

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Infrastructure and Transport

Norfolk Island Act 1979

Norfolk Island Continued Laws Amendment (2017 Measures No. 3) 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.

Subsection 17(3) of the Act provides that a section 19A Ordinance may amend laws made by the former Norfolk Island Legislative Assembly, which are continued in force by section 16A of the Act.

The *Norfolk Island Continued Laws Ordinance 2015* (the Principal Ordinance) is a section 19A Ordinance that amends several laws made by the former Norfolk Island Legislative Assembly, including the *Child Welfare Act 2009* (NI) and the *Criminal Code 2007* (NI).

Purpose and operation

The *Norfolk Island Continued Laws Amendment (2017) Measures No. 3) Ordinance 2017* (the Ordinance) effects the amendment of the Child Welfare Act and Criminal Code. It does so by amending the provisions of the Principal Ordinance that in turn amend these laws, thereby ensuring that all amendments to these laws are contained in a single section 19A Ordinance (ie, the Principal Ordinance). The amendments are part of ongoing efforts to improve the laws in force in Norfolk Island relating to child welfare and domestic violence. They follow on from amendments made earlier in 2017 to the Child Welfare Act by the *Norfolk Island Continued Laws Amendment (2017 Measures No. 1) Ordinance 2017*.

The amendments to the Child Welfare Act serve two primary purposes: first, to facilitate the child welfare officer in carrying out their existing functions under that Act, including in matters of delegation and information sharing; second, to provide for court proceedings in child protection matters to be conducted informally, reflecting the approach taken in other Australian jurisdictions. The amendments also clarify that, where the child welfare officer (or police officer) takes emergency action by arranging for the care and protection of a child or young person in a particular premises or place, that premises or place may be outside Norfolk Island (for example, in another State or Territory).

The amendments to the Criminal Code serve the primary purpose of updating the criminal law of Norfolk Island in key areas of child welfare and domestic violence by creating offences of procuring and grooming a child for a sexual act and by expanding the offence of endangering health to include non-fatal strangulation. The new procurement and grooming offences are modelled on cognate offences under New South Wales (NSW) law, set out in section 66EB of the *Crimes Act 1900* (NSW), and have been adapted to existing sexual offence provisions in parts 3.6 and 3.7 of the Criminal Code. The amendments will align the criminal law of Norfolk Island in these key areas with the criminal law in several mainland jurisdictions and provide children and victims of domestic violence with comparable protection. At the same time, it is the intention that these new offences are consistent with,

and complementary to, the procurement and grooming offences under Commonwealth criminal law, which apply only to procurement and grooming outside Australia (division 272 of the *Criminal Code* (Cth)), using a postal or similar service (division 471 of the *Criminal Code* (Cth)), or using a carriage service (division 474 of the *Criminal Code* (Cth)).

The Ordinance also makes some technical amendments to the Criminal Code. These amendments clarify the operation of the codification and application provisions of the Criminal Code with respect to offences under applied NSW laws, section 19A Ordinances and laws continued in force under section 16 or 16A of the Act. Presently, there is some ambiguity as to the relationship of the Criminal Code with the range of laws which now apply on Norfolk Island. These technical amendments are intended to address this ambiguity.

Special features

The Ordinance is made pursuant to a plenary legislative power conferred on the Governor-General under section 19A of the Act for the government of Norfolk Island. It is rare for Commonwealth legislation to confer a plenary power to make delegated legislation. Such conferrals are very different to the general regulation-making power that is commonly found in Commonwealth Acts, which authorises the Governor-General to make regulations prescribing matters that are ‘required or permitted’ to be prescribed by the Act, or that are ‘necessary or convenient’ for carrying out or giving effect to the Act.

The Parliament has conferred plenary legislative power on the Governor-General for the external territories and the Jervis Bay Territory. This power is found in the Act that provides for the government of the relevant territory (see, for example, section 4F of the *Jervis Bay Territory Acceptance Act 1914* (Cth), section 12 of the *Cocos (Keeling) Islands Act 1955* and section 9 of the *Christmas Island Act 1958* (Cth)). The power is designed to enable the Governor-General to legislate for state-level matters, including criminal law. This is particularly relevant during the current period in which the operation of NSW laws are suspended pursuant to the *Norfolk Island Applied Laws Ordinance 2016*.

Many of the criminal offences under the laws in force in Norfolk Island are set out in the Criminal Code, which was made by the former Norfolk Island Legislative Assembly and has been continued in force by section 16A of the Act. At present, the only way to amend these offences, or create new offences in the Criminal Code, is either through a section 19A Ordinance or through an Act of Parliament. While it is generally more appropriate for an Act of Parliament to create offences, particularly those that impose penalties greater than 50 penalty units, given the legislative framework for Norfolk Island that Parliament has established under the Act, it is more appropriate for the new procurement and grooming offences to be created by a section 19A Ordinance. Similarly, it is more appropriate for the new non-fatal strangulation offence to be created by section 19A Ordinance. One consequence of this is that the Principal Ordinance, as amended by this Ordinance, will amend existing offences and create new offences, each of which imposes a substantial maximum penalty.

Ordinarily, the Commonwealth develops offences having regard to the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011 edition) (the Guide). Given the special nature of the Principal Ordinance and the legislative framework in which it operates, the offences created by the Ordinance depart from the Guide in several respects.

First, the Guide provides guidance on how an offence should be expressed. In particular, it stipulates that ‘different physical elements of an offence should be able to be clearly distinguished’. The new procurement offence effectively merges two physical elements, namely that of (a) the conduct of procuring a child, and (b) the result of that conduct, being

an act constituting a child sex offence (albeit an act that does not need to take place). It does so in the same paragraph, in keeping with the NSW procurement offence on which it is modelled.

Second, the Guide stipulates that '[r]egulations should not be authorised to impose fines exceeding 50 penalty units'. It also states that:

If it is intended that an offence is to be included in a legislative instrument, the empowering Act for the instrument must include express power for the instrument to provide for offences, and should also include the maximum penalty that is considered appropriate to contain offences. In general, a regulation is the only kind of legislative instrument that is considered appropriate to contain offences

Section 19A of the Act clearly authorises the making of Ordinances that impose penalties exceeding a fine of 50 penalty units, and the Ordinance amends the Principal Ordinance to do just that. Specifically, the Principal Ordinance as amended will impose a maximum penalty of imprisonment for 15 years for each of the new procurement and grooming offences, and apply the existing maximum penalty of imprisonment for 5 years to the expanded offence of endangering health as including non-fatal strangulation. Given the seriousness of the offences that are amended or created by the Ordinance, it would be inappropriate for the maximum penalty to be limited to 50 penalty units.

Consultation

The Ordinance was prepared in consultation with the child welfare authorities and residents of Norfolk Island. A notice detailing the proposed amendments and calling for comment was published in volume 52 no 25 of *The Norfolk Islander* (23 September 2017). Provisions of the Ordinance affecting Norfolk Island court services were prepared in consultation with the Registrar of the Norfolk Island Supreme Court and the Clerk of the Court of Petty Sessions.

The Ordinance was also prepared in consultation with various Commonwealth agencies. Amendments to the information sharing regime under the Child Welfare Act were prepared in consultation with the Attorney-General's Department and the Office of the Australian Information Commissioner. Amendments to the Criminal Code were also prepared in consultation with the Attorney-General's Department, the Australian Federal Police, and the Office of the Commonwealth Director of Public Prosecutions.

Other matters

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

The Ordinance commences the day after registration.

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 (2017 Measures No. 3) Ordinance 2017

The amendments made by the *Norfolk Island Continued Laws Amendment (2017 Measures No. 3) Ordinance 2017* (the Ordinance) are 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 Ordinance

The Ordinance provides for the amendment of the *Child Welfare Act 2009* (NI) and *Criminal Code 2007* (NI). The amendments to the Child Welfare Act concern:

- the conduct of proceedings under the Act in relation to a child or young person
- the exchange of information relating to the safety, welfare and well-being of a child or young person
- emergency action taken under Div 5.3.4 of the Act with respect to a child or young person.

A ‘child’ is defined in section 7 of the Act to mean a person who is under 12 years old, and a ‘young person’ is defined in section 8 of the Act to mean a person who is 12 years old or older, but not yet 18 years old.

The amendments to the Criminal Code concern:

- criminalising the procurement and grooming of a child or young person for a child sex offence
- criminalising non-fatal choking, suffocation and strangulation
- the disclosure of information relating to convictions for sexual offences against or with a child or young person.

The Ordinance also makes some technical amendments to the Criminal Code that clarify its operation with respect to offences under applied NSW laws, section 19A Ordinances, and laws continued in force under section 16 or 16A of the *Norfolk Island Act 1979*.

Human rights implications

The amendments to the Child Welfare Act and Criminal Code engage the following categories of human rights that are recognised in the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *Convention on the Rights of the Child* (CROC):

- Rights relating to the protection of children from physical or mental violence, injury or abuse, and the obligation of the State to provide children with protection and care as necessary for their wellbeing
- Rights relating to the recognition of the family as the natural and fundamental unit of society

- Rights relating to the protection of women from gender-based violence
- Right to a fair trial
- Right to privacy
- Right to freedom of expression.

To the extent that the amendments concern action concerning children undertaken by public authorities, they also engage the ‘best interests’ principle recognised in the CROC.

To the extent that the Ordinance makes technical amendments to the Criminal Code to clarify its operation with respect to offences under other laws in force in Norfolk Island, it does not engage any of the applicable human rights or freedoms.

Protection of children

Article 3(2) of the CROC requires States Parties to ensure that the child receives such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents. Article 19 of the CROC contains the obligation to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents, legal guardians or any other person who has the care of the child. Article 20 of the CROC contains the obligation to provide special protection and assistance to a child who is temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment. Article 34 of the CROC contains an obligation to protect the child from all forms of sexual exploitation and sexual abuse, as well as a specific obligation to take all appropriate measures to prevent the inducement or coercion of a child to engage in any unlawful sexual activity. While framed as obligations on States Parties, each of these provisions accords corresponding rights to the child.

Similarly, Article 24(1) of the ICCPR contains the obligation to provide children with protection on the part of the child’s family, society and the State. Article 10(3) also recognises that special measures of protection and assistance should be taken on behalf of children and young persons.

The insertion of section 90(3A) in the Child Welfare Act promotes the right to protection. The new subsection clarifies that, where the child welfare officer (or police officer) takes emergency action by arranging for the care and protection of a child or young person in a premises or place pursuant to section 90(3) of the Child Welfare Act, that premises or place may be outside Norfolk Island (eg, in another State or Territory). These arrangements may only be taken where the child welfare officer (or police officer) reasonably believes that the child or young person is in immediate need of care and protection, or would be so if immediate care and protection were not provided (s 90(2) of the Child Welfare Act). A child or young person is in need of care and protection if he or she has been, is being or is likely to be, abused or neglected, and no one with parental responsibility for the child or young person is willing and able to protect him or her from suffering the abuse or neglect (s 38(1)). The insertion of section 90(3A) will assist the child welfare officer (or police officer) to put adequate arrangements in place, particularly where the accommodation of the child or young person in Norfolk Island is not conducive, in the circumstances, to their care and protection. In this regard, Norfolk Island is in a unique position on account of its small geographical area and the fact that it has dedicated child welfare authorities that exercise functions and powers only with respect to Norfolk Island. Accordingly, similar provisions are not found in the child protection laws of other Australian jurisdictions. Without the clarification, there is a risk that the powers of the Child Welfare Office (or police officer) to take the relevant emergency

action might be interpreted as applying to accommodation in Norfolk Island alone, which might not afford the child the care and protection that he or she needs.

The insertion of sections 121A and 121B in the Criminal Code also promote the right to protection. The creation of new procurement and grooming offences are designed to protect children from sexual exploitation and abuse occasioned by engaging in sexual activity or by exposure to sexually explicit material as part of the ‘grooming process’.

Recognition of the family

Article 23 of the ICCPR and Article 10(1) of the ICESCR provide that protection should be given to the family as the natural and fundamental group unit of society. Moreover, Art 17 of the ICCPR provides that no one is to be subjected to arbitrary or unlawful interference with his or her family, and that everyone has the right to the protection of the law against such interference.

Article 5 of the CROC requires States Parties to respect the responsibilities, rights and duties of parents. Article 9(1) of the CROC requires States Parties to ensure that a child shall not be separated from his or her parents against their will, unless the competent authorities determine that such separation is necessary for the best interests of the child. Article 18(1) recognises that parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. Finally, Article 16 of the CROC, like Art 17(1) of the ICCPR, provides that no child should be subject to arbitrary or unlawful interference with his or her family.

Section 90(3A) of the Child Welfare Act will clarify that the child welfare officer (or police officer) may arrange for the care and protection of a child or young person in a premises or place outside Norfolk Island when taking emergency action under Division 5.3.4 of the Act. This will necessarily involve separation of the child or young person from his or her parents, possibly against their will, and may involve some interference with the family unit. This separation and interference will likely be exacerbated by placement outside Norfolk Island, given the distance from Norfolk Island and limited transport links to and from Norfolk Island.

To the extent that emergency action does involve separation or interference, it will only be taken in a manner that is necessary in the best interests of the child. That is, the power under section 90(3) to take emergency action by arranging for the care and protection of a child or young person in another premises or place may only be exercised where the child welfare officer (or police officer) reasonably believes that the child or young person is in immediate need of care and protection, or would be so in need if immediate care and protection were not provided. Moreover, pursuant to section 12(1)(a) of the Child Welfare Act, the principle that the best interests of the child or young person should be the paramount consideration (the ‘best interests principle’) is to be applied when taking action, including emergency action, under the Act. Furthermore, section 13(1) of the Act sets out matters to be taken into account when applying the best interests principle, including the capacity of parents to provide for the child’s needs, and the likely effect of separation of the child from a parent. The principles set out in section 12 also acknowledge the importance of the family unit. Accordingly, factors relating to the protection of or interference with the family unit and the separation of the child or young person from his or her parents are already taken into account in all actions concerning children and young persons under the Act.

Moreover, the process for taking emergency action is prescribed by law (ie, Div 5.3.4 of the Child Welfare Act) and is proportionate to the legitimate objective of protecting the child or young person, consistent with the CROC and ICCPR. In this regard, the placement of the child or young person (including outside Norfolk Island) is designed to remove the child or young person from a situation in which they are in need of immediate care and protection,

and to place them in a situation where that care and protection is being provided. The placement is for a maximum of 3 days, after which the child welfare officer or (police officer) must deliver the child or young person into the care of the former caregiver or other person with parental responsibility for the child or young person, unless a care and protection order has been made by a court. Bearing in mind the general principle that consideration be given to placing a child or young person with a family member (s 12(1)(f)), which principle equally applies to any emergency action taken under Div 5.3.4 of the Act, it may be that a relevant family member of the child or young person in respect of whom emergency action is to be taken lives outside Norfolk Island.

In light of these factors, the Ordinance is consistent with applicable rights and obligations in relation to the protection of the family.

Protection from gender-based violence

Protection from gender-based violence engages a number of rights recognised in relevant international instruments, particularly the right to equal protection of the law and non-discrimination. Notably, Article 2 of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) requires States Parties to pursue all appropriate means and without delay a policy of eliminating discrimination against women. To this end, Article 2(c) requires States Parties to establish legal protection of the rights of women on an equal basis with men and to ensure the effective protection of women against any act of discrimination. The Committee on the Elimination of All Forms of Discrimination against Women has recognised that gender-based violence is a form of discrimination which seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.

The new offence in section 87(2)(aa) of the Criminal Code recognises that non-fatal strangulation is a common form of domestic violence, in which women are disproportionately the victim, and is an indicator of an escalation in domestic violence offending. The new offence promotes the right to protection from gender-based violence by granting these victims greater legal protection from such violence.

Freedom from unlawful and arbitrary deprivation of liberty

Article 37(b) of the CROC and Article 9(1) of the ICCPR require Parties to ensure that no child is deprived of his or her liberty unlawfully or arbitrarily.

It may be said that arrangements for the care and protection of a child or young person in a premises or place outside Norfolk Island (as with a premises or place in Norfolk Island) involves some deprivation of the liberty of that child or young person. To the extent that this is the case, such deprivation is neither unlawful nor arbitrary.

As noted above, the process for taking emergency action by arranging for the care and protection of a child or young person in another premises or place is prescribed by law (ie, Div 5.3.4), which includes specific conditions that must be met before any such action is taken, and sets a time limit of 3 days on any placement of the child or young person. Accordingly, any deprivation of liberty resulting from an arrangement for the care and protection of a child or young person is lawful.

The operation of these specific conditions, as well as the application of the general principles set out in section 12(1), ensure that any arrangement for the care and protection of a child or young person is not arbitrary. Such arrangements pursue the legitimate objective of protecting the child or young person, consistent with the CROC and ICCPR and are necessary and proportionate to the achievement of that objective. An arrangement may only be made where the child is in immediate need of care and protection, or would be so in need

if immediate care and protection were not provided. Action to arrange for the care and protection of the child or young person is taken applying the best interests principle, as well as the principle that governmental intervention be the least intrusive consistent with the best interests principle. The time limit of 3 days on any placement reinforces the limited nature of emergency action taken under Div 5.3.4.

In light of these considerations, the Ordinance is consistent with the child's right to freedom from arbitrary deprivation of liberty.

Right to a fair trial

Article 14 of the ICCPR provides that all persons are equal before the courts. The Ordinance engages this right to the extent that it provides for the insertion of section 23A into the Child Welfare Act. This new section provides that proceedings under the Act are to be conducted in a non-adversarial manner, and with as little formality and legal technicality as possible. To the extent that these proceedings relate to a child or young person, this amendment will promote the enjoyment of this right by the child or young person, who are entitled to be represented before the court in those proceedings.

Right to privacy

Article 17 of the ICCPR protects every person from arbitrary or unlawful interference with his or her privacy, and provides for the protection of the law against such interference. Article 16 of the CROC reaffirms this protection for children.

The Ordinance engages the right to privacy to the extent that it has the effect of expanding the classes of bodies and persons (ie, 'defined entities') to which the child welfare officer may disclose, and from which the child welfare officer may seek, information relating to the safety, welfare and well-being of a child or young person (child welfare information).

The handling of child welfare information by the child welfare officer or a defined entity may substantially interfere with the privacy of that person. Such interference is not unlawful as the circumstances in which the information is disclosed or sought by the child welfare officer are defined by section 27 of the Child Welfare Act. Moreover, the interference is not arbitrary in that it is necessary and proportionate to the legitimate objective of protecting the child or young person, consistent with both the ICCPR and the CROC. In this regard, access to child welfare information is essential to the effective and coordinated provision of care and protection to children and young persons by a range of government agencies and non-governmental organisations. The child welfare officer may only disclose information to, or seek information from, a defined entity under section 27 of the Act for the purposes defined in section 27(1). In doing so, the child welfare officer is to apply the general principles set out in section 12(1), including the best interests principle. Section 13(1) of the Act sets out matters to be taken into account when applying the best interests principle, including the need to protect the child or young person from harm. The child welfare officer and defined entities are also limited by section 186 as to the handling of information received under section 27, which prohibits the recording or on-disclosure of the information except where it is required by law or for the Act. Restrictions under the *Privacy Act 1988* (Cth) also apply to the handling of the information by the child welfare officer and by many of the other defined entities.

The Ordinance also engages the right to privacy to the extent that it provides for the exchange of information relating to a person's conviction for sexual offences against or with a child or young person. This information will contain personal information of the person and may constitute a criminal record for that person, which is 'sensitive information' for the purposes of the Privacy Act. The exchange of such information may interfere with the person's privacy. Such interference is not unlawful as the circumstances in which the information is

disclosed are defined by new section 193A of the Child Welfare Act. Moreover, the interference is not arbitrary in that it is necessary and proportionate to the legitimate objective of the effective administration of the child protection system provided for under Child Welfare Act. The functions of the child welfare officer are essential to the administration of this system, and central to the ability of the child welfare officer to carry out those functions is access to information that may be relevant to the welfare of children and young persons.

In light of these factors, the Ordinance is consistent with the right to privacy.

Right to freedom of expression

Article 19(2) of the ICCPR recognises the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds. The Ordinance engages the right to freedom of expression to the extent that the new grooming offence in section 121B of the Criminal Code prohibits certain conduct that could be characterised as imparting information and ideas to children and other persons. Regardless of how it is characterised, Article 19(3) provides that the right to freedom of expression may be subject to restrictions that are provided by law and are, among other things, necessary for respect of the rights or reputations of others. Prohibiting communications that seek to facilitate the procurement of a child for sexual activity respects the rights of the child to protection from sexual exploitation and abuse, and is necessary to achieving that objective given the central role that such communications play in the grooming process.

Best interests of the child

Article 3 of the CROC provides that a primary consideration in all actions concerning children must be the best interests of the child.

Section 12(1)(a) of the Child Welfare Act provides that, in making a decision or taking action under the Act in relation to a child or young person, the best interests of the child or young person should be the paramount consideration. The content of this best interests principle is elaborated in section 13 of the Act. In taking emergency action under the Act, the requirement of Article 3 of the CROC is therefore already embedded as the primary consideration.

Conclusion

The amendments in the Ordinance are compatible with human rights.

**Minister for Infrastructure and Transport,
The Hon Darren Chester MP**

Norfolk Island Continued Laws Amendment (2017 Measures No. 3) Ordinance 2017

Section 1 – Name

This section provides that the title of the Ordinance is the *Norfolk Island Continued Laws Amendment (2017 Measures No. 3) Ordinance 2017*.

Section 2 – Commencement

This section provides the commencement provisions for the Ordinance. The Ordinance commences on the day after registration.

Section 3 – Authority

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

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 terms in the Schedule concerned, and any other item in a Schedule to the Ordinance has effect according to its terms.

There are three Schedules to the Ordinance. Schedule 1 sets out the amendments to the *Child Welfare Act 2009* (NI) (Child Welfare Act), which are effected by amending part 1 of Schedule 1 to the *Norfolk Island Continued Laws Ordinance 2015* (Principal Ordinance). Schedule 2 sets out the amendments to the *Criminal Code 2007* (Criminal Code), which are also effected by amending part 1 of Schedule 1 to the Principal Ordinance. Schedule 3 amends part 2 of Schedule 1 to the Principal Ordinance to insert provisions dealing with the transitional application of several of those amendments.

Schedule 1 – Amendments of the Child Welfare Act 2009 (Norfolk Island)

Norfolk Island Continued Laws Ordinance 2015

Item 1—After item 29 of Schedule 1

This item inserts new item 29AAA into Schedule 1 to the Principal Ordinance, which in turn inserts a new provision into the Child Welfare Act relating to the conduct of proceedings under the Act.

The primary objective of such proceedings will always be to discern what is in the best interests of the child and for orders to be made to reflect those interests. It is also important that a child or young person, and anyone else involved in the proceedings, understand the court's process, and have the opportunity to express their views about the well-being of the child or young person.

For this reason, proceedings under the Act should be conducted as far as possible in an informal way, and the court should be able to determine how it receives information relevant to those proceedings without being bound by the rules of evidence. This approach is taken in courts with similar jurisdiction in other Australian states and territories, including in NSW, where similar requirements are set out in section 93 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW). It is also taken with respect to proceedings in other courts established under Norfolk Island enactments (see section 131 of the *Environment Act 1990* (NI)).

To ensure procedural fairness, item 1 of Schedule 3 to the Ordinance amends Schedule 1 to the Principal Ordinance to provide that the new section 23A only applies in relation to proceedings commenced on or after the commencement of the Ordinance.

Item 2—After item 30 of Schedule 1

This item inserts a number of new items into Schedule 1 to the Principal Ordinance, which in turn:

- repeal and substitute paragraph (j) of the definition of ‘defined entity’ in subsection 27(11) of the Child Welfare Act (new items 30AC and 30AD)
- insert two additional classes of bodies and persons to the definition of ‘defined entity’ (new item 30AC)
- facilitate the handling of information received by defined entities under section 27 of the Child Welfare Act in a manner consistent with the *Privacy Act 1988* (Cth) (new items 30AA and 30AB).

Subsection 27(2) of the Child Welfare Act authorises the child welfare officer to disclose ‘information relating to the safety, welfare and well-being of a particular child or young person or class of children or young persons’ (child welfare information) to a defined entity. Subsection 27(11) defines the term ‘defined entity’ to include a range of bodies and persons.

The exchange of child welfare information is essential to the effective and coordinated provision of care and protection to children and young persons by a range of bodies and persons. Besides the child welfare officer, such bodies and persons include non-governmental organisations providing services in Norfolk Island, as well as employees of Commonwealth departments and agencies and their contractors.

Repeal and substitution of paragraph (j) of the definition of ‘defined entity’

The current paragraph (j) of subsection 27(11) contemplates that regulations made under the Child Welfare Act may prescribe a body or class of bodies for the purposes of the definition of ‘defined entity’. This acknowledges that it is difficult to anticipate the range of bodies with which information needs to be exchanged, and therefore to specify all of these bodies in the Child Welfare Act itself.

To ensure flexibility to respond to changes in how relevant services are provided in Norfolk Island, it is preferable for the power to prescribe a body or class of bodies to be exercised by way of legislative instrument made by the Commonwealth Minister, rather than by regulation. Current paragraph (j) is therefore being repealed and substituted by new paragraph (l) (the change in paragraph lettering is due to the insertion of two additional classes of bodies and persons, which are discussed below), which provides that a defined entity includes ‘a body determined by the Commonwealth Minister under subsection (12)’. A new subsection 27(12) is then being inserted to expressly confer on the Commonwealth Minister the power to make this determination in the form of a legislative instrument. Under section 33(3A) of the *Acts Interpretation Act 1901*, which applies because of section 8A of the *Interpretation Act 1979* (NI), the power to determine a body for the purposes of new paragraph (l) includes a power to determine classes of bodies.

Insertion of two additional classes of bodies and persons to the definition of ‘defined entity’

At present, the child welfare officer is not authorised under subsection 27(2) of the Child Welfare Act to disclose child welfare information to a Commonwealth department or to a State or Territory department unless the department is prescribed by regulation for the purposes of section 27 (thereby making it a ‘defined entity’ under current paragraph (j) of

subsection 27(11)). In view of the governance arrangements for Norfolk Island, there may be circumstances where it is necessary or desirable for the child welfare officer to provide child welfare information to the Commonwealth or to a State with which the Commonwealth enters into arrangements for the administration of laws in force in Norfolk Island. There may also be circumstances where it is necessary or desirable for the child welfare officer to share this information with persons contracted by a defined entity to provide child services, including persons working in collaboration with the child welfare officer. At present, the child welfare officer is not authorised under subsection 27(2) of the Child Welfare Act to exchange child welfare information with these contractors.

To facilitate the provision of child welfare information in these circumstances, two new classes of bodies and persons have been added to the definition of defined entity in subsection 27(11). The first class – defined by new paragraph (j) – is designed to cover government departments that are involved in administering the child protection system in Norfolk Island. This notably applies to the Department of Infrastructure and Regional Development, which currently has portfolio responsibility for administering Norfolk Island. It also applies to any NSW government department that is responsible for executing any arrangement made under section 18C of the Act so far as it relates to the administration of the Child Welfare Act.

The second class – defined by new paragraph (k) – is designed to cover any person (including an individual) that is contracted by a defined entity to provide certain child services in Norfolk Island, to assist the child welfare officer in exercising functions and powers under the Child Welfare Act, or to assist another defined entity in connection with the administration of the Child Welfare Act. This class includes a person contracted to provide advice to the child welfare officer on matters within the functions of the child welfare officer, including the type of help that is contemplated in section 26 of the Child Welfare Act. It also includes a person that is contracted to provide advice to the responsible Commonwealth department on matters relating to the administration of the child protection system in Norfolk Island, including on the monitoring of decisions and action taken under the Act, the development of best practice procedures, and the handling of complaints.

Facilitating the handling of information received by defined entities under section 27 of the Child Welfare Act in a manner consistent with the Privacy Act.

Child welfare information that is exchanged with defined entities under section 27 of the Child Welfare Act will likely contain personal information, and may contain sensitive information, within the meaning of the Privacy Act. The Child Welfare Act establishes safeguards for the disclosure of child welfare information by the child welfare officer. For example, under subsection 12(1) of the Act, action by the child welfare officer to exchange information under subsection 27(2) of the Act about a particular child or young person is to be taken applying the principle that the best interests of the child or young person should be the paramount consideration. Moreover, the collection, use and disclosure of child welfare information by Commonwealth employees (as well as Commonwealth departments and agencies) is subject to the Privacy Act, including Australian Privacy Principles 3 and 6 set out in Schedule 1 to the Privacy Act. These safeguards extend to Commonwealth contractors pursuant to section 95B of the Privacy Act. The disclosure of information that is received by a defined entity under section 27 is also subject to the confidentiality provision in section 186 of the Child Welfare Act.

A new subsection 27(9A) has been inserted to ensure that those defined entities that are APP entities for the purposes of the Privacy Act are able to handle child welfare information that is disclosed to them under section 27 of the Child Welfare Act in a manner that is consistent with the Privacy Act. Australian Privacy Principle 3.3 provides that an APP entity must not

collect sensitive information about an individual without that individual's consent unless circumstances specified in Australian Privacy Principle 3.4 apply. One of these circumstances is that the collection of the information is required or authorised by or under an Australian law. Information that the child welfare officer discloses to a defined entity under section 27 of the Child Welfare Act may contain sensitive information (as that term is defined in section 6 of the Privacy Act). It will not always be practicable or appropriate, or consistent with the objects of the Child Welfare Act, for the defined entity to obtain the consent of the child or young person (or their parent or guardian) to the collection of that information. Accordingly, new subsection 27(9A) authorises a defined entity to collect the information, thereby ensuring that it can handle it consistently with the Privacy Act (to the extent that the Privacy Act applies to that defined entity). The safeguards in the Australian Privacy Principles concerning the subsequent use and disclosure of personal information will continue to apply to child welfare information that is collected by the defined entity.

To clarify the temporal application of new subsection 27(9A), item 1 of Schedule 3 to the Ordinance amends part 2 of Schedule 1 to the Principal Ordinance to provide that the authorisation to collect child welfare information under the new subsection applies in relation to information that is disclosed by the child welfare officer on or after the commencement of Schedule 1 to this Ordinance, regardless of when that information came into the possession of the child welfare officer.

As a consequence of the insertion of new subsection 27(9A) authorising the collection of child welfare information, subsection 27(10) is being amended to state that section 27 does not limit any other power to collect information.

Item 3—Items 30B and 31 of Schedule 1

This item repeals items 30B and 31 of Schedule 1 to the Principal Ordinance and substitutes new item 31, which in turn repeals and substitutes section 32 of the Child Welfare Act. At present, section 32 gives the child welfare officer the power to delegate his or her functions to certain classes of persons, but does not expressly authorise the delegation of the powers of the child welfare officer. The new provision expressly authorises the child welfare officer to delegate those powers.

The new provision also removes the power to delegate to public sector employees, thereby narrowing the overall scope of the delegations power. At present, no delegations have been made under section 32 to that class of persons. There is no change to the other classes of persons to which the child welfare officer has the power to delegate his or her functions.

In order to ensure the continuation of existing delegations made by the child welfare officer, item 1 of Schedule 3 to the Ordinance amends Schedule 1 to the Principal Ordinance to provide that delegations made under the repealed section 32 continue in effect as if they were made under the new provision. As already noted, no delegations have been made under section 32 to public sector employees, so no special transitional arrangements are needed for delegates within that class of persons on account of the fact that the new provision removes the power of the child welfare officer to delegate to public sector employees.

Item 4—Item 31E of Schedule 1

This item repeals item 31E of Schedule 1 to the Principal Ordinance and inserts new item 31EA, which in turn inserts a new subsection 90(3A) into the Child Welfare Act.

Division 5.3.4 of the Child Welfare Act provides for the child welfare officer or a police officer to take emergency action. A situation could arise where the child welfare officer (or police officer) needs to take emergency action in relation to a child or young person under Division 5.3.4 that includes arranging for that person to be cared for outside Norfolk Island.

At present, the power in section 90(3) of the Act to make such an arrangement does not expressly contemplate this situation. For the avoidance of doubt, the new subsection 90(3A) makes it clear that, where the child welfare officer (or police officer) takes emergency action by arranging for the care and protection of a child or young person in a premises or place pursuant to section 90(3) of the Child Welfare Act, that premises or place may be outside Norfolk Island.

In order to maintain the sequential order of amendments to the Child Welfare Act in Schedule 1 to the Principal Ordinance, the amendments made by repealed item 31E of that Schedule are now split between new items 31E and 31EB.

Item 5—After item 32 of Schedule 1

This item inserts new item 32A into Schedule 1 to the Principal Ordinance, which in turn inserts a new section 193A into the Child Welfare Act.

The new section establishes an obligation on courts exercising criminal jurisdiction in Norfolk Island to notify the child welfare officer of convictions for sexual offences against or with a child or young person. The purpose of the new obligation is to ensure that the child welfare officer is aware of all such convictions so that he or she can take follow-up action if necessary under the Child Welfare Act. The new obligation is adapted from section 80AA of the *Crimes Act 1900* (NSW), which confers a discretion on the courts to refer convictions for sexual offences to appropriate child protection agencies where the victim of the offence is under the authority of those agencies. As this provision is designed to assist the child welfare officer in exercising his or functions under the Child Welfare Act, and does not establish an offence, it is more appropriate for the obligation to be included in the Child Welfare Act rather than in the Criminal Code.

Schedule 2 – Amendments of the Criminal Code 2007 (Norfolk Island)

Norfolk Island Continued Laws Ordinance 2015

Item 1—Item 53A of Schedule 1

This item substitutes a new item 53A and inserts new items 53AA-53AE into Schedule 1 to the Principal Ordinance, which in turn make a number of amendments to the Criminal Code. The amendments clarify the operation of the codification and application provisions in the Criminal Code with respect to offences under applied NSW laws and section 19A Ordinances. Section 18A of the Act provides that laws in force in NSW from time to time are also in force on Norfolk Island (applied NSW laws), subject to incorporation, amendment, repeal or suspension by a section 19A Ordinance. Currently, the *Norfolk Island Applied Laws Ordinance 2016* provides for the suspension of most applied NSW laws until 1 July 2018, and amends some of the applied NSW laws that have been unsuspending on Norfolk Island since 1 July 2016.

New item 53A repeals section 5 of the Criminal Code. Subsection 5(1) presently provides that the only offences against laws of Norfolk Island are the offences created under this Act or any other Act. Subsection 5(2) presently provides that subsection 5(1) has no effect until 30 June 2018. ‘Act’ as defined in the dictionary at the end of the Criminal Code means, unless otherwise indicated, an enactment of the former Legislative Assembly of Norfolk Island. The repeal of this section will clarify that the operation of the Criminal Code does not preclude in Norfolk Island the operation of offence provisions under either a section 19A Ordinance or an applied NSW law.

New items 53AA and 53AB will amend subsections 6(1) of the Criminal Code to clarify that the main purpose of chapter 2, which deals with general principles of criminal responsibility, is to codify general principles of criminal responsibility under ‘Norfolk Island legislation’. New item 53AC similarly amends subsection 6(2) to provide that chapter 2 contains all the general principles of criminal responsibility that apply to any offence against ‘Norfolk Island legislation’. New item 53AD amends section 7 of the Criminal Code to clarify that chapter 2 applies to all offences against the Criminal Code and all other offences against ‘Norfolk Island legislation’.

The insertion of the references to ‘Norfolk Island legislation’ and the insertion of the new definition of this term (see new item 56C of Schedule 1 to the Principal Ordinance, discussed further below) will clarify that the general principles of criminal responsibility contained in chapter 2 of the Criminal Code are intended to apply to offence provisions contained in section 19A Ordinances as well as offences in laws continued in force by section 16 or section 16A of the Act, which include laws made by the former Legislative Assembly of Norfolk Island.

Chapter 2 will (with the exception of part 2.7) not apply to offence provisions in applied NSW laws. This is because, as NSW is not a criminal code jurisdiction, the offence provisions in applied NSW laws are not drafted in a way that reflects the principles set out in chapter 2. Consistently chapter 2 will also not apply to those section 19A Ordinances, which have the effect (directly or indirectly) of amending an applied NSW law so that the applied NSW law (as amended) provides for an offence; or which ends the suspension of the operation in Norfolk Island of an applied NSW law that provides for an offence.

New item 53AE inserts a new note at the end of section 7 noting that part 2.7 of chapter 2 of the Criminal Code also applies to offences against applied NSW laws. Part 2.7 of chapter 2 deals with the geographical application of offences.

Item 2—Item 53B of Schedule 1 (heading to section 8)

This item amends item 53B of Schedule 1 to the Principal Ordinance, which in turn inserts a new heading to section 8 of the Criminal Code. This amendment is consequential to the amendment made by item 3 below.

Item 3—Item 53B of Schedule 1 (subsection 8(1))

This item also amends item 53B of Schedule 1 to the Principal Ordinance, which in turn amends subsection 8(1) of the Criminal Code by omitting the words ‘from the commencement of this section until 30 June 2018’. The effect of this amendment is that chapter 2 of the Criminal Code will continue not to apply beyond 30 June 2018 to certain offences that were in force before 1 January 2008. It is not appropriate to apply chapter 2 to these older offence provisions, which were not drafted in a way that reflects the principles set out in chapter 2.

Item 4—After item 53B of Schedule 1

This item inserts new item 53BA into Schedule 1 to the Principal Ordinance, which in turn repeals section 9 of the Criminal Code. The intended operation of section 9, which deals with liability to trial, is unclear and its removal will avoid any ambiguity as to its operation with respect to offences under applied NSW laws.

Item 5—After item 53CA of Schedule 1

This item inserts new items 53CB and 53CC into Schedule 1 to the Principal Ordinance, which in turn amend the Criminal Code to deal with the application of part 2.7 of chapter 2 to offences against applied NSW laws. It also inserts new item 53CD into Schedule 1 to the Principal Ordinance, which in turn expands the offence of endangering health in section 87 of the Criminal Code to include non-fatal strangulation.

Application of part 2.7 of chapter 2 to applied NSW laws

New item 53CB adds a note at the end of subsection 62(1) of the Criminal Code to clarify the manner in which subsection 62(1) applies part 2.7 of chapter 2 to all offences against ‘Norfolk Island legislation’. New item 53CC inserts new subsection 62(1A) into the Criminal Code, which applies part 2.7 in relation to an offence against an applied NSW law in the same way as this part applies in relation to an ‘offence’ or an ‘offence’ against a ‘law’; and applies part 2.7 in relation to an applied NSW law in the same way as this part applies in relation to a ‘law’. ‘Offence’ and ‘law’ are defined in the dictionary at the end of the Criminal Code (see the new definition of ‘law’ to be inserted into the Principal Ordinance by new item 56B, which will mean ‘Norfolk Island legislation’ or a provision of ‘Norfolk Island legislation’). The effect of new subsection 62(1A) is that part 2.7 of chapter 2 of the Criminal Code, which deals with the geographical application of offences, will also apply to offences against applied NSW laws.

Expanded offence of endangering health to include non-fatal strangulation

New item 53CD amends the offence of endangering health in section 87 of the Criminal Code. The amendment expands the offence to encompass what is sometimes referred to as ‘non-fatal strangulation’. The maximum penalty for this offence is 5 years

At present, the intentional and unlawful choking, suffocation or strangulation of another person is an offence under section 86 of the Criminal Code (acts endangering life) but only where the defendant engages in that conduct so as to render the victim ‘insensible or unconscious’. Sections 86 and 87 of the NI Criminal Code are based on sections 27 and 28 of the *Crimes Act 1900* (ACT) respectively. In 2015, the *Crimes Act 1900* (ACT) was amended to criminalise intentional and unlawful choking, suffocation and strangulation without the

additional requirement that the victim be rendered insensible or unconscious. This was done by adding a new paragraph to the offence of endangering health in section 28 of the *Crimes Act 1900* (ACT). In keeping with the *Crimes Act 1900* (ACT), the new non-fatal strangulation offence is being included in the Criminal Code by similar amendment to the equivalent provision in section 87.

The ACT amendment was introduced by the *Crimes (Domestic and Family Violence) Legislation Amendment 2015* (ACT). The revised explanatory memorandum to the relevant Bill identified non-fatal strangulation by a partner as ‘one of the most important predictive risk factors for intimate partner homicide’ and ‘a tactic often used in family violence to threaten, intimidate and control a victim’. It went on to state that, prior to the amendment, in order to prove an offence under section 27 of the *Crimes Act 1900* (ACT) (acts endangering life), the prosecution was required to prove beyond reasonable doubt that the strangulation was so severe that the victim lost consciousness or was rendered insensible. If an accused merely applied pressure to a victim’s throat to such an extent that the victim lost the ability to breathe but stayed conscious and in possession of all their faculties, the charge would fail.

In order to prove the expanded offence of endangering health in section 87 of the Criminal Code in cases of non-fatal strangulation, the prosecution will need to prove beyond reasonable doubt that the defendant strangled (or choked or suffocated) the victim, but will not be required to prove that the victim was thereby rendered insensible or unconscious.

Item 6—After item 53DA of Schedule 1

This item inserts new item 53DB into Schedule 1 to the Principal Ordinance, which in turn amends the Criminal Code to create two new offences, namely an offence of procuring a young person for a child sex offence, and an offence of grooming a person for a child sex offence. It also inserts new items 53DC and 53DD that deal with alternative verdicts for these new offences.

New procurement offence

The new procurement offence, created by new section 121A, is modelled on the procurement offence in section 66EB(2) of the *Crimes Act 1900* (NSW) and has been adapted to existing sexual offence provisions in parts 3.6 and 3.7 of the Criminal Code.

In keeping with the NSW model and existing sexual offence provisions, the new provision provides for two offences; an ‘ordinary’ offence where the young person is under the age of 16 years, and an ‘aggravated’ offence where the young person is under the age of 10 years. A higher maximum penalty applies to the aggravated offence. In NSW, the aggravated offence applies where the young person is under the age of 14 years. In keeping with other offences in part 3.6 of the Criminal Code (including the offence of sexual intercourse with a young person in section 113), the new aggravated offence applies where the young person is under the age of 10 years.

The maximum penalty for the ordinary offence is imprisonment for 12 years. The maximum penalty for the aggravated offence is imprisonment for 15 years. These maximum penalties are relative to the maximum penalties for other offences in part 3.6 of the Criminal Code.

The new offence comprises two principal physical elements: first, the defendant engaging in conduct of procuring a young person; second, the conduct resulting in an act taking place that constitutes, or would if it occurred in Norfolk Island constitute, a child sex offence. The term ‘child sex offence’ is defined in new section 121C to mean an offence under part 3.6, (sexual offences), part 3.7 (child pornography), or part 3.10 (sexual servitude) of the Criminal Code. The term ‘procure’ is also defined in that section to include an act of encouraging, enticing or recruiting a person in relation to an act constituting a child sex offence, or inducing that

person (whether by threats, promises or otherwise) in relation to such an act. This definition is based on the definition of 'procure' in the dictionary at the end of the *Criminal Code* (Cth).

It is not necessary for the act constituting a child sex offence to involve the defendant. This is made clear in paragraphs (1)(a) and (2)(a) of the new provision. It is also not necessary for the act constituting a child sex offence to actually take place. New subsection (4) provides that a person may be found guilty of the offence of procuring a young person for a child sex offence even though it is impossible for the act constituting the child sex offence to take place. This provision is taken from the procurement offences in divisions 272, 471, and 474 of the *Criminal Code* (Cth), and pursues a similar policy; namely, that the fundamental component of the new offence is criminalising the person's intention to engage in – or for someone else to engage in – an act constituting a child sex offence with the young person, and not the actual engagement in that act. The actual engagement in the act for which the young person is procured is – by definition – subject to other offences in parts 3.6, 3.7 and 3.10 of the *Criminal Code* (if occurring in Norfolk Island).

The new offence only applies where the defendant is of or above the age of 18 years (ie, an adult).

By operation of the general principles set out in division 2.2.3 of the *Criminal Code*:

- the default fault element for the physical element consisting of the conduct of procuring a young person is intention
- the default fault element for the physical element consisting of the result that an act constituting a child sex offence will take place is recklessness.

The NSW model applies to the procurement of a person who pretends to be a child, in which case the offence is committed if the defendant believed the person to be a child (see section 66EB(5) of the *Crimes Act 1900* (NSW)). This is intended to cover situations where the 'child' is actually a law enforcement officer posing as a child. A situation in which a law enforcement officer pretends to be a child will more likely occur in an online environment, which is subject to the Commonwealth procurement offence in section 474.26 of the *Criminal Code* (Cth). The Commonwealth procurement offence in section 474.26 of the *Criminal Code* (Cth) deals with this situation differently to the NSW model. It provides that the offence always applies where the defendant believes the person being procured is a child (see for example section 474.26(1)(c)), then states that it does not matter that the person is a 'fictitious person' represented to the defendant as a real person (see section 474.28(9)).

The new procurement offence adopts the approach taken by the *Criminal Code* (Cth). Accordingly, subparagraphs (1)(b)(ii) and (2)(b)(ii) apply the offence where the defendant believes the procured young person to be under the age of 10 years and 16 years respectively, and subsection 121A(5) provides that it does not matter that the young person is a fictitious person represented to the defendant as a real person. In cases where the procured young person is a real person who is in fact under 10 years or 16 years respectively, the belief of the defendant as to the person's age is not relevant (see new subsection (3)).

New subsection (6) establishes a defence to a prosecution for the new procurement offence where the defendant proves that, at the time the defendant engaged in the conduct constituting the offence, he or she believed on reasonable grounds that the young person was of or above the age of 16 years. A similar defence is provided for in the NSW model (see subsection 66EB(7) of the *Crimes Act 1900* (NSW) and the Commonwealth procurement offence (see, for example, subsection 272.16(3) of the *Criminal Code* (Cth)). The defence only applies to the 'ordinary' offence in subsection (2) (it does not apply to the 'aggravated' offence in subsection (1)), and parallels the defence provided in sections 113(3) and 119(3) of

the Criminal Code to a prosecution for the offences of sexual intercourse with a young person and acts of indecency with a young person, respectively.

Pursuant to section 59 of the Criminal Code, if a defendant wishes to rely on the defence, he or she bears a legal burden of proving that, at the time the defendant engaged in the conduct constituting the offence, he or she believed on reasonable grounds that the young person was of or above the age of 16 years. This is confirmed in the note to new subsection (6).

According to the general principles of criminal responsibility that apply to an offence created by a provision of the Criminal Code, a defendant ordinarily bears an evidential burden in relation to a defence, which may be discharged by presenting or pointing to evidence that suggests a reasonable possibility that the matter to which the defence relates exists or does not exist. However, in this case, the defendant bears a higher burden, namely a legal burden. Subsection (6) achieves this by expressly requiring the defendant to prove that the defendant believed on reasonable grounds that the young person was of or above the age of 16 years, thereby invoking section 59 of the Criminal Code, which imposes the legal burden. Pursuant to section 60 of the Criminal Code, the defendant must discharge a legal burden on the balance of probabilities (ie, by proving on the balance of probabilities that he or she had the requisite belief).

It is appropriate for the defendant to bear the burden of proof of establishing the defence. The new procurement offence is designed to protect children and young persons from sexual exploitation and abuse occasioned by the sexual acts for which they might be procured. The harm to such a child or young person is done regardless of how old the defendant believed that they were. Moreover, it is appropriate for that burden to be the higher legal burden. This is because the defence relates to the peculiar state of mind of the defendant (ie, the defendant's belief), and it would be difficult for the prosecution to *disprove* that, at the time of engaging in the conduct constituting the offence, the defendant believed on reasonable grounds that the young person was of or above the age of 16 years (as it would be required to do under section 56(2) of the Criminal Code if the burden was an evidential burden).

New subsection (7) provides that the ancillary offences of attempt and incitement, created by sections 44 and 47 of the Criminal Code respectively, do not apply to the new procurement offence. This is consistent with the approach taken in NSW and the Commonwealth, and is justified by the fact that the new offence is directed at conduct that it already preparatory in nature.

New grooming offence

The new grooming offence, created by new section 121B, is modelled on the grooming offence in section 66EB(3) of the *Crimes Act 1900* (NSW) and has been adapted to existing sexual offence provisions in parts 3.6 and 3.7 of the Criminal Code, as well as the new procurement offence in section 121A.

The new offence departs from the NSW model in three important respects:

- First, the new offence is not limited to grooming by exposure to indecent material or by provision of an intoxicating substance. This feature of the new offence recognises that the grooming process can encompass a wide range of activity. The indecency requirement was removed from the Commonwealth grooming offences in 2010 by the enactment of the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth). The relevant explanatory memorandum notes:

The practice of grooming encompasses a wide range of activity designed to build a relationship of trust with the child for the purposes of later sexually exploiting the child. The content of communications between the offender and

the child may not always be indecent – the grooming process is just as likely to involve platonic, ‘innocent’ exchanges.

- Second, the new offence applies not only to the grooming of a young person whom the defendant is seeking to procure for an act constituting a child sex offence, but also to the grooming of third parties. These third parties include parents and other family members of the young person. In Victoria, the grooming offence applies to third parties with care, supervision or authority over the young person (section 49M of the *Criminal Code 1958* (Vic)). Recently, the Commonwealth has introduced legislation to create a new third party grooming offence, which applies to the grooming of any third party regardless of their relationship with the young person (see Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017). The new grooming offence adopts the latter approach.
- Third, the maximum penalty for the new grooming offence is the same as the maximum penalty for the new procurement offence. In NSW, the maximum penalty for grooming a child is lower than the maximum penalty for procuring a child. The parity in maximum penalties for both offences is consistent with the approach taken in the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017, and reflects the serious nature of grooming.

In keeping with the NSW model and existing offence provisions, the new provision provides for two offences; an ‘ordinary’ offence where the young person is under the age of 16 years, and an ‘aggravated’ offence where the young person is under the age of 10 years. A higher maximum penalty applies to the aggravated offence. In NSW, the aggravated offence applies where the young person is under the age of 14 years. In keeping with other offences in part 3.6 of the Criminal Code (including the offence of sexual intercourse with a young person in section 113), and consistent with the new procurement offence, the new aggravated offence applies where the young person is under the age of 10 years.

The maximum penalty for the ordinary offence is imprisonment for 12 years. The maximum penalty for the aggravated offence is imprisonment for 15 years. These maximum penalties are relative to the maximum penalties for other offences in part 3.6 of the Criminal Code. As already noted, they are also the same as the maximum penalties for the new procurement offence.

The principal physical element for the new grooming offence is the defendant engaging in conduct in relation to another person. The new offence only applies where the defendant is of or above the age of 18 years (ie, an adult). The fault element for the new grooming offence is intention, such that the offence is only constituted by the defendant intentionally engaging in conduct in relation to the other person, and where they engage in that conduct with the intention of making it easier to procure a young person (whether or not the young person is the person being groomed) for an act that constitutes, or would if occurred in Norfolk Island constitute, a child sex offence. As with the new procurement offence, the term ‘child sex offence’ is defined in new section 121C to mean an offence under part 3.6, (sexual offences), part 3.7 (child pornography), or part 3.10 (sexual servitude) of the Criminal Code. The term ‘procure’ is also defined in that section to include an act of encouraging, enticing or recruiting a person in relation to an act constituting a child sex offence, or inducing that person (whether by threats, promises or otherwise) in relation to such an act. This definition is based on the definition of ‘procure’ in the dictionary at the end of the *Criminal Code* (Cth).

As with the new procurement offence, it is not necessary for the act constituting a child sex offence to involve the defendant. This is made clear in paragraphs (1)(b) and (2)(b) of the

new provision. It is also not necessary for the act constituting a child sex offence to actually take place. New subsection (4) provides that a person may be found guilty of the offence of grooming a person for a child sex offence even though it is impossible for the act constituting the child sex offence to take place. This provision is taken from the grooming offences in divisions 272, 471, and 474 of the *Criminal Code* (Cth), and pursues a similar policy; namely, that the fundamental component of the new offence is criminalising the person's intention to facilitate the procurement of the young person for an act constituting a child sex offence, and not the actual engagement in that act. The actual engagement in the act for which the young person is sought to be procured is – by definition – subject to other offences in parts 3.6, 3.7 and 3.10 of the *Criminal Code* (if occurring in Norfolk Island).

Like the new procurement offence, the new grooming offence adopts the approach taken by the *Criminal Code* (Cth) to dealing with situations where the person being groomed is actually a law enforcement officer posing as such a person. Accordingly, new subsection 121B(5) provides that it does not matter that the groomed person is a fictitious person represented to the defendant as a real person. To account for the fact that the new offence applies to the grooming of third parties, subsection 121B(5) also provides that it does not matter that the young person the procurement of whom the defendant intends to facilitate is a fictitious person.

New subsection (6) establishes a defence to a prosecution for the new grooming offence where the defendant proves that, at the time the defendant engaged in the conduct constituting the offence, he or she believed on reasonable grounds that the young person was of or above the age of 16 years. A similar defence is provided for in the NSW model (see subsection 66EB(7) of the *Crimes Act 1900* (NSW) and the Commonwealth procurement offences (see, for example, subsection 272.16(3) of the *Criminal Code* (Cth)). The defence only applies to the 'ordinary' offence in subsection (2) (it does not apply to the 'aggravated' offence in subsection (1)), and parallels the defence provided in sections 113(3) and 119(3) of the *Criminal Code* to a prosecution for the offences of sexual intercourse with a young person and acts of indecency with a young person, respectively.

Pursuant to section 59 of the *Criminal Code*, if a defendant wishes to rely on the defence, he or she bears a legal burden of proving that, at the time the defendant engaged in the conduct constituting the offence, he or she believed on reasonable grounds that the young person was of or above the age of 16 years. This is confirmed in the note to new subsection (6). Pursuant to section 60 of the *Criminal Code*, the defendant must discharge a legal burden on the balance of probabilities (ie, by proving on the balance of probabilities that he or she had the requisite belief).

It is appropriate for the defendant to bear the burden of proof of establishing the defence. The new grooming offence is designed to protect children and young persons from sexual exploitation and abuse occasioned by the sexual acts for which they might be groomed and the grooming process itself. The harm to such a child or young person is done regardless of how old the defendant believed that they were. Moreover, it is appropriate for that burden to be the higher legal burden. This is because the defence relates to the peculiar state of mind of the defendant (ie, the defendant's belief), and it would be difficult for the prosecution to *disprove* that, at the time of engaging in the conduct constituting the offence, the defendant believed on reasonable grounds that the young person was of or above the age of 16 years (as it would be required to do under section 56(2) of the *Criminal Code* if the burden was an evidential burden).

New subsection (7) provides that the ancillary offences of attempt and incitement, created by sections 44 and 47 of the *Criminal Code* respectively, do not apply to the new grooming offence. This is consistent with the approach taken in NSW and the Commonwealth, and is

justified by the fact that the new offence is directed at conduct that it already preparatory in nature.

Alternative verdicts

Section 129(5) of the Criminal Code provides for alternative verdicts in relation to certain sex offences that distinguish between an ‘ordinary’ and ‘aggravated’ offence on account of the age of the young person in relation to whom the offence is committed. It provides that, if a person (the accused) is on trial for an aggravated offence, the jury may find the accused not guilty of the aggravated offence but guilty of the ordinary offence where:

- the jury is not satisfied that the young person was under the age limit for the aggravated offence at the time of the offence (being the age of 10 years)
- the jury is satisfied that the accused is guilty of the ordinary offence.

New items 53DC and 53DD amend section 129(5) to apply this alternative verdict regime to the new procurement and grooming offences, which similarly distinguish between an ‘ordinary’ and ‘aggravated’ offence on account of the age of the young person in relation to whom the offence is committed, and do so by reference to the same age limits used in the other sex offences to which section 129(5) currently applies.

Item 7—After item 54A of Schedule 1

This item inserts new items 54B, 54C, and 54D into Schedule 1 to the Principal Ordinance, which in turn make a number of consequential amendments to the Criminal Code relating to the new definitions of ‘Norfolk Island legislation’ or ‘applied NSW law’.

New item 54B amends subsection 375(1) of the Criminal Code by substituting the existing reference to ‘a territory law’ with a reference to ‘Norfolk Island legislation or an applied NSW law’

New item 54C amends section 377 of the Criminal Code by inserting a reference to an offence against Norfolk Island legislation or an applied NSW law.

New item 54D amends section 378 of the Criminal Code by inserting a reference to an offence against Norfolk Island legislation or an applied NSW law.

Item 8—After item 56 of Schedule 1

This item inserts new item 56AA into Schedule 1 to the Principal Ordinance, which in turn inserts a new definition of ‘applied NSW law’ into the dictionary at the end of the Criminal Code. An ‘applied NSW law’ will mean a law in force in Norfolk Island in accordance with section 18A of the Act.

Item 9—After item 56A of Schedule 1

This item inserts new item 56B into Schedule 1 to the Principal Ordinance, which in turn substitutes a new definition of ‘law’ into the dictionary at the end of the Criminal Code. A ‘law’ will mean Norfolk Island legislation or a provision of Norfolk Island legislation.

This item also inserts new item 56C into Schedule 1 to the Principal Ordinance, which in turn substitutes a new definition of ‘Norfolk Island legislation’ into the dictionary at the end of the Criminal Code. ‘Norfolk Island legislation’ will mean an enactment or legislation made under an enactment, except so far as the enactment is a section 19A Ordinance, which has the effect (directly or indirectly) of amending an applied NSW law so that the applied NSW law (as amended) provides for an offence; or which ends the suspension of the operation in Norfolk Island of an applied NSW law that provides for an offence. ‘Enactment’ is defined in subsection 12(2) of the *Interpretation Act 1979* (NI) and means a section 19A Ordinance; or

an Ordinance continued in force by section 16 or 16A (disregarding subsection 16A(4)) of the Act, as the Ordinance is in force from time to time; or a Legislative Assembly law continued in force by section 16A (disregarding subsection 16A(3)) of the Act, as the law is in force from time to time.

Schedule 3 – Application of amendments

Norfolk Island Continued Laws Ordinance 2015

Item 1—In the appropriate position in Part 2 of Schedule 1

This item inserts new division 13 (item 374) into part 2 of Schedule 1 to the Principal Ordinance. This new division contains provisions dealing with the application of amendments to the Child Welfare Act, as set out in Schedule 1 to this Ordinance.

In order to ensure procedural fairness, subitem (1) provides that new section 23A (relating to the conduct of proceedings under the Child Welfare Act) only applies in relation to proceedings commenced on or after the commencement of Schedule 1 to this Ordinance.

Subitem (2) provides that new subsection 27(9A) (which authorises a defined entity to collect child welfare information received from the child welfare officer under section 27 of the Child Welfare Act) applies in relation to information that is disclosed by the child welfare officer on or after the commencement of Schedule 1 to this Ordinance, regardless of when that information came into the possession of the child welfare officer.

In order to ensure the continuation of existing delegations made by the child welfare officer, subitem (3) provides that delegations made under the repealed section 32 of the Child Welfare Act continue in effect as if they were made under the new delegation provision.

Subitem (4) provides that the new obligation in section 193A of the Child Welfare Act to notify the child welfare officer of convictions for sexual offences against or with a child or young person applies only in relation to convictions on or after the commencement of Schedule 1 to this Ordinance, even if the offence was committed before that commencement.