

# **FAMILY VIOLENCE LEGISLATION REFORM (COVID-19 RESPONSE) BILL 2020**

## **EXPLANATORY MEMORANDUM**

### **Overview of the Bill**

The Family Violence Legislation Reform (COVID-19 Response) Bill 2020 amends the *Sentencing Act 1995*, the *Sentence Administration Act 2003*, the *Bail Act 1982* and the *Restraining Orders Act 1997*.

Its purpose is to implement reforms that will assist in the justice system's preparedness and response to the spread of the Coronavirus.

### **PART 1 – PRELIMINARY**

#### **1 Short Title**

Clause 1 provides that the Bill, once enacted, will be known as the *Family Violence Legislation Reform (COVID -19 Response) Act 2020*.

#### **2 Commencement**

Clause 2 provides that Part 1 will commence on Royal Assent; and the rest of the Act on the day after that day.

## **PART 2 – SENTENCING ACT 1995 AMENDED**

### **3 Act amended**

Clause 13 provides that Part 2 amends the *Sentencing Act 1995* (Sentencing Act).

### **4 Section 4 amended**

Clause 4 inserts the following definition into section 4(1) of the Sentencing Act.

The term **approved electronic monitoring device** means:

- a) an electronic monitoring device that has been approved by the CEO (corrections); and
- b) any equipment, wires or other items associated with a device under paragraph (a).

This definition is intended to capture radio frequency devices and global positioning system devices, and any other technology that may be used for the purpose of the electronic monitoring or curfew requirements under a sentencing order, as well as all ancillary equipment associated with those devices. This definition is consistent with the definition of approved electronic monitoring device inserted into section 4(2) of the *Sentence Administration Act 2003* by clause 15 of the Bill and section 3(1) of the *Bail Act 1982* by clause 22 of the Bill.

### **5 Section 33H amended**

Clause 5 amends section 33H(10) of the Sentencing Act to replace “any device” and “any device or equipment” with “an approved electronic monitoring device”. This amendment is made as a consequence of defining “approved electronic monitoring device” in section 4(1) and to accommodate current drafting conventions.

### **6 Section 72 amended**

Clause 6 amends section 72 of the Sentencing Act to insert subsection (d).

This subsection allows for an electronic monitoring requirement to be imposed as a primary requirement of an intensive supervision order (ISO) in accordance with new section 76A.

### **7 Section 75 amended**

Clause 7 amends section 75(10) of the Sentencing Act to replace “any device” and “any device or equipment” with “an approved electronic monitoring device”. This amendment is made as a consequence of defining “approved electronic monitoring device” in section 4(1).

## **8 Section 76A inserted**

Clause 8 inserts section 76A (Electronic monitoring requirement) into the Sentencing Act.

This amendment allows a court to impose an electronic monitoring requirement when imposing an ISO.

The section empowers a court to impose such an electronic monitoring requirement for the purpose of monitoring the location of the offender. This is achieved by a CCO directing the offender to wear a monitoring device and/or by placing a monitoring device at the offender's place of residence or another location.

Subsection (1) provides that the purpose of an electronic monitoring requirement under section 76A is to enable the location of an offender to be monitored where the offender presents a high risk to a person, a group of persons, or the community more generally.

Subsection (2) provides that if a court considers that electronic monitoring should occur in a particular case, the court may impose an electronic monitoring requirement under section 76A.

Subsection (3) provides that if a court imposes an electronic monitoring requirement, a CCO may direct the person bound to wear an approved electronic monitoring device and/or to permit the installation of an approved electronic monitoring device at their residence or, if they have no place of residence, any other place specified by the CCO.

Subsection (4) provides that the term of an electronic monitoring requirement must be set by the court when it imposes the requirement.

Subsection (5) provides that an electronic monitoring requirement ceases to be in force when its term ends or when the ISO ceases to be in force, whichever happens first. This ensures that an electronic monitoring requirement can only subsist while the ISO subsists.

Subsection (6) provides that this section does not apply to an offender who is under 18 years of age at the time of sentencing. This is to ensure that children who may be subject to an ISO cannot be electronically monitored as part of that order.

## **9 Section 84 amended**

Clause 9 amends section 84 of the Sentencing Act to insert subsection (2).

This subsection allows for an electronic monitoring requirement to be imposed as a primary requirement of a conditional suspended imprisonment order.

## **10 Section 84C amended**

Clause 10 amends section 84C(10) of the Sentencing Act to replace “any device” and “any device or equipment” with “an approved electronic monitoring device”. This amendment is made as a consequence of defining “an approved electronic monitoring device” in section 4(1).

## **11 Section 84CA inserted**

Clause 11 inserts section 84CA (Electronic monitoring requirement) into the Sentencing Act.

This amendment empowers a court to impose an electronic monitoring requirement when imposing conditional suspended imprisonment (CSI) for the purpose of monitoring the location of the offender. This is achieved by a CCO directing the offender to wear a monitoring device and/or placing a monitoring device at the offender’s place of residence or another location.

Subsection (1) provides that the purpose of an electronic monitoring requirement under section 84CA is to enable the location of an offender to be monitored where the offender presents a high risk to a person, a group of persons, or the community more generally.

Subsection (2) provides that if a court considers that electronic monitoring should occur in a particular case, the court may impose an electronic monitoring requirement under section 84CA.

Subsection (3) provides that an electronic monitoring requirement may be imposed only if the court has received a report from the CEO (corrections) about the suitability of electronic monitoring in a particular case.

Subsection (4) provides that if a court imposes an electronic monitoring requirement, a CCO may direct the person bound to wear an approved electronic monitoring device and/or to permit the installation of an approved electronic monitoring device at their residence or, if they have no place of residence, any other place specified by the CCO.

Subsection (5) provides that an electronic monitoring requirement ceases to be in force when the suspension ends. This ensures that an electronic monitoring requirement can only subsist while CSI is in force.

## **12 Section 147A inserted**

Clause 12 inserts section 147A (Monitoring requirements: additional provisions) into the Sentencing Act.

Section 147A is inserted to provide a general provision enabling administration by the Department of Justice of approved electronic monitoring, consistent with the approach in existing legislation.

Subsection (1) allows a CCO to give any reasonable direction to an offender to ensure the proper administration and effectiveness of an electronic monitoring requirement made under a court order.

Subsection (2) provides that an electronic monitoring requirement can be suspended by a CCO if he or she is satisfied that it is not practicable or necessary for the person to be subject to electronic monitoring.

### **13 Schedule 1A amended**

Clause 13 makes a consequential amendment to Part 2 of Schedule 1A of the Sentencing Act because of the separation of breach of family violence restraining order and breach of violence restraining order offences in the *Restraining Orders Act 1997*. This Schedule sets out the relevant simple offences for the purposes of Part 2, Division 2A of that Act, which deals with sentencing where declared criminal organisations are involved. This amendment simply ensures breach of family violence restraining order and violence restraining order both remain in the offence Schedule.

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## **PART 3 – SENTENCE ADMINISTRATION ACT 2003 AMENDED**

### **14 Act amended**

Clause 14 provides that Part 3 amends the *Sentence Administration Act 2003* (Sentence Administration Act).

### **15 Section 4 amended**

Clause 15 inserts the following definition into section 4(2) of the Sentence Administration Act.

**Approved electronic monitoring device** is defined as:

- a) an electronic monitoring device that has been approved by the CEO (corrections); and
- b) any equipment, wires or other items associated with a device under paragraph (a).

This definition is intended to capture radio frequency devices and global positioning system devices, and any other technology that may be used for the purpose of surveillance and monitoring of a person's location and movements, as well as all ancillary equipment associated with those devices. This definition is consistent with the definition of approved electronic monitoring device inserted into section 4(2) of the Sentencing Act by clause 15 of the Bill and section 3(1) of the *Bail Act 1982* by clause 22 of the Bill.

### **16 Section 30 amended**

Clause 16 amends section 30 of the Sentence Administration Act.

Section 30 is amended to accommodate the new definition of an approved electronic monitoring device. The amendment does not change the operation of existing section 30(1) in relation to the application of an electronic monitoring requirement as part of a parole order.

### **17 Section 57 amended**

Clause 17 amends section 57 of the Sentence Administration Act.

Subsection (2) is amended to accommodate the new definition of an approved electronic monitoring device.

### **18 Section 74G amended**

Clause 18 amends section 74G of the Sentence Administration Act.

The section is amended to accommodate the new definition of an approved electronic monitoring device.

## **19 Section 118 amended**

Clause 19 amends section 118 of the Sentence Administration Act.

Section 118 of the Sentence Administration Act currently provides for a number of offences in relation to interfering with, damaging or destroying, hindering access to and contravening a direction in relation to, monitoring equipment.

To accommodate other amendments to the Sentencing Act and the Sentence Administration Act, and to ensure a consistent approach to penalties in respect of approved electronic devices, section 118 is amended to expand the range of offences that can be committed in relation to monitoring equipment that is installed either at a place or worn by a person.

The definition of **monitoring equipment** in section 118(1) is amended to mean any device or equipment, and any related wiring or other item, that is designed or intended to keep a person under surveillance or to monitor a person's movements and that is required to be worn by a person, or to be installed at a place, under this Act, the Sentencing Act or the *Bail Act 1982*.

Subsection (1A) is inserted to provide that the CEO may give a person who is, or who has been, the subject of a direction or order to wear monitoring equipment a direction to be available at a specific place and time in order to surrender or deliver the monitoring equipment to the CEO.

The offence provided by subsection (2) remains, but the provision is amended to accommodate the new definition of monitoring equipment.

Subsection (3) is amended to provide that a person who, without reasonable excuse, fails to comply with, or contravenes, a direction given under subsection (1A) or (2) commits an offence.

The offence provided by subsection (4) remains, but the provision is amended to accommodate the new definition of monitoring equipment.

Subsection (6) is amended to provide that a person who, without reasonable excuse, removes or interferes with, or interferes with the operation of, any monitoring equipment in such a way as to prevent or impede monitoring of the person's location, commits an offence.

The penalty for each of these offences is \$12,000 or imprisonment for 12 months.

## **20 Schedule 2 amended**

Clause 20 amends Schedule 2 of the Sentence Administration Act to provide that a serious offence also includes an offence under new section 61(1A) of the *Restraining Orders Act 1997* – breach of a violence restraining order.



## **PART 4 – BAIL ACT 1982 AMENDED**

### **21 Act amended**

Clause 21 provides that Part 4 amends the *Bail Act 1982* (Bail Act).

### **22 Section 3 amended**

Clause 22 inserts the following definition into section 3(1) of the Bail Act.

The term **approved electronic monitoring device** means:

- a) an electronic monitoring device that has been approved by the CEO (corrections); and
- b) any equipment, wires or other items associated with a device under paragraph (a).

This definition is intended to capture radio frequency devices and global positioning system devices, and any other technology that may be used for the purpose of the electronic monitoring or curfew requirements under a sentencing order, as well as all ancillary equipment associated with those devices. This definition is consistent with the definition of approved electronic monitoring device inserted into section 4(1) of the Sentencing Act by clause 4 of the Bill and section 4(2) of the Sentence Administration Act by clause 15 of the Bill.

### **23 Section 16A amended**

Clause 23 deletes section 16A(3) of the Bail Act.

The effect of this amendment is to allow police to grant bail for breaches of family violence restraining orders (FVROs) or violence restraining orders (VROs) in an urban area, as they currently can in regional areas.

Currently, police officers do not have jurisdiction to grant bail to an accused who has been arrested and charged with breaching a restraining order in an urban area. In such cases, bail can only be considered by a court and an accused may be kept in custody overnight until he or she can be brought before a court. This has had the unintended consequence of encouraging police to use the summons process for an offence of breaching a restraining order instead of arresting the offender where the officer considers it unfair or inappropriate to remand an accused in custody to appear at the next court sitting. It is also inconsistent with the discretion afforded to police in regional and remote areas, who have the power to set bail conditions in these circumstances.

## **24 Section 24A amended**

Clause 24 amends section 24A(4) of the Bail Act.

The amendment to this section is part of the proposed changes to facilitate electronic monitoring of an accused on home detention bail.

The amendment ensures a CCO who is writing a report on the suitability of an accused for a home detention condition includes a recommendation as to whether the accused is suitable for electronic monitoring while on home detention.

This amendment interacts with new Schedule 1, Part D, clause 3(4) (discussed below) which provides a judicial officer may impose a home detention condition inclusive of electronic monitoring if a recommendation has been made under section 24A(4).

## **25 Section 50K deleted**

Clause 25 deletes section 50K of the Bail Act.

The effect of section 50K has been incorporated into new section 66E.

## **26 Section 50L amended**

Clause 26 amends section 50L(1) of the Bail Act to accommodate the new definition of an approved electronic monitoring device into the conditions that may be placed on home detention.

## **27 Section 66E inserted**

Clause 27 inserts section 66E (Retrieving monitoring equipment) into the Bail Act.

Section 66E provides that section 118 of the Sentence Administration Act applies if, under the Bail Act, any approved electronic monitoring device has been required to be worn by a person, or has been installed at a place, in connection with keeping an accused under surveillance or to monitor an accused. Section 118 of the Sentence Administration Act contains offences in relation to monitoring equipment.

## **28 Schedule 1 Part D clause 3 amended**

Clause 28 amends Schedule 1 Part D clause 3 of the Bail Act.

Clause 3 deals with a judicial officer's power to impose a home detention condition. The overall effect of the amendments to clause 3 is to allow for electronic monitoring of an accused who is on home detention as part of his or her bail conditions.

Subclause (3)(ca) is inserted to provide that a home detention condition includes a condition that while the accused is on bail, the accused shall, if relevant, comply with any direction under subclause (4).

Subclause (4) provides that a judicial officer may, if a CCO recommends that the accused is suitable for electronic monitoring, direct that the accused, while subject to a home detention condition:

- a) be subject to electronic monitoring under subclause (5) so as to allow the location of the accused to be monitored; and
- b) be under the supervision of a CCO and comply with the directions of the CCO under subclause (5).

The purpose of electronic monitoring under these provisions is to monitor the accused's location to ensure compliance with bail conditions.

Subclause (5) empowers a CCO to do any or all of the following for the purpose of the electronic monitoring of an accused:

- a) direct the accused to wear an approved electronic monitoring device;
- b) direct the accused to permit the installation of an approved electronic monitoring device at the place where the accused is to remain; and
- c) give any other reasonable direction to the accused as necessary for the proper administration of the electronic monitoring of the accused.

Subclause (6) allows a CCO to suspend an electronic monitoring requirement if he or she is satisfied that it is not practicable or not necessary for the accused to be subject to such a requirement.

Subclause (7) states that a requirement that an accused subject to a home detention condition while on bail is to wear an electronic monitoring device cannot apply to a person who is under 18 years of age. This prevents children from being subject to electronic monitoring in this context.

## **PART 5 – RESTRAINING ORDERS ACT 1997 AMENDED**

### **29 Act amended**

Clause 29 provides that Part 5 amends the *Restraining Orders Act 1997* (Restraining Orders Act).

### **30 Section 3 amended**

Clause 30 inserts the following definitions into section 3(1) of the Restraining Orders Act.

**Affidavit** includes an electronic declaration made in accordance with the rules of court.

**Public Advocate** means the person holding or acting in the office of the Public Advocate under the *Guardianship and Administration Act 1990*.

### **31 Section 9 replaced**

Clause 31 deletes and replaces existing section 9 of the Restraining Orders Act.

New section 9 allows the court to make procedural rules in relation to a number of functions relating to restraining order hearings. This amendment is for the purpose of enabling electronic lodgement of restraining orders and so functions that must currently be undertaken by a Registrar can be carried out by the court's electronic system where required.

### **32 Section 10 amended**

Clause 32 deletes section 10(1) and (1a) of the Restraining Orders Act and replaces them with a new section 10(1) and (1A).

The new provisions allow the court to make rules in relation to a number of functions of the Registrar relating to preparing and serving restraining orders. This amendment is for the purpose of enabling electronic lodgement of restraining orders and so functions that must currently be undertaken by a Registrar can be carried out by the courts electronic system where required.

### **33 Section 16 amended**

Clause 33 amends section 16(4)(c) of the Restraining Orders Act to remove the existing provision that provides that an interim order remains in force until it expires.

This amendment intends to make clear that an interim order is in force until a final order comes into force, or the matter is concluded without an order being made through a hearing or conference, or the interim order is cancelled. This prevents the courts from making interim orders for a fixed period of time.

### **34 Section 24A amended**

Clause 34 amends section 24A of the Restraining Orders Act.

Subsection (1) is amended to delete the words “in person” so that an applicant may make an application for an order online rather than being required to attend court in person.

Subsection (2)(c) is inserted, which allows an application for an FVRO to be made by a person acting on behalf of another person in circumstances prescribed in the regulations.

New subsection (2A) is inserted to provide clarity around whose name an application for an FVRO is made in if it is made by someone other than the person seeking to be protected.

In summary, the amendment provides that where a police officer, a child welfare officer, or guardian appointed under the *Guardianship and Administration Act 1990* applies for a restraining order on behalf of a person, the application is to be made in the name of “the Commissioner of Police,” the “CEO (child welfare)” or “Public Advocate,” respectively, rather than in the name of the individual officer.

Subsection (2A)(d) provides that where regulations permit a person to make an application on behalf of another person under section 24A(2)(c), regulations may prescribe circumstances where a prescribed body, who applies for a restraining order on behalf of another person, is to be recorded as the applicant.

These amendments are intended to prevent child protection workers, police officers, guardians or other persons from being named as the applicant.

Subsection (3) is amended to compliment amended section (1) allowing a person to make an application for an order online in accordance with rules of the court rather than being required to attend court in person.

### **35 Section 25 amended**

Clause 35 amends section 25 of the Restraining Orders Act.

Subsection (1) is amended to delete the words “in person” so that an applicant may make an application for an order online rather than being required to attend court in person.

Subsection (3) is amended to compliment amended section (1) allowing a person to make an application for an order online in accordance with rules of the court rather than being required to attend court in person.

### **36 Section 26 amended**

Clause 36 amends section 26 of the Restraining Orders Act.

The effect of the amendments to sections 26(2) and 26(3) are to enable rules of court to provide for the method by which hearings are fixed and summons served on a respondent. This allows functions that must currently be undertaken by a Registrar to be carried out by the court's electronic system where required.

### **37 Section 55 amended**

Clause 37 amends section 55 of the Restraining Orders Act.

Subsection (1)(c) is amended to provide that a restraining order is to be served personally unless substituted service is allowed under section 60.

### **38 Section 59 amended**

Clause 38 amends section 59 of the Restraining Orders Act.

Subsection (2) is amended to provide that as soon as practicable after the registrar receives the proof of service copy of a restraining order, the registrar is to notify the following persons that the order has been served:

- a) the applicant; or
- b) if an application was made under section 24A(1)(b) or 24A(2), the applicant and the person to be protected by the order.

Subsection (3) is inserted. This subsection provides that a notification that a restraining order has been served may be given in such a manner as the registrar thinks fit, including, if authorised by the person who is to receive the notification, by email, text message, or some other form of electronic communication using contact details provided by the person. The object of this amendment are to ensure that the person protected by the order is informed that service has been achieved and that delays in doing so are minimised.

### **39 Section 60 amended**

Clause 39 amends section 60 of the Restraining Orders Act.

Subsection (1) is deleted and replaced to reflect current drafting conventions.

The amendments to subsection (1A) retain the existing powers for the court to make an order allowing substituted service, however, provide for new circumstances under which substituted service may occur without an order of the court.

Subsection (1A)(b) is inserted to allow substituted service without application to the court if a person attempting to serve the order has failed to achieve personal service after taking the steps prescribed by the regulations, including on the basis that substituted service may only occur with the approval of a person of a prescribed class or holding a prescribed office. This subsection intends to allow substituted service without application to the court in circumstances where reasonable attempts at personal service have occurred.

The effect of this provision is to minimise delays in service caused by the current requirement to seek an order from the court permitting substituted service. Regulations will prescribe what constitutes reasonable steps to achieve personal service and contemplates substituted service only occurring with the approval of a senior officer (in the case of service by Western Australian Police).

Subsection (2) is amended to add that substituted service is taken to occur if the person serving it takes such steps as a court directs to bring the document to the attention of the person being served, or, in a case where subsection (1A)(b) applies, takes the steps prescribed in the regulations. This subsection allows regulations to prescribe the manner in which substituted service may occur, for example, orally in accordance with section 55(5A). The use of regulations to prescribe the methods of substituted service enables the methods to be expanded in the future with improvements in technology.

#### **40 Section 61 amended**

Clause 40 amends section 61 of the Restraining Orders Act.

The amendments to section 61:

- create separate offences for breach of an FVRO and a VRO; and
- increase the monetary penalty for breach of an FVRO, VRO and police order to \$10,000, in order to allow a judicial officer to consider a higher penalty for restraining order breaches.

Subsection (6) is inserted to extend the limitation period for prosecution of breach of an FVRO, VRO or police order to 2 years (rather than the 1 year that currently applies by virtue of section 21(2) of the *Criminal Procedure Act 2004*) in order to ensure perpetrators are held to account for breaches. A timely prosecution is made difficult where a complainant is reluctant to make a statement, or recants or delays making a complaint. In circumstances of family violence, the dynamics of coercion, power and control can contribute to delays in the prosecution of breaches.

#### **41 Section 63 amended**

Clause 41 amends section 63 of the Restraining Orders Act.

Subsection (3AA) is added to make it clear that:

- The Family Court of Western Australia can make restraining orders ex parte in the course of existing proceedings under the *Family Court Act 1997* or the *Family Law Act 1975*.
- The Children’s Court of Western Australia can make restraining orders ex parte in the course of protection proceedings under the *Children and Community Services Act 2004*.

Subsection (4)(c) is deleted to remove the requirement that a restraining order can only be made under section 63 if the person is present when the order is made and has been given an opportunity to make submissions on the matter.

The reference to section 10G(2) in subsection (4AB)(d) is amended to be section 10G to ensure that a court issuing an FVRO under subsection (4AA) may impose any restraint that applies under section 10G.

Subsection (4a) is amended to replace the reference to subsection (4b) to new subsection (4B).

Subsection (4b) is deleted.

Subsection (4B) is inserted which provides that a restraining order made by a court under subsections (2) or (3) (that is, a restraining order made by the Family Court or Children’s Court as part of existing proceedings in those courts) will be an interim restraining order if:

- the person who would be bound by the order objects to it being made and the court considers that the order should be an interim order in the circumstances;  
or
- the order is made ex parte.

Subsection (4c) is amended to replace the reference to repealed subsection (4b) to new subsection (4B)(a).