

EVIDENCE (PROTECTION OF CHILDREN) AMENDMENT BILL 2003

AMENDMENTS IN COMMITTEE

EXPLANATORY NOTES

General Outline

Objectives of the Amendments

The amendments in committee to the *Evidence (Protection of Children) Amendment Bill 2003* have the following purpose:—

- (a) amend the *Criminal Proceeds Confiscation Act 2002* to change the procedure for making applications for restraining orders without notice;
- (b) amend the *Drug Rehabilitation (Court Diversion) Act 2000* to change the definition of ‘disqualifying term of imprisonment’.

Reasons for the objectives and how they will be achieved

Criminal Proceeds Confiscation Act 2002

The Court of Appeal has declared s.30 of the *Criminal Proceeds Confiscation Act 2002* (the Act) to be invalid as beyond the power of the Queensland Parliament: *Re Criminal Proceeds Confiscation Act 2002 (QLD)* [2003] QCA 249.

Section 30 of the Act purports to compel the Supreme Court to hear an ex parte application for a restraining order in the absence of the respondent or any person whose property is the subject of the application. The section relates to applications in the civil confiscation scheme under Chapter 2 of the Act. Similar considerations would apply to section 121 of the Act, which applies to applications without notice made under the conviction

based scheme in Chapter 3 of the Act. The Court of Appeal held, that because the section requires the judge hearing the application to proceed in the absence of any party affected by the order to be made, it so interferes with the exercise of the judicial process as to be incompatible with the exercise of the judicial power of the Commonwealth and consequently constitutionally invalid. The amendments omit the invalid provisions and amend the application procedure for restraining orders to follow the procedures in the *Proceeds of Crime Act 2002* of the Commonwealth.

Drug Rehabilitation (Court Diversion) Act 2000

A person is an 'eligible person' to participate in the North Queensland Drug Court Pilot Program (at the Cairns and Townsville Magistrates Courts) if that person has not previously been ordered to serve a *disqualifying term of imprisonment*. Disqualifying term of imprisonment is defined in section 7A of the *Drug Rehabilitation (Court Diversion) Act 2000* to mean a single term of imprisonment of more than 6 months.

The North Queensland Drug Court Pilot Program commenced on 1 November 2002. To date, the number of eligible participants in North Queensland has been less than anticipated. The proposed amendment will widen eligibility by defining a disqualifying term of imprisonment as a single term of imprisonment of more than 1 year.

Administrative cost to Government of implementation

Implementing the amendments will involve no cost to Government. The amendments to the *Criminal Proceeds Confiscation Act 2002* will not involve any additional cost in the administration of that Act. The North Queensland Drug Court Pilot Program has a cap of 40 participants in Cairns and 40 participants in Townsville.

Consistency with Fundamental Legislative Principles

While the provisions of the amendments are consistent generally with the standards required to be met under the *Legislative Standards Act 1992*, it is arguable that the provision enabling the DPP to request that an application for a restraining order be made without notice breaches the principles of natural justice. The ability to make an application without notice is necessary for those matters where there is a risk of assets being dissipated, or a criminal investigation being prejudiced, if notice is given. The potential breach is tempered by the inclusion of the power for the

Court, before deciding an application, to direct the DPP to give notice to a stated person or class of person. Additionally the amendments provide the right, under the civil confiscation scheme, for a person who was not given notice of the application to apply to the court to revoke the restraining order. A restraining order made without notice under the conviction based scheme expires after 7 days unless it is extended after a hearing on notice. There is therefore no need to provide a right of revocation.

CONSULTATION

Government

The Solicitor-General and MD Hinson SC have provided a joint advice on the decision in *Re Criminal Proceeds Confiscation Act 2002 (QLD)* [2003] QCA 249 and amendment of the *Criminal Proceeds Confiscation Act 2002*.

NOTES ON AMENDMENTS

Amendment 1 amends clause 2 of the Bill to provide that Part 8 (Amendment of *Criminal Proceeds Confiscation Act 2002*) and Part 9A (Amendment of *Drug Rehabilitation (Court Diversion) Act 2000*) commence on assent. The remaining provisions of the Bill commence on proclamation.

Amendment 2 inserts new clause 44A into the Bill containing amendments to the *Criminal Proceeds Confiscation Act 2002* (the Act).

New clause 44A amends the Act to relocate the heading to Chapter 2, Part 3, Division 2, omit section 30 and insert new sections 30 and 30A. New section 30 provides for the giving of notice of the making of an application for a restraining order. The State must give notice to a person whose property is the subject of the application. Also, anyone considered, by the authorised commission officer or police officer whose affidavit supports the application, to have an interest in the property must be given notice. The section is subject to the provisions of section 30A(2) which require the Supreme Court to consider the application without notice if requested by the DPP to do so. A person whose property is the subject of an application must be given a copy of the supporting affidavit when given

*Evidence (Protection of Children)
Amendment Bill 2003*

notice. Anyone else given notice will be informed of their right to request a copy of the supporting affidavit.

New section 30A sets out the provisions for hearing of an application for a restraining order and adopts a similar model to the Commonwealth in the *Proceeds of Crime Act 2002* (Cwlth). Under the section the Supreme Court must not hear an application for a restraining order unless satisfied notice (required to be given under section 30) has been given to the person whose property is the subject of the application. This requirement is subject to subsection (2) which requires the Court to hear the application *ex parte* if requested to do so by the DPP. The purpose of subsection (2) is to allow an *ex parte* application to be made in those matters where there is a risk of property being disposed of or dissipated, or where a criminal investigation could be jeopardised if notice is given. Under subsection (3) in either case, the Court has power before the application is finally decided, to direct the DPP to give notice to any person or class of person. Subsection (4) makes it clear that a person whose property is the subject of the application and anyone else claiming an interest in the property has a right of appearance at the application.

Amendment 3 inserts new clauses 46A–46E into the Bill containing amendments to the Act.

New clause 46A inserts new subsection (3) into section 48 of the Act.

New section 48(3) enables the Supreme Court, if the Court makes an order under section 48 excluding the prescribed respondent's property from a restraining order, to require the prescribed respondent to provide adequate security to meet any liability that may be imposed on the prescribed respondent under the Act. Although not limited to the situation where the exclusion order is made under section 48(2), it will allow the court a wider discretion where it is in the public interest to amend the restraining order.

New clause 46B inserts new subsection (4) into section 50 of the Act.

New section 50(4) applies if the Supreme Court makes an order under section 50 excluding a person other than the prescribed respondent's property from a restraining order and enables the court to require the person to provide appropriate undertakings about the person's property. Although not limited to the situation where the exclusion order is made under section 50(3), it will allow the court a wider discretion where it is in the public interest to amend the restraining order.

*Evidence (Protection of Children)
Amendment Bill 2003*

New clause 46C inserts new heading Division 7A and new sections 50A and 50B into the Act.

New section 50A provides a procedure for a person whose property is the subject of a restraining order and who was not given notice of the application to apply for the revocation of the restraining order. The section adopts a similar model to the Commonwealth in the *Proceeds of Crime Act 2002* (Cwlth). The application must be made within 28 days after the person was given notice of the restraining order as required by section 45. However the court may extend this period for up to 3 months. The State must be given notice of the application and may present additional material to the court for the hearing of the application. The court may revoke the restraining order if it is satisfied that, at the time the application for revocation is heard, and on all the material then before the court there would be no grounds on which a restraining order could be made in relation to the property.

New section 50B provides for the giving of notice of the revocation of a restraining order under section 50A. The State must give notice to a person whose property was restrained under the order or who was affected by the order. Subsection (2) makes it clear that the section does not require the State to give notice to the applicant for the revocation.

New clause 46D amends section 120 of the Act which provides for the giving of notice of the making of an application for a restraining order. The section requires the State to give notice to a person whose property is the subject of the application. Also, anyone considered, by the appropriate office making the application, to have an interest in the property must be given notice. The amendment to the section makes the notice provision subject to section 121(2) which requires the Supreme Court to consider the application without notice if requested by the DPP to do so. The DPP, under section 117(2), may make such a request in urgent circumstances or if the prescribed respondent is about to be charged with a relevant offence. In practice the amendment does not alter the procedure for giving notice under Chapter 3 of the Act, as previously, the section requiring notice to be given did not apply if an application was made without notice, in the circumstances permitted by section 117(2). The clause also omits subsections (2) to (4) of section 120 and the note as these matters are now found in section 121.

New clause 46E amends the Act to omit section 121 and insert a new section 121.

*Evidence (Protection of Children)
Amendment Bill 2003*

New section 121 sets out the provisions for hearing of an application for a restraining order under the conviction based confiscation scheme. Under the section the Supreme Court must not hear an application for a restraining order unless satisfied notice (required to be given under section 120) has been given to the person whose property is the subject of the application. This requirement is subject to subsection (2) which requires the Court to hear the application *ex parte* if requested to do so by the DPP (in urgent circumstances or if the prescribed respondent is about to be charged with a relevant offence). The purpose of subsection (2) is to allow an *ex parte* application to be made in those matters where there is a risk of property being disposed of or dissipated, or where a criminal investigation could be jeopardised if notice is given. Under subsection (3) in either case, the Court has power before the application is finally decided, to direct the DPP to give notice to any person or class of person. Subsection (4) makes it clear that a person whose property is the subject of the application and anyone else claiming an interest in the property has a right of appearance at the application.

Unlike the civil confiscation scheme in Chapter 2 of the Act, there is no provision for a restraining order made without notice having been given, to be revoked. The reason is that, under the conviction based scheme a restraining order made without notice expires, under section 128, within 7 days or shorter period stated in the order. Any application to extend the order requires notice to be given and this procedure allows the prescribed respondent or anyone else with an interest in the property to be heard on whether the order should continue in force. Also section 137 contains a provision enabling certain persons, including a person whose property is restrained, to apply for a restraining order to be set aside. The procedure in the conviction based scheme follows the same procedure as the repealed *Crimes (Confiscation) Act 1989* on which it was based.

Amendment 4 inserts a new clause 48A into the Bill containing an amendment to the Act.

New clause 48A inserts new subsection (4) into section 139 of the Act.

New section 139(4) enables the Supreme Court, if the Court makes an order under section 139 excluding the prescribed respondent's property from a restraining order, to require the prescribed respondent to provide adequate security to meet any liability that may be imposed on the prescribed respondent under the Act. Although not limited to the situation where the exclusion order is made under section 139(3), it will allow the

*Evidence (Protection of Children)
Amendment Bill 2003*

court a wider discretion where it is in the public interest to amend the restraining order.

New clause 48B inserts new subsection (6) into section 140 of the Act.

New section 140(6) applies if the Supreme Court makes an order under section 140 excluding a person other than the prescribed respondent's property from a restraining order and enables the court to require the person to provide appropriate undertakings about the person's property. Although not limited to the situation where the exclusion order is made under section 140(5), it will allow the court a wider discretion where it is in the public interest to amend the restraining order.

Amendment 5 amends the Bill by inserting a new Part 9A (Amendment of *Drug Rehabilitation (Court Diversion) Act 2000*) containing amendments to the *Drug Rehabilitation (Court Diversion) Act 2000*. New clause 51A provides that this Part amends the *Drug Rehabilitation (Court Diversion) Act 2000*. New clause 51B amends section 7A (What is a "disqualifying term of imprisonment") by changing 6 months to 1 year.