

CLAUSE NOTES

Restraint Orders Bill 2019

PART 1 – PRELIMINARY

Clause 1: Short title

Cites the Act as the *Restraint Orders Act 2019*.

Clause 2: Commencement

Provides for the Bill to commence on the same day as the *Magistrates Court (Criminal and General Division) Act 2019* commences.

Clause 3: Interpretation

Provides for a range of definitions for the purposes of the Bill, including clarifying when a person is a member of the family of another person and clarifying, for the purpose of the definition of stalking, the circumstances in which an act is done for a lawful purpose.

PART 2 – RESTRAINT ORDERS

Clause 4: Restraint order defined

Clarifies that a restraint order imposes restraints and obligations on a person that the court making the order thinks are necessary or desirable to prevent the restrained person from acting in a specified way.

Clause 5: Application for restraint order

Specifies who may make an application for a restraint order to the court. This includes a police officer, the person against whom the offending behaviour is directed or a parent or guardian where that person is a child, and a person who is granted leave by the court to make an application.

An application for leave to make an application may be made in the absence of the respondent to the application.

An application is to be filed in a district registry.

Applications must include relevant Family Court orders and relevant pending applications for Family Court orders that the applicant is aware of. Orders include family dispute resolution processes or other processes undertaken under Part VII of the *Family Law Act 1975*.

Clause 6: Making restraint order

Clarifies that personal injury includes injury, damage or impairment of or to a person's physical or mental condition.

Provides that the Court may make a restraint order against a person if is satisfied, on the balance of probabilities of certain matters. These include where the person to be restrained person:

- has or is likely to cause personal injury or damage to property unless restrained;
- has threatened to cause personal injury or damage to property and they are likely to carry out the threat unless restrained;
- has behaved in a provocative or offensive manner and they are likely to behave in the same or similar manner again unless restrained; or
- the person has stalked the person for whose benefit the order is sought, or a third person and the stalking of the third person has caused the beneficiary of the order to feel apprehension or fear.

Provides that in deciding whether or not to make a restraint order, and what orders should be included in the restraint order, the Court must consider:

- the protection and welfare of the person for whose benefit the order is sought to be of paramount importance;
- whether it is relevant to the making of the order that a person for whose benefit, or against whom, the order is sought be able to communicate with, or spend time with, any child who is a member of the family of that person;
- whether it is relevant to the making of the order that a person for whose benefit, or against whom, the order is sought be able to communicate with, or spend time with, the other person; and
- any relevant Family Court order of which it has been informed.

Clarifies that a restraint order is not invalid simply because the applicant does not inform the court of relevant Family Court orders or pending applications for such an order.

Clarifies that a restraint order is not invalid simply because the Court fails to consider access, contact or communication, or any relevant Family Court orders, as required by this clause.

Specifies the types of orders which may be included in a restraint order. The types of orders may include, but are not limited to, one or more of the following types of orders.

- An order prohibiting the restrained person from behaving in a specified manner;
- An order prohibiting the restrained person from approaching or contacting, or both approaching and contacting the person for whose benefit the order is sought, by any means.
- An order directing the restrained person to vacate premises, or to prohibit the person from entering premises or limiting their access to premises, regardless of any legal or equitable interest they may have in those premises;
- An order prohibiting or restricting the restrained person from having possession, custody or control of any firearm or firearm accessory, regardless of whether they hold a licence or permit under the *Firearms Act 1996*.

- An order directing the forfeiture, disposal or surrender of any firearm and firearm accessory that is in the possession custody or control of the restrained person, regardless of whether the restrained person holds a licence or permit under the *Firearms Act 1996* or whether the firearm is registered or is a prohibited firearm.
- An order cancelling or suspending a licence or permit held by the restrained person under the *Firearms Act 1996*.
- An order prohibiting the restrained person from applying for or holding a licence or permit under the *Firearms Act 1996* for a specified period or while the restraint order is in force.
- An order prohibiting the restrained person from applying for the reinstatement of a licence or permit, or the return of any firearm and firearm accessory.
- An order prohibiting the restrained person from stalking the protected person or a third person.
- An order prohibiting the restrained person from causing another person to engage in conduct that the restraint order prohibits or restrains the restrained person from doing.
- An order directing the restrained person to deliver property to or to allow the protected person to recover or have access to property.

Specifies that before making an order relating to the vacation of or prohibition on entry or access to premises, the court must consider the effect of the order on the accommodation of persons affected by the proceedings, the effect on children or persons in care, and the need to allow the restrained person to take possession of personal property on the premises.

Specifies that legal or equitable interests held in premises or property is not affected by a restraint order.

Clarifies that the restraint order has effect for the period specified in it, or if it is revoked before the order expires, when the order is revoked.

Specifies that copies of orders relating to firearms or firearms accessories, licences and permits must be provided to the Commissioner of Police, and the Commissioner of Police must do everything necessary to give effect to the terms of that order.

Clause 7: Warrants and ancillary and other orders on making restraint order

If the court makes an order prohibiting or restricting a restrained person from having the possession, custody or control of any firearm or accessory, or directs that it be forfeited, disposed or surrendered, the Court may issue a warrant authorising a police officer, to enter and remain in the premises specified in the warrant, or enter and remain on premises the police officer reasonably believes such a firearm or accessory is situated, and to seize it.

The police officer in exercising this power may use such force as is necessary in the circumstances.

In searching the premises entered with a warrant, the police officer may search the premises and anything in or on them, open or break open anything in or on them, and

require any person in or on the premises to give reasonable assistance to the police officer in exercising this power.

On making a restraint order, the Court may make ancillary and other orders as it considers necessary or appropriate.

The restrained person or person who is the subject of an order, may be ordered by the court to remain in the precincts of the courthouse until they are provided with a copy of the orders, or immediately provide the district registrar with his or her email address for electronic communication to enable the order or copy of it to be provided to the person.

Clause 8: Issue of warrant in respect of application for restraint order

Clarifies that if an application for a restraint order and required materials are produced to a magistrate or bench justice, they may issue a warrant for the arrest of the person against whom the restraint order is sought in the case of urgency and if there is sufficient cause to do so.

Clarifies that if the restraint order application has not been filed in a district registry when the warrant is issued, the application is to be filed as soon as practicable after the warrant is issued.

Clause 9: Powers of Court after restraint order application filed

Clarifies that if a restraint order application has been filed in a district registry, the Court may do any of the following things if there is sufficient cause to do so.

At any stage of the application proceedings, make or vary an interim restraint order, or give directions in relation to the further hearing of the application as the Court considers necessary.

Clarifies that if a restraint order application has been filed in a district registry, and if at any stage of the proceedings the Court considers that a family violence order application under section 15 of the *Family Violence Act 2004* should have been made instead, the Court may proceed to deal with the matter under the *Family Violence Act 2004*.

Clause 10: Application for variation, extension and revocation of restraint orders

Clarifies that an application for the variation, extension or revocation of a restraint order may be made by the following persons.

The person who applied for the restraint order, a police officer, the protected person or a parent or guardian of a child who is a protected person, the restrained person.

Provides for those persons who do not fall within one of the above mentioned categories to apply to the Court for leave to make such an application, and for them to apply if they are granted leave to make the application. If granted leave to apply, the application can be made in the absence of the respondent.

Sections 5(4) and (5) apply to the application as if it were an application to make a restraint order.

Clause 11: Varying, extending or revoking restraint order

If the relevant application is made, a court may vary, extend or revoke a restraint order.

Sections 6(3),(4),(5),(6) and (10) apply to the application as if the application were an application to make a restraint order.

A restraint order has effect for the period for which the restraint order had effect before it was varied, unless the Court provides otherwise while hearing the application.

A restraint order may be extended for a period that the Court considers necessary, or until it is revoked by the Court.

The Court may make ancillary and other orders it considers necessary or appropriate in the circumstances.

Clause 12: Interim restraint order

Provides that the Court may make or vary an interim restraint order whether or not it is satisfied of any matters specified in section 6(2).

In making an interim restraint order, the Court may make any orders which it may make for a restraint order. The interim restraint order has effect until a restraint order is made, or until proceedings in relation to the restraint order are otherwise terminated by the Court.

Clarifies that an interim restraint order may be made, varied or extended in the absence of the person against whom it is sought, and whether or not the application has been provided to that person.

Provides that the Court may issue a warrant for the arrest of the person against whom the order is sought.

Sections 5(4) and (5), sections 6(3),(4),(6) and (10) and section 7 apply to the making, variation or extension of an interim restraint order in the same way that they apply to a restraint order.

Clause 13: Electronic interim restraint order

Clarifies that a police officer may apply by way of an electronic device or prescribed telephone to a magistrate for an interim restraint order against a person in certain circumstances. That is where a police officer has reasonable grounds for believing that the person has behaved in a manner specified in section 6(2) and the behaviour is likely to continue and give rise to an assault.

It also must be not practicable to immediately file an application for a restraint order in a district registry because of the time and place at which the relevant behaviour occurred.

The presiding magistrate may in these circumstances make an electronic interim restraint order, if he or she considers there is sufficient cause to do so and regardless of whether he or she is satisfied of any of the matters specified in section 6(2).

On making an electronic interim restraint order, the magistrate may issue a warrant or make an ancillary or other orders under section 7.

The relevant orders are made and the warrant issued, when the magistrate either sends or transmits it by way of electronic communication to the applicant and the applicant receives it on an electronic device, or in the case of a prescribed telephone, it is orally communicated to the applicant and the applicant receives it aurally.

Clarifies that an electronic interim restraint order may include any order that may be included in a restraint order, and it has effect for the period specified in it, but the period must not exceed 5 working days.

Provides that an electronic interim restraint order, any ancillary or other orders, or warrant which is made in conjunction with it, may be made in the absence of the person who is the subject of the order or warrant.

Sections 6(3),(4),(6) and (10) and section 7 apply to an electronic interim restraint order as if it were a restraint order.

Clarifies that a record made by a police officer of an electronic interim restraint order or any associated ancillary orders, other orders or warrant, received by that police officer by way of speech to a prescribed telephone, is taken to be the relevant electronic interim restraint order, warrant, ancillary or other order.

A paper that is produced by or from the electronic communication to the applicant of any of those orders or warrant that has been received by way of an electronic device (other than a prescribed telephone), is taken to be the relevant order or warrant.

Clause 14: Procedure of magistrate and police officer on making of electronic interim restraint order

Clarifies that where an electronic interim restraint order or ancillary order, other order or warrant made or issued in conjunction with the electronic interim restraint order is electronically communicated by way of an electronic device, the magistrate must electronically communicate that order or warrant to the relevant district registrar.

Provides that in the case of electronic communication of those orders or a warrant being made by way of a prescribed telephone to a police officer, the magistrate must record in writing the name and rank of the applicant police officer, the name of the person against whom the order is made, the name of the protected person, the reasons for the application, terms of the order, date and time the order is made and the period for which the order operates.

The magistrate must also record in writing details of any warrant issued, or any ancillary or other orders made in conjunction with the electronic interim restraint order, and provide the record or a copy of it to the district registrar.

Clarifies that as soon as reasonably practicable after receiving the electronic communication of an electronic interim restraint order, where it is made by way of a prescribed telephone, the police officer must record in writing the name of the magistrate who made the order and specified information, and also the details of any warrant, ancillary or other order made or issued in conjunction with the electronic interim restraint order.

Clause 15: Detention of person for purpose of making electronic interim restraint order

Clarifies that where a police officer is making or intends to make an application for an electronic interim restraint order, the police officer may use such force as is necessary and reasonable to detain the person against whom the order is sought at the scene, or to take the person into custody, remove them to a place the police officer thinks is appropriate to enable the application to be made and detain the person, for as long as is reasonably necessary for the application to be made and heard and for the electronic interim restraint order or a copy of it to be provided to the person.

Clarifies that where a person has been detained to make an electronic interim restraint order, they are not taken into custody for the purpose of section 4E of the *Bail Act 1994*, section 18 of the *Magistrates Court (Criminal and General Division) Act 2019* or section 4 of the *Criminal Law (Detention and Interrogation) Act 1995*.

Clause 16: Duty of police officer before expiration of electronic interim restraint order

Provides that before an electronic interim restraint order expires, a police officer must either apply for a restraint order or notify the Court as to why a restraint order application is not being made.

Clause 17: Procedure for hearing and determining Part 2 application

Clarifies that unless the Court or the Act provides otherwise, Part 2 applications are to be heard and determined in open court and are to be dealt with, as far as is practicable, in the same manner, as a charge for a summary offence.

A person who makes an application under Part 2, is to be treated, as far as is practicable, as a person who has commenced proceedings for an offence against a defendant under the *Magistrates Court (Criminal and General) Division) Act 2019*.

Clarifies that in a hearing of a Part 2 application, the applicant or respondent or their legal practitioner, a police officer representing the applicant or respondent or any other person who is granted leave by the Court, may conduct the case and examine and cross-examine witnesses.

At a hearing of Part 2 application that is made by a person other than a police officer, the Commissioner of Police is also taken to be a party, may make submissions, call witnesses and examine and cross-examine witnesses.

Clarifies that if a police officer could give direct oral evidence of a fact in a Part 2 hearing, the statutory declaration of that police officer is admissible of that fact as evidence in the hearing, even if they are not available as a witness. The statutory declaration is not admissible however, if the Court, in having regard to all the circumstances, is of the opinion that the evidence in the statutory declaration ought not be admitted without being tested by cross-examination.

Clarifies that opinion evidence of a medical practitioner is admissible as evidence of the fact in a hearing even where the medical practitioner is not available as a witness, if the medical practitioner in his or her professional capacity could give that opinion as direct oral evidence, and the Court in having regard to all the circumstances, is of the opinion that justice does not require the medical practitioner's opinion to be tested by cross-examination.

If in a hearing, the Court is satisfied that a sealed copy of the application has been provided, or reasonable attempts have been made to provide it to the respondent, the court may proceed in their absence. This does not apply to proceedings for an interim restraint order.

Where proceedings are undertaken in the absence of the respondent, the Court may make the order sought or other orders it considers necessary, or issue a warrant requiring the arrest of the respondent.

Clarifies that if the applicant and respondent consent to the terms of an order, the Court may make an order in accordance with the terms consented to.

Provides that the court, at any time may transfer proceedings to the Youth Justice Division or Children's Division of the Magistrates Court, if it determines that it is appropriate to do so. Where proceedings are transferred, the Court has jurisdiction to hear and determine those proceedings.

Clause 18: Service of order

Provides that unless otherwise specified in Part 2, an order or copy of it, is to be personally served on the restrained person, the person who is the subject of the order or the respondent to the application for the order, unless the person was present before the Court when the order was made.

Clarifies that where the person is present before the Court, the order is to be provided to them, but there is no requirement for personal service. It may be provided to the person by way of electronic communication to an email address, or telephone or facsimile number given to the district registrar by the person, and when it is sent or transmitted to that address or number, it is taken to be provided to them.

Clarifies that the order or copy of it can still be provided under the provisions of section 29AB of the *Acts Interpretation Act 1931*.

Clause 19: When order takes effect

Clarifies that unless Part 2 specifies otherwise, an order takes effect if the respondent is present before the Court when the order is made, or if the respondent is not present, when the respondent is personally served with the order, or a copy of it.

Clause 20: Powers of Court to remand in custody, admit to bail, &c

Provides that if a Part 2 application is adjourned, the Court may remand the restrained person or the person against whom the restraint order is sought in custody, or admit them to bail or order them to appear before the Court.

In making this determination, the Court must consider the protection and welfare of the person for whose benefit the order is sought or the protected person to be of paramount importance.

The Court must also take into account any previous violence by the person against whom the restraint order is sought or by the restrained person against any other person, whether or not they have been convicted of an offence or have had a prior restraint order made against them.

If a person is remanded in custody, the Court must inform the person and the order must provide that the person will be remanded for a maximum period of 28 days at any one time, and then brought before the Court.

Where a person is admitted to bail under this section, they must not be bailed for a period of more than 60 days, unless that person consents.

Clarifies that an order that a person appear before the Court under this section, has the same effect as an order to attend under the *Magistrates Court (Criminal and General Division) Act 2019*.

Clause 21: Contravention of restraint order, &c

Provides that it is an offence for a person to contravene a restraint order, interim restraint order or electronic interim restraint order, including one that is varied or extended.

Provides that if a police officer has reasonable cause to suspect that a person has committed such an offence, the officer may arrest and detain the person without a warrant and enter by force if necessary any premises on which the officer has reasonable cause to believe the person is present for that purpose, and search the premises for that person.

Clarifies that section 4E of the *Bail Act 1994* does not apply to a person arrested and detained under this section.

Clause 22: Power to make orders under this Act at hearing of charge for offence

Clarifies that if, in proceedings for an offence under any Act, a Court or judge in hearing those proceedings is satisfied on the balance of probabilities as to any of the matters

specified in section 6(2), that court or judge may make an order under Part 2, in addition to any other order it or he or she may make.

Clause 23: Powers of police to enter certain premises

Provides that a police officer, at the request of a person who appears to reside at any premises, or where the police officer reasonably suspects that a person on any premises:

- is being, may imminently be or has recently been injured or threatened with injury; or
- is damaging, may imminently damage or has recently damaged any property on the premises; or
- is behaving, may imminently behave or has recently behaved in a provocative or offensive manner,

may, without a warrant and using such force as is necessary, enter the premises and remain for as long as he or she considers necessary to prevent a recurrence of the behaviour.

Clarifies that where a police officer has entered those premises under this section, the police officer may, without warrant;

- apprehend a person to make an application for a restraint order against that person;
- search the premises for an object, any person on the premises that the officer reasonably suspects has an object in their possession, and seize and retain an object which the police officer reasonably suspects has been used or may be used to threaten or injure any person on the premises.

Clarifies that an allegation by a person on those premises that an object has been used to threaten or injure that person, is sufficient justification for the police officer to search any person or the premises, and to seize and retain the object.

Provides that where a police officer reasonably suspects that a person has acted in a manner that would constitute grounds for making a restraint order, and they have used an object to threaten or injure another person, the officer, without warrant and using necessary force, may:

- enter any premises on which the officer reasonably suspects the object to be found; and
- search any person the officer reasonably suspects has possession of the object; and
- search the premises for the object; and
- seize and retain the object.

An allegation to a police officer that another person has acted in a manner that would provide grounds for the making of a restraint order and they have used an object to threaten or injure a person, is sufficient justification for the above mentioned powers to be used.

Provides that where an object is seized and retained under this section, the Court may order that the object is forfeited to the Crown, destroyed, returned to that person, or disposed of in a manner that the Court considers appropriate in the circumstances. A

police officer or any person who claims to be the owner of the object may make the application to the Court in relation to the how the object should be dealt with.

Provides that where an application is not made in relation to how the seized property is to be dealt with, the object is to be returned to the person from whom it was seized within 60 days after the day it was seized.

PART 3 – EXTERNAL RESTRAINT ORDERS

Clause 24: Application for registration of external restraint order

Provides that a person may apply to the Administrator for the registration of an external restraint order.

An application is to be in a form approved by the Administrator, and is to be accompanied by a copy of the external restraint order, and evidence of effective service on the person against whom the order was made as the Administrator considers appropriate.

Clause 25: Registration of external restraint order

Provides that on receipt of an application, the Administrator is to register the external restraint order, or refer it to the Court for adaptation and modification.

Provides that upon referral of the order, the Court may vary the period during which the order operates in this State, and make any other adaptations and modification that the Court thinks are necessary or desirable for its operation in this State.

An external restraint order that has been adapted and modified, is to be registered by the Administrator.

Once registered, a copy of the external restraint order is to be provided to the Commissioner of Police by the Administrator.

Provides that notice of the registration is not to be provided to the person against whom the order was made, unless the person who applied for registration has consented to it being provided.

Clarifies that a registered order is registered for the period during which the order, or adapted and modified order, is in force.

Clause 26: Effect of registration of external restraint order

A registered external restraint order has the same effect and may be enforced against a person in the same way as a restraint order made under this Act and provided to that person.

Clause 27: Application for variation, &c, of registered external restraint order

Provides that a prescribed person, who is a person for whose benefit or against whom a registered external restraint order has been made, or a person who has applied for the registration of an external restraint order, or a person to whom the Court has granted leave to make an application, may apply to the Court to vary such an order, vary the duration of the order, or cancel the registration of the order.

Provides that a person who is granted leave by the Court to make an application for a variation or cancellation of a registered external restraint order, may also make an application for a variation or cancellation of such an order.

An application is to be filed in a district registry, and if it relates to an application for a variation of an order, must include information of any relevant Family Court order or pending application for a relevant Family Court order that the applicant is aware of.

Clause 28: Variation, &c of registered external restraint order

Provides that on receipt of an application for a variation or cancellation of a registered external restraint order, the Court may vary the order, vary the duration of the order or cancel the registration of the order.

Provides that an application that is made by a prescribed person who is a person who has applied for the registration of an external restraint order, or for whose benefit a registered external restraint order has been made or who has been granted leave by the Court to make an application under this section, may be heard and determined in the absence of any person against whom the registered external restraint order has been made.

Clarifies that a registered external order that is varied, is registered for the period, as varied and has effect in this State.

Provides that sections 6(3),(4),(5),(6) and (10) of the Act apply to the variation of a registered external restraint order, including a variation as to the duration of such an order, in the same way that those sections apply to a restraint order.

PART 4 – MISCELLANEOUS

Clause 29: Relevant Family Court order prevails if inconsistency

Provides that a relevant Family Court order prevails over a restraint order, interim restraint order, electronic interim restraint order or registered external restraint order, if there is any inconsistency.

Clause 30: Costs

Provides that if the Court considers it appropriate, the Court may on hearing an application by a person (other than a police officer) order a party to pay to the other party, costs that the Court considers reasonable in the circumstances.

If the Court orders costs to be paid, they are to be assessed by the Court or if the Court directs, by a district registrar. If costs are assessed by a district registrar, he or she must have regard to the same matters that the Court would have regard to as if it were assessing costs, including witnesses' expenses under the *Magistrates Court (Criminal and General Division) Act 2019*.

Provides that an assessment of costs is part of the order and they are to comply with the rules of the Court.

If costs are ordered to be paid, they may be recovered as if they have been allowed under the *Magistrates Court (Civil Division) Act 1992*.

Provides that if costs are ordered to be paid and publication of the name of any of the parties is prohibited under section 31, the Court is to report that fact to the Director of the Monetary Penalties Enforcement Service.

Clause 31: Restriction of publication of names of parties, &c

Provides that if it appears to the Court that, in the interests of justice it is desirable to prohibit the publication of any material relating to proceedings under the Act, the Court, before, during or after the proceedings, may make an order forbidding the publication of the material.

Provides that it is an offence for a person to publish any material relating to proceedings under the Act which disclose or may disclose the identity of a child who is mentioned in, is concerned with or is affected by the proceedings.

The publication of any reference or allusion to material which must not be published under this section, is taken to be published if, in the opinion of the Court, the reference or allusion is either intended or sufficient to disclose the material.

Clause 32: Form of application, restraint order, &c

Provides that a restraint order, an interim restraint order and an application under the Act, are to be in a form approved by the Chief Magistrate.

Clause 33: Rules

Provides that rules of the Court may provide for the practice and procedure of the Court in relation to proceedings under this Act. This provision does not affect rules of the Court that can be made under section 15AE of the *Magistrates Court Act 1987*.

Clause 34: Regulations

Provides that the Governor may make regulations for the purposes of the Act.

Regulations may:

- provide for fees and charges that are payable under the Act;

- provide that a contravention of any of the regulations is an offence and for the imposition of a specific fine for such an offence;
- provide for savings or transitional matters that are necessary or expedient for bringing the Act into operation, including specifying when they are to take effect;
- apply differently according to matters, limitations or restrictions, as to time, circumstance or otherwise;
- provide for matters to be determined, approved, applied or regulated by the Chief Magistrate, a magistrate, the Administrator, a district registrar, the Secretary of the Department or another person specified in the regulations.

Clause 35: Savings and transitional provisions

Provides for the continuation of a restraint order, interim restraint order, telephone interim restraint order or registered external restraint order that was made or registered under the Part XA of the *Justices Act 1959* and which was in force immediately before commencement day of this Act.

Provides for the continuation of an application that was made under Part XA of the *Justices Act 1959* which has not finally been determined before commencement day of this Act.

Clause 36: Administration of Act

Provides that administrative responsibility for the Act vests with the Minister for Justice and the Department of Justice, until alternative arrangements are made under section 4 of the *Administrative Arrangements Act 1990*.