

REPLACEMENT EXPLANATORY STATEMENT

Issued by the authority of the Assistant Minister for Regional Development and Territories,
Parliamentary Secretary to the Deputy Prime Minister and Minister for Infrastructure,
Transport and Regional Development

Norfolk Island Act 1979

Norfolk Island Legislation Amendment (Protecting Vulnerable People) Ordinance 2018

Authority

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

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

The *Norfolk Island Legislation Amendment (Protecting Vulnerable People) Ordinance 2018* (the Ordinance) is made under section 19A of the Norfolk Island Act. The Ordinance amends the *Norfolk Island Continued Laws Ordinance 2015* (the Continued Laws Ordinance) with the effect of amending the *Criminal Procedure Act 2007* (NI) (the Criminal Procedure Act), the *Bail Act 2005* (NI) (the Bail Act) and the *Sentencing Act 2007* (NI) (the Sentencing Act). It also amends the *Norfolk Island Applied Laws Ordinance 2016* (the Applied Laws Ordinance) to remove the suspension of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (NI), and the related provisions of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (NI).

Purpose and operation

The Ordinance introduces a range of measures intended to protect vulnerable people on Norfolk Island. These measures include a comprehensive framework for apprehended violence orders, special measures to assist vulnerable witnesses (including children and people with disability) to give evidence in court, reforms to sentencing processes with respect to sex and violent offenders, and a new presumption against police bail for persons accused of domestic violence offences.

Subsection 18A(1) of the Norfolk Island Act provides that laws in force in New South Wales (NSW) from time to time are also in force on Norfolk Island. Subsection 18A(2) provides that a law in force in the Territory under subsection 18A(1) may be incorporated, amended or repealed by a section 19A Ordinance or a law made under such an Ordinance.

Subsection 18A(3) provides that a section 19A Ordinance can suspend the operation of a law in force in the Territory under subsection 18A(1) for such period as is specified in the Ordinance.

Currently, the Applied Laws Ordinance provides for the suspension of most applied NSW laws until 1 July 2021, and amends some of the applied NSW laws that have commenced operation on Norfolk Island. The suspension of most applied NSW laws is to allow additional time to settle arrangements for the provision of state-level services to Norfolk Island.

The Ordinance, by amendment to the Applied Laws Ordinance, removes the suspension of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (NI), and the related provisions of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (NI), which deal with apprehended violence orders (the NSW AVO laws). The Ordinance also amends these laws as appropriate for their application to Norfolk Island.

In addition, the Ordinance amends the Continued Laws Ordinance to amend certain laws made by the former Norfolk Island Legislative Assembly (continued laws), including

effecting amendments to the Criminal Procedure Act, the Bail Act and the Sentencing Act. Continued laws are continued in force by sections 16 and 16A of the Norfolk Island Act, and may be amended or repealed by a section 19A Ordinance in accordance with subsection 17(3) of the Norfolk Island Act. Other amendments to the Continued Laws Ordinance are consequential to the removal of the suspension of the NSW AVO laws mentioned above.

Special legislative framework

The Ordinance is made pursuant to a plenary legislative power conferred on the Governor-General under section 19A of the Norfolk Island Act, which provides that the Governor-General may, subject to the Act, make Ordinances ‘for the peace, order and good government of the Territory’. This is quite different from the general regulation-making powers commonly found in Commonwealth legislation, which generally only authorise the Governor-General to make regulations prescribing matters that are ‘required or permitted’ to be prescribed by an Act, or that are ‘necessary or convenient’ for carrying out or giving effect to an Act.

The Parliament has conferred plenary legislative power on the Governor-General for the external territories and the Jervis Bay Territory. That power is expressed in broad terms, and reflects the wording used in State constitutions to confer plenary legislative power on State parliaments. The conferral of the power is to enable the Governor-General to legislate for state-level matters, and authorises the broadest range of Ordinances as necessary for the good government of Norfolk Island, including to prescribe offences that are punishable by imprisonment.

The Criminal Procedure Act was made by the former Norfolk Island Legislative Assembly and has been continued in force by section 16A of the Norfolk Island Act. The Criminal Procedure Act covers matters that would normally be dealt with under state or territory legislation. Subsection 17(3) of the Norfolk Island Act expressly provides that laws continued in force by section 16A of that Act may be amended or repealed by a section 19A Ordinance. Accordingly, the amendment of this continued law by a section 19A Ordinance is expressly authorised by the Norfolk Island Act.

The Commonwealth develops offences having regard to the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) which sets out limitations on the inclusion of certain penalties in delegated legislation. However, the special legislative framework applying in the case of Norfolk Island permits departure from the limitations regarding penalties in delegated legislation.

Section 19A authorises the broadest range of Ordinances to be made for the good government of Norfolk Island, which includes the power to prescribe offences that impose penalties exceeding a fine of 50 penalty units and/or punishable by imprisonment. The Criminal Procedure Act as amended will impose penalties ranging from fines of 60 penalty units, or terms of imprisonment, or both, for the offences of publishing certain information in relation to sexual and violent offence proceedings. These penalties are consistent with penalties in other jurisdictions in Australia for similar offences.

Consultation

The Department of Infrastructure, Regional Development and Cities consulted broadly about measures included in the Ordinance. The consultation included:

- a notice detailing the application of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (NI) and calling for comment, published in volume 52 no 25 of *The Norfolk Islander* on 23 September 2017
- community consultation conducted by the Norfolk Island Response Taskforce (the Taskforce) regarding the amendments which drew involvement from a range of members of the Norfolk Island community, including the legal profession and health care practitioners
- consultation with the Taskforce, the Norfolk Island Supreme Court, the Chief Magistrate, Registrar and Deputy Registrar of the Norfolk Island Court of Petty Sessions, and various Commonwealth and state and territory agencies, including the Australian Federal Police and Norfolk Island Police Force, the Department of Home Affairs, the Commonwealth Office of the Director of Public Prosecutions, the Australian Capital Territory Justice and Community Safety Directorate, and the NSW Department of Premier and Cabinet. The community and other parties consulted generally supported the amendments, and
- consultation with the Attorney-General's Department, with specific reference to a number of new provisions in the continued laws and their relationship to the Guide.

Details of the Ordinance are set out in the Attachment.

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

The Ordinance commences the day after registration on the Federal Register of Legislation.

Statement of Compatibility with Human Rights

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

Norfolk Island Legislation Amendment (Protecting Vulnerable People) Ordinance 2018

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

Overview of the Ordinance

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

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

The *Norfolk Island Legislation Amendment (Protecting Vulnerable People) Ordinance 2018* (the Ordinance) is made under section 19A of the Norfolk Island Act. The Ordinance introduces a range of measures intended to protect vulnerable people on Norfolk Island. These measures include a comprehensive framework for apprehended violence orders, special measures to assist vulnerable witnesses to give evidence in court, reforms to sentencing processes with respect to sex and violent offenders, and a new presumption against police bail for persons accused of domestic violence offences.

Subsection 18A(1) of the Norfolk Island Act provides that laws in force in New South Wales (NSW) from time to time are also in force on Norfolk Island. Subsection 18A(2) provides that a law in force in the Territory under subsection 18A(1) may be incorporated, amended or repealed by a section 19A Ordinance or a law made under such an Ordinance. Subsection 18A(3) provides that a section 19A Ordinance can suspend the operation of a law in force in the Territory under subsection 18A(1) for such period as is specified in the Ordinance.

Currently, the *Norfolk Island Applied Laws Ordinance 2016* (the Applied Laws Ordinance) provides for the suspension of most applied NSW laws until 1 July 2021, and amends some of the applied NSW laws that have commenced operation on Norfolk Island.

The Ordinance, by amendment to the Applied Laws Ordinance, removes the suspension of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (NI), and the related provisions of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (NI), which deal with apprehended violence orders (the NSW AVO laws). The Ordinance also amends these applied NSW laws, including the respective regulations, as appropriate for their application to Norfolk Island.

In addition, the Ordinance amends the *Norfolk Island Continued Laws Ordinance 2015* (the Continued Laws Ordinance) to amend certain laws made by the former Norfolk Island Legislative Assembly (continued laws), including effecting amendments to the *Criminal Procedure Act 2007* (NI) (the Criminal Procedure Act), the *Bail Act 2005* (NI) (the Bail Act) and the *Sentencing Act 2007* (NI) (the Sentencing Act). Continued laws are continued in force by sections 16 and 16A of the Norfolk Island Act, and may be amended or repealed by a section 19A Ordinance in accordance with subsection 17(3) of the Norfolk Island Act. Other amendments to the Continued Laws Ordinance are consequential to the removal of the suspension of the NSW AVO laws mentioned above.

Schedule 1 – Applying NSW domestic violence laws

Schedule 1 to the Ordinance removes the suspension of the NSW AVO laws, makes some amendments to these laws as applied in Norfolk Island, and also makes some consequential amendments to the Continued Laws Ordinance.

Since the *Domestic Violence Act 1995* (NI) was enacted in Norfolk Island, there have been advances in dealing with domestic and personal violence in other Australian jurisdictions and the application of the NSW AVO laws provides a modern framework for the application of protection orders with respect to persons who have reasonable grounds to fear domestic or personal violence. Amongst these changes, the NSW AVO laws apply a modern definition of ‘domestic relationship’ with respect to domestic violence and also allows people not necessarily in a domestic relationship but who are affected by personal violence to apply for a protection order (‘apprehended personal violence orders’). Currently Norfolk Island law does not make provision for protection orders outside of a domestic relationship.

The NSW AVO laws also give effect to the Norfolk Island component of a national recognition scheme for domestic violence orders. The new recognition scheme removes the existing requirement that domestic violence orders issued by a court in one jurisdiction need to be registered in another jurisdiction to be enforced in that other jurisdiction.

Schedule 1 also repeals the *Domestic Violence Act 1995* (NI) and the *Domestic Violence Regulations 1995* (NI).

Schedule 2 – Bail

Schedule 2 to the Ordinance amends the Bail Act to insert a new presumption against bail for persons accused of domestic violence offences when a bail determination is being made by a member of the Police Force of Norfolk Island with respect to police bail under the Bail. This new presumption is based on section 9F of the *Bail Act 1992* (ACT) and aligns this area of criminal procedure on Norfolk Island with other Australian jurisdictions and provides victims of domestic violence with comparable protection to what they would receive on the mainland. Other amendments to the Bail Act substitute redundant references to the *Crimes Act 1900* (NSW), as previously applied to Norfolk Island, with comparable or equivalent provisions in the *Criminal Code 2007* (NI) or the Criminal Procedure Act and make a number of other consequential and technical amendments, including consequential amendments arising from the commencement of the NSW AVO laws.

Schedule 3 – Criminal procedure

Schedule 3 to the Ordinance amends the Criminal Procedure Act to modernise Norfolk Island legislation relating to criminal court procedures and make it consistent with similar legislation in other Australian jurisdictions. Under the current Criminal Procedure Act, certain witnesses can access special measures to assist them to give evidence in particular proceedings. These measures are based on those that were available in the ACT in 2007. However, a number of advancements have been made in the ACT and other jurisdictions since then, particularly in relation to procedures applying to vulnerable witnesses.

The Ordinance makes changes to bring Norfolk Island court procedure law back into alignment with mainland jurisdictions, expanding the range of special measures that are available to assist vulnerable witnesses and expanding the classes of witness who can access those measures (including children, complainants in sexual offence proceedings, and people with disability). This includes requiring evidence given by audiovisual link to be recorded, allowing records of evidence to be admitted in subsequent trials, and introducing additional protections for victims with respect to examination by self-represented accused persons. The amendments also introduce provisions to allow, for example, vulnerable witnesses to have a support person (or support animal) present in court while giving evidence, and clarify and

expand the orders a court can make regarding the arrangement of the courtroom (such as the use of screens) to allow witnesses to give evidence without seeing or hearing the accused. The amendments also broaden the availability of these protections to ‘similar act witnesses’ – as well as complainants – in sexual and violent offence proceedings.

Schedule 4 – Sentencing

Schedule 4 to the Ordinance amends the Sentencing Act to expressly prevent a sentencing court in a child sexual offence proceeding from taking the convicted person’s good character into account as a mitigating factor, where that good character facilitated the commission of the offence. Currently, the factors to which a Norfolk Island court must have regard when sentencing an offender include the offender’s character, and the presence of any aggravating or mitigating factors concerning the offender. The amendments in the Ordinance make the Norfolk Island law more consistent with that of NSW and are also consistent with recommendations from the Criminal Justice Report of the Royal Commission into Institutional Responses to Child Sexual Abuse.

The Ordinance also amends the Sentencing Act to limit the availability of home detention orders in the sentencing of persons convicted of a sexual or violent offence, or persons at risk of committing a sexual or violent offence. Currently, Norfolk Island law allows a sentencing court to make a home detention order, which can last up to 12 months, as a substitute for imprisonment. It is only available when the sentencing court has sentenced the offender to a term of imprisonment. The amendments, to restrict the availability of home detention orders in certain circumstances, align Norfolk Island sentencing options more closely with those available in NSW.

Schedules 5 and 6 – Consequential and technical amendments and transitional provisions

Schedule 5 to the Ordinance amend a number of continued laws, namely the *Adoption of Children Act 1932* (NI), the *Child Welfare Act 2009* (NI), the *Court of Petty Sessions Act 1960* (NI), the *Environment Act 1990* (NI), the *Evidence Act 2004* (NI), the *Firearms and Prohibited Weapons Act 1997* (NI), the *Mental Health Act 1996* (NI) and the *Summary Offences Act 2005* (NI). These amendments omit redundant references to the *Crimes Act 1900* (NSW), as previously applied to Norfolk Island, or substitute references to that Act with comparable or equivalent provisions in the *Criminal Code 2007* (NI) or the Criminal Procedure Act, and make a number of other technical and consequential amendments, including consequential amendments arising from the commencement of the NSW AVO laws. Schedule 6 to the Ordinance deal with transitional matters arising from the amendments.

The two applied NSW laws are in force on Norfolk Island under section 18A of the Norfolk Island Act, not this instrument. This Statement of Compatibility with Human Rights considers the human rights issues raised by the substantive amendments to the Bail Act, Criminal Procedure Act and the Sentencing Act, but is limited in its consideration of the applied NSW laws – it does so only in the context of the human rights implications of the specific modifications to NSW laws, rather than of the NSW laws themselves.

Human Rights implications – Applied NSW laws

The right to a fair trial and fair hearing rights

The modifications to the NSW laws engage the following rights:

- Fair trial and fair hearing rights, as set out in Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR). See also Article 40 of the *Convention on the Rights of the Child* (CROC) and Article 13 of the *Convention on the Rights of Persons with Disabilities*.

The *Crimes (Domestic and Personal Violence) Act 2007* (NSW), as in force in NSW, makes provision for an application for an apprehended violence order to be made to a NSW court, usually the NSW Local Court or the Children's Court of NSW. Similar functions, as well as jurisdiction to review and determine appeals of decisions, are also conferred upon the NSW District Court and the Supreme Court of NSW.

The *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) relevantly allows a person to appeal to the NSW Local Court against the failure or refusal by the police to return a seized or confiscated dangerous article or dangerous implement.

The Territory of Norfolk Island has its own system of courts and tribunals. The Supreme Court of Norfolk Island is constituted under the Norfolk Island Act. In addition, Norfolk Island continued laws have established the Norfolk Island Court of Petty Sessions.

The Ordinance amends the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (NI) in its application to Norfolk Island to provide that an application for an apprehended violence order is to be made to a Norfolk Island court, usually the Court of Petty Sessions. Similar functions, as well as jurisdiction to review and determine appeals of decisions, are also conferred upon the Supreme Court of Norfolk Island. The Ordinance also amends the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (NI) to allow a person to appeal to the Court of Petty Sessions against the failure or refusal by the police to return a seized or confiscated dangerous article or dangerous implement.

Whilst this instrument changes the judicial forum in which rights may be exercised on Norfolk Island under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (NI) or the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (NI) it does not reduce or limit these rights. Accordingly, the instrument may be considered to promote human rights by ensuring that access to justice for Norfolk Islanders is protected under applied NSW laws.

Human Rights implications –Norfolk Island continued laws

The amendments to the Bail Act, Criminal Procedure Act, and Sentencing Act engage the following categories of human rights that are recognised in the ICCPR, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) and the Convention on the Rights of the Child (CROC):

- Right to freedom of movement
- Right to security of the person and freedom from arbitrary detention
- Minimum guarantees in criminal proceedings including right to a fair trial and fair hearing rights
- Prohibition on retrospective criminal laws
- Right to protection from gender-based violence
- Rights of children and families to protection
- Right to an effective remedy
- Right to privacy

Rights of accused persons

The right to freedom of movement

Article 12 of the ICCPR provides for the right to freedom of movement. Any limitation of this right must have a clear legal basis, be necessary in pursuit of a legitimate objective, have a rational connection to the objective, and be reasonable and proportionate to the objective (the limitation criteria).

Subsection 16A(2) of the Bail Act provides that an authorised member must not grant bail to a person accused of a domestic violence offence unless satisfied that the person poses no danger to a protected person while released on bail. A protected person, under subsection 16A(5) of the Bail Act, is someone against whom the alleged conduct constituting the offence was directed, or someone with whom the accused person has a domestic relationship.

Depriving a person of bail is a limitation on their freedom of movement. However, this limitation is permissible because it meets the limitation criteria, for the following reasons.

The limitation has a clear legal basis: subsection 16A(1) clearly articulates that it applies to a person accused of a domestic violence offence. Subsection 16A(5) provides that the term ‘domestic violence offence’ has the meaning given by section 11 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (NI).

The limitation is necessary in pursuit of a legitimate objective: in this case, the protection of the rights of protected persons. Article 12(3) of the ICCPR provides that the right to freedom of movement may be restricted by domestic law where necessary to protect the rights and freedoms of others. The rights of protected persons that are safeguarded by this restriction on the accused’s freedom of movement include protection from violence, in particular protection from gender-based violence and the rights of children and families to protection. The interaction with these latter rights is discussed further below.

The limitation has a rational connection to the objective, in that the intention is that a protected person be protected from potential further violence by a person accused of a domestic violence offence if the person is remanded in custody.

The limitation is reasonable and proportionate to the objective in that the restriction on granting bail is not absolute. An authorised member may grant bail if satisfied that an accused person poses no danger to a protected person, and that granting bail is appropriate after considering the matters mentioned in section 25 of the Bail Act. These limitations on the restriction ensure that it is reasonable and proportionate to the purpose of safeguarding protected persons and is the least intrusive means of achieving the desired result.

Subsection 16A(2) of the Bail Act in so far as it restricts freedom of movement, is a necessary measure done for a permissible purpose, namely to protect the rights of protected persons, and does so in a reasonable and proportionate manner.

Right to security of the person and freedom from arbitrary detention

Presumption against bail for persons accused of domestic violence offences

Article 9 of the ICCPR provides for the right to security of the person and freedom from arbitrary detention. The right in Article 9 to be free from arbitrary detention, and the provision that persons should not generally be detained in custody pending trial in criminal matters, are relevant to laws providing for bail, and in particular to those that impose a presumption against bail for particular categories of offences or offenders.

Any limitations on these rights must satisfy the limitation criteria.

Article 9(1) of the ICCPR provides that everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of their liberty except on such grounds and in accordance with such procedure as are established by law. Article 9(3) provides that anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. Article 9(4) provides that anyone who is deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful.

Section 16A of the Bail Act provides for a person to be detained pending trial, which limits the right to security of the person and freedom from arbitrary detention. However, the limitation meets the limitation criteria for the following reasons.

As outlined above, the limitation has a clear legal basis, is necessary in pursuit of the legitimate objective of protecting protected persons, and has a rational connection to that objective.

The limitation is reasonable and proportionate to the objective because appropriate safeguards are in place to ensure the provision is not exercised in an arbitrary manner. Under section 16A of the Bail Act, a person accused of a domestic violence offence can only be refused bail by an authorised member on specific grounds and in accordance with procedure as established under the Act. Furthermore, section 34 of the Bail Act provides for the review rights of a person who has been refused bail and obligations on the authorised member to ensure that the accused is aware of their review rights, including the right to a legal practitioner. Subsection 34(4) provides that where the person charged indicates to a member of the Police Force that he or she wishes to make an application for review (under subsection 34(3)), the member shall, as soon as practicable after the person gives that indication, bring or arrange for the person to be brought before a magistrate or shall arrange for the person to make an application to a magistrate by facsimile, telephone, radio or similar facility. The existing provision obliging a member of the Police Force to act expediently when handling an application for review by the court is another safeguard related to the right to security of the person and freedom from arbitrary detention.

The limitation on the right to security of the person and freedom from arbitrary detention is appropriate because of the safeguards detailed above.

Limitation on availability of home detention orders

The amendment to subsection 43(1) of the Sentencing Act restricts the circumstances in which a court can make a home detention order. When sentencing a convicted person for certain classes of offences, including sexual or violent offences, or if the court considers that the offender is a person likely to commit a sexual offence or violent offence while the order is in force, the court cannot make a home detention order. This is generally consistent with the position in NSW, on which these provisions are based.

While this may engage the right to freedom from arbitrary detention, it is consistent with the laws in other Australian jurisdictions, is reasonable, proportionate, appropriate, and not arbitrary. It is appropriate that people convicted of serious offences, including sexual and violent offences, be imprisoned in a correctional facility rather than detained in their community, particularly if they are considered a risk to that community while detained.

Specifically, if a sentencing court considers that the offender is likely to commit a sexual offence or a violent offence while the order is in force (whether or not the offender has previously committed offences of that nature) and that it is otherwise inappropriate or undesirable in the circumstances to make a home detention order, the court would not make a home detention order.

Removing home detention as a sentencing option for offenders in respect of certain crimes is proportionate, reasonable and necessary, as it both prevents the recurrence of crime in circumstances where the offender presents a risk of reoffending and advances a victim's right to an effective remedy.

To the extent that subsection 43(1) of the Sentencing Act as amended limits the right to freedom from arbitrary detention, the limitation has a clear legal basis, is necessary in pursuit of the legitimate objective of protecting victims of crime and the community more generally, and has a rational connection to that objective and is proportionate and reasonable.

Minimum guarantees in criminal proceedings, including the right to a fair trial and fair hearing rights

Article 14 of the ICCPR provides for the right to minimum guarantees in criminal proceedings, and the right to a fair trial and a fair hearing. Any limitations on these rights must satisfy the limitation criteria.

Article 14(1) of the ICCPR provides that all persons are equal before the courts.

Article 14(3)(a) of the ICCPR provides that, in the determination of any criminal charge, a person must be informed promptly and in detail in a language which they understand of the nature and cause of the charge against them. Article 14(3)(e) of the ICCPR further provides that, in the determination of any criminal charge, a person is entitled to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them. The right to a fair hearing requires that all parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to the proceedings.

Examination of witnesses – recorded statements

The amendments to the Criminal Procedure Act engage these rights in that they affect the law of evidence governing the examination of witnesses. The amendments insert new Chapters 6 and 6A into, and amend Chapter 7 of, that Act. The amended provisions allow statements – including police interviews – recorded by complainants and similar act witnesses after an alleged sexual or violent offence (including a domestic violence offence) to be used as evidence in Court. They also deal with the evidence of children, allow evidence in some proceedings to be given by audiovisual link from a place other than the courtroom, offer protections such as screens to prevent some kinds of witness or complainants from being able to see accused persons in court, place restrictions on the way that self-represented accused persons may examine complainants and witnesses in proceedings for sexual and violent offences, and in some circumstances allow evidence given in one proceeding to be used in subsequent proceedings.

The right to cross-examine witnesses would normally require evidence to be given in person at the trial, so that the reliability and credibility of the witness can be tested. However, evidence given other than in person does not necessarily violate this right if the reliability and credibility of the witness giving the statement can still be tested, for example by examination of a witness over an audiovisual link or by the use of a nominated or appointed legal representative. In addition, special methods to protect a vulnerable witness, for example by the use of video link, or where the witness is shielded from the accused, may be permissible.

This would generally be the case where there is a risk of re-traumatising a witness if the special measures were not implemented (for example by requiring them to be in the courtroom with the accused) or where the witnesses may not be able to give clear evidence because of the presence of the accused person. This is particularly important in relation to child witnesses and witnesses with vulnerabilities (including persons with a disability). Each case should be considered on its merits, giving careful consideration to the rights of the accused under article 14(3)(e). Except as specified, the new and amended Chapters do not affect the general power of a court to control the conduct of a proceeding, including the questioning of witnesses.

The new provisions are intended to provide protection for vulnerable witnesses against re-traumatisation (see further discussion of this aspect below.) They include a number of safeguards for the accused to ensure compliance with Article 14 of the ICCPR.

For example, if a representation contained in a recorded statement, or part of it, is in a language other than English, the recorded statement must contain an English translation of the representation or part, or a separate written English translation of the representation or part must accompany the recorded statement. Accused persons are to be given reasonable opportunity to listen to recorded statements and to view them if they are video recordings and in some circumstances are to be given a copy of the transcript of a statement. An accused person may be given this access on more than one occasion. Further, the jury is to be warned not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because the evidence has been given in the form of a recorded statement, or by audiovisual link, or if a self-represented accused person does not examine the witness personally but instructs (or the court orders) another person to do it on their behalf.

Prohibition against self-represented accused cross-examining witnesses

The prohibition against a self-represented accused person cross-examining certain witnesses in sexual or violent offence proceedings does not remove the person's entitlement to cross examine those witnesses, but instead requires that such an examination is conducted by legal representation chosen by or provided to them. The right of self-representation in the ICCPR is not absolute and where a state law obliges a court to appoint legal counsel to defend an accused person (even if the accused person does not want representation), the right is not offended. With respect to sexual offences, the questions likely to be put to alleged victims deal with intimate matters which may cause the alleged victim to feel violated, demeaned or humiliated. Requiring or allowing an accused person to put those questions directly to the alleged victim or other vulnerable witnesses may cause fear and distress in the alleged victim/witness and make it more difficult for them to give their evidence effectively, rationally and coherently. This offends against the proper administration of justice in ensuring everyone enjoys rights and obligations recognised by law. Violent offences raise similar problems, as complainants in those offences can often suffer the same vulnerabilities as those in sexual offences. In addition, with many violent offences the accused person and the alleged victim know each other before the offence is committed which may create potential for a self-represented accused person to use their cross-examination to intimidate or cause further humiliation and distress to a complainant or witness.

The new provisions prohibiting cross-examination of certain witnesses by self-represented accused persons are reasonable, necessary and proportionate; prohibiting an accused person from personally cross-examining specified witnesses removes the potential, in so far as possible, for the accused person to use cross-examination to re-traumatise vulnerable witnesses. The prohibition is necessary to achieve that objective. The measures also provide more specific guidance for courts in terms of ensuring fair process, to avoid them having to make orders about self-represented accused persons cross-examining witnesses that result in a negative outcome, based on concerns about appearing (or not appearing) biased against

accused people who are unfamiliar with court procedures. The prohibition also ensures that private details of the relationship between complainants/witnesses and accused persons cannot be used by an accused person to intimidate a complainant/witness without the court detecting this.

The prohibition strikes a fair balance between the general interests of the community, and the protection of an individual's fundamental rights. It does not impose an excessive or unreasonable burden on accused persons or complainants/witnesses. It does not seek to remove an accused person's right to represent themselves absolutely, as they will continue to be able to represent themselves in all other aspects of the proceeding. The accused will also not be forced to accept legal representation for the cross-examination and may choose not to cross-examine the witness.

Giving evidence by audiovisual link

Under the new provisions, children who are witnesses are generally required to give evidence by audiovisual link, unless the court is satisfied either that the child prefers to give evidence in person in the courtroom, or the interests of justice require otherwise. In relation to adult witnesses and complainants (in the context of the new and amended Chapters of the Criminal Procedure Act) giving evidence by audiovisual link, the court has a broad discretion to make any orders it considers necessary to ensure fair process, as well as orders about who may or must not be with the witness or complainant while they give evidence, who in the courtroom may be, or must not be able to be, heard or seen and heard by the witness, and who in the courtroom is to be able to see and hear a witness or complainant. Accused persons will still be able to examine (including cross-examine and re-examine) witnesses giving evidence by audiovisual link, subject to any order the court makes. This is a further protection for vulnerable witnesses from the risks described above in relation to cross examination, and does not unnecessarily or unfairly burden the right of the accused person to a fair trial or fair hearing.

Public hearing

The new and amended Chapters therefore limit the right to a public hearing, by allowing the court to exclude members of the public in certain circumstances as described above and, further, by making it an offence to publish, possess or use certain material (such as the complainant's identity in certain proceedings, audiovisual recordings of statements, or other recorded statements). However, Article 14(1) of the ICCPR provides that the press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security, or when the interests of the private lives of the parties to a proceeding require it, or to the extent strictly necessary in the opinion of the court in circumstances where publicity would prejudice the interests of justice. Such limitations are permissible where they seek to achieve a legitimate objective, and are reasonable, necessary and proportionate to that objective.

Allowing the court to exclude certain people from the courtroom ensures that vulnerable witnesses are able to give effective evidence to the court, including by minimising intimidation, additional trauma, fear for their personal safety, undue public embarrassment, and protects their reputation and privacy. These concerns are particularly important in proceedings for sexual, violent, and domestic violence offences. If a witness is unable to give their best testimony, or is reluctant to give evidence at all, this may adversely affect the outcome of a trial – which, in turn, may result in decreased public confidence in the administration of justice.

The right of the public to open justice must be balanced against the rights of participants in the criminal justice system to safety and protection from undue distress or public embarrassment. Given the nature of sexual, violent, and domestic violence offences and the high levels of shame and stigma that can be associated with victims of those crimes, it is appropriate that the court be empowered to make the orders outlined above and contained in the new and amended Chapters of the Criminal Procedure Act, excluding members of the public and other people as the court sees fit, while children, complainants and certain kinds of witnesses are giving evidence.

There are offences in Chapter 7 of the Criminal Procedure Act as amended that relate to publishing some material, such as the identity of a complainant in a sexual offence proceeding, and publishing/using recorded statements. Broadly, the provisions take into account the sensitivity of the information considered in sexual, violent and domestic violence offences. Other Australian jurisdictions have similar prohibitions and impose similar penalties for contraventions. Although this arguably restricts a person's right to a public hearing, it is reasonable, necessary and proportionate in that it operates to protect complainants from the potential harm and distress that public identification – or details of an alleged offence – may cause, as well as protecting an accused person's right to a fair trial through preventing the publication of potentially prejudicial material and promoting the public interest in the administration of justice. The implications of these offences relating to publishing and using certain material are discussed further below in relation to the right to privacy and reputation.

Tendency and coincidence evidence

Some of the new provisions allow for the admission of tendency and coincidence evidence, due to the protections available for complainants and witnesses being extended to 'similar act witnesses', and to Subdivisions E and F in Division 2 of Chapter 7, which in certain circumstances allow evidence from earlier proceedings to be admitted in retrials and subsequent trials. Similar act witnesses are those who give evidence that relates to an act committed on or in the presence of the accused, or who give tendency or coincidence evidence. The ability for similar act witnesses to give evidence in proceedings for certain classes of offence has been in place for a number of years in the ACT and there are rules governing tendency and coincidence evidence in most Australian jurisdictions.

Tendency evidence is generally only admissible if, in addition to reasonable notice being given, 'the court thinks that the evidence will, either by itself or having regard to other evidence ... have significant probative value'. In criminal proceedings, tendency evidence about a defendant can only be used against the defendant if the probative value of the evidence substantially outweighs any prejudicial effect. Coincidence evidence requires reasonable notice to be given and for the coincidence evidence to have significant probative value, and that value must substantially outweigh its prejudicial effect.

Generally, courts have considered that tendency and coincidence evidence is likely to be prejudicial to an accused person, because juries may place too much weight on such evidence. However, the *Royal Commission into Institutional Responses to Child Sexual Abuse* (Royal Commission) considered the issue in detail in its final report, and recommended that the current law needs to change to facilitate more admissibility and cross-admissibility of tendency and coincidence evidence and more joint trials, specifically in child sexual abuse matters. It found in its report that tendency and coincidence evidence can be highly relevant, and that its probative value has been generally understated. The Royal Commission indicated that tendency and coincidence evidence has only a minimal risk of unfair prejudice to an accused person, and that excluding it may be unfair to complainants.

The Australian Government has accepted in principle the recommendations of the Royal Commission in relation to tendency and coincidence evidence; the admissibility of tendency and coincidence evidence is being further considered through a Council of Attorneys-General Working Group.

The risk evidence of similar act witnesses resulting in an unfair or unjust outcome is low and based on the ACT experience and research published by the Royal Commission, it is proportionate to the objective (that is, ensuring offenders are convicted and sentenced and victims protected, and ensuring public confidence in the administration of justice). Extending the protections offered to children and vulnerable witnesses to similar act witnesses is similarly necessary, proportionate and reasonable and does not unnecessarily impinge on an accused person's right to a fair trial.

In addition, the admission of certain kinds of evidence in retrials and subsequent trials serves to protect complainants from being continually re-traumatised by having to give the same evidence in multiple proceedings, and having to do so progressively further from the time of the alleged offence. The provisions of Subdivisions E and F in Division 2 of Chapter 7 allow a record of evidence given by a complainant in an original trial to be admitted as the complainant's evidence in a retrial. The complainant would not be compellable to give further evidence in the retrial, although they may elect to do so. A record of evidence given by a complainant would also be admissible in any subsequent trial, however, the court may decline to admit the original evidence of the complainant if it would be unfair to the accused. The complainant may elect to give further evidence but in a subsequent hearing may also be compellable to clarify their original evidence, or to cover new material which may have come to light since the first trial, or if the court believes it is in the interests of justice to do so.

Vulnerability of witnesses - court not bound by rules of evidence

In determining how children should give evidence and related orders, and whether: witnesses have vulnerability; vulnerable witnesses can give evidence in closed court; witnesses should be screened from accused persons in the court room; witnesses should have a support person/s present; and witnesses can give evidence by audiovisual link, the court is not bound by the rules of evidence and can inform itself as it considers appropriate. These measures will not have significant unfair effects on the accused (as discussed above, due to accused persons retaining the ability to examine witnesses over audiovisual link or through the use of a nominated or appointed legal representative) but do have the advantage of allowing the court to take into account considerations such as any likely additional trauma a witness may experience by giving evidence, and advice from (for example) psychologists and counsellors about the likely effects of making or not making orders about specific witnesses and how they should give their evidence.

A prosecution for a sexual or violent or domestic violence offence has very serious consequences for an accused person, and it is therefore vital to safeguard the minimum guarantees to which everyone charged with a criminal offence is entitled under the ICCPR. However, the new provisions in the Criminal Procedure Act also recognise that protecting the rights of alleged offenders is only one of a number of objectives of the criminal justice system. The community in general has an interest in encouraging the reporting of sexual and violent crimes, and in apprehending and dealing with those who commit them.

The measures in this Ordinance bring Norfolk Island laws into line with both Commonwealth laws and those of comparable Australian jurisdictions, and with the recommendations of the Royal Commission, most of which the Australian Government has accepted.

The measures are compatible with human rights because of the safeguards that have been put in place; to the extent that the measures may limit Article 14, those limitations are reasonable, necessary and proportionate.

Prohibition on retrospective criminal laws

The amendments to section 5 and subsection 43(1) of the Sentencing Act, which relate respectively to the removal of ‘good character’ as a mitigating factor in certain offences and the prohibition on home detention orders for certain classes of offence, and the related transitional provision in item 380 of Schedule 1 to the Continued Laws Ordinance, as amended, engage the prohibition on retrospective criminal laws in Article 15 of the ICCPR. Article 15 prohibits the imposition of ‘a heavier penalty ... than the one that was applicable at the time when the criminal offence was committed’. Although the provisions may result in a court using its discretion to impose a longer sentence than may have been the case prior to the commencement of the amendments, the amendments themselves will not result in a court applying a penalty greater than that which was provided for in legislation at the time of the offence. The provisions may result in a court imposing a longer sentence on an accused than if the accused had been able to rely on or prove their ‘good character’; however, as that is not objectively predictable or measurable, it cannot be considered a ‘heavier’ penalty.

In relation to home detention orders, although such orders are an available sentencing option (as they are in a number of other Australian jurisdictions), they have not commonly been used in Norfolk Island. Currently, the Sentencing Act restricts home detention orders to not more than 12 months duration and sets out a range of factors for the court to take into account when making such orders. The new provisions in the Ordinance would only have the effect of limiting the availability of home detention orders as a sentencing option for certain offences, including sexual offences and violent offences. As with the changes to the mitigating factor of ‘good character’ outlined above, the change to the conditions under which a home detention order may be made does not impose a measurably heavier penalty than what exists under current provisions; particularly since home detention is a substitute for and not an alternative to imprisonment. Home detention orders are restricted in similar ways in NSW, and are not available in the ACT. Most Australian jurisdictions where such orders can be made have restrictions around the kinds of offences that may be subject to home detention orders as sentences.

The restrictions to when home detention orders can be made are directed towards protecting both victims and the community in general, to ensure that offenders who are likely to commit a sexual offence or a violent offence while the order would be in force (whether or not the offender has previously committed offences of that nature) are not sentenced to home detention. Although home detention is a substitute for imprisonment, it is generally regarded as substantially less onerous than a term of imprisonment (regardless of any comments to the contrary by the sentencing court). A home detention order may be seen as dilution of the sentence of imprisonment and therefore a significant diminution in the effectiveness of the sentence in terms of proper retribution, proper personal deterrence, and proper general deterrence. Removing the potential for home detention for specific types of offences, such as sexual offences and child sexual offences, or in situations where an offender is seen as likely to commit a violent offence during their period of detention, may ameliorate community perceptions of the punishment not fitting the crime. The amendments would still allow home detention orders to be made in respect of other offences.

The Criminal Procedure Act and Sentencing Act as amended also contain provisions that would apply to proceedings that were on foot at the time of commencement, even if the proceedings were instituted or partly heard before that commencement. Under subsection 155F(2) of the Criminal Procedure Act as amended, the court can make any order it considers appropriate to ensure fair process. This allows the court to effectively manage any conflict in court procedures if circumstances arise where a matter before the court in Norfolk Island has already begun when the amendments commence. Subsection 155F(2) and other similar provisions mitigate the risk of offending the prohibition in Article 15.

While Article 15 imposes a general prohibition on (especially criminal) laws that operate retrospectively, there is a general presumption that this prohibition does not apply to procedural changes. The High Court of Australia has made decisions confirming this presumption (see, for example, *Maxwell v Murphy* (1957) 96 CLR 261; *Rodway v R* (1990) 169 CLR 515), and the Australian Law Reform Commission also supports this position. This approach is also consistent across Australian jurisdictions in general.

The Australian Law Reform Commission in its 2015 report *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* noted that there is no implied or express prohibition against retrospective laws in the Constitution, and that there are circumstances where it is entirely appropriate for the Commonwealth Parliament to make such laws (such as to address a gap in existing offences or to clarify an understanding of the law that a court decision has invalidated or unsettled).

However, particularly where a procedural law does not impose a penalty on a person that was not available before the law's commencement, or otherwise affect the punishment to which an offender is liable, it is unlikely to engage the presumption against retrospectivity. Retrospective changes to trial practice or rules of evidence would therefore not normally infringe the prohibition.

Therefore, to the extent that the Sentencing Act and Criminal Procedure Act as amended engage Article 15, the limitations are reasonable, necessary and proportionate.

Rights of victims of sexual, violent and domestic violence offences

Right to protection from gender-based violence

Women are disproportionately the victim of domestic violence. The Committee on the Elimination of Discrimination against Women, established under CEDAW, has recognised that gender-based violence, including domestic violence, is a form of discrimination which seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.

Notably, Article 2 of the CEDAW requires State Parties to pursue by all appropriate means and without delay a policy of eliminating discrimination against women. To this end, Article 2(c) requires State 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.

Subsection 16A(2) of the Bail Act provides protections against further domestic violence by alleged perpetrators by providing that an authorised member must not grant bail to a person accused of a domestic violence offence unless satisfied that the person poses no danger to a protected person while released on bail. The new provision is therefore consistent with Article 2 of the CEDAW.

Rights of children and families to protection

Article 10(1) of the ICESCR states that the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children. Similarly, Article 23(1) of the ICCPR provides that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. Article 24(1) of the ICCPR provides that every child shall have the right to such measures of protection as are required by their status as a minor, on the part of their family, society and the State. Similarly, Article 3(2) of the CROC states that States Parties undertake to ensure the child 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, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. Article 19(1) of the CROC provides that States Parties shall take all appropriate legislative, administrative, social and educational measures 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 parent(s), legal guardian(s) or any other person who has the care of the child.

Subsection 16A(2) of the Bail Act will operate to protect vulnerable children and families against further potential violence and abuse. To the extent that protected persons include parents and their children, the subsection promotes the objectives of Article 10(1) of the ICESCR and Articles 23(1) and 24(1) of the ICCPR.

The amendments to the Criminal Procedure Act are also consistent with these objectives because allowing evidence to be given via audiovisual link, a recorded statement, or in ways that generally protect and assist complainants and vulnerable witnesses to give evidence in sexual, violent, and domestic violence offence proceedings, will encourage them to give that evidence, facilitating the successful prosecution of those offences (which in turn may act as a deterrent to the commission of further such offences). The amendments also safeguard protected persons against re-traumatisation that could occur when giving testimony in person, protecting, to the best extent that it can, the wellbeing of children and vulnerable people.

Specifically in relation to domestic violence offences, the need for such arrangements for giving evidence was articulated in the Second Reading speech for the *Criminal Procedure Amendment (Domestic Violence Complainants) Bill 2014* (NSW), which inserted the provisions into the *Criminal Procedure Act 1986* (NSW) on which the amendments to the Criminal Procedure Act are based. The Second Reading speech for that Bill states:

The power dynamic that typifies domestic violence does not stop at the courtroom door. There is a risk of re-traumatisation of victims. They must attend court and give oral evidence from memory, and usually in front of the perpetrator, about a traumatic incident. They may face pressure from a perpetrator to stop cooperating with the prosecution. This can result in victims being reluctant to come to court or changing their evidence once in the witness box. Some may choose to not report an incident to police. The Bureau of Crime Statistics and Research estimates that only half of domestic assaults are reported to police. New measures for giving evidence using available technology are needed to reduce the trauma faced by victims when in court.

Right to a fair trial and a fair hearing

As mentioned above, Article 14 of the ICCPR provides for the right to a fair hearing, which requires that all parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to the proceedings.

To the extent that the amendments to the Bail Act and the Criminal Procedure Act enable children, complainants and certain classes of vulnerable witnesses to give evidence without fear of retribution, they contribute to giving them a reasonable opportunity of presenting their case, and therefore promote Article 14 of the ICCPR. Safeguards for accused persons have been discussed above.

Right to an effective remedy

Article 2(3) of the ICCPR provides that State Parties will undertake to ensure that any person whose rights or freedoms under the Covenant are violated shall have an effective remedy. The UN Human Rights Committee has stated that the right to an effective remedy encompasses an obligation to bring to justice perpetrators of human rights abuses.

To the extent that the amendments to the Bail Act and the Criminal Procedure Act remove deterrents for domestic violence victims to report crimes and give evidence, they help to bring to justice perpetrators of human rights abuses and therefore promote the objectives of Article 2(3) of the ICCPR.

The amendment to section 5 of the Sentencing Act removes ‘good character’ as a mitigating factor when a court is sentencing an offender for certain classes of offence, where that ‘good character’ facilitated the commission of the offence. In its Criminal Justice report, the Royal Commission recommended that state and territory governments ‘introduce legislation to provide that good character be excluded as a mitigating factor in sentencing for child sexual abuse offences where that good character facilitated the offending’ (recommendation 74). The sentencing of child sex offenders is an important issue. This is in part because of the role sentencing plays in achieving some of the purposes of the criminal justice system – particularly punishment and deterrence. New subsection 5(4) of the Sentencing Act meets the Royal Commission’s recommendation, aligns sentencing law more closely with that of NSW (where incarcerated offenders from Norfolk Island are currently held), and satisfies the right to an effective remedy by bringing to justice perpetrators of certain classes of offences.

Right to privacy

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy or family, and that everyone has the right to the protection of the law against such interference or attacks.

Chapters 6, 6A and 7 of the Criminal Procedure Act are consistent with Article 17 of the ICCPR in that they provide appropriate protections for a witness’s and complainant’s privacy. Such protections are necessary given the intensely personal nature of evidence given in sexual, violent and domestic violence offences, and contained in recorded statements. Persons are prohibited from copying a recorded statement, giving possession of the recorded statement to another person, or publishing the recorded statement, without authority. In addition, a lawyer who represents an accused person must not give possession of a video copy of a recorded statement to the accused person or permit the accused person to copy or obtain a copy of a recorded statement. It is also an offence to publish information that may identify a complainant in a sexual offence proceeding. The victim’s right to privacy is appropriately balanced with the right of the accused to a fair trial and a fair hearing (discussed above).

The offences of publishing a complainant's identity (or information that may identify the complainant) or publishing or using recorded statements are subject to a penalty of imprisonment for 12 months or 60 penalty units, or both. This penalty is consistent with similar provisions in legislation such as subsections 110X(1) and (3) of the *Child Support (Registration and Collection) Act 1988* and subsection 121(1) of the *Family Law Act 1975*. The offences protect the identity of complainants and their right to privacy, and protect complainants and witnesses from the potential harm and distress that identification and dissemination of details of alleged offences may cause; the offences also further an accused person's right to a fair trial through preventing the publication of potentially prejudicial material and promoting the public interest in the administration of justice.

The new subsection 167F(2) makes it a defence to an offence against that section if the person proves that the complainant had consented to the publication before the publication happened. The description of this defence requires the defendant to discharge a legal burden to make out the defence.

In the circumstances where consent relates to a particular act, in this case publication of certain material, it follows that, if existing and relevant, consent ought to be in the knowledge of the person committing the act, in this case the defendant. If that consent was received it will be significantly less difficult and less costly for the defendant to prove the existence of the consent than for the complainant or the prosecution to disprove the existence of consent. In addition, given there is a presumption against the publication of sensitive information, the defendant would be or should be aware of the need for consent from a complainant and should be able to produce proof of such consent.

This defence is also appropriate in the circumstances because the issue of consent is not central to the question of culpability. In relation to an offence mentioned in Subsection 167(1), lack of consent is not something that is needed to establish the offence. This provides further justification for placing a legal burden, rather than an evidential burden, on the defendant in relation to the statutory defence in Subsection 167F(2).

The defence also offers some protection for a defendant, by placing a limit on the criminal liability associated with the offence, noting that the offence itself is made out only by proving that a person published relevant material. In this way, the statutory defence provides protection to defendants where consent has been provided for the publication and greater certainty to defendants who may rely on having obtained a person's consent prior to publishing the material. Subsection 167F(1) (and the penalty for an offence under the subsection) is similar to section 181U of the current Evidence Act, which also prohibits the publication of a complainant's identity without their consent. The ACT and most other Australian jurisdictions have similar prohibitions.

The offence protects the identity of complainants, and protects them from the potential harm and distress that identification may cause, as well as protecting an accused person's right to a fair trial through preventing the publication of potentially prejudicial material and promoting the public interest in the administration of justice. Subsection 167F(3) defines 'protected identity information' as information about, or allowing someone to find out, the private, business, official or email address, or telephone number, of a person.

Human rights implications - Consequential and technical amendments

To the extent that the Ordinance repeals and amends a number of other continued laws, it engages a number of applicable human rights or freedoms. These amendments and the repeal of the *Domestic Violence Act 1995* (NI) and the *Domestic Violence Regulations 1995* (NI) are largely consequential to the commencement of the *Crimes (Domestic and Personal Violence)*

Act 2007 (NSW) (NI), and the related provisions of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (NI) which deal with apprehended violence orders. The Ordinance also amends a number of outdated cross-references. These amendments do not engage any of the applicable human rights or freedoms.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights because it promotes the protection of human rights and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.

**Assistant Minister for Regional Development and Territories,
Parliamentary Secretary to the Deputy Prime Minister and Minister for
Infrastructure, Transport and Regional Development**

The Hon Sussan Ley MP

Norfolk Island Legislation Amendment (Protecting Vulnerable People) Ordinance 2018

Section 1 – Name

This section provides that the title of the Ordinance is the *Norfolk Island Legislation Amendment (Protecting Vulnerable People) Ordinance 2018*.

Section 2 – Commencement

This section provides that the Ordinance commences on the day after it is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the Ordinance is made under the *Norfolk Island Act 1979* (the Norfolk Island 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 that Ordinance has effect according to its terms.

Schedule 1 – Applying NSW domestic violence laws

Schedule 1 to the Ordinance removes the suspension of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (NI), and the related provisions of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (NI), which deal with apprehended violence orders (the NSW AVO laws), makes some amendments to these laws as applied in Norfolk Island, and also makes some consequential amendments to the Continued Laws Ordinance.

Since the *Domestic Violence Act 1995* (NI) was enacted in Norfolk Island, there have been advances in dealing with domestic and personal violence in other Australian jurisdictions and the application of the NSW AVO laws provides a modern framework for the application of protection orders with respect to persons who have reasonable grounds to fear domestic or personal violence. Amongst these changes, the NSW AVO laws apply a modern definition of ‘domestic relationship’ with respect to domestic violence and also allow people not necessarily in a domestic relationship but who are affected by personal violence to apply for a protection order (‘apprehended personal violence orders’). Currently Norfolk Island law does not make provision for protection orders outside of a domestic relationship.

The NSW AVO laws also give effect to the Norfolk Island component of a national recognition scheme for domestic violence orders. The new recognition scheme removes the existing requirement that domestic violence orders issued by a court in one jurisdiction need to be registered in another jurisdiction to be enforced in that other jurisdiction.

Schedule 1 also repeals the *Domestic Violence Act 1995* (NI) and the *Domestic Violence Regulations 1995* (NI).

Part 1—Application and amendment of NSW domestic violence laws

Norfolk Island Applied Laws Ordinance 2016

Item [1] – Subitem 1(3) of Schedule 1 (table)

Item 1 amends the table in subitem 1(3) of Schedule 1 by adding a reference to the *Crimes (Domestic and Personal Violence) Act 2007*. The effect of this amendment is that the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (NI) (the CDPV Act), subject to the amendments made by the Ordinance, is no longer suspended on Norfolk Island. The Acts specified in the table in subitem 1(3) are those laws that apply in Norfolk Island by virtue of section 18A of the Norfolk Island Act and the operation of which in the Territory is not suspended by an Ordinance made under section 19A of the Norfolk Island Act.

Item [2] – Subitem 1(3) of Schedule 1 (table)

Item 2 amends the table in subitem 1(3) of Schedule 1 by adding a reference to the *Law Enforcement (Powers and Responsibilities) Act 2002*. The effect of this amendment is that the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (NI) (LEPR Act), subject to the amendments made by the Ordinance, is no longer suspended on Norfolk Island. The Acts specified in the table in subitem 1(3) are those laws that apply in Norfolk Island by virtue of section 18A of the Norfolk Island Act and the operation of which in the Territory is not suspended by an Ordinance made under section 19A of the Norfolk Island Act.

Item [3] – After Schedule 1A

Item 3 inserts a new Schedule 1AAA into the *Norfolk Island Applied Laws Ordinance 2016* (the Applied Laws Ordinance), which makes a number of amendments to the CDPV Act and the *Crimes (Domestic and Personal Violence) Regulation 2014* (NSW) (NI) (CDPV Regulation) as appropriate to their application to Norfolk Island.

Schedule 1AAA — Amendment of the Crimes (Domestic and Personal Violence) Act 2007 (NSW) and the Crimes (Domestic and Personal Violence) Regulation 2014 (NSW)

Crimes (Domestic and Personal Violence) Act 2007 (NSW)

Item 1 of Schedule 1AAA – Subsection 3(1)

This item inserts a new definition of ‘Australian legal practitioner’ into subsection 3(1) of the CDPV Act. This definition is consistent with the relevant terms used in the *Legal Profession Act 1993* (NI).

Item 2 of Schedule 1AAA – Subsection 3(1) (definition of *authorised officer*)

This item substitutes a new definition of ‘authorised officer’ into subsection 3(1) of the CDPV Act. The new definition provides that an ‘authorised officer’ for the purposes of that Act is a Magistrate of the Court of Petty Sessions of Norfolk Island.

Item 3 of Schedule 1AAA – Subsection 3(1) (definition of *Children’s Magistrate*)

This item repeals the definition of ‘Children’s Magistrate’ in subsection 3(1) of the CDPV Act as this is a reference to the President of the Children’s Court of NSW.

Item 4 of Schedule 1AAA – Subsection 3(1)

This item inserts a new definition of ‘Commissioner of Police’ into subsection 3(1) of the CDPV Act. The new definition provides that ‘Commissioner of Police’ means, for the purposes of that Act, the police officer in charge in Norfolk Island.

Item 5 of Schedule 1AAA – Subsection 3(1) (definition of *court*)

This item substitutes a new definition of ‘court’ into subsection 3(1) of the CDPV Act. The new definition provides that ‘court’ means, for the purposes of that Act, the Court of Petty Sessions of Norfolk Island exercising jurisdiction under section 91. Item 67 of Schedule 1AAA amends section 91 to confer jurisdiction on the Court of Petty Sessions of Norfolk Island to make, vary and revoke orders, and determine applications, under the CDPV Act. An application for an apprehended violence order would usually be made, in the first instance, in the Court of Petty Sessions.

Item 6 of Schedule 1AAA – Subsection 3(1)

This item inserts new definitions of ‘Court of Petty Sessions’, ‘Magistrate’ and ‘Norfolk Island’ into subsection 3(1) of the CDPV Act. A ‘Magistrate’ for the purposes of the Act means a Magistrate of the Court of Petty Sessions of Norfolk Island.

Item 7 of Schedule 1AAA – Subsection 3(1) (definition of *Registrar*)

This item substitutes a new definition of ‘Registrar’ into subsection 3(1) of the CDPV Act. The new definition provides that ‘Registrar’ means a Magistrate of the Court of Petty Sessions of Norfolk Island. However, as mentioned in the note to this definition, in some sections of the CDPV Act the definition of Registrar has a different meaning (for instance, sections 77 and 94 as amended by the Ordinance).

Item 8 of Schedule 1AAA – Subsection 3(1)

This item inserts new definitions of ‘Secretary of the Department of Family and Community Services’ and ‘Supreme Court’ into subsection 3(1) of the CDPV Act. The new definitions respectively provide that the ‘Secretary of the Department of Family and Community Services’ means the child welfare officer appointed under section 24 of the *Child Welfare Act 2009* (NI) (the CW Act) and that ‘Supreme Court’ means the Supreme Court of Norfolk Island.

The functions of the Secretary of the Department of Family and Community Services under the Act relate to child welfare and it is appropriate for the child welfare officer to exercise these functions as the Act applies to Norfolk Island.

Item 9 of Schedule 1AAA – Subsection 3(4)

This item amends subsection 3(4) of the CDPV Act by substituting the reference to section 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) with a reference to section 10 or 11 of the *Sentencing Act 2007* (NI) (the Sentencing Act). As the *Crimes (Sentencing Procedure) Act 1999* (NSW) is currently suspended in Norfolk Island it is appropriate that this reference is substituted with a reference to the Norfolk Island law that currently deals with sentencing matters, including the release of offenders without the recording of a conviction. The effect of this amendment is that a reference in the CDPV Act to a finding of guilt includes a reference to the making of an order under section 10 or 11 of the Sentencing Act, which deals with the unconditional release, or release on bond, of a person found guilty of an offence but where no conviction is recorded by the court.

Item 10 of Schedule 1AAA – Paragraph 4(a)

This item substitutes a new paragraph 4(a) into the CDPV Act which replaces the references to offences under the *Crimes Act 1900* (NSW) with references to a number of comparable or equivalent offences against the *Criminal Code 2007* (NI) (the Code). As the *Crimes Act 1900* (NSW) is currently suspended in Norfolk Island it is appropriate that these references be substituted with references to the Norfolk Island law that currently deals with criminal law matters, including crimes against the person. The effect of this amendment is that a ‘personal violence offence’ is defined for the purposes of the CDPV Act to include the appropriate offences under Norfolk Island law.

Item 11 of Schedule 1AAA – Paragraph 4(b1)

This item repeals paragraph 4(b1) of the CDPV Act, which refers to a number of offences under the *Crimes Act 1900* (NSW). This amendment is consequential to the amendment made to paragraph 4(a) by item 10 of Schedule 1AAA.

Item 12 of Schedule 1AAA – Paragraph 4(c)

This item amends paragraph 4(c) of the CDPV Act by removing a reference to paragraph 4(b1). This amendment is consequential to the repeal of paragraph 4(b1) by item 11 of Schedule 1AAA.

Item 13 of Schedule 1AAA – Subsection 9(3)

This item amends subsection 9(3) of the CDPV Act by removing the reference to the NSW Parliament enacting that Act. This amendment is appropriate as the CDPV Act is in force on Norfolk Island under section 18A of the Norfolk Island Act.

Item 14 of Schedule 1AAA – Paragraphs 9(3)(a) to (f1)

This item amends paragraphs 9(3)(a) to (f1) of the CDPV Act by removing the last occurring ‘and’ in each paragraph. This amendment is consequential to the amendment of subsection 9(3) made by item 13 of Schedule 1AAA.

Item 15 of Schedule 1AAA – Sections 21 and 24A

This item repeals sections 21 and 24A of the CDPV Act. Section 21 deals with the referral of matters to mediation under the *Community Justice Centres Act 1983* (NSW) when an application for an apprehended personal violence order is made to a court.

As the latter NSW law is currently suspended on Norfolk Island it is appropriate that this section is repealed to avoid any ambiguity as to its operation.

The repeal of section 24A, which provides that section 21 also applies in relation to an application for an interim apprehended personal violence order, is consequential to the repeal of section 21.

Item 16 of Schedule 1AAA – Subsection 28(2)

This item repeals subsection 28(2) of the CDPV Act. The repeal of subsection 28(2), which provides that section 21 applies in relation to the making of a provisional order by an authorised officer, is also consequential to the repeal of section 21.

Item 17 of Schedule 1AAA – Subsection 28A(3)

This item amends subsection 28A(3) of the CDPV Act by substituting ‘Local Area Commander of Police at which the defendant may serve an application’ with ‘court to which the defendant may apply’. As there is no Local Area Commander of Police on Norfolk Island, the effect of the amendment is to provide that any provisional order made by a senior police officer is to contain the address or facsimile number of the court to which the defendant may serve an application for variation or revocation of the provisional order.

Item 18 of Schedule 1AAA – Paragraph 29(3)(a)

This item amends paragraph 29(3)(a) of the CDPV Act by substituting ‘on a domestic violence list at’ with ‘for hearing by’. The Norfolk Island courts do not have a domestic violence list and the effect of the amendment is to provide that the ‘specified date’, contained in a provisional order, for the hearing of any application for an order under Part 10 must be the next date on which the matter can be listed for hearing by the appropriate court.

Item 19 of Schedule 1AAA – Subsection 33A(4)

This item amends subsection 33A(4) of the CDPV Act by substituting ‘Local Area Commander of Police’ with ‘Commissioner of Police’. The effect of the amendment is to provide that a provisional order is not to be varied or revoked on the application of the defendant unless notice of the application has been served on the police officer in charge in Norfolk Island (see the new definition of ‘Commissioner of Police’ inserted into subsection 3(1) by item 4 of Schedule 1AAA).

Item 20 of Schedule 1AAA – Subsection 39(3) (definition of court)

This item amends the definition of ‘court’ in subsection 39(3) of the CDPV Act by substituting ‘District Court’ with ‘Supreme Court’. The effect of the amendment is to provide that section 39, which deals with the making of a final apprehended violence order with respect to a person who pleads guilty to, or is found guilty of, a serious offence, applies to criminal proceedings in the Supreme Court of Norfolk Island as well as the Court of Petty Sessions.

Item 21 of Schedule 1AAA – Subsection 40(4)

This item amends subsection 40(4) of the CDPV Act by substituting ‘District Court or the Supreme Court in respect of a serious offence is admissible in the Local Court or Children’s Court’ with ‘Supreme Court in respect of a serious offence is admissible in the Court of Petty Sessions’. The effect of the amendment is that the transcript of proceedings and any evidence admitted in the Supreme Court in respect of a serious offence is also admissible in the Court of Petty Sessions for the purposes of determining an application for an apprehended violence order.

Item 22 of Schedule 1AAA – Subsection 40(4A)

This item amends subsection 40(4A) of the CDPV Act by omitting the redundant reference to the District Court.

Item 23 of Schedule 1AAA – Paragraph 40(5)(b)

This item amends paragraph 40(5)(b) of the CDPV Act by omitting the reference to an offence under section 25A of the *Crimes Act 1900* (NSW). As the latter NSW law is currently suspended on Norfolk Island it is appropriate that this reference is repealed.

Item 24 of Schedule 1AAA – Paragraph 40(5)(c)

This item repeals paragraph 40(5)(c) of the CDPV Act and substitutes a new paragraph (c) which replaces the references to offences under the *Crimes Act 1900* (NSW) with references to a number of comparable or equivalent offences against the Code. As the *Crimes Act 1900* (NSW) is currently suspended in Norfolk Island it is appropriate that these references are substituted with references to the Norfolk Island law that currently deals with criminal law matters, including crimes against the person. The effect of this amendment is that a ‘serious offence’ is defined for the purposes of section 40 to include the appropriate offences under Norfolk Island law.

Item 25 of Schedule 1AAA – Paragraph 40(5)(f)

This item amends paragraph 40(5)(f) of the CDPV Act by substituting ‘another State or a Territory’ with ‘a State or another Territory’. The effect of the amendment is that the definition of ‘serious offence’ relevantly means an offence under the law of a State or another Territory that is similar to a Norfolk Island offence referred to in paragraphs 40(5)(a) to (e).

Items 26 to 31 of Schedule 1AAA – Section 40A

These items amend section 40A of the CDPV Act by substituting a number of references to the ‘Children’s Court’ with ‘court’ and substituting references to ‘the Court’ with ‘the court’. The effect of these amendments is that these references in section 40A refer to the Court of Petty Sessions of Norfolk Island.

Item 32 of Schedule 1AAA – Subsection 40A(8)

This item amends subsection 40A(8) of the CDPV Act to provide that ‘Chapter 7 of the *Child Welfare Act 2009* of Norfolk Island (about appeals) applies in relation to an apprehended violence order made under this section as if the order had been made under Chapter 5 of that Act.’ The effect of this amendment is that the appeal and review provisions of the CW Act apply to any apprehended violence order made in the course of an application for a care and protection order under the CW Act.

Item 33 of Schedule 1AAA – Subsection 40A(9) (definition of *care proceedings*)

This item amends subsection 40A(9) of the CDPV Act by repealing the definition of ‘care proceedings’, which provides that the term has the same meaning as in the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (CYP Act), and substituting a new definition to the effect that the term means proceedings relating to an application for a care and protection order as defined in section 59 of the CW Act. As the CYP Act is currently suspended in Norfolk Island it is appropriate the reference to that Act is substituted with the appropriate reference to the Norfolk Island law that currently deals with child care proceedings.

Item 34 of Schedule 1AAA – Subsection 40A(9) (definition of *relative*)

This item amends subsection 40A(9) of the CDPV Act by repealing the definition of ‘relative’, of a child, which provides that the term has the same meaning as in the CYP Act, and substitutes a new definition to the effect that ‘relative’, of a child, means a person who would be the relative of the child under the CYP Act if paragraph (d) of the definition of ‘relative’ in subsection 3(1) of that Act referred to the *Adoption of Children Act 1932* (NI) (instead of the *Adoption Act 2000* (NSW)). As the latter NSW law is currently suspended in Norfolk Island it is appropriate that the reference to that Act is substituted with the appropriate reference to the Norfolk Island law which currently deals with adoption. The effect of this amendment is that a ‘relative’ of a child for the purposes of section 40A includes a person who has care responsibility for the child under the *Adoption of Children Act 1932* (NI) (not being the Minister, the Secretary or a person who has care responsibility other than in his or her personal capacity). By virtue of subitem 2(1) of Schedule 1 to the Applied Laws Ordinance, applied NSW laws that are not suspended in the Territory are still able to incorporate, by reference, provisions of NSW laws the operation of which is suspended in the Territory, for example, where a non-suspended law defines a particular term by reference to the definition provided in a suspended law.

Items 35 to 37 of Schedule 1AAA – Section 41

These items amend subsections 41(5) and (6) of the CDPV Act by substituting references to the *Criminal Procedure Act 1986* (NSW) with references to Chapter 6 of the *Criminal Procedure Act 2007* (NI) (CP Act) and substituting ‘criminal proceedings’ in subsection 41(6) with ‘proceedings mentioned in that Chapter’. As the *Criminal Procedure Act 1986* (NSW) is currently suspended in Norfolk Island it is appropriate that references to that Act are substituted with the appropriate references to the Norfolk Island law that currently deals with criminal procedure matters. The effect of these amendments is that, if a child is required to give evidence under section 41 in an apprehended violence order proceeding, the evidence should be given in accordance with Chapter 6 of the CP Act, which deals with the giving of evidence by children in criminal and other proceedings.

Items 38 and 39 of Schedule 1AAA – Section 45

These items amend section 45 of the CDPV Act by substituting 2 references to the ‘District Court’ with references to the ‘Supreme Court’ in subsection 45(7) and repealing and substituting the definition of ‘court’ in subsection 45(8) to provide that ‘court’ includes the Supreme Court for the purposes of section 45.

Item 40 of Schedule 1AAA – Section 47

This item amends section 47 of the CDPV Act by repealing the definitions of ‘authorised officer’, ‘court’ and ‘Magistrate’. These terms are defined in subsection 3(1) of the CDPV Act as amended by the Ordinance. However, the term ‘court’ is given a different meaning in some sections of the CDPV Act, for example, in section 45 (see item 39 of Schedule 1AAA).

Item 41 of Schedule 1AAA – Section 47 (definition of *rules*)

This item repeals and substitutes the definition of ‘rules’ in section 47 of the CDPV Act to provide that, for the purposes of Part 10, ‘rules’ means rules of court relating to the Court of Petty Sessions made under the *Court of Petty Sessions Act 1960* (NI) or the *Court Procedures Act 2007* (NI). This includes the *Magistrates Court (Civil Jurisdiction) Rules 2004* (ACT) which relevantly, under subsection 248(2) of the *Court of Petty Sessions Act 1960* (NI), are deemed to be rules made under that Act until, in relation to a matter or class of matters, rules or Regulations are made under that Act.

Item 42 of Schedule 1AAA – Paragraph 48(2)(a1)

This item amends paragraph 48(2)(a1) of the CDPV Act by omitting the reference to a person in respect of whom a guardianship order within the meaning of the *Guardianship Act 1987* (NSW) is in force. As the latter NSW law is currently suspended in Norfolk Island it is appropriate that this reference be omitted. The effect of this amendment is that an application for an order may be made by the guardian of the person for whose protection the order would be made.

Item 43 of Schedule 1AAA – Subsection 48(7)

This item amends subsection 48(7) of the CDPV Act by omitting the reference to subsection 84(6). This amendment is consequential to the amendment to be made by item 55 of Schedule 1AAA, which repeals and substitutes section 84.

Item 44 of Schedule 1AAA – Subsection 53(8)

This item repeals subsection 53(8) of the CDPV Act. That subsection provides that a Magistrate can review a decision by a Registrar to refuse to accept an application notice for filing. It would be redundant in the Act as applied where all relevant references to a ‘Registrar’ would be amended to mean a ‘Magistrate’ (see item 7 of Schedule 1AAA).

Item 45 of Schedule 1AAA – Section 55

This item amends section 55 of the CDPV Act by inserting ‘(if any)’ after ‘the rules’ wherever these words occur in the section. The effect of the amendment is to make clear that the requirement that any application notice must be filed or served in accordance with the rules only applies if rules have been made which deal with this matter.

Item 46 of Schedule 1AAA – Sections 70 and 71

This item repeals sections 70 and 71 of the CDPV Act and substitutes a new section 71 which provides that Division 5 of Chapter 3 of the CP Act applies, with any necessary modifications, in relation to a warrant of arrest, or warrant of commitment, issued under the CDPV Act. The effect of this amendment is that the appropriate Norfolk Island law that deals with arrest warrants (or warrants of commitment) applies to that Act.

Item 47 of Schedule 1AAA – Section 72

This item inserts a new definition of ‘court’ into section 72 of the CDPV Act for the purposes of Division 5 of Part 10 of that Act, which deals with the variation or revocation of final apprehended violence orders or interim court orders. This definition provides that ‘court’ means the Supreme Court in relation to an application involving a final apprehended violence order made by the Supreme Court or a final apprehended violence order made by the Supreme Court. It also provides that ‘court’ means the Court of Petty Sessions in relation to an application involving an order made by the Court of Petty Sessions or a Magistrate, a final apprehended violence order made by the Court of Petty Sessions, or an interim court order made by the Court of Petty Sessions or a Magistrate. This definition of ‘court’ is included to avoid any ambiguity as to the meaning of ‘court’ in Division 5 of Part 10 and to clarify that the Court of Petty Sessions does not have the power to vary or revoke an order made by the Supreme Court under section 39, which instead must be exercised by the Supreme Court itself.

Item 48 of Schedule 1AAA – Section 72 (paragraph (b) of the definition of *interested party*)

This item amends the definition of ‘interested party’ in section 72 of the CDPV Act by omitting the reference to a protected person in respect of whom a guardianship order within the meaning of the *Guardianship Act 1987* (NSW) is in force. As the latter NSW law is currently suspended in Norfolk Island it is appropriate that this reference is removed. The effect of this amendment is that, for the purposes of Division 5 of Part 10, an interested party, in relation to an order, includes each guardian of a protected person under the order.

Item 49 of Schedule 1AAA – Paragraph 72B(2)(b)

This item amends paragraph 72B(2)(b) of the CDPV Act by substituting a reference to the CYP Act with a reference to the CW Act. As the CYP Act is currently suspended in Norfolk Island it is appropriate that the reference to that Act is substituted with a reference to the Norfolk Island law that currently deals with child welfare matters. The effect of this amendment is that paragraph 72B(2)(b) would refer to a care plan within the meaning of the CW Act.

Item 50 of Schedule 1AAA – Subsection 75(2) (definition of *court*)

This item amends the definition of ‘court’ in subsection 75(2) of the CDPV Act by substituting ‘District Court’ with ‘Supreme Court’. The effect of the amendment is to provide that the Supreme Court may also vary a final apprehended violence order or an interim court order for the purpose of providing greater protection for a person against whom a serious offence has been committed, whether or not an application to vary the order has been made under Division 5 of Part 10 of that Act.

Item 51 of Schedule 1AAA - Before section 76

This item inserts new section 75A into Division 6 of Part 10 of the CDPV Act, which deals with ancillary provisions. New section 75A provides that ‘court’, for the purposes of Division 6 of Part 10, means ‘in relation to the making, variation or revocation of an order ... a court that is empowered by a provision of this Act outside this Division to make, vary or revoke (as appropriate) the order.’ The definition makes clear that the powers conferred by Division 6 of Part 10 are purely ancillary to the powers conferred upon the relevant court elsewhere under the Act.

Item 52 of Schedule 1AAA – At the end of section 77

This item amends section 77 of the CDPV Act by adding new subsection 77(9), which provides a definition of ‘Registrar’ for the purpose of the section. The effect of the amendment is to provide that, for this purpose, ‘Registrar’, in relation to the Supreme Court, means the Registrar of the Supreme Court, and in relation to the Court of Petty Sessions, means the Clerk of the Court of Petty Sessions. Section 77 deals with the copying and service of a final apprehended violence order or an interim court order (including a variation or revocation order) and it is appropriate for these procedural functions to be conferred upon the Registrar and Clerk respectively.

Item 53 of Schedule 1AAA – Subsection 78(4)

This item repeals subsection 78(4) of the CDPV Act, which provides a definition of ‘court’ for the purposes of section 78. This repeal is consequential to amendments made elsewhere to that Act. The effect of the repeal is that, for the purposes of section 78, ‘court’ has the meaning provided by subsection 3(1) as amended by item 5 of Schedule 1AAA.

Item 54 of Schedule 1AAA – Section 83

This item repeals section 83 of the CDPV Act, which deals with the application of the *Bail Act 2013* (NSW) to apprehended violence orders, and substitutes a new provision which instead deals with the application of the *Bail Act 2005* (NI) (Bail Act) to such orders. As the *Bail Act 2013* (NSW) is currently suspended in Norfolk Island, it is appropriate for this substitution to be made. The effect of this amendment is that the appropriate Norfolk Island law dealing with bail applies to defendants who are arrested under a warrant issued under the CDPV Act or who first appear before a court in answer to a direction to appear given under that Act.

Item 55 of Schedule 1AAA – Section 84

This item repeals and substitutes section 84 of the CDPV Act, which deals with the review and appeal of apprehended violence orders. The effect of this amendment is that an appeal may be made to the Supreme Court of Norfolk Island against a decision of the Court of Petty Sessions relating to apprehended violence orders. New subsection 84(2) also provides that sections 231, 232 and 234 of the *Court of Petty Sessions Act 1960* (NI), which deal with appeals under that Act, apply to an appeal under section 84 of the CDPV Act in the same way as they apply in relation to an appeal under section 229 of the *Court of Petty Sessions Act 1960* (NI).

Item 56 of Schedule 1AAA – Subsection 85(2)

This item amends subsection 85(2) of the CDPV Act, which deals with the stay of orders subject to an appeal under section 84, and substitutes a reference to ‘original court’ with a reference to the ‘Court of Petty Sessions’. The effect of this amendment is that the Court of Petty Sessions may, on application by the defendant, stay the operation of an apprehended violence order, if satisfied that it is safe to do so, having regard to the need to ensure the safety and protection of the protected person or any other person.

Item 57 of Schedule 1AAA – Subsection 85(3)

This item amends subsection 85(3) of the CDPV Act by substituting ‘District Court’ with ‘Supreme Court’. The effect of this amendment is that any stay ordered on the operation of an apprehended violence order continues until any appeal is finally determined, subject to any order or direction of the Supreme Court of Norfolk Island.

Item 58 of Schedule 1AAA – Subsection 85(4)

This item amends subsection 85(4) of the CDPV Act by omitting the reference to section 63 of the *Crimes (Appeal and Review) Act 2001* (NSW). As the latter NSW law is currently suspended in Norfolk Island it is appropriate to omit this reference. The effect of this amendment is that section 85, which deals with staying the operation of appealed orders, has effect despite section 84, which deals generally with the review and appeal of apprehended violence orders.

Items 59 and 60 of Schedule 1AAA – Subsection 85(5)

These items amend subsection 85(5) of the CDPV Act by substituting 2 references to the *Bail Act 2013* (NSW) with references to the Bail Act. As the *Bail Act 2013* (NSW) is currently suspended in Norfolk Island it is appropriate to substitute these references. The effect of these amendments is that the appropriate Norfolk Island law dealing with bail applies in relation to staying the operation of an apprehended violence order where the appellant is in custody, or entitled to be released on bail.

Item 61 of Schedule 1AAA – Subsection 85(6)

This item repeals subsection 85(6) of the CDPV Act, which contains a definition of ‘original court’. Its repeal is consequential to the amendment made to subsection 85(2) to omit the reference to ‘original court’.

Item 62 of Schedule 1AAA – Subsection 86(2)

This item amends subsection 86(2) of the CDPV Act by substituting the reference to the *Civil Procedure Act 2005* (NSW) with references to the 2 Norfolk Island continued laws that provide for the making of court rules, namely the *Court Procedures Act 2007* (NI) and the *Court of Petty Sessions Act 1960* (NI). As the *Civil Procedure Act 2005* (NSW) is currently suspended in Norfolk Island it is appropriate to omit the reference to that Act. The effect of this amendment is that rules made for the purposes of the CDPV Act may adopt, with or without modification, the provisions of any rules made under the *Court Procedures Act 2007* (NI) or the *Court of Petty Sessions Act 1960* (NI). This includes the *Magistrates Court (Civil Jurisdiction) Rules 2004* (ACT) which, under subsection 248(2) of the *Court of Petty Sessions Act 1960* (NI), are deemed to be rules made under the *Court of Petty Sessions Act 1960* (NI) until, in relation to a matter or class of matters, rules or regulations are made under that Act.

Item 63 of Schedule 1AAA – Subsection 86(3)

This item amends subsection 86(3) of the CDPV Act by substituting the reference to NSW ‘legal costs legislation’ (as defined in section 3A of the *Legal Profession Uniform Law Application Act 2014* (NSW)) with a reference to the *Legal Profession Act 1993* (NI). As the NSW legislation is currently suspended in Norfolk Island it is appropriate to substitute this reference. The effect of this amendment is that section 86, which deals with the making of court rules for the purposes of the CDPV Act, does not give power to make rules with respect to any matter relating to costs that is regulated by the *Legal Profession Act 1993* (NI).

Item 64 of Schedule 1AAA – Subsection 87(1)

This item amends subsection 87(1) of the CDPV Act by substituting ‘Local Court or the President of the Children’s Court’ with ‘Court of Petty Sessions’. The effect of this amendment is that the Chief Magistrate of the Court of Petty Sessions may approve forms for documents to be used in connection with application proceedings under the CDPV Act.

Item 65 of Schedule 1AAA – Paragraph 87(1)(b)

This item amends paragraph 87(1)(b) of the CDPV Act by substituting a reference to the ECM, or electronic case management system, with the term ‘electronically’. The Norfolk Island courts do not use the ECM system that operates in NSW courts. The effect of this amendment is that the Court of Petty Sessions may approve the electronic format in which documents may be filed with, or issued by, the court.

Item 66 of Schedule 1AAA – Subsection 87(2)

This item amends subsection 87(2) of the CDPV Act by substituting ‘court’s internet website’ with ‘internet’. The Court of Petty Sessions does not currently have its own website. The effect of this amendment is that copies of the Court’s approved forms may be made available for public inspection on the internet, for instance on the Norfolk Island Regional Council website.

Items 67 and 68 of Schedule 1AAA – Subsections 91(1) to (4); sections 92 and 93

These items make some amendments to Part 12 of the CDPV Act, which deal with the jurisdiction of the Norfolk Island courts under that Act. Item 67 repeals subsections 91(1) to (4), which deal with the jurisdiction of the NSW Local and Children's Courts, and substitutes new subsection 91(1), which provides that, to the extent permitted by the Commonwealth Constitution, jurisdiction is conferred on the Court of Petty Sessions in the matters of making, varying and revoking orders and determining applications under the CDPV Act. Similarly, item 68 repeals sections 92 and 93, which deal with the jurisdiction of the District and Supreme Courts of NSW, and inserts new subsection 92(1), which confers, to the extent permitted by the Commonwealth Constitution, jurisdiction on the Supreme Court of Norfolk Island in any matter in relation to which the CDPV Act expressly or impliedly permits proceedings in that court or provides for that court to make, vary or revoke orders. New subsection 92(2) provides that this jurisdiction is to be exercised as criminal jurisdiction of the Supreme Court.

Item 69 of Schedule 1AAA – Section 94 (definition of *appropriate court*)

This item amends section 94 of the CDPV Act by substituting the definition of 'appropriate court' for the purposes of Part 13, which deals with the registration of protection orders made in a State or another Territory of Australia or in New Zealand (external protection orders). The effect of this amendment is that the Court of Petty Sessions is the 'appropriate court' in relation to the registration of an external protection order.

Item 70 of Schedule 1AAA – Section 94 (paragraphs (b) and (c) of the definition of *external protection order*)

This item amends section 94 of the CDPV Act by amending the definition of 'external protection order' for the purposes of Part 13, which deals with the registration of protection orders made in a State or another Territory of Australia or in New Zealand. The effect of this amendment is that an 'external protection order' relevantly means an order made by a court of a State, another Territory or New Zealand that has been made to prevent a person from acting in a manner specified in section 19 (apprehended personal violence orders) or an order made by a court of a State, another Territory or New Zealand that is of a kind prescribed by the regulations.

Item 71 of Schedule 1AAA – Section 94

This item amends section 94 of the CDPV Act by inserting a new definition of 'Registrar' for the purposes of Part 13, which deals with the registration of protection orders made in another State or Territory or in New Zealand. The effect of the amendment is to provide that, in Part 13 of the CDPV Act, 'Registrar' means the Clerk of the Court of Petty Sessions.

Item 72 of Schedule 1AAA – Paragraph 96(1)(b)

This item amends paragraph 96(1)(b) of the CDPV Act by omitting redundant references to the Children's Magistrate and the Children's Court. Subsection 96(1), as amended, provides that, on receipt of an application under section 95, the Clerk of the Court of Petty Sessions must register the external protection order to which the application relates (paragraph 96(1)(a)), or refer the external protection order to a Magistrate for adaptation or modification (paragraph 96(1)(b)).

Item 73 of Schedule 1AAA – Subsection 96(2)

This item amends subsection 96(2) of the CDPV Act by substituting references to ‘New South Wales’ with ‘Norfolk Island’ and omitting redundant references to the Children’s Magistrate. The effect of this amendment is that, on the referral of an external protection order, the Magistrate may vary the period during which the order has effect in its operation in Norfolk Island and/or make such other adaptations or modifications to the order as the Magistrate considers necessary or desirable for its effective operation in Norfolk Island.

Item 74 of Schedule 1AAA – Subsections 97(2) and (2A)

This item amends subsections 97(2) and 97(2A) of the CDPV Act by substituting references to NSW with references to Norfolk Island. Subsection 97(2), as amended, provides that the variation or revocation of an external protection order by a court of the State, Territory or country in which it was made after the order has been registered under section 96 has no effect in Norfolk Island. Subsection 97(2A), as amended, provides that subsection 97(2) does not apply to a variation or revocation of an external protection order if the order is a recognised DVO (domestic violence order) under Part 13B of the CDPV Act and the variation or revocation is recognised in Norfolk Island under that Part.

Item 75 of Schedule 1AAA – Paragraphs 98(2)(a) and (b) and (3)(a) and (b)

This item amends paragraphs 98(2)(a) and (b) and (3)(a) and (b) of the CDPV Act by substituting references to NSW with references to Norfolk Island. Relevantly, the effect of these amendments is that, upon application by a ‘prescribed person’, a registered external protection order may be varied by the Court of Petty Sessions as it applies in Norfolk Island, including by extending or reducing the period it has effect.

Item 76 of Schedule 1AAA – Subsection 98(7)

This item amends subsection 98(7) of the CDPV Act by substituting ‘New South Wales’ with ‘Norfolk Island’. The effect of this amendment is that a registered external protection order varied under paragraph 98(3)(a) or (b) is registered for the period during which the order, as varied, has effect in its operation in Norfolk Island.

Item 77 of Schedule 1AAA – Section 98A (at the end of the definition of *agency*)

This item amends section 98A of the CDPV Act by amending the definition of ‘agency’ for the purposes of Part 13A of that Act. Part 13A deals with information sharing by agencies and non-government bodies with respect to the provision of domestic violence support services. The effect of this amendment is that for the purposes of Part 13A, ‘agency’ also means an ‘agency’ or ‘organisation’ within the meaning of the *Privacy Act 1988* (Cth).

Item 78 of Schedule 1AAA – Section 98A

This item amends section 98A of the CDPV Act by repealing the definitions of ‘central referral point’ and ‘local co-ordination point’. These entities perform functions under the *It Stops Here: Safer Pathway* program in NSW which will not operate on Norfolk Island.

Item 79 of Schedule 1AAA – Section 98A

This item amends section 98A of the CDPV Act by inserting a new definition of ‘nominated non-government support service’ for the purposes of Part 13A of that Act. A ‘nominated non-government support service’ means a non-government support service nominated by the Norfolk Island Minister. The Norfolk Island Minister means the Commonwealth Minister who administers the Norfolk Island Act (see the *Interpretation Act 1987* (NSW) (NI) as amended by Schedule 3 to the Applied Laws Ordinance).

Under section 98A of the CDPV Act, a ‘non-government support service’ means a person or body (other than an agency) that provides domestic violence support services but does not include an individual. This provision allows the Minister to nominate a specific non-government support service which provides domestic violence support services in Norfolk Island for the purposes of Part 13A of the CDPV Act.

Item 80 of Schedule 1AAA – Section 98A (definition of *privacy legislation*)

This item amends section 98A of the CDPV Act by repealing the definition of ‘privacy legislation’. That definition refers to NSW privacy legislation which is presently suspended on Norfolk Island.

Item 81 of Schedule 1AAA – Section 98A (definition of *support agency*)

This item amends the definition of ‘support agency’ in section 98A of the CDPV Act to omit redundant references to the ‘central referral point’ and ‘local co-ordination point’. This amendment is related to the repeal of the definitions of those terms by item 78 of Schedule 1AAA, and its effect is that ‘support agency’, in Part 13A of the CDPV Act, means an agency that provides domestic violence support services.

Items 82 and 83 of Schedule 1AAA – Section 98C

These items amend section 98C of the CDPV Act by repealing subsection 98C(2) and making a consequential amendment to subsection 98C(1). Subsection 98C(2) deals with the status of local co-ordination points and these amendments are related to the repeal of the definition of that term.

Item 84 of Schedule 1AAA – Subsection 98D(2)

This item amends subsection 98D(2) of the CDPV Act by substituting ‘the central referral point or a local co-ordination point’ with ‘a support agency or nominated non-government support service’. The effect of this amendment is that an agency may disclose personal information and health information about a threatened person and any person that the agency reasonably believes is a cause of the threat (the threatening person) to a support agency or nominated non-government support service for contact purposes.

Items 85 and 86 of Schedule 1AAA – Section 98E

These items amend the heading to section 98E and subsections 98E(1) and (2) of the CDPV Act respectively by substituting references to the ‘Local Court’ with references to the ‘Court of Petty Sessions’.

Item 87 of Schedule 1AAA – Subsection 98E(2)

This item amends subsection 98E(2) of the CDPV Act by omitting ‘the central referral point’ and substituting ‘a support agency or a nominated non-government support service’.

Item 88 of Schedule 1AAA – Sections 98F and 98G

This item repeals sections 98F and 98G of the CDPV Act, which deal with ‘central referral points’ and ‘local co-ordination points’ respectively. These entities perform functions under the *It Stops Here: Safer Pathway* program in NSW which will not operate on Norfolk Island.

Items 89 and 90 of Schedule 1AAA – Section 98H

These items respectively amend the heading to section 98H of the CDPV Act and add a new subsection 98H(4). The effect of these amendments is that section 98H, which deals with the collection and use of personal information or health information, applies to a nominated non-government support service in the same way as it applies to a support agency.

Items 91 to 93 of Schedule 1AAA – Section 98K

These items amend section 98K of the CDPV Act by repealing subsection 98K(1), making a consequential amendment to subsection 98K(2) and omitting a redundant reference to the privacy legislation and the *Government Information (Public Access) Act 2009* (NSW) in subsection 98K(2). The effect of these amendments is to provide that nothing in Division 2 of Part 13A restricts or prevents the disclosure of information under any other Act or law.

Items 94 to 96 of Schedule 1AAA – Section 98L

These items amend section 98L of the CDPV Act by making a consequential amendment to subsection 98L(1), omitting a redundant reference to the privacy legislation in subsection 98L(1), and repealing subsection 98L(2), which would require the Minister to consult with the Privacy Commissioner before recommending the making of a regulation under section 98L. The provision is unnecessary because it is intended that any regulations in force under section 98L are applied NSW regulations.

Item 97 of Schedule 1AAA – Subsection 98M(2)

This item amends subsection 98M(2) of the CDPV Act by omitting a redundant reference to NSW privacy legislation.

Item 98 of Schedule 1AAA – Subsection 98O(4)

This item repeals subsection 98O(4) of the CDPV Act which is a redundant provision dealing with local co-ordination points. Local co-ordination points perform functions under the *It Stops Here: Safer Pathway* program in NSW which will not operate on Norfolk Island.

Item 99 of Schedule 1AAA – Sections 98P and 98Q

This item repeals sections 98P and 98Q of the CDPV Act. Section 98P deals with the power of the Secretary of the NSW Department of Justice to delegate his or her functions under Part 13A of that Act, as it applies in NSW, and section 98Q deals with the review of Part 13A of that Act, as it applies in NSW, by the NSW Minister.

Items 100 to 102 of Schedule 1AAA – Section 98S

These items amend section 98S of the CDPV Act by amending the definition of ‘participating jurisdiction’ for Part 13B of that Act, and adding a new subsection 98S(2). The amendment to the definition of ‘participating jurisdiction’ would substitute ‘New South Wales’ with ‘Norfolk Island’. New subsection 98S(2) provides that, to avoid doubt, any reference in Part 13B to a law of Norfolk Island includes a reference to an applied NSW law. Part 13B of the CDPV Act deals with the national recognition of domestic violence orders and removes the existing requirement that domestic violence orders issued by a court in one jurisdiction need to be registered in another jurisdiction to be enforced in that other jurisdiction.

Item 103 of Schedule 1AAA – After paragraph 98U(1)(a)

This item amends subsection 98U(1) of the CDPV Act by inserting new paragraph (aa), which provides that an apprehended domestic violence order, or an interim apprehended domestic violence order, under the *Crimes (Domestic and Personal Violence) Act 2007*, as it applies in NSW, is also an interstate DVO (domestic violence order) for the purposes of Part 13B.

Item 104 of Schedule 1AAA – After paragraph 98V(a)

This item amends section 98V of the CDPV Act by inserting new paragraph (aa), which provides that a registered external protection order under Part 13 of the *Crimes (Domestic and Personal Violence) Act 2007*, as it applies in NSW, that has been made to prevent a person acting in a manner specified in section 16 of that Act, is also a registered foreign order for the purposes of Part 13B.

Item 105 of Schedule 1AAA – Sections 98Y, 98Z, 98ZA, 98ZB, 98ZD, 98ZE, 98ZF, 98ZG and 98ZH

This item amends a number of sections in Part 13B of the CDPV Act by substituting references to NSW with references to Norfolk Island.

Items 106 to 108 of Schedule 1AAA – Subsection 98ZI

These items amend subsections 98ZI(2) and (4) of the CDPV Act by substituting ‘Commissioner of Police’ with ‘issuing officer’ (within the meaning of the *Firearms and Prohibited Weapons Act 1997* (NI) (Firearms Act)), and substituting references to the *Firearms Act 1996* (NSW) with references to the Firearms Act in the definitions of ‘local firearms licence’ and ‘non-local firearms licence’. The effect of these amendments is that the issuing officer must revoke any local firearms licence held by a person, or refuse to issue a local firearms licence to a person, if the person is disqualified from holding the firearms licence by a recognised DVO (domestic violence order). The amendments also have the effect that references to a ‘local firearms licence’ or a ‘non-local firearms licence’ in section 98ZI respectively mean a licence, permit or other authorisation under the Firearms Act or an equivalent licence, permit or authorisation (within the meaning of that Act) issued under the law of another jurisdiction or country.

Item 109 of Schedule 1AAA – At the end of subsection 98ZJ(1)

This item amends section 98ZJ of the CDPV Act by inserting a note at the end of subsection 98ZJ(1). Section 98ZJ deals with the recognition in Norfolk Island of a disqualification to hold a weapons permit under a recognised DVO (domestic violence order). The note provides that section 45D of the Firearms Act, as amended by the Ordinance, requires the Administrator of Norfolk Island to refuse to issue a local weapons permit to, and revoke a local weapons permit previously issued to, a person disqualified by subsection 98ZJ(1) from holding a local weapons permit.

Item 110 of Schedule 1AAA – Subsection 98ZJ(2)

This item repeals subsection 98ZJ(2) of the CDPV Act, which provides that the Commissioner of Police must revoke any local weapons permit held by a person, or refuse to issue a local weapons permit to a person, if the person is disqualified from holding the weapons permit by a recognised DVO (domestic violence order). Subsection 98ZJ(2) is repealed because section 45D of the Firearms Act, as amended by the Ordinance, deals with this matter, requiring the Administrator of Norfolk Island to refuse to issue a local weapons permit to, and revoke a local weapons permit previously issued to, a person disqualified by subsection 98ZJ(1) from holding a local weapons permit.

Items 111 and 112 of Schedule 1AAA – Subsection 98ZJ(4)

These items amend subsection 98ZJ(4) of the CDPV Act by substituting references to the *Weapons Prohibition Act 1998* (NSW) with appropriate references to the Firearms Act. These amendments have the effect that the references to a ‘local weapons permit’ or a ‘non-local weapons permit’ in section 98ZJ(4) respectively mean a permit under section 45D of the Firearms Act or an equivalent licence, permit or authorisation to possess a prohibited weapon (within the meaning of that Act) issued under the law of another jurisdiction or country.

Item 113 of Schedule 1AAA – Sections 98ZK, 98ZL, 98ZM, 98ZP, 98ZQ and 98ZR

This item amends a number of sections of Part 13B of the CDPV Act by substituting references (wherever occurring) to NSW with references to Norfolk Island.

Item 114 of Schedule 1AAA – Subsection 98ZT(1)

This item amends subsection 98ZT(1) of the CDPV Act by substituting references (wherever occurring) to NSW with references to Norfolk Island.

Items 115 and 116 of Schedule 1AAA – Subsection 98ZT(5)

These items amend subsection 98ZT(5) of the CDPV Act by repealing the definition of ‘authorised officer’ of New South Wales, and substituting a new definition of ‘authorised officer’ of Norfolk Island for the purposes of section 98ZT. An ‘authorised officer’ for these purposes means a Magistrate, the Registrar or a Deputy Registrar of the Supreme Court, the Clerk or Deputy Clerk of the Court of Petty Sessions, or a member or special member of the Australian Federal Police of or above the rank of sergeant. This definition differs from that used in the rest of the CDPV Act and from the definition of ‘authorised officer’ in the LEPR Act.

Item 117 of Schedule 1AAA – Section 98ZTA

This item amends section 98ZTA of the CDPV Act by substituting references (wherever occurring) to NSW with references to Norfolk Island.

Item 118 of Schedule 1AAA – Division 6 of Part 13B (heading)

This item repeals and substitutes the heading to Division 6 of Part 13B of the CDPV Act, removing a redundant reference to the *Crimes (Domestic and Personal Violence) Amendment (National Domestic Violence Orders Recognition) Act 2016* (NSW), which inserted Part 13B into the *Crimes (Domestic and Personal Violence) Act 2007*, as it applies in NSW. Division 6 of Part 13B contains application and transitional provisions relating to the introduction of the national recognition of domestic violence orders under that Part.

Item 119 of Schedule 1AAA – Section 98ZU

This item amends section 98ZU of the CDPV Act, which defines the meaning of ‘commencement date’ for the purposes of Division 6 of Part 13B of that Act. The effect of the amendment is that ‘commencement date’ means the date Part 13B comes into force in Norfolk Island.

Items 120 and 121 of Schedule 1AAA – Sections 98ZV and 98ZW

These items repeal sections 98ZV and 98ZW of the CDPV Act, which are transitional provisions dealing with the introduction of Part 13B of the *Crimes (Domestic and Personal Violence) Act 2007*, as it applies in NSW, but which would have no practical application to its application in Norfolk Island.

Item 122 of Schedule 1AAA – Subsection 98ZX(4)

This item amends subsection 98ZX(4) of the CDPV Act by substituting ‘New South Wales’ with ‘Norfolk Island’.

Item 123 of Schedule 1AAA – Paragraph 98ZY(1)(a)

This item amends paragraph 98ZY(1)(a) of the CDPV Act by omitting ‘registrar of a court of New South Wales to be a recognised DVO in New South Wales’ and substituting ‘Magistrate to be a recognised DVO in Norfolk Island’. The effect of this amendment is that paragraph 98ZY(1)(a) provides that a ‘recognised DVO’ includes any DVO that is declared by a Magistrate to be a recognised DVO in Norfolk Island under Subdivision 4 of Division 6 of Part 13B.

Item 124 of Schedule 1AAA – Subsections 98ZY(2) and 98ZZ(3)

This item amends subsections 98ZY(2) and 98ZZ(3) of the CDPV Act by substituting references to NSW with references to Norfolk Island.

Item 125 of Schedule 1AAA – Section 98ZZA (definition of registrar)

This item amends the definition of ‘registrar’ in section 98ZZA of the CDPV Act so that, in Subdivision 4 of Division 6 of Part 13B of that Act, ‘registrar’ means a Magistrate.

Item 126 of Schedule 1AAA – Subsections 98ZZB(1), (2) and (6) and 98ZZC(1)

This item amends subsections 98ZZB(1), (2) and (6) and 98ZZC(1) of the CDPV Act by substituting references to NSW with references to Norfolk Island.

Item 127 of Schedule 1AAA – Subdivision 5 of Division 6 of Part 13B

This item repeals Subdivision 5 of Division 6 of Part 13B of the CDPV Act, which contains transitional provisions dealing with the introduction of Part 13B of the *Crimes (Domestic and Personal Violence) Act 2007*, as it applies in NSW, but which have no practical application for the application of the CDPV Act in Norfolk Island.

Item 128 of Schedule 1AAA – Subsection 99(9)

This item amends subsection 99(9) of the CDPV Act by substituting ‘State’ with ‘Commonwealth’. The effect of this amendment is that the Commonwealth is to indemnify a police officer, who acts in his or her capacity as a police officer in apprehended violence order proceedings, for any professional costs awarded against the police officer personally.

Item 129 of Schedule 1AAA – Section 104

This item repeals section 104 of the CDPV Act, which deals with the review of the *Crimes (Domestic and Personal Violence) Act 2007*, as it applies in NSW, by the NSW Minister.

Crimes (Domestic and Personal Violence) Regulation 2014 (NSW)

Items 130 and 131 of Schedule 1AAA – Forms 1 and 2 in Schedule 1

These items amends Forms 1 and 2 in Schedule 1 to the CDPV Regulation by substituting references to the Local Court or Children’s Court of NSW with references to the Court of Petty Sessions of Norfolk Island. Forms 1 and 2 are the application notice forms for apprehended violence orders prescribed for the purposes of subsection 50(2) of the CDPV Act.

Item 132 of Schedule 1AAA – Form 2 in Schedule 1 (paragraph 6(b) under the heading “Orders about family law and parenting”)

This item amends Form 2 in Schedule 1 to the CDPV Regulation by omitting ‘or court-approved’. This amendment is consequential to the repeal of sections 21 and 24A of the CDPV Act, which deal with the power of the court to refer personal violence matters to mediation.

Item [4] – After Schedule 3

Item 4 inserts a new Schedule 3A to the Applied Laws Ordinance, which makes a number of amendments to the LEPR Act and the *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW) (NI) (LEPR Regulation) as appropriate to their application to Norfolk Island.

Schedule 3A – Amendment of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) and the Law Enforcement (Powers and Responsibilities) Regulation 2016 (NSW)

Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)

Item 1 of Schedule 3A – Subsection 3(1) (definition of *authorised officer*)

This item substitutes a new definition of ‘authorised officer’ into subsection 3(1) of the LEPR Act. The new definition provides that, in the LEPR Act, an ‘authorised officer’ is a Magistrate of the Court of Petty Sessions of Norfolk Island.

Item 2 of Schedule 3A – Subsection 3(1) (definition of *Commissioner*)

This item inserts a new definition of ‘Commissioner’ into subsection 3(1) of the LEPR Act. The new definition provides that, in the LEPR Act, ‘Commissioner’ means the police officer in charge in Norfolk Island.

Item 3 of Schedule 3A – Subsection 3(1)

This item inserts new definitions of ‘Local Area Commander of Police’ and ‘Local Court’ into subsection 3(1) of the LEPR Act. According to the new definitions, ‘Local Area Commander of Police’ means the police officer in charge in Norfolk Island and ‘Local Court’ means the Court of Petty Sessions of Norfolk Island.

Item 4 of Schedule 3A – Subsection 3(1) (definition of *police officer*)

This item repeals the definition of ‘police officer’ in subsection 3(1) of the LEPR Act. ‘Police officer’, for the purposes of the Act, is relevantly defined in subsection 21(1) of the *Interpretation Act 1987* (NSW) (NI) to mean: a member or a special member of the Australian Federal Police; a member of the Police Force of Norfolk Island; or a member of a State or Territory police force providing police services in relation to Norfolk Island in accordance with section 18B or 18C of the Norfolk Island Act.

Item 5 of Schedule 3A – Section 8

This item amends section 8 of the LEPR Act, which deals with the extent to which that Act binds the Crown, by removing a reference to the Crown in right of NSW. The effect of the amendment is that the Act binds the Crown in each of its capacities.

Item 6 of Schedule 3A – At the end of Part 1

This item inserts a new section 8A into the LEPR Act that deals with the application of that Act in Norfolk Island. The effect of the amendment is that only those provisions that deal with law enforcement powers with respect to apprehended violence orders and domestic violence offences, as well as the necessary safeguards, auxiliary and other related provisions, apply in Norfolk Island. The remainder of the LEPR Act continues to be suspended in its application to the territory.

Item 7 of Schedule 3A – Subsection 211(2)

This item amends subsection 211(2) of the LEPR Act, which deals with the application of Division 1 of Part 17 of that Act, by substituting ‘Act’ with ‘law’. That Division deals with the seizure and confiscation of knives and other dangerous articles and implements. The effect of this amendment is that that Division does not apply in circumstances where another law, for instance a law continued in force under section 16A of the Norfolk Island Act, deals with the seizure or confiscation of such articles.

Item 8 of Schedule 3A – Paragraph 212(4)(b)

This item amends paragraph 212(4)(b) of the LEPR Act by substituting a reference to the *Firearms Act 1996* (NSW) with a reference to Part 5 of the *Firearms and Prohibited Weapons Act 1997* (NI). As the *Firearms Act 1996* (NSW) is currently suspended in Norfolk Island it is appropriate to substitute this reference. The effect of this amendment is that the appropriate Norfolk Island law dealing with firearms applies with respect to an applicant seeking the return from the police of a seized or confiscated dangerous article or implement under section 212 of the LEPR Act.

Item 9 of Schedule 3A – Subsection 214(4)

This item repeals subsection 214(4) of the LEPR Act, which provides that the proceeds of any sale of an article or implement disposed of under section 214 of that Act should be paid into the Consolidated Fund of NSW.

Law Enforcement (Powers and Responsibilities) Regulation 2016 (NSW)

Item 10 of Schedule 3A – Subclause 3(1) (at the end of the note)

This item adds a sentence at the end of the note to subclause 3(1) of the LEPR Regulation) noting that section 8A of the LEPR Act limits the application of that Regulation so that it applies only to the extent that it is relevant to a provision of the LEPR Act described in that section. Section 8A provides that only those provisions that deal with law enforcement powers with respect to apprehended violence orders and domestic violence offences, as well as the necessary safeguards, auxiliary and other related provisions, apply in Norfolk Island. The remainder of the LEPR Act continues to be suspended in its application to the territory.

Items 11 and 13 of Schedule 3A – Part 1 of Form 4 and Part 1 of Form 5 in Schedule 1

These items omit references to the State of New South Wales in Parts 1 of Forms 4 and 5 of Schedule 1 to the LEPR Regulation. Those Parts deal with applications for warrants under the LEPR Act.

Items 12 and 14 of Schedule 3A – Part 2 of Form 4 in Schedule 1 (note) and Part 2 of Form 5 in Schedule 1 (note)

These items substitute references to the ‘Local Court’ with references to the ‘Court of Petty Sessions’ in the notes to Parts 2 of Forms 4 and 5 in Schedule 1 to the LEPR Regulation. Those Parts deal with the records kept by an authorised officer with respect to an application for a warrant under the LEPR Act.

Part 2— Repealing the Domestic Violence Act 1995 (Norfolk Island)

Division 1—Repeals

Norfolk Island Continued Laws Ordinance 2015

Item [5] – Item 1 of Schedule 2

This item inserts a reference to the *Domestic Violence Act 1995* (NI) (DV Act) into Part 1 of Schedule 2 to the *Norfolk Island Continued Laws Ordinance 2015* (Continued Laws Ordinance). The effect of this amendment is to repeal this Norfolk Island continued law.

Item [6] – Item 2 of Schedule 2

This item inserts a reference to the *Domestic Violence Regulations 1995* (NI) into Part 2 of Schedule 2 to the Continued Laws Ordinance. The effect of this amendment is to repeal this Norfolk Island continued law.

Division 2—Repeals of amendments of repealed laws

Norfolk Island Continued Laws Ordinance 2015

Item [7] — Part 1 of Schedule 1 (heading specifying *Domestic Violence Act 1995* (Norfolk Island))

This item repeals the heading specifying the DV Act in Part 1 of Schedule 1 to the Continued Laws Ordinance and is consequential to the repeal of the DV Act.

Item [8] — Items 72A, 72B and 72C of Schedule 1

This item repeals items 72A to 72C of Schedule 1 to the Continued Laws Ordinance, which presently effect amendments to the DV Act. The repeal of these items is consequential to the repeal of the DV Act.

Schedule 2—Bail

Norfolk Island Continued Laws Ordinance 2015

The items in Schedule 2 to the Ordinance amend the Continued Laws Ordinance to effect amendments to the *Bail Act 2005* (NI) (Bail Act) to insert a new presumption against bail for persons accused of domestic violence offences, when a bail determination is being made by a member of the Police Force of Norfolk Island with respect to police bail under the Bail Act. This new presumption is based on section 9F of the *Bail Act 1992* (ACT) and aligns this area of criminal procedure on Norfolk Island with other Australian jurisdictions and provides victims of domestic violence with comparable protection to what they would receive elsewhere in Australia. Other amendments to the Bail Act substitute redundant references to the *Crimes Act 1900* (NSW), as previously applied to Norfolk Island, with comparable or equivalent provisions in the *Criminal Code 2007* (NI) or the Criminal Procedure Act and make a number of other consequential and technical amendments, including consequential amendments arising from the commencement of the NSW AVO laws.

Item [1] —Before item 22AA of Schedule 1

Item 22AAA of Schedule 1 – Subsection 3(1) (definition of *Crimes Act*)

This item repeals the definition of ‘Crimes Act’ in subsection 3(1) of the Bail Act. ‘Crimes Act’ is defined to mean the *Crimes Act 1900* (NSW) as applied in Norfolk Island (Crimes Act). The definition is no longer required and its repeal is consequential to other amendments to the Bail Act that substitute references to the Crimes Act with references to comparable or equivalent provisions in the Code or the CP Act. The Code repealed most of the Crimes Act in its application to Norfolk Island. However, the references to the Crimes Act in the Bail Act were not updated at that time. The Ordinance would address this oversight.

Item [2] —After item 22AA of Schedule 1

This item makes a number of amendments to the Bail Act.

Item 22AAAA of Schedule 1 – Paragraph 6(1)(d)

This item repeals and substitutes paragraph 6(1)(d) of the Bail Act. This amendment substitutes an existing reference to the Crimes Act with the equivalent reference to the CP Act. The effect of the amendment is that bail may be granted to an accused person in accordance with the Bail Act in respect of the period in which the Mental Health Tribunal is considering the fitness of an accused to plead when committed for trial for an indictable offence.

Item 22AAAB of Schedule 1 – Paragraph 9(1)(b)

This item amends paragraph 9(1)(b) of the Bail Act to substitute the reference to section 54 of the Crimes Act with an equivalent reference to section 77 or 78 of the Code. It is appropriate to amend the reference because section 54 of the Crimes Act has been repealed in its application to Norfolk Island.

Item 22AAAC of Schedule 1 – Paragraph 9(1)(c)

This item amends paragraph 9(1)(c) of the Bail Act by substituting the reference to part 3A of the Crimes Act with an equivalent reference to Part 3.6 of the Code. It is appropriate to amend the reference because part 3A of the Crimes Act has been repealed in its application to Norfolk Island.

Item 22AAAD of Schedule 1 – Paragraph 9(1)(d)

This item repeals and substitute paragraph 9(1)(d) of the Bail Act, which substitutes the reference to section 42 of the DV Act with a reference to section 14 of the CDPV Act. This amendment is consequential to the removal of the suspension of the CDPV Act and the repeal of the DV Act by Schedule 1 to the Ordinance.

Item 22AAAE of Schedule 1 – Subsection 9(1)

This item amends subsection 9(1) of the Bail Act to substitute references to sections of the Crimes Act with equivalent references to sections of the Code. It is appropriate to amend the references because the provisions referred to in the Crimes Act have been repealed in their application to Norfolk Island.

Item 22AAAF of Schedule 1 – Paragraph 9(2)(a)

This item amends paragraph 9(2)(a) of the Bail Act to substitute an incorrect reference to section 23 of that Act with the correct reference to section 25 of that Act.

Item 22AAAG of Schedule 1 – Section 9 (note)

This item repeals the note to section 9 of the Bail Act, because the note refers to offences in the Crimes Act that have been repealed.

Item 22AAAH of Schedule 1 – After section 16

This item inserts new section 16A into Part 3 of the Bail Act, which deals with police bail. New section 16A inserts a new presumption against bail for persons accused of domestic violence offences when a bail determination is being made by an authorised member with respect to police bail under that Act.

This new presumption is based on section 9F of the *Bail Act 1992* (ACT). It aligns this area of criminal procedure on Norfolk Island with the law of several Australian jurisdictions and provide victims of domestic violence on Norfolk Island with comparable protection.

New subsection 16A(1) provides that section 16A applies to a person accused of a domestic violence offence. Under new subsection 16A(2), an authorised member must not grant bail to the accused person unless satisfied that the person poses no danger to a protected person while released on bail. However, under subsection 16A(3), even if the authorised member is satisfied that the person poses no danger to a protected person while released on bail, the member must still refuse bail if satisfied that the refusal is justified after considering the matters mentioned in section 25 (criteria to be considered in bail applications). Under subsection 16A(4), if an authorised member grants bail to the person, the member must include, with the entry in the book, or the information stored on a computer, under section 18, a statement about why the member is satisfied that the person poses no danger to any protected person. Under subsection 3(1) of the Bail Act, ‘authorised member’ is presently defined, in relation to a person in custody, as a member of the Police Force who may, under Part 3, grant bail to the person. Subsection 16A(5) defines ‘domestic violence offence’ and ‘protected person’ for the purposes of section 16A.

Item 22AAAI of Schedule 1 – Paragraph 25(1)(d)

This item amends paragraph 25(1)(d) of the Bail Act to substitute a reference to the DV Act with a reference to the CDPV Act. This amendment is consequential to the removal of the suspension of the CDPV Act and the repeal of the DV Act by Schedule 1 to the Ordinance.

Item [3] —After item 22BB of Schedule 1

Item 22BC of Schedule 1 – Subsection 54(1) (definition of *accused person*)

This item repeals and substitutes the definition of ‘accused person’ in subsection 54(1) of the Bail Act. The effect of this amendment is to provide that an ‘accused person’, for the purposes of section 54 of the Bail Act, means an accused person who is the subject of an order under Chapter 2 of the CP Act.

Schedule 3—Criminal procedure

Norfolk Island Continued Laws Ordinance 2015

Schedule 3 amends the Continued Laws Ordinance in order to amend the CP Act to modernise Norfolk Island legislation relating to criminal court procedures and make it consistent with similar legislation in other Australian jurisdictions. Under the current CP Act, certain witnesses can access special measures to assist them to give evidence in particular proceedings. These measures are based on those that were available in the Australian Capital Territory (ACT) in 2007. However, a number of advancements have been made in the ACT and other jurisdictions since then, particularly in relation to procedures applying to vulnerable witnesses.

The Ordinance makes changes to bring Norfolk Island court procedure law back into alignment with other Australian jurisdictions, expanding the range of special measures that are available to assist vulnerable witnesses and expanding the classes of witness who can access those measures (including children, complainants in sexual offence proceedings, and people with disability). This includes requiring evidence given by audiovisual link to be recorded, allowing records of evidence to be admitted in subsequent trials, and introducing additional protections for victims with respect to examination by self-represented accused persons. The amendments also introduce provisions to allow, for example, vulnerable witnesses to have a support person (or support animal) present in court while giving evidence, and clarify and expand the orders a court can make regarding the arrangement of the courtroom (such as the use of screens) to allow witnesses to give evidence without seeing or hearing the accused. The amendments also broaden the availability of these protections to ‘similar act witnesses’ – as well as complainants – in sexual and violent offence proceedings.

Item [1] – Item 57A of Schedule 1

This item repeals item 57A of Schedule 1 to the Continued Laws Ordinance and substitutes new items 57AA to 57AY. The new items amend the CP Act by repealing current definitions and inserting new definitions, and makes amendments consequential to the removal of the suspension of the CDPV Act and the repeal of the DV Act by Schedule 1 to the Ordinance.

Item 57A of Schedule 1 – Subsection 7(4)

New item 57A repeals subsection 7(4) of the CP Act, which specifies how examples in the CP Act should be read. It is appropriate to repeal it because section 15AD of the *Acts Interpretation Act 1901* (Cth), as applied by the *Interpretation Act 1979* (NI), has a different rule about examples.

Item 57AA of Schedule 1 – Subsection 7(5)

This item inserts a definition of ‘audiovisual link’ into subsection 7(5) of the CP Act, to mean a system of 2-way communication linking different places so that a person at any of them can be seen and heard at the other places. The CP Act currently does not contain such a definition.

Item 57AC of Schedule 1 – Subsection 7(5) (definitions of *Chief Executive Officer* and *Crown law officer*)

This item repeals the definitions in subsection 7(5) of the CP Act of ‘Chief Executive Officer’ and ‘Crown law officer’ as these roles are no longer relevant in Norfolk Island.

Item 57AE of Schedule 1 – Subsection 7(5)

This item inserts a definition of ‘external place’ into subsection 7(5) of the CP Act with the effect that ‘external place’, for a proceeding, means a place other than the courtroom where the proceeding is heard.

Item 57AG of Schedule 1 – Subsection 7(5)

This item replicates an existing provision repealing the definitions of ‘public office’, ‘public sector’, ‘public sector agency’ and ‘public service’ in subsection 7(5) of the CP Act. This is a change to the grouping of amendments and has no substantive effect.

Item 57AK of Schedule 1 – Paragraph 53(4)(b)

This item amends paragraph 53(4)(b) of the CP Act by substituting a reference to a protection order that is a domestic violence order under the DV Act with a reference to an apprehended violence order under the CDPV Act. The effect of the amendment is, relevantly, that a firearm, ammunition or licence seized under subsection 53(1) of the CP Act must be returned to the licensee at the end of 60 days after the seizure if, before the end of that period, an apprehended violence order has not been made under the CDPV Act.

Item 57AL of Schedule 1 – Section 54 (heading)

This item repeals the heading to section 54 of the CP Act, substituting the existing reference to ‘protection orders’ with a reference to ‘apprehended violence orders’.

Items 57AM to 57AO of Schedule 1 – Subsection 54(1)

These items make a number of consequential amendments to subsection 54(1) of the CP Act. The effect of these amendments is that if a court has made an apprehended violence order against a person that prohibits, or restricts, under paragraph 35(2)(d) of the CDPV Act, the possession by the person of one or more firearms, a police officer may enter the premises where the person is reasonably believed to be living or staying and seize firearms, ammunition and firearm licences or permits, whether in or on the premises concerned, or in or on a connected motor vehicle.

Item 57AP of Schedule 1 – Subsections 54(2), (3) and (4)

This item makes a number of consequential amendments to subsections 54(2), (3) and (4) providing that, with respect to apprehended violence orders, a police officer is able to exercise the same powers of seizure with respect to firearm permits that they may currently exercise with respect to firearm licences.

Items 57AQ to 57AW of Schedule 1 – Subsection 54(5)

These items make a number of consequential amendments to subsection 54(5) of the CP Act. The effect of these amendments is that if a firearm, ammunition or licence or permit has been seized under subsection 54(1) for the purpose of enforcing an order mentioned in that subsection, and the licence or permit was not suspended or cancelled, the firearm, ammunition, licence or permit must be returned to the licensee or permittee if the circumstances described in paragraphs 54(5)(c), (d) and (e) are satisfied.

Item 57AX of Schedule 1 – Subsection 54(6) and (7)

This item amends subsections 54(6) and (7) of the CP Act by substituting the outdated references to the *Firearms Act 1997* (NI) (Firearms Act) with references to the correct short title of that Act.

Item 57AY of Schedule 1 – Subsection 74(5) (definition of *domestic violence offence*)

This item amends the definition of ‘domestic violence offence’ in subsection 74(5) of the CP Act, by substituting the reference to the DV Act with a reference to section 11 of the CDPV Act. This amendment is consequential to the removal of the suspension of the CDPV Act and the repeal of the DV Act by Schedule 1 to the Ordinance.

Item [2] – Item 59 of Schedule 1

This item repeals item 59 of Schedule 1 to the Continued Laws Ordinance and substitutes new items 59 and 59D.

Item 59 of Schedule 1 – Subsection 112(2)

This item replicates an existing provision repealing subsection 112(2) of the CP Act. This is a change to the grouping of amendments and has no substantive effect.

Items 59D to 59X of Schedule 1 – Chapters 6 and 7

The effect of these amendments is, broadly, to create further protections for vulnerable witnesses – including children – in giving evidence. Under the current CP Act, there are special measures available to some witnesses to assist them to give evidence in certain proceedings, including those for sexual and violent offences. The current provisions are based on the law in the ACT, as it was in force in 2007 when the CP Act was made. This law included the *Crimes Act 1900* (ACT) and the *Evidence (Miscellaneous provisions) Act 1991* (ACT). The amendments to the CP Act are designed to take account of the changes that have been made to the ACT legislation since 2007, relating specifically to its provisions for vulnerable witnesses giving evidence in criminal proceedings.

The amendments: create further special measures for particular witnesses to give evidence in criminal (including domestic violence) proceedings; require evidence given by audiovisual link to be recorded and allow those records of evidence to be admitted in retrials and subsequent trials; and prevent certain witnesses being examined by self-represented accused persons. The amendments, in doing so, bring the CP Act into alignment with other Australian jurisdictions and would also implement a number of recommendations from the Criminal Justice Report of the *Royal Commission into Institutional Responses to Child Sexual Abuse*. Those recommendations are ones that the Australian Government has accepted in its response to the report.

Under current subsection 172(1) of the CP Act, evidence from a complainant in a sexual offence proceeding must be given by audiovisual link from a place other than the courtroom, unless the court orders otherwise. Under current subsection 168(2) of that Act, the court has discretion to make a number of orders including closing the court while a complainant gives evidence in a sexual offence proceeding, and about who may be present with the complainant and/or in the courtroom. The amendments maintain the requirement in current subsection 172(1) and the discretion in current subsection 168(2). However, since the CP Act was made, Australian jurisdictions (and particularly the ACT, on which the current CP Act is based) have created additional special measures and have extended their availability. The amendments adopt these additional measures.

Item 59D of Schedule 1 – Chapter 6

This item repeals Chapter 6 of the CP Act and substitutes new Chapter 6 of that Act, based on Chapters 2 and 4 of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) (EMP Act), with changes as appropriate to its application to Norfolk Island. Item 59D also inserts new Chapter 6A of the CP Act, based on Chapter 7 of the EMP Act.

Chapter 6—Evidence of children

New Chapter 6 is substantially the same as the current Chapter 6, but updates and simplifies the headings and the language used, to ensure consistency with other provisions adopted from ACT legislation and be more reflective of their content and operation.

New section 155 contains new definitions of ‘court’ and ‘proceeding’. The definitions provide that ‘court’ means the Supreme Court, the Court of Petty Sessions, or the Coroner’s Court, and ‘proceeding’ means a proceeding to which Chapter 6 applies.

New section 155A includes a definition of ‘give evidence in a proceeding by audiovisual link’ for the purposes of Chapter 6, meaning ‘to give evidence in the proceeding by audiovisual link from an external place which is linked to the courtroom by an audiovisual link’. This definition is consistent with the relevant definition used in the ACT legislation.

New section 155B specifies that for the purposes of Chapter 6, it does not matter whether evidence is given on oath or otherwise.

New section 155C outlines the proceedings to which Chapter 6 apply, including proceedings in the Supreme Court, the Court of Petty Sessions or the Coroner’s Court, and proceedings under the CDPV Act and Chapters 5 and 6 of the CW Act.

New section 155D requires that children giving evidence in proceedings, other than children who are accused persons, must do so by audiovisual link between the court and an external place (subject to a court’s orders otherwise with respect to delays and fairness) and that while the child is at the external place, it is taken to be part of the courtroom.

New section 155E allows a court to make any order regarding the representation of the child, including that they be separately represented.

New section 155F allows the court to make consequential orders if a child is to give evidence in a proceeding by audiovisual link, including in relation to the conduct of the proceeding, the child’s identification of a person or thing, the child’s viewing or participation in demonstrations or experiments, or in relation to the location of part of the proceeding. In addition, the court will be able to make other appropriate orders about who may be or must not be with the child at an external place, who can see or hear the child and who the child can see or hear, and the operation of the audiovisual link. The provision also allows the court to direct that an order only apply to a part of the proceeding.

New section 155G allows the court to make orders under Chapter 6 on its own initiative or on the application of the child (or their representatives or parents) and also provides that the court is not bound by the rules of evidence when making an order under the Chapter.

New section 155H provides that, if the child is giving evidence by audiovisual link in a proceeding before a jury, the judge must warn the jury not to make any adverse inferences against an accused person because the child is giving evidence by audiovisual link.

New section 155J ensures that a proceeding will not be invalidated nor the child’s evidence inadmissible due only to non-compliance with Chapter 6.

New section 155K continues to apply the provisions of the Chapter for the duration of a proceeding to a child who turns 18 before the proceeding is disposed of.

Chapter 6A—Evidence of witnesses with disabilities or vulnerabilities

While new Chapters 6 and 6A of the CP Act contain similar protections for children as witnesses in criminal proceedings to current Chapter 6 of the CP Act, Chapter 6A introduces 2 additional measures – providing for the presence of support person/s and for the court to have discretion to close the court – to assist witnesses giving evidence in criminal proceedings. The provisions regarding support person/s would extend to both children and to witnesses with disability, while the provisions regarding closure of the court will be extended to witnesses with a vulnerability that affects their ability to give evidence. Whether a witness has a vulnerability will be a matter for the court to decide, taking into account the person’s circumstances or those of the proceeding and may include, for example, any emotional trauma or distress a person might suffer because of the nature of the offence or their relationship with the accused person. A court is not bound by the rules of evidence when determining whether a witness has a vulnerability, which would allow the court to consider hearsay evidence in its decision – for example, evidence from a counsellor or psychologist. This will reduce the need to subject a witness to further possible emotional trauma, which is also the rationale for new sections relating to support person/s and the court’s discretion to make orders closing the court.

New section 160 defines ‘proceeding’ for the purposes of new Chapter 6A of the CP Act as a proceeding to which Chapter 6A applies.

New section 160A defines ‘witness with a disability’ as a person giving evidence in a proceeding who has a mental or physical disability that affects their ability to give evidence.

New section 160B describes the proceedings to which Chapter 6A apply, including proceedings in the Supreme Court, the Court of Petty Sessions and the Coroner’s Court, and proceedings under the CDPV Act or Chapters 5 and 6 of the CW Act.

New section 160C applies to children and witnesses with disability giving evidence in a proceeding and relates to witnesses having a support person or persons in court with them. It requires the court to order (on application) that while a witness gives evidence they have a support person or persons close to the witness and in the witness’s awareness or sight. The section also provides that the support persons should not generally be or be likely to be a witness or party in the proceeding. In addition, the court will be required to tell the jury that having a support person is a usual practice and that the jury must not draw any inference against an accused person or attribute any more or less weight to the evidence given because of the presence of a support person/s.

New section 160D allows the court to order that witnesses who have a vulnerability that affects their ability to give evidence do so in a court closed to the public. This order will be subject to the wishes of the witness and the interests of justice. The section also specifies that such orders do not prevent from being in court a person nominated by the witness or a person authorised to attend the proceeding to prepare a news report. The section contains a note about the offence of publishing certain information about sexual offence proceedings. The section also specifies that giving evidence includes giving evidence by playing an audiovisual recording at a hearing in relation to sexual or violent offence proceedings (under Subdivision C of Division 2 of Chapter 7).

New section 160E provides that the court is not bound by the rules of evidence in making orders under section 160C or 160D.

Item 59E of Schedule 1 – Chapter 7 (heading)

This item repeals the heading of Chapter 7 of the CP Act and substitute a new heading: ‘Chapter 7—Evidence in sexual, violent and domestic violence proceedings’.

Item 59F of Schedule 1 – Divisions 1, 2 and 3 of Chapter 7

Item 59F repeals Divisions 1 to 3 of Chapter 7 of the CP Act, and substitutes new Divisions 1 to 3 of Chapter 7, based on parts 4.1 and 4.3 and Divisions 4.2.1, 4.2.2, 4.2.2A and 4.2.3 of the EMP Act, with changes as appropriate to its application to Norfolk Island.

The effect of amending Chapter 7 is to extend protections – such as having support person/s, screens in the courtroom to prevent a witness seeing the accused person, and using a pre-recorded interview as evidence in chief, either in whole or in part – to additional classes of witnesses, being all complainants and similar act witnesses. Similar act witnesses are those who give evidence that relates to an act committed on or in the presence of the accused, or who give tendency or coincidence evidence. These protections would apply in all sexual offence proceedings and certain violent offence proceedings. In addition, complainants in domestic violence offence proceedings will be able to have a pre-recorded interview admitted as evidence in chief and in some circumstances give evidence in closed court.

The new Chapter 7 satisfies the Australian Government's response to the recommendations of the *Royal Commission into Institutional Responses to Child Sexual Abuse*, with respect to giving evidence by audiovisual link, allowing support person/s, closing the court, and arranging the courtroom in such a way as to prevent the witness from seeing the accused while giving evidence.

New Chapter 7 also introduces provisions requiring that evidence given by audiovisual link be recorded, and allows a recording of a complainant's evidence in a sexual offence proceeding to be tendered and relied on as the complainant's evidence in subsequent trials and retrials. In proposing amendments to Chapter 7, some provisions of the ACT legislation have been enhanced by adopting the approach of NSW, specifically in relation to the admission of evidence in retrials and subsequent trials. While the ACT approach of ensuring that all evidence given by witnesses by audiovisual link in sexual offence proceedings is recorded is adopted, the rules around tendering that evidence are more reflective of the *Criminal Procedure Act 1986* (NSW).

The NSW provisions were adopted for a number of reasons, including to satisfy recommendations of the Australian Law Reform Commission (ALRC) and the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission). In its report titled *Family Violence—A National Legal Response* (released in 2010), the ALRC recommended that prosecutors should be able to tender a record of the original evidence of the complainant from a sexual offence proceeding in any re-trial ordered on appeal. Further, the Royal Commission recommended that states and territories introduce legislation to require the audiovisual recording of evidence given by complainants and other witnesses that the prosecution considers necessary in child sexual abuse prosecutions, and to allow these recordings to be tendered and relied on as the relevant witness's evidence in any subsequent trial or retrial.

NSW and the Commonwealth introduced provisions consistent with the ALRC recommendation – NSW law provides that the prosecutor may tender as evidence in new trial proceedings a record of the original evidence of the complainant. The original evidence of the complainant means all evidence given by the complainant in the proceedings from which the conviction arose, including the evidence given by the complainant on examination in chief in the original proceedings and any further evidence given on cross-examination or re-examination in those proceedings. A hierarchy of evidence is adopted: video recording is preferred, but audio recording and transcripts of proceedings can also be admitted if video recording is not available. There is no requirement that evidence given in court be recorded.

The ACT legislation provides that all complainant and similar fact witnesses in particular proceedings give evidence by audiovisual link (unless the court orders otherwise). In sexual offence proceedings, the ACT provisions require that the audiovisual link must be recorded, and the recording can be admitted in subsequent proceedings. In practice, that means there is always a video recording of all of a witness's evidence in a sexual offence proceeding, which is then admissible in subsequent proceedings.

NSW allows for different recordings to be admitted (video, audio and transcript, for example) but does not require an audiovisual recording be made.

The amendments to the Norfolk Island CP Act generally reflect the NSW legislation, which ensures there is an audiovisual record of evidence given by complainants, similar act witnesses, children and intellectually impaired witnesses in sexual offence proceedings. To take account of the specific circumstances on Norfolk Island (and particularly to ensure that if an audiovisual recording fails, other records of evidence can still be admitted in future proceedings), the NSW definition of best available record was adopted. This allows prosecutors to tender as evidence in any retrial or subsequent trial a record of the original evidence of the complaint. This reduces the trauma to complainants and witnesses in having to repeat the same evidence multiple times, particularly as there may be some time between trials.

Chapter 7, Division 1—Preliminary

New section 165 ensures that a proceeding would not be invalidated, nor the evidence of a complainant or similar act witness be inadmissible, due only to non-compliance with Chapter 7.

New section 165A defines 'relevant person' for the purposes of Chapter 7, and defines 'intimate partner' for the purposes of that definition.

New section 165B defines 'relative' for the purposes of Chapter 7. If the person (the original person) was Indigenous, 'relative' includes someone the original person has responsibility for or an interest in (or someone who has responsibility for or an interest in the original person), in accordance with the traditional laws and customs of the community of Indigenous persons to which the original person belongs.

New subsection 165C(1) defines some family relationships for the purposes of Chapter 7, including 'child', 'de facto partner', 'parent', 'stepchild' and 'step-parent'. Subsection 165(2) provides for a tracing rule, so that if one person was the child of another person because of the definition in subsection 165C(1), relationships to or through that person will be determined on the basis that the person was the child of the other person. The above expressions have been amended to reflect standard definitions which avoid gendered references.

New section 165D provides that 'found guilty' for the purposes of Chapter 7 includes having an offence taken into account under section 143 of the Sentencing Act, which deals with the disposal of other pending charges against a person who has been found guilty of an offence.

New section 165E provides a definition of 'intellectually impaired' for the purposes of Chapter 7.

New section 165F defines 'lawyer' to mean a person entitled to practise as a practitioner under sections 7, 8 and 9 of the *Legal Profession Act 1993* (NI).

New section 165G provides that references to offences include related ancillary offences (attempt, incitement or conspiracy) unless the provision suggests expressly or impliedly the contrary.

Chapter 7, Division 2—Evidence in sexual and violent offence proceedings

Subdivision A—Preliminary

New section 166 defines ‘less serious violent offence’, ‘serious violent offence’ and ‘sexual offence’, for the purposes of Division 2 to include offences against a range of provisions of the Code. It also defines ‘sexual or violent offence’ and ‘sexual or violent offence proceeding’. ‘Similar act witness’ is defined as a witness who gives evidence that relates to an act committed on or in the presence of the witness by the accused, or who give tendency or coincidence evidence under the *Evidence Act 2004* (NI) (the Evidence Act). New section 166 also defines ‘violent offence’ and ‘witness with a disability’.

Subdivision B—Sexual and violent offence proceedings: general

New section 167 defines ‘complainant’ and ‘sexual offence proceeding’ for the purposes of Subdivision B. References to proceedings for an offence includes retrials and subsequent trials, which is generally consistent with the approach taken in the ACT and NSW.

New section 167A defines ‘violent offence proceeding’. References to proceedings for an offence includes retrials and subsequent trials, which is generally consistent with the approach taken in the ACT and NSW.

New section 167B sets out provisions allowing an accused to be screened from a witness in court. It applies to a complainant or similar act witness giving evidence in proceedings relating to sexual offences, serious violent offences, and less serious violent offences if the witness is a relevant person (see section 165A) in relation to the accused or the witness has a vulnerability that affects their ability to give evidence – for example, if they are likely to suffer severe trauma because of the nature of the alleged offence or if they are intimidated or distressed because of their relationship to the accused. The court is not bound by the rules of evidence for the purposes of satisfying itself that a witness has such a vulnerability. In addition, section 167B allows the court to order the arrangement of the courtroom to ensure that the witness cannot see, when giving their evidence, the accused person or any other person the court considers they shouldn’t see. However, the witness has to be visible to a range of court and judicial staff, the accused person and their lawyer, the prosecutor, and any person that the court has ordered should be screened from the complainant or similar act witness.

New section 167C makes provisions about the examination of witnesses by self-represented accused persons. The provisions apply to the complainant or similar act witness in the same way that section 167B does. The court is not bound by the rules of evidence for the purposes of satisfying itself that a witness has a vulnerability that affects their ability to give evidence. Section 167C also applies to a child or a witness with disability giving evidence for the prosecution in a sexual or violent offence proceeding.

The section provides that the witness must not be examined personally by the accused person, but may be examined by the accused person’s legal representative or, if the accused does not have a legal representative, a person appointed by the court. The section also requires the court to tell an accused person who is without representation, as soon as practicable, about the requirements of subsection 167C(4). Paragraph 167C(5)(b) captures the rule in *Browne v Dunn* with the effect that, if evidence relates to a disputed fact, an accused person must put that evidence to the first witness during cross examination before they can present evidence from another witness that contradicts the evidence of the first witness.

The section further specifies that if a person was appointed by the court under paragraph 167C(4)(b) to cross-examine the witness on behalf of the accused, that person may not independently provide the accused person legal or other advice and can only ask the questions of the witness that the accused has directed them to ask. A note is included in the section stating that the court must disallow questions or tell the witness not to answer them if the court considers them to be unduly annoying, harassing, intimidating, misleading etc. (as considered by subsection 41(1) of the Evidence Act).

In addition, the section, if the accused person did not have a legal representative and the court considered it in the interests of justice, allows the court to: adjourn the proceeding to give the accused person time to obtain a representative to conduct the examination, make an order that the person obtain legal representation, or make any other order that would secure such representation. Subsection 167C(8) provides that if the proceeding is a trial by jury, the court must tell the jury that the accused may not examine the witness themselves and that obtaining legal representation or having representation provided to examine the witness on the accused's behalf is a usual practice. The court is also required to direct the jury that, where an examination is not carried out by the accused person, the jury must not draw any inference against the accused person or give the evidence any more or less weight. These provisions do not remove the right of an accused person to represent themselves, but rather provide additional protections for witnesses who may otherwise be subject to questioning causing further trauma. By allowing the court to appoint a legal representative to examine a witness on behalf of the accused person, both the rights of vulnerable witnesses and of accused persons are protected.

Subsection 167C(9) defines 'examine' for the purposes of section 167C, to include cross-examine and re-examine.

New section 167D allows witnesses to have support persons in court while giving evidence. It applies to the complainant or a similar act witness giving evidence in a sexual offence proceeding, serious violent proceeding, or less serious violent offence proceeding if the witness was a relevant person in relation to the accused or if the court considered that the witness had a vulnerability affecting their ability to give evidence – for example, if the witness would suffer severe emotional trauma because of the nature of the alleged offence or be intimidated or distressed because of their relationship to the accused. The section also provides that the court is not bound by the rules of evidence for the purposes of considering a witness's vulnerability.

Subsection 167D(3) requires the court, on application by a party intending to call a witness, to order that the witness have a support person in the court close to and within their sight while they give evidence. The court may order that a witness have more than one support person, if it considers it to be in the interests of justice. The subsection provides that a support person would not be able to speak for the witness or otherwise interfere in the proceeding. In addition, the subsection provides that unless the court orders otherwise the support person must not be or be likely to be a witness in or party to the proceeding.

As with paragraph 167C(8)(c) above, the section provides that if a proceeding is a trial by jury then the court must tell the jury that the presence of a support person/s is a usual practice, and direct it not to draw any inferences against the accused or give the witness's evidence any more or less weight due to the presence of the support person.

New section 167E requires evidence to be given in closed court for sexual and serious violent offence proceedings and less serious violent offence proceedings where the court considers that the witness has a vulnerability that affects their ability to give evidence – for example, if the witness would suffer severe emotional trauma because of the nature of the alleged offence or is intimidated or distressed because of their relationship to the accused.

The section also provides that the court is not bound by the rules of evidence for the purposes of considering a witness's vulnerability.

The section allows the court to order that the court be closed to the public while all or part of the witness's evidence (including under cross-examination) is given. In ordering the court closed, the court is required to consider the wishes of the witness and the interests of justice. Ordering the court closed would not prevent the presence in the court of a person nominated by the witness, or of a person who attends the proceeding to prepare a news report (and who is authorised by their employer to attend for that purpose), when the witness gives evidence.

For the purposes of the section, a reference to a person giving evidence would include the person giving evidence by audiovisual link under Subdivision D, or playing an audiovisual recording or audio recording or tendering a transcript of the evidence under Subdivisions C, E and F.

New section 167F makes it an offence for a person to publish, in relation to a sexual offence proceeding, the complainant's name, or protected identity information about the complainant, or a reference or allusion that discloses the complainant's identity, or a reference or allusion from which the complainant's identity might reasonably be worked out. The penalty is imprisonment for 12 months or 60 penalty units, or both. This penalty is consistent with similar provisions in legislation such as subsections 110X(1) and (3) of the *Child Support (Registration and Collection) Act 1988* (Cth) and subsection 121(1) of the *Family Law Act 1975* (Cth), and takes into account the sensitivity of the information considered. The provision also allows, under section 167 of the Sentencing Act, a corporate multiplier to be applied to the penalty. In addition, subsection 167F(2) makes it a defence to an offence against that section if the person proves that the complainant had consented to the publication before the publication happened. This defence requires the defendant to discharge the legal burden of proof for an element of the defence.

The Commonwealth *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) outlines circumstances in which it will be appropriate for legislation to provide an offence-specific defence, being where:

- it is peculiarly within the knowledge of the defendant, or
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

In the circumstances where consent relates to a particular act, in this case publication of certain material, it follows that, if existing and relevant, consent ought to be in the knowledge of the person committing the act, in this case the defendant. If that consent was received it will be significantly less difficult and less costly for the defendant to prove the existence of the consent than for the complainant or the prosecution to disprove the existence of consent. In addition, given there is a presumption against the publication of sensitive information, the defendant would be or should be aware of the need for consent from a complainant and should be able to produce proof of such consent.

The Guide also indicates that creating an offence-specific defence in legislation may be justified where the matter in question is not central to the question of culpability. In relation to an offence referred to in Subsection 167(1), lack of consent is not something that is needed to establish the offence. This provides further justification for placing a legal burden, rather than an evidentiary burden, on the defendant in relation to the statutory defence set out at subsection 167F(2). The Australian Law Reform Commission has also acknowledged the appropriateness of placing a legal burden, as opposed to an evidentiary burden, on the

defendant where the matter is not an essential element of the offence, or is not central to culpability.

Subsection 167F(2) also protects a defendant, by limiting the criminal liability associated with the offence, noting that the offence itself is made out only by proving that a person published relevant material. In this way, the statutory defence provides protection to defendants where consent has been provided for the publication and greater certainty to defendants who may rely on having obtained a person's consent prior to publishing the material.

The subsection (and the penalty for an offence under the subsection) is similar to section 181U of the current Evidence Act, which also prohibits the publication of a complainant's identity without their consent. The ACT and most other Australian jurisdictions have similar prohibitions.

The offence protects the identity of complainants, and protects them from the potential harm and distress that identification may cause, as well as protect an accused person's right to a fair trial through preventing the publication of potentially prejudicial material and promoting the public interest in the administration of justice. Subsection 167F(3) defines 'protected identity information' as information about, or allowing someone to find out, the private, business, official or email address, or telephone number, of a person.

Subdivision C—Sexual and violent offence proceedings: audiovisual recording of police interview admissible as evidence

New sections 168 to 168D define a number of terms including 'sexual offence', 'violent offence', 'sexual offence proceeding', 'violent offence proceeding', 'witness', and 'audiovisual recording' for Subdivision C.

'Sexual offence proceeding' for the Subdivision, is defined as a proceeding for a sexual offence, or a sentencing proceeding for a person convicted or found guilty of a sexual offence (regardless of whether they are also convicted or found guilty of any other offence), or an appeal arising out of either of those proceedings. 'Convicted or found guilty' of an offence would cover circumstances where a jury has made a finding of guilt and a court has ordered a conditional release after it has found charges proven, but has not convicted a person. A conviction includes the complete orders made by a court after finding an accused person guilty of an offence including both the finding of guilt and the sentence passed. In some instances a court may have reached a finding of guilt yet not completed its official function by formally convicting and sentencing a person, because, for example, the court has ordered something else to happen in the interim. In other instances a court may convict a person by its actions when it finds a person guilty and proceeds to sentence the person without explicitly stating that the person is convicted.

New section 168E allows an audiovisual recording to be played at the hearing of a proceeding for the sexual or violent offence to which it relates and, if it is played, to be admitted as the witness's evidence in chief in that proceeding as if the witness had given that evidence at the hearing in person. The court is able to refuse to admit any or all of the recording. The witness would not be able to be present in the courtroom, or visible to anybody in the courtroom by audiovisual link, when the recording is played at the hearing. The provision is subject to section 168J (admissibility of audiovisual recordings).

New section 168F applies if the prosecutor in a sexual or violent offence proceeding intends to tender an audiovisual recording as evidence. The prosecutor is required to give written notice that they intend to tender the audiovisual recording and provide a copy of the

transcript of the recording to the accused person or the accused person's lawyer. The notice is required to state each audiovisual recording the prosecutor intends to tender, that the accused person and their lawyer are entitled to see and listen to each recording at a police station or somewhere else decided by the police officer in charge in Norfolk Island, and the person responsible for arranging access to each recording. The notice is also required to identify the responsible person either by their name or by stating the occupant of a position.

New section 168G requires the accused person or their lawyer to give written notice to the responsible person to have access to an audiovisual recording. That notice is required to state the name of the accused person and the name of their lawyer and each individual recording to which they seek access.

New section 168H applies if the accused person or their lawyer gives notice under section 168G. It requires the responsible person to give access as soon as practicable after receiving the notice to the person seeking that access. The person who gave notice may have access to an audiovisual recording more than once; however, they must not be given or take a copy of the recording.

New section 168J determines the admissibility of an audiovisual recording in a sexual or violent offence proceeding. The recording is only admissible if notice is given under section 168F, a copy of the transcript from the recording is given to the accused person or their lawyer a reasonable time before the start of the hearing of the proceeding, and the accused person and their lawyer are given a reasonable opportunity to see and listen to the recording. However, even if the prosecutor fails to give notice under section 168F, the audiovisual recording is still admissible if a copy of the transcript is given to the accused person or their lawyer a reasonable time before the start of the hearing of the proceeding, the accused person (or their lawyer) is given a reasonable opportunity to see and listen to the recording, and the court considers it to be in the interests of justice to admit the recording. Subsection 168J(3) provides that section 168J does not prevent the parties consenting to admitting an audiovisual recording into evidence.

New section 168K applies if a sexual or violent offence proceeding was a trial by jury, and an audiovisual recording was admitted in evidence in the proceeding. The provision requires the court to tell the jury that admitting an audiovisual recording is a usual practice and that the jury must not draw any inference against the accused person, or give the evidence more or less weight, because the evidence is given in that way. In addition, subsection 168K(3) provides that the court may order a copy of the transcript of the recording be made available to the jury, if it considers that it would help the jury's understanding of the evidence.

New section 168L provides that if an audiovisual recording was admitted in evidence in a sexual or violent offence proceeding, the court may order a transcript of that recording to be made available to the court.

New section 168M creates an offence around the unauthorised possession, supplying, or use of audiovisual recordings. It provides that a person commits an offence if they possess, supply or offer to supply to another person, or play, copy or erase (or allow someone else to do so) an audiovisual recording without authority. The penalty for these offences is imprisonment for 12 months or 60 penalty units, or both. This penalty is consistent with comparable provisions in the EMP Act and those in other jurisdictions, including the *Crimes Act 1958* (Vic), for similar offences. The offence protects complainants and witnesses (including their identity), as well as protect an accused person's right to a fair trial through preventing the publication of potentially prejudicial material and, further, promotes the public interest in the administration of justice.

Subsection 168M(2) provides that a person would have 'authority' in relation to an audiovisual recording only if they possess or do something with it in connection with the

investigation of, or a proceeding for, an offence in relation to which the recording is prepared; or in connection with a re-hearing, retrial or appeal in relation to such a proceeding, including a proceeding in which the recording is or may be admitted in evidence under Subdivision E or F.

Subdivision D—Sexual and violent offence proceedings: giving evidence by audiovisual link

New sections 169 to 169B include a number of definitions for the purposes of Subdivision D, including defining ‘give evidence in a proceeding by audiovisual link’, ‘proceeding’, ‘complainant’, ‘sexual offence proceeding’ and ‘violent offence proceeding’.

New section 169C sets out the proceedings to which Subdivision D relates. Those proceedings are sexual offence proceedings, violent offence proceedings in relation to serious violent offences, and violent offence proceedings in relation to less serious violent offences if the complainant or similar act witness is a relevant person in relation to the accused person, or if the court considers that the witness has a vulnerability that affects their ability to give evidence (for example, if the witness would be likely to suffer severe emotional trauma because of the nature of the alleged offence or the witness was intimidated or distressed because of their relationship to the accused person). Subsection 169(2) also provides that it would not matter if the evidence was being provided or was provided on oath or otherwise.

New section 169D requires complainants or similar act witnesses to give their evidence by audiovisual link. The section provides that, if a complainant or similar act witness is to give evidence in a proceeding, the proceeding is to be heard in a courtroom, and the courtroom and an external place are connected by an audiovisual link, then the complainant’s (or similar act witness’s) evidence must be given by that link unless the court orders otherwise. The court is only be able to make such an order if it was satisfied that the complainant or similar act witness prefers to give evidence in the courtroom, or that if the order was not made, the proceeding may be unreasonably delayed or there is a substantial risk that the court would not be able to ensure fair process.

The section also provides that while the complainant or similar act witness was at the external place to give evidence, that place is taken to be part of the courtroom (except for the purposes of subsection 168E(3)). In addition, subsection 169D(5) imposes some restrictions that apply while the complainant or similar act witness is at the external place to give evidence.

New section 169E requires that evidence given in a sexual offence proceeding by a complainant or similar act witness, by audiovisual link, be recorded as an audiovisual recording. If a court made an order under subsection 169D(2) in a sexual offence proceeding (ordering that the complainant or similar act witness give evidence in the courtroom), that evidence may be recorded as an audiovisual recording.

New section 169F relates to consequential orders that the court could make if complainants or similar act witnesses give evidence in a proceeding by audiovisual link. For example, the section provides that the court may make any order it considers appropriate to ensure the proceeding is conducted fairly.

The section allows the court to make any other order it considers appropriate, including, for example: who may be with or must not be with the complainant or similar act witness at the external place; who in the courtroom is to be able or must not be able to be heard, or seen and heard, by the complainant or similar act witness and people in the external place with the complainant or similar act witness; who in the courtroom is to be able to see and hear the complainant and similar act witness and anyone else in the external place with the complainant or similar act witness; or how the audiovisual link is to operate. The court is

also able to make an order excluding a person from the other place while the complainant or similar act witness is giving evidence. The court is also able to direct that an order under section 169F apply only to a particular part of the proceeding.

New section 169G allows the court to make an order under Subdivision D on its own initiative or on the application of a party to the proceeding, the complainant, or a similar act witness, Subsection 169G(2) allows the court to make orders under Subdivision D without being bound by the rules of evidence and to inform itself as it considers appropriate.

New section 169H requires the judge, if a proceeding is before a jury, to warn the jury that it should not draw any inferences against an accused person in a proceeding because the complainant or similar act witness gives evidence by audiovisual link.

Subdivision E—Special provisions relating to retrials of sexual offence proceedings

New section 170 inserts a number of definitions, including ‘accused person’, ‘complainant’, ‘original evidence’, ‘original proceedings’ and ‘prosecutor’.

New section 170A deals with the admission of the evidence of the complainant in new trial proceedings.

Subsection 170A(1) provides that if a person is convicted of a sexual offence and on appeal against that conviction a new trial is ordered, the prosecutor may tender a record of the original evidence of the complainant, as evidence in the new trial proceedings. This prevents re-traumatising the complainant by requiring them to give the same evidence multiple times, particularly as the offence becomes more distant.

Subsection 170A(3) deals with the admissibility of records of the original evidence of complainants in new trial proceedings. The subsection ensures that despite anything to the contrary in the Evidence Act, a record of the original evidence of the complainant is admissible in new trial proceedings under certain conditions.

Subsection 170A(4) specifies that the hearsay rule in the Evidence Act would not prevent the admission of a record of the original evidence of the complainant under Subdivision E, or the use of that record, to prove the existence of a fact that the complainant intended to assert by a representation made in the original evidence.

Subsection 170A(5) provides that the court hearing the new trial proceedings would not have any discretion to decline to admit a record of the original evidence of a complainant if it is admissible under Subdivision E. However, subsection 170A(6) allows the court to give directions requiring that record to be altered or edited for the purpose of removing any statements that would not have been admissible if the original evidence of the complainant had been given in person before the court hearing the new trial proceedings in accordance with the usual rules and practice of the court. Subsection 170A(7) further provides that a record of the original evidence of the complainant may be altered or edited in accordance with an agreement between the prosecutor and the accused person and their lawyer (if any). This covers, for example, circumstances where a particular piece of information was agreed to be unnecessary or if a fact was agreed on that was previously disputed. Subsection 170A(8) applies these provisions in respect of proceedings for a new trial in which a person is charged with a sexual offence, whether or not they are charged with only that offence alone or together with any additional or alternative offences and whether or not the person is liable, on the charge of the offence, to be found guilty of any other offence.

New section 170B provides that, if a record of the original evidence of the complainant (or any part of that record) is admitted in proceedings under Subdivision E, the complainant is not compellable to give further evidence in the proceedings, despite anything to the contrary

in the CP Act or the Evidence Act, including for the purposes of examination in chief, cross-examination or re-examination by or at the request of the accused person or their lawyer.

New section 170C allows the complainant to choose to give further oral evidence in the proceedings, with the leave of the court hearing the proceedings. Subsection 170C(2) requires that the court only give its leave if it is satisfied, on application by one of the parties to the proceedings, that it was necessary for the complainant to give further oral evidence to clarify any matters relating to the complainant's original evidence, to canvas information or material that has become available since the original proceedings, or if it is in the interests of justice. Subsection 170C(3) provides that the court is to ensure that the complainant is only questioned, by any party to the proceedings, about matters that are relevant to the reasons the court gave leave. Subsection 170C(4) further states that subject to subsection 170C(3), if a complainant gives any further oral evidence under section 170C, they are compellable (for the prosecution or accused person) to give evidence (despite section 170B).

New section 170D deals with the form in which a record of original evidence of a complainant is to be tendered. Subsection 170D(1) provides that the record tendered by the prosecutor must be the best available record, or be comprised of the best available records, of the original evidence of the complainant, and that the record/s must be properly authenticated. Subsections 170D(2) and (3) define 'best available record' of the evidence. Subsection 170D(4) outlines what it means for a record to be 'properly authenticated'.

New section 170E prohibits the accused person or their lawyer (if any) from being entitled to possession of an audiovisual or audio recording of the original evidence of the complainant – or a copy of it – that the prosecutor tenders or proposes to tender under Subdivision E. However, subsection 170E(2) provides that the accused and their lawyer (if any) are to be given reasonable access to the recording to enable them to listen to it and, if the record is an audiovisual recording, view it. Subsection 170E(3) provides that this may require access to be given on more than one occasion.

New section 170F relates to exhibits tendered on the basis of the original evidence of the complainant. Subsection 170F(1) has the effect that if an exhibit or exhibits were tendered – and were admissible – in the original proceedings on the basis of the complainant's original evidence, those exhibits are also admissible in the new trial proceedings, as if the original evidence of the complainant had been given orally before the court hearing the new trial proceedings in accordance with the usual rules and practice of the court. Subsection 170F(2) provides that section 170F does not prevent any other exhibits tendered in the original proceedings from being tendered and admitted in the new trial proceedings in accordance with the usual rules and practice of the court hearing the new trial proceedings.

Subdivision F—Special provisions relating to subsequent trials of sexual offence proceedings

Subdivision F contains a note explaining that while Subdivision E applies in relation to a retrial of proceedings following a conviction for a sexual offence, Subdivision F applies when a trial for a sexual offence has been discontinued and a new trial listed.

New section 171 defines certain terms for the purposes of the Subdivision.

New section 171A relates to the admission of evidence of complainants in new trial proceedings. Subsection 171A(1) provides that if the trial of an accused person is discontinued following the jury being discharged because the jurors could not reach a verdict, or for any other reason, and as a result a new trial is listed, the prosecutor may tender as evidence in the new trial proceedings a record of the original evidence of the complainant. Subsection 171A(2) defines the 'original evidence' of the complainant as all evidence given by the complainant in the discontinued trial (the 'original proceedings'), including the evidence given by the complainant on examination in chief in the original

proceedings and any further evidence given in cross- or re-examination in those proceedings.

Subsection 171A(3) provides that despite anything to the contrary in the Evidence Act or any other Act or law, a record of the original evidence of the complainant is admissible in the new trial proceedings under certain conditions.

Subsection 171A(4) provides for an exception to the hearsay rule for the admission of a record of the original evidence of the complainant, or its use to prove the existence of a fact that the complainant intended to assert by a representation made in the original evidence.

Subsection 171A(5) provides that despite subsection 171A(3), the court hearing the new trial proceedings may decline to admit a record of the original evidence of the complainant if, in the court's opinion, the accused would be unfairly disadvantaged by the admission of the record, having regard to certain matters.

Subsection 171A(6) allows the court, if it allowed a record of the original evidence of the complainant to be admitted, to give directions requiring the record to be altered or edited for the purpose of removing any statements that would be inadmissible had the complainant given the evidence orally before the court hearing the new trial proceedings in accordance with the usual rules and practice of the court. Subsection 171A(7) further provides that the record of the original evidence of the complainant may be altered or edited in accordance with an agreement between the prosecutor and the accused person or their lawyer (if any).

Subsection 171A(8) applies Subdivision F in respect of proceedings for a new trial in which a person is charged with a sexual offence, whether or not they are charged with that offence alone or together with any additional or alternative offences and whether or not the person is liable, on the charge of the offence, to be found guilty of any other offence.

New section 171B provides that, if a record of the original evidence of the complainant (or any part of that record) is admitted in proceedings under Subdivision F, the complainant is not compellable to give further evidence in the proceedings, despite anything to the contrary in the CP Act or the Evidence Act, unless the court is satisfied that it is necessary for the complainant to give further evidence to clarify any matters relating to the original evidence of the complainant, to canvas information or material that has become available since the original proceedings, or in the interests of justice. Subsection 171B(1) would apply despite anything to the contrary in the CP Act or the Evidence Act.

Subsection 171B(3) requires the court to ensure that the complainant is only questioned – by any party to the proceedings – about matters that are relevant to the matters in subsection 171B(1) (clarification, new information or material, or in the interests of justice). Subsection 171B(4) provides that subject to subsection 171B(3), a complainant is compellable for the prosecution or the accused person to give evidence, if the complainant gives any further oral evidence under section 171B.

New section 171C allows a complainant to choose to give further oral evidence in the proceedings with the leave of the court hearing the proceedings, even if a record of their original evidence (or any part of the record) is admitted in proceedings under Subdivision F. Subsection 171C(2) provides that the court is to grant leave only if it is satisfied, on application by one of the parties to the proceedings, that it is necessary for the complainant to give further oral evidence to clarify any matters relating to their original evidence, to canvas information or material that has become available since the original proceedings, or in the interests of justice.

Subsection 171C(3) requires the court to ensure that the complainant is only questioned – by any party to the proceedings – about matters that are relevant to the reasons the court gave leave. Subsection 171C(4) further states that subject to subsection 171C(3), if a complainant

gives any further oral evidence under the section, they are compellable (for the prosecution or accused person) to give evidence.

New section 171D provides that sections 170D to 170F apply for the purposes of Subdivision F with such modifications as necessary.

Chapter 7, Division 3—Evidence in domestic violence proceedings
Subdivision A—Definitions for this Division

Subdivision A contains definitions for the purposes of Division 3, including ‘domestic violence offence’, ‘domestic violence offence proceeding’, ‘complainant’, and ‘recorded statement’.

Subsection 172C(2) requires a police officer, before making a recorded statement, to tell the complainant that the recorded statement may be used in evidence at a hearing, and that if it is, the complainant may be called to the hearing in person to give evidence under cross-examination, and that the complainant does not have to consent to the recording.

Subsection 172C(3) defines ‘police officer’ for the purposes of section 172C.

Subdivision B—Evidence may be given in closed court

New section 173 allows complainants, if the court considers that they have a vulnerability that affects their ability to give evidence in a domestic violence offence proceeding (because of their circumstances or the circumstances of the proceeding), to give evidence in closed court. For example, a court may consider a complainant has a vulnerability if they are likely to suffer severe emotional trauma because of the nature of the alleged offence, or if they are intimidated or distressed because of the complainant’s relationship to the accused person.

Subsection 173(2) provides that the court is not bound by the rules of evidence and may inform itself as it considers appropriate.

Subsection 173(3) allows the court to order that it be closed to the public while all or part of the complainant’s evidence (including under cross-examination) is given.

Under subsection 173(4), in deciding whether to order the court closed, the court is required to consider whether the complainant wants to give evidence in open court, and whether it is in the interests of justice that the complainant give evidence in open court.

Subsection 173(5) provides that an order to close the court would not stop a person nominated by the complainant, or a person who attends the proceeding to prepare a news report of the proceeding (and who is authorized to attend for that purpose by their employer), from being in court when the complainant gives evidence. Subsection 173(6) provides that a reference to a person giving evidence includes the person giving evidence by playing a recorded statement under Subdivision C.

Subdivision C—Recorded statement of police interview admissible as evidence: domestic violence offence proceedings

New section 174 sets out the requirements for recorded statements.

New section 174A allows a recorded statement to be played at the hearing of a proceeding for the domestic violence offence to which it relates, and, if it is played at the hearing, be admitted as all or part of the complainant’s evidence in chief in the proceedings, as if the complainant gave the evidence at the hearing in person. Subsection 174A(2) allows a court to refuse to admit all or any part of the recorded statement if the court considers that it is in the interests of justice to do so. Subsection (3) allows the complainant to choose not to be present in the courtroom while the court is viewing or listening to the recorded statement. Subsection 174A(4) provides that if the complainant is giving evidence by audiovisual link from an external place under Subdivision D of Division 2, the complainant must not be

visible or audible to anyone in the courtroom by closed-circuit television or similar technology while the court is viewing or listening to the recorded statement. Subsection 174A(5) confirms that, even if a recorded statement is admitted as part of a complainant's evidence in chief in a proceeding, the complainant may still give further evidence in chief. Subsection 174A(6) makes section 174A subject to section 174F (recorded statement—admissibility).

New section 174B provides that the hearsay and opinion rules do not prevent the admission or use of evidence of a representation in the form of a recorded statement only because it is in that form. Subsection (2) define 'hearsay rule' and 'opinion rule' with reference to the Evidence Act.

New section 174C ensures that the validity of a proceeding is not affected by the failure to record a representation in accordance with Subdivision C, or give evidence in accordance with Division 3.

New section 174D deals with the requirement to provide an accused person with a copy of a recorded statement.

New section 174E applies to an unrepresented accused person. The section applies if a recorded statement has been made in relation to a domestic violence offence that is the subject of a proceedings and the accused person is not represented by a lawyer in the proceeding. Subsection 174E(2) requires that an accused person be given an audio copy of the recorded statement as soon as practicable about the proceeding is commenced. Subsection 174E(3) further provides that, if it is reasonably practicable, the accused person must be given an opportunity to view a recorded statement that is in the form of a video recording at a police station on at least one of the occasions listed. Subsection 174E(4) states that if compliance with subsection 174E(3) is not reasonably practicable, the accused person must be given the opportunity to view the recorded statement on a day on which proceedings relating to the offence are being held.

New section 174F relates to the admissibility of a recorded statement.

New section 174G provides for the accused person to be given an audio copy of the recorded statement in certain circumstances.

New section 174H applies if a domestic violence offence proceeding is a trial by jury, and a recorded statement is admitted in evidence in the proceeding. Subsection 174H(2) requires the court to tell the jury that admission of a recorded statement is a usual practice, and that the jury must not draw any inference against the accused person, or give the evidence more or less weight, because the evidence is given in that way. Subsection 174H(3) allows the court to order that the transcript of the recorded statement be made available to the jury, if the court considers that it would be likely to help the jury's understanding of the evidence.

New section 174J provides that it is an offence to publish, without authority, a recorded statement. The penalty is imprisonment for 12 months or 60 penalty units, or both. This penalty is generally consistent with comparable provisions in the *Criminal Procedure Act 1986* (NSW) and the EMP Act, as well as similar laws in other jurisdictions. The offence protects complainants, including their identity, as well as protect an accused person's right to a fair trial by preventing the publication of potentially prejudicial material and promoting the public interest in the administration of justice.

Subsection 174J(2) outlines the circumstances in which a person has 'authority' to publish a recorded statement. Subsection 174J(3) defines 'person' and 'publish' for the purposes of section 174J.

Subdivision D—Recorded statement of police interview admissible as evidence: application for apprehended domestic violence order

New section 175 allows recorded statements to be admitted as evidence in applications for apprehended domestic violence orders in certain circumstances.

Items 59H to 59S of Schedule 1 - Other amendments to Chapter 7

New item 59H inserts, after ‘convicted’ (wherever occurring) ‘or found guilty’ in paragraph 177(2)(c) of the CP Act. This has the effect of making the language in the CP Act consistent with the provisions and terminology of the ACT legislation on which the new provisions of the CP Act are based.

New item 59K inserts, after ‘convicted’, ‘or found guilty’ in paragraph (b) of the definition of ‘criminal proceeding’ in section 183 of the CP Act. This has the effect of making the language in the CP Act consistent with the provisions and terminology of the ACT legislation on which the new provisions of the CP Act are based.

New item 59M repeals the note to the definition of ‘harm’ in section 183 of the CP Act. It is appropriate to repeal it because section 15AD of the *Acts Interpretation Act 1901* (Cth), as applied by the *Interpretation Act 1979* (NI), has a different rule about examples.

New item 59P repeals the notes to subsections 184(4), 186(2) and 187(3) to the same effect as above, to ensure consistency with the *Acts Interpretation Act 1901* (Cth), which applies a different rule about examples.

New item 59S repeal Division 7 of Chapter 7 of the CP Act. That Division is no longer required due to the insertion by the Ordinance of provisions modelled on the EMP Act.

Item 59X of Schedule 1 – Subsection 215(3)

This item replicates an existing provision that repeals subsection 215(3) of the CP Act. This is a change to the grouping of amendments only and has no substantive effect.

Schedule 4—Sentencing

Norfolk Island Continued Laws Ordinance 2015

Schedule 4 amends the Continued Laws Ordinance in order to amend the Sentencing Act to expressly prevent a sentencing court in a child sexual offence proceeding from taking the convicted person's good character into account as a mitigating factor, where that good character facilitated the commission of the offence. Currently, the factors to which a Norfolk Island court must have regard when sentencing an offender include the offender's character, and the presence of any aggravating or mitigating factors concerning the offender. The amendments in the Ordinance make the Norfolk Island law more consistent with that of NSW and are consistent with recommendations from the Criminal Justice Report of the Royal Commission into Institutional Responses to Child Sexual Abuse.

The Ordinance also amends the Sentencing Act to limit the availability of home detention orders in the sentencing of persons convicted of a sexual or violent offence, or persons at risk of committing a sexual or violent offence. Currently, Norfolk Island law allows a sentencing court to make a home detention order, which can last up to 12 months, as a substitute for imprisonment. It is only available when the sentencing court has sentenced the offender to a term of imprisonment. The amendments, to restrict the availability of home detention orders in certain circumstances, align Norfolk Island sentencing options more closely with those available in NSW.

Item [1] – After item 297AA of Schedule 1

Item 297AB of Schedule 1 – Paragraph 5(2)(f)

This item amends paragraph 5(2)(f) of the Sentencing Act by inserting 'subject to subsection (4),' before 'the offender's'. Subsection 5(2) deals with the factors the court must take into account in sentencing and specifically deals with the offender's character, age and intellectual capacity.

Item 297AC of Schedule 1 – At the end of section 5

This item adds a new subsection (4) to section 5 of the Sentencing Act. Subsection 5(4) provides that in sentencing an offender for an offence against Part 3.6, 3.7, or 3.10 of the Code (which relate to sexual offences, child pornography and sexual servitude), the court must not have regard to the good character of the offender as a mitigating factor in certain circumstances where that factor facilitated the offence.

Currently, paragraphs 5(2)(f) and (g) of the Sentencing Act set out factors to which a Norfolk Island court must have regard when sentencing an offender, including the offender's character, and the presence of any aggravating or mitigating factors concerning the offender. The measure aligns Norfolk Island sentencing law more closely with that of NSW, and implements recommendation 74 of the Criminal Justice report of the Royal Commission into Institutional Responses to Child Sexual Abuse, which recommended that state and territory governments 'introduce legislation to provide that good character be excluded as a mitigating factor in sentencing for child sexual abuse offences where that good character facilitated the offending'. The Australian Government, in its response to the Royal Commission's report, accepted this recommendation, and a Bill is currently before Parliament (the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017). The Bill, amongst other things, makes it an aggravating factor in sentencing if a federal offender used their standing in the community to assist in the commission of an offence.

In NSW legislation, such a provision already exists – an offender’s good character must not be taken into account as a mitigating factor in sentencing for a child sexual offence where that good character was of assistance to the offender in the commission of the offence. The amendments to the Sentencing Act reflects the NSW legislative provisions.

Item 297AH of Schedule 1 – Subsection 43(1)

This item amends subsection 43(1) of the Sentencing Act in relation to home detention orders. The effect of this amendment is to provide that a sentencing court may not make a home detention order where the offender is being sentenced for certain categories of offences, including a ‘sexual offence’ or ‘violent offence’ within the meaning of the Sentencing Act, or where the offender is a person whom the court considers likely to commit a sexual offence or violent offence while the order is in force. Like a number of other jurisdictions in Australia, Norfolk Island law currently authorises a sentencing court to make a home detention order, which is a substitute for – not an alternative to – imprisonment. Sentencing options in Norfolk Island need to be adapted to the particular circumstances in Norfolk Island; however, it is inappropriate for home detention to be available for certain categories of offences, including sex offences, child sex offences and some violent offences, or in circumstances where the offence was committed against the person with whom the convicted person would reside under the home detention order. The amendment makes the law in Norfolk Island more consistent with that in NSW, where home detention orders are not available for offenders being sentenced for sexual assaults on adults or children, or child sexual offences. The *Crimes (Sentencing Procedure) Act 1999* (NSW) governs the use of the orders in NSW (home detention orders per se are not available in the ACT).

Item [2] – After item 297A of Schedule 1

Item 297H of Schedule 1 – Clause 2 of Schedule 2

This item amends Clause 2 of Schedule 2 to the Sentencing Act to omit ‘or 120’ and substitute ‘, 120, 121A or 121B’. Clause 2 of Schedule 2 specifies offences that are sexual offences for the purposes of the Sentencing Act. The amendment includes, in the list of sexual offences, procuring a young person for a child sex offence (section 121A of the Code) and grooming a person for a child sex offence (s121B of the Code).

Schedule 5—Consequential and technical amendments

Schedule 5 to the Ordinance amends a number of continued laws, namely the *Adoption of Children Act 1932* (NI), the *Child Welfare Act 2009* (NI), the *Court of Petty Sessions Act 1960* (NI), the *Environment Act 1990* (NI), the *Evidence Act 2004* (NI), the *Firearms and Prohibited Weapons Act 1997* (NI), the *Mental Health Act 1996* (NI) and the *Summary Offences Act 2005* (NI). These amendments omit redundant references to the *Crimes Act 1900* (NSW), as previously applied to Norfolk Island, or substitute references to that Act with comparable or equivalent provisions in the *Criminal Code 2007* (NI) or the Criminal Procedure Act, and make a number of other technical and consequential amendments, including consequential amendments arising from the commencement of the NSW AVO laws.

Part 1—Amendments affecting the Adoption of Children Act 1932 (Norfolk Island)

Norfolk Island Continued Laws Ordinance 2015

Item [1] — After item 2A of Schedule 1

This item inserts new item 2AA into Schedule 1 to the Continued Laws Ordinance, which amends subsection 9(5) of the *Adoption of Children Act 1932* (NI) by omitting some redundant references to the Crimes Act. The Code repealed most of the Crimes Act in its application to Norfolk Island, however, the references to that Act in the *Adoption of Children Act 1932* (NI) were not removed at that time. This amendment addresses that oversight.

Part 2—Amendments affecting the Child Welfare Act 2009 (Norfolk Island)

Norfolk Island Continued Laws Ordinance 2015

Item [2] — After item 31 of Schedule 1

This item inserts new item 31AAA into Schedule 1 to the Continued Laws Ordinance, which amends subparagraph (c)(iv) of the definition of ‘abuse’ in subsection 33(1) of the CW Act. The amendment substitutes a reference to a domestic violence offence within the meaning of section 3 of the DV Act with a reference to a domestic violence offence as defined in section 11 of the CDPV Act. This amendment is consequential to the removal of the suspension of the CDPV Act and the repeal of the DV Act by Schedule 1 to the Ordinance.

Item [3] — Before item 31E of Schedule 1

This item inserts new items 31DE to 31DG into Schedule 1 to the Continued Laws Ordinance, which makes a number of consequential amendments to the CW Act.

Item 31DE of Schedule 1 – Section 59 (definition of *final care and protection order*)

This item amends the definition of ‘final care and protection order’ in section 59 of the CW Act by omitting a redundant reference to ‘a protection order’. This amendment is consequential to the removal of the suspension of the CDPV Act and the repeal of the DV Act by Schedule 1 to the Ordinance. Apprehended violence orders made in the course of an application for a care and protection order under the CW Act is made pursuant to section 40A of the CDPV Act.

Item 31DF of Schedule 1 – Section 59

This item repeals the definitions of ‘final protection order’ and ‘interim protection order’ in section 59 of the CW Act. These definitions refer to the DV Act and their repeal is consequential to the repeal of the DV Act and the removal of the suspension of the CDPV Act.

Item 31DG of Schedule 1 – Sections 70 to 73

This item repeals sections 70 to 73 of the CW Act, which deal with the making of final and interim protection orders. Repeal of these provisions is consequential to the removal of the suspension of the CDPV Act and the repeal of the DV Act.

Item [4] — After item 31K of Schedule 1

This item inserts new item 31KA into Schedule 1 to the Continued Laws Ordinance, which amends subsection 123(7) of the CW Act by omitting a redundant reference to ‘a protection order’. This amendment is consequential to the removal of the suspension of the CDPV Act and the repeal of the DV Act.

Item [5] —After item 32AA of Schedule 1

This item inserts new item 32AAA into Schedule 1 to the Continued Laws Ordinance, which amends subsection 170(4) of the CW Act to remove redundant references to protection orders and the DV Act.

Item [6] —Item 37 of Schedule 1

This item repeals item 37 and insert new items 37 and 37AA into Schedule 1 to the Continued Laws Ordinance, which amends the CW Act.

Item 37 of Schedule 1 – Dictionary (note 3)

This item repeals note 3 to the Dictionary in the CW Act. That note refers to definitions in the Norfolk Island Act that have been repealed.

Item 37AA of Schedule 1 - Dictionary

This item repeals from the Dictionary in the CW Act the redundant definitions of ‘final protection order’ and ‘interim protection order’. Repeal of these provisions is consequential to the removal of the suspension of the CDPV Act and the repeal of the DV Act.

Part 3—Amendments affecting the Court of Petty Sessions Act 1960 (Norfolk Island)

Norfolk Island Continued Laws Ordinance 2015

Item [7] — Item 43AL of Schedule 1

This item repeals and substitutes item 43AL and inserts new items 43ALA and 43ALB into Schedule 1 to the Continued Laws Ordinance, which amends the *Court of Petty Sessions Act 1960* (NI). The *Death Penalty Abolition Act 1973* abolished the death penalty for all offences under territory laws. These amendments remove some redundant references to capital punishment in the *Court of Petty Sessions Act 1960* (NI) and make related consequential amendments.

Item 43AL of Schedule 1 – Subsection 4(1)

This item reinserts the existing definitions of ‘applied law’ and ‘audio link’ into subsection 4(1) of the *Court of Petty Sessions Act 1960* (NI). This is a change relating to the order of existing amendments and has no substantive effect.

Item 43ALA of Schedule 1 – Subsection 4(1) (definition of *capital offence*)

This item repeals the definition of ‘capital offence’ in subsection 4(1) of the *Court of Petty Sessions Act 1960* (NI). This amendment is consequential to the removal of references to capital punishment elsewhere in that continued law.

Item 43ALB of Schedule 1 – Subsection 4(1)

This item reinserts the existing definitions of ‘continued law’ and ‘video link’ into subsection 4(1) of the *Court of Petty Sessions Act 1960* (NI). This is a change relating to the order of existing amendments and has no substantive effect.

Item [8] — After item 43AP of Schedule 1

This item inserts new items 43AT, 43AU and 43AW into Schedule 1 to the Continued Laws Ordinance, which amends the *Court of Petty Sessions Act 1960* (NI). The *Death Penalty Abolition Act 1973* abolished the death penalty for all offences under territory laws. These amendments remove some redundant references to capital punishment in the *Court of Petty Sessions Act 1960* (NI) and make related consequential amendments.

Items 43AT and 43AU of Schedule 1 – Paragraph 45(a)

These items omit the references to capital punishment in paragraph 45(a) of the *Court of Petty Sessions Act 1960* (NI) and insert a reference to life imprisonment.

Item 43AW of Schedule 1 – Subsection 59(1)

This item omits a reference to capital punishment in subsection 59(1) of the *Court of Petty Sessions Act 1960* (NI).

Part 4—Amendments affecting the Environment Act 1990 (Norfolk Island)

Norfolk Island Continued Laws Ordinance 2015

Item [9] — After item 88 of Schedule 1

This item inserts new items 88K and 88L into Schedule 1 to the Continued Laws Ordinance, which repeals subsection 134(2) of the *Environment Act 1990* (NI) and makes a consequential amendment to subsection 134(1) of that Act. Subsection 134(2) contains a reference to a provision of the *Criminal Law Act 1960* (NI) that does not exist.

Part 5—Amendments affecting the Evidence Act 2004 (Norfolk Island)

Norfolk Island Continued Laws Ordinance 2015

Item [10] — After item 97 of Schedule 1

This item inserts new items 97AAA to 97AAM into Schedule 1 to the Continued Laws Ordinance, which amends the Evidence Act.

Item 97AAA of Schedule 1 – Paragraph 19(a)

This item amends paragraph 19(a) of the Evidence Act by omitting some redundant references to the *Criminal Law Act 1960* (NI) and substituting the appropriate references to the Code. The effect of the amendment is that section 18 of the Evidence Act, which deals with the compellability of spouses and others in criminal proceedings, does not apply to proceedings for a range of offences against the person, under the Code, where the relevant offence is against a person under the age of 16 years.

Item 97AAB of Schedule 1 – Paragraph 19(b)

This item amends paragraph 19(b) of the Evidence Act by omitting the reference to section 12 of the repealed *Child Welfare Act 1937* (NI) and substituting the appropriate reference to section 174 or 175 of the CW Act. The effect of the amendment is that section 18 of the Evidence Act, which deals with the compellability of spouses and others in criminal proceedings, does not apply to proceedings for those child welfare offences.

Item 97AAC of Schedule 1 – Paragraph 19(c)

This item repeals and substitutes a new paragraph 19(c) of the Evidence Act. The effect of the amendment is that section 18 of the Evidence Act, which deals with the compellability of spouses and others in criminal proceedings, does not apply to proceedings for a domestic violence offence, as defined in section 11 of the CDPV Act. This amendment is consequential to the removal of the suspension of the CDPV Act and the repeal of the DV Act by Schedule 1 to the Ordinance.

Item 97AAH of Schedule 1 – Subsection 181AR(2) (note)

This item amends the note to subsection 181AR(2) of the Evidence Act by substituting the redundant reference to the repealed Part 7 of the Crimes Act with a reference to Chapter 7 of the Code, which now contains the relevant offences relating to perjury and giving of false testimony in judicial proceedings. The Code repealed most of the Crimes Act in its application to Norfolk Island.

Item 97AAL of Schedule 1 – Section 181R (definition of *Crimes Act*)

This item repeals the redundant definition of ‘Crimes Act’ in section 181R of the Evidence Act. The Code repealed most of the Crimes Act in its application to Norfolk Island.

Item 97AAM of Schedule 1 – Section 181AR (definition of *prescribed sexual offence*)

This item repeals and substitutes a new definition of ‘prescribed sexual offence’ in section 181R of the Evidence Act, which substitutes the references to offences under the Crimes Act with the comparable or equivalent offences contained in the Code. The effect of this amendment is that a ‘prescribed sexual offence’ is defined for the purposes of Part 4A.3 of the Evidence Act with reference to the appropriate offences under Norfolk Island law, namely Part 3.6 of the Code, which deals with sexual offences.

Part 6—Amendments affecting the Firearms and Prohibited Weapons Act 1997 (Norfolk Island)

Norfolk Island Continued Laws Ordinance 2015

Item [11] — Before item 97AA of Schedule 1

This item inserts new items 97AAO to 97AAY into Schedule 1 to the Continued Laws Ordinance, which amends the Firearms Act. These amendments are consequential to the removal of the suspension of the CDPV Act and the repeal of the DV Act by Schedule 1 to the Ordinance.

Item 97AAO of Schedule 1 – Subsection 16(3) (table items 7 and 8)

This item repeals and substitutes items 7 and 8 of the table in subsection 16(3) of the Firearms Act, which replaces the references to an interim domestic violence order and domestic violence order under the DV Act with references to an interim apprehended violence order and a final apprehended violence order under the CDPV Act. Subsection 16(3) of the Firearms Act sets out the grounds on which an issuing officer must refuse to grant a person a licence under that Act.

Item 97AAP of Schedule 1 – Subsection 21(1A)

This item amends subsection 21(1A) of the Firearms Act by substituting the reference to an interim protection order under the DV Act with a reference to an interim apprehended violence order under the CDPV Act. The effect of the amendment is that any licence held by a person under the Firearms Act is automatically suspended while an interim apprehended violence order against the person is in force under the CDPV Act.

Item 97AAQ of Schedule 1 – Paragraph 22(1)(a)

This item repeals and substitutes paragraph 22(1)(a) of the Firearms Act to replace the reference to a firearms prohibition order or a protection order under the DV Act with a reference to a final apprehended violence order under the CDPV Act. The effect of the amendment is that a licence that authorises a person to possess or use a firearm is automatically revoked if a final apprehended violence order comes into force against the person under the CDPV Act.

Item 97AAR of Schedule 1 – Subsection 26A(3) (table items 3 and 4)

This item repeals and substitutes new items 3 and 4 of the table in subsection 26A(3) of the Firearms Act, which replaces the references to an interim protection order and a protection order under the DV Act with references to an interim apprehended violence order and final apprehended violence order under the CDPV Act. Subsection 26A(3) of the Firearms Act sets out the grounds on which an issuing officer must refuse to grant a person a permit under that Act.

Item 97AAS of Schedule 1 – Subsection 26D(2)

This item amends subsection 26D(2) of the Firearms Act by substituting the reference to an interim protection order under the DV Act with a reference to an interim apprehended violence order under the CDPV Act. The effect of the amendment is that any firearm permit held by a person under the Firearms Act is automatically suspended while an interim apprehended violence order against the person is in force under the CDPV Act.

Item 97AAT of Schedule 1 – Paragraph 26E(1)(a)

This item repeals and substitutes paragraph 26E(1)(a) of the Firearms Act to replace the reference to a firearms prohibition order or a protection order under the DV Act with a reference to a final apprehended violence order under the CDPV Act. The effect of the amendment is that a firearm permit is automatically revoked if a final apprehended violence order comes into force against the holder under the CDPV Act.

Item 97AAX of Schedule 1 – After subsection 45D(1)

This item inserts new subsection 45D(1A) into the Firearms Act, which would provide that the Administrator must refuse to issue a permit to a person who is disqualified by subsection 98ZJ(1) of the CDPV Act from holding such a permit. The effect of the amendment is that the Administrator must refuse to issue a prohibited weapons permit to a person if a recognised non-local DVO (domestic violence order) disqualifies the person from holding a non-local weapons permit or type of non-local weapons permit within the meaning of section 98ZJ of the CDPV Act.

Item 97AAY of Schedule 1 – After subsection 45D(5)

This item inserts new subsection 45D(5A) into the Firearms Act, which provides that the Administrator must, by written notice, cancel the prohibited weapons permit of a person who is disqualified by subsection 98ZJ(1) of the CDPV Act from holding such a permit.

The effect of the amendment is that the Administrator must cancel, by written notice, a prohibited weapons permit issued to a person if a recognised non-local DVO (domestic violence order) disqualifies the person from holding a non-local weapons permit or type of non-local weapons permit within the meaning of section 98ZJ of the CDPV Act.

Part 7—Amendments affecting the Mental Health Act 1996 (Norfolk Island)

Norfolk Island Continued Laws Ordinance 2015

Item [12] — Before item 206AA of Schedule 1

This item inserts new item 206AAA into Schedule 1 to the Continued Laws Ordinance, which amends paragraph (a) of the definition of ‘custodial order’ in section 4 of the *Mental Health Act 1996* (NI) (the MH Act) by substituting the redundant reference to Part 11A of the *Criminal Law Act 1960* (NI), which does not exist, with a reference to Chapter 2 of the CP Act. The effect of this amendment is that the definition of ‘custodial order’ in the MH Act relevantly means an order of a court under Chapter 2 of the CP Act.

Item [13] — After item 206AA of Schedule 1

This item inserts new item 206AAAA into Schedule 1 to the Continued Laws Ordinance. New item 206AAAA substitutes the heading to section 17A of the MH Act to replace the redundant reference to the *Criminal Law Act 1960* (NI) with a reference to the CP Act.

Item [14] — After item 206AB of Schedule 1

This item inserts new items 206AH to 206AV into Schedule 1 to the Continued Laws Ordinance, which amends the MH Act. These consequential amendments substitute a number of redundant references to the *Criminal Law Act 1960* (NI) with the appropriate references to the CP Act.

Item 206AH of Schedule 1 – Part 4A (heading)

This item substitutes the redundant reference to the *Criminal Law Act 1960* (NI) in the heading to Part 4A of the MH Act with a reference to the CP Act.

Item 206AI of Schedule 1 – Subsection 37A(1) (definition of *order to determine fitness*)

This item substitutes the redundant reference to part 11A of the *Criminal Law Act 1960* (NI) in the definition of ‘order to determine fitness’ in subsection 37A(1) of the MH Act with a reference to section 18 of the CP Act.

Item 206AL of Schedule 1 – Paragraph 37C(1)(c)

This item substitutes the redundant references to the *Criminal Law Act 1960* (NI) in paragraph 37C(1)(c) of the MH Act with the appropriate references to the CP Act.

Item 206AM of Schedule 1 – Subsection 37D(1) (definition of *order for recommendations*)

This item substitutes the redundant reference to Division 11A of the *Criminal Law Act 1960* (NI) in the definition of ‘order for recommendations’ in subsection 37D(1) of the MH Act with the appropriate references to the CP Act and the Court of Petty Sessions.

Item 206AN of Schedule 1 – Subsection 37D(2)

This item omits the redundant reference to Division 11A of the *Criminal Law Act 1960* (NI) in subsection 37D(2) of the MH Act.

Item 206AP of Schedule 1 – Subsection 37F(1) (paragraph (a) of the definition of *order for detention*)

This item substitutes the redundant reference to Part 11A of the *Criminal Law Act 1960* (NI) in paragraph (a) of the definition of ‘order for detention’ in subsection 37F(1) of the MH Act with the appropriate references to the CP Act.

Item 206AQ of Schedule 1 – Paragraph 37F(3)(c)

This item substitutes the redundant reference to Part 11A of the *Criminal Law Act 1960* (NI) in paragraph 37F(3)(c) of the MH Act with the appropriate references to the CP Act.

Item 206AR of Schedule 1 – After paragraph 37F(6)(c)

This item inserts new paragraph 37F(6)(ca) into the MH Act. The effect of this amendment is that if, on a review, the Mental Health Tribunal determines to order the release of a person under section 37F, the Tribunal must, before making the order, notify, if the order for detention was originally made by the Court of Petty Sessions, the Clerk of that court.

Item 206AS of Schedule 1 – Paragraph 37F(7)(b)

This item amends paragraph 37F(7)(b) of the MH Act by substituting ‘Court’ with ‘Supreme Court’. The effect of this amendment is to clarify that this reference is to the Supreme Court of Norfolk Island.

Item 206AT of Schedule 1 – Subsection 37J(2) (paragraph (a) of the definition of *limiting period*)

This item substitutes the redundant reference to Part 11A of the *Criminal Law Act 1960* (NI) in paragraph (a) of the definition of ‘limiting period’ in subsection 37J(2) of the MH Act with the appropriate reference to Chapter 2 of the CP Act.

Item 206AU of Schedule 1 – Part 4B (heading)

This item substitutes the redundant reference to the *Criminal Law Act 1960* (NI) in the heading to Part 4B of the MH Act with a reference to the CP Act.

Item 206AV of Schedule 1 – Paragraph 37L(5)(d)

This item substitutes the redundant reference to Part 11A of the *Criminal Law Act 1960* (NI) in paragraph 37L(5)(d) of the MH Act with the appropriate reference to Chapter 2 of the CP Act.

Part 8—Amendments affecting the Summary Offences Act 2005 (Norfolk Island)

Norfolk Island Continued Laws Ordinance 2015

Item [15] — After item 335A of Schedule 1

This item inserts new items 335P and 335Q into Schedule 1 to the Continued Laws Ordinance, which would amend subsection 30(1) of the *Summary Offences Act 2005* (NI). Subsection 30(1) of that Act defines ‘sexual offence’ for the purposes of the offence in section 30 of that Act of loitering by a sexual offender.

Item 335P of Schedule 1 – Paragraph 30(1)(a)

This item amends paragraph 30(1)(a) of the *Summary Offences Act 2005* (NI) by substituting the redundant references to the Crimes Act with the appropriate references to Parts 3.6 and 3.7 of the Code, which contain the relevant sexual and child pornography offences.

Item 335Q of Schedule 1 – Subparagraphs 30(1)(b)(i) and (ii)

This item repeals subparagraphs 30(1)(b)(i) and (ii) of the *Summary Offences Act 2005* (NI). These provisions, which provide that a ‘sexual offence’ for the purposes of subsection 30(1) includes the offences of counselling or procuring and aiding or abetting, are redundant as section 45 of the Code deems a person who aids, abets, counsels or procures the commission of an offence to have committed that offence.

Schedule 6—Transitional provisions

Schedule 6 to the Ordinance deals with transitional matters arising from the amendments.

Norfolk Island Continued Laws Ordinance 2015

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

This item inserts new Division 15 into Part 2 of Schedule 1 to the Continued Laws Ordinance. This new Division contains transitional provisions dealing with the application of amendments made by the Ordinance to the Bail Act, the CW Act, the CP Act, the Evidence Act, the Firearms Act, the Sentencing Act and the *Summary Offences Act 2005* (NI).

Item 375A – Provisions affecting the *Bail Act 2005* (Norfolk Island)

Subitem 375A(1) provides that despite the repeal and substitution of paragraph 9(1)(d) of the Bail Act, section 9 of that Act does not apply to an offence against section 42 of the DV Act. This is a transitional provision intended to ensure that, despite the amendment to paragraph 9(1)(d), the presumption in favour of bail for certain offences does not apply to a person who has been accused of an offence against section 42 of the DV Act (which deals with the contravention of a protection order or an interim protection order) in the circumstances set out in subsection 9(1) of the Bail Act.

Subitem 375A(2) provides that paragraph 25(1)(d) of the Bail Act, as amended, applies as if the reference in that paragraph to the CDPV Act includes a reference to the DV Act. This is a transitional provision which ensures that, despite the amendment to paragraph 25(1)(d), an authorised member or a court, when considering whether to grant bail to a person accused of contravening an order under the DV Act, shall continue to consider the same factors with respect to this matter as if the amendment had not been made.

Item 376 – Provision affecting the *Child Welfare Act 2009* (Norfolk Island)

Item 376 is a savings provision which provides that the definition of ‘abuse’ in subparagraph 33(1)(c)(iv) of the CW Act continues to include behaviour which would have constituted a domestic violence offence, within the meaning of section 3 of the DV Act, which occurred before the repeal of that Act by the Ordinance.

Item 377 – Provisions affecting the *Criminal Procedure Act 2007* (Norfolk Island)

Subitem 377(1) provides that the CP Act, as amended, applies subject to item 377 so that Chapters 6, 6A and 7 apply in relation to proceedings conducted on or after the commencement of the Ordinance, even if the proceedings were instituted or partly heard before that commencement. The other provisions of the CP Act apply in relation to proceedings instituted on or after the commencement of the Ordinance. Under new subsection 155F(2), the court may make any order it considers appropriate to ensure fair process. This would effectively manage any conflict in court procedures if any circumstances arose where a matter before the court in Norfolk Island is already started when the Ordinance commences.

Subitem 377(2) is a savings provision that provides that section 54 of the CP Act, as amended by the Ordinance, applies to a direction or an order to seize or detain a firearm for a period, that was in force under the DV Act immediately before the repeal of that Act, as if it were an order described in subsection 54(1) of the CP Act.

Subitem 377(3) provides that paragraphs 155C(c) and 160B(c) of the CP Act, as inserted by the Ordinance, apply as if a reference in those paragraphs to the CDPV Act included a reference to the DV Act.

This is a transitional provision which provides that Chapter 6, about evidence of children, and Chapter 6A, about evidence of witnesses with disabilities or vulnerabilities, also apply to any proceedings under the DV Act.

Subitem 377(4) provides that paragraph (b) of the definition of ‘less serious violent offence’ in section 166, and subsections 168(1) and (2), of the CP Act, as inserted by the Ordinance, apply as if a reference in those provisions to section 14 of the CDPV Act included a reference to section 42 of the DV Act. This is a transitional provision which provides that the offence of contravening a protection order or an interim protection order made under the DV Act is a ‘less serious violence offence’ for the purposes of Division 2 of Chapter 7 of the CP Act, which deals with evidence in sexual, violent and domestic violence proceedings. It also provides that, for the purposes of Subdivision C of Division 2 of Chapter 7, which deals with the admission of police interviews as evidence, a sexual offence or a violent offence includes an offence under section 42 of the DV Act in relation to another sexual or violent offence, as the case may be.

Subitem 377(5) provides that Subdivision C of Division 2 of Chapter 7 of the CP Act, as inserted by Schedule 1 to the Continued Laws Ordinance at the commencement of subitem 377(5), applies in relation to an audiovisual recording even if the recording was made before that commencement.

Subitem 377(6) provides that paragraphs 168J(1)(b) and (2)(a) of the CP Act, as inserted by the Ordinance at its commencement, apply in relation to proceedings instituted before that commencement as if those paragraphs required the copy of the transcript mentioned in those paragraphs to be given to the accused person or their lawyer as soon as practicable after that commencement.

Subitem 377(7) provides that paragraphs 169A(2)(c) and 169B(1)(c) of the CP Act, as inserted by the Ordinance, apply as if a reference in those paragraphs to the CDPV Act included a reference to the DV Act. This is a transitional provision that provides that Subdivision D of Division 2 of Chapter 7, which deals with the giving of evidence by audiovisual link in sexual and violent offence proceedings, also applies to any proceedings under the DV Act in relation to a sexual or violent offence.

Subitem 377(8) provides that subsection 174D(2) of the CP Act, as inserted by the Ordinance at its commencement, applies in relation to proceedings instituted before that commencement as if that subsection required the copy of the recorded statement mentioned in that subsection to be given to the lawyer representing the accused person as soon as practicable after that commencement.

Subitem 377(9) provides that subsection 174E(2) of the CP Act, as inserted by the Ordinance at its commencement, applies in relation to proceedings instituted before that commencement as if that subsection required the audio copy of the recorded statement mentioned in that subsection to be given to the accused person as soon as practicable after that commencement.

Subitem 377(10) provides that Subdivisions E and F of Division 2 of Chapter 7 of the CP Act, as inserted by the Ordinance at its commencement, apply in relation to new trial proceedings, even if the new trial was ordered or listed before that that commencement.

Subitem 377(11) provides that Subdivisions C and D of Division 3 of Chapter 7 of the CP Act, as inserted by the Ordinance at its commencement, apply in relation to a recorded statement, even if it was made before that commencement.

Item 378 – Provisions affecting the *Evidence Act 2004* (Norfolk Island)

Subitem 378(1) provides that section 18 of the Evidence Act does not apply in proceedings for an offence constituted by domestic violence as defined in the DV Act immediately before its repeal by the Ordinance (despite the repeal and substitution of paragraph 19(c) of the Evidence Act by the Ordinance). Section 18 of the Evidence Act deals with the compellability of spouses and other family members in criminal proceedings generally. This transitional provision provides that section 18 continues not to apply to an offence that is a domestic violence offence within the meaning of the DV Act.

Subitem 378(2) is a savings provision to the effect that, despite the amendment of the definition of ‘prescribed sexual offence’ in section 181R of the Evidence Act, part 4A.3 of the Evidence Act, which deals with evidence in sexual offences proceedings, still applies with respect to any future sexual offences proceedings that relate to these historic sexual offences under the repealed Crimes Act.

Item 379 – Provisions affecting the *Firearms and Prohibited Weapons Act 1997* (Norfolk Island)

Subitem 379(1) provides that item 8 of the table in subsection 16(3) of the Firearms Act, as in force immediately before its repeal by the Ordinance, continues to apply despite the repeal. However, this subitem does not limit the application of item 8 of the table in subsection 16(3) of that Act as amended by the Ordinance. This transitional provision provides that an issuing officer must continue to refuse to grant a person a licence who has, within the last 5 years, been subject to a protection order under the DV Act.

Subitem 379(2) provides that item 4 of the table in subsection 26A(3) of the Firearms Act, as in force immediately before its repeal by the Ordinance, continues to apply despite the repeal. However, this subitem does not limit the application of item 4 of the table in subsection 26A(3) of that Act as amended by the Ordinance. This transitional provision provides that an issuing officer must continue to refuse to grant a person a firearm permit (other than a visiting sporting shooter permit), if the person has, within the last 5 years, been subject to a protection order under the DV Act.

Item 380 – Provisions affecting the *Sentencing Act 2007* (Norfolk Island)

Item 380 provides that subsections 5(4) and 43(1) of the Sentencing Act, as amended by the Ordinance at its commencement, apply in relation to the sentencing of an offender on or after that commencement, even if the offence for which they are being sentenced was committed before that commencement.

Item 381 – Provisions affecting the *Summary Offences Act 2005* (Norfolk Island)

Subitem 381(1) provides that paragraph 30(1)(a) of the *Summary Offences Act 2005* (NI), as in force immediately before its repeal by the Ordinance, continues to apply despite the repeal. However, this subitem does not limit the application of paragraph 30(1)(a) of that Act as amended by the Ordinance. This savings provision has the effect that any behaviour that would have constituted a ‘sexual offence’ for the purposes of section 30 of the *Summary Offences Act 2005* before the repeal of paragraph 30(1)(a) continues to constitute a ‘sexual offence’ for the purposes of that section.

Subitem 381(2) provides that despite the repeal of subparagraphs 30(1)(b)(i) and (ii) of the *Summary Offences Act 2005* (NI) by the Ordinance, those subparagraphs continue to apply in relation to paragraph 30(1)(a) of that Act as it applies because of subitem 381(1). This savings provision has the effect that any behaviour that would have constituted counselling or procuring or aiding and abetting a sexual offence before the repeal of paragraph 30(1)(a) of the *Summary Offences Act 2005* (NI) continues to remain covered by the definition of ‘sexual offence’ even after its repeal.

Item [2] — In the appropriate position in Schedule 2

This item inserts a new Part 9 into Schedule 2 to the Continued Laws Ordinance, which would contain transitional provisions relating to the repeal of the DV Act.

Item 28 – Protection orders in force immediately before repeal

This item provides that a protection order in force under the DV Act immediately before the repeal of that Act by the Ordinance would have effect after that repeal as if it were an apprehended domestic violence order made under the CDPV Act. An apprehended domestic violence order is able to be varied or revoked under Division 5 of Part 10 of the CDPV Act.

Item 29 – Interim protection orders in force immediately before repeal

This item provides that an interim protection order in force under the DV Act immediately before the repeal of that Act by the Ordinance has effect after that repeal as if it were an interim apprehended domestic violence order made under Part 6 of the CDPV Act. An interim apprehended domestic violence order made under Part 6 of the CDPV Act is able to be varied or revoked under Division 5 of Part 10 of the CDPV Act.

Item 30 – Applications on foot immediately before repeal

This item provides that an application made (and not decided or withdrawn) for a protection order under the DV Act before the repeal of that Act by the Ordinance has effect after that repeal as if it were an application made under Part 4 of the CDPV Act for an apprehended domestic violence order. The application has that effect even if an interim protection order was made before that repeal as a result of the application.

Item 31 – Directions and orders for seizure etc. of firearms

This item provides that a direction or an order to seize and/or detain a firearm that was in force under paragraph 15(1)(b) or 15(6)(a) of the DV Act immediately before the repeal of that Act by the Ordinance would continue to have effect despite that repeal.

Item 32 – Weapons seized before repeal

This item deals with the application of Division 1 of Part 17 of the LEPR Act to a weapon seized under the DV Act before its repeal by the Ordinance. The weapon will be treated as if it were a dangerous implement that had been seized under the LEPR Act. If the seizure actually occurred before the repeal of the DV Act, the seizure will be treated as having occurred at the time that Act was repealed. If the seizure actually occurred at a time on or after the repeal of the DV Act, the seizure will be treated as having occurred at the time it actually occurred. (For instance, if the seizure occurred under a direction or order that was made under section 15 of the DV Act and continued in effect despite the repeal of that Act). This timing is relevant for the operation of a number of statutory time limits contained in Division 1 of Part 17 of the LEPR Act.

Item 33 – Registered orders from other jurisdictions

This item provides that a registered external order in force under the DV Act immediately before the repeal of that Act would have effect after that repeal as if it were a registered external protection order for the purposes of Part 13 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (CDPV Act). However, paragraph 97(1)(a) of the CDPV Act does not have the effect that the order is a local DVO (domestic violence order) for the purposes of Part 13B of that Act. The order ceases to be registered under Part 13 of that Act if the order becomes a recognised DVO (domestic violence order) in Norfolk Island under Part 13B of that Act.

In that case, Part 13B of that Act applies to the order in the same way as it applies to any other recognised DVO that is a non-local DVO for the purposes of that Part.

The effect of this transitional provision is to treat registered external orders in force at the time the Ordinance commences in Norfolk Island in a similar way to the way registered external protection orders in force in NSW when Part 13A of the CDPV Act commenced in NSW on 25 November 2017.