

1990

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

MAGISTRATES COURT (AMENDMENT) BILL 1990

EXPLANATORY MEMORANDUM

(Circulated by the Authority of
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OUTLINE

The primary purpose of this amendment is to update Part X of the Magistrates Court Act 1930 (the Act).

Part X of the Act provides a procedure whereby a person who has threatened to cause or has caused physical injury or property damage may be required to enter into a recognizance to keep the peace or to be of good behaviour commonly referred to as "keep the peace orders".

The present procedure is limited in scope, cumbersome and sometimes ineffective. The main problems are that the range of persons who can apply is limited, it is not available in respect of intimidation or harassment, delays are inherent in the procedure, interim protection is not available and the only sanction is the forfeiture of the amount of the recognizance. In short, in many cases the procedure does not provide an effective deterrent.

In 1986 the Domestic Violence Ordinance (now Act) was made which created a new legislative scheme to provide protection for the victims of domestic violence. Previously victims had to rely on keep the peace orders to obtain protection. This now left keep the peace orders to deal with areas of conflict outside the scope of the Domestic Violence Act such as boyfriend/girlfriend situations and neighbourhood disputes.

Following introduction of the Domestic Violence Act there was community pressure and pressure from the court to update the keep the peace provisions.

The new scheme to replace the keep the peace provisions follows in broad terms the legislative scheme in the Domestic Violence Act.

The proposed Act provides that where the Magistrates Court is satisfied on the balance of probabilities that a person has caused or has threatened to cause personal injury or damage to property or has behaved in a provocative or offensive manner, the court may make an order restraining that person from such conduct and may impose certain prohibitions or conditions. These include prohibiting that person from approaching, contacting, harassing, threatening or intimidating a person; prohibiting that person from damaging property; from being on premises where the respondent resides or works or from being on specified premises or areas.

In making such an order, the court is required to have regard to the need to provide protection from violence or harassment, the welfare of any children and to any other relevant matters.

Provisions have been included to enable the court to make an interim restraining order where it is satisfied that it is necessary to ensure the safety of a person pending the hearing of the full application.

An application can be made by the person against whom or in respect of whose property the conduct is directed, a relative of the person, a police officer or, where the conduct involves a child, a child's parent or guardian, the person with whom the child normally resides or the child. Where a child applies in his or her own right, the court may order separate legal representation for the child.

The proposed Act provides that, where a copy of an order or an interim order has been served personally on the person concerned or that person has had the order explained to by the court, contravention of that order in any respect is an offence.

FINANCIAL IMPLICATIONS

While these amendments will improve the protection previously available under Part X of the Magistrates Court Act, they will not necessarily lead to a significant increase in applications. However, the need for additional resources will be kept under review.

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Clause 1 Provides that the proposed Act may be cited as the Magistrates Court (Amendment) Act 1990.

Clause 2 defines "Principal Act" to mean the Magistrates Court Act 1930.

Clause 3 will repeal Part X of the Principal Act and substitute it with a new Part. The new Part is entitled "Part X Restraining Orders" and inserts new sections 196 to 206P.

Section 196 of the new Part contains definitions.

Included
in the definitions are:

- 'aggrieved person' is defined to mean the person who, or whose property, has suffered from the alleged conduct.
- 'relative' is defined in relation to an aggrieved person to mean that person's parent, or child or brother or sister of the person who is at least 18 years old.
- 'respondent' is defined as the person in respect of whom the order is sought.
- 'restraining order, is defined as an order under section 197.

Section 197 provides for the making of restraining orders.

Subsection 197(1) provides that the court must be satisfied on the balance of probabilities that the respondent -

- (a) has caused personal injury or damage to property and unless restrained will cause more injury or damage;
- (b) has threatened to cause personal injury or damage to property and unless restrained is likely to carry out the threat, or
- (c) has behaved in an offensive or harassing manner.

If the Court is so satisfied then it can make an order restraining the respondent and may impose any of the prohibitions and conditions set out in section 205. Subsection 197(2) provides that the conduct referred to in Subsection 197(1) includes conduct occurring outside the ACT.

Section 198 provides for an application to be made by the aggrieved person, the aggrieved person's relative or a police officer. When the aggrieved person is a child, the application can be made by the person the child normally lives with, a parent or guardian of the child or the child can bring the application in his or her own right.

Subsection 198(2) prevents a person entitled to make an application in respect of conduct under the Domestic Violence Act (1986) from making an application in respect of that conduct under this Part of the Principal Act.

Section 199 provides that the clerk of the court shall fix a date for hearing the application that is not more than 2 days after the date on which the application is filed.

Section 200 makes the aggrieved person a party to the proceedings where the applicant is a relative or a police officer. Subsection 200(2) prevents a child who is an aggrieved person from being made a party to the proceedings.

Section 201 ensures that where the aggrieved person is a child, the clerk shall serve a copy of the application and notice of the date, time and place of the hearing on the person with whom the child normally resides and on the child's parent or guardian if the child does not normally reside with them. Subsection 201(2) makes a person who has been served a party to the proceedings.

Subsection 202(1) permits the court to order separate representation for a child who has made an application in his or her own right and make any other orders necessary to secure such representation. Subsection 202(2) provides that the court may request that representation be arranged by the Legal Aid Office (ACT) where an order has been made that the child be separately represented.

Subsection 203(1) provides that section 20 of the Magistrates Court (Civil Jurisdiction) Act 1982 relating to details to be specified on an application shall apply other than paragraph 20(4)(a) which requires the time, place and date for hearing to be specified and subsection 20(5) which requires a copy of the application to be served on the

respondent 14 days before the hearing. Subsection 203(2) provides that section 198 of the Magistrates Court (Civil Jurisdiction) Act 1982 which deals with medical evidence shall not apply. Subsection 203(3) provides for the service of affidavits and subsection 203(4) provides wherever a period of 5 days or less is prescribed for a purpose under this Part it will not include any day on which the office of the court is closed.

Section 204 provides that the court shall have regard to certain matters in determining an application for a restraining order. These are to ensure that the aggrieved person is protected from violence, threats or harassment, the welfare of any child involved, the protection of property and anything else the court considers relevant. Subsection 204(2) provides that the court shall consider the need to protect the aggrieved person and the welfare of any child involved as being of primary importance.

Section 205 sets out the restrictions the court may impose as part of the restraining order and aim at ensuring that the person is protected from violence, threats or harassment.

Section 206 enables the court to make any order with the parties' consent.

Section 206A(1) provides for the personal service of an application for a restraining order and a notice of proceedings on the respondent and, where the applicant is a relative or a police officer, on the aggrieved person (other than a child). Subsection 206A(2) provides for the respondent who has not been served to be notified of the date, time and place of the adjourned hearing.

Section 206B provides that where the respondent has been served but fails to appear in person in court, the court may hear and determine the matter in the person's absence or if the court considers it appropriate, the court may adjourn the matter and issue a warrant for the respondent to be apprehended and brought before the court.

Subsection 206C provides for the making of interim restraining orders. Subsection 206C(1) enables the court to make an interim order where it is satisfied it is necessary to do so to ensure the safety of the aggrieved person. Subsection 206C(2) requires that before the court makes an interim order, the application must be supported by oral evidence on oath by the applicant or the aggrieved person. Subsection 206(3) sets out the restrictions that may be imposed in an interim order.

Subsection 206D(1) provides that a licence under the Gun Licence Act 1937 is cancelled where a restraining order is made against the licensee unless the court, on application by the licensee, is satisfied the licence should not be cancelled. Subsection 206D(2) provides that the court shall have regard to the matters detailed in section 204(1) in considering an application. These are matters the court must consider when determining an application for a restraining order. Subsection 206D(3) allows the court to order the seizure of any gun in the possession of the person against whom a restraining order is made and provides that it may be detained for the period during which the order is in force. Subsection 206D(4) provides that where a licence is cancelled under subsection 206D(1), the cancellation is effective from the date the order is served on that person. Subsection 206D(5) allows the court, where it makes an interim restraining order, to suspend the gun licence of the person against whom the order is made and direct the seizure of any gun in his or her possession. Subsection 206D(6) is an interpretation provision.

Section 206E provides that where a court proposes to make a restraining order or an interim restraining order and the respondent or the aggrieved person is before the court then before making the order the court shall explain in language likely to be understood by him or her the purpose, terms and effect of the order, the consequences that may follow if the order is contravened and the means by which the order can be varied or revoked. The aggrieved person is also informed of the consequences of his or her aiding or abetting the respondent in the commission of an offence under this Part of the Principal Act.

Section 206F enables the court where it has made a restraining order to recommend counselling or conflict resolution services to the respondent, the aggrieved person or any other person.

Section 206G provides that a restraining order or interim order can be made even if the person has been charged with an offence arising out of the same conduct that gave rise to the application for the order.

Section 206H provides that a restraining order remains in force for no longer than 12 months. It also provides for the court to specify the period for which a prohibition or condition of a restraining order specified in the protection order remains in force. An interim protection order remains in force for no longer than 10 days. The court can, where it has adjourned the hearing of an application and an interim restraining order is in force, extend the period for which the order remains in force

until the date fixed for further hearing of the application. Subsection 206H(5) provides that an interim restraining order ceases to be in force when a restraining order is made and the respondent is present, or when the restraining order is served on the respondent where the respondent was not present when the order was made or when the application was dismissed.

Section 206J provides that a party to the proceeding or an aggrieved person can apply to the court for the variation or revocation of a restraining order or interim order. A copy of the application is to be served on each other person who was a party to the proceedings in which the order was made. Subsection 206H(3) provides that in determining whether to vary or revoke a protection order the court shall have regard to the matters set out in section 204(1) which are the matters a court must consider when determining an application for a restraining order.

Section 206K provides for the service of a made or varied restraining order or interim order. Subsection 206K(1) provides that the clerk shall arrange for such orders to be engrossed and filed in the court, to be served personally on the respondent and for copies of the order to be given to the Commissioner of Police, the Registrar of Gun Licences and to each other person who was a party to the proceedings. Subsection 206K(2) explains references to the prescribed forms as orders being in accordance with Forms 1A and 1B in the First Schedule of the Principal Act. Subsection 206K(3) provides that where an order has been made under section 206D, the clerk shall cause a copy of the order to be forwarded to the Registrar of Gun Licences.

Section 206L provides that where a restraining order or interim order is in force and the respondent was present when the order was made, or was served personally with a copy of the order and he or she contravenes that order, he or she is guilty of an offence punishable on conviction by a fine not exceeding \$1,000 or imprisonment for a period not exceeding 6 months or both.

Section 206M provides for an alternative means of service or substituted service where it appears to the court that personal service of an application under this Part is not practicable.

Section 206N provides that the court may direct, where it is satisfied that it is appropriate to do so, that a document be served by a police officer. Where such a direction is given, a police officer in charge of a police station shall, when requested by the clerk, arrange for the document to be served by a police officer.

Section 206P places certain restrictions on the publication of reports of proceedings under the Act so as to protect the identity of parties or witnesses in the proceedings or persons related to or associated with the parties or the matter. Subsection 206M(2) provides penalties on conviction for an offence against this section of a fine not exceeding \$25,000 for a body corporate and a fine not exceeding \$5,000 or imprisonment not exceeding 2 years, or both, for a natural person. Subsection 206M(3) provides that no proceedings for an offence against the section will be commenced except by or with the consent in writing of, the Attorney-General or the Director of Public Prosecutions.

Subsection 206Q deals with appeals to the Supreme Court from the making, variation, revocation or refusal to make restraining order. No appeal can be made to the Supreme Court in relation to an interim restraining order.

Section 206R preserves the operation of subsection 547(1) of the Crimes Act 1900 (NSW) in its application to the ACT which deals with recognizances to keep the peace.

Clause 4 will amend Section 207 of the Principal Act to make it clear that it does not apply to decision under the new Part X.

Clause 5 will omit paragraph 208(1)(f) of the Principal Act. That paragraph relates to appeals from a section of Part X that has now been repealed.

Clause 6 will amend subsection 214(1) of the Principal Act to identify the section's application to appeals in cases other than civil cases.

Clause 7 will amend the First Schedule to the Principal Act by omitting certain forms and substituting new forms.

Clause 8 will amend subsection 14A(3) of the Domestic Violence Act 1986 to specify that where the court orders the seizure of any gun or pistol, the seized item may be detained only for the period during which the protection order is in force. This amendment provides consistency between the gun provisions in the Domestic Violence Act and the Principal Act.