

2017

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

FAMILY AND PERSONAL VIOLENCE LEGISLATION AMENDMENT BILL 2017

REVISED EXPLANATORY STATEMENT

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FAMILY AND PERSONAL VIOLENCE LEGISLATION AMENDMENT BILL 2017

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Purpose of the Bill

The *Family Violence Act 2016* (FV Act) and the *Personal Violence Act 2016* (PV Act) were passed by the ACT Legislative Assembly with unanimous support on 2 August 2016. The PV and FV Acts will commence on 1 May 2017 (apart from national recognition provisions which are delayed by the Family and Personal Violence Legislation Amendment Bill 2017 (the Bill) so that they commence at the same time as other jurisdictions' national recognition provisions commence).

After introduction, stakeholders requested a number of amendments to allow the courts to administer the family violence and protection order schemes more effectively. Many of the issues identified already existed under the *Domestic Violence and Protection Orders Act 2008* (DVPO Act) and were duplicated in the new legislation.

The purpose of the Bill is to address procedural issues and reduce red tape to facilitate streamlined family violence and personal protection order schemes.

Human Rights Considerations

In Australia, one in three women experience gender-based violence in their lifetime. Gender-based violence, including family violence, cannot be eliminated through legislation alone, however legal measures are an essential component of any response to domestic, family and sexual violence. The Bill balances the human rights of a person affected by changes in the law and the public interest in protecting 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.

Federal, State and Territory 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, family and sexual 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).

The family violence order scheme addresses human rights obligations to tackle family violence as a systemic, widespread and pervasive human rights violation.

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

Personal and workplace protection orders provide members of the community with additional protection to that available from the criminal law. The personal protection order 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 ICCPR, to provide reasonable and appropriate measures to protect an individual's personal security where it is at risk from another private individual.² In the ACT, that obligation is enshrined in section 18 of the HR Act (right to liberty and security of person).

The personal protection order scheme addresses human rights obligations to ensure that people living and working in the ACT have access to additional civil protections to ensure their safety where necessary.

Broadly, family violence and personal protection orders engage, 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 20 – Children in the criminal process; and
- Section 21 – Fair trial.

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; and
- Section 18 – Right to liberty and security of person.

The limitations on human rights and a thorough human rights assessment have been outlined previously in the explanatory statement accompanying the FV and PV Acts and can be accessed online at http://www.legislation.act.gov.au/es/db_54020/default.asp and http://www.legislation.act.gov.au/b/db_54029/default.asp.

The FV and PV Acts have been assessed as compatible with the HR Act.

Most amendments in this Bill are procedural or administrative in nature and do not alter the substantive methods, considerations or conditions under the protection order scheme.

² *Delgado Paez v Columbia*, 12 July 1990, No 195/85 at 5.5

Specific amendments that may be considered to limit and engage rights are discussed below.

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, but many of the principles that characterise a fair trial are not absolute³. The right is engaged and limited by the Bill as the court must grant leave for a child to be called as a witness in protection order proceedings. The **purpose of the limitation** is to support the right to protection of family and children. The **nature and extent of the limitation** is to require the court's leave to call a child to give evidence in a protection order proceeding as a witness. The court is required to consider the need to protect the child from unnecessary exposure to the court system and the harm that could be done to the child and the child's relationship with a family member if leave is granted. The limitation is the **least restrictive possible** to achieve a balance between the rights of the child and family and the applicant or respondent in protection order proceedings as the provisions require the court to consider these rights in each case. The court is also able to give leave for the child to give evidence while restricting cross-examination of the child if this would be in the child's best interests, providing the least restrictive limitation to the rights of the applicant or respondent.

The amendments that remove the requirement for the court to consider an objection of a respondent to an interim order do not limit the right to fair trial as interim orders are made before a respondent is aware of the application.

The right to fair trial is not engaged by the amendments which clarify that the rules of evidence do not apply to protection order proceedings. These amendments do not make any substantive difference to protections available or the rules of evidence applicable in protection order proceedings under the FV and PV Acts or the DVPO Act. The FV and PV Acts provide that the court can inform itself in any way it considers appropriate in a proceeding for a protection order. Section 8 of the *Evidence Act 2011* provides that "This Act does not affect the operation of the provisions of any other Act." These provisions when read together provide that the court is not bound by the rules of evidence in protection order proceedings.

Application of the rules of evidence is not a requirement of the right to a fair trial in civil proceedings. All parties are entitled to procedural fairness. Sections 6 and 12 of the FV Act and sections 6 and 9 of the PV Act require access to the courts and procedures under the acts to be as simple, quick and inexpensive as is consistent with achieving justice. These amendments are consistent with existing ACT legislation and are based on section 8 (Rules of Evidence) of the *ACT Civil and Administrative Tribunal Act 2008* (ACAT Act). The ACAT Act also includes equivalent provisions allowing the Tribunal to inform itself in any way it sees fit (section 26) requiring access to the Tribunal to be simple and inexpensive (section

³ *Brown v Stott* (2003) 1 AC 681

6(b)) and requiring matters to be resolved quickly as is consistent with achieving justice (section 6(c)).

The amendments do not restrict or negate any existing common-law protections. Part 15.4 of the *Legislation Act 2001* preserves the common law privileges against self-incrimination and exposure to the imposition of civil penalty and client legal privilege unless they are displaced expressly or by a manifest contrary intention. The amendments are not intended to displace these protections. Parties retain the right to have their matter heard by a fair, independent and impartial court in a manner consistent with achieving justice.

The amendments in new section 81H may engage a respondent's right to a fair trial, but will not limit them, as the substantive changes affect how applicants may give their evidence. The new provision allows, but does not require, a recorded statement to be admitted by the Magistrates Court in a proceeding for an application for a protection order. The court retains discretion to admit or refuse to admit any or all of a recorded statement into evidence as it sees fit. As recorded statements are, wherever possible, given by audiovisual recording, respondents are able to observe the manner in which the evidence is given, as well as the content of that evidence. The Bill supports the right to fair trial for a respondent as the amendments will not limit the ability of the court to determine what evidence should be admitted or the ability of a respondent to cross-examine witnesses or adduce evidence for their own submissions.

FAMILY AND PERSONAL VIOLENCE LEGISLATION AMENDMENT BILL 2017

Detail

Part 1 – Preliminary

Clause 1 — Name of Act

The name of the Act will be the *Family and Personal Violence Legislation Amendment Act 2017*.

Clause 2 — Commencement

This clause provides that the Act, other than sections 58 to 61 and 63 and 64, commences on 30 April 2017. The purpose of the provision is to ensure that the amendments contained in the Act come into effect prior to the commencement of the FV Act and PV Act. Subsection (2) provides that sections 58 to 61, 63 and 64 commence when section 115 of the FV Act commences.

Clause 3 — Legislation amended

This clause identifies the legislation amended by this Act.

Part 2 – Evidence (Miscellaneous Provisions) Act 1991

Clause 4 – Division 4.3.3 heading

This clause substitutes the heading in division 4.3.3 to include a reference to family violence offence proceedings.

Clause 5 – Recorded statement – offence to publish - Section 81G (2)

This clause expands the list of circumstances in which a person has *authority* to publish a recorded statement to include a person publishing the recorded statement in connection with a proceeding for an application for a protection order under the FV Act.

A recorded statement can only be published if the affected person is the complainant in relation to the recorded statement, and the respondent to the protection order application is the person who is alleged to have committed the family violence offence that is the subject of the recorded statement.

The purpose of this provision is to ensure that an affected person can rely on their recorded statement in circumstances where they are seeking a protection order against the alleged perpetrator of the family violence offence. The ability to publish a recorded statement for this limited purpose ensures that a victim of family violence is not required to provide the same evidence on multiple occasions. Publication of the recorded statement in these circumstances can occur regardless of whether charges have already been laid, or an offence has been proved in relation to the family violence offence that was the subject of the recorded statement.

Clause 6 – New division 4.3.4

This clause inserts a new division 4.3.4 which provides that a recorded statement of a police interview is admissible as evidence in an application for a protection order in limited circumstances for the purposes described in clause 5.

This provision allows a recorded statement to be admitted by the ACT Magistrates Court in a proceeding for an application for a protection order if the affected person is the complainant in relation to the recorded statement, and the respondent is the person who is alleged to have committed the family violence offence to which the recorded statement relates.

Part 3 – Family Violence Act 2016

Clause 7 – Section 2

This clause provides when provisions of the Act will take effect. Subsection (1) provides that the national recognition provisions commence on a date to be fixed by the Minister by written notice. The national recognition provisions support the operation of the National Domestic Violence Order scheme (NDVO scheme). Participating States and Territories have agreed to commence their respective laws on the same date.

The purpose of this delayed commencement is to allow the commencement date of the ACT national recognition provisions to align with other jurisdictions. These provisions provide certainty around when the provisions will commence nationally while also providing some flexibility to ensure administrative arrangements are in place in the ACT and other jurisdictions to support the Act when it commences.

Subsection (2) provides that the remaining provisions commence on 1 May 2017.

Subsection (3) provides that if the national recognition provisions have not commenced within 12 months beginning on its notification day, they will automatically commence on the first day after that period.

Subsection (4) disapplies section 79 of the *Legislation Act 2001* as it would otherwise require automatic commencement six months after notification.

Clause 8 – Principle about procedures - Section 12

This clause corrects a grammatical error.

Clause 9 – New section 13A

This clause inserts a provision to clarify that the ACT Magistrates Court does not need to comply with the rules of evidence in a proceeding for a family violence order.

The Magistrates Court may inform itself in any way it considers appropriate under section 65 (Court may inform itself).

Clause 10 – Matters to be considered – family violence orders - Section 14 (1)(i)

This clause removes the mandatory requirement for the court to consider, if the respondent has objected to the making of the interim order, the respondent's objection. As the vast majority of interim order hearings are held *ex parte*, without the respondent being present or having prior knowledge that the applicant is going to apply for the order, the court may not be able to obtain this information from the respondent or from the applicant.

Clause 11 – New section 14 (2A)

This clause provides that a failure to comply with subsection (1) does not affect the validity of the order.

Clause 12 – New sections 16A and 16B

This clause inserts two new provisions. New provision 16A clarifies that if a child and the child's parent are each an affected person in relation to family violence by a respondent, the child may be included in an application for a protection order by the child's parent.

The note clarifies that the court may hear the applications separately under section 60C (Children as witnesses).

New provision 16B applies to applications made by police officers and prescribes that the police officer making the application must tell the ACT Magistrates Court whether the affected person consents to the application. The purpose of this provision is to ensure that the court is able to take into account the affected person's wishes in relation to the application.

Clause 13 – Application forms that require affected person's address - Section 17 (2), new note

This clause inserts a new note clarifying that if a party to an application is self-represented, any address for service given to the court must not be given to the other party without the self-represented party's consent.

Clause 14 – Interim orders – only on application for final order - Section 20 (2)

This clause substitutes the current provision to remove paragraph (b). Paragraph (b) provided that the ACT Magistrates Court could make an interim order at any time before the application for a final order is decided even if the respondent had not been served. This paragraph is unnecessary as interim orders are made before a respondent has been served with an application or timing notice in the vast majority of cases.

Clause 15 – General interim orders – length - Section 24 (2) and note

This clause omits section 24(2) and the accompanying note. This removes the prohibition on a general interim order being in force for more than 16 weeks. The purpose of this amendment is to ensure that a protected person can still have a general interim order while an application for a final order is being decided.

Clause 16 – General interim orders – taken to be special interim orders if related charges laid - Section 26 (2) new note

This clause inserts a new note to clarify that an application for a final order must not be decided until all related charges are finalised.

Clause 17 – Section 26(3) and note

This clause inserts a new subsection (3) clarifying that unless section 31(2) applies (Special interim orders—application not to be decided until related charges finalised) the return date must be changed after all related charges are finalised to a day as soon as practicable after that date. The note clarifies the circumstances under section 31(2) in which a final order may be finalised before all related charges are finalised.

Clause 18 – Special interim orders – application not to be decided until related charges finalised - Section 31 (2) (a)

This clause amends subsection (2)(a) to include a reference to new sections 53 (Applicant not present at return of application) and 54 (Respondent not present at return of application).

Clause 19 – Special interim orders – final application decided - Section 32 (1), note

This clause inserts a note clarifying the circumstances in which the court must not make a final order.

Clause 20 – Section 32 (5)

This clause clarifies wording of this provision to make it clear that the return date is for the hearing of the application for a final order.

Clause 21 – New section 33A

This clause remakes section 36 of the DVPO Act and provides that a respondent who wishes to consent to an interim order becoming a final order may return an endorsement copy of the interim order to the Magistrates Court before the return date for the application for the final order. The interim order becomes a final order on the day the Magistrates Court receives an endorsement copy returned by the respondent.

Clause 22 – Final orders – length - Section 35(1), note

This clause inserts the words ‘by the respondent’ to clarify the extent of section 86 (Final Orders – extension) of the FV Act.

Clause 23 – Divisions 4.1 and 4.2

This clause replaces division 4.1. This division remakes and relocates various existing provisions to provide a clear and cohesive outline of the processes once an application for a protection order is received by the ACT Magistrates Court.

New section 45 remakes and simplifies the definition of timing notice. A timing notice is a written notice that states the return date, time and place of the conference and that if a party does not appear at the conference the court may decide the application in the party’s absence.

New section 46 prescribes what the ACT Magistrates Court must do if it receives an application for a protection order and an interim order is not sought. This provision incorporates previous sections 45(1), 48(1)(b) and 48(2)(b) of the FV Act. This provision removes the requirement for the registrar to set a return date not later than 10 days after the application is received to allow sufficient time to ensure the respondent is served and to avoid unnecessary court appearances for the applicant. The return date for a preliminary conference must be as soon as practicable after the application is received.

New section 47 sets out what the ACT Magistrates Court must do if it receives an application for a protection order and an interim order is sought. This provision incorporates previous sections 45(1), 48(1)(b) and 48(2)(a) and includes a note to clarify that the application for the protection order and timing notice must be served personally on the respondent under new section 70A. Subsection (2) clarifies that subsection (1)(b) applies regardless of whether an order has been taken to be a special interim order under section 26 of the FV Act (General interim orders – taken to be special interim orders if related charges laid).

New section 48 remakes section 45(2) of the FV Act and inserts an additional requirement for the registrar to give a copy of a document required to be served under new sections 46 or 47 to certain people. If the applicant or respondent is a child or has a disability guardian, the registrar must give a copy of any document to the child’s parent or guardian or the person with a disability guardian’s guardian. Subsection (3) provides that failure to comply with subsection (2)(a) does not affect the validity of any order made under the FV Act.

New division 4.2 sets out the procedure and objects of preliminary conferences. New section 49 replicates section 50(1) and 51(5) of the FV Act and provides two additional notes.

New section 50 remakes and rewords section 49 of the FV Act to clarify what the registrar must do if the respondent has not been served in accordance with new sections 46 or 47. Paragraph (c) has been included to clarify that an adjournment may only be made if the registrar is satisfied the respondent may be able to be served if further time for service were allowed. A new note has been added to clarify that the court may direct that service be effected in another way if personal service is not reasonably practicable under new section 70A (2).

New section 51 remakes and rewords section 51(6) of the FV Act to clarify what the registrar must do if a consent order is not made at a preliminary conference.

New division 4.2A sets out what the ACT Magistrates Court must do if one or both parties are not present at the return date for an application. New section 52 provides a definition of returned for the purpose of the new division to clarify that returned means a return date set for a preliminary conference or a return date set for a hearing of the application.

New sections 53, 54 and 54A replicate and renumber sections 55, 56 and 57 of the FV Act.

Clause 24 – Sections 55, 56 and 57

This clause omits sections 55, 56 and 57 of the FV Act. These provisions have been relocated to new division 4.2 A (Non-attendance by party).

Clause 25 – Public hearing not required Section 59(a), (b) and (c)

This clause simplifies section 59 of the FV Act to provide that a public hearing is not required if the hearing is for an interim order or a party is not present when the application is returned before the court. Current section 59(c) is limited to circumstances where a respondent is not present, this clause expands this paragraph to either party.

This clause also omits section 59 (a) which provides that the hearing need not be public if the order sought is a consent order. This paragraph is not required as orders made by consent do not proceed to a hearing.

Clause 26 – New section 59 (2)

This clause clarifies that the definition of returned in new section 52 applies to section 59.

Clause 27 – New sections 60A to 60D

New section 60A replicates section 45 of the *Domestic Violence and Protection Orders Regulation 2009* (DVPO Regulation) and allows a respondent in a proceeding to file a notice of grounds of defence at any time before the end of the proceeding. This provision sets out the requirements for service of a notice of grounds of defence. Subsection (3) clarifies that a respondent does not waive any objection they may have on the grounds of lack of jurisdiction only because the respondent files a notice of grounds offence.

New section 60B replicates section 24 of the DVPO Regulation, which allows applicants to rely on additional information in a hearing.

New section 60C applies where a child and the child's parent are both affected people in relation to the same or similar family violence by a respondent. This provision provides that if a child is included in an application by the child's parent the court may hear the application of the child and the child's parent separately. Paragraph (b) replicates section 20(2) of the DVPO Regulation and provides that where a child is not a party to the proceeding the court may join the child in the proceeding. The purpose of these provisions is to ensure that the rights of the child are protected. These provisions ensure that a child who was included on a parent's application is able to proceed separately if they are in need of protection but the parent revokes the parent's application.

New section 60D inserts a provision requiring the court to give leave for a child, other than a child who is a party to the proceeding, to be called as a witness in the proceeding. This provision replicates the restrictions contained in section 715 of the *Children and Young People Act 2008* (CYP Act), including the ability for the court to restrict cross-examination of the child if it is in the child's best interests. This provision provides an additional requirement for the court, in deciding whether to give leave, to consider the need to protect the child from unnecessary exposure to the court system and the harm to the child and the child's relationship with a family member if the child gives evidence.

Clause 28 – Discontinuance Section 61 (1), note

This clause inserts two new notes. The first note clarifies that an application is not vexatious, frivolous or in bad faith only because it is made and then discontinued. The court may make an order for costs against an applicant if satisfied the application is vexatious frivolous or in bad faith under section 73.

Note 2 provides that if a form is approved under the *Court Procedures Act 2004* for the provision the form must be used.

Clause 29 – New section 62A

This clause applies where a police officer makes an application for a protection order on behalf of an affected person. New subsection (2) provides that, for an interim order, evidence may be given by an affidavit made by the affected person or a police officer and witnessed by a police officer of, or above, the rank of sergeant.

This provision ensures that where the affected person or a police officer who attended an incident or spoke to the affected person is not able to attend court in person, sworn affidavit evidence is available to the court. This provision also allows an officer who is ranked sergeant or above to witness an affidavit. In practice, it is unlikely that a justice of the peace or legal practitioner would be available to witness affidavits as incidents often take place during the night.

Clause 30 – Service of protection orders Section 70

This clause removes section 70 which has been relocated to new division 4.4A

Clause 31 – New division 4.4A

This clause inserts a new division 4.4A which clearly sets out the requirements for the service of documents.

New section 70A remakes sections 45(5) and 46 of the FV Act.

New section 70B allows the ACT Magistrates Court to dismiss an application for a protection order in certain circumstances. An application can only be dismissed if the court is satisfied that the application cannot be served on the respondent, no alternative way of service would be effective to serve the application and the respondent has not intentionally avoided service.

New section 70C prescribes what the registrar must do if a protection order is made by the court and sets out who must be provided with a copy. This provision remakes and amends section 70 of the FV Act. This provision replaces set time limits for the service of orders on the respondent with a requirement that copies of the order be served as soon as practicable. This provision includes an additional requirement that the parent or guardian of a child, or the guardian of a person with a disability guardian, who is a party to the proceeding, be given a copy of the order.

New section 70D provides that if a party to an application for a protection order is not represented by a lawyer, the registrar must serve any document required to be served by the self-represented party. This provision also provides that any address for service given to the court must not be given to the other party without the self-represented party's consent. This is to protect the self-represented party's safety and privacy.

New section 70E remakes and simplifies section 47 of the FV Act to provide that a court may direct that a document required to be served on someone be served by a police officer.

New section 70F prevents a document that is required to be given to a child from being given at or near the child's school unless there is no other place where the document can reasonably be given to the child. Subsection (2) provides an exception to the requirement to give a document to a parent or guardian in circumstances where the parent or guardian is also a party to the application or proceeding. Subsection (2) also provides that the court may order that the document is not required to be given to a person if satisfied that giving the document is not reasonably practical or there are circumstances that justify the document not being given. The provision provides examples such as a child who is estranged from their parent or where there would be an unacceptable risk to the child's safety if the parent or guardian was provided with the document.

Clause 32 – New section 71A

This clause provides that a party may only seek further particulars from an applicant with the court's leave.

Clause 33 – Directions about procedure Section 72

This section omits section 72, which allows the court to make directions about procedure. Rule 6907 of the *Court Procedure Rules 2006* (CPR) will allow the court to make directions about procedure.

Clause 34 – Costs - Section 73(2), note

This clause substitutes the numbering in the note to reflect amendments made by clause 23.

Clause 35 – Litigation guardian – appointment - Section 78 (1) (a)

This section substitutes the reference to individual with a reference to adult to clarify that only an adult can be appointed as a litigation guardian.

Clause 36 – New section 82A

This clause inserts new section 82A which sets out what the registrar must do if the ACT Magistrates Court receives an application under section 82 (Amendment of protection orders – who may apply). This provision replicates the procedure set out in new section 46 (Interim order not sought) and new section 91A (Preliminary conferences).

Clauses 37 – Amendment of protection orders - Section 83(1) (a)

This clause omits section 83(1)(a) to remove the requirement that the ACT Magistrates Court may only amend a protection order if satisfied that there has been a change in the circumstances of a party to the order or the order causes unnecessary hardship to the respondent.

These clauses reduce and simplify the requirements for party seeking amendments to an order. Final orders can be in place for up to 24 months and there may be a range of reasons why a party may seek amendments to the conditions during this period. These clauses remove unnecessary barriers to accessing amendments to protection orders.

Clause 38 – Section 83 (1) example and note

This clause omits the example and note that accompany section 83(1)(a).

Clause 39 – Section 83 (5) and note

This clause substitutes subsection (5) to remove a subsection and note that are no longer required as a result of amending section 86. This clause also includes an additional requirement for applications to amend protection orders that are made by consent.

This clause provides that, if the parties consent, the ACT Magistrates Court must amend a protection order regardless of whether or not the grounds in subsection (1) have been satisfied or the court has considered those grounds. This clause allows the parties to tailor an order to suit their needs and requirements if all parties consent.

Clause 40 – General interim orders made by consent – extension - Section 85(1)

This clause omits the words ‘of up to 8 weeks’ from subsection (1). This clause removes the limitation on the time that a general interim order can be extended where it is made by consent of the parties. The current limitations are unnecessarily restrictive and may not allow adequate time for the application for a final order to be resolved.

Clause 41 – Section 85 (2)

This clause omits subsection (2) to remove the prohibition on a general interim order being in force for more than 16 weeks. This provision replicates the amendments made by clause 15.

Clause 42 – Final orders – extension - Section 86 (3), (4) and (5) and note

This clause removes subsections (3), (4) and (5) of section 86. These provisions require an application to extend an order to be made at least 21 days before the original order expires unless the ACT Magistrates Court is satisfied that it is appropriate to allow a party to apply for extension after this time and the parties consent to an application being made after this time. This clause removes unnecessarily restrictive time limits which disadvantage protected people.

Clause 43 – Special interim orders – application for review - Section 87 (d)

This clause removes paragraph (d) as the consideration set out in it replicates circumstances outlined in paragraph (c).

Clause 44 – Special interim orders – review - Section 88 (3)

This clause removes the requirement for the court to notify the protected person in writing as soon as practicable after the special interim order is revoked if the protected person is present in court when the order is revoked.

Clause 45 – Section 89 heading; Clause 46 – Section 89 (1); Clause 47 – Section 89 (1), note; Clause 48 – New section 89 (3A); Clause 49 – Section 90 heading; Clause 50 – Section 90 (3); Clause 51 – Consent orders – review Section 91 (1); and Clause 52 – Section 91 (1).

The purpose of clauses 45 – 52 is to expand the circumstances in which a consent order may be reviewed to include a review under section 90.

Under the FV Act if the parties to an order wish to have a final order revoked they must apply for a review of the order. Current section 91 of the FV Act limits the circumstances where final orders made by consent can be reviewed by the court to where the agreement to make the order is induced by fraud or duress (other than the fraud of, or duress applied by, the party applying for the order to be reviewed). As a family violence order may be made for up to 24 months, there may be a range of reasons why the parties to a consent order seek to have the order revoked.

Clauses 45 and 49 amend the headings of sections 89 and 90 respectively to remove the word ‘Particular’.

Clause 46 omits the words ‘other than a consent order’ to ensure that section 89 applies to both orders made by consent and not made by consent.

Clause 47 inserts the word ‘also’ into the note to reflect the amendments made by clause 51.

Clause 48 inserts a requirement that the ACT Magistrates Court be satisfied that there has been a change in the circumstances of a party to the order before granting leave under section 89(2)(c). This provision ensures that a respondent is not able to use the protection order system as a means of further abuse against the protected person. The rights of the respondent are protected by sections 92 to 97 of the FV Act, which provide a right of appeal against certain decisions.

Clause 50 removes the requirement for the court to notify the protected person in writing as soon as practicable after the original order is revoked if the protected person is present in court when the original order is revoked.

Clause 51 inserts the word ‘also’ to clarify that the right to review a consent order under section 91 is additional to the right to review provided by section 90. Clause 52 omits the word ‘only’ to achieve the same purpose as clause 51.

Clause 53 – New section 91A

This clause inserts new section 91A to clarify what the registrar must do when an application under section 87, 89 or 91 is received. This provision replicates the procedure set out in new section 46 (Interim order not sought) and new section 82A (Preliminary conferences).

Clause 54 – Giving notice of appeal - Section 94

This clause omits section 94. This provision sets out the requirements for giving notice of an appeal. The requirements are set out in rule 5107 of the CPR, which will apply to the FV Act.

Clause 55 – Court-initiated interim orders - Section 112 (1), note

This clause amends the numbering in the note to reflect the changes made by clause 31.

Clause 56 – Interim Court-initiated protection order taken to be special interim order - Section 113 (a)

This clause replaces a reference to section 45 with the words ‘on the respondent’ to reflect the amendments made by clause 23.

Clause 57 – Section 113 (e) and (f)

This clause substitutes current paragraphs (e) and (f) with new paragraphs (e), (f), (g) and (h) to reflect the amendments made by clause 23.

Clause 58 – Definitions – pt 9 - Section 115, definition of *registered foreign order*

This clause substitutes and expands the current definition of registered foreign order to include an order registered under new section 134B.

Clause 59 – Meaning of *properly notified* – pt 9 – Section 117

This clause replaces a reference to division 4.1 with reference to new division 4.4A to reflect the amendments made by clause 31.

Clause 60 – Making new orders - Section 123 (2)

This clause substitutes the reference to ‘make’ with ‘apply for’ as police do not make orders in the ACT.

Clause 61 – New division 9.3A

This clause sets out the process for the registration of foreign orders. New provisions 134A and 134B replicate and remake the requirements for registration of recognised orders under the DVPO Act, by replacing references to recognised orders with reference to foreign orders. This clause ensures there is a clear process for recognising foreign orders in the ACT.

Clause 62 – New sections 198 and 199

This clause inserts new sections 198 and 199. New section 198 relocates current section 200(4) to the beginning of part 20.

New section 199 applies if an application for a domestic violence order (DVO) is made under the repealed Act or a DVO is made under the repealed Act. Subsections (2) and (3) provide that the application or DVO is taken to have been made under the FV Act and a proceeding for an application for a DVO is taken to be a proceeding under the FV Act. The note clarifies that any procedural requirement under the FV Act, the CPRs or any other territory law applies to a proceeding under the repealed Act.

Subsection (4) clarifies that if an application is properly made under the repealed Act (section 27 or 28 of the DVPO Act) it is taken to have been properly made under the FV Act.

This section prevents confusion by ensuring there are consistent procedures and processes regardless of whether an application was made under the DVPO Act or the FV Act. New section 199 ensures that the new procedures and processes apply to all applications and orders from commencement.

Clause 63 – New section 199 (2A)

This clause clarifies that part 9 (National Recognition of family violence orders) does not apply to a domestic violence order made under the repealed Act.

Clause 64 – Existing registered orders under repealed Act Section 200 (4)

This clause omits section 200(4) which has been relocated to new section 198.

Clause 65 – New section 200A

This clause inserts new section 200A which provides that part 12 (Reciprocal arrangements) of the DVPO Act continues to apply to an order that corresponds to a domestic violence order until the commencement of part 9 (National Recognition of family violence orders). This provision ensures that corresponding domestic violence orders can be registered in the ACT from the commencement date until the national recognition provisions commence. Clause 7 provides that the national recognition provisions commence on a date to be fixed by the Minister by written notice.

Clause 66 – Dictionary, note 2

This clause amends the dictionary to insert a reference to adult to reflect the amendment made by clause 27.

Clause 67 – Dictionary note 2

This clause amends the dictionary to omit the reference to individual to reflect the amendment made by clause 27.

Clause 68 – Dictionary - new definition of *returned*

This clause amends the dictionary to inserts a reference to ‘returned’ to reflect the amendment made by clause 31.

Clause 69 – Dictionary - definition of *timing notice*

This clause amends the dictionary to substitute the reference to ‘timing notice’ to reflect the amendment made by clause 23.

Part 4 – Personal Violence Act 2016

Clause 70 – Principle about procedures - Section 9

This clause corrects a grammatical error.

Clause 71 – New section 10A

This clause inserts a provision to clarify that the rules of evidence do not apply in a proceeding for a personal violence order.

The new provision includes a note indicating that the ACT Magistrates Court may inform itself in any way it considers appropriate under section 59 (Court may inform itself).

Clause 72 – Matters to be considered – protection orders Section 11 (1) (f)

This clause removes the mandatory requirement for the court to consider, if the respondent has objected to the making of the interim order, the respondent’s objection. As the vast majority of interim order hearings are held *ex parte*, without the respondent being present or having prior knowledge that the applicant is going to apply for the order, the court may not be able to obtain this information from the respondent or from the applicant.

Clause 73 – New section 11 (2A)

This clause provides that a failure to comply with subsection (1) (Matters the Magistrates Court must consider) does not affect the validity of the order.

Clause 74 – New sections 13A and 13B

This clause inserts two new provisions. New section 13A clarifies that if a child and the child’s parent are each an affected person in relation to personal violence by a respondent, the child may be included in an application for a protection order by the child’s parent.

The note clarifies that the court may hear the applications separately under section 55C (Children as witnesses).

New section 13B applies to applications made by police officers and prescribes that the police officer making the application must tell the ACT Magistrates Court whether the affected person consents to the application. The purpose of this provision is to ensure that the court is able to take into account the affected person's wishes in relation to the application.

Clause 75 – Application forms that require affected person's address - Section 14 (2), new note

This clause inserts a new note clarifying that if a party to an application is self-represented, any address for service given to the court must not be given to the other party without the self-represented party's consent.

Clause 76 – Interim orders – only on application for final order - Section 17 (2)

This clause substitutes the current provision to remove paragraph (b). Paragraph (b) provided that the ACT Magistrates Court could make an interim order at any time before the application for a final order is decided even if the respondent had not been served. This paragraph is unnecessary as interim orders are made before a respondent has been served with an application or timing notice in the vast majority of cases.

Clause 77 – Interim orders – length Section 20 (2) and note

This clause omits section (2) and the accompanying note. This removes the prohibition on an interim order being in force for more than 16 weeks. The purpose of this amendment is to ensure that a protected person can still have an interim order while an application for a final order is being decided.

Clause 78 – New section 24A

This clause remakes section 36 of the DVPO Act and provides that a respondent who wishes to consent to an interim order becoming a final order may return an endorsement copy of the interim order to the ACT Magistrates Court before the return date for the application for the final order. The interim order becomes a final order on the day the Magistrates Court receives an endorsement copy returned by the respondent.

Clause 79 – Final orders – length - Section 27(1), note

This clause inserts the words 'by the respondent' to clarify the extent of section 80 (Final Orders – extension).

Clause 80 – Divisions 4.1 and 4.2

This clause replaces division 4.1. This division remakes and relocates various existing provisions to provide a clear and cohesive outline of the processes that occur once an application for a protection order is received by the ACT Magistrates Court.

New section 39 provides remakes and simplifies the definition of timing notice. A timing notice is a written notice that states the return date, time and place of the conference and that if a party does not appear at the conference the court may decide the application in the party's absence.

New section 40 prescribes what the ACT Magistrates Court must do if it receives an application for a protection order and an interim order is not sought. This provision incorporates previous sections 39(1), 42(1)(b) and 42(2)(b) of the PV Act. This provision removes requirement for the registrar to set a return date not later than 10 days after the application is received to allow sufficient time to ensure the respondent is served and to avoid unnecessary court appearances for the applicant. The return date for a preliminary conference must be as soon as practicable after the application is received.

New section 41 sets out what the ACT Magistrates Court must do if it receives an application for a protection order and an interim order is sought. This provision incorporate previous sections 39(1), 42(1)(b) and 42(2)(a) and includes a note to clarify that the application for the protection order and timing notice must be served personally on the respondent under new section 64A.

New section 42 remakes section 39(2) of the PV Act and inserts an additional requirement for the registrar to give a copy of a document required to be served under new section 40 or 41 to certain people. If the applicant or respondent is a child or has a disability guardian, the registrar must give a copy of any document to the child's parent or guardian or the person with a disability guardian's guardian. Subsection (3) provides that failure to comply with subsection (2)(a) does not affect the validity of any order made under the Act.

New division 4.2 sets out the procedure and objects of preliminary conferences. New section 43 replicates section 44(1) and 45(5) of the PV Act and provides two additional notes.

New section 44 remakes and rewords section 43 of the PV Act to clarify what the registrar must do if the respondent has not been served in accordance with new sections 40 or 41. Paragraph (c) has been included to clarify that an adjournment may only be made if the registrar is satisfied the respondent may be able to be served if further time for service were allowed. A new note has been added to clarify that the court may direct that service be effected in another way if personal service is not reasonably practicable under new section 64A (2).

New section 45 remakes and rewords section 45(6) of the PV Act to clarify what the registrar must do if a consent order is not made at a preliminary conference.

New section 46 remakes section 46 of the PV Act in its entirety, with no amendments.

New division 4.2A sets out what the ACT Magistrates Court must do if one or both parties are not present at the return date for an application. New section 47 provides a definition of returned for the purposes of the new division to clarify that returned means a return date set for a preliminary conference or a return date set for a hearing of the application.

New sections 48, 49 and 49A replicate and renumber sections 50, 51 and 52 of the PV Act.

Clause 81 – Sections 50, 51 and 52

This clause omits sections 50, 51 and 52 of the PV Act. These provisions have been relocated to new division 4.2 A (Non-attendance by party).

Clause 82 – Public hearing not required Section 54(a), (b) and (c)

This clause simplifies sections 54 of the PV Act to provide that a public hearing is not required if the hearing is for an interim order or a party is not present when the application is returned before the court. Current section 54(c) is limited to circumstances where a respondent is not present, this clause expands this paragraph to either party.

This clause also omits section 54 (a) which provides that the hearing need not be public if the order sought is a consent order. This subsection is not required as orders made by consent do not proceed to a hearing.

Clause 83 – New section 54 (2)

This clause clarifies that the definition of returned in new section 47 applies section 54.

Clause 84 – New sections 55A to 55D

New section 55A replicates section 45 of the DVPO Regulation and allows a respondent in a proceeding to file a notice of ground of defence at any time before the end of the proceeding. This provision sets out the requirements for service of a notice of grounds of defence. Subsection (3) clarifies that as respondent does not waive any objection they may have on the grounds of lack of jurisdiction only because the respondent files a notice of grounds offence.

New section 55B replicates section 24 of the DVPO Regulation, which allows applicants to rely on additional information in a hearing.

New section 55C applies where a child and the child's parent are both affected people in relation to the same or similar personal violence by a respondent. This provision provides that if a child is included in an application by the child's parent the court may hear the application of the child and the child's parent separately. Paragraph (b) replicates section 20(2) of the DVPO Regulation and provides that where a child is not a party to the proceeding the court may join the child in the proceeding. These provisions ensure that the rights of the child are protected. These provisions ensure that a child who was included on a parent's application is able to proceed separately if they are in need of protection but the parent revokes the parent's application.

New section 55D inserts a provision requiring the court to give leave for a child, other than a child who is a party to the proceeding to be called as a witness in the proceeding. This provision replicates the restrictions contained in section 715 of the CYP Act, including the ability for the court to restrict cross-examination of the child if it is in the child's best interests. This provision provides an additional requirement for the court, in deciding whether to give leave, to consider the need to protect the child from unnecessary exposure to the court system and the harm to the child if the child gives evidence.

Clause 85 – Discontinuance - Section 56(1), note

This clause inserts two new notes to clarify that an application is not vexatious, frivolous or in bad faith only because it is made and then discontinued. The court may make an order for costs against an applicant if satisfied the application is vexatious frivolous or in bad faith under section 67. The second note provides that if a form is approved under the Court Procedures Act for the provision the form must be used.

Clause 86 – New section 57A

This clause applies where a police officer makes an application for a protection order on behalf of an affected person. New subsection (2) provides that, for an interim order, evidence may be given by an affidavit made by the affected person or a police officer and be witnessed by a police officer of, or above the rank of sergeant.

This provision ensures that in circumstances where the affected person or a police officer who attended an incident or spoke to the affected person is not able to attend court in person, sworn affidavit evidence is available to the court. This provision also allows an officer who is ranked sergeant or above to witness an affidavit. In practice, it is unlikely that a justice of the peace or legal practitioner would be available to witness affidavits as incidents often take place during the night.

Clause 87 – Service of protection orders - Section 64

This clause omits section 64 which has been relocated to new division 4.4A

Clause 88 – New division 4.4A

This clause inserts a new division 4.4A which clearly sets out the requirements for the service of documents.

New section 64A remakes sections 39(5) and 40.

New section 64B allows the ACT Magistrates Court to dismiss an application for a protection order in certain circumstances. An application can only be dismissed if the court is satisfied that the application cannot be served on the respondent, no alternative way of service would be effective to serve the application and the respondent has not intentionally avoided service.

New section 64C prescribes what the registrar must do if a protection order is made by the court and sets out who must be provided with a copy. This provision remakes and amends section 64. This provision replaces set time limits for the service of orders on the respondent with a requirement that copies of the order be served as soon as practicable. This provision includes an additional requirement that the parent or guardian of a child, or the guardian of a person with a disability guardian, who is a party to the proceeding, be given a copy of the order.

New section 64D provides that if a party to an application for a protection order is not represented by a lawyer, the registrar must serve any document required to be served by the self-represented party. This provision also provides that any address for service given to the court must not be given to the other party without the self-represented party's consent. This is to protect the self-represented party's safety and privacy.

New section 64E remakes and simplifies section 41 of the PV Act to provide that a court may direct that a document required to be served on someone be served by a police officer.

New section 64F prevents a document that is required to be given to a child from being given to the child at or near the child's school unless there is no other place where the document can reasonably be given to the child. Subsection (2) provides an exception to the requirement to give a document to a parent or guardian in circumstances where the parent or guardian is also a party to the application or proceeding. Subsection (2) also provides that the court may order that the document is not required to be given to a person if satisfied that giving the document is not reasonably practical or there are circumstances that justify the document not being given. The provision provides examples such as a child estranged from their parent or where there would be an unacceptable risk to the child's safety if the parent or guardian was provided with the document.

Clause 89 – New section 65A

This clause provides that a party may only seek further particulars from an applicant with the court's leave.

Clause 90 – Directions about procedure - Section 66

This section omits section 66 which allows the court to make directions about procedure. Rule 6907 of the CPR will allow the court to make directions about procedure.

Clause 91 – Costs - Section 67 (2), note

This clause substitutes the numbering in the note to reflect amendments made by clause 80.

Clause 92 – Litigation guardian – appointment - Section 72 (1) (a)

This section substitutes the reference to individual with a reference to adult to clarify that only an adult can be appointed as a litigation guardian.

Clause 93 – New section 76A

This clause inserts new section 76A which sets out what the registrar must do if the Magistrates Court receives an application under section 76 (Amendment of protection orders – who may apply). This provision replicates the procedure set out in new section 40 (Interim order not sought) and new section 83A (Preliminary conferences).

Clauses 94 – Amendment of protection orders Section 77 (1) (a)

These clauses omit section 77(1)(a) to remove the requirement that the ACT Magistrates Court may only amend a protection order if satisfied that there has been a change in circumstances of a party to the order with the order cause unnecessary hardship to the respondent.

This clause reduces and simplifies the requirements for party seeking amendments to an order. Final orders can be in place for up to 12 months and there may be a range of reasons why a party may seek amendments to the conditions during this period. These clauses remove unnecessary barriers to accessing amendments to protection orders.

Clause 95 – Section 77 (1), example and note

This clause omits the example and note that accompany section 77(1)(a)

Clause 96 – Section 77 (5) and note

This clause substitutes subsection (5) to remove a provision and note that are no longer required as a result of amending section 79. This clause also includes an additional requirement for applications to amend a protection order that are made by consent.

This clause provides that, if the parties consent, the ACT Magistrates Court must amend a protection order regardless of whether or not the grounds in subsection (1) have been satisfied or the court has considered those grounds. This clause allows the parties to tailor an order to suit their needs and requirements if all parties consent.

Clause 97 – Interim orders made by consent – extension - Section 79 (1)

This clause omits the words ‘of up to 8 weeks’ from subsection (1). This clause removes the limitation on the time that an interim order can be extended where it is made by consent of the parties. The current limitations are unnecessarily restrictive and may not allow adequate time for the application for a final order to be resolved.

Clause 98 – Section 79 (2)

This clause omits subsection (2) to remove the prohibition on a general interim order being in force for more than 16 weeks. This provision replicates the amendments made by clause 77.

Clause 99 – Final orders – extension - Section 80 (3), (4) and (5) and note

This clause removes subsections (3), (4) and (5) of section 80. These provisions require an application to extend an order to be made at least 21 days before the original order expires unless; the ACT Magistrates Court is satisfied that it is appropriate to allow a party to apply for extension after this time; and the parties consent to an application being made after this time. This clause removes unnecessarily restrictive time limits that disadvantage protected people.

Clauses 100 – Section 81 heading; Clause 101 – Section 81 (1); Clause 102 – Section 81 (1); note, Clause 103 – New section 81 (3A); Clause 104 – Section 90 heading; Clause 105 – Section 82 (3); Clause 106 – Consent orders – review Section 83 (1); and Clause 107 – Section 83 (1).

The purpose of clauses 100 – 107 is to expand the circumstances in which a consent order may be reviewed to include a review under section 82.

Under the PV Act if the parties to an order wish to have a final order revoked they must apply for a review of the order. Current section 83 of the PV Act limits the circumstances where final orders made by consent can be reviewed by the court to where the agreement to make the order is induced by fraud or duress (other than the fraud of, or duress applied by, the party applying for the order to be reviewed). As a personal violence order may be made for up to 12 months, there may be a range of reasons why the parties to a consent order seek to have the order revoked.

Clauses 100 and 104 amend the headings of sections 81 and 82 respectively to remove the word ‘Particular’.

Clause 101 omits the words ‘other than a consent order’ to ensure that section 82 applies to both orders made by consent and is not made by consent.

Clause 102 inserts the word ‘also’ into the note to reflect the amendments made by clause 106.

Clause 103 inserts a requirement that the ACT Magistrates Court be satisfied that there has been a change in the circumstances of a party to the order before granting leave under section 81(2)(c). This provision ensures that a respondent is not able to use the protection order system as a means of further abuse against the protected person. The rights of the respondent are protected by sections 84 to 89, which provide a right of appeal against certain decisions.

Clause 105 removes the requirement for the court to notify the protected person in writing as soon as practicable after the original order is revoked if the protected person is present in court when the original order is revoked.

Clause 106 inserts the word ‘also’ to clarify that the right to review a consent order under section 83 is additional to the right to review provided by section 82. Clause 107 omits the word ‘only’ to achieve the same purpose as clause 106.

Clause 108 – New section 83A

This clause inserts a new section 83A to clarify what the registrar must do when an application under section 81 is received. This provision replicates the procedure set out in new section 40 (Interim order not sought) and new section 76A (Preliminary conferences).

Clause 109 – Giving notice of appeal - Section 86

This clause omits section 86. This provision sets out the requirements for giving notice of an appeal. The requirements are set out in rule 5107 of the CPR, which will apply to the PV Act.

Clause 110 – New sections 198 and 199

This clause inserts new sections 198 and 199. New section 198 clarifies that for this part the repealed Act means the DVPO Act.

New section 199 applies if an application for a personal violence order (PVO) is made under the repealed Act or a PVO is made under the repealed Act. Subsections (2) and (3) provide that the application or PVO is taken to have been made under the PV Act and a proceeding for an application for a PVO is taken to be a proceeding under the PV Act. The note clarifies that any procedural requirement under the PV Act, the CPRs or any other territory law applies to a proceeding under the repealed Act.

Subsection (4) clarifies that if an application is properly made under the repealed Act (section 27 or 28 of the DVPO Act) it is taken to have been properly made under the PV Act.

This section prevents confusion by ensuring there are consistent procedures and processes regardless of whether an application was made under the DVPO Act or the PV Act. New section 199 ensures that the new procedures and processes apply to all applications and orders from commencement.

Clause 111 – Existing registered orders under repealed Act - Section 200 (1) (a)

This clause omits the reference to the DVPO Act and substitutes a reference to repealed Act to reflect the amendments made by new section 198.

Clause 112 – Dictionary, note 2

This clause amends the dictionary to insert a reference to ‘adult’ to reflect the amendment made by clause 92.

Clause 113 – Dictionary note 2

This clause amends the dictionary to omit the reference to ‘individual’ to reflect the amendment made by clause 92.

Clause 114 – Dictionary - new definition of *returned*

This clause amends the dictionary to insert reference to ‘returned’ to reflect the amendment made by clause 80.

Clause 115 – Dictionary - definition of *timing notice*

This clause amends the dictionary to substitute the reference to ‘timing’ notice to reflect the amendment made by clause 80.