

# Submission: Consultation - Retail Barring Orders

## To

DEPARTMENT OF JUSTICE

## Law Society Contact

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# Table of Contents

Submission to the Department of Justice – Consultation on Retail Barring Orders	2
Introduction	2
Primary considerations	2
Consultation Questions	2
Final comments	7

## Submission to the Department of Justice – Consultation on Retail Barring Orders

The Department of Justice has sought feedback regarding the proposed model for legislation enabling Courts to grant a Retail Barring Order (RBO) which can exclude a person who is likely to use violent or intimidating behaviour in or near a retail premises from entering that premises for a specified time. This submission responds to the consultation questions set out in the Department's letter dated 26 June 2025 to the Law Society.

### Introduction

The Law Society of Western Australia is the peak professional association for lawyers in Western Australia. Established in 1927, the Law Society (the Society) is a not-for-profit association dedicated to the representation of its members and the enhancement of the legal profession through leadership and advocacy on law reform, access to justice and the rule of law.

This submission reflects the responses to the consultation provided by the Society's Criminal Law Committee.

### Primary considerations

The proposed RBO legislation provides a new form of restraint on anti-social behaviour in public places. The Society considers there are already substantial and adequate safeguards available in the current criminal and protective order legislation which apply to the types of behaviour the subject of the proposed Act. Further orders may lead to confusion and potentially to disproportionate action being taken against vulnerable members of the community.

In particular, the Society is concerned about the legislation leading to increased incarceration of vulnerable members of the community including Indigenous persons, people experiencing homelessness, children and victims of family and domestic violence.

With a focus on retail premises in this legislation, the Society is concerned to ensure that a person subject to a RBO is not prevented from accessing essential services, particularly if medical, or postal services are to be included in the definition of "retail premises". In regional areas in particular, where there is limited access to retail premises, there is a real risk of persons the subject of a RBO being prevented from accessing essential services and the daily necessities of life including food and fuel.

## Consultation Questions

### 1. Terminology: does "personal violence" adequately reflect the basis for an RBO or is another term preferable, for example, "public violence" or "retail violence"?

The Society submits that the term "retail violence" should be applied in this proposed legislation to provide a definition distinct from the meaning of "personal violence" in section 6 of the *Restraining Orders Act 1997* (WA). Two definitions of the term personal violence in different legislation is potentially confusing. It is preferable to use a simple term which clearly reflects the behaviour to be addressed.

As the orders are intended to apply to children, the defined behaviour must be specific so that all persons clearly understand what they are not allowed to do. A term such as 'retail violence' is clear. The Society notes that this definition could include retail outlets, shopping centres and public spaces in shopping precincts.

- 2. Should the definition of the term (whether “personal violence” or another term) include damage to property such that a RBO may be granted to restrain a person who has caused property damage in a retail premises and is again likely to cause property damage if an order is not made?**

Whilst the Society acknowledges that property damage is often distressing for retail workers and members of the public to witness, the proposed Act seeks to address behaviour that jeopardises the personal safety of retail workers, rather than damage to property at retail premises.

- 3. Are there types of premises not included in the list in paragraph 13 which in your view should be covered by the definition?**

The Society’s members report that children are frequently banned from shopping centres and larger shopping precincts in addition to individual outlets. This enables pop-up shops or retail stands in the middle of the shopping malls of major shopping centres to be included in general banning notices.

The Society notes that bans from whole shopping centre and shopping precincts has a significant impact on a person’s ability to shop if they live a significant distance from any other shopping venue. There may be a detrimental impact on family finances if a person is forced to shop at a more expensive alternative retail outlet supermarket.

If the definition of “retail premises” is extended to include whole shopping complexes, the Society submits there should be scope to allow an exception for children to attend large shopping areas from which they are restrained under a RBO if they are in the company of and are under the supervision of a responsible adult. The terms of any RBO should not conflict with a general banning notice applicable to the same retail premises.

- 4. Are there any types of premises which it would be problematic for the definition to cover? For example, should places which sell goods by retail but which also provide essential services, for example, medical or postal services, be excluded from the definition? Or is it the case that access to essential services could be addressed by requiring a court to consider any hardship that a RBO might cause a respondent?**

The Society submits that there should be scope for exclusions in the definition of “retail premises”. There may be circumstances where it is not appropriate for an order to be made notwithstanding the retail component to the business of an applicant, including government services. The suggested requirement for courts to consider the hardship of a respondent is a minimum mandatory safeguard.

- 5. Should retail premises be defined so as to include shopping centres that contain retail premises?**

The Society recommends shopping centres containing retail premises can be included in the definition of ‘retail premises’ on the proviso that the legislation includes scope to limit areas of shopping centres for the purpose of an RBO.

- 6. Should the new RBO legislation contain an object section? Please give reasons for why/why not.**

The Society supports the inclusion of an object section in the proposed Act. Specified objects will assist the Courts to focus on the particular intention of this legislation and minimise the foreseeable prospect of mission creep affecting people against whom these laws are targeted. Respondents bound by a RBO may have their shopping access restricted alongside other freedoms relating to their workplace and/or access to essential services.

There are already a number of mechanisms available to restrain behaviours including banning notices, bail conditions and misconduct restraining orders. A clear objects section provides boundaries to prevent respondents being subject to multiple orders.

The Society recommends the object section be drafted in similar terms to section 6 of the *Personal Violence Act 2016* (ACT), which focuses on prevention and reduction of personal violence through legally enforceable mechanisms and encourages accountability for violent behaviour.

The objects of the proposed legislation should also include consideration of:

- time limits so that a RBO is clear and not time oppressive;
- alternative options to prevent or reduce unacceptable conduct and taking into account whether a person has been charged with (related) offences;
- juvenile circumstances:
  - to provide for consistency with the objects and principles contained in the *Young Offenders Act 1994* (WA);
  - to ensure responsible adults and Department of Communities are included when dealing with applications;
  - to provide clarity as to how the proposed legislation relates to the provisions of section 29 of the *Criminal Code Compilation Act 1913* (WA) relating to the criminal responsibility of children under 14 years or the capacity of children aged between 10 and 14 years.

**7. It is proposed that a Magistrate's Court or the Children's Court may make a RBO if satisfied that the respondent has used "personal violence" (or other appropriate term as determined) in or near a retail premises and is likely to again engage in "personal violence" in or near such premises if an order is not made. Is the above wording for when an RBO should be granted appropriate?**

The Society submits the grounds for a RBO need to be clear. The basis for when a RBO may be made could be drafted in similar terms to section 11A(a) of the *Restraining Orders Act 1997* (WA). The Society supports the proposed Act requiring actual acts or threats of violence to occur before a RBO can be made.

The proposed basis for a Court making a RBO raises an issue of whether there needs to be an individual requiring protection from the violence in whose favour the RBO is made. If a person is 'violent' in a shop/shopping centre and there is no particular individual victim involved, the Society queries whether the Act would permit a company/corporation to apply for the order to protect the public and/or their employees in a general sense or whether the order must protect an individual.

If there is a power for 'general orders' to be made, this is a very serious power and should not be exercised lightly.

**8. Should the new Act contain a measure that makes it easier to obtain a RBO or creates a presumption in favour of granting a RBO, if the respondent has been convicted of assaulting a retail worker pursuant to section 318B of the Criminal Code?**

The Society does not support a measure that raises a presumption in favour of a RBO in these circumstances. If a person has been convicted of assaulting a retail worker, this should only have evidential probative value in the application for a RBO. There may be many reasons why a person pleads guilty to or is convicted of an offence.

If a child under the age of 14 years is charged with the offence of assaulting a retail worker and the charge is withdrawn because of capacity issues pursuant to section 29 of the *Young Offenders Act 1994 (WA)*, the Society cautions against this behaviour being used to support an order in RBO proceedings involving that child.

The Society further submits that the general provisions of the *Children's Court of Western Australia Act 1988* protecting the identity of a child charged with an offence must be preserved in an application for a RBO, if the fact of a child's conviction for assault against a retail worker can be used in those proceedings.

**9. Please comment on who should or should not be able to apply for a RBO:**

- **Individuals?**
- **Persons conducting a business or undertaking where the business or undertaking is the sale of goods by retail?**
- **Persons who employ others to work in a retail premises?**
- **Persons who own buildings in which retail premises are situated?**
- **Unions?**

The Society contends that eligible applicants for a RBO should include individuals, and persons undertaking a business or undertaking where the business or undertaking is the sale of goods by retail.

The Society considers that eligibility to apply for a RBO of persons who employ others to work in a retail premises should be limited to persons directly affected by the alleged behaviour.

The Society does not support eligibility for a RBO extending to the owners of buildings in which retail premises are situated, unions, or labour-hire companies. The interests of landlords are distinct from workers or employers and are too remote from the behaviour sought to be addressed.

**10. Should the court be required to satisfy itself of any additional or different factors depending on the identity or nature of the applicant?**

The Society considers that the eligible applicants should be limited to the individuals described in the first three categories listed in question 9.

**11. Are there any other factors which the court should be obliged or permitted to consider when deciding whether to make a RBO or the terms of a RBO?**

The factors listed the consultation which the Court should be obliged or permitted to consider are:

- a) the need to protect retail workers from personal violence and threats of personal violence in or near retail premises, including the commission of an offence under section 318B of the Code;
- b) the need to protect against property damage to retail premises;
- c) the need to protect the public from personal violence in or near retail premises;
- d) any hardship that may be caused to the respondent in making the RBO including whether their access to basic necessities and essential services (for example, medical services, medical supplies, food and postal services) would be limited;

- e) the respondent's criminal convictions, if any;
- f) any previous RBO or restraining order made in relation to the respondent and the respondent's compliance or contravention of such an order;
- g) other current legal proceedings involving the respondent;
- h) any other factor the court considers relevant.

The Society submits that the Court should be also obliged to consider any disabilities, mental health or medical conditions affecting the respondent which may have impacted or triggered the violent or aggressive behaviour in the retail premises.

**12. Please comment on whether specific factors should be mandatory (must) or discretionary (may) factors for a court to consider.**

In relation to applications for RBOs involving adults, the Society submits that all of the factors listed in response to question 11 above should be mandatory considerations for the Court.

With respect to RBOs imposed on children, the Society is concerned about a child's history of convictions or information about current legal proceedings being made available to an applicant in RBO proceedings.

**13. Do you have any comments about the matters set out in Part 4 of the *Restraining Orders Act 1997 (WA)* and their applicability to RBOs? For example: should the rules of evidence apply when courts are considering whether to grant a RBO? Should similar provisions to those regarding mention hearings and final hearings be included in the RBO legislation?**

The Society will provide any feedback on these issues on the release of the draft legislation.

**14. Please comment on the types of restraints that a court should be able to place on a respondent when making a RBO.**

The Society will provide any feedback on this issue on the release of the draft legislation.

**15. Should a court have the power, in an appropriate case, to restrain a respondent from entering or approaching etc multiple retail premises owned or operated by a particular person? What types of circumstances would make an order in such terms appropriate?**

The Society will provide any feedback on these issues on the release of the draft legislation.

**16. Should the legislation specify minimum and maximum durations for RBOs?**

The Society submits that clear timeframes are essential. In the case of RBOs imposed on children, the Society recommends that this legislation is consistent with the six month limit applied to Violence Restraining Orders against children. The Society notes that general banning notices are often in place for 12 months or for periods up to two years.

**17. Do you have any comments about the powers a court should have to vary or cancel a RBO once granted, or about the matters a court should consider when hearing an application to vary or cancel a RBO or about the procedure to be followed when an application is made to vary or cancel a RBO?**

The Society will provide any feedback on these issues on the release of the drafted legislation.



**18. Please comment on the proposed maximum penalties for breaching a RBO.**

In the case of children, the Society submits that a Juvenile Justice Team (JTT) referral should be available for the Court's consideration, especially if other related charges such as trespass, unlawful damage and common assault are eligible for a JTT referral.

**Final comments**

The Society urges the government to consider whether existing legislative provisions provide sufficient safeguards against violent behaviour in retail premises. If RBO legislation is enacted, the Society submits that the Act takes into consideration the personal impact on prospective respondents, particularly in relation to a reduction in access to essential services and the unique vulnerabilities of children subject to a RBO.

The Society requests an opportunity to meet with the government to further discuss the implications of the proposed legislation at the earliest opportunity.