

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Local Government and Territories

Norfolk Island Act 1979

Norfolk Island Continued Laws Amendment (Chief Magistrate) Ordinance 2017

Authority

The *Norfolk Island Act 1979* (the Act) provides for the Government of the Territory of Norfolk Island.

Section 19A of the Act provides that the Governor-General may make Ordinances for the peace, order and good government of the Territory of Norfolk Island.

The *Norfolk Island Continued Laws Amendment (Chief Magistrate) Ordinance 2017* (the Ordinance) is made under section 19A of the Act. The Ordinance amends the *Norfolk Island Continued Laws Ordinance 2015* (the Principal Ordinance) to amend the *Court of Petty Sessions Act 1960* (NI) (the Court of Petty Sessions Act). Norfolk Island enactments, made by the former Legislative Assembly, have been continued in force under section 16A of the Act and, under section 17, may be amended or repealed by a section 19A ordinance.

Purpose and operation

The geographical isolation of Norfolk Island can pose challenges for the operation of the Norfolk Island courts. This is particularly so given that the Judges and Magistrates of these courts do not necessarily reside on the Island. Consequently, the Court of Petty Sessions Act enables certain Court of Petty Sessions proceedings to be conducted off-Island, specifically, in the ACT or NSW.

The recent appointment of a new Chief Magistrate of that Court prompted consideration of the scope of provisions in the Court of Petty Sessions Act relating to the exercise of Magistrates' powers, and to sittings of the Court of Petty Sessions, outside Norfolk Island. The Ordinance clarifies the scope of the Chief Magistrate's and other Magistrates' ability, when outside Norfolk Island, to exercise powers and perform functions conferred on them by laws applying in the Territory. It also expands the range of proceedings that can be conducted in a sitting of the Court off-Island, and extends the places in Australia (but outside Norfolk Island) in which the Court may sit. These changes allow greater flexibility to deal with the difficulties that can arise from Norfolk Island's remote location.

The changes are facilitated by new provisions relating to the means of communication (for example, video conferencing) that can be used to enable persons to appear remotely before a Magistrate or the Court. These new provisions operate, to the extent possible, in conjunction with provisions in the *Evidence Act 2004* (NI) relating to the appearance of persons before Norfolk Island courts by means of audio or audio visual facilities.

Consultation

The Court of Petty Sessions of Norfolk Island was consulted on the efficacy and effect of the amendments. As the change are machinery in nature, consultation with the community was not undertaken.

Details of the Ordinance are set out in the Attachment.

The Ordinance is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Ordinance is able to amend the *Norfolk Island Continued Laws Ordinance 2015* because of s33(3) of the *Acts Interpretation Act 1901*.

The Ordinance commences the day after it is registered on the Federal Register of Legislation.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Norfolk Island Continued Laws Amendment (Chief Magistrate) Ordinance 2017

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instruments

The Ordinance clarifies the scope of the ability of the Chief Magistrate of the Court of Petty Sessions and other Magistrates of that Court to exercise powers and perform functions conferred on them by laws applying in the Territory when outside the Territory of Norfolk Island. It also expands the range of proceedings that can be conducted in a sitting of the Court off-Island, and extends the places in Australia (but outside Norfolk Island) in which the Court may sit. These changes allow greater flexibility to deal with the difficulties that can arise from Norfolk Island's remote location.

Human rights implications

This Disallowable Legislative Instrument engages fair trial and fair hearing rights.

Fair trial and fair hearing rights

Under Article 14(1) of the *International Covenant on Civil and Political Rights* (ICCPR), a person is 'entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'. The changes in this disallowable instrument advances this right in a number of respects.

Firstly, given the small size of the Norfolk Island community and its geographical isolation, it is not feasible for judicial officers to reside there permanently. Therefore the Chief Magistrate has, of necessity, been a person who resides elsewhere in Australia.

It is important that Norfolk Island residents are not subject to unnecessary delays in the administration of justice in particular for criminal matters (Article 14(3)(c) of the ICPR). By clarifying the ability of the Chief Magistrate and other Magistrates, when not present on Norfolk Island, to exercise powers and perform functions conferred on them by laws applying in the Territory, the Disallowable Legislative Instrument reduces the risk of delays for Norfolk Island residents in having a matter heard. Provisions that allow persons to appear remotely before the Court by audio or video link support these changes.

The ability of the Court of Petty Sessions to sit outside Norfolk Island is subject to the Chief Magistrate being satisfied that this would not be contrary to the interests of justice. This important safeguard ensures that the Court will only sit outside the Territory where this is compatible with the interests of justice.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights as it promotes the protection of human rights.

**Minister for Local Government and Territories,
Senator the Hon Fiona Nash**

Norfolk Island Continued Laws Amendment (Chief Magistrate) Ordinance 2017

Section 1 – Name

This section provides that the title of the Ordinance is the *Norfolk Island Continued Laws Amendment (Chief Magistrate) Ordinance 2017*.

Section 2 – Commencement

This section provides that the Ordinance commences on the day after it is registered.

Section 3 – Authority

This section provides that the Ordinance is made under the *Norfolk Island Act 1979*.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to the Ordinance is amended or repealed as set out in the applicable items in the Schedule concerned, and that any other item in a Schedule to the Ordinance has effect according to its terms.

Schedule 1 – Amendments

Item 1

Item 1 inserts a number of new sections into Schedule 1 of the *Norfolk Island Continued Laws Ordinance 2015* (the Principal Ordinance) to amend the *Court of Petty Sessions Act 1960* (NI) (the Court of Petty Sessions Act).

Section 43AL

This new provision of the Principal Ordinance inserts a number of new definitions into subsection 4(1) of the Court of Petty Sessions Act. These include definitions of terms that are used in new provisions relating to means of remote communication that may be used.

Section 43AM

This provision of the Principal Ordinance inserts new section 28A into the Court of Petty Sessions Act. Section 28A ensures that, regardless of where in Australia the Chief Magistrate or another Magistrate is, he or she can exercise the powers and perform the functions conferred on him or her by a law applying in Norfolk Island. The powers and functions to which section 28A applies are both those conferred on the Chief Magistrate or another Magistrate as such, and those conferred on him or her personally. An example of the latter is a power to issue a warrant (if the power is conferred on the Magistrate personally, rather than on the Court).

Some powers or functions can only be exercised upon application. Subsection 28A(2) makes it clear that, in such cases, an application can be made to a Magistrate wherever he or she is in Australia. Subsections 28A(3) and (4) provide for the means of communication by which applications can be made when an applicant and a Magistrate are in different places in Australia, and for the means by which a Magistrate can give a document to someone consequent on the application.

Subsection 28A(5) makes it clear that section 28A applies even if there is another continued Legislative Assembly law or applied NSW law in force in Norfolk Island that provides to the contrary.

Section 43AN

This section of the Principal Ordinance inserts new subsection 33(4) into the Court of Petty Sessions Act. This new subsection is consequent on the changes to section 33B of that Act

(described below) effected by the Ordinance. The purpose of the new subsection is to clarify that section 33 is not to be taken to limit s 33B (as amended).

Section 43AO

This section of the Principal Ordinance repeals subsections 33B(1)-(7) of the Court of Petty Sessions Act and substitutes new provisions.

The substituted provisions simplify s 33B and expand its scope in certain respects, so as to provide maximum flexibility in terms of where the Court can sit and conduct proceedings.

Under the current section 33B, the Court of Petty Sessions can sit outside Norfolk Island. The Chief Magistrate can order that a proceeding (whether before the Court for hearing or pending) be heard or continued at a sitting of the Court outside the Territory. The Chief Magistrate can do so where he or she is satisfied that it would be contrary to the interests of justice for the proceeding to be conducted in Norfolk Island. Section 33B is flexible in such cases, so that part-heard or pending proceedings can be moved between Norfolk Island and other jurisdictions at any stage.

However, current section 33B is limited in certain respects. The places outside the Territory where the Court can sit are limited to the ACT and NSW. Also, the proceedings that can be dealt with in sittings of the Court outside Norfolk Island are limited to matters within the Court's criminal jurisdiction. The amendments to s 33B expand the scope of that section so that the Court's ability to sit and conduct proceedings off-Island are not limited in either of these ways.

The Chief Magistrate's power to order that a proceeding be heard or continued at a sitting of the Court outside Norfolk Island continue to be subject to him or her being satisfied that this would not be contrary to the interests of justice, although the substituted provisions in s 33B are less prescriptive in terms of what the Chief Magistrate must have regard to in deciding this.

The substituted provisions also provide for the means ('audio link' and 'video link') by which persons can appear before the Court remotely, so as to address the geographical challenges that can arise in relation to sittings of the Court (whether the Court is sitting on or off-Island).

Section 43AP

This section of the Principal Ordinance repeals subsection 33B(9) of the Court of Petty Sessions Act and substitute a new subsection. The substituted provision makes it clear that section 33B applies even if another continued Legislative Assembly law or applied NSW law in force in Norfolk Island provides to the contrary.

Item 2

Item 2 amends the Principal Ordinance by inserting new item 366 into Part 2 of Schedule 1 to the Principal Ordinance.

Item 366 provides for the application of new section 28A and the amendments to section 33B of the Court of Petty Sessions Act made by the Ordinance. Item 366 has the effect that that section and those amendments apply in relation to the matters they deal with from the commencement of the Ordinance (that is, the day after its registration). The item also makes clear how s 28A and the amendments to s 33B of the Court of Petty Sessions Act apply in cases where certain things have been done before the commencement of the Ordinance – for example, in cases where a matter has been part-heard at the time of that commencement (see sub item 366(2)).