

REVISED 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, Cities and Regional Development

Norfolk Island Act 1979

Norfolk Island Legislation Amendment (Criminal Justice Measures) Ordinance 2019

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 (Criminal Justice Measures) Ordinance 2019* (the proposed 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) to amend certain laws made by the former Norfolk Island Legislative Assembly (continued laws), namely the *Criminal Code 2007* (NI) (the NI Criminal Code) and the *Telecommunications Act 1992* (NI) (the Telecommunications 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 Continued laws are continued in force by sections 16 and 16A of the Norfolk Island Act, and may be amended or repealed by a section 19A Ordinance in accordance with subsection 17(3) of the Norfolk Island Act.

Purpose and operation

The amendments contained in the Ordinance further the work of the Australian Government in ensuring that vulnerable people in Norfolk Island receive comparable protections to those in other Australian jurisdictions, and that Norfolk Island police and courts have the authority and ability to take action against people who perpetrate sexual abuse or violence. The new offences contained in the Ordinance are also consistent with the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse in its 2017 *Criminal Justice* report.

The Ordinance amends the NI Criminal Code to insert new definitions and new offences, and increases penalties in relation to certain sexual offences.

Specifically, the Ordinance:

- amends the definition of ‘sexual intercourse’ and inserts a definition for ‘act of indecency’, to align the NI Criminal Code more closely with other Australian jurisdictions
- increases the penalty for sexual intercourse with a young person under the age of 10 years from 17 to 20 years
- increases the penalty from 5 to 7 years for committing an act of indecency without consent, and from 7 to 9 years for committing an act of indecency without consent and in company with another person, and
- introduces new offences of sexual intercourse and acts of indecency with a person aged at least 16 but under 18, where the defendant is in a position of trust or authority (with a penalty of 10 years and 7 years respectively).

The Ordinance also amends the Telecommunications Act by allowing for the interception of telecommunications without a warrant in certain circumstances (including, for example, where a person's life or physical safety may be at risk and the matter is so urgent that applying for a warrant is not reasonably practicable). This amendment makes the law in Norfolk Island more consistent with that in other Australian jurisdictions, including the Commonwealth.

In addition, the Ordinance makes minor technical amendments to the *Norfolk Island Applied Laws Ordinance 2016* in relation to the domestic and personal violence provisions that were applied to Norfolk Island in 2018.

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.

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 Code 2007* (NI) was made by the now abolished Legislative Assembly of Norfolk Island and has been continued in force by section 16A of the Norfolk Island Act. The Criminal Code 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.

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 Code as amended increased penalties for the existing offences of: sexual intercourse with a young person under the age of 10 years (penalty increased from 17 to 20 years); committing an act of indecency without consent (penalty increased from 5 to 7 years); and committing an act of indecency without consent and in company with another person (penalty increased from 7 to 9 years). It also imposes penalties for the offences of sexual intercourse and acts of indecency with a person aged at least 16 but under 18, where the defendant is in a position of trust or

authority (with a penalty of 10 years and 7 years respectively). 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 proposed Ordinance. The consultation included:

- community consultation conducted during 2017-2018 regarding the proposed amendments, which drew involvement from a range of members of the Norfolk Island community, including the legal profession and health care practitioners, and
- consultation with the Department of Prime Minister and Cabinet, 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 Attorney-General's Department, 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 proposed amendments.

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 (Criminal Justice Measures) Ordinance 2019

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 (Criminal Justice Measures) Ordinance 2019* (the proposed 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) to amend certain laws made by the former Norfolk Island Legislative Assembly (continued laws), namely the *Criminal Code 2007* (NI) (the NI Criminal Code) and the *Telecommunications Act 1992* (NI) (the Telecommunications 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.

The amendments contained in the Ordinance further the work of the Australian Government in ensuring that vulnerable people in Norfolk Island receive comparable protections to those in other Australian jurisdictions, and that Norfolk Island police and courts have the authority and ability to take action against people who perpetrate sexual abuse or violence. The new offences contained in the Ordinance are also consistent with the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse in its 2017 *Criminal Justice* report.

The proposed Ordinance amends the NI Criminal Code to insert new definitions and new offences, and increase penalties in relation to certain sexual offences.

Specifically, the Ordinance:

- amends the definition of ‘sexual intercourse’ and inserts a definition for ‘act of indecency’, to align the NI Criminal Code more closely with other Australian jurisdictions
- increases the penalty for sexual intercourse with a young person under the age of 10 years from 17 to 20 years
- increases the penalty from 5 to 7 years for committing an act of indecency without consent, and from 7 to 9 years for committing an act of indecency without consent and in company with another person, and
- introduces new offences of sexual intercourse and acts of indecency with a person aged at least 16 but under 18, where the defendant is in a position of trust or authority (with a penalty of 10 years and 7 years respectively).

The Ordinance also amends the Telecommunications Act by allowing for the interception of telecommunications without a warrant in certain circumstances (including, for example, where a person's life or physical safety may be at risk and the matter is so urgent that applying for a warrant is not reasonably practicable). This amendment makes the law in Norfolk Island more consistent with that in other Australian jurisdictions, including the Commonwealth.

In addition, the Ordinance makes minor technical amendments to the *Norfolk Island Applied Laws Ordinance 2016* in relation to the domestic and personal violence provisions that were applied to Norfolk Island in 2018.

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.

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 Code 2007* (NI) was made by the now abolished Legislative Assembly of Norfolk Island and has been continued in force by section 16A of the Norfolk Island Act.. The Criminal Code 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.

Section 19A of the Norfolk Island Act 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 NI Criminal Code as amended increases penalties for the existing offences of sexual intercourse with a young person under the age of 10 years, committing an act of indecency without consent, and committing an act of indecency without consent and in company with another person. It also imposes penalties for the offences of sexual intercourse and acts of indecency with a person aged at least 16 but under 18, where the defendant is in a position of trust or authority. These penalties are consistent with penalties in other jurisdictions in Australia for similar offences.

Human Rights implications

This Ordinance engages the following rights:

- The rights of children, and the right to protection from exploitation, violence and abuse, in Articles 3, 19 and 34 of the Convention on the Rights of the Child (CRC)
- The prohibition on retrospective criminal laws and the presumption of innocence in Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR)
- The right to privacy in Article 17 of the ICCPR

The rights of children, and the right to protection from exploitation, violence and abuse

The Ordinance promotes the principles underpinning, and the fundamental rights and freedoms protected by, the CRC including the right of the child to be protected from all forms of physical and mental violence, including sexual abuse (Articles 19 and 34).

The best interests of the child (Article 3 CRC)

Article 3 of the CRC provides that States Parties shall make the best interests of the child a primary consideration in all actions concerning children, including by courts of law, administrative authorities and legislative bodies. States Parties must ensure the child has such protection and care as is necessary for his or her well-being.

Consistent with the CRC, the Ordinance gives primary consideration to the best interests of the child through amendments to the legal framework applicable to child sex offending in Norfolk Island, mirroring the Commonwealth framework. The Ordinance protects all people from non-consensual sexual intercourse and acts of indecency, and by increasing the penalties involved for these offences aims to prevent and deter the perpetration of child and adult sex offences. This is particularly the case in relation to circumstances where a person is in a position of trust or authority in relation to the child (in this instance, a young person aged between 16-18 years), as the Ordinance places a positive obligation on an accused person to consider the age of the young person and their relationship with them.

Right of the child to be protected from sexual abuse (Articles 19 and 34 CRC)

Article 19 of the CRC provides that “States Parties shall take all appropriate legislative ... measures to protect the child from all forms of physical or mental violence, injury or abuse, ... including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has care of the child.”

Article 34 similarly provides that “State Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse”.

The Ordinance provides measures to protect children from sexual abuse, including:

- Increased penalties for sexual intercourse and acts of indecency where the victim is less than 10 years old, and
- The new offences of sexual intercourse and acts of indecency with a person aged at least 16 but under 18, where the defendant is in a position of trust or authority in relation to the young person.

In addition, the Ordinance promotes Articles 19 and 34 of the CRC by increasing the general and specific deterrence for committing child sex offences, and ensuring that penalties for these offences more appropriately reflect the gravity of child sexual abuse. This is achieved through various measures, including:

- the creation of new offences that criminalise sexual abuse of young people where the accused person is in a position of trust or authority, and
- the increase in maximum penalties for certain offences.

Criminalisation of child sex abuse

Article 3(1) of the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography (OPSC) expands on the fundamental rights in the CRC by requiring that certain forms of child sex abuse be fully covered under criminal law. The Ordinance advances this Article by introducing new offences which criminalise sexual intercourse and acts of indecency perpetrated on young people (aged between 16 and 18 years), where the accused person is in a position of trust or authority in relation to the young person. These new offences are modelled on existing Commonwealth laws and support recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse. In addition, the Ordinance increases the maximum penalties for certain child and other sex offences, to penalties which more adequately reflect the serious nature of the offending.

The amendments made by the Ordinance in relation to the sexual offences and child sexual offences are compatible with human rights, as they promote and advance human rights and, to the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate to protect children and other people at risk of sexual abuse and sexual violence.

The prohibition on retrospective criminal laws and the presumption of innocence

Prohibition on retrospective criminal laws

Article 15(1) of the ICCPR provides that a heavier penalty shall not be imposed than the one that was applicable at the time a criminal offence was committed.

The Ordinance increases the maximum penalties for certain offences, from 17 to 20 years in the case of sexual intercourse with a young person under the age of 10 years, and from 7 to 9 years in the case of committing an act of indecency without consent and in company with another person.

However, it is not the intention that the Ordinance retrospectively impose a harsher penalty, in relation to an offence committed prior to the commencement of the Ordinance, than would have been available at the time the offence was committed. Rather, if a circumstance arose in which the Court was called to pass sentence for an offence committed prior to the commencement of the Ordinance, the Court could exercise its discretion to ensure the sentence did not exceed the sentence applying at the time the offence was committed. This would be consistent with the rule of statutory interpretation outlined by Dawson J in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501: ‘a statute ought not be given a retrospective operation where to do so would be to attach new legal consequences to facts or events which occurred before its commencement’.

Presumption of Innocence

Article 14(2) of the ICCPR provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. This right imposes on the prosecution the burden of proving charges against a defendant.

In relation to the new offences of sexual intercourse and acts of indecency with a person aged at least 16 but under 18, where the defendant is in a position of trust or authority, the Ordinance introduces offence-specific defences that shift the burden of proof to the accused. It is a defence to these offences if the defendant proves that, at the time of the alleged offence, there existed between the defendant and the other person a marriage that was valid (or recognised as valid in relevant jurisdictions) and that, when it was solemnised, the

marriage was genuine. It is also a defence to these offences if the defendant proves that, at the time of the alleged offence, the defendant believed on reasonable grounds that the other person was of or above the age of 18 years.

Reverse onus provisions can be considered a limitation on the presumption of innocence. However, under international law, a reverse onus provision may be acceptable provided the law is reasonable in the circumstances and maintains the rights of the accused.

In the defences mentioned above, it is reasonable in the circumstances to require the defendant to prove the existence of a marriage, since that fact is not central to the question of culpability. The non-existence of a marriage between the defendant and the young person is not needed to establish the offences in question. It is also reasonable for the defendant to bear the onus of proving they had reasonable grounds to believe the other person was of or above the age of 18 years. This is because the defendant's belief about the age of the person would be peculiarly within the knowledge of the defendant, and would also be significantly less difficult and less costly for the defendant to establish than for the prosecution to disprove.

The Ordinance does not otherwise affect rights to a fair trial and fair hearing, minimum guarantees in criminal proceedings, or existing legislation relating to procedural fairness.

The right to privacy

The human rights engaged by the Ordinance in relation to the amendments to the Telecommunications Act are those set out in Article 17 of the ICCPR, in relation to privacy.

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

The Ordinance limits the right to privacy under Article 17. However, the right to privacy under the ICCPR is not an absolute right. The right can be limited if the limitation is not incompatible with the right itself and the limitation is authorised by law, is for a legitimate objective and is reasonable, necessary and proportionate to that objective.

In general, interception of people's private communications without a warrant is unlawful. However, the provisions of the Ordinance mean that such interception will not be unlawful in some circumstances, such as when a person's safety or life is threatened or at risk or there is a risk of serious property damage. In these circumstances, as limited by the provisions of the Ordinance, the police can intercept communications without a warrant, as long as a warrant application is made as soon as reasonably practicable and, if an application is not granted, the interception ceases.

In these circumstances, the interception will not be arbitrary within the meaning of Article 17. Interception of telecommunications may only occur subject to either a warrant issued by a judge, or in emergency circumstances. The instrument will serve the legitimate objective of the investigation and prosecution of serious crime and the preservation of people's lives and safety and is reasonable, necessary and proportionate to achieving this end.

Other jurisdictions have similar measures in place to allow for communications to be intercepted without a warrant in emergency circumstances. The measures in the Ordinance bring Norfolk Island law into better alignment with other Australian jurisdictions.

The amendments made by the Ordinance in relation to telecommunications interception without a warrant are compatible with human rights because they advance the protection of human rights, and to the extent that they limit human rights, those limitations are authorised by law, reasonable, necessary and proportionate.

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, Cities and Regional Development**

The Hon Nola Marino MP

Norfolk Island Legislation Amendment (Criminal Justice Measures) Ordinance 2019

Section 1 – Name

This section provides that the title of the proposed Ordinance is the *Norfolk Island Legislation Amendment (Criminal Justice Measures) Ordinance 2019*.

Section 2 – Commencement

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

Section 3 – Authority

This section provides that the proposed Ordinance is made under section 19A of 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 proposed Ordinance is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to that Ordinance has effect according to its terms.

Schedule 1 – Amendments

Part 1—Amendment of the Criminal Code 2007 (Norfolk Island)

Part 1 of Schedule 1 to the Ordinance amends the *Norfolk Island Continued Laws Ordinance 2015* (the Continued Laws Ordinance) with the effect of amending the *Criminal Code 2007* (NI) (the NI Criminal Code) in relation to certain sexual offences and their associated penalties.

The Norfolk Island criminal law regime is based to a large degree on the criminal law regime operating in the Australian Capital Territory at various points in time (for example, the *Crimes Act 1900* (ACT) as it existed in 2007). Since that time, the criminal law in the Australian Capital Territory has been amended to reflect changing community attitudes in relation to the protection of vulnerable people, particularly children, and the need for stronger deterrence of sexual violence and child sexual abuse. Criminal law in Norfolk Island has remained unchanged and, as a result, the amendments in the Ordinance are required to modernise Norfolk Island laws, to ensure they continue to be comparable to other Australian jurisdictions.

The amendments and new offences also generally reflect recommendations for law reform made by Australian, New South Wales and Victorian Law Reform Commissions and other legal review processes established to strengthen law enforcement and deliver improved justice outcomes to reduce sexual violence and child sexual abuse.

Norfolk Island Continued Laws Ordinance 2015

Item [1] – After item 53D of Schedule 1

Item 1 inserts new items 53DAAA, 53DAAB and 53DAAC into Schedule 1 to the Continued Laws Ordinance.

Item 53DAAA of Schedule 1 – Section 108

New item 53DAAA of Schedule 1 repeals section 108 of the NI Criminal Code (meaning of sexual intercourse) and substitutes a new definition. The new definition is consistent with the definitions contained in both Commonwealth and Australian Capital Territory laws. The use of ‘genitalia’ has been preferred over ‘vagina’ as it is less gendered. The new definition defines sexual intercourse as the penetration, to any extent, of the genitalia or anus of a person by any part of the body of another person; or the penetration, to any extent, of the genitalia or anus of a person, by an object, carried out by another person; or fellatio; or cunnilingus; or the continuation of any of those preceding activities. Sexual intercourse does not include an act of penetration that is carried out for a proper medical or hygienic purpose, or is carried out for a proper law enforcement purpose. The definition also specifies that ‘genitalia’ includes surgically constructed or altered genitalia and that ‘object’ includes an animal.

New item 53DAAA also inserts new subsection 108A into the NI Criminal Code, which provides a definition of ‘act of indecency’. The definition provides that ‘act of indecency’ means any act, other than sexual intercourse, that is of a sexual or indecent nature (including an indecent assault); and involves the human body, or bodily actions or functions; whether or not the act involves physical contact between people.

Item 53DAAB of Schedule 1 – Subsection 113(1)

New item 53DAAB of Schedule 1 amends subsection 113(1) of the NI Criminal Code to increase the penalty for sexual intercourse with a young person under the age of 10 years from 17 years imprisonment to 20 years imprisonment. While the current penalty of 17 years is consistent with that imposed in the Australian Capital Territory, the offence carries higher

penalties in most other Australian jurisdictions, including the Commonwealth, New South Wales and Victoria. The increase in penalty is appropriate given the seriousness of the offence.

Item 53DAAC of Schedule 1 – After section 113

New item 53DAAC of Schedule 1 inserts new section 113A, ‘Sexual intercourse with person aged at least 16 but under 18—defendant in position of trust or authority’, into the NI Criminal Code, with a penalty of 10 years imprisonment. The new offence provides that a person (‘the defendant’) commits an offence if (a) they engage in sexual intercourse with another person; and (b) that person is at least 16 but less than 18 years old; and (c) the defendant is in a position of trust or authority in relation to the other person for the purposes of section 272.3 of the *Criminal Code* of the Commonwealth.

Subsection (2) of the new offence provides that absolute liability applies with respect to the age of the person and that strict liability applies with respect to the defendant’s position of trust or authority. In this instance, the imposition of absolute liability with respect to the age of the young person is appropriate and consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) as the element of the person’s age is a precondition of an offence, and the state of mind of the defendant is not relevant. Imposing strict liability with respect to the defendant’s position of trust or authority in relation to the young person will except circumstances where a defendant honestly and reasonably does not believe they hold such a position in relation to the young person.

However, offence-specific statutory defences to the strict and absolute liability offences in subsection (1) are available under new subsections (3) and (4). Subsection (3) of the new offence sets out a defence if the defendant proves that, at the time of the alleged offence, there existed between the defendant and the other person a marriage that was valid (or recognised as valid in relevant jurisdictions) and that, when it was solemnised, the marriage was genuine. Subsection (4) of the new offence sets out a further defence if the defendant proved that, at the time of the alleged offence, the defendant believed on reasonable grounds that the other person was of or above the age of 18 years. A defendant bears a legal burden in relation to subsections (3) and (4) of the new offence.

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,
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

The Guide also indicates that creating an offence-specific defence in legislation is more readily justified where the matter in question is not central to the question of culpability. In relation to an offence referred to in subsection 113A(1), the non-existence of a marriage between the defendant and the young person is not something that is needed to establish the offence. This provides justification for the legal burden of proof resting on the defendant, rather than simply an evidential burden of proof, in relation to the statutory defence set out at subsection 113A(3). Further, it is appropriate to require the defendant to prove the defence because the defendant is likely to be claiming the existence of a marriage that has taken place in a country without readily accessible records or registers, or where marriages are recognised as legal based on cultural practices. In the circumstances it would be significantly less difficult and less costly for the defendant – a person of adult age – to prove the existence of a valid and genuine marriage, rather than for the complainant or prosecution to prove that the marriage does not exist. An adult defendant should be aware of the relevance of the need

to prove the existence of a marriage in a country like Australia that does not generally permit child marriage and be able to readily produce proof of such.

In relation to the defence in subsection (4), it is clear that there is a presumption against sexual intercourse with a young person, and that the defendant's belief about the age of that person would be peculiarly within the knowledge of the defendant. If the defendant believed on reasonable grounds that the person was of or above the age of 18 years at the time of the alleged offence, the reasons for that belief would not only be solely within the knowledge of the defendant, their existence and nature would also be significantly less difficult and less costly for the defendant to establish than for the prosecution to disprove.

Item [2] – After item 53DA of Schedule 1

Item 2 inserts new items 53DAA, 53DAB and 53DAC into Schedule 1 to the Continued Laws Ordinance.

Item 53DAA of Schedule 1 – Subsection 118(1)

New item 53DAA of Schedule 1 amends subsection 118(1) of the NI Criminal Code to increase the penalty for an act of indecency without consent from 5 years imprisonment to 7 years imprisonment.

Item 53DAB of Schedule 1 – Subsection 118(2)

New item 53DAB of Schedule 1 amends subsection 118(2) of the NI Criminal Code to increase the penalty for an act of indecency without consent and in company with another person from 7 to 9 years imprisonment.

The increased penalties bring the NI Criminal Code into line with similar penalty increases in the *Crimes Act 1900* (ACT).

Item 53DAC of Schedule 1 – After section 119

New item 53DAC of Schedule 1 inserts a new section 119A, 'Act of indecency with person aged at least 16 but under 18—defendant in position of trust or authority', with a penalty of 7 years imprisonment, into the NI Criminal Code. The new offence provides that a person ('the defendant') commits an offence if (a) they commit an act of indecency on, or in the presence of, another person; and (b) that person is at least 16, but less than 18, years old; and (c) the defendant is in a position of trust or authority in relation to the defendant for the purposes of section 272.3 of the *Criminal Code* of the Commonwealth. Subsection (2) of the new offence provides that absolute liability applies with respect to the age of the person and that strict liability applies with respect to the defendant's position of trust or authority.

Subsection (3) of the new offence sets out a defence if the defendant proves that, at the time of the alleged offence, there existed between the defendant and the other person a marriage that was valid (or recognised as valid in relevant jurisdictions) and that, when it was solemnised, the marriage was genuine. Subsection (4) of the new offence sets out a further defence if the defendant proved that, at the time of the alleged offence, the defendant believed on reasonable grounds that the other person was of or above the age of 18 years. A defendant bears a legal burden in relation to subsections (3) and (4) of the new offence.

The justification for imposing strict and absolute liability to the offence in subsection 119A(1) and the imposition of a legal burden on the defendant for making out the statutory defences are as described for new section 113A, as the same fault elements and defences apply.

Item [3] – After item 53DB of Schedule 1

Item 3 inserts items 53DBA and 53DBB into Schedule 1 to the Continued Laws Ordinance.

Item 53DBA of Schedule 1 – Subsection 125(6) (at the end of the definition of *act of a sexual nature*)

New item 53DBA of Schedule 1 adds “(both within the meaning of Part 3.6)” to the current definition of “act of a sexual nature” (“act of a sexual nature means sexual intercourse or an act of indecency”) in subsection 125(6) of the NI Criminal Code. This addition clarifies that “sexual intercourse” and “act of indecency” take the same meaning as contained in the respective definitions inserted in sections 108 and 108A of the NI Criminal Code by new item 53DAAA.

Item 53DBB of Schedule 1 – Subsection 126(1)

New item 53DBB of Schedule 1 amends subsection 126(1) of the NI Criminal Code to omit “122, 123 (3) (b)”, and substitute “112, 113(3)(b)”. This amendment corrects an error by replacing incorrect references in this subsection to child pornography offences with references instead to sexual intercourse without consent and sexual intercourse with a young person.

Item [4] – After item 53DD of Schedule 1

Item 4 inserts items 53DE, 53DF, 53DG and 53DH into Schedule 1 to the Continued Laws Ordinance.

Item 53DE of Schedule 1 – At the end of section 129

New item 53DE of Schedule 1 adds new subsection 129(6) to the NI Criminal Code. Section 129 relates to alternative verdicts for certain sexual offences. New subsection 129(6) provides that a person may be found guilty of an offence in accordance with section 129 only if the person has been accorded procedural fairness in relation to that finding of guilt. This addition reflects the provisions of the *Criminal Code* of the Commonwealth (section 272.28).

Items 53DF and 53DG of Schedule 1 – Section 130

New items 53DF and 53DG of Schedule 1 amend section 130 of the NI Criminal Code to break it into two subsections, such that the current provision becomes subsection 130(1) and a new subsection 130(2) is added, which provides that in an indictment for sexual intercourse without consent where the defendant is in a position of trust or authority (section 113A), a count may be added for an act of indecency with a person aged at least 16 but under 18 (section 119A) where the defendant is in a position of trust or authority.

Item 53DH of Schedule 1 – Section 131

New item 53DH of Schedule 1 amends section 131 of the NI Criminal Code by omitting “118 or 119” and substituting “118, 119 or 119A”. This addition takes account of the new offence of act of indecency with a person aged at least 16 but under 18 where the defendant is in a position of trust or authority.

Part 2—Amendment of the Telecommunications Act 1992 (Norfolk Island)

Part 2 of Schedule 1 to the Ordinance amends the Telecommunications Act 1992 (NI) (the Telecommunications Act) by allowing for the interception of telecommunications without a warrant in certain circumstances (including, for example, where a person’s life or physical safety may be at risk and the matter is so urgent that applying for a warrant is not reasonably practicable). These amendments make the law in Norfolk Island more consistent with that in other Australian jurisdictions, including the Commonwealth.

Norfolk Island Continued Laws Ordinance 2015

Item [5] – After item 338 of Schedule 1

Item 5 inserts items 338AA and 338AB in Schedule 1 to the Continued Laws Ordinance to amend section 3 of the Telecommunications Act, to insert ‘Judge’ and ‘officer in charge’ and omit ‘Principal Police Officer’. This amendment is consequential to the amendment effected by item [7] below to the list of definitions included in Schedule 1 to the Telecommunications Act (see new item 340AA below).

Item [6] – After item 339D of Schedule 1

Item 6 inserts new items 339DA, 339DB, 339DC, 339DD and 339DE into Schedule 1 to the Continued Laws Ordinance.

These items relate to the interception of telecommunications by police officers without a warrant in emergency circumstances, such as when a person’s life or personal safety has been threatened or is at risk, or serious damage to property has occurred or is likely to occur, and it is not practical in the circumstances to apply for a warrant before intercepting the communication. The new provisions require a police officer to apply for a warrant as soon as reasonably practicable after intercepting the communication and sets out the requirements for ceasing the interception and the consequences for continuing the interception if a warrant is not issued on application.

Item 339DA of Schedule 1 – At the end of subsection 48(2)

New item 339DA of Schedule 1 amends subsection 48(2) of the Telecommunications Act to add new paragraph 48(2)(d) to include the interception of a communication because of a request made, or purporting to be made, under new subsection 54A(2) or (4). Subsections 54A(2) and (4) relate to requests by members of the police force asking the Norfolk Island Regional Council to trace the location of a caller, in the context of emergency requests for interception (see item 339DE below). Section 48 of the Telecommunications Act makes it an offence to intercept telecommunications and this amendment extends the exemptions to this offence to interceptions of telecommunications made under new section 54A.

Item 339DB of Schedule 1 – At the end of section 48

New item 339DB amends section 48 of the Telecommunications Act to add new subsections (3) to (9). Subsection (3) provides that subsection 48(1), which prohibits the interception of a communication passing over a telecommunications network, does not apply to, or in relation to, an act done by a member of the police force in relation to a communication if: the member, or another member of the police force, is a party to the communication; there are reasonable grounds for suspecting that another party to the communication has: done an act that has resulted, or may result, in the loss of life or the infliction of serious personal injury; or threatened to kill or seriously injure another person or to cause serious damage to property; or threatened to take their own life or create a serious threat to their safety; and, in any case, because of the urgency of the need for the act to be done, it is not reasonably practicable for an application for a warrant to be made.

Subsection (4) provides that subsection (1) (as outlined above) does not apply to, or in relation to, an act done by a member of the police force in relation to a communication if all of the following conditions are satisfied: the person to whom the communication is directed has consented to it; there are reasonable grounds for believing that that person is likely to receive a communication from a person who has done an act that has resulted or may result in loss of life or the infliction of serious personal injury; or threatened to kill or seriously injure another person or to cause serious damage to property; or threatened to take their own life or to do an act that would or may endanger their own life or create a serious threat to their health or safety; and, in any case, because of the urgency of the need for the act to be done, it is not reasonably practicable for an application for a warrant to be made.

Subsection (5) provides that as soon as practicable after the doing of an act in relation to a communication under subsection (3) or (4), a member of the police force concerned with the communication must apply for a warrant in relation to the matter.

Subsection (6) provides that subsection (5) does not apply if action has been taken under subsection (3) or (4) (above) to intercept or cause to intercept a communication and the action has ceased before it is practicable for an application for a warrant to be made.

Subsection (7) provides that if a judge does not issue a warrant in relation to an application made under subsection (3) or (4), the officer in charge must ensure that no further action is taken to intercept the communication or cause it to be intercepted.

Subsection (8) provides that the acts in subsections (3) and (4), in relation to the inflicting/threatening of personal injury or damage to property or threatening/endangering one's own life, are taken to be eligible offences (as defined in Schedule 1 to the Telecommunications Act), even if they would not constitute eligible offences apart from subsection (8).

Subsection (9) provides that subsection (8) has effect only to the extent necessary to enable an application to be made for the purposes of subsection (5), and to enable a decision to be made on such an application, and if a judge so decides, a warrant to be issued, and to enable the Telecommunications Act to operate in relation to a warrant issued on the application.

Item 339DC of Schedule 1 – Paragraph 50(3)(a)

New item 339DC of Schedule 1 omits “Principal Police Officer” from paragraph 50(3)(a) of the Telecommunications Act wherever it occurs and substitutes it with “officer in charge”. This amendment is consequential to the amendment effected by item [7] below to the list of definitions included in Schedule 1 to the Telecommunications Act (see new item 340AA below).

Item 339DD of Schedule 1 – Subparagraph 53(3)(b)(ii)

New item 339DD of Schedule 1 omits “Principal Police Officer” from subparagraph 53(3)(b)(ii) of the Telecommunications Act and substitutes it with “officer in charge”. This amendment is consequential to the amendment effected by item [7] below to the list of definitions included in Schedule 1 to the Telecommunications Act (see new item 340AA below).

Item 339DE of Schedule 1 – At the end of Part 7

New item 339DE of Schedule 1 adds new section 54A, relating to emergency requests, to the end of Part 7 (Privacy) of the Telecommunications Act.

Section 54A consists of subsections (1) to (6). Subsection (1) provides that a person may take action under subsection (2) or (3) (which relate to intercepting communications to trace the location of a caller) if: the person is a party to a communication passing over a telecommunications system, and as a result of information conveyed by another party to the

communication (the caller) and of any other matters, the person forms the honest belief that either another person is dying, has been or is being seriously injured, or another person is likely to die or be seriously injured, and, in any case, the person does not know the location of the caller.

Subsection (2) provides that the person may request the Norfolk Island Regional Council to intercept a communication for the purposes of tracing the location of the caller if the person is a member of the police force, and is of the opinion that tracing the location of the caller is likely to be of assistance in dealing with the emergency.

Subsection (3) provides that if the person is not a member of the police force, the person may inform, or cause another person to inform, a member of the police force of the matters in subsection (1).

Subsection (4) provides that a member of the police force may request the Norfolk Island Regional Council to intercept a communication for the purposes of tracing the location of the caller if the member is informed by a person under subsection (3) of the matters referred to in subsection (1), and is of the opinion that tracing the location of the caller is likely to be of assistance in dealing with the emergency.

Subsection (5) provides that if the Norfolk Island Regional Council intercepts a communication under subsection (2) or (4), they must provide the location of the caller to the member of the police force who made the request, or another member of the police force.

Subsection (6) provides that a member of the police force who makes a request under subsection (2) or (4) must, as soon as practicable after making the request, give, or cause another member of the police force to give, written confirmation of the request to the Norfolk Island Regional Council.

Item [7] – After item 340A of Schedule 1

Item 7 insert items 340AA and 340AB in Schedule 1 to the Continued Laws Ordinance. These items insert, respectively, definitions of ‘judge’ and ‘officer in charge’ and repeal the definition of ‘principal police officer’, in item 2 of Schedule 1 to the Telecommunications Act. For the purposes of these items, ‘judge’ means a judge of the Supreme Court of Norfolk Island, and includes an acting judge, and ‘officer in charge’ means the police officer in charge of the Police Force of Norfolk Island.

Part 3—Other amendments

Part 3 of Schedule 1 to the Ordinance makes minor technical amendments to the *Norfolk Island Applied Laws Ordinance 2016* (the Applied Laws Ordinance) in relation to the domestic and personal violence provisions that were applied to Norfolk Island in 2018. These technical amendments are consequential to recent amendments made to the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) and the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (the NSW AVO laws) as these laws apply in New South Wales. The effect of these amendments is that the relevant functions exercised by a Police Area Commander or Police District Commander in New South Wales with respect to the NSW AVO laws will continue to be exercised by the police officer in charge in Norfolk Island with respect to the NSW AVO laws as applied in the Territory under section 18A of the Norfolk Island Act.

Norfolk Island Applied Laws Ordinance 2016

Item [8] – Items 17 and 19 of Schedule 1AAA

Item 8 substitutes the references to “Local Area Commander of Police” in items 17 and 19 of Schedule 1AAA to the Applied Laws Ordinance with references to “Police Area Commander or Police District Commander”. Items 17 and 19 of Schedule 1AAA to the Applied Laws Ordinance presently amend subsections 28A(3) and 33A(4) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (NI) as it applies in Norfolk Island.

Item [9] – Item 3 of Schedule 3A

Item 9 substitutes a new item 3 into Schedule 3A to the Applied Laws Ordinance which has the effect of amending subsection 3(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (NI) as it applies in Norfolk Island. New item 3 of Schedule 3A inserts into subsection 3(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (NI) the existing definition of ‘Local Court’ but provides that ‘Police Area Commander’ or ‘Police District Commander’ in this applied law means the police officer in charge in Norfolk Island.