unforeseen consequences that may result from constraining behaviours proposed to be included in the PBO. It will also provide an opportunity for the person to have the terms of the PBO fully explained to reduce the chances of the restrained person breaching the PBO.

Sub subparagraph (4)(c)(ii) provides that if the person is not present in the court, then the person must have been personally given a hearing notice at least 7 days before the PBO proceedings.

Clause 7 Hearing of PBO proceedings

Sub paragraph (1)(a) provides that the court will hear proceedings relating to whether a PBO should be made only after passing the sentence.

Sub paragraph (1)(b) provides that a court can adjourn the proceedings to be considered at a hearing.

Subclause (2) provides that if a PBO proceeding in relation to a person is adjourned to a hearing, a registrar must issue a hearing notice to each party involved in the proceedings. This is to ensure all those involved in the matter are made aware of the time and date of the hearing so that they attend the hearing.

Sub paragraph (3)(a) provides that if a party is given the hearing notice but does not attend the hearing, the court may proceed to hear the matter in that person's absence, and under these circumstances, this may include the person who is to be the constrained person.

Sub paragraph (3)(b) provides that if the prosecutor does not attend the hearing the court may dismiss the application if the court is satisfied the prosecutor received the hearing notice.

Sub paragraph (3)(c) provides that the court may adjourn the hearing if a party is given the hearing notice but does not attend the hearing.

Subclause (4) provides that a court hearing PBO proceedings that is adjourned under proposed section 7 of the Act does not have to be constituted in the same manner as the court. This means that where PBO hearings are adjourned, they are not required to be heard by the original magistrate or judge.

Clause 8 Grounds for PBO

Subclause (1) provides that the term **conviction** under (a) in this clause includes a finding or admission of guilt that is not recorded due to the provisions under the *Young Offenders Act 1994* section 55. This means that although a conviction is not recorded, the offender is deemed to have been convicted for the purpose of the making of any order that may be made upon convicting a person of such an offence.

Under (b) in this clause the term **conviction** does not include a conviction that has been set aside by the court or quashed.

Subclause (2) provides direction to the court regarding the grounds for making a PBO which will include consideration of the following:

Sub sub-paragraph (2)(a)(i) provides that a PBO can only be made if a person has previously been committed of a relevant offence within the meaning of relevant offence in proposed section 3; and

Sub sub-paragraph (2)(a)(ii) provides that a PBO can only be made if a person has again committed and was convicted of a relevant offence within the meaning of relevant offence during a period of 3 years after a previous conviction of a relevant offence.

Sub paragraph (2)(b) directs the court to consider the lawful activities and behaviours of the person that are likely to contribute to that person committing further offences involving antisocial behaviour if they continue to undertake those activities and behaviours; and

Sub paragraph (2)(c) directs the court to consider that the constraints imposed on the person by the PBO are appropriate because of the circumstances that have resulted in the person being convicted of a further offence involving anti-social behaviour.

Subclause (3) provides that for the purposes of proposed sub-paragraph (2)(a)(i) the relevant offence can have been committed before, on or after the day on which the proposed section comes into operation. This will ensure that applications for PBOs can be made for offences that have occurred prior to the commencement of the proposed Act.

Clause 9 Matters to be considered by court

Sub paragraphs (1)(a) and (b) sets out the things a court must consider before imposing a PBO.

Sub paragraph (1)(a) – The court must consider if it is desirable for other persons or property to be protected from further incidents of anti-social behaviour referred to in proposed section 8(2)(b) that could be perpetrated by the person if not constrained. For example, the offender may have a history of anti-social offending at a local shopping centre or licensed premises. It would be appropriate to constrain the offender from entering these particular premises during the period of the PBO.

Sub paragraph (1)(b) – The court must consider the degree of hardship a PBO may cause the person. The restrictions should not include behaviour or activities that are necessary for a person's basic amenity of life, personal safety or medical needs. Therefore, the person should not be constrained from normal day-to-day activities such as employment, education, access to health services, grocery shopping, care of children or care of other dependent persons.

Subclause (2) provides that a court must give primary importance to the matter set out in proposed sub section (1)(a) as being of primary importance when considering whether to make a PBO against a person. That is, protecting other persons or property from further acts of anti-social behaviour is of primary importance.

Subclause (3) provides that when considering whether to make a PBO against a person a court may also consider all or any of the matters set out in sub paragraphs (3)(a) to (g).

Sub paragraph (a) – any other legal proceedings involving the person, such as court hearings or court mandated activities may be considered.

Sub paragraph (b) – the criminal record of the person may be considered with consideration being given to the types and severity of previous offences.

Sub paragraph (c) – any sentence to which the person is subject may be considered.

Sub paragraph (d) – any order made under a written law that applies to the person, or where that person is a child, where an order applies to a person responsible for the care, welfare or development of the child may be considered.

Sub paragraph (e) – the similarity of previous offences of anti-social behaviour to offences for which the offender has been convicted may be considered and influence the types of behaviours that will be constrained. This might include constraining a person from an entertainment precinct or all licensed premises and not just one specific licensed premise if the person has a history of anti-social behaviour related to the consumption of alcohol.

Sub paragraph (f) – the extent to which the person complied with or did not comply with any previous PBO may be considered and influence the decision regarding a further PBO.

Sub paragraph (g) – the court may consider any other matters believed to be relevant to the decision regarding issuing a PBO.

Clause 10 Constraints imposed by PBO

Subclause (1) provides that the term *specified*, in relation to a PBO in this clause means a constraint that is specified in the PBO.

Subclause (2) – This clause provides that the constrained person will be prevented from undertaking activities and behaviours that would be lawful if they were not specified in the PBO as activities and behaviours that the constrained person must not undertake for the term of the PBO. These will be activities and behaviours that the court considers will reduce the likelihood of the person committing another relevant offence and are appropriate in the circumstances.

Subclause (3) – This clause provides details of the types of constraints that the court can impose on the constrained person through the PBO. The court may impose just one constraint or a number of constraints through the PBO which can include, but is not restricted to the following:

Sub paragraph (3)(a) – will constrain a person from entering a specified place. This could be a shopping centre or specified licensed premises or it could include constraining a person from all licensed premises or any other place where the constrained person may commit acts of anti-social behaviour. The constraint could also include remaining on, or being near specified premises. The constraint may include, but is not limited to, a locality or place, such as a suburb, a town or any other location that can be defined by the court such as a specific park or beach.

Sub paragraph (3)(b) – will constrain a person from a specified kind of behaviour at all specified places or at one particular place. This could include restraining the person from a behaviour at the specified place or places at certain times or in a certain manner. The behaviour may include, but is not limited to, consuming alcohol, driving a motor vehicle, using public transport, or attending public events.

Sub paragraph (3)(c) – will constrain a person from being within a specified distance of a specified person. This could include a friend or associate with whom the constrained person has engaged in anti-social offences in the past.

Sub paragraph (3)(d) – will constrain a person from communicating, or attempting to communicate with a specified person. This could include constraining the person from contacting a friend or associate, with whom the constrained person has engaged in anti-social offence, by telephone or email or any other form of electronic communication, mail, or in person.

Sub paragraph (3)(e) – will constrain a person from being in possession of a specified item or a specified class of item. This could include, but is not limited to, a spray paint or other known graffiti implements, a pocket knife, or alcohol, or any other item the court believes may contribute to the constrained person participating in anti-social behaviour.

Sub paragraph (3)(f) – will constrain a person from causing or allowing another person to engage in conduct of the type referred to in proposed sub paragraphs (3)(a) to (3)(e). This aims to prevent the constrained person from encouraging another person to undertake anti-social behaviour on their behalf at a place or with a possession, such as causing graffiti damage to a property on their behalf.

Subclause (4) – This subclause provides the court with the option of imposing a constraint that can include particular terms that the court might consider appropriate for that person to assist that person to maintain the constraints of the PBO which could include such things as a curfew.

Subclause (5) – This subclause provides that the court can constrain a person from entering or remaining on premises or being in a place that if not for the PBO, that person would have had a legal right to be. This could include, but is not limited to, a public space, public building, road, beach, park, or river.

Subclause (6) – This subclause provides that the PBO cannot require the constrained person to do anything at the request of another person that is unlawful.

Subclause (7) – This subclause provides direction to courts that the PBO must not duplicate or conflict with other court orders that apply to a constrained person which are listed in sub paragraphs (a) to (h) as follows:

Sub paragraph (7)(a) a restraint imposed by a restraining order made under the *Restraining Orders Act 1997*.

Sub paragraph (7)(b) a limitation or condition imposed by an extraordinary licence granted under the *Road Traffic Act 1974* section 76.

Sub paragraph (7)(c) a requirement of a conditional release order made under the *Sentencing Act 1995* Part 7.

Sub paragraph (7)(d) a requirement of a community based order made under the *Sentencing Act 1995* Part 9.

Sub paragraph (7)(e) an obligation of an intensive supervision order made under the *Sentencing Act 1995* Part 10.

Sub paragraph (7)(f) a condition of conditional suspended imprisonment under the *Sentencing Act 1995* Part 12 Division 1.

Sub paragraph (7)(g) a condition of a youth community based order made under the *Young Offenders Act 1994* Part 7 Division 6.

Sub paragraph (7)(h) a condition of an intensive youth supervision order made under the *Young Offenders Act 1994* Part 7 Division 7.

It is intended that the above orders, will take priority over a PBO.

Clause 11 When PBO comes into force

Clause 11 provides direction to the court about when a PBO will come into force when a sentence is non-custodial and when a sentence is custodial.

Sub subparagraph 11(a)(i) provides that when a sentence is non-custodial or imprisonment has been suspended, the PBO will come into force at the conclusion of the proceedings in which the PBO is made.

Sub subparagraph 11(a)(ii) provides that when a sentence is non-custodial or imprisonment has been suspended, the PBO can be made to come into force at a later time than the conclusion of the proceedings in which the PBO is made which will be stated in the PBO.

Sub subparagraph 11(b)(i) provides that when a sentence is a term of imprisonment that is not suspended, the PBO will come into force when the constrained person is released from custody that has been served in respect of the sentence or any other sentence of imprisonment that may have been served concurrently or cumulatively with the sentence.

Sub subparagraph 11(b)(ii) provides that when a sentence is a term of imprisonment that is not suspended, the PBO will come into force at a later time than release from custody and that time will be stated in the PBO.

Having the PBO come into force after a term of imprisonment ensures that the constrained person has behaviours that may lead to anti-social behaviour constrained to limit their risk of committing further acts of anti-social behaviour once they have been released from custody. This is not intended to be a further punishment. It is intended to assist that constrained person to modify their behaviour to avoid further offending that includes anti-social behaviour. Allowing for a time other than release from custody for the time the PBO comes into force allows for any circumstances that may have an impact on the constrained person's ability to comply with the conditions of the PBO.

Clause 12 Duration of PBO

Clause 12 provides direction about the duration for a PBO to constrain the behaviour of a constrained person.

Sub clause (1) provides direction that the term *community based sentence* means as follows:

Sub paragraph (1)(a) a community based order made under the *Sentencing Act 1995* Part 9; or

Sub paragraph (1)(b) an intensive supervision order made under the *Sentencing Act 1995* Part 10: or

Sub paragraph (1)(c) conditional suspended imprisonment imposed under the *Sentencing Act 1995* Part 12 Division 1.

Sub clause (1) provides direction that the term *specified* in a PBO includes specified in a PBO that has been varied, under proposed section 24 (1)(b) or made, under proposed section 24(2).

Sub clause (2) provides for the period that a PBO will be in force, subject to proposed section 13, which deals with when a PBO ceases to have force if a conviction is set aside or quashed.

Sub paragraph (2)(a) provides that the period for which a PBO will be in force will be clearly stated in the PBO.

If a period for which a PBO will be in force is not stated, as per proposed sub paragraph (2)(a), then sub subparagraph (2)(b)(i) provides that the period the PBO will be in force will be the shorter period of either the period of the sentence if the related sentence is a community based sentence; or if the proposed sub subparagraph (2)(b)(i) does not apply, sub subparagraph (2)(b)(ii) provides that the PBO will be in force for six months from the day the PBO came in force.

Sub clause (3) provides for the time for which a PBO will be in force when it is stated in the PBO.

Sub paragraph (3)(a) provides that the time for which a PBO will be in force if the sentence is a community based sentence is not to be longer than the period of that sentence.

Sub paragraph (3)(b) provides that if the sentence is a sentence other than a community based sentence, the time for which a PBO will be in force will be at least 6 months but not more than 2 years.

Clause 13 PBO ceases to have force if conviction set aside or quashed

Clause 13 provides that if a PBO is made against a person and the person's conviction for the related offence is set aside or quashed, then the PBO will cease to be in force at the conclusion of the proceedings in which the conviction is set aside or quashed. This ensures that PBOs are used only in conjunction with a sentence for an offence.

Clause 14 Explanation about PBO to be given

Clause 14 ensures the constrained person is provided with an explanation regarding the behaviours that will be constrained by the PBO.

Sub paragraph (1)(a) provides that the purpose of the PBO and terms and effects of the PBO must be explained to the constrained person.

Sub paragraph (1)(b) provides that the consequences for the constrained person must be explained if the constrained person does not abide by the constraint set out in the PBO. This will include explaining that although the order is a civil order, breaching the PBO will be a criminal offence and will result in a fine and/or a term of imprisonment, as set out in proposed clause 35.

Sub paragraph (1)(c) provides that the constrained person must have explained to them that the constrained behaviours and duration of the PBO may be varied, cancelled or extended by the court if the circumstances of the constrained person change in a way which warrants changes to the order.

Sub paragraph (1)(d) provides that the constrained person must have explained to them if the PBO imposes any constraints relating to the possession of a firearm or a firearm licence or to applying for a firearm licence as provided under proposed sections 30 and 31 in the Act that relate to firearms.

Sub clause (2)(a) provides that, if the person is present, the court can either give the explanation about the PBO orally or in writing. Sub clause (2)(b) provides that if the person is not present, the court must give the explanation in writing. This ensures that the person who is to be constrained is provided with information about the constraints imposed by the PBO.

Sub clause (3) provides that if the constrained person does not understand English, or the court is not satisfied that the constrained person understands the explanation about the constrained behaviours in the PBO, the court must make reasonable efforts to arrange for an explanation to be given to the constrained person in a way that the constrained person can understand the constraints.

Sub clause (4) provides that the PBO will not be invalid because the constrained person was not given an explanation as the court may consider there are circumstances that require a PBO to be issued to constrain the behaviour of a person but there is not an opportunity to explain the constraints. This could include circumstances where the constrained person does not appear in court despite being notified of the hearing date.

Clause 15 Registrar to give copies of PBOs

Clause 15 provides that after the court makes a PBO, the registrar will provide a copy of the order to each party involved in the PBO proceedings. This may include the prosecutor, or the constrained person. A copy will also be provided to the Commissioner of Police, if the Commissioner of Police was not already involved in the proceedings, to ensure police have information about PBOs when a breach is reported to them.

Division 2 – Making PBOs against youths

This division deals with making a PBO against a youth.

Clause 16 Term used: youth-related PBO proceedings

Clause 16 provides that the term *youth-related PBO proceedings* refers to proceedings in a court relating to either making, varying or cancelling a PBO against a youth, who will be aged 16 or 17 years of age.

Clause 17 No PBO where court refrains from imposing punishment on youth

Clause 17 provides that a PBO cannot be made against a youth if the related sentence involves the exercise of a power under the *Young Offenders Act 1994* Part 7 Division 2, 3, or 4. Division 2 of the *Young Offenders Act 1994* provides for the court to refrain from imposing any punishment for a child; division 3 provides for the court to refrain from imposing a punishment if it is satisfied of certain undertakings or informal punishments are put in place; division 4 provides that the court may refrain from imposing a punishment if the offender enters into a recognisance to keep the peace and be on good behaviour.

This ensures that the provisions in the proposed Act will not override the provisions of the Part 7 Division 2, 3, or 4 of the *Young Offenders Act 1994*.

Clause 18 Child welfare laws not affected

Sub clause (1) provides the meaning of the term *child welfare law* which in the proposed section is to mean any of the following written laws:

- (a) the *Adoption Act 1994*
- (b) the *Children and Community Services Act 2004*
- (c) the *Family Court Act 1997*
- (d) the *Young Offenders Act 1994*
- (e) another written law providing for:
 - (i) the imprisonment, detention or residence of a child; or
 - (ii) the care, treatment and protection of a child who has a mental illness.

Sub clause (2) provides that the provisions of the proposed Act will not have power over the provisions of a child welfare law.

Sub paragraph (2)(a) provides that the proposed Act or any PBO made under the proposed Act will not affect the jurisdiction of a court or the power provided under child welfare law where a youth is placed under the control, supervision or care of a person through the provision of a child welfare law.

Sub paragraph (2)(b) provides that the provisions of the proposed Act will not affect any order or action taken under a child welfare law.

Sub paragraph (2)(c) provides that the provisions of the proposed Act will not affect the operation of a child welfare law in relation to a youth.

Sub clause (3) provides that if a court becomes aware that another court or authority proposes to make an order or to take any other action referred to in subsection (2)(a) in relation to a youth, the court may adjourn the PBO proceedings until that order is made or the action is

taken. This ensures that constrained behaviours that may be included in the PBO do not interfere with the welfare of the youth.

Clause 19 Court to take into account certain principles and considerations

Clause 19 provides that the court that hears a youth-related PBO proceeding will follow the Principles of the *Young Offenders Act 1994* in sections 46(1) and (2) of that Act.

Clause 20 Responsible adult to attend

Clause 20 provides that section 45 of the *Young Offenders Act 1994* applies in youth-related PBO proceedings.

Division 3 – Varying or cancelling PBOs

Clause 21 Application

Sub clause (1) provides that an application to vary or cancel a PBO may be made at any time while the PBO is in force. This ensures that the constrained person or other party can apply to alter all or a number of specified constrained behaviours in the PBO. This will enable the alteration of the constrained behaviours to make them either less restrictive or more restrictive.

Sub paragraph (1)(a) provides that the prosecutor can make an application to vary or cancel the PBO.

Sub paragraph (1)(b) provides that the constrained person can make an application to vary or cancel the PBO.

Sub clause (2) provides that all applications to vary or cancel a PBO must be made in accordance with the rules of the court.

Clause 22 Registrar to fix hearing and notify parties

Sub clause (1) provides that if an application is made under proposed section 21 to vary or cancel a PBO, a registrar must give a hearing notice and a copy of the application to each party involved in the PBO proceedings.

Sub clause (2) provides that if a party to the PBO proceedings is given the hearing notice but does not attend the hearing then the court may take actions on how to proceed as outlined in proposed sub paragraphs (a) (b) and (c).

Sub paragraph (a) provides that the court may proceed with the hearing if a party is given a hearing notice but does not attend.

Sub paragraph (b) provides that the court may dismiss the application made under proposed section 21 if satisfied that the party that does not attend was given the hearing notice.

Sub paragraph (c) provides that the court may adjourn the hearing if the party is given a hearing notice but does not attend.

Clause 23 Applications to extend period of PBOs

Clause 23 provides that if an application is made to vary the PBO by extending the period of the PBO and the constrained person has been given a copy of the application, then proposed sub paragraph (a) and (b) apply despite anything else in the proposed Act.

Sub paragraph (a) provides that the PBO does not expire until the application to vary the period of the PBO is determined.

Sub paragraph (b) provides that the period of the PBO is extended until the time that the application to extend the period of the PBO is determined.

Clause 24 Variation or cancellation

Sub clause (1) provides what orders a court may make at a hearing under proposed section 21.

Sub paragraph (a) provides that a court may make an order to dismiss the application made under proposed section 21; or

Sub paragraph (b) provides that the court may make an order to vary the PBO in response to an application made under proposed section 21; or

Sub paragraph (c) provides that the court may make an order to cancel a PBO in response to an application made under proposed section 21.

Sub clause (2) provides what a court can do if it decides to vary a PBO instead of making an order under proposed sub paragraph (1)(b).

Sub paragraph (a) provides that the court can make an order to cancel the PBO; and

Sub paragraph (b) provides that the court can make a new PBO that has the same constraints the cancelled PBO would have had if it had been varied under proposed subsection (1)(b).

Sub clause (3) provides that if the court makes an order under proposed subsection (1)(b) to vary the PBO or (c) to cancel the PBO, or if it makes a new PBO under proposed subsection (2), a registrar must arrange for a copy of the order or the PBO to be given to parties as provided in proposed subclause (3)(1) under *party*.

Sub paragraph (a) provides that the order or PBO should be given to each party in the PBO proceedings; and

Sub paragraph (b) provides that if the Commissioner of Police is not a part to the PBO proceedings, then a copy of the order or PBO should be given to the Commissioner of Police to ensure police have information about the order or PBO if a breach is reported to police.

Sub clause (4) provides when a cancellation of a PBO comes into effect.

Sub paragraph (a) provides that a PBO is cancelled and is no longer in effect at the time a new PBO comes into force; or

Sub paragraph (b) provides that if a new PBO is not made, then the cancelled PBO is no longer in effect at the conclusion of the hearing at which the PBO was cancelled.

Clause 25 Correcting minor errors in PBOs

Sub clause (1) provides the circumstances when a PBO can be corrected by a registrar, or a court when an application to make a correction has been made by or on behalf of the prosecutor or the constrained person.

Sub paragraph (a) provides that a clerical mistake can be corrected under sub clause (1).

Sub paragraph (b) provides that an error arising from an accidental slip or omission can be corrected under sub clause (1).

Sub paragraph (c) provides that a material mistake in the description of any person, thing or matter referred to in the PBO can be corrected under sub clause (1).

Sub clause (2) provides that subsection (1) does not apply if the correction would adversely affect the interests of the public or the constrained person.

Division 4 – PBO proceedings

Clause 26 Evidence in PBO proceedings

Sub clause (1) provides direction on the evidence a court may take when considering whether to make a PBO against a person.

Sub subparagraph (a)(i) provides that the court may take evidence as to whether the behaviour of the person in committing the offence for which the person received the related sentence had an element of anti-social behaviour; and

Sub subparagraph (a)(ii) provides that the court may take evidence as to whether the behaviour of the person in committing any other offence of which the person was convicted before committing the offence referred to in proposed sub subparagraph (i) constituted anti-social behaviour.

Sub paragraph (b) provides that the court may take evidence as to whether the PBO should be made to reduce the likelihood of the person committing a further offence involving anti-social behaviour. The behaviours that are to be constrained will relate to the type of behaviour for which the constrained person was convicted of an offence. A PBO is not to be made as a punishment.

Sub clause (2) provides direction on evidence a court may take that is relevant to whether a PBO should be varied or cancelled.

Sub paragraph (a) provides that the court may take evidence relevant to whether the PBO should be varied to reduce the likelihood of the constrained person engaging in further anti-social behaviour; or

Sub paragraph (b) provides that the court may take evidence relevant to whether the PBO should be varied to alleviate undue hardship imposed on the constrained person by the PBO; or

Sub paragraph (c) provides that the court may take evidence relevant to whether the PBO should be varied or cancelled because of the likelihood of the constrained person committing a further offence involving anti-social behaviour has significantly decreased.

Sub clause (3) provides what evidence may be admitted in PBO proceedings without limiting proposed subsections (1) or (2).

Sub sub paragraph (a)(i) provides that any record as defined in the *Criminal Procedure Act 2004* section 3 that was disclosed to the person in accordance with the *Criminal Procedure Act 2004* section 35, 42, 61, 62, 95 or 96 may be admitted as evidence in PBO proceedings in the course of the prosecution referred to in proposed paragraph (b) or (d); or sub subparagraph (a)(ii) provides that any record as defined in the *Criminal Procedure Act 2004* section 3 that was otherwise admitted into evidence in the course of the prosecution referred to in proposed paragraph (b) or (d) may be admitted as evidence.

Sub paragraph (b) provides that any evidence given in the related prosecution may be admitted as evidence; and the court may hear any evidence given during the related prosecution.

Sub subparagraph (c)(i) provides that the criminal record of the person, subject to the *Criminal Procedure Act 2004* section 168 (which applies with any necessary changes) may be admitted as evidence; or sub subparagraph (c)(ii) provides that any criminal record of the person admitted in the related prosecution may be admitted as evidence.

Sub paragraph (d) provides that evidence relating to the circumstances of an offence specified on a criminal record admitted under paragraph (c) can be admitted as evidence.

Sub paragraph (e) provides that the transcript of the proceedings of any prosecution referred to in paragraph (b) or (d) can be admitted as evidence.

Clause 27 PBO proceedings, general provisions about

Clause (1) provides that PBO proceedings are taken to be civil proceedings for all purposes.

Clause (2) provides that the rules of evidence applicable in civil proceedings apply in PBO proceedings.

Clause (3) provides that the rules of evidence applicable only in criminal proceedings do not apply in PBO proceedings.

Clause (4) provides that a question of fact to be decided by a court in PBO proceedings is to be decided on the balance of probabilities.

Clause (5) provides that except in relation to an offence under the Act, a rule of construction that is applicable only in relation to the criminal law does not apply in the interpretation of the Act.

Clause 28 Practice and procedure

Sub clause (1) provides the practice and procedure to be followed in PBO proceedings, unless otherwise prescribed.

Sub paragraph (a) provides that in the Magistrates Court the practice and procedure to be applied in that court is under the *Magistrates Court (Civil Proceedings) Act 2004*.

Sub paragraph (b) provides that in the Children's Court the practice and procedure to be applied in that court in non-criminal proceedings is under the *Children's Court of Western Australia Act 1988*.

Sub paragraph (c) provides that in the District Court or Supreme Court the practice and procedure of those courts is that which is exercised when exercising their civil jurisdiction.

Sub clause (2) provides that despite proposed subsection (1) a court cannot order a party to PBO proceeding to pay another party's costs of or relating to PBO proceedings unless there are exceptional circumstances.

Part 3 – Firearms constraints in PBOs

Part 3 of the proposed Act mirrors the provisions of the *Restraining Orders Act 1997* relating to firearms orders.

Clause 29 Application of this Part

Clause 29 provides that the provisions in Part 3 applies if a court makes a PBO that prohibits the constrained person from possession of a firearm or firearms licence, as provided in sub paragraph (a), or from obtaining a firearms licence, as provided in sub paragraph (b).

Clause 30 Constrained person to give up possession of firearms and licences

Sub clause (1) provides that the constrained person must give up possession of all firearms and firearms licences held by the constrained person.

Sub paragraph (a) provides that the court will prescribe the person to whom the constrained person will give up possession of firearms and firearms licence.

Sub paragraph (b) provides that the court will prescribe the manner in which the constrained person will give up possession of firearms and firearms licence.

Sub paragraph (c) provides that the court will prescribe the period of time after making a PBO that the constrained person has to give up possession of firearms and firearms licence.

Sub clause (2) provides that a firearm or firearms licence given up under the provisions of proposed sub clause (1) must be dealt with in the prescribed manner.

Sub paragraph (3)(a) provides that if the constrained person was lawfully in possession of a firearm or firearms licence before the PBO was made he or she does not breach the PBO if he

or she is in possession of the firearm or firearms licence for the period for him or her to comply with proposed sub clause (1).

Sub paragraph (3)(b) provides that if the constrained person gives up possession of the firearm or firearms licence under proposed subsection (1) he or she does not breach the PBO if he or she is in possession of the firearm or firearms licence for the period for him or her to comply with proposed sub clause (1).

Sub clause (4) provides that the court may shorten the prescribed period within which the constrained person must give up possession of firearms and firearms licence when making a PBO.

Clause 31 Seizure of firearms

Sub clause (1) provides the actions a police officer may take, subject to *Criminal Investigation Act 2006* section 31, when a constrained person does not give up possession of a firearm or firearms licence in accordance with proposed section 30 of the proposed Act.

Sub paragraph (a) provides that a police officer may, with or without a warrant, enter a place where a firearm that is or is reasonably suspected to be, in the possession of the constrained person, to search for and seize firearms.

Sub paragraph (b) provided that a police officer may, with or without a warrant, enter a place where a firearms licence is held by the constrained person to search for and seize the licence.

Sub clause (2) provides that a police office may use any force against any person or thing that it is reasonably necessary to use in the circumstances in order to exercise a power under proposed subsection (1).

Sub clause (3) provides that a firearm or firearms licence seized under proposed subsection (1) must be given to the Commissioner of Police to be dealt with in the prescribed manner relating to the seizure of firearms and firearms licences.

Clause 32 Notification of co-licensees and responsible persons

Sub clause (1) provides the meaning of the terms *co-licensee* and *responsible person* used in the proposed clause.

Sub clause (2) provides the actions the Commissioner of Police must instruct a police officer to undertake as soon as is practicable after receiving a copy of a PBO under proposed section 15 or proposed section 24(3).

Sub paragraph (a) provides that the instructed police officer will ask the constrained person whether that person uses or has access to any firearms in the course of his or her usual occupation.

Sub sub paragraph (i) provides that the police officer will ask for the name and business address of the responsible person if the constrained person uses or has access to any firearms in the course of his or her occupation.

Sub sub paragraph (ii) provides that the police officer will ask for the name and address of the co-licensee if the constrained person uses or has access to any firearms in the course of his or her occupation.

Sub paragraph (b) provides that the police officer will complete the relevant part of the copy of the PBO in accordance with the response given by the constrained person to questions asked in accordance with sub sub paragraphs (i) and (ii).

Sub paragraph (c) provides that the police officer will tell the constrained person that written notice that the constrained person has been given a PBO will be given to the person responsible for the firearm.

Sub clause (3) provides that a constrained person who fails to answer or gives a false answer to a question asked under proposed subsection (2)(a) commits an offence and the penalty for that offence will be a fine of \$6,000 and/or imprisonment of 9 months.

Sub clause (4) provides that as soon as possible after receiving the copy of the PBO the Commissioner of Police must give written notice to any responsible person or co-licensee of a firearm who is named in the copy.

Sub paragraph (a) provides that the written notice referred to in proposed sub section 4 will state that a PBO has been made in relation to the constrained person.

Sub paragraph (b) provides that the written notice referred to in proposed sub section 4 will state that the PBO prohibits the constrained person from being in possession of a firearm or being in possession of a firearm other than on the conditions specified in the PBO.

Sub paragraph (c) provides that information about the period of time the PBO will be in force should be provided in the written notice referred to in proposed sub section 4.

Sub paragraph (d) provides that information should be included in the written notice referred to in proposed sub section 4 that it is an offence for the responsible person or co-licensee to allow the constrained person to use or have access to a firearm in contravention of the PBO.

Sub clause (5) provides that a responsible person or co-licensee who is given a written notice under proposed subsection 4 who allows the constrained person to use or have access to a firearm other than what use or access is permitted under the PBO commits an offence. The penalty for that offence will be a fine of \$12,000 for a responsible person; and a fine of \$12,000 or imprisonment for 12 months or both in the case of a co-licensee.

Part 4 – General

Clause 33 Giving of documents

Sub clause (1) provides the ways in which documents may be given to a person if required by the proposed Act.

Sub paragraph (a) provides that a document must be given personally; or

Sub paragraph (b) provides that if a document cannot be given to a person personally the document can be sent by ordinary prepaid post to the person at the person's last known place of residence or business.

Sub clause (2) provides the number of days notice that is to be given if the proposed Act requires that a person is given a hearing notice.

Sub paragraph (a) provides that if the hearing notice is given personally then the notice must be given at least 7 days before the hearing date.

Sub paragraph (b) provides that if the hearing notice is not given personally and is given by post then the notice must be posted at least 14 days before the hearing date.

Clause 34 Publication of details of constrained people

Sub clause (1) provides the meaning of *CEO* in the proposed section, which is to mean the chief executive officer of the department of the Public Service principally assisting in the administration of the proposed Act.

Sub clause (2) provides which PBO details may be published by the chief executive officer on a website, unless ordered otherwise by a court.

Sub paragraph (a) provides that the name of the constrained person can be published.

Sub paragraph (b) provides that the photograph of the constrained person can be published.

Sub paragraph (c) provides that the town or suburb where the constrained person lives can be published.

Sub paragraph (d) provides that the constraints that are imposed by the PBO on the activities and behaviour of the constrained person can be published.

Sub clause (3) provides details of certain things or certain persons that must not be identified through the provisions of proposed subsection (2).

Sub paragraph (a) provides that a child other than the constrained person cannot be identified through the provisions of proposed subsection (2).

Sub paragraph (b) provides that the exact address of the constrained person cannot be identified through the provisions of proposed subsection (2).

Sub paragraph (c) provides that any offence of which the constrained person was convicted in the Children's Court cannot be identified through the provisions of proposed subsection (2).

Sub clause (4) provides that a court making a PBO may order that all or some of the things referred to in proposed subsection (2) must not be published if there are circumstances justifying making such an order.

Sub clause (5) provides that the court must have regard to the wellbeing of the youth when considering the circumstances that justify an order to be made under proposed subsection (4) that will prevent publication of all or some of the things referred to in proposed subsection (2).

Sub clause (6) provides that the chief executive officer may request that the Commissioner of Police provide the most recent photograph of the constrained person that may be in the possession of the Commissioner of Police for the purposes of proposed section (2)(b).

Sub clause (7) provides that the Commissioner of Police must comply with a request made by the chief executive officer made under proposed sub section (6) as soon as practicable.

Sub clause (8) provides that a person may republish in any manner something that has been published on the PBO website as provided under proposed subsection (2).

Clause 35 Breach of PBO

Sub clause (1) provides that a constrained person who breaches the PBO under which that person is constrained from specified behaviours will have committed an offence.

Sub paragraph (a) provides that the penalty for a breach of a PBO that was made by Children's Court will be a fine of \$2,000 or imprisonment for 2 years or both.

Sub paragraph (b) provides that the penalty for a breach of a PBO that was made in the Magistrates Courts will be a fine of \$6,000 or imprisonment for 2 years or both.

Sub paragraph (c) provides that the penalty for a breach of a PBO that was made by the Supreme or District Court will be a fine of \$10,000 or imprisonment for 5 years or both.

Sub clause (2) provides for where the proceedings for a breach of a PBO will be held.

Sub paragraph (a) provides that if the alleged offender is a youth, the proceedings for a breach of a PBO will be held in the Children's Court.

Sub paragraph (b) provides that if the alleged offender is an adult the proceedings for a breach of a PBO will be held in the Magistrates Court.

Clause 36 Defence

Sub clause (1) provides the meaning for the term *legal practitioner*.

Sub clause (2) provides the defence to a charge of breach of a PBO by a constrained person under proposed section 35.

Sub paragraph (a) provides that if the constrained person was using a process of family dispute resolution as defined in the *Family Court Act 1997*, this can be used as a defence for a charge of breach of a PBO by a constrained person under proposed section 35.

Sub paragraph (b) provides that if the constrained person was instructing, or acting through, a legal practitioner or a person acting under the *Aboriginal Affairs Planning Authority Act 1972* section 48 or using conciliation, mediation or another form of consensual dispute resolution provided by a legal practitioner, this can be used as a defence for a charge of breach of a PBO by a constrained person under proposed section 35.

Sub paragraph (c) provides that if the constrained person was acting in accordance with an action taken by a person or authority under a written law, this can be used as a defence for a charge of breach of a PBO by a constrained person under proposed section 35.

Sub paragraph (d) provides that if the constrained person was acting on the medical advice of a person with medical qualifications as defined in the *Civil Liability Act 2002* section 5AB, this can be used as a defence for a charge of breach of a PBO by a constrained person under proposed section 35.

Sub paragraph (e) provides that if the constrained person was acting as a result of such an emergency that an ordinary person in similar circumstances would have acted in the same or a similar way, this can be used as a defence for a charge of breach of a PBO by a constrained person under proposed section 35.

Clause 37 Appeals

Subclause (1) provides that a person aggrieved by the decision of a court in PBO proceedings may appeal against that decision in accordance with the proposed section.

Subclause (2) provides that if the decision was made by the Magistrates Court, the appeal is to be made in accordance with the *Magistrates Court (Civil Proceedings) Act 2004* Part 7.

Subclause (3) provides that if the decision was made by the Children's Court when constituted so as not to consist of or include a judge, the appeal is to be made in accordance with the *Children's Court of Western Australian Act 1988* section 41 as if the decision were a decision referred to in that section.

Subclause (4) provides that if the decision was made by the Children's Court when constituted so as to consist of or include a judge, the appeal is to be made to the Court of Appeal in accordance with the *Children's Court of Western Australia Act 1988* section 43 as if the decision were a decision referred to in subsection (4) of that section.

Subclause (5) provides that if the decision was made by the District Court, the appeal is to be made to the Court of Appeal and the *District Court of Western Australia Act 1969* section 79 (with any necessary changes) applies as if the decision were a final judgement of the District Court.

Subclause (6) provides that if the decision was made by a judge of the Supreme Court, the appeal is to be made to the Court of Appeal in accordance with the *Supreme Court Act 1935* section 58.

Clause 38 Protection from liability for wrongdoing

Subclause (1) provides that a person who acts in good faith in the performance or purported performance of a function under the proposed Act will be protected from civil liability.

Subclause (2) provides that the protection given in proposed subsection (1) applies even though the thing done as described in that section may have been capable of being done whether or not the proposed Act had been enacted.

Subclause (3) provides that despite proposed subsection (1), the State is not relieved of any liability that it might have for another person having done anything as described in that section.

Subclause (4) provides that in the proposed section, a reference to the doing of anything includes a reference to an omission to do a thing.

Clause 39 Regulations

Sub clause (1) provides that the Governor may make regulations prescribing all matters that are required or permitted by the proposed Act to be prescribed, or that are necessary or convenient to be prescribed to give effect to the purposes of the Act.

Sub clause (2) provides that without limiting the provisions in proposed subsection (1), regulations may be made in relation to certain matters.

Sub paragraph (a) provides that regulations can be in relation to the manner in which firearms and firearms licences are to be given up by a constrained person; and delivered to, and dealt with by, a prescribed person.

Sub paragraph (b) provides that regulations can be in relation to facilitating the effective operation of PBOs that prohibit or restrict a person from being in possession of a firearm.

Clause 40 Review of Act

Sub clause (1) provides that the Minister must carry out a review of the operation and effectiveness of the proposed Act as soon as is practicable three years after the commencement of proposed section 40.

Sub clause (2) provides that the Minister is to prepare a report on the review of the Act as soon as is practicable after the report is prepared and the report is to be laid before each House of Parliament.

Part 5 – Amendments to other Acts

Division 1 – Children’s Court of Western Australia Act 1988 amended

Clause 41 Act amended

This Division amends the *Children’s Court of Western Australia Act 1988*.

Clause 42 Section 20 amended

Sub clause 42 amends section 20 of the *Children’s Court of Western Australia Act 1988* to insert after section 20(2):

- (3) Subject to this Act, the Court has exclusive jurisdiction to hear PBO proceedings under *Prohibited Behaviour Order Act 2010* related to a child.

Clause 43 Section 35 amended

Sub clause (1) amends section 35(1) of the *Children’s Court of Western Australia Act 1988* to delete “section 36A” and insert “section 36A or in accordance with the *Prohibited Behaviour Orders Act 2010* section 34”.

Sub clause (2) amends section 35(3) of the *Children’s Court of Western Australia Act 1988* to delete “section 36A,” and insert “section 36(A) or in accordance with the *Prohibited Behaviour Orders Act 2010* section 34”..

Clause 44 Section 36 amended

Clause 44 amends section 36(1) of the *Children’s Court of Western Australia Act 1988* to delete “section 36A.” and insert “section 36A or in accordance with the *Prohibited Behaviour Orders Act 2010* section 34”

Division 2 – Criminal Investigation Act 2006 amended

Clause 45 Act amended

This Division amends the *Criminal Investigation Act 2006*.

Clause 46 Section 69A inserted

Clause 46 amends section 69A of the *Criminal Investigation Act 2006* to insert after section 68:

69A Searching people for things relevant to prohibited behaviour orders

If an officer reasonably suspects that a person in a public place is prohibited by a PBO made under the *Prohibited Behaviour Orders Act 2010* from having something in his or her possession (a ***prohibited thing***) in that place, the officer-

- (a) may do a basic search of the person, whether or not the officer suspects the person is in possession of a prohibited thing; and
- (b) may, subject to section 146, seize any prohibited thing that the officer finds; and
- (c) may do a forensic examination on the prohibited thing, whether or not the officer seizes it.

Division 3 – Criminal Investigation (Identifying People) Act 2002 amended

Clause 47 Act amended

This Division amends the *Criminal Investigation (Identifying People) Act 2002*.

Clause 48 Section 73 amended

Clause 48 amends section 73(1)(m) of the *Criminal Investigation (Identifying People) Act 2002* to insert:

(na) for the purposes of the *Prohibited Behaviour Orders Act 2010* section 34;

Division 4 – Sentencing Act 1995 amended

Clause 49 Act amended

This Division amends the *Sentencing Act 1995*.

Clause 50 Section 124B inserted

Clause 50 amends section 124B of the *Sentencing Act 1995* to insert at the end of Part 17:

124B. Prohibited behaviour orders

For the purposes of section 123, a prohibited behaviour order made against an offender under the *Prohibited Behaviour Orders Act 2010* is taken to be an order made under this Part.