

# **PENALTIES AND SENTENCES (NON-CONTACT ORDERS) AMENDMENT BILL 2001**

## **EXPLANATORY NOTES**

### **GENERAL OUTLINE**

#### **Objectives of the Legislation**

To allow the sentencing court to make an order that an adult offender who has been convicted of an indictable offence against the person (except where an order may be made under section 30 of the *Domestic Violence (Family Protection) Act 1989*) refrain from contact with the victim or someone who was with the victim when the offence was committed (an associate) or from attending a stated place for a particular period of time.

#### **Reasons for the objectives and how they will be achieved**

On occasions victims and their associates may have a fear that an offender, even though convicted, may injure them, harass them, damage their property or otherwise cause them detriment.

The Bill attempts to address this by allowing the sentencing court to make an order that an adult offender who has been convicted of an indictable offence against the person refrain from contact with the victim or associate or from attending a stated place for a particular period of time. An order cannot be made where an order can be made under section 30 of the *Domestic Violence (Family Protection) Act 1989*.

The court can only make the order if satisfied that unless the order is made there is an unacceptable risk that the offender will injure or harass the victim, cause damage to the victim's property or act in a way that could cause detriment to the victim. The court in deciding whether or not to make an order has to have regard to all the circumstances of the case including, for example, the terms of any other order relating to the offender and the victim or associate, the viability of making the order in circumstances in which contact between the offender and victim may be unavoidable and the

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antecedents of the offender. If the offender breaches the order then he or she is guilty of an offence.

The time stated in the order must be for a period starting when the order is made and ending no later than:

- if the offender is sentenced to a term of imprisonment and the sentence is not suspended – 2 years after the day on which the term of imprisonment ends.
- otherwise – 2 years after the day on which the order is made.

There is provision under the Bill for the offender, prosecutor, victim or associate to apply for an amendment or revocation of a non-contact order. The amendment or revocation order can only be made if the court is satisfied that there has been a material change in the offender's or victim's or associate's circumstances that justifies the amendment or revocation.

An order cannot be made where an order may be made under section 30 of the *Domestic Violence (Family Protection) Act 1989*. (Section 30 of the *Domestic Violence (Family Protection) Act 1989* provides that a court before which a person pleads guilty to, or is found guilty of, an offence that involves domestic violence may, on its own initiative, if satisfied that a protection order could be made under section 20 of the *Domestic Violence (Family Protection) Act 1989*, make a domestic violence order against the offender. Under section 30 the court can also vary an existing domestic violence order.) The reason for this exception is to avoid any potential for inconsistency or for the non-contact order to be interpreted as over-riding or invalidating the conditions of a domestic violence order.

### **Administrative cost to Government of implementation**

The administrative cost to Government of implementation is minimal and includes costs associated with the preparation of submissions for court by prosecutors of the need for such an order, the notification of the existence of the orders by court officers to the Queensland Police Service and the Department of Corrective Services, and the costs to the Director of Public Prosecutions and the Queensland Police Service associated with bringing orders and applications for amendment to the attention of relevant parties.

### **Fundamental legislative principles**

Section 4(2) of the *Legislative Standards Act 1992* provides that fundamental legislative principles include requiring that legislation has sufficient regard to the rights and liberties of individuals. Although not specifically referred to in the examples in section 4(3) of the *Legislative Standards Act 1992*, there is an argument that the requirement in section 43D(2) of the Bill that an order has to be in existence for six months before an application for variation or revocation can be made by an offender affects the offender's rights and liberties within the meaning of section 4(2). This six-month limitation does not in any way prohibit the offender appealing against the order as a sentence in accordance with the general principles that apply in relation to appeals against sentence.

### **Consultation**

Consultation has occurred with the Queensland Police Service, the Department of the Premier and Cabinet, the Department of Corrective Services, the Department of Families, the Director of Public Prosecutions, the Queensland Council for Civil Liberties, Legal Aid Queensland, the Queensland Law Society Inc, the Queensland Bar Association, the Chief Justice, the Chief Judge, the Chief Stipendiary Magistrate, the Victims of Crime Association, the Women's Legal Service and the Catholic Prison Ministry.

## **NOTES ON PROVISIONS**

**Short title** Penalties and Sentences (Non-contact Orders) Amendment Act 2001.

**Clause 1** Sets out the short title of the Bill.

**Clause 2** Provides that the Act commences on a date to be fixed by proclamation.

**Clause 3** Provides that the Act amends the *Penalties and Sentences Act 1992*.

**Clause 4** Inserts into section 4 of the *Penalties and Sentences Act 1992* (the definition section) the following definitions:

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**Crown prosecutor:** for Part 3A includes –

- (a) the Attorney-General; and
- (b) the Director of Public Prosecutions ; and
- (c) another person, other than a police officer, appearing for the State.

**Prosecutor:** for Part 3A means –

- (a) in the context of a proceeding before, or an application to, a Magistrates Court- a police officer or Crown prosecutor; or
- (b) otherwise – a Crown prosecutor.

**Non-contact order** means a non-contact order in force under part 3A.

**Clause 5** Inserts a new Part 3A into the *Penalties and Sentences Act 1992* which contains the following sections:

**Section 43A** – provides that a court may make a non-contact order whether or not a conviction is recorded.

**Section 43B(1)** – provides that if a court convicts an offender of a personal offence, whether on indictment or summarily, the court may make a non- contact order for the offender. (“Conviction” is defined in section 4 of the *Penalties and Sentences Act 1992* to mean a finding of guilt, or the acceptance of a plea of guilty, by a court.)

**Section 43B(2)** –provides the non-contact order may be made in addition to any other order the court may make under this or another Act.

**Section 43B(3)** – provides that the court cannot make an order where an order may be made under section 30 of the *Domestic Violence (Family Protection) Act 1989*. ((Section 30 of the *Domestic Violence (Family Protection) Act 1989* provides that a court before which a person pleads guilty to, or is found guilty of, an offence that involves domestic violence may, on its own initiative, if satisfied that a protection order could be made under section 20 of the *Domestic Violence (Family Protection) Act 1989*, make a domestic violence order against the offender. Under section 30 the court can also vary an existing domestic violence order.)

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**Section 43B(4)** – provides that in this section "personal offence" means an indictable offence committed against the person of someone.

**Section 43C(1)** – provides that a non-contact order is an order that contains either or both of the following -

- (a) a requirement that the offender not contact the victim against whom the offence was committed, or someone who was with the victim when the offence was committed (called the "associate"), for a stated time; or
- (b) a requirement that the offender not go to a stated place, or within a stated distance of a stated place, for a stated time.

**Section 43C(2)** – provides that the time stated in the order must be a period starting when the order is made and ending no later than -

- (a) if the offender is sentenced to a term of imprisonment for the offence and the sentence is not suspended - 2 years after the day on which the term of imprisonment ends; or
- (b) otherwise - 2 years after the day on which the order is made.

**Section 43C(3)** – provides that the court may make the order if satisfied that unless such an order is made there is an unacceptable risk that the offender would injure or harass the victim or associate or damage the property of the victim or associate or act in a way that could reasonably be expected to cause a detriment to the victim or associate. The following are given as examples of acting in a way that could reasonably be expected to cause detriment to the victim -

- (i) making the victim or associate fear that he or she may be injured; or
- (ii) making the victim or associate fear that his or her property may be damaged; or
- (iii) hindering or stopping the victim or associate doing something that he or she is lawfully entitled to do (such as acting in a way that makes the

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victim or associate change the way he/she would travel to work); or

- (iv) making the victim or associate do something he or she is lawfully entitled not to do (such as acting in a way that makes the victim or associate sell a property the victim would not otherwise sell).

**Section 43C(4)** - provides that when considering whether to make the order, the court must have regard to all the circumstances of the case, including for example –

- (a) the terms of any other order relating to the offender and the victim or associate (for example an order under the *Family Law Act 1975* of the Commonwealth); and
- (b) the viability of making the order in circumstances in which contact between the offender and the victim or associate may be unavoidable (this may be the case in a very small community); and
- (c) the offender’s antecedents.

**Section 43C(5)** – provides the following definitions for the section:

"contact" the victim or associate means -

- (a) intentionally initiate contact with the victim or associate in any way including for example by phone, mail, fax, email or other technology; or
- (b) intentionally follow, loiter near, watch or approach the victim or associate; or
- (c) intentionally loiter near, watch, approach or enter a place where the victim lives, works or visits.

"property" of a victim or associate means

- (a) property in which the victim has an interest whether or not the offender also has an interest in the property; or
- (b) property that is otherwise –
  - (i) in the care or custody of the victim or associate; or
  - (ii) at the premises at which the victim or associate is living.

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**Section 43D(1)** – provides that a prosecutor, victim named in the order, associate named in the order or the offender may apply to amend or revoke a non-contact order.

**Section 43D(2)** - provides that the offender cannot apply for an amendment or revocation within 6 months after the order was made. (The offender can however within that 6 months period appeal against the order as an appeal against sentence.)

**Section 43D(3)** – provides that the application may be made to -

- (a) a court of equivalent jurisdiction as the court in which the order was made; or
- (b) if the offender is appearing before a court of higher jurisdiction in relation to another offence against the victim or associate – the judge before whom the offender is appearing.

**Section 43D(4)** – provides that the applicant must give a copy of the application to -

- (a) if the applicant is the offender, victim or associate – the prosecuting authority; or
- (b) if the applicant is a prosecutor - the offender, victim and any associate named in the order.

**Section 43D(5)** - provides that the applicant must give the copy at least 21 days before the day on which the application is to be heard.

**Section 43D(6)** – provides that for an application made by the offender, victim or associate, the prosecuting authority that received the application is to take all reasonable steps to immediately give a copy of the application to –

- (a) if the application is made by the offender – the victim and any associate named in the order; or
- (b) if the application is made by the victim – the offender and any associate named in the order; or
- (c) if the application is made by the associate – the offender and the victim.

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(The reason why this obligation is placed on the prosecuting authority is to avoid the potential for contact between the offender and the victim or associate which itself may be in breach of the non-contact order.)

**Section 43D(7)** – provides that the prosecutor, offender, victim and associate are each entitled to be heard at the hearing of an application.

**Section 43D(8)** - provides that the court can only amend or revoke the order if it is satisfied that there has been a material change in the circumstances of the offender, victim or associate that justifies the amendment or revocation. An example of this is the relocation of the victim's employer's workplace so that the victim starts working in the same building in which the offender works.

**Section 43D(9)** – provides that in this section “prosecuting authority” means –

- (a) if the prosecutor who appeared before the court when the non-contact order was made was a police officer – the commissioner of the police service or someone authorised to accept the application on the commissioner’s behalf; or
- (b) if the prosecutor who appeared before the court when the non-contact order was made was a Crown prosecutor – the director of public prosecutions or someone authorised to accept the application on the director’s behalf.

**Section 43E(1)** – provides that the proper officer of the court must immediately reduce the order to writing and give a copy of the order to:

- if the prosecutor who appeared before the court when the non-contact order was made was a Crown prosecutor – the director of public prosecutions or someone authorised to accept the order on the director’s behalf; and
- the offender; and
- if the order was amended or revoked on the victim’s application – the victim; and



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- if the order was amended or revoked on the associate's application – the associate; and
- the chief executive of the Department of Corrective Services

In addition, the proper officer is to give a copy of the order to the Commissioner of Police or someone authorised to accept the order on the Commissioner's behalf by fax, e-mail or a similar facility.

("Proper officer" is defined in section 4 of the *Penalties and Sentences Act 1992* to mean the sheriff of the Supreme Court, any registrar of the District Court and any clerk of the Magistrates Court.)

**Section 43E(2)** - Non- compliance with sub-section(1) does not invalidate the order.

**Section 43E(3)** – provides that if the proper officer is not obliged under subsection (1) to give a copy of order to the victim or associate, the prosecutor, or someone on the prosecutor's behalf, must take all reasonable steps to give a copy of the order to the victim or associate.

(This is because the proper officer will only know the victim or associate's contact details when the victim or associate brings an application for amendment or revocation.)

**Section 43F(1)** – provides the offence for contravention of a non-contact order.

**Section 43F(2)** – provides that a Magistrates Court that convicts an offender for the offence may, in addition to or instead of dealing with the offender for the offence –

- (a) if the non-contact order was made by a Magistrates Court – amend the order; or
- (b) if the non-contact order was made by the Supreme or District Court (the "sentencing court") – order the offender to appear before the sentencing court..

**Section 43F(3)** – provides that if an order is made under subsection (2)(b), the Magistrates Court must also make one of the following orders –

- (a) an order committing the offender into custody to be brought before the sentencing court;

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(b) an order granting the offender bail on the condition that the offender appear before the sentencing court.

**Section 43F(4)** – provides that if the Magistrates Court sentenced the offender under subsection (1), the sentencing court may amend the order or decide no further action be taken.

**Section 43F(5)** – provides that if the Magistrates Court did not sentence the offender under subsection (1), the sentencing court may do any of the following -

- (a) sentence the offender under subsection (1);
- (b) in addition to or instead of sentencing the offender under subsection (1), amend the order;
- (c) decide no further action be taken.

**Clause 6** Inserts a new section 209 to make it clear that the new part only applies to an offence committed after commencement.

**Clause 7** Provides that this part amends the *Evidence Act 1977*.

**Clause 8** Amends section 132C(5)(a) of the *Evidence Act 1977* to provide that an allegation of fact for the purpose of section 132C of the *Evidence Act 1977* (which deals with fact finding on sentence) also includes evidence at the hearing in relation to an order under Part 3A of the *Penalties and Sentences Act 1992*.