

EXPLANATORY STATEMENT

Issued by the authority of the Attorney-General

Director of Public Prosecutions Act 1983

Director of Public Prosecutions Amendment (Norfolk Island) Regulations 2017

Authority

The *Director of Public Prosecutions Act 1983* (the Act) establishes the Office of the Director of Public Prosecutions and confers certain powers, functions and duties on the Director of Public Prosecutions.

Section 34 of the *Director of Public Prosecutions Act 1983* provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. Paragraph 6(2)(b) of the Act provides that the functions of the Director include such other functions as are prescribed.

The purpose of the *Director of Public Prosecutions Amendment (Norfolk Island) Regulations 2017* (the Regulations) is to provide the Commonwealth Director of Public Prosecutions (CDPP) with certain functions in relation to particular Norfolk Island laws, as permitted by paragraph 6(2)(b) of the Act. The Regulations also provide the CDPP with powers and duties necessary or convenient to the performance of those functions, as permitted by paragraph 34(b) of the Act.

Details of the Regulations are set out at [Attachment A](#).

The Australian Government has committed to providing to Norfolk Island a level of services comparable to those enjoyed by Australians in other similar-sized communities. The Regulations contribute to delivering this commitment by allowing the CDPP to perform certain functions in relation to particular Norfolk Island laws. This will allow prosecutions against particular Norfolk Island laws to be dealt with by a professional and independent prosecution service with significant technical expertise, akin to normal prosecution practices on mainland Australia and the other external Territories.

The Attorney-General's Department (AGD) consulted with the CDPP, the Department of Infrastructure and Regional Development and the Department of the Prime Minister and Cabinet, who support the amendments. The CDPP advised that the Regulations would provide the Commonwealth Director of Public Prosecutions with sufficient and appropriate powers to effectively conduct prosecutions, and related functions, in relation to particular Norfolk Island laws.

The Office Best Practice Regulation were consulted by AGD in the preparation of the Regulations and advised that a Regulatory Impact Statement was not required.

The Statement of Compatibility with Human Rights set out at [Attachment B](#) is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Act specifies no conditions that need to be satisfied before the power to make the regulation may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commences on the day after it is registered on the Federal Register of Legislative Instruments.

Details of the *Director of Public Prosecutions Amendment (Norfolk Island) Regulations 2017*

Section 1 – Name

This section provides that the title of the Regulation is the *Director of Public Prosecutions Amendment (Norfolk Island) Regulations 2017*.

Section 2 – Commencement

This section provides that each provision of the Regulation specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table.

Section 3 – Authority

This section provides that the Regulation is made under the *Director of Public Prosecutions Act 1983* (DPP Act).

Section 4 – Schedules

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

Schedule 1 – Amendments

Item 1 inserts new Part 1 ‘Preliminary’.

Item 2 inserts a definition of ‘continued Norfolk Island law’ into regulation 2. A continued Norfolk Island law is defined as a law that was continued in force in Norfolk Island by section 16 of the *Norfolk Island Act 1979* (the Norfolk Island Act), or a Legislative Assembly law, or a law made under a Legislative Assembly law, that was continued in force in Norfolk Island by section 16A of the Norfolk Island Act. The definition is intended to include any amendments that are made to those laws. This defined term is used to limit the application of the new functions, powers and duties conferred on the Director of Public Prosecutions (the Director) to this limited subset of laws applicable on Norfolk Island.

A definition of ‘Norfolk Island authority’ is also included.

Item 3 inserts new Part 2 ‘General provisions’.

Item 4 amends subregulation 3(1) to clarify that the other functions of the Director provided in regulation 3 are non-exhaustive.

Item 5 inserts new Part 3 ‘Norfolk Island’ to prescribe additional functions of the Director and powers and duties necessary and convenient to the performance of those functions (new regulations 6 to 19). A new Part 4 is inserted to specify the application and transitional arrangements for the new regulations (regulation 20).

New regulation 6 – Functions relating to Norfolk Island

New regulation 6 confers additional functions on the Director, as enabled by section 6(2)(b) of the DPP Act. Those functions include instituting, or carrying on, certain prosecutions under continued Norfolk Island laws, assisting a coroner in inquests and inquiries conducted under continued Norfolk Island laws and providing legal advice in certain circumstances on law enforcement, investigation and prosecution.

New regulation 7 – Instituting prosecutions

New regulation 7 provides the Director with powers necessary to support the exercise of his or her new functions under regulation 6. Regulation 7 provides for the circumstances in which the Director can institute a prosecution of a person on indictment for an indictable offence against a continued Norfolk Island law. Section 39 of the *Interpretation Act 1979* (Norfolk Island) sets out a general rule for which offences are indictable offences under Norfolk Island law.

New regulation 8 – Additional powers in relation to prosecutions

New regulation 8 provides the Director with additional powers necessary to support the exercise of his or her new functions under regulation 6. Regulation 8 contains several provisions relating to the procedure for instituting, taking over and proceeding with a prosecution after it has been taken over.

New regulation 9 – Undertakings

New regulation 9 permits the Director, in discharging the duties provided in new regulation 6, to give an undertaking that self-incriminating evidence given or made by a person, documents produced by a person, or evidence obtained as a result of such evidence being provided, will not be used in a prosecution against the person, other than in a prosecution in respect of the falsity of evidence given by the person. The new regulation also permit the Director to give an undertaking that the person will not be prosecuted for a specified offence or in respect of specified acts or omissions.

New regulation 10 – Appeals

New regulation 10 provides that the Director may exercise certain rights of appeal in relation to prosecutions for offences against continued Norfolk Island laws instituted by, taken over, or carried on by the Director. This provision ensures that the Director is in a position to effectively perform his or her functions under regulation 6.

New regulation 11 – Recovering pecuniary penalty

New regulation 11 confers a power on the Director to institute proceedings for the recovery of a pecuniary penalty under a continued Norfolk Island law, in performance of the function provided to the Director in paragraph 6(1)(h) of the Regulations.

New regulation 12 – Director may act as counsel or solicitor for Norfolk Island authority

New regulation 12 provides that the Director, or a person entitled to represent the Director, may act for a Norfolk Island authority in certain circumstances.

New regulation 13 – Powers and functions of Director do not affect those of other persons

New subregulation 13(1) clarifies that Part 3, with the exception of subregulation 8(5), does not affect the right of a person to institute or carry on proceedings for the committal of a person for an indictable offence or summary conviction in respect of offences against continued Norfolk Island laws.

Additionally, subregulation 13(2) clarifies that Part 3 does not affect the right of a person to institute or carry on proceedings for the recovery of pecuniary penalties under continued Norfolk Island laws.

New regulation 14 – Directions and guidelines by Director

New regulation 14 enables the Director to give directions or guidelines to the Commissioner of the Australian Federal Police, the Australian Government Solicitor, and certain persons engaged in enforcing and prosecuting offences against continued Norfolk Island laws. Directions and guidelines made under this regulation provide guidance on the implementation of the law and are not considered to be legislative instruments.

New regulation 15 – Provision of information to Director

New regulation 15 requires a person, other than the Director, that has carriage of a prosecution to give the Director certain information if the Director informs the person that he or she is considering taking over the prosecution, if the Director takes over the prosecution, or if the person considers that the Director should take over the prosecution. This duty ensures that the Director has the information required to effectively fulfil the functions listed in regulation 6.

New regulation 16 – Director may request assistance of Commissioner of Police

New regulation 16 provides the Director with the power to request the assistance of the Commissioner, Deputy Commissioner or employee of the Australian Federal Police in the investigation of a matter in relation to which the Director is considering instituting or has instituted, taken over or carried on a prosecution for an offence against a continued Norfolk Island law, and is of the opinion that the matter requires further investigation.

New regulation 17 – Director to inform court when taking over or carrying on proceedings

New subregulation 17(1) places an obligation on the Director, when taking over or carrying on a prosecution or proceeding, to inform the court that the Director has taken over, or is carrying on the prosecution or proceeding. New subregulation 17(2) provides that, from the time the court is informed under subregulation 17(1), the Director is taken for all purposes to be the prosecutor, informant or complainant in that prosecution or proceeding.

New regulation 18 – Appearances by and on behalf of Director

New regulation 18 provides that, when exercising his or her functions under regulation 6, the Director may appear in person or may be represented by a member of the staff of the Office of the Commonwealth Director of Public Prosecutions who is a legal practitioner, by counsel or solicitor, or by the Australian Government Solicitor.

New regulation 19 – Appearances on behalf of Director in summary or committal proceedings

New regulation 19 provides that, in proceedings for the summary conviction of a person or committal proceedings, the Director may be represented by a member of the Australian Federal Police, or a

member of a State or Territory police force, whether or not the member concerned is a legal practitioner.

New regulation 20 – Amendments made by the *Director of Public Prosecutions Amendment (Norfolk Island) Regulations 2017*

New regulation 20 provides that the Regulations apply in relation to proceedings instituted before or after the commencement of the Regulations in relation to conduct occurring before or after that commencement.

Statement of Compatibility with Human Rights

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

Director of Public Prosecutions Amendment (Norfolk Island) Regulations 2017

This 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 instrument

The *Director of Public Prosecutions Amendment (Norfolk Island) Regulations 2017* (the Regulations) provide the Commonwealth Director of Public Prosecutions (CDPP) with certain functions in relation to particular Norfolk Island laws. The Regulations also provide the CDPP with powers and duties necessary or convenient to the performance of those functions.

The Australian Government has committed to providing to Norfolk Island a level of services comparable to those enjoyed by Australians in other similar-sized communities. The Regulations contribute to delivering this commitment by allowing the CDPP to perform certain functions in relation to particular Norfolk Island laws. This will allow prosecutions against particular Norfolk Island laws to be dealt with by a professional and independent prosecution service with significant technical expertise, akin to normal prosecution practices on mainland Australia and the other external Territories.

Human rights implications

The Regulations extend existing Commonwealth prosecutorial arrangements applicable on mainland Australia to Norfolk Island, such that the CDPP may institute, carry on or take over proceedings on Norfolk Island if he or she so wishes. They replicate these existing arrangements with only minor amendments (in order to make them relevant to Norfolk Island) and so do not materially change any of the functions, powers or duties of the CDPP. As such, the bulk of the Regulations do not engage any of the applicable rights or freedoms.

Regulation 19, which applies the Regulations to proceedings instituted before or after the commencement of the Regulations in relation to conduct occurring before or after the commencement of the Regulations, engages the prohibition against retrospective criminal laws in Article 15(1) of the International Covenant on Civil and Political Rights (ICCPR).

Article 15(1) provides that:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

The prohibition relates to someone being held guilty of a criminal offence that was not a criminal offence when the criminal conduct occurred, or being given a heavier penalty than that which was applicable at the time of the offence. It does not extend to retrospective changes to procedure, practice or rules that do not affect the punishment to which an offender is liable. The Regulations do not change any criminal offences, penalties or sanctions applicable to Norfolk Islanders. As such, they do not infringe the prohibition against retrospective criminal laws.

Conclusion

This legislative instrument is compatible with human rights as to the extent that while it may limit human rights, those limitations are reasonable, necessary and proportionate.