

2016

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

PERSONAL VIOLENCE BILL 2016

EXPLANATORY STATEMENT

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PERSONAL VIOLENCE BILL 2016

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Purpose of the Bill

The *Personal Violence Bill 2016* establishes a system of protection for those who fear or experience personal violence (other than from a family member) or workplace violence. The Bill creates a single point of legislation that deals with protection orders and workplace orders, to replace the system established in the *Domestic Violence and Protection Order Act 2008*, which is to be repealed by the *Family Violence Bill 2016*.

The Bill will:

- a) make provisions for personal violence and workplace violence protection orders;
- b) promote mediation of appropriate matters; and
- c) create offences to enforce protection orders.

Human Rights Considerations

The Bill establishes a scheme of personal and workplace protection orders to provide additional protection to that available from the criminal law. This scheme applies where violence is used or threatened by one individual against another and where such behaviour does not constitute family violence.

Australian Federal and State governments are obliged, under the International Covenant on Civil and Political Rights (ICCPR), to provide reasonable and appropriate measures to protect an individual's personal security where it is at risk from another private individual.¹ In the ACT that obligation is enshrined in section 18 of the *Human Rights Act 2004* (HR Act) (right to liberty and security of person).

This Bill addresses human rights obligations to ensure that people living and working in the ACT have access to additional civil protections where necessary to ensure their safety. 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.

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

- Section 8 – Recognition and equality before the law
- Section 13– Freedom of movement;
- Section 18– Right to liberty and security of person; and
- Section 21– Fair trial.

¹ *Delgado Paez v Columbia*, 12 July 1990, No 195/85 at 5.5

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

- Section 10– Protection from torture and cruel, inhuman or degrading treatment;
- Section 12 – Privacy and reputation
- Section 13 – Freedom of movement
- 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 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.

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).

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*⁴. 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

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 [1986] 1 S.C.R. 103.

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”⁵.

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 prohibited behaviour.

Detailed human rights discussion

Rights engaged and supported

The Bill offers protection to individuals whose physical safety or property, or the property of the individual’s employer, is at risk. In doing so, it engages and supports the rights to protection from torture and cruel, inhuman or degrading treatment, liberty and security of person, freedom movement and a fair trial.

The Bill’s provisions also engage and support a number of rights for those individuals who are the subject of applications for interim or final protection orders.

The right to privacy and reputation is engaged and supported notably by the provisions relating to public access and protection which create an offence of publication of reports about proceedings while permitting the release of information in limited circumstances.

The right to a fair trial is engaged and supported to the extent that final orders may only be made where all the procedural requirements have been met and the court is satisfied that the requirements to make an order have been met on the balance of probabilities. In addition, procedures are designed to be simple, quick and inexpensive as is consistent with achieving justice.

Rights engaged and limited

It is inevitable that a protection order scheme for individuals will engage and limit another individuals’ rights and the Bill’s provisions seek to strike a balance between the rights of an affected person and a respondent. This balance is reflected in two particular provisions. Clause 28 of the Bill requires a court to give paramount consideration to the safety and protection of the affected person when deciding what conditions should be included in a protection order. Clause 29 provides that the conditions must be the least restrictive possible to achieve the objects of the legislation and give effect to clause 28.

Section 8 - Recognition and equality before the law

This right requires that no legislation should discriminate against an individual but formal equality may create unfair outcomes and so the **nature of the right** is not absolute. The right

⁵ *R v Oakes* [1986] 1 S.C.R. 103.

is engaged and limited by the prohibition on orders being made against a child under the age of 10 years (section 69) which aims to preserve the principle that children under 10 cannot be held criminally responsible. Although the proceedings for a personal violence order are civil in nature, breach of an order is a criminal offence. The **purpose of the limitation** is to prevent a child being found guilty of contravening an order and the **nature and extent of the limitation** is restricted solely to children under 10 which recognises the capabilities, level of maturity and rights relating to children. The limitation is the **least restrictive possible** as it reflects the position of the criminal law in its treatment of children.

Section 13 – Freedom of movement

This right is engaged and limited by permitting a court to prohibit a respondent from going within a certain distance of specified place or person or contacting a specified person. The **nature of the right** is not absolute and so may be subject to reasonable limitations pursuant to section 28 of the HR Act. The **purpose of the limitation** is to protect the affected person and the **nature and extent of the limitation** may vary. However, as previously stated, the nature and extent is required by the Bill to be the **least restrictive possible**. In addition, a respondent may apply to a court to amend or review the order in certain circumstances.

Section 18 - Liberty and security of person

The right is engaged and limited due to a power for a court to issue a warrant for a respondent's arrest in certain circumstances. The **nature of the right** is not absolute and may be limited by grounds and in accordance with the procedures established by law. The **purpose of the limitation** imposed by the power to issue a warrant for arrest is to ensure that where a court decides that the respondent should be present to participate fully in proceedings which affect them there is a method of securing attendance. The **nature and extent of the limitation** is to ensure the physical appearance of a respondent which will allow the court to hear the best evidence prior to reaching a decision. The limitation is the **least restrictive possible** in that a respondent will already have received notification of the hearing and chosen not to attend. Also, the provision does not create any criminal offence in respect of the respondent's non-attendance.

Section 21 – Fair trial

The right to a fair trial includes all proceedings in a court or tribunal and all stages of proceedings. It is concerned with procedural fairness, that is, the right of all parties in proceedings to be heard and respond to any allegations and the requirement that the court be unbiased and independent. The **nature of right** may be absolute in itself, in that it can never be justified to hold an unfair trial many of the principles that characterise a fair trial are not absolute⁶. The right is engaged and limited by the Bill as an interim order may be made even where a respondent has not been made aware of proceedings. The **purpose of the limitation** is to protect the affected person from certain behaviours. The **nature and extent of the limitation** is to allow applications to be heard without notice only where it is necessary to

⁶ *Brown v Stott* (2003) 1 AC 681

ensure an affected person's safety or to prevent substantial damage to property. The limitation is the **least restrictive possible** to achieve a balance between the rights of the affected person and respondent in that interim orders are time limited and may only be made on application for a final order.

Personal Violence Bill 2016

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 *Personal Violence Act 2016*.

Clause 2 — Commencement

This clause provides that the Act will commence on the commencement of the *Family Violence Act 2016*, section 3. That section commences six months after the notification day for the *Family Violence Act 2016*.

The naming and commencement provisions automatically commence on the Act's notification day.

Clause 3 — Dictionary

This clause is a technical clause that notes the dictionary is at the end of the Act, and is also a part of the Act.

Clause 4 — Notes

This clause is a technical clause that specifies that notes are explanatory and not part of the Act.

Clause 5 — Offences against Act—application of Criminal Code etc

This clause states that the Criminal Code applies to offences against the Act.

Part 2 – Objects and important concepts

Division 2.1 – Objects

Clause 6 – Objects of Act

This clause sets out the objects of the Act, broadly to prevent and reduce personal violence (other than family violence), keep people (including children) safe, provide people with a legally enforceable mechanism to prevent personal violence and allow for the resolution of conflict without the need to resort to adjudication, and hold perpetrators of personal violence accountable for their conduct.

Clause 7 – How objects are to be achieved

This clause sets out how the Act aims to achieve its objects through giving the courts power to make protection orders; creating offences to enforce protection orders; ensuring that access to the courts is as simple, quick and inexpensive as is consistent with justice and recognising orders made elsewhere in Australia and in New Zealand.

Division 2.2 – Important concepts

Clause 8 – Meaning of *personal violence*

This clause defines personal violence for this Act. It expands and clarifies the previous definition in the *Domestic Violence and Protection Orders Act 2008* (DVPO Act) by providing behaviours by a person in relation to another person that constitute personal violence. These behaviours include physical and sexual violence or abuse, stalking, damaging property, and threatening to do any of the behaviours listed in this clause.

This clause also defines personal violence by a person in relation to a workplace, and notes that a workplace protection order (WPO) is only available in relation certain people in the workplace (see clause 13 for further details).

This clause clarifies that a person's conduct is not personal violence if it is family violence. Family violence is defined in the *Family Violence Act 2016*, section 8, which deals with protection orders and other orders relating to family violence matters.

Clause 9 – Principle about procedures

This clause provides that procedures under the Act are to be as simple, quick and inexpensive as is consistent with achieving justice.

Clause 10 – Balance of probabilities

This clause provides that the level of satisfaction required for decision-makers under this Act is the balance of probabilities.

Part 3 – Protection orders

Division 3.1 – Matters to be considered when making protection orders

Clause 11 – Matters to be considered—protection orders

This clause provides the matters a court must consider in deciding whether to make a protection order. This simplifies and streamlines the matters to be considered and reinforces the objects and principles of the Act, and includes whether a previous protection order has been made in relation to the person or contravened by the person.

For the purposes of this section, protection orders include certain orders made under the *Family Violence Act 2016*, *Domestic Violence Agencies Act 1986*, *Domestic Violence and Protection Orders Act 2001*, *Domestic Violence and Protection Orders Act 2008*, *Magistrates Court Act 1930*, and an order under a law of a State or Territory or New Zealand that has or had the same or substantially the same effect as a protection order under this Act or the *Family Violence Act 2016*.

Division 3.2 – Applications for protection orders

Clause 12 – Who may apply for personal protection orders?

This clause provides that a person may apply to the Magistrates Court for a personal protection order (PVO) for themselves. In relation to another person, a police officer or a litigation guardian for a person may apply for a PVO for someone else. For clarification, examples include a parent or guardian of a child, or an agent of the person.

Clause 13 – Who may apply for workplace protection orders?

This clause provides that an employer for the workplace, or an agent of the employer, may apply to the Magistrates Court for a WPO in relation to an affected person.

An affected person for the purposes of personal violence in a workplace is defined in the dictionary at the end of the Act as an employee at the workplace, the employee's employer, or any other person in the workplace against whom personal violence has been, or is likely to be, committed.

Clause 14 – Application forms that require affected person's address

This clause replicates section 21 under the DVPO Act and provides that an affected person's address need not be included in the application. This is to protect the affected person's safety and prevent a respondent seeking out an affected person who wishes to have no contact with the respondent.

For the purposes of this section, if the affected person is not the applicant, affected person includes the applicant.

Clause 15 – What if application is made for the wrong order?

This clause replicates section 27 of the DVPO Act and provides for the circumstances in which a person applies for one type of protection order, when they should have applied for another type of order. For example, if a person applies for a family violence order, but is not related to the respondent, the Magistrates Court may make a PVO if the person honestly applied for the first order and the court could have made a PVO if the application had been properly made.

Clause 16 – What if application for the wrong order is decided?

This clause replicates section 28 of the DVPO Act and provides for circumstances similar to those set out in the previous clause, where an application is made for the wrong order. This clause clarifies that where the wrong order is decided, the operation of the order is not affected and the order must be treated as the kind of order that could have been made in relation to the conduct set out in the application.

Division 3.3 – Interim Orders

Clause 17 – Interim orders—only on application for final order

This clause reflects division 4.2 of the DVPO Act and clarifies the grounds for making an interim order. The clause reflects the intention that an interim order may only be made on application for a final order and the court may make the order at any time before the final order is decided, even if a copy of the application and a timing notice have not been served on the respondent.

Clause 18 – General interim orders—only 1 may be made

This clause remakes section 41 of the DVPO Act and provides that only one general interim order may be made in relation to an application for a final order unless there are grounds for making further orders, as provided by clause 22 (Interim orders – further orders).

Clause 19 – Interim orders—grounds for making

This clause also reflects division 4.2 of the DVPO Act and provides that a court may make an interim order if satisfied that it is necessary to ensure the safety of an affected person, or prevent substantial damage to a person's property or property of the workplace, until the application for the final order is decided.

Clause 20 – Interim orders—length

This clause provides that an interim order must not be in force for more than one year, plus any extension under clause 23 or clause 24 of the Bill.

Clause 21 – Interim orders—ending

This clause remakes section 41A of the DVPO Act and provides for the circumstances in which an interim order ends.

Clause 22 – Interim orders—further orders

This clause remakes section 41D of the DVPO Act and provides that the court may make a further interim order if there are special or exceptional circumstances that justify the making of a further order. These circumstances are to be determined with reference to the Act's objects and how those objects are to be achieved, as set out in clause 6 and 7 of the Bill. This clause also provides that a further interim order must not be made as a consent order.

Clause 23 – Interim orders—extension for non-service of application

This clause remakes section 41E of the DVPO Act and provides that a registrar may extend an interim order for up to eight weeks where a respondent has not been served with a copy of the application and a notice about the proceeding stating the date for the application’s return before the Magistrates Court. This clause ensures that the respondent knows the matter they must respond to.

Clause 24 – Interim orders—extension for non-service of final order

This clause remakes section 41F of the DVPO Act and provides that a general interim order will continue in force where a final order has been made but has not yet been served on the respondent. This ensures that the respondent is aware of the conditions and making of the final order, before requiring them to comply with that order.

Division 3.4 – Consent Orders

Clause 25 – Consent orders

This clause remakes section 43 of the DVPO Act and provides for the making of consent orders.

Division 3.5 – Final Orders

Clause 26 – Final orders—grounds for making

This clause remakes sections 46 and 52 of the DVPO Act, outlining the circumstances in which a court may, on application, make a final order. A court may make a final PVO if satisfied that the respondent has used personal violence in relation to the person, and may engage in personal violence in relation to the person if the PVO is not made. Similarly, a court may make a WPO if the respondent has used personal violence in relation to a workplace, and may engage in this violence in relation to a workplace if the WPO is not made.

Clause 27 – Final orders—length

This clause provides that a final order remains in force for up to 12 months or, if the court is satisfied there are special or exceptional circumstances that justify a longer period, the period stated in the order. However, a final order made as a consent order must not be longer than one year, as the court must have some oversight before extending the length of the order.

Division 3.6 – Conditions of protection orders

Clause 28 – Safety of affected person paramount

This clause outlines the principle that, in deciding the conditions to be included in a protection order, a court must give paramount consideration to the safety and protection of the affected person. This provision is included to support section 11 of the HR Act

(protection of the family and children) and ensure that this consideration is given appropriate weight when the court balances a decision about the conditions to be attached to an order.

Clause 29 – Least restrictive principle

This clause provides a balancing consideration for the court to take into account, along with clause 28, when deciding conditions to be attached to a protection order. The court must ensure the conditions included in a PVO or WPO are the least restrictive of the personal rights and liberties of the respondent as possible, while still achieving the objects of the Act and the principle set out in clause 28. This clause reflects section 28 of the HR Act, by asking the court to consider the conditions that will be the least restrictive on the respondent's human rights.

Clause 30 – Conditions—personal protection orders

This clause sets out a non-exhaustive list of conditions that a court may include in a PVO while having regard to the principles outlined in clauses 28 and 29. The conditions reflect a range of the options the court may consider in tailoring a PVO to the particular circumstances in each case. These include conditions that would prohibit a respondent from being on premises where the protected person lives or from contacting the protected person, prohibit the respondent from being in a particular place, and prohibit the respondent from doing anything that is personal violence to the protected person.

Clause 31 – Exclusion conditions—personal protection orders

This clause provides the considerations a court must take into account in deciding whether to make an exclusion condition. This clause ensures that any limitation of a person's right to freedom of movement (section 13 of the HR Act) is only made where necessary and that if an exclusion order is sought by the applicant, the impact of that order is carefully considered by the court before making such an order.

Clause 32 – Conditions—workplace protection orders

This clause remakes section 54 of the DVPO Act by providing a non-exhaustive list of conditions that the Magistrates Court may include in a WPO where necessary having regard to the important principles in clauses 28 and 29. As with PVOs, the conditions reflect a range of the options the court may consider in tailoring a WPO to the particular circumstances in each case. These include conditions that would prohibit the respondent from entering or being within a particular distance from the workplace, and prohibit the respondent from doing anything that is personal violence in relation to the workplace.

Clause 33 – Conditions—consent orders

This clause provides that a final order made by consent may contain a condition that any other final order may contain, but it is not necessary for the court to consider whether the condition is

necessary or desirable. This is because the court will not determine the content of consent orders, as these are made based on the wishes of each party, determined by the parties together.

Clause 34 – Conditions may apply for shorter time than order

This clause clarifies that a condition in a protection order may have effect for a shorter period than the period of the order. For example, a specific condition may be in place for six months, where the order itself lasts for one year.

Division 3.7 – Effect of protection orders

Clause 35 – Offence—contravention of protection order

This clause remakes section 90 of the DVPO Act and sets out the offence for contravening a PVO. The offence is constructed to ensure that contravening a protection order results in a proportionate penalty. The penalty for contravention of a PVO is identical to section 90 of the DVPO Act.

Clause 36 – Interim orders—respondent’s firearms

This clause reflects section 40 of the DVPO Act by providing for the suspension of a respondent’s firearms licence where an interim order is made against a respondent who is the holder of a firearms licence. In those circumstances, the respondent’s firearms licence will be automatically suspended, unless the court is satisfied that the licence should not be suspended.

Clause 37 – Final orders— respondent’s firearms

This clause reflects section 57 of the DVPO Act by providing for the cancellation of a respondent’s firearms licence where a final order is made against a respondent who is the holder of a firearms licence. In those circumstances, the respondent’s firearms licence will be automatically cancelled, unless the court is satisfied that the licence should not be cancelled.

Clause 38 – Firearm licences—other conditions and orders

This clause provides that, where a respondent’s firearms licence is suspended or cancelled under clauses 36 or 37, the court may order the seizure of the firearms licence and any firearm or ammunition in the respondent’s possession. This aims to further protect the protected person. The clause also provides that where a respondent’s firearms licence is not suspended or cancelled under this division, the court may place conditions on the use or possession of the respondent’s firearms. This clause refers to the role of the registrar of firearms and the *Firearms Act 1996* in governing firearms licences, clarifying the interaction between this Act and the Firearms Act.

Part 4 – Procedural matters

Clause 39 – Service of applications

This clause remakes section 63 of the DVPO Act and provides for service of applications for protection orders. This seeks to ensure that each party is aware of the proceedings and return date before the court. The language has been amended to reflect the changes of return date to ‘timing notice’.

Clause 40 – If personal service of application impracticable

This clause remakes section 66 of the DVPO Act and provides for circumstances where personal service is impracticable. This section allows for operational efficiency and flexibility by providing that the court may order the application be served in the way that the court considers is likely to bring the application to the attention of the person required to be served.

Clause 41 – Service of documents by police

This clause remakes section 67 of the DVPO Act and provides for service of documents by police if the court considers that it is appropriate to do so.

Division 4.2 – Pre-hearing procedures

Clause 42 – Registrar sets return date

This clause remakes section 22 of the DVPO Act and provides that the registrar must enter an application for a protection order into the Magistrates Court’s record and set a return date for the application. The clause replicates the previous procedural requirements for setting a return date.

Subclause (3) replicates section 6 of the DVPO Regulations.

Clause 43 – Adjournment of proceedings for non-service

This clause remakes section 23 of the DVPO Act, providing that the registrar may adjourn proceedings where a respondent has not been served with the application in accordance with the Act.

Clause 44 – Preliminary conferences—objects

This clause remakes section 8 of the DVPO Regulations and outlines the objects of a preliminary conference. A preliminary conference allows for the parties to assess their options, consider making orders by consent and also provides an opportunity for parties to seek legal advice if need be.

Clause 45 – Preliminary conferences

This clause remakes section 24 of the DVPO Act, providing that a registrar must hold a preliminary conference in relation to an application for a protection order unless satisfied that it would not achieve its objects.

This clause also includes sections 9 and 10 of the DVPO Regulations.

Clause 46 – Referrals to mediation

This clause remakes section 25 of the DVPO Act, which provides a power for the registrar to recommend a matter to mediation when the registrar believes that the matter is more likely to be effectively resolved through a mediation process. In addition, this clause outlines what a registrar must do in circumstances where they are referring the parties involved to mediation.

Clause 47 – Preparation for hearing in Magistrates Court

This clause remakes section 26 of the DVPO Act, which provides for the preparation of documents to accompany a hearing of a protection order application.

This clause also includes section 12 of the DVPO Regulations.

Clause 48 – Interim orders—return date for hearing to decide final order

This clause remakes section 34 of the DVPO Act, which provides for the setting of return dates for a hearing to decide interim order applications.

Clause 49 – Interim orders—endorsement of consent or objection

This clause remakes section 36 of the DVPO Act, which provides for where the court makes an interim order in the absence of a respondent. The clause sets out the options available to a respondent and how the respondent may indicate their consent or objection to final orders being made.

Division 4.3 – Hearings

Clause 50 – Applicant not present at return of application

This clause remakes section 17 of the DVPO Regulations, which gives the court the power to either dismiss an application or adjourn the hearing if an applicant is not present at the return of the application.

Clause 51 – Respondent not present at return of application

This clause remakes section 18 of the DVPO Regulation and provides for the procedure the Magistrates Court must follow, where the respondent to an application for a non-emergency protection order is not present, in certain specified circumstances. The Court must either decide the application in the respondent's absence or, if the Court considers it appropriate,

adjourn the proceedings and issue a warrant for the respondent to be arrested and brought before the court.

Clause 52 – Neither party present at return of application

This clause remakes section 19 of the DVPO Regulations and provides that the Magistrates Court may dismiss the proceedings, but may not order costs, if neither the applicant nor the respondent appears, either personally or via their representative.

Clause 53 – Hearings usually in public

This clause remakes section 13 of the DVPO Regulations and requires that hearings be in public, unless certain conditions are met.

Clause 54 – Public hearing not required

This clause remakes section 14 of the DVPO Regulations and sets out the circumstances in which a public hearing is not required.

Clause 55 – Closed hearings in special circumstances

This clause remakes section 15 of the DVPO Regulation provides the circumstances in which the presiding magistrate may order that a hearing or part of a hearing for a non-emergency application order be held in private. The circumstances are that he or she is satisfied that it is in the interests of safety, justice or the public to do so. This clause also provides that it is an offence to contravene an order made by a magistrate under this section. The maximum penalty for this offence is 50 penalty units.

Section 21 of the HR Act 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. This clause limits the right to a public hearing, as it provides for the hearing of evidence in closed court in particular circumstances. The **nature of 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 **purpose of the limitation** is to protect vulnerable people in family violence proceedings from additional trauma resulting from giving sensitive evidence in an open court, or from disclosing particular evidence (such as their current location) to a perpetrator of violence. The **nature and extent** of the limitation is to achieve the **purpose** of allowing vulnerable people protection if it is in the interests of safety, justice or the public to do so.

This clause is the **least restrictive** and most reasonable way to achieve the purpose of protecting vulnerable complainants in family violence proceedings. By hearing evidence in closed court, where this is in the interests of justice, complainants are protected and the hearing 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. In addition, for the

purpose of this clause, the right to a public hearing is outweighed by competing interests if the court is satisfied that the application, or part of the application, should be kept private:

- to protect the affected person and any child directly or indirectly affected by the respondent's alleged conduct; or
- to protect morals, public order or national security in a democratic society; or
- because the interest of the private lives of the parties require the privacy; or
- to the extent privacy is strictly necessary, in special circumstances of the application, because publicity would otherwise prejudice the interests of justice.

This clause is consistent with the right to a fair trial stated in section 21 of the *Human Rights Act 2004*. The wording of section 21 has been adopted to ensure consistency.

Clause 56 – Discontinuance

This clause remakes section 48 of the DVPO Regulation and provides that an applicant may discontinue a proceeding at any time, before the proceeding is finally decided. It also provides that discontinuance does not prevent a further application being made in relation to the same or substantially the same matter and that discontinuance is not a defence in a proceeding on any further application.

Clause 57 – Admissibility of preliminary conference evidence

This clause remakes section 11 of the DVPO Regulation and provides that statements made during a preliminary conference are not admissible evidence, except in particular circumstances.

Clause 58 – Undertakings by respondent

This clause introduces new requirements to formalise the process and form for the giving of undertakings in protection order matters. The clause clarifies the role and function of undertakings, and requires the court to confirm in writing that the respondent and protected person understand the nature of undertakings before accepting an undertaking from a respondent in a proceeding for a protection order.

Clause 59 – Court may inform itself

This clause clarifies that the court may inform itself in any way it considers appropriate in a proceeding for a protection order.

Division 4.4 – Making of protection orders

Clause 60 – Explaining orders if respondent present

This clause remakes section 84 of the DVPO Act, which provides for the explanation the court must provide to the respondent if the court intends to make a protection order and the respondent

is present before the court. This provision ensures that the court actively ensures the respondent understands the purpose, terms and effect of the order, as well as the consequences of contravening the order, and is therefore in a better position to comply with the order.

Clause 61 – Explaining orders if protected person present

This clause remakes section 85 of the DVPO Act, which provides for the explanation the court must provide to the protected person if the court intends to make a protection order and the protected person is present before the court. This provision ensures that the court actively ensures the protected person understands the purpose, terms and effect of the order, as well as the consequences of the respondent contravening the order, and that if the protected person aids or abets the respondent to commit an offence, the protected person may also commit an offence. This provision seeks to ensure the protected person understands their legal rights and obligations under the order.

Clause 62 – Reasons for order

This clause remakes section 86 of the DVPO Act and provides that a court must record their reasons when making a protection order.

Clause 63 – Orders generally not to include protected person’s address

This clause remakes section 87 of the DVPO Act and provides that orders should generally not include a protected person’s address, unless the protected person agrees to their address being included; it is necessary to ensure to respondent to comply with the order; or the person making the order is satisfied the respondent already knows the address. This provision aims to ensure the protected person is kept as safe as possible, and that personal information is not disclosed to the respondent unnecessarily.

Clause 64 – Service of protection orders

This clause remakes section 64 of the DVPO Act and provides for service of protection orders on all relevant parties.

Division 4.5 – Other procedural matters

Clause 65 – Police officer party to proceeding for personal protection order— substitution of applicant etc

This clause allows greater flexibility for police officers who act as applicants under the Bill. It allows clarity for police officers that if they apply for a protection order, or if they are appointed as the applicant for court-initiated protection orders, they are taken to be the applicant for the proceedings. It is the intention of the legislation that whoever is an applicant, including ACT Police Officers, they will be the applicant for the entire proceedings unless the applicant applies for and is granted the right to substitute the applicant for another named applicant.

Subclause (2) states that the Magistrates Court can, on application or on its own initiative substitute an applicant with the protected person with their consent, or with a litigation guardian or any other person who has a right to apply for the protected person.

Subclause (3) states that in proceedings for protection orders the police officer may be represented by another police officer or a police officer nominated by the chief police officer. This allows a ‘nominal applicant’ to appear for ACT Policing in protection order proceedings. The policy intention is that applicants appearing for ACT Policing will be appropriately trained.

Clause 66 – Directions about procedure

This clause allows the Chief Magistrate to give a direction about the procedure to be followed for a step in a protection order proceeding, where that procedure has not already been prescribed under the Act.

The direction is a notifiable instrument. This approach is consistent with the approach used for the *Court Procedures Rules 2006* which are used for similar procedural directions to the Court.

Clause 67 – Costs

This clause clarifies the existing scheme for allocating costs in protection order matters and provides that cost orders be legislatively limited to prevent costs against applicants in protection order proceedings, unless an application is frivolous or vexatious. It also provides that costs can be awarded against the respondent if the court considers it appropriate to do so. This removes the disadvantage that a party may perceive if they are unsuccessful in either applying for or disputing a protection order in good faith.

Division 4.6 – Party with impaired decision-making ability

This and the following division replace the previous sections in the DVPO Act and the DVPO Regulation about ‘legal disability’. These changes support the right to equality before the law (section 8 of the HR Act), and also support the rights of children (section 11(2) of the HR Act).

The provisions are limited in their application only to the civil jurisdiction of protection order hearings and therefore do not engage the rights of children in the criminal process (section 20 of the HR Act).

Clause 68 – Meaning of *impaired decision-making ability*

This clause defines a person with “impaired decision-making ability” as a person who is unable to make decisions in relation to a proceeding under this Act or does not understand the nature and effect of the decisions relating to the proceeding.

A person is not taken to have impaired decision-making ability only because they make an unwise decision, have a guardian appointed or are taken to have impaired decision-making ability under another territory law or in relation to another matter.

In addition, a person who is a child is not taken to have impaired decision-making ability subject to the conditions set out below.

These provisions ensure that the courts assess “decision-making ability” based on each individual circumstance and ensure each application is assessed on its merits and the ability of parties to understand the proceedings. The provisions also start from a presumption of capacity, which is in line with recommendations relating to supported decision-making made by the ALRC in its 2013 report, ‘Equality, Capacity and Disability in Commonwealth Laws (ALRC Report 124)’.

Clause 69 – Child respondents

This clause replicates section 20 of the DVPO Act, and includes a provision that a respondent who is 10 to 14 is taken to have a presumption of impaired decision-making ability. This aligns with the principles of *doli incapax* and further supports the rights of children by providing them with appropriate support in making decision relating to protection orders.

Clause 70 – Representation—party with impaired decision-making ability

This clause elevates and remakes sections 57 and 58 of the DVPO Regulation and updates the language to adequately reflect the new concept of ‘impaired decision-making ability’.

Subclause (3) notes that the court can make an interim or after-hours order if they are satisfied that it are necessary to do so, notwithstanding that a person may have impaired decision-making ability. This allows immediate protection in situations where the court considers there to be a risk t the safety of the protected person, balanced with the least restrictive principles of achieving that protection.

Clause 71 – Consent orders—party with impaired decision-making ability

This clause remakes section 44 of the DVPO Act and updates the language to adequately reflect the new concept of ‘impaired decision-making ability’.

Division 4.7 – Appointment etc of litigation guardian

Clause 72 – Litigation guardian—appointment

This clause elevates and remakes section 52 of the DVPO Regulation and updates the language to adequately reflect the new concept of ‘impaired decision-making ability’.

Clause 73 – Litigation guardian—powers

This clause elevates and remakes section 53 of the DVPO Regulation and updates the language to adequately reflect the new concept of ‘impaired decision-making ability’.

Clause 74 – Litigation guardian—responsibilities

This clause elevates and remakes section 54 of the DVPO Regulation and updates the language to adequately reflect the new concept of ‘impaired decision-making ability’.

Clause 75 – Litigation guardian—removal

This clause elevates and remakes section 55 of the DVPO Regulation and updates the language to adequately reflect the new concept of ‘impaired decision-making ability’.

Part 5 – Amendment of protection orders

Clause 76 – Amendment of protection orders—who may apply

This clause provides for the people who can apply to the Magistrates Court to amend a protection order. It specifies that the protected person, the applicant and the respondent for the order may apply to amend, including extend or reduce, the protection order.

Clause 77 – Amendment of protection orders

This clause adopts sections from part 7 of the DVPO Act and provides that the Magistrates Court may amend a protection order only if satisfied that there has been a relevant change in circumstances of a party to the order, based on the need to keep the protected person and any affected children, safe, while also not imposing unnecessary hardship on the respondent.

Clause 78 – Final orders—temporary amendment

This clause provides that the Magistrates Court may make a temporary amendment to a final order for a stated period. This ensures flexibility should the court be made aware of relevant circumstances warranting a temporary amendment to the order.

Clause 79 – Interim orders made by consent-extension

This clause remakes section 61 of the DVPO Act and provides for the extension of interim orders by consent, allowing the Magistrates Court to extend an order by up to eight weeks, as long as this would not mean the order is in force for more than 16 weeks.

Clause 80 – Final orders—extension

This clause reflects section 62 of the DVPO Act, making small amendments to clarify that the Magistrates Court must, on application, extend a final order unless satisfied that a protection order is no longer necessary to protect the protected person from personal violence by the respondent. For consent orders, the court must amend the original order without considering the need to protect the protected person.

Part 6 – Review of orders

Clause 81 – Particular final orders—application for review

This clause remakes section 91 of the DVPO Act and provides for the application for review of a final order. The clause provides that a party to the original order or someone with sufficient interest in the original order may apply for review of the original order.

Clause 82 – Particular final orders—review

This clause remakes section 92 of the DVPO Act and provides that where an application is made under clause 81, the Magistrates Court must dismiss the application, or confirm, revoke or set aside the order.

Clause 83 – Consent orders—review

This clause remakes section 95 of the DVPO Act and provides that a party to a proceeding may apply to the Magistrates Court for a review of a consent order only on the ground that the making of the original order was induced or affected by fraud or duress, other than fraud of the party or duress applied by the party. Under this provision, the court may amend or refuse to amend the order, declare the order void and make any order that could have been made on the application for the original order.

Clause 84 – Appealable decisions

This clause remakes section 96 of the DVPO Act and provides for the decisions under the Act that are appealable.

Clause 85 – Appeals to Supreme Court

This clause remakes section 97 of the DVPO Act and provides for the circumstances in which a person can appeal to the Supreme Court against an appealable decision.

Clause 86 – Giving notice of appeal

This clause remakes section 98 of the DVPO Act and provides that the appellant must file and serve a copy of the notice as soon as practicable after filing the notice of appeal.

Clause 87 – Evidence on appeal

This clause remakes section 99 of the DVPO Act and provides for the evidence the Supreme Court must consider in an appeal.

Clause 88 – Powers of Supreme Court on appeal

This clause remakes section 100 of the DVPO Act and provides for the powers of the Supreme Court on appeal.

Clause 89 – Effect of filing appeal

This clause remakes section 101 of the DVPO Act and provides that the filing of an appeal under the Act does not affect the operation of the order appealed.

Part 7 – Reciprocal arrangements

Clause 90 – Definitions—pt 7

This clause remakes section 102 of the DVPO Act and provides a number of definitions for terms specific to part 8 in relation to reciprocal arrangements for protection orders.

Clause 91 – Recognised orders—applications for registration

This clause remakes section 103 of the DVPO Act and provides that a person may apply to the registrar for registration of a recognise order, and that the application must be accompanied by the recognised order or a certified copy of the recognised order.

Clause 92 – Recognised orders—registration

This clause remakes section 104 of the DVPO Act and outlines the registrar’s obligations on receiving an application for a registration of a recognised order.

Clause 93 – Effect of registration

This clause remakes section 105 of the DVPO Act and provides that registered order has the effect of being a final order in the ACT with accompanying rights as to enforceability, amendment and revocation.

Clause 94 – Registered orders—amendment

This clause remakes section 106 of the DVPO Act and provides that the registrar must inform the recognised court in the corresponding jurisdiction, in writing, of any amendments to the registered order.

Clause 95 – Registered orders—revocation

This clause remakes section 107 of the DVPO Act and outlines the registrar’s obligations where a registered order is revoked. In these circumstances, the registrar must cancel the registration and inform the chief police officer and the person who sought the recognised order about the cancellation.

Clause 96 – Recognised orders—amendment

This clause remakes section 108 of the DVPO Act and provides for the circumstances in which a recognised court tells the relevant ACT registrar that a recognised order registered under this part has been amended.

This clause also provides that if a breach of the original order that is not enforced before the original order is cancelled would amount to a breach of the amended order, the breach may be enforced as if it were a breach of the amended order.

Clause 97 – Notification by interstate court of registration

This clause remakes section 109 of the DVPO Act and provides that where a protection order has been registered by a recognised court and the Magistrates Court amends or revokes the order, the Magistrates Court must inform the recognised court of the changes in writing, and give a copy of an amended order to the recognised court.

Part 8 – Miscellaneous

Division 8.1 – Public access and publication

Clause 98 – Publication of reports about proceedings—offence

This clause largely remakes section 111 of the DVPO Act, clarifying that a person commits an offence if they publish (communicate or disseminate information in a way that makes it available to the public) information about a proceeding for a protection order. This is an appropriate and proportionate restriction to place on the right to fair trial, as it meets the exception set out in s 21(2)(b) of the HR Act, that the exclusion of the public from the trial is necessary to protect the private lives of the parties, and the interests of a child. The maximum penalty for this offence is 10 penalty units.

In most circumstances, courts and their decisions are accessible to members of the public. This policy of 'open justice' is reflected in division 4.3 of the Bill, which provides that all proceedings should be heard in open unless a court decides otherwise. The principle of open justice is fundamental to ensuring that courts remain transparent and accountable for their decisions.

However, the special nature of protection order proceedings, which often involve children, requires that a balance be struck between the need for open justice and a family's right to privacy. Accordingly, this clause makes it an offence to publish proceedings that identify persons or witnesses involved in protection order proceedings. Exceptions to this provision are contained below and in schedule 1.

Clause 99 – Publication of reports about proceedings—exceptions to offence

This clause largely remakes section 112 of the DVPO Act, providing exceptions to the offence of publication of reports about proceedings. This sets out legitimate and authorised reasons for the disclosure of sensitive information in relation to protection order proceedings.

Division 8.2 – Other matters

Clause 100 – Effect of availability of workplace protection orders

This clause remakes section 51 of the DVPO Act by stating that the availability of WPOs under this Act does not create a new right or obligation in relation to employment relationships.

Clause 101 – Deciding application if criminal proceedings

This clause remakes section 113 of the DVPO Act, which provides that a criminal proceeding involving the respondent to a protection order does not prevent the Magistrates Court from deciding a protection order on the grounds of the same conduct that is the subject of the criminal proceedings. This clause clarifies that criminal and civil proceedings against the same person arising from personal violence can run together.

Clause 102 – Criminal and civil liability not affected by protection orders

This clause clarifies that the making, amendment or revocation of a protection order does not affect the civil or criminal liability of the respondent in relation to the same conduct that is the subject of the application. This clause clarifies that a protection order is to be considered a safety mechanism for the protected person or people, rather than a judgment as to the respondent's culpability in relation to other relevant legal proceedings.

Clause 103 – Crimes Act, s 397 (1)

This clause remakes section 114 of the DVPO Act and clarifies that this Act does not affect the operation of section 397(1) of the *Crimes Act 1900*, which deals with the making of recognisances to keep the peace.

Clause 104 – Working out time if less than 5 days

This clause remakes section 115 of the DVPO Act and provides that where this Act prescribes a period of less than 5 days, the time is to be worked out ignoring any day when the Magistrates Court is not open for business.

Clause 105 – Regulation-making power

This clause remakes section 118 of the DVPO Act and provides for the power of the Executive to make regulations for this Act. This clause is consistent with other ACT legislative provisions and is standard wording for regulation-making powers.

Part 20 – Transitional

Clause 200 – Existing registered orders under repealed Act

This clause ensures that protection orders made before the commencement of the Act are taken to have been made under the Act.

Clause 201 – Transitional regulations

This clause provides a power to prescribe transitional matters necessary or convenient to be prescribed because of the enactment of the Act.

Clause 202 – Expiry—pt 20

This clause provides that part 20 expires 2 years after it commences.

Part 21 – Other amendments

Clause 203 – Legislation amended—sch 2

This clause provides for other amendments in schedule 2.

Schedule 1 – Permitted publication about proceedings

Clause 1.1 – Definitions—sch 1

This clause sets out the definitions for schedule 1, including the definitions for “authorised person” and “care and protection chapters” under the *Children and Young People Act 2008*.

Clause 1.2 – Permitted publication about proceedings

This clause provides a table of the permitted publication about FVO proceedings and should be read in conjunction with clause 99.

Schedule 2 – Other amendments

Part 2.1 – Firearms Act 1996

[2.1] – Section 18 (1) (b) (ii) and (iii)

This clause amends section 18 of the *Firearms Act 1996* which sets out the discretionary criteria the registrar of firearms must consider when making a decision under the Act in relation to an individual's suitability. This clause provides that the registrar must consider any final protection orders that permit the individual to possess or retain a firearm in making an assessment of suitability.

[2.2] – Section 19 (1) (b) (i), except note

This clause amends section 19 of the Firearms Act to exclude any final protection orders that permit the individual to possess or retain a firearm from an assessment of suitability under the Firearms Act. This means that where a person has been subject to a final protection order in the last 10 years which includes a provision permitting that person to possess or retain a firearm, that person will not be automatically assessed as unsuitable under the Firearms Act. This clause operates with other amendments to address the inconsistency between the Firearms Act and DVOP Act as identified by the ACT Supreme Court in *Singh v Registrar of Firearms* [2015] ACTSC 186. The effect of these changes is to clarify the interaction between orders made by the Magistrates Court under the Bill and the Family Violence Bill in relation to firearms licences, and decisions of the registrar under the Firearms Act.

The clause includes a note referencing section 37(3) of the *Personal Violence Act 2016* which provides the Magistrates Court may order that the firearms licence of a person subject to a final order not be cancelled.

[2.3] – Section 80 heading

This clause makes only consequential amendment to the heading in section 80 of the Firearms Act to clarify this provision deals with mandatory suspension of firearms licences for family violence offences.

[2.4] – Section 80 (1)

This clause makes only consequential language changes replacing references of 'domestic violence' with 'family violence'.

[2.5] – Section 80 (1), notes

This clause makes only consequential language changes replacing references of 'domestic violence' with 'family violence' and update references to sections and titles of the Bill and the Family Violence Bill.

[2.6] – Section 81 (2), note 2

This clause replaces note 2 in section 81 (2) of the Firearms Act to include a reference to the Registrar's obligations to notify the Magistrates Court when the Registrar cancels a licence

under section 81 following a reassessment of the licensee's suitability under section 81A. Note 3 has also been amended to update references to sections and titles of the Bill and the Family Violence Bill 2016.

[2.7] – New section 81A

This clause inserts a new provision into the Firearms Act and provides that where a licensee is subject to a final or interim protection order made under the Bill, and the Magistrates Court orders the licensee's adult firearms licence not be cancelled or suspended, the registrar must undertake a new assessment of suitability having regard to section 18 and 19 of the Firearms Act. When making this assessment the registrar must disregard the current protection order. Where the registrar cancels a licence under section 81 following a reassessment of the licensee's suitability in accordance with this clause, the registrar must notify the Magistrates Court of this decision in writing.

This clause operates with section 18 and 19 of the Firearms Act to address an inconsistency between the Firearms Act and DVOP Act identified by the ACT Supreme Court in *Singh v Registrar of Firearms* [2015] ACTSC 186 and clarifies the interaction between orders made by the Magistrates Court under the Bill and the Family Violence Bill in relation to a firearms licence, and decisions of the registrar under the Firearms Act.

[2.8] – Section 97 heading

This clause makes only consequential language changes to include a reference to 'family violence' in the heading for this section.

[2.9] – Section 97 (1)

This clause makes only consequential language changes replacing references of 'domestic violence' with 'family violence'.

[2.10] – Section 97 (1), notes

This clause makes only consequential changes to update references to sections and titles of the Bill and the Family Violence Bill 2016.

[2.11] – Section 98, note 2

This clause replaces note 2 in section 98 of the Firearms Act to include a reference to the registrar’s obligations to notify the Magistrates Court when the registrar cancels a licence under section 98 following a reassessment of the licensee’s suitability under section 98A. Note 3 has also been amended to update references to sections and titles of the Bill and the Family Violence Bill 2016.

[2.12] – New section 98A

This clause inserts a new provision into the Firearms Act and operates in the same way as clause 81A to address the inconsistency identified in *Singh v Registrar of Firearms* [2015] ACTSC 186 in relation to minors firearms licences.

[2.13] – Section 119 heading

This clause makes only consequential language changes to include a reference to ‘family violence’ in the heading for this section.

[2.14] – Section 119 (1)

This clause makes only consequential language changes replacing references of ‘domestic violence’ with ‘family violence’.

[2.15] – Section 119 (1), notes 1, 2 and 3

This clause removes notes 1, 2 and 3 from section 119 (1) of the Firearms Act.

[2.16] – Section 120, note 2

This clause removes note 2 from section 119 (1) of the Firearms Act.

[2.17] – Section 132, note 2

This clause makes only consequential changes to update references to sections and titles of the Bill and the Family Violence Bill 2016.

[2.18] – Dictionary, definitions of *corresponding order* and *domestic violence offence*

This clause removes the current definition of ‘corresponding order’ and ‘domestic violence offence’ from the Act.

[2.19] – Dictionary, new definitions

This clause inserts new definitions into the Act for the terms ‘family violence offence’ and ‘final protection order’. This provides consistency of definitions across ACT legislation to ensure updated language in the Bill.

[2.20] – Dictionary, definition of *interim protection order*

This clause inserts a definition for ‘interim protection order’ into the Act. This provides consistency of definitions across ACT legislation to ensure updated language in the Bill.

[2.21] – Dictionary, definition of *protection order*

This clause removes the current definition of ‘protection order’ from the Act.

[2.22] – Dictionary, definition of *recognised FVO*

This clause inserts a definition for ‘recognised FVO’ into the Act. ‘Recognised FVO’ is defined under Family Violence Act 2016, section 115.

Dictionary

This clause sets out the dictionary for the Act.