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**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**CRIMES (DOMESTIC AND
FAMILY VIOLENCE) LEGISLATION AMENDMENT BILL 2015**

**REVISED
EXPLANATORY STATEMENT**

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CRIMES (DOMESTIC AND FAMILY VIOLENCE) LEGISLATION AMENDMENT BILL 2015

Outline

Purpose of the Bill

The policy objective of the amendments is aimed at addressing a systemic, widespread and pervasive human rights violation, experienced largely by women. In recognising the gendered nature of domestic violence we follow the lead of national and international efforts to work towards substantive as well as formal equality in our community.

The *Crimes (Domestic and Family Violence) Legislation Amendment Bill 2015* will:

- a) amend s 28 of the *Crimes Act 1900* to reflect that strangulation that does not cause unconsciousness is still an act that endangers health;
- b) amend the *Evidence (Miscellaneous Provisions) Act 1991* to:
 - i) allow police records of interview to be admitted as evidence in chief for family violence and all sexual offences;
 - ii) expand the special measures provisions to allow special measures to apply to breaches of domestic violence orders and other select offences; and
 - iii) make a number of consequential amendments as a result of the new evidence in chief provisions; and
- c) amend the *Domestic Violence and Protection Orders Act 2008* to create a new class of interim Domestic Violence Order (DVO) to allow a court to extend interim DVOs when there are current criminal charges unresolved before the court.

Human Rights Considerations

In Australia, one in three women experience gender-based violence in their lifetime. While gender-based violence, including domestic violence, cannot be eliminated through law alone, legal measures are an essential component of any response to domestic and family violence. This Bill is a good example of the balance between the human rights of a person affected by changes in the law and the public interest to protect an individual's right to safety within their home and in the community.

Section 8 of the *Human Rights Act 2004* (HR Act) provides the right to recognition and equality before the law. It is now widely accepted that gender-based violence is a form of discrimination against women and their children. The European Court of Human Rights (ECHR) has confirmed the importance of characterising gender-based violence against

women as a form of discrimination that public authorities are required to eliminate and remedy¹.

Australian Federal and State governments are obliged, under the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Discrimination against Women to protect the right to private and family life of victims of domestic and family violence, including through effective prosecution and punishment of offenders. In the ACT that obligation is further enshrined in section 12 of the HR Act (right to privacy and reputation).

This Bill addresses human rights obligations to tackle domestic violence as a systemic, widespread and pervasive human rights violation.

Broadly, this Bill engages, and places limitations on, the following HR Act rights:

- Section 11– Protection of family and children;
- Section 13– Freedom of movement;
- Section 18– Right to liberty and security of person;
- Section 21– Fair trial; and
- Section 22– Rights in criminal process.

The Bill also engages, and supports, the following HR Act rights:

- Section 10– Protection from torture and cruel, inhuman or degrading treatment;
- Section 11– Protection of family and children;
- Section 12– Privacy and reputation;
- Section 18– Right to liberty and security of person; and
- Section 21– Fair trial.

The preamble to the HR Act notes that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. Section 28 (2) of the HR Act contains the framework that is used to determine the acceptable limitations that may be placed on human rights.

The responsibility of governments to undertake measures to protect their citizens has been discussed in European human rights jurisprudence. This responsibility has been described as the ‘doctrine of positive obligations’ which encompasses the notion that governments not

¹ *Case of Opuz v Turkey* [2009] ECHR, *Application no. 33401/02* (9 June 2009).

only have the responsibility to ensure that human rights be free from violation, but that governments are required to provide for the full enjoyment of rights.² This notion has been interpreted as requiring states to put in place legislative and administrative frameworks designed to deter conduct that infringes human rights and to undertake operational measures to protect an individual who is at risk of suffering treatment that would infringe their rights³.

In 2012 the ECHR affirmed the need for governments to protect the physical and moral integrity of victims of domestic violence. In particular, when discussing the positive obligations on States to protect individuals, the court noted that private individuals may engage in domestic violence, and stated:

[t]he concept of private life includes a person's physical and psychological integrity. Under Article 8 States have a duty to protect the physical and moral integrity of an individual from other persons. To that end they are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals.

Victims of domestic violence are of a particular vulnerability and the need for active State involvement in their protection has been emphasised in a number of international instruments⁴.

This responsibility supports the positive protection of the right of individuals, children and families to enjoy their human rights and supports the right to protection of family and children, and the right to liberty and security of person (ss 11 and 18 of the HR Act).

The Government recognises that these amendments engage the human rights of people who perpetuate family violence, who statistically are predominantly men⁵. It is also recognised that domestic and family violence is a problem that affects not only women, an issue that was summarised by the ECHR in *Opuz v Turkey*:

...the issue of domestic violence, which can take various forms ranging from physical to psychological violence or verbal abuse...is a general problem which concerns all member States and which does not always surface since it often takes place within personal relationships or closed circuits and it is not only women who are affected. The Court acknowledges that men may also be the victims of domestic violence and,

² Colvin, M & Cooper, J, 2009 'Human Rights in the Investigation and Prosecution of Crime' Oxford University Press, p. 424-425.

³ Ibid, p.425.

⁴ *Irene Wilson v The United Kingdom* [2012] ECHR, Application no. 10601/09 (23 October 2012) §37.

⁵ Research indicates that 1 in 6 Australian women have experienced physical or sexual violence from a current or former partner, while only 1 in 19 men have experienced similar types of violence. Further information can be found from Australia's National Research Organisation for Women's Safety (ANROWS) at <http://www.anrows.org.au/publications/fast-facts/key-statistics-violence-against-women>.

*indeed, that children, too, are often casualties of the phenomenon, whether directly or indirectly*⁶.

Section 28 of the HR Act requires that any limitation on a fundamental right must be authorised by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate. Proportionality can be understood and assessed as explained in *R v Oakes*⁷. A party must show that:

*[f]irst, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”*⁸.

The Government is of the view that the limitations on human rights in this Bill are proportionate and justified in the circumstances because they are the least restrictive means available to achieve the purpose to protect victims of domestic and family violence and the community as a whole.

Detailed human rights discussion

Themes of safety and protection (ss 10, 11, 18) and the right to privacy (s 12) are central to these amendments.

Rights engaged and supported

The Bill engages and supports the right to protection from torture and cruel, inhuman or degrading treatment (s 10 HR Act), protection of family and children (s 11 HR Act), right to privacy and reputation (s 12 HR Act) and the right to liberty and security of person (s 18 HR Act). These are supported by all proposed amendments and are discussed briefly below.

The primary purpose of this Bill is to make legislative amendments to protect the lives and safety of women and children where there is a risk posed to them because of domestic and family violence. This purpose upholds the right to protection from torture and cruel, inhuman or degrading treatment, protection of family and children, and the right to liberty and security of person (ss 10, 11 and 18 of the HR Act) by putting in place measures to minimise the risk of physical and psychological harm to victims of abuse.

⁶ *Case of Opuz v Turkey* [2009] ECHR, Application no. 33401/02 (9 June 2009), 132.

⁷ [1986] 1 S.C.R. 103.

⁸ *R v Oakes* [1986] 1 S.C.R. 103.

In addition, this Bill makes a number of amendments that engage and support the right to privacy (s 12), primarily in relation to victims of domestic and family violence. In this Bill, the right to privacy interacts closely with the right to family. Domestic and family violence is inherently personal, relationship-based and largely occurs in the private sphere. This Bill seeks to support existing criminal and civil law intended to promote lawful conduct within family relationships, which necessarily requires a careful balance of human rights considerations.

This Bill also supports the section 21 right to a fair trial for respondents to DVOs who are also subject to criminal proceedings by ensuring they do not have to make admissions or disclose any information during a hearing for a DVO. The amendments to the *Domestic Violence and Protection Orders Act 2008* (DVPOA) ensure that respondents (who are also defendants in criminal proceedings) do not have to consent to DVOs or prepare for a hearing until after related criminal proceedings are finalised.

Rights engaged and limited

The amendments in this Bill primarily engage and limit the right to family (s 11 HR Act) given the nature of domestic and family violence. In protecting a victim's rights to safety on the one hand, there is a limitation on the accused's right to family that must flow from that protection.

Other rights engaged and limited are discussed with reference to specific legislative amendments in the detail stage below.

Section 11 – right to family

Section 11 of the HR Act states that:

- (1) The family is the natural and basic group unit of society and is entitled to be protected by society.
- (2) Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

The nature of the right affected (s 28 (2) (a))

General comment 19 from the United Nations Human Rights Council, which describes the right to the protection of the family at article 23 of the ICCPR, notes that when read with article 17 (right to privacy), the right to protection of the family establishes a prohibition on arbitrary or unlawful interference with the family unit.⁹

In addition, general comment 19 emphasises equality in marriage, which extends to arrangements regarding legal separation or dissolution of marriage.

The importance of the purpose of the limitation (s 28 (2) (b))

The importance of these amendments in protecting victims of domestic and family violence is discussed in general terms above.

This Bill establishes a new category of “special” interim DVO to increase the protections available to victims of domestic violence where there are related criminal charges.

The new orders may prevent the subject of the order from contacting or visiting their family in certain circumstances. A person may also be punished with imprisonment if they breach the order, which engages their rights under section 18 (discussed below).

Nature and extent of the limitation (s 28 (2) (c))

The section 11 (1) right to the protection of the family unit is not an absolute right, but has been characterised as a protection against unlawful or arbitrary interference of the family unit. Arbitrariness is interpreted to include elements of inappropriateness, injustice and lack of predictability¹⁰.

The Bill amends legislation to protect victims of domestic and family violence who are subject to ongoing violence. The nature of those amendments means that by protecting one party in domestic and family violence, the other party’s rights are limited. Consequently, the accused’s rights to protection of family are limited by the following amendments:

- the interaction between the ACT’s pro-arrest policy and the inclusion of strangulation as an act endangering health; and
- the introduction of the power to extend a DVO when there are current criminal charges.

⁹ 13 Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, 1990 ‘General comment 19: Protection of the family, the right to marriage and equality of spouses, para 1. Available: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/6f97648603f69bcde12563ed004c3881?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/6f97648603f69bcde12563ed004c3881?Opendocument).

¹⁰ *Hugo Van Alphen v The Netherlands* Communication No. 305/1988, 15 August 1990.

Relationship between the limitation and its purpose (s 28 (2) (d))

Limitations on the rights of families at section 11 (1) against unlawful or arbitrary interference are intended to provide greater protection for victims of domestic and family violence.

The purpose of the amendments discussed above is to protect victims of domestic and family violence from further traumatisation. In addition, the ability to extend an interim DVO until related criminal proceedings are finalised will also support a defendant/respondent's rights in criminal proceedings.

Any less restrictive means reasonably available to achieve the purpose (s 28 (2) (e))

These restrictions are proportionate to the aim of keeping people safe and are the least restrictive means possible in the circumstances. The means used are reasonable, considering the growing evidence that suggests the persistence and prevalence of domestic violence¹¹.

In particular, there are no less restrictive means available to provide added protections for both respondents and applicants who are subject to a special interim order with current related criminal charges. The orders will remain interim until after the related criminal charges are heard and a decision is made on the final orders. In the event of a breach of an order, any punishment will be determined by a court in accordance with transparent and codified legal procedures, reflecting a person's rights under section 22 of the HR Act. This amendment reflects the positive obligation of states to actively protect citizens from domestic and family violence¹².

The ability of the Magistrates Court to issue conditions appropriate for each person's circumstances, together with the right of review by the respondent to the orders provide safeguards which ensure the respondents rights are represented in the granting of special interim orders.

¹¹ Australia's National Research Organisation for Women's Safety, *Violence against women: key statistics*, 14 May 2014 www.anrows.org.au.

¹² *Case of Opuz v Turkey* [2009] ECHR, *Application no. 33401/02* (9 June 2009).

Crimes (Domestic and Family Violence) Legislation Amendment Bill 2015

Detail

Part 1 – Preliminary

Clause 1 — Name of Act

This is a technical clause that names the short title of the Act. The name of the Act will be the *Crimes (Domestic and Family Violence) Legislation Amendment Act 2015*.

Clause 2 — Commencement

This clause provides that certain amendments in the Act will commence the day after it is notified. Amendments to the *Evidence (Miscellaneous Provisions) Act 1991* and related amendments will commence six months after the Act's notification day. This commencement date will allow the necessary administrative and other implementation activities to occur.

Clause 3 — Legislation amended

This clause identifies the legislation amended by the Act.

Part 2 – Crimes Act 1900

Clause 4 – Acts endangering health etc – New section 28 (2) (aa)

This clause amends section 28 (acts endangering health etc), to provide that a person who intentionally and unlawfully chokes, suffocates or strangles another person is guilty of an act endangering health.

Non-fatal strangulation by a partner is one of the most important predictive risk factors for intimate partner homicide¹³. A study conducted in San Diego of 300 domestic violence cases concluded that, despite strangulation leading to serious health issues, only 15% of strangulation victims had marks able to be photographed and 50% of all victims had no visible markings at all¹⁴.

¹³ Glass, N et al. Non-fatal strangulation is an important risk factor for homicide of women. *Journal of Emergency Medicine*, 2008, 35(3): 329. Accessed online at http://ac.els-cdn.com/S0736467907004143/1-s2.0-S0736467907004143-main.pdf?_tid=afad1c9c-e8b6-11e4-9bdc-00000aacb35d&acdnat=1429683385_587fff12f3131aacff70f8dcbc054ba1.

¹⁴ Strack, G, McClane, G and Hawley, D. A review of 300 attempted strangulation cases part I. *Journal of Emergency Medicine*, 2001, 21:303-309. Accessed online at http://ac.els-cdn.com/S0736467901003997/1-s2.0-S0736467901003997-main.pdf?_tid=2f14ea5e-e8b8-11e4-b3b2-00000aab0f6c&acdnat=1429684029_bfc9d4253a1ec8ad3aad599e62016423.

The United Nations Entity for Gender Equality and the Empowerment of Women states:

[l]egislation should provide serious penalties for strangulation. Many domestic violence victims have experienced some form of attempted strangulation, which has often been discounted as “choking.” This form of abuse can have serious physical and psychological consequences, and is often a precursor to deadly violence¹⁵.

Currently the only offence in ACT Legislation directly aimed at strangulation is contained in section 27 of the *Crimes Act 1900* as an ‘act endangering life’. The penalty for an offence under this section is imprisonment for up to 10 years.

In order to prove an offence under section 27 of the Crimes Act, the prosecution must prove beyond reasonable doubt that the strangulation was so severe that the victim lost consciousness or was rendered insensible. If an accused merely applied pressure to a victim’s throat to such an extent that they lost the ability to breathe but stayed conscious and in possession of all their faculties, the charge would fail. The only alternative charge, when no marks are visible, is common assault which has a maximum penalty of two years imprisonment.

The amendment seeks to recognise the seriousness of strangulation in an offence with a lower threshold than “endangering life”. This reflects the evidence that strangulation is a tactic often used in family violence to threaten, intimidate and control a victim. The amendment will primarily support the human rights of a person who has experienced, or may experience, family violence and will affect the rights of an accused in the criminal process.

By introducing an offence for strangulation with a lower threshold of harm to proof, victims are more likely to be granted protection from violence. A person accused of the new offence may experience a restriction of their rights under sections 11 and 18 of the HR Act if they are arrested or detained. The new offence will operate within the existing criminal law framework in the ACT to ensure that any action to restrict a person’s liberty occurs as part of a lawfully established criminal procedure.

A person affected by violence, specifically, strangulation, will be better protected by this new offence. The offence will support the following rights for victims:

- protection of the family and children (s 11);
- privacy and reputation (s 12); and
- right to liberty and security of person (s 18).

The penalty for an act endangering health is imprisonment for up to five years. This allows any offences under this section to be summarily indictable, ensuring that only the most serious offences are heard in the Supreme Court.

¹⁵ <http://www.endvawnow.org/en/articles/834-felony-strangulation-and-other-provisions.html>.

Under section 8 of the *Criminal Code 2002*, the provisions of the Criminal Code do not apply to an offence in force before 1 January 2003 unless:

- it is omitted and remade, or
- an Act or subordinate law expressly provides for the provisions to apply to the offence.

Section 8 (4) clarifies that an offence that is amended without being omitted and remade does not automatically attract the provisions of criminal responsibility contained in the Criminal Code.

By amending section 28 of the Crimes Act, the provision is not being omitted and remade. There is no new penalty attached to the amendment, nor is the existing section 28 penalty amended. Accordingly, the provisions of criminal responsibility contained in chapter 2 of the Criminal Code are not intended to apply to the amended section 28.

This offence will also apply outside a domestic or family violence situation. While the risk of serious injury is substantially higher for strangulation that occurs in a domestic or family violence setting, there is nonetheless an impact on a person's health and wellbeing when they are strangled. For that reason, it is appropriate that the police have discretion to charge with the new offence, or an assault, or an assault occasioning actual bodily harm.

Clause 5 – Alternative verdicts for certain other offences against the person, Table 49, new item 7A

This clause inserts the offence of choking (s 27 (3) (a) Crimes Act) as an alternative verdict to the act endangering health, where a person intentionally and unlawfully chokes, suffocates or strangles another person (new s 28 (2) (aa) Crimes Act). This will mean that if a person is on trial for a strangulation offence under section 27 (3) (a), but the decision maker is not satisfied that the accused is guilty of the higher offence the accused can be found guilty of an act endangering health under new section 28 (2) (aa).

Clause 6 – Table 49, new item 11A

This clause inserts the offence of common assault (s 26 Crimes Act) as an alternative verdict to the offence of choking (s 27 (3) (a) Crimes Act).

The same principle described above also applies to new section 28 (2) (aa), in that an act endangering health that consists of choking, suffocation or strangulation will have an alternative verdict of common assault (s 26 Crimes Act).

This approach is consistent with the existing approach taken to inflicting actual bodily harm.

Part 3 – Domestic Violence and Protection Orders Act 2008

The amendments to the DVPOA create a new category of interim domestic violence order (DVO), a “special interim order”, to allow the interim DVO to extend until related criminal charges have been determined by a criminal court. The result is that a court cannot consider whether to issue a final DVO if there are current criminal charges relating to the same applicants and respondents. Under the amendments, a court may extend an interim DVO for longer than two years if domestic violence criminal charges are still before the court.

These amendments engage and support the rights in criminal proceedings¹⁶ for an accused who also has a DVO pending in relation to those proceedings. This right is supported because the respondent to the DVO, who has been charged with criminal offences, is not required to test the evidence of related criminal charges, or to confess guilt through the hearing of a DVO proceeding.

These amendments engage and limit the right to move freely within the ACT¹⁷.

Section 28 HR Act analysis

(a) the nature of the right affected

Section 13 of the HR Act provides that everyone has the right to move freely within the ACT and to enter and leave it, and the freedom to choose his or her residence in the ACT.

The right to freedom of movement is not an absolute right. The right has inherent limitations, which are acknowledged at subsection (3) of article 12 of the ICCPR (the equivalent right to s 13 of the HR Act): ‘the rights to liberty and freedom of movement shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights or freedoms of others and are consistent with the other rights recognised in the Covenant’.

(b) the importance of the limitation

The right to freedom of movement is a fundamental human right as it supports a person’s right to move freely and choose a place of residence within a country without restrictions.

Respondents to domestic violence orders are already subject to restrictions on their human rights through court-imposed conditions. They are given certain conditions to ensure the safety of the applicant. Under s 10 (2) of the DVPOA, a ‘domestic violence order’ is defined as an order that ‘restrains the respondent from engaging in conduct that constitutes domestic violence in relation to the aggrieved person’. An interim DVO also allows the court to prohibit a respondent from being on premises where the aggrieved person lives or works.

¹⁶ Section 22(2)(i) of the Human Rights Act.

¹⁷ Section 13 of the Human Rights Act.

(c) the importance of the purpose of the limitation

Please refer to the purpose section for a detailed discussion on the broad purposes of this Bill. As discussed above, the limitations on section 13 are important for the protection of people who experience domestic and family violence. The ACT has a positive obligation to protect its people from the violation to safety and private life that occur as a result of domestic and family violence.

(d) the relationship between the limitation and its purpose

The courts are already required to consider the principles for making protection orders referred to in section 6 of the DVPOA, in particular that the order is the “least restrictive of the personal rights and liberties of the respondent as possible that still achieves the objectives of the Act”.¹⁸

The purpose of the special interim DVO scheme is to protect both applicants and respondents when there is a DVO application made with related criminal charges involving both parties.

Applicants are able to obtain protection without the need to endure a lengthy hearing and can still consent to final orders or withdraw the order. Respondents who have criminal charges related to the DVO are no longer forced to make admissions of guilt before their criminal matter has been determined to the appropriate standard in a criminal court.

(e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

There are a number of safeguards contained in this proposal to ensure the least restrictive measure available to ensure the rights of applicants and respondents are protected in domestic violence order proceedings.

These safeguards include:

- the amendments only apply to DVOs (recognising the harm caused by domestic and family violence, and the human rights violations that such violence causes) (new s 28A);
- the related offence is limited so that the person charged is the respondent for the application and a relevant person in relation to the aggrieved person (new s28B);
- a breach of a domestic violence order is excluded from triggering the special interim order protections (new s 28B (b));
- the applicant and respondent can consent to orders (new s 42B (2));

¹⁸ *Firestone v The Australian National University* [2004] ACTSC 76

- the applicant can withdraw the order (new s 42B (2));
- the respondent has a right of review for the special interim order (new ss 90A and 90B); and
- the applicant and respondent are able to mediate the order (under s 25 of the DVPOA); and
- the applicant and respondent are able to apply to amend the protection order (under s 58 of the DVPOA).

Clause 7 – Registrar may adjourn proceedings etc, Section 23 (2), note

This clause is a technical amendment to clarify the return date for special interim orders.

Clause 8 – New division 4.1 and division 4.2 heading

This clause inserts a number of new sections in the DVPOA which are preliminary definitional sections relevant for the new special interim order scheme.

New section 28A

This section defines ‘general interim order’, ‘interim order’ and ‘special interim order’. A general interim order is defined as a protection order including a consent order made under section 30A (b) and includes an order, other than a final order, that amends or revokes a general interim order.

An interim order is defined to mean a general interim order or a special interim order.

A special interim order is defined to mean a domestic violence order, including a consent order, made under section 30A (a) and includes an order, other than a final order, that amends or revokes a special interim order. The definition of special interim order has been constructed to ensure that only domestic violence orders are applicable for this scheme.

New section 28B

This section defines ‘related’ charges to mean that a charge against a person for an offence is related to an application for a final order or interim order if the person charged is the respondent for the application and a relevant person in relation to the aggrieved.

Section 28B (b) states that a charge cannot be related if it is a breach of a domestic violence order under section 90 of the DVPOA. While it is noted that some breaches of a domestic violence order can be particularly severe, the vast majority of those breaches are accompanied by other charges. This section is one safeguard to ensure the least restrictive means of limiting the right to freedom of movement. The limitations on these rights are discussed above in detail.

New section 28C

This section defines ‘outstanding’ charges for part 4 of the DVPOA.

Outstanding charges are defined as being outstanding until the charge is finally dealt with by withdrawal; dismissal; or discharge by a court following committal; or the person is acquitted, convicted or found guilty by a court of the offence.

Pending charges are not covered by this scheme. It is anticipated that submissions can be made at hearing if there are pending charges for related criminal matters.

Clause 9 – Section 29 heading

This clause amends the section heading to clarify that the section applies to interim orders.

Clause 10 – Section 30 heading

This clause amends the section heading to clarify that the section applies to interim orders.

Clause 11 – Section 30 (3)

This clause omits section 30 (3). Its effect is relocated to div 4.3 and remade as section 41 to clarify that only one general interim order may be made in relation to an application for a final order unless section 41D applies. This amendment distinguishes general interim orders from special interim orders.

Clause 12 – New section 30A

This clause inserts new section 30A to clarify the circumstances in which the Magistrates Court must make a special or general interim order. Specifically, a general interim order must be made in all cases except where the application for an interim order is for a final DVO and there is a related charge outstanding in relation to the respondent. In those cases, the court must make a special interim order.

Section 30A (2) states that if the court makes a special interim order in circumstances where a general interim order may be made, the operation of the special interim order is not affected by the fact that a general interim order may have been made, and the court may set aside the order and make a general interim order.

Section 30A (3) sets out a similar procedure for when general interim orders are made, and a special order may have been more appropriate.

The purpose of section 30A (2) and (3) is to ensure that if the court makes a general or special interim order in error (for example because of incorrect information), it does not affect the validity of enforcement of that order. If a special interim order should be made, it is these provisions which allow submissions to be made to allow the court to make a general order a special order. When general orders should have been made (instead of special orders),

it is open for a respondent to make an application for review of a special order, stating that it should be a general order instead.

In section 30A (2) and (3), the court will be able to hear submissions at any stage of the proceeding and consider whether a different order would be more appropriate. This ensures the protection of both the applicant and the respondent in domestic violence order proceedings.

Clause 13 – Section 31 heading

This clause amends the section heading to clarify that the section applies to interim orders.

Clause 14 – Section 32 heading

This clause amends the section heading to clarify that the section applies to interim orders.

Clause 15 – Section 33 heading

This clause amends the section heading to clarify that the section applies to interim orders.

Clause 16 – Section 34 heading

This clause amends the section heading to clarify that the section applies to general interim orders.

Clause 17 – Section 34 (1) (a)

This clause amends section 34 to clarify that the section applies to general interim orders.

Clause 18 – Section 34 (1) (b) and (2)

This clause amends section 34 to clarify that the section applies to general interim orders.

Clause 19 – New section 34A

This clause inserts a new section to clarify the return date for a final order when a special interim order has been made. Section 34A states that the return date for the application for the final order must not be earlier than the day all related charges are finalised and not later than 21 days after the day that all related charges are finalised.

This clause supports the provisions relating to special interim orders to ensure that before making a final order, unless by consent (see new s 42B) all charges must be finalised.

Clause 20 – Section 35 heading

This clause amends the section heading to clarify that the section applies to interim orders.

Clause 21 – Section 36 heading

This clause amends the section heading to clarify that the section applies to general interim orders.

Clause 22 – Section 36

This clause amends the section to clarify that the section only applies to general interim orders.

Clause 23 – Section 36

This clause amends the section to clarify that the section only applies to general interim orders.

Clause 24 – Section 36 (as amended)

This clause amends section 36 (as amended by clauses 20-22) and relocates it to section 41C. Section 41C is under new division 4.3 (General interim orders – no related charges) and is discussed below at clause 29.

Clause 25 – Length of interim orders not by consent, Section 37

This clause omits section 37. Its effect is relocated to div 4.3 and remade as section 41B to state that a general interim order (other than a consent order) must not be in force for more than 2 years. This amendment distinguishes general interim orders from special interim orders, and has been moved to the appropriate section that deals with general interim orders.

Clause 26 – Section 38

This clause remakes section 38 to distinguish between how a general interim order and special interim order ends.

Clause 27 – What if interim orders would expire before final orders are served? – Section 39

This clause omits section 39. Its effect is kept as new section 41E to distinguish how a general interim order ends from how a special interim order ends.

Clause 28 – Section 40 heading

This clause amends the section heading to clarify that the section applies to interim orders.

Clause 29 – Sections 41 and 42

This clause omits sections 41 and 42. Their effect is kept as new sections 41B and 41C to distinguish between how a general interim order and special interim order may be extended.

Clause 30 – New divisions 4.3 and 4.4

This clause inserts new divisions 4.3 and 4.4.

Division 4.3 replicates the existing interim order provisions, and clarifies that they apply to ‘general interim orders’.

Division 4.4 gives effect to the special interim order scheme.

New section 41

This section clarifies that only one general interim order may be made in relation to an application for a final order unless section 41D applies.

Section 41 replicates and replaces section 30 (3) (*When can interim orders be made?*) of the DVPOA. Justification for this section is at page 8 of the Explanatory Statement for the *Domestic Violence and Protection Orders Bill 2008*¹⁹.

Section 30 (3) was omitted by clause 11 (above).

New section 41A

This section states that a general interim order, other than a consent order, must not be in force for more than 2 years.

Section 41A replicates and replaces section 37 (*Length of interim orders by consent*) of the DVPOA. Justification for this section is at page 12 of the Explanatory Statement for the *Domestic Violence and Protection Orders Bill 2008*²⁰.

Section 37 is omitted by clause 25 (above).

New section 41B

This section sets out the circumstances when a general interim order is taken to be a special interim order.

Section 41B (1) states that the section applies if a court has made a general interim order on an application, after the general interim order is made (but before a final order is made), the respondent is charged with an offence and the charge is related to the application.

If the criteria in section 41B (1) have been met, section 41B (2) states that an interim order is taken to be a special interim order in the same terms and subject to the same conditions as the general interim order.

¹⁹ http://www.legislation.act.gov.au/es/db_33009/20080807-37363/pdf/db_33009.pdf.

²⁰ http://www.legislation.act.gov.au/es/db_33009/20080807-37363/pdf/db_33009.pdf.

Once a special interim order is made, the return date for the application must be changed to a day that is not earlier than a day when all related charges have been finalised, and not later than 21 days after all related charges are finalised.

A general interim order that has been made into a final order even after the respondent has been charged remains a valid final order.

New section 41C

Section 41C is contained in clause 24 (above), and is a relocation of section 36 of the DVPOA.

New section 41D

This section outlines what further orders can be made by the court when a general interim order has ended or is about to end.

Section 41D replicates and replaces section 41 of the DVPOA. Justification for this section is at page 12 of the Explanatory Statement for the *Domestic Violence and Protection Orders Bill 2008*²¹.

New section 41E

This section outlines the circumstances for extension of general interim orders.

Section 41E replicates and replaces section 42 (*When may the registrar extend interim orders?*) of the DVPOA. Justification for this section is at page 12 of the Explanatory Statement for the *Domestic Violence and Protection Orders Bill 2008*²².

Section 42 is omitted by clause 29 (above).

New section 41F

This section outlines the procedure in the event that general interim orders expire before final orders are served.

Section 41F replicates and replaces section 39 (*What if interim order would expire before final orders are served?*) of the DVPOA. Justification for this section is at page 12 of the Explanatory Statement for the *Domestic Violence and Protection Orders Bill 2008*²³.

Section 39 is omitted by clause 27 (above).

²¹ http://www.legislation.act.gov.au/es/db_33009/20080807-37363/pdf/db_33009.pdf.

²² http://www.legislation.act.gov.au/es/db_33009/20080807-37363/pdf/db_33009.pdf.

²³ http://www.legislation.act.gov.au/es/db_33009/20080807-37363/pdf/db_33009.pdf.

New section 42

This section defines ‘finalised’ for outstanding related charges as either charges that have been withdrawn, a notice declining to proceed has been filed or the charges have been dismissed by a court, or if the person is discharged, acquitted, convicted or found guilty of the offence.

New section 42A

This section states that if the Magistrates Court makes a special interim order on an application for a final order, the special interim order continues in force until the application is decided.

New section 42B

This section states that if the Magistrates Court has made a special interim order on an application for a final order, the court must not decide the application until all related charges are finalised.

Section 42B (2) ensures that an applicant is still able to withdraw or apply for consent orders before all related charges are finalised.

New section 42C

This section details what happens to a special interim order when charges are finalised.

Section 42C (1) notes that the section applies if the Magistrates Court has made a special interim order on application for a final order, and all charges related to it are finalised and the application for the final order has not been decided.

Section 42C (2) sets out the way that the court should deal with a special interim order when all related charges have been finalised.

If the Magistrates Court finalises all charges, they must also decide the application for the final order.

If another court finalises all charges, they may either:

- decide the application for the final as if it were the Magistrates Court, or
- notify the Magistrates Court that the final related charge has been decided.

The purpose of this section is to provide the court with the ability to finalise the charges and, as the court that has heard all evidence related to charges in the criminal proceeding, use its judicial discretion to impose a final DVO with relevant conditions. This section recognises that often related charges may be finalised in the Supreme Court and these provisions allow a Judge to decide an application if they choose, as if they were in the Magistrates Court.

A new note has been inserted to confirm that the relevant test for deciding a DVO proceeding is that the Magistrate has to be satisfied on the balance of probabilities. This is different to the standard required in criminal proceedings which is beyond reasonable doubt.

Section 42C (3) outlines that if a Judge does not wish to issue a final DVO, they may use their discretion to give the Magistrates Court guidance about, or a direction for, suitable conditions that should be considered for inclusion in the final order. If that is the case, the Magistrates Court must decide the application for the final order.

Section 42C (4) states that a decision to dismiss the application may only be made after giving the parties an opportunity to be heard. Section 42C (5) states that the court deciding the application for the final order under this section may set a return date for the application.

These sections operate to ensure that any application that is dismissed is only dismissed after all parties have been heard. If the parties are not sufficiently prepared to present arguments before the court on the DVO hearing, the matter can be adjourned for a DVO hearing.

Clause 31 – Consent orders, Section 43 (4) (b)

This clause is a technical amendment to ensure consistency of language in the legislation and reflect the change of heading made by clause 32 to section 45.

Clause 32 – Section 44 heading

This clause is a technical amendment to ensure consistency of language in the legislation and reflect the change of heading to section 44.

Clause 33 – Section 45

This section outlines the circumstances for length of general interim orders.

Section 45 substitutes section 45 (*Length of interim orders by consent*) of the DVPOA. Justification for this section is at page 13 of the Explanatory Statement for the *Domestic Violence and Protection Orders Bill 2008*²⁴.

This clause is a technical amendment to ensure consistency of language in the legislation and ensure that the section applies only to general interim orders.

A new note has been inserted to reflect the amendment at section 42A that a special interim order made as a consent order continues in force until the application for the final order is decided.

²⁴ http://www.legislation.act.gov.au/es/db_33009/20080807-37363/pdf/db_33009.pdf.

Clause 34 – Amendment generally, Section 58 (3), note 1

This clause is a technical amendment to ensure consistency in language in the legislation. The note inserts the word ‘general’ before ‘interim orders’ when referring to section 61.

Clause 35 – Section 61

This clause is a technical amendment to ensure consistency in language in the legislation. The substance of section 61 has remained the same, with the word ‘general’ inserted before ‘interim order’ in section 61 (1) and (2). The addition of a second note is to clarify the return date for special interim orders.

Clause 36 – Service of non-emergency protection orders, Section 64 (1) (a)

This clause is a technical amendment to ensure consistency in language in the legislation by amending section 64 (1) (a) to clarify the service of non-emergency order for general interim orders and special interim orders.

Clause 37 – New sections 90A and 90B

This clause inserts two new sections in part 11 of the DVPOA to outline the review procedures for special interim orders.

Section 90A

This section states that a respondent to a special interim order may apply to the Magistrates Court for review of the order.

The Court can grant leave for the respondent to apply for a review of the order in relation to:

- the identity of the respondent
- administrative defects
- whether there are outstanding related charges
- whether the order should instead be a general interim order.

The purpose of this section is to ensure that the respondent has a right of review for the order and the extension of the interim order.

Section 90B

This section states that on hearing an application for review under section 90A, the Magistrates Court may:

- dismiss the application;

- confirm the special order;
- revoke the special order; or
- set aside the special order.

Under section 90B (2), a revocation of the order can only be made in the court is satisfied that the special order is no longer necessary for the protection of the people it is meant to protect. It is intended that a revocation should only be made if, on review, the court is satisfied that it does not operate to protect the person that it is meant to protect.

Clause 38 – Application for review of particular final orders, Section 91 (1) (a)

This clause is a technical amendment to ensure consistency in language in the legislation by amending section 91 (1) (a) to insert the word ‘general’ before ‘interim order’ and to refer to the new section 41C.

This section previously referred to section 36, which is replaced by new section 41C (see clause 23).

Clause 39 – Section 91 (1), note 1

This clause is a technical amendment to ensure consistency in language in the legislation by amending the note in section 91 (1) to refer to the correct section.

Clause 40 – Section 93 heading

This clause is a technical amendment to ensure consistency in language in the legislation by amending the heading of section 93 to refer to the correct section.

Clause 41 – Section 93 (1)

This clause is a technical amendment to ensure consistency in language in the legislation by amending section 93 (1) to insert the word ‘general’ before ‘interim order’ and to refer to the new section 41C.

It is noted that this section previously referred to section 36, which is replaced by new section 41C (see clause 23).

Clause 42 – Section 93 (3) (a)

This clause is a technical amendment to ensure consistency in language in the legislation by amending section 93 (3) (a) to refer to the correct section.

Clause 43 – Section 94 heading

This clause is a technical amendment to ensure consistency in language in the legislation by amending the heading of section 94 to refer to the correct section.

Clause 44 – Section 94 (2)

This clause is a technical amendment to ensure consistency in language in the legislation by amending section 94 (2) to refer to the correct section.

Clause 45 – Deciding application if criminal proceedings, Section 113, new note

This clause inserts a new note in s113 to clarify that the Magistrates Court must make a special interim order if there are related outstanding criminal charges.

Clause 46 – Dictionary, new definitions

This clause inserts new definitions of ‘finalised’ and ‘general interim order’ as defined under the Bill. For further discussion on these definitions refer to clause 26 (s 42) and clause 8 (s 28A).

Clause 47 – Dictionary, definition of *interim order*

This clause substitutes a definition of ‘interim order’ to ensure consistency in the legislation. For further discussion of this definition refer to clause 8 (s 28A).

Clause 48 – Dictionary, new definitions

This clause inserts new definitions of ‘outstanding’, ‘related’ and ‘special interim order’ as defined under the Bill. For further discussion on these definitions refer to clause 8 (ss 28A – 28C).

Part 4 – Evidence (Miscellaneous Provisions) Act 1991

There are three main categories of amendments in part 4. The first deals with amendments to the definition of ‘serious violent offence’ and ‘less serious violent offence’ to ensure sufficient protections for victims of crime who give evidence in criminal proceedings.

The second category of amendments insert a new scheme allowing a police interview of first complaint of domestic and family violence to be used in court as the complainant’s primary evidence in chief.

The third category of amendments is primarily technical in nature and relates to changes in the titles and numbers of relevant areas of the *Evidence (Miscellaneous Provisions) Act 1991* (EMPA). These changes are minor in nature and result from the need to ensure the new provisions sit within the EMPA. These amendments have been described as necessary to ensure consistency of language in the legislation.

Clauses 49, 50 and 51

These clauses are technical amendment to ensure consistency of language in the legislation.

Clause 52 – Part 4 heading

This clause is a technical amendment to ensure consistency of language in the legislation. Clause 52 also inserts sections 36A and 36D.

Section 36A

This section states that if the evidence of a complainant or a similar act witness is not given in accordance with this chapter, the evidence is not inadmissible for that reason only. Section 36A (2) states that failure to comply with this chapter in relation to a proceeding does not affect the validity of the proceeding.

Section 36A substitutes section 47 (*Failure to comply with div 4.3*) of the EMPA. Justification for this section is at page 3 of the Explanatory Statement for the *Evidence (Miscellaneous Provisions) Amendment Bill 2003*.²⁵

This clause is a technical amendment to ensure consistency of language in the legislation and ensure that the section applies only to general interim orders.

Section 47 is omitted by clause 83.

Section 36B

Section 36B is contained in clause 62 (below), and is a relocation of section 38B of the EMPA.

Section 36C

Section 36C is contained in clause 65 (below), and is a relocation of section 38BA of the EMPA.

Section 36D

This section relocates the definition of ‘intellectually impaired’ from sections 40D and 40P. The definition now applies to the whole of chapter 4 (Evidence in sexual, violence and domestic violence offence proceedings).

The existing definitions (in ss 40D and 40P) are omitted by clauses 72-76.

Clause 53 – Division 4.1 heading

This clause is a technical amendment to ensure consistency of language in the legislation.

Clause 54 – Section 37 heading

This clause is a technical amendment to ensure consistency of language in the legislation.

²⁵ http://www.legislation.act.gov.au/es/db_5400/20030626-6617/pdf/db_5400.pdf.

Clause 55 – Section 37, definition of *less serious violent offence*

This clause amends the definition of ‘less serious violent offence’ by removing stalking (s 35 Crimes Act) and inserting:

- an offence under section 90 of the DVPOA (breach of a DVO); and
- an offence under section 116 of the Crimes Act (destroying or damaging property); and
- an offence under section 403 of the Criminal Code (damaging property).

Including these new offences means that the special measures under division 4.2.2 will now apply to complainants who can demonstrate that there was a ‘relevant relationship’ between the witness and the accused. This is an important amendment which ensures that complainants of domestic and family violence are not subject to further victimisation during criminal proceedings for breaches of DVOs or damage to property offences.

The definition has been substituted with a new section to ensure consistency in drafting structure.

Clause 56 – Section 37, definition of *serious violent offence*, new paragraph (a) (xiia)

This clause amends the definition of ‘serious violent offence’ by inserting stalking (s 35 Crimes Act). Stalking was removed from the definition of ‘less serious violent offence’ and included under violent offence to reflect the serious psychological harm that stalking has on victims.

People who have been subjected to stalking will now be able to give evidence and have special measures under division 4.2.2 apply to complainants whether or not there was a relevant relationship.

Clause 57 – Section 37, definition of *serious violent offence*, new paragraph (b) (iii) and (iv)

This clause amends the definition of ‘serious violent offence’ by inserting burglary (s 311 Crimes Act) and aggravated burglary (s 312 Crimes Act) if the complainant was in the building at the time of the offence.

This amendment recognises the trauma that witnesses suffer when they are present during a burglary.

People who have been subjected to burglary and aggravated burglary and were in the building at the time of the offence will now be able to give evidence and have special measures under division 4.2.2 apply to complainants whether or not there was a relevant relationship.

Clause 58 – Section 37, new definitions

This clause relocates definitions of ‘sexual or violent offence’ and ‘sexual or violent offence proceeding’. This clause has been inserted to ensure consistency with the remainder of the legislation.

Clause 59 – Division 4.2

This clause is a technical amendment to ensure consistency of language in the legislation.

Clause 60 – Section 38B heading

This clause is a technical amendment to ensure consistency of language in the legislation.

Clause 61 – Section 38B (1)

This clause is a technical amendment to ensure consistency of language in the legislation.

Clause 62 – Section 38B (as amended)

This clause is a technical amendment to ensure consistency of language and numbering in the legislation.

Clause 63 – Section 38BA heading

This clause is a technical amendment to ensure consistency of language in the legislation.

Clause 64 – Section 38BA

This clause is a technical amendment to ensure consistency of language in the legislation.

Clause 65 – Section 38BA (as amended)

This clause is a technical amendment to ensure consistency of language in the legislation.

Clause 66 – Division 4.2A

This clause is a technical amendment to ensure consistency of language in the legislation.

Clause 67 – Meaning of *complainant*—div 4.2A, section 40A

This clause omits the definition of complainant in section 40A because the term is not used in this division.

Clause 68 – Section 40B heading

This clause is a technical amendment to ensure consistency of language in the legislation.

Clause 69 – Section 40B (1) (c) and (d)

This clause is a technical amendment to ensure consistency of language in the legislation.

Clause 70 – Section 40C heading

This clause is a technical amendment to ensure consistency of language in the legislation.

Clause 71 – Section 40C (1) (c) and (d)

This clause is a technical amendment to ensure consistency of language in the legislation.

Clause 72 – Section 40D heading

This clause is a technical amendment to ensure consistency of language in the legislation.

Clause 73 – Section 40D (2)

This clause is a technical amendment to ensure consistency of numbering in the legislation.

Clause 74 – Division 4.2B

This clause is a technical amendment to ensure consistency of numbering in the legislation.

Clause 75 – Section 40P heading

This clause is a technical amendment to ensure consistency of numbering in the legislation.

Clause 76 – Section 40P (3)

This clause is a technical amendment to ensure consistency of numbering in the legislation.

Clause 77 – Division 4.3

This clause is a technical amendment to ensure consistency of numbering in the legislation.

Clause 78 – Meaning of *complainant* and *sexual offence proceeding*—div 4.3, section 41 (2) (c)

This clause is a technical amendment to ensure consistency of language in the legislation.

Clause 79 – Meaning of *violent offence proceeding*—div 4.3, section 41A (1) (c)

This clause is a technical amendment to ensure consistency of language in the legislation.

Clause 80 – Meaning of *sexual offence* and *violent offence*—div 4.3, section 41B

This clause is a technical amendment to ensure consistency of language in the legislation.

Clause 81 – Proceedings to which div 4.3 applies, section 42 (1) (c) (i)

This clause is a technical amendment to ensure consistency of numbering in the legislation.

Clause 82 – Section 42 (3)

This clause is a technical amendment to ensure consistency of language in the legislation.

Clause 83 – Failure to comply with div 4.3, section 47

This clause omits section 47, as it is replaced by new section 36A.

Clause 84 – Divisions 4.4 to 4.6

This clause is a technical amendment to ensure consistency of numbering in the legislation.

Clause 85 – New part 4.3

Part 4.3 inserts the substantive amendment to the EMPA to allow evidence of the first complaint of domestic violence taken by police officers to be used as evidence in chief in a proceeding for a domestic violence offence.

This evidence may be used in other proceedings where the evidence is relevant and appropriate submissions are made as to whether the evidence could be appropriate in the circumstances. The provisions do not expressly restrict the use of such evidence in other proceedings instead allows for the rules of evidence to apply.

Section 28 HR Act analysis

The Bill makes amendments to the EMPA to allow a police record of interview of a complainant to be provided to the court as the complainant's evidence in chief. These amendments seek to balance the rights of a person and their family to be safe, with the rights of a person accused of using violence.

Under section 10 of the HR Act, no one may be tortured or treated or punished in a cruel, inhuman or degrading way. Section 11 of the HR Act provides that families and children are entitled to be protected by society. The Bill supports these sections in promoting the safety of women and children. This amendment is a balance between the victim's right to safety and the offender's rights in the criminal process.

It aims to reduce trauma to the victim caused by testifying in court and also looks to improve the accuracy of the evidence, as the statement will likely be taken shortly after an incident has occurred. This protects families by ensuring that family violence incidents are recorded and addressed by the law where necessary.

However, it may also result in a separation of a family where the aggressor is a member of the family and must be prevented from living with or contacting family members for safety reasons. The amendment takes into account the best interests of children, by streamlining the legal process for dealing with a family violence incident. By resolving incidents quickly and with the assistance of cogent evidence, families are more likely to be kept safe and free from the stress of lengthy family violence proceedings. The effect of this amendment is proportionate, considering the right to safe family life and promoting the best interests of the child.

For these sections, the Bill engages and supports the following rights:

- Section 10– Protection from torture and cruel, inhuman or degrading treatment;
- Section 11– Protection of family and children; and
- Section 12– Privacy and reputation.

The Bill engages and limits the following rights:

- Section 18– Right to liberty and security of person (discussed in detail above);
- Section 21– Fair trial; and
- Section 22– Rights in criminal process.

Section 21 – Fair trial

Section 21 provides that everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing. The amendments in new part 4.3 will limit the right to a public hearing, as new section 78 provides for the hearing of evidence in closed court in particular circumstances. This limitation will be discussed below.

Section 22 – Rights in criminal proceedings

Section 22 provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law. A person charged with a criminal offence is also entitled to a number of minimum guarantees, including the ability to cross-examine prosecution witnesses. The amendments in new part 4.3, including s 80, will engage an accused's rights in criminal proceedings, but will not limit them, as the substantive changes affect how complainants give evidence in chief. The amendments will not limit the ability of an accused to examine witnesses or adduce evidence for their own submissions.

The nature of the right affected (s 28 (2) (a))

The right to a fair trial guarantees the right of all parties in civil and criminal proceedings to a fair and public hearing. However, the court may exclude the public from a trial in the interests of the private lives of the parties.

The importance of the purpose of the limitation (s 28 (2) (b))

The right to a fair trial is limited by section 77 because this section allows evidence to be given in closed court if the court considers that the complainant has a vulnerability that affects their ability to give evidence because of the circumstances of the proceeding. This protects vulnerable complainants in domestic violence proceedings from additional trauma resulting from the giving of evidence in an open court.

Nature and extent of the limitation (s 28 (2) (c))

The limitation on the right to a public hearing will only be imposed where the court considers that the complainant has a vulnerability that affects the complainant's ability to give evidence because of the circumstances of the proceeding or the complainant's circumstances (new s 77 (1)). The court must also consider whether it is in the interests of justice that the complainant give evidence in open court (new s 77 (4) (b)).

Relationship between the limitation and its purpose (s 28 (2) (d))

The purpose of the amendments is to protect vulnerable complainants in domestic violence proceedings. In addition, the amendments seek to balance the interests of justice with that protection. As a result, the right to a fair trial and public hearing are limited only to the extent necessary to protect witnesses and also uphold the interests of justice. The court has discretion to decide that it would not be in the interests of justice to take evidence in closed court.

Any less restrictive means reasonably available to achieve the purpose (section 28 (2) (e))

This amendment is the least restrictive and most reasonable way to achieve the purpose of protecting vulnerable complainants in domestic violence proceedings. By hearing evidence in closed court, where this is in the interests of justice, complainants are protected and the trial can proceed on the basis of the evidence admitted. The requirement that the court consider the interests of justice serves to balance the limitation on the right to fair trial and ensures the limitation is proportionate to the aim of the provision.

Section 74

The definition of a domestic violence offence is defined in relation to the list of domestic offences at schedule 1 of the DVPOA. The policy intent behind this definition is to ensure consistency within domestic and family violence legislative schemes.

Section 75

This section defines ‘domestic violence offence proceeding’ to include:

- a proceeding for a domestic violence offence;
- a proceeding in relation to bail;
- a sentencing proceeding relating to a domestic violence offence; or
- an appeal arising out of a proceeding or sentencing proceeding relating to a domestic violence offence.

Section 75 (2) makes it clear that a proceeding for a domestic violence offence includes a broad category of proceedings related to mainstream domestic violence offences. The policy intent behind this is to ensure that proceedings that involve other non-domestic violence offences that stem from the same set of facts (for example, an assault against a partner and an assault against a person that attempts to intervene) can come within this definition.

Section 76

This section defines a ‘complainant’ in a domestic violence offence proceeding as a person against whom a domestic violence offence the subject of the proceeding is alleged, or has been found, to have been committed.

The person must be a ‘relevant person’ in relation to the accused person.

A relevant person is defined in newly numbered section 36A (see clause 61).

Section 77

This section defines a ‘recorded statement’ as an audiovisual recording of a complainant answering questions of a police officer in relation to the investigation of a domestic violence offence.

Section 77 (1) (a) (ii) states that the recording must be made by a police officer, with the informed consent of the complainant.

Section 77 (1) (b) allows audio recordings to be made if the complainant does not consent to an audiovisual recording, but gives informed consent to an audio recording. It is intended that the majority of statements will be audiovisual. This clause allows complainants who may be particularly vulnerable to object to having visual images made of them. Audio only statements can also be made in exceptional circumstances. It is intended that this provision will cover circumstances that are beyond the control of the person making or taking the statement, for example technical difficulties that were not known about prior to making the statement.

Section 77 (2) states that a police officer must, before making a recorded statement, tell the complainant that the recorded statement may be used in evidence at a hearing and that, if a statement is used in evidence, the person giving the statement may be called to give evidence under cross-examination in person at the hearing. This section is an important safeguard to protect both the complainant and the accused. It is important that the complainant understands how the statement may be used, particularly given that false statements made to police, or when giving sworn evidence, attract penalties under other laws.

Section 77 (3) defines ‘police officer’ to include other members of the police force of a State or another Territory who have corresponding provisions and who have undergone training in taking evidence in accordance with those provisions. The purpose of this definition is to ensure that evidence taken in other jurisdictions with similar provisions that allow evidence taken at domestic violence matters to be tendered as evidence in chief can be used in proceedings in the ACT without the need for additional recorded evidence to be taken.

Section 78

This section allows the complainant to give evidence, including the hearing of pre-recorded evidence in chief, in closed court if the complainant wants to do so and it is in the interests of justice to do so.

The purpose of this section is to acknowledge the nature of the evidence being given by a complainant, particularly when they are being interviewed shortly after a traumatic event. The evidence is being taken at a time when the complainant is particularly vulnerable and it is important that they have the ability to seek to request the evidence be heard in a closed court.

This section was requested by the Victims of Crime Commissioner to ensure adequate protections for victims of domestic and family violence, and to ensure that they are not further traumatised by a measure intended to support their need to give evidence.

This section does not prevent the attendance of a person nominated by the complainant, such as a support friend, or a person who is authorised to attend a proceeding for a news report.

This section engages the right to a fair trial (s 21 of the HR Act), and is discussed above.

Section 79

This section outlines the requirements of a recorded statement.

Section 79 (1) states that the statement must be made as soon as practicable after the events mentioned in the statement happened, and must be in the form of questions and answers. The “form of question and answers” implies that the conversation must be started with a question and the following answers, or narrative, will form the statement. It is intended that the *Evidence Act 2001* will apply to the questions and the content of the statement will need to comply with the Evidence Act.

Section 79 (2) states that a recorded statement must include the name of each person present during any part of the recording, and it must include a statement made by the complainant about their name, age and address and the truth of the representations made in the statement. Other content of a recorded statement can be prescribed by regulation.

Section 79 (3) indicates that the recorded statement, as far as practicable, must not contain images of a child or a person who is intellectually impaired. The definition of ‘intellectually impaired’ is contained in old section 40D of the EMPA (relocated to new s 36D).

It is important to ensure that additional protections are available for children or people with an intellectual impairment. These measures are already established and used in practice. They are not amended by this Bill.

Section 79 (4) allows recorded statements to be made when the complainant is unable to speak English. In those circumstances, if any part of a recorded statement is in a language other than English, the statement must contain an English translation of that part and a separate written English translation of that part must accompany the recorded statement.

Section 79 (5) states that a recorded statement must not be edited or changed unless both parties consent or the court hearing the proceeding orders otherwise. It is intended that a police officer will be able to certify the recording in that officer’s written statement.

Section 80

This section provides that a recorded statement may be played at the hearing of a proceeding for the domestic violence offence to which it relates. If it is played at the hearing, the statement may be admitted as all or part of the complainant’s evidence in chief in the proceeding. The statement will still be subject to the discretion of the court and all or part of the statement may not be admitted, at the court’s discretion.

The complainant may choose to be present in the courtroom, but if giving evidence from a remote location must not be visible or audible to anyone in the courtroom by closed-circuit television or other similar technology while the court is viewing or listening to the recorded statement. This section ensures that if the complainant is giving evidence from a remote location the evidence in chief is presented clearly.

These amendments do not involve the derogation of the right to a fair trial. The accused will be entitled to listen to and view the recording, in advance of the trial. This will provide the accused with sufficient time to prepare itself for the cross-examination. The accused person’s right to cross-examine the witness is not affected by this section or part 4.3, and will occur in the normal manner following the admission of the recording. The recording provides a reasonable substitute for the live testimony of the witness as it continues to allow the accused, the judge and the jury to observe the characteristics of the witness, such as their demeanour, voice and language.

The court is also provided with a broad discretion to admit or reject the recording as the evidence-in-chief of the witness.

Section 81

This section clarifies that the hearsay rule and opinion rule do not prevent the admission or use of evidence of a representation in the form of a recorded statement. That is, the fact that the evidence is a recorded statement does not make it inadmissible on account of the operation of the hearsay or opinion rules. However, the content of the recorded statement will still be subject to the hearsay and opinion rules.

Section 81A

Section 81A (1) states that the failure of a police officer to make a recorded statement in accordance with the requirements of this division does not affect the validity of a proceeding in which evidence of the representation is given.

Section 81A (2) states that the failure of a complainant to give evidence in accordance with this part does not affect the validity of a proceeding or decision made in connection with the proceeding.

This section is an important provision which ensures that criminal proceedings are able to continue regardless of whether a recorded statement is used in those proceedings.

Section 81B

This section applies when a recorded statement has been made and the accused person is represented by a lawyer in the proceeding. In those cases, the legal representative must be given a copy of the recorded statement as soon as practicable. This ensures that the accused's lawyer is able to view the proposed evidence and therefore uphold the right of the accused to a fair trial. This section is intended to operate to ensure that a person's legal representative is provided a copy of the recorded statement as soon as practicable.

Legal representative includes the firm who employs the legal representative. This definition has been included to ensure that personal delivery is not required and to recognise that often a firm will represent an accused, but sometimes have multiple legal representatives attend court on the accused's behalf.

Section 81B (3) states that at the completion of a matter the legal representative must return all copies of the recorded statement to the prosecutor within 16 weeks.

Section 81B (4) states that the accused person must not be given, or take a copy of, the recorded statement.

Section 81C

This section applies if the accused person is not represented by a lawyer in the proceeding. In those cases, the accused person must be given an audio (audio only, not audio-visual) recording as soon as practicable.

The accused must also be provided with an opportunity to view a recorded statement at a police station on one of the specified occasions. This ensures the accused knows the case that they will be required to answer at the trial and protects their right to a fair trial and their rights in criminal proceedings.

Section 81D

This section provides that a recorded statement will only be admitted where the accused person was given an opportunity to view the recorded statement. However, if this requirement has not been complied with, the recorded statement may still be admitted if the parties consent to the statement being admitted or if it is in the interests of justice to do so.

Section 81E

This section provides that an accused person must be given an audio recording if the prosecutor in a domestic violence proceeding intends to tender a recorded statement as evidence and the court accepts a plea of not guilty from the accused person and the accused person has not already been given a copy of the recorded statement under section 81C. This ensures that an accused person has had ample opportunity to obtain an audio recording of the evidence so they can adequately prepare for their trial.

Section 81F

This section applies in a jury trial for a domestic violence offence where a recorded statement is admitted as evidence. In those circumstances, the court must tell the jury that the admission of the recorded statement is a usual practice and the jury must not draw a particular inference because of the way in which the evidence is given. This ensures that a jury appropriately understands why the evidence has been provided in an audiovisual format and how to use the evidence in their deliberations. This aims to avoid the result that a jury gives the evidence inappropriate weight or draws an inference against the accused because of the way the evidence is presented.

This provision is modelled on existing provisions in the EMPA.

Section 81G

This section creates an offence where a person publishes a recorded statement and does not have authority to do so. This safeguards the recorded statement as evidence for the purposes of the related proceeding and protects the rights of victims from further abuse.

Clause 86 – Parts 5 to 7

This clause is a technical amendment to ensure consistency of numbering in the legislation.

Clause 87 – Divisions 7.1 to 7.3

This clause is a technical amendment to ensure consistency of numbering in the legislation.

Clause 88 – Parts 8 and 9

This clause is a technical amendment to ensure consistency of numbering in the legislation.

Clause 89 – Dictionary, note 2

This clause is a technical amendment to ensure consistency of language and numbering in the legislation.

Clause 90 – Dictionary, definition of *complainant*

This clause is a technical amendment to ensure consistency of language and numbering in the legislation.

Clause 91 – Dictionary, new definitions

This clause is a technical amendment to ensure consistency of language and numbering in the legislation.

Clause 92 – Dictionary, definitions of *relative, relevant person and sexual offence*

This clause is a technical amendment to ensure consistency of language and numbering in the legislation.

Clause 93 – Dictionary, new definitions

This clause is a technical amendment to ensure consistency of language and numbering in the legislation.

Clause 94 – Dictionary, definition of *violent offence*

This clause is a technical amendment to ensure consistency of language and numbering in the legislation.

Clause 95 – Further amendments, mentions of 4.2

This clause is a technical amendment to ensure consistency of numbering in the legislation.

Clause 96 – Further amendments, mentions of 4.2A

This clause is a technical amendment to ensure consistency of numbering in the legislation.

Clause 97 – Further amendments, mentions of 4.2B

This clause is a technical amendment to ensure consistency of numbering in the legislation.

Clause 98 – Further amendments, mentions of 4.3

This clause is a technical amendment to ensure consistency of numbering in the legislation.

Clause 99 – Further amendments, mentions of 4.4

This clause is a technical amendment to ensure consistency of numbering in the legislation.

Clause 100 – Further amendments, mentions of 4.5

This clause is a technical amendment to ensure consistency of numbering in the legislation.

Clause 101 – Further amendments, mentions of 4.6

This clause is a technical amendment to ensure consistency of numbering in the legislation.

Clause 102 – Further amendments, mentions of *div*

This clause is a technical amendment to ensure consistency of numbering in the legislation.

Clause 103 – Further amendments, mentions of *division*

This clause is a technical amendment to ensure consistency of numbering in the legislation.

Clause 104 – Further amendments, mentions of *part*

This clause is a technical amendment to ensure consistency of numbering in the legislation.

Clause 105 – Further amendments, mentions of *part 4*

This clause is a technical amendment to ensure consistency of numbering in the legislation.

Clause 106 – Further amendments, mentions of *pt*

This clause is a technical amendment to ensure consistency of numbering in the legislation.

Schedule 1 – Consequential amendments

Primarily as a result of the amendments to the EMPA, there are a number of consequential amendments to other legislation to ensure consistency in language, references and numbering.

Part 1.1 – Children and Young People Act 2008

Clause [1.1] – Section 246, definition of *privileged*, paragraph (b)

This amendment is as a result of the amendments to the EMPA and will ensure consistency with numbering.

Clause [1.2] – Section 463 (5), example

This amendment is as a result of the amendment to section 38 of the DVPOA.

Part 1.2 – Confiscation of Criminal Assets Act 2003

Clause [1.3] – Section 176 (5)

This amendment is as a result of the amendments to the EMPA and will ensure consistency with numbering.

Clause [1.4] – Section 176 (5), note

This amendment is as a result of the amendments to the EMPA and will ensure consistency with numbering.

Part 1.3 – Court Procedures Act 2004

Clause [1.5] – Section 41 (2) (d)

This amendment is as a result of the amendments to the EMPA and will ensure consistency with numbering and language.

Part 1.4 – Court Procedures Rules 2006

Clause [1.6] – Rule 6703 (2), note 1

This amendment is as a result of the amendments to the EMPA and will ensure consistency with numbering.

Clause [1.7] – Rule 6703 (2), note 1

This amendment is as a result of the amendments to the EMPA and will ensure consistency with numbering.

Part 1.5 – Crimes Act 1900

Clause [1.8] – Section 192 (1)

This amendment is as a result of the amendments to the DVPOA and will ensure consistency with language used in the legislation.

Part 1.6 – Crimes (Forensic Procedures) Act 2000

Clause [1.9] – Section 38 (2) (a), note 2

This amendment is as a result of the amendments to the EMPA and will ensure consistency with numbering.

Clause [1.10] – Section 77C (2) (a), note 2

This amendment is as a result of the amendments to the EMPA and will ensure consistency with numbering.

Part 1.7 – Crimes (Sentencing) Act 2005

Clause [1.11] – Section 52 (4) (a)

This amendment is as a result of the amendments to the EMPA and will ensure consistency with numbering.

Clause [1.12] – Section 52 (4) (b)

This amendment is as a result of the amendments to the EMPA and will ensure consistency with numbering.

Part 1.8 – Evidence Act 2011

Clause [1.13] – Section 8, example 2

This amendment is as a result of the amendments to the EMPA and will ensure consistency with numbering.

Clause [1.14] – Section 126F (3)

This amendment is as a result of the amendments to the EMPA and will ensure consistency with numbering.

Part 1.9 – Evidence (Miscellaneous Provisions) Regulation 2009

Clause [1.15] – New section 4 (3)

This amendment inserts a definition of ‘police officer’ to ensure consistency with the amendments made to the EMPA at new section 77 (3).

Part 1.10 – Firearms Act 2996

Clause [1.16] – Section 80 (1), note 2

This amendment is as a result of the amendments to the DVPOA and will ensure consistency with language.

Clause [1.17] – Section 97 (1), note 2

This amendment is as a result of the amendments to the DVPOA and will ensure consistency with language.

Clause [1.18] – Section 119 (1), note 2

This amendment is as a result of the amendments to the DVPOA and will ensure consistency with language.

Part 1.11 – Supreme Court Act 1933

Clause [1.19] – Section 37N (4), definition of *audio link*

This amendment is as a result of the amendments to the EMPA and will ensure consistency with numbering.