

2016

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

FAMILY VIOLENCE BILL 2016

EXPLANATORY STATEMENT

Presented by
Simon Corbell MLA
Attorney-General

FAMILY VIOLENCE BILL 2016

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Purpose of the Bill

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

The Royal Commission into Family Violence (Victoria) delivered its report to Government on 29 March 2016, providing 227 recommendations directed at improving the foundations of the current system, seizing opportunities to transform the response to family violence, and building the structures that will guide and oversee a long-term reform program that deals with all aspects of family violence. The Bill builds on the work currently being completed at a national and international level to improve the response to family violence to keep families safe. Importantly, the Bill implements a number of the recommendations contained in the joint Australian and New South Wales Law Reform Commissions report, *Family Violence – A National Legal Response*, (ALRC Report 114) (“the ALRC Report”).

This Bill implements 22 recommendations from the ALRC Report. The Table at the end of this explanatory statement provides a list of recommendations implemented together with references to clauses in the Bill which have given effect to each recommendation.

The *Family Violence Bill 2016* will establish the legal framework for the protection of people from family violence, including:

- a) the context and principles governing the operation of the legislation;
- b) applying, making and reviewing interim family violence orders, final family violence orders and after-hours orders;
- c) the effect of family violence orders and conditions attached to those orders; and
- d) national recognition of family violence orders.

Human Rights Considerations

In Australia, one in three women experience gender-based violence in their lifetime. While gender-based violence, including domestic violence, cannot be eliminated through law alone, legal measures are an essential component of any response to domestic, 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 Bill addresses human rights obligations to tackle domestic violence as a systemic, widespread and pervasive human rights violation.

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

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

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

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

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

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

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

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

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

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

*Victims of domestic violence are of a particular vulnerability and the need for active State involvement in their protection has been emphasised in a number of international instruments*⁴.

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

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

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

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

³ Ibid, p.425.

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

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

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

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

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

The limitations on human rights in the Bill are proportionate and justified in the circumstances because they are the least restrictive means available to achieve the purpose of protecting victims of domestic, family and sexual violence and the community as a whole.

Detailed human rights discussion

Rights engaged and supported

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

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

In addition, the Bill makes a number of amendments that engage and support the right to privacy (s 12), primarily in relation to victims of domestic, family and sexual violence. In the Bill, the right to privacy interacts closely with the right to family. Domestic, family and sexual violence is inherently personal and relationship-based and largely occurs in the private sphere. The Bill seeks to support existing criminal and civil law intended to promote lawful

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

⁷ [1986] 1 S.C.R. 103.

⁸ *R v Oakes* [1986] 1 S.C.R. 103.

conduct within family relationships, which necessarily requires careful balancing of human rights considerations.

Rights engaged and limited

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

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

Section 11 – right to family

Section 11 of the HR Act states that:

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

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

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

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

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

The purpose of the Bill is protecting victims of domestic, family and sexual violence, discussed in general terms above.

Section 6 of the Bill outlines the framework that underpins the limitation, which is that the Bill aims to:

- prevent and reduce family violence;
- ensure the safety and protection of people, including children who fear experience or witness family violence; and
- encourage perpetrators to be accountable for their conduct.

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

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

The Bill creates and amends previous legislation to protect victims of domestic and family violence who are subject to ongoing violence. The nature of those amendments means that by protecting one party in domestic and family violence, the other party's rights are limited.

The accused's rights to protection of family are limited by:

- conditions that attach to any family violence order made by the court; and
- subsequent criminal penalties that flow from breaching a family violence order.

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

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

The purpose of the amendments is to protect victims of domestic and family violence from further traumatisation. In issuing conditions attached to protection orders, decision-makers will be required to consider the impact of those conditions on the respondent, in particular for exclusion orders, where the restriction on access to family will be particularly felt. This measure seeks to ensure the balance of competing rights is appropriately adjudicated, with the emphasis ultimately being placed on protection of victims and their family.

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

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

In particular, clause 37 states that the court must ensure that any conditions imposed are the least restrictive of the personal rights and liberties of the respondent, balanced with the risk to safety of the person seeking protection.

Other rights engaged and limited

It is inevitable that a protection order scheme for individuals will engage and limit another individual's 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 36 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 37 provides that the conditions must be the least restrictive possible to achieve the objects of the legislation and give effect to clause 36.

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 is engaged and limited by the prohibition on orders being made against a child under the age of 10 years (clause 75) 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 a specified place or contacting or going near 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 by 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, but many of the principles that characterise a fair trial are not absolute⁹. 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 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.

⁹ *Brown v Stott* (2003) 1 AC 681

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Detail

Preamble

The preamble reflects the recommendations in the ALRC Report (chapter 7) concerning a common interpretive framework for family violence legislation. The preamble sets out principles to foster a common approach to family violence and perform an educative function.

This integrates the operation of the Bill with the HR Act and ensures that the provisions in the Act will be interpreted with the appropriate evidence and specific context around family violence.

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 *Family Violence Act 2016*.

Clause 2 — Commencement

This clause provides that the Act, other than the below sections, will commence by written notice or, if there is no written notice, six months after the notification day.

Schedule 3, part 3.21 will have a delayed commencement depending on when the *Victims of Crime (Financial Assistance) Act 2016* commences.

Clause 3 — Dictionary

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

Clause 4 — Notes

This clause is a technical clause specifying 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 this Act.

Part 2 – Objectives 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 family violence, keep people, including children, safe, and hold perpetrators accountable.

Clause 7 – How objects are to be achieved

This sets out how the Act aims to achieve its objects, through giving the courts power to make family violence orders (FVOs), creating offences to enforce FVOs, promoting efficient access to the courts and recognising FVOs in other jurisdictions.

Division 2.2 – Important concepts

This division outlines important definitional terms that set context for the legislation.

Clause 8 – Meaning of *family violence*

This clause sets out the meaning of family violence for this Act, replacing the term “domestic violence”. The definition in this clause expands the previous definition of domestic violence in the DVPO Act to include sexual violence or abuse, emotional or psychological abuse, economic abuse, coercion or other behaviour that controls or dominates the family member and causes them to feel fear for their safety or wellbeing. The clause removes conduct that is harassing or offensive, as it is covered by the more general ‘emotional or psychological abuse’, and ‘threatening behaviour’. The clause also introduces a subsection that defines family violence as behaviour that causes a child to hear, witness or otherwise be exposed to family violence.

Clause 8 (2) outlines that, without limiting the definition of family violence, it can include behaviour that is sexually coercive, damaging property, harming an animal, stalking or deprivation of liberty. These behaviours can fall under a number of categories of ‘family violence’ for example, ‘sexually coercive’ behaviour could be both coercion and control as well as sexual abuse.

Sexually coercive behaviour can include behaviour that could be criminal and also behaviour that may not ordinarily be criminally liable, for example using control or coercion to force a person to masturbate or forcing them to perform other sexual activities without their consent.

Damaging property can extend to damage to property that is not owned by the family member, but which relates to the family member. This would include where a respondent damages property which the family member rents, but does not own. For example, if the respondent punches a hole in the wall of a house belonging to the ACT Government or other agency that is leased to the applicant, this property damage would constitute family violence.

The definition is intentionally broad to ensure that all types of domestic, family and sexual violence are covered. There are a myriad of ways that people can perpetrate violence against a family member and people who suffer this violence should be protected under the law.

Clause 8 (3) defines and provides examples of “economic abuse” and “emotional or psychological abuse”.

Clause 9 – Meaning of *family member*

This clause sets out the meaning of family member for this Act, replacing the previous definition of “relevant person” in the DVPO Act. The new definition replaces the term “relevant relationship” with the term “intimate partner” to reflect modern language.

Clause 10 – Meaning of *intimate partner*

This clause sets out the meaning of intimate partner for this Act, replacing the previous definition of “relevant relationship” in the DVPO Act. The clause adopts the definition of “relevant relationship” from the DVPO Act and instead applies it to the term “intimate partner”.

Clause 11 – Meaning of *relative*

This clause sets out the meaning of relative for this Act, largely replicating the previous definition of “relative” in the DVPO Act. The clause has been clarified with the addition of paragraph (c), which sets out factors that indicate whether there is a family-like relationship between two people. This ensures that the definition covers circumstances such as those where a carer and a person being cared for are in a family-like relationship and reflects the policy intent that those people should receive the same protection as people in similarly close domestic relationships.

Division 2.3 – Other important matters

Clause 12 – 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 13 – 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 – Family violence orders

Division 3.1 – Matters to be considered when making family violence orders

Clause 14 – Matters to be considered—family violence orders

This clause provides the matters a court must consider in deciding whether to make a FVO. This simplifies and streamlines the matters to be considered and reinforces the objects and principles of the Act.

Clause 15 – Family Law Act order

This clause provides that a court must enquire whether a Family Law Act order applies to any child of the affected person or respondent. This effectively replicates sections 31, 47 and 71 of the DVPO Act and is intended to ensure that the court does not make an order that may be inconsistent with an order of the Family Court.

Division 3.2 – Applications for protection orders

Clause 16 – Who may apply for protection order?

This clause provides that an affected person, a police officer or a litigation guardian for a person may apply to the Magistrates Court for a protection order for the person. This clarifies the previous equivalent provision in the DVPO Act.

Clause 17 – Application forms that require affected person’s address

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

Clause 18 – 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, where a person applies for a personal violence order, but is related to the respondent, the Magistrates Court may make a FVO if the person honestly applied for the first order and the court could have made an FVO if the application had been properly made.

Clause 19 – 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

Subdivision 3.3.1 – Making interim orders

Clause 20 – 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 previous 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 during the proceedings, even if a copy of the application and a timing notice have not been served on the respondent.

Clause 21 – Interim orders—grounds for making orders

This clause also reflects division 4.2 of the DVPO Act and sets out 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 the affected person’s property until the application for the final order is decided.

Clause 22 – Interim orders—general interim orders and special interim orders

This clause provides for making interim orders where there is a charge outstanding in relation to the respondent and that charge is related to the application for the protection order. The clause remakes section 30A of the DVPO Act, which provides for circumstances where a special interim order should have been made, or should not have been made. It ensures that the court has flexibility in responding to new information about charges connected to an application for a protection order.

Subdivision 3.3.2 – General interim orders

Clause 23 – General interim orders—only one 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 27.

Clause 24 – General interim orders—length

This clause remakes sections 41A and 45 of the DVPO Act and provides that:

- a general interim order must not be in force for more than 12 months (old s 41A); and
- a general interim order made by consent remains in force for a period of up to 16 weeks (old s 45).

The length of general interim orders has been lowered from two years to 12 months. This is to ensure fairness to respondents of a general interim order, noting that final orders have a length of up to two years. General interim orders apply only in cases where a final order has not been made, there is no consent order and there are no related criminal charges to make the order a ‘special’ interim order.

Clause 25 – General interim orders—ending

This clause remakes section 41AA of the DVPO Act and provides for the circumstances in which a general interim order ends.

Clause 26 – General interim orders—taken to be special interim orders if related charges laid

This clause remakes section 41B of the DVPO Act and provides that a general interim order will be taken to be a special interim order if the respondent to a general interim order is charged with a related offence after the general interim order has been made. This allows for flexibility where criminal and civil matters progress under differing timeframes.

Clause 27 – General interim orders—further orders

This clause remakes section 41D of the DVPO Act and provides that the court may make one further general 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.

Clause 28 – General interim orders—extension for non-service of application

This clause remakes section 41E of the DVPO Act and provides that a registrar may extend a general 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 29 – General 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.

Subdivision 3.3.3 – Special interim orders

Clause 30 – Special interim orders—ending

This clause remakes section 42A of the DVPO Act and provides the circumstances in which a special interim order ends.

Clause 31 – Special interim orders—application not to be decided until related charges finalised

This clause remakes section 42B of the DVPO Act and states that if the Magistrates Court has made a special interim order on an application for a final order, the court must not decide the application until all related charges are finalised. Subsection (2) ensures that an applicant is still able to withdraw or apply for consent orders before all related charges are finalised.

Clause 32 – Special interim orders—final application decided

This clause remakes section 42C of the DVPO Act and details what happens to a special interim order when related charges are finalised. The explanatory statement for the Crimes (Domestic and Family Violence) Legislation Amendment Bill 2015 provides a detailed explanation of this provision.

Division 3.4 – Consent Orders

Clause 33 – Consent orders

This clause remakes section 43 of the DVPO Act, providing for the making of consent orders, and inserts a new subclause (3), which allows the Court to hold a hearing into the particulars for an application before making a consent order, where the court is satisfied that it is in the interests of justice to do so.

Division 3.5 – Final Orders

Clause 34 – Final orders—grounds for making

This clause remakes section 46 of the DVPO Act to provide the grounds on which a court may make a final order. The new provision reflects recommendation 7-5 of the ALRC report, which recommends providing alternative grounds for a person seeking protection, including where they have reasonable grounds to fear family violence, or where the respondent has used family violence and is likely to do so again.

Clause 34 (3) clarifies that that even if there is no offence connected to family violence behaviour, the court should not be prohibited from making an order. This clause was included to ensure that it was clear that the absence of a family violence offence should not prohibit the granting of an order if an offence has not been made out.

Clause 35 – Final orders—length

This clause provides that a final order may last for up to two years, 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 two years, as the court must have some oversight before extending the length of the order.

Division 3.6 – Conditions of family violence orders

Clause 36 – Safety of affected person and children paramount

This clause provides the principle that, in deciding the conditions to be included in a family violence order, a court must give paramount consideration to the safety and protection of the affected person and any child affected by the respondent's conduct. 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 the decision about the conditions to be attached to an order.

Clause 37 – Least restrictive principle

This clause provides a balancing consideration for the court to take into account, along with clause 36, when deciding conditions to be attached to an order. This clause provides that the court must ensure the conditions included in a FVO 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 36.

This clause supports section 28 of the HR Act, by requiring the court to consider the conditions that will be the least restrictive on the respondent's human rights.

Clause 38 – Conditions—general

This clause sets out a non-exhaustive list of the conditions the court may attach to a FVO. The conditions reflect a range of the options the court may consider in tailoring a FVO to the particular circumstances in each case.

Clause 39 – Exclusion conditions

This clause provides the considerations a court must take into account in deciding whether to make an exclusion condition. This provision gives effect to recommendation 11-9 of the ALRC report.

Clause 39 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 40 – Personal property orders

This clause remakes section 47 (1) (e) of the DVPO Act as a stand-alone section to ensure clarity and visibility in relation to personal property orders. It provides that the court must consider the income, assets and liabilities of the respondent and the protected person in making a condition in a FVO in relation to personal property orders. This ensures the court considers all relevant information in making a personal property order and protects the rights and obligations of each party.

Clause 41 – 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 42 – 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 two years.

Division 3.7 – Effect of family violence orders

Clause 43 – Offence—contravention of family violence order

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

The penalty for contravention of a FVO is identical to section 90 of the DVPO Act. The section is relocated to an appropriate section in the FV Bill, with reference to ‘protection order’ amended to ‘family violence order’.

Clause 44 –Firearms licences

This clause remakes sections 40, 57 and 80 of the DVPO Act to provide clarity around suspension and cancellation of a firearms licence when a FVO is issued.

Under the DVPO Act (sections 40 and 80), a respondent’s firearms licence is automatically suspended when an interim or after-hours domestic violence order is made against a respondent who is the holder of a firearms licence.

Section 57 of the DVPO Act provides for the automatic cancellation of a respondent’s firearms licence if a final domestic violence order is made.

This clause combines the three provisions into one single provision to allow greater clarity and update the language. The policy and intent of the previous provisions has remained intact with no material changes other than those to update the language.

Part 4 – Procedural matters

Division 4.1 – Service of applications

Clause 45 – 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 46 – 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 47 – 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 48 – 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 *Domestic Violence and Protection Orders Regulation 2009* (DVPO Regulation).

Clause 49 – Adjournment of proceeding 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 50 – Preliminary conferences—objects

This clause remakes section 8 of the DVPO Regulation 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 51 – Preliminary conference

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.

This clause also remakes sections 9 and 10 of the DVPO Regulation.

Clause 52 – Preparation for hearing

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 remakes section 12 of the DVPO Regulation.

Clause 53 – 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 general and special interim order applications.

Clause 54 – 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 55 – Applicant not present at return of application

This clause remakes section 17 of the DVPO Regulation, 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 56 – 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 57 – Neither party present at return of application

This clause remakes section 19 of the DVPO Regulation 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 58 – Hearings usually in public

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

Clause 59 – Public hearing not required

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

Clause 60 – 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 HR Act. The wording of section 21 has been adopted to ensure consistency.

Clause 61 – 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 62 – 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 63 – Examination of affected person by self-represented respondent

This clause implements recommendation 18-3 of the ALRC report, which recommends that the respondent in a protection order proceeding be prohibited from personally cross-examining any person against whom the respondent is alleged to have used family violence. This amendment reflects a commitment to reducing the trauma experienced by complainants in protection order proceedings and restricting the ability for a respondent to exert further power and control over the affected person. The clause provides for the respondent's legal representation by allowing the court to appoint a person to examine an affected person on the respondent's behalf, or by adjourning the proceeding to allow the respondent to obtain a legal representative to conduct the examination.

Clause 64 – Undertakings by respondent

This clause implements recommendation 18-4 of the ALRC report, which recommends the introduction of 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 65 – Court may inform itself

This clause remakes section 25 of the DVPO Regulation to state 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 66 – 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 67 – 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 68 – 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 69 – 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 allow the 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 unless necessary or the person’s consent has been provided.

Clause 70 – 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 71 – Police officer party to proceeding—substitution of applicant etc

This clause allows greater flexibility for police officers who act as applicants under the FV 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 Policing 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 72 – 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 73 – 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 FVO 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 (s 8 HR Act), and also support the rights of children (s 11(2)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 74 – 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 is 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 in the following clauses.

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 75 – 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 76 – 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 satisfied that it is 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 to the safety of the protected person, balanced with the least restrictive principles of achieving that protection.

Clause 77 – 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 78 – 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 79 – 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 80 – 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 81 – 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 82 – 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 83 – 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 where there has been a relevant change in circumstances, based on the need to keep the protected person and any affected children, safe, while also not imposing unnecessary hardship on the respondent.

Clause 84 – 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 allows flexibility should the court be made aware of relevant circumstances warranting a temporary amendment to the order.

Clause 85 – General interim orders made by consent—extension

This clause remakes section 61 of the DVPO Act and provides for the extension of general interim orders by consent, allowing the Magistrates Court to extend an order by up to 8 weeks, as long as this would not mean the order is in force for more than 16 weeks.

Clause 86 – Final orders – extension

This clause remakes 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 family 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 87 – Special interim orders—application for review

This clause remakes section 90A of the DVPO Act and provides that the Magistrates Court may, on application by the respondent to a special interim order, give the respondent leave to apply for a review of the order in prescribed circumstances. This gives the respondent a right of review for the order.

Clause 88 – Special interim orders—review

This clause remakes section 90B of the DVPO Act and provides that, on hearing an application for review under clause 87, the Magistrates Court must dismiss the application, or confirm, revoke or set aside the special interim order.

Clause 89 – 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 90 – Particular final orders—review

This clause remakes section 92 of the DVPO Act and provides that where an application is made under clause 82, the Magistrates Court must dismiss the application, or confirm, revoke or set aside the order.

Clause 91 – 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 92 – Appealable decisions

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

Clause 93 – 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 94 – 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 95 – 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 96 – 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 97 – 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 – After-hours orders

Clause 98 – Meaning of *business hours*—pt 7

This defines business hours of the Magistrates Court as a time between the earliest and latest times that the court would normally sit on a day that the registry is required to be open under the *Court Procedures Rules 2006*.

Clause 99 – Police officer may apply for after-hours order

This clause remakes section 68 of the DVPO Act and provides that a police officer may apply to a judicial officer for an order against a person outside the business hours of the Magistrates Court.

Clause 100 – After-hours orders—grounds for making

This clause provides that a judicial officer may make an after-hours order if satisfied that it is necessary to ensure the safety of an affected person or prevent substantial damage to the

affected person's property and it is not practicable to arrest the respondent for a family violence offence.

This provision updates the language used in section 69 of the DVPO Act and reflects the original intention of the legislation, which was that ACT Policing officers, 'when attending a scene where violence has occurred will need to give consideration to the appropriateness of a criminal response prior to considering a civil application. In circumstances where a criminal offence has occurred, the appropriate response is for the alleged offender to be arrested and charged'.¹⁰

This provision clarifies that an after-hours order can only be used as a tool by police where their pro-arrest powers are not engaged. This allows a responsive tool for ACT Policing to use only when immediately necessary to keep an affected person safe until an application can be prepared and heard in the usual way.

A "family violence offence" is defined as an offence if the conduct making up the offence is family violence. It is intended that for the matter to be a family violence offence there would need to be reasonable grounds to believe that an offence has occurred. It is not intended in any way that this provision should be used as an alternative to the proper process of arresting and charging a person with a family violence offence if that would ordinarily have occurred.

Clause 101 – After-hours orders—application

This clause remakes section 70 of the DVPO Act and provides that a police officer must make an application for an after-hours order by telephone and establish the police officer's identity, the conduct the application is based on, the reasons for the application and any other relevant information.

Clause 102 – After-hours orders—making

This clause remakes section 72 of the DVPO Act and sets out what an after-hours order must include and how the order is to be made.

Clause 103 – After-hours orders—refusal

This clause remakes section 73 of the DVPO Act and sets out that a judicial officer must record where an after-hours order is refused, and the details of that order, including the name of the people involved and the reasons for refusing to make the order. This ensures there is a record of the incident, should a similar incident arise again in the future, establishing a relevant pattern of behaviour.

Clause 104 – After-hours orders—records

This clause remakes section 74 of the DVPO Act and provides that the judicial officer must ensure that every record made is part of the record of the Magistrates Court.

¹⁰ <http://www.hansard.act.gov.au/hansard/1998/pdfs/19980924.pdf>

Clause 105 – After-hours orders—detention of person against whom order sought

This clause remakes section 75 of the DVPO Act and provides that a police officer may remove a person to another place and detain the person for up to four hours if the person is the respondent to an after-hours order.

The right to liberty and security of person (s 18 HR Act) is engaged and limited due to the ability for police officers to detain a person for up to four hours 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 detain a person is to ensure that in high-risk situations a respondent to an after-hours order can be removed from the family violence situation and detained until either the order is refused or can be served on the respondent. The **nature and extent of the limitation** is to ensure the de-escalation of violence and protection of both parties until an after-hours order can be obtained. The limitation is the **least restrictive possible** in that the police must be reasonably satisfied that there is a risk to safety of the affected person and that detention is necessary to ensure their safety or prevent damage to property. Also, the provision does not create any criminal offence in respect of the respondent's detention.

Clause 106 – After-hours orders—length

This clause remakes section 77 of the DVPO Act and provides for the length of emergency orders, limiting the time frame to provide emergency protection only.

Clause 107 – After-hours orders—amendment or revocation

This clause largely remakes section 78 of the DVPO Act and provides for the circumstances in which an after-hours order may be amended or revoked.

Clause 108 – Service of after-hours orders

This clause largely remakes section 81 of the DVPO Act and provides that a copy of an after-hours order must be served on the respondent by a police officer, unless the Magistrates Court makes an order that personal service is impracticable under the Bill.

Clause 109 – Police required to explain after-hours orders

This clause remakes section 82 of the DVPO Act and provides that a police officer must explain the after-hours order to the respondent and the consequences of contravening the order.

Clause 110 – Police to give reasons for not applying for after-hours order

This clause largely remakes section 83 of the DVPO Act and provides that a police officer must make a record of their decision where they do not apply for an after-hours order in dealing with an incident where the police officer is satisfied there are reasonable grounds for making an after-hours order under clause 100.. This provision requires police to make a

record of the incident, and brief reasons for not applying for an after-hours order. This requirement provides that should a similar incident arise again in the future, any relevant pattern of behaviour can be identified.

Part 8 – Court-initiated actions

Clause 111 – Application—pt 8

This clause states that this part applies to a proceeding for a family violence offence.

Clause 112 – Court-initiated interim orders

This clause reflects recommendation 11-3 of the ALRC report and provides that a court may make an interim order in a family violence proceeding if it is satisfied that a court may, if it were acting on an application for a final order, make an interim order against the defendant. This provides the court with flexibility in identifying and responding to safety risks to a person affected by family violence.

Clause 113 – Interim court-initiated protection order taken to be special interim order

This clause provides that if a court makes a court-initiated interim order, the provisions governing special interim orders apply where that order is taken to be a special interim order.

This ensures consistency with the specific operation of that protection order scheme.

Paragraph (c) states that for a court-initiated protection order the applicant is taken to be a stated police officer or if the protected person consents either the protected person or their litigation guardian. The policy intent is that a ‘stated police officer’ can be a nominal police officer.

Clause 114 – Amendment of existing protection order if later family violence charge

This clause reflects recommendation 11-5 of the ALRC report and provides the court with the power to consider whether any existing protection order obtained under family violence legislation needs to be varied to provide greater protection for the person against whom the offence was committed, where a person pleads or is found guilty of a family violence offence.

Part 9 – National recognition of FVOs

This part gives effect to the national recognition scheme for domestic violence offences. NSW introduced the *Crimes (Domestic And Personal Violence) Amendment (National Domestic Violence Orders Recognition) Bill 2016*. The explanatory material accompanying that Bill assists in the interpretation of this part.

Division 9.1 – Preliminary

Clause 115 – Definitions—pt 9

This clause sets out the definitions for the national recognition scheme.

Clause 116 – Meaning of *family violence concern*—pt 9

This clause sets out the meaning of “family violence concern” for part 9 of the Act. South Australia and Western Australia do not have a distinct category of family violence order, so to distinguish FVOs from other protection orders in those jurisdictions, a protection order made in SA and WA will be taken to address a family violence concern if the order is made because it is reasonable to suspect that the respondent will, without intervention, commit an act of domestic abuse.

Clause 117 – Meaning of *properly notified*—pt 9

This clause sets out the meaning of “properly notified” for part 9 of the Act. A local FVO will be properly notified under a law of the ACT if the respondent is present when the FVO is made, or the FVO is served in accordance with division 5.1. An interstate FVO will be properly notified if it is properly notified under the law of the jurisdiction in which it is made.

Clause 118 – Special provisions for registered foreign orders

This clause sets out how a registered foreign order is made, amended or revoked.

Division 9.2 – National recognition of FVOs

Subdivision 9.2.1 – General principles

Clause 119 – Recognition of FVOs

This clause provides that a registered foreign order is taken to be made in the jurisdiction in which it is registered and is taken to have been made when it is so registered.

Clause 120 – Amendment of FVOs

This clause provides for the circumstances in which an amendment of a recognised FVO is a recognised amendment in the ACT.

Clause 121 – Revocation of recognised FVOs

This clause sets out the circumstances in which a recognised FVO is taken to be revoked.

Clause 122 – Recognised FVO prevails over earlier comparable FVOs

This clause sets out the recognised FVO that will prevail where there is a comparable recognised FVO made earlier than the new FVO. Where a new recognised FVO is made, it will supersede and revoke the earlier FVO. This promotes clarity and consistency.

Clause 123 – Making new orders

This clause provides that a person is able to apply for a local FVO even where there is a recognised FVO in force that applies to the same respondent. However, a police officer must not make a local FVO if they are aware that there is also a recognised and enforceable FVO against the respondent which applies to the same respondent and protected person and was made by a court.

Subdivision 9.2.2 – Enforcement of recognised FVOs

Clause 124 – Recognised FVOs and amendments are enforceable against respondent

This clause provides that both a recognised FVO and recognised amendment to a recognised FVO are enforceable in the ACT.

Clause 125 – Contravention of enforceable recognised FVOs

This clause provides that a recognised FVO may be enforced in the ACT as if it were a local FVO.

Subdivision 9.2.3 – Enforcement of non-local FVOs

Clause 126 – Non-local FVOs to be treated as local FVOs

This clause provides that a recognised FVO that is a non-local FVO has the same effect in the ACT as a local FVO.

Clause 127 – Licences, permits and other authorisations

This clause provides that licences, permits and other authorisations that apply to local FVOs, apply to a person subject to a recognised non-local FVO.

Clause 128 – Recognition of disqualification to hold firearms licence

This clause provides that a person subject to a recognised non-local FVO is subject to the same firearms licence restrictions as would apply to a person subject to a local FVO under the Act.

Clause 129 – Recognition of disqualification to hold prohibited weapons permit

This clause provides that a person subject to a recognised non-local FVO is subject to the same restrictions as would apply to a person subject to a local FVO under the Act.

Clause 130 – Costs—non-local FVO

This clause provides that a non-local FVO, to the extent that it requires the payment of money, cannot be enforced in the ACT and that the recognition of a FVO in the ACT does not permit an ACT court to award costs in respect of proceedings occurring in another jurisdiction.

Division 9.3 – Amendment and revocation of recognised non-local FVOs

Clause 131 – Meaning of *court*—div 9.3

This clause provides that, for division 9.3, “court” means a court of the ACT that has power to make local FVOs.

Clause 132 – Power of court to amend or revoke recognised non-local FVOs

This clause sets out when a court may amend or revoke a recognised non-local FVO. It clarifies that a court cannot amend or revoke a non-local FVO if it is a kind of FVO that cannot be amended or revoked by a court in the jurisdiction in which the FVO was made.

Clause 133 – Application for amendment or revocation of recognised non-local FVO

This clause sets out the circumstances in which an application can be made to a court for the variation or revocation of a recognised non-local FVO.

Clause 134 – Decision about hearing of application

This clause provides that a court may decide to hear or not to hear an application for amendment or revocation of a non-local FVO. In making their decision, the court may consider a number of relevant factors such as whether the court has sufficient information to make the order or where the protected person and respondent live.

Division 9.4 – Exchange of information

This division supports the national domestic violence order scheme by promoting processes for the sharing of information between jurisdictions about FVOs.

Clause 135 – Issuing authorities may obtain FVO information

This clause provides that an issuing authority in the ACT may obtain information about an FVO from an issuing authority in another jurisdiction and use that information to exercise its functions under this Act.

Clause 136 – Issuing authorities must provide FVO information

This clause requires an ACT issuing authority that makes, varies or revokes a FVO to provide, on request, information about the FVO to a court in a participating jurisdiction for

the purposes of a corresponding law or to a local or interstate law enforcement agency for the purposes of its law enforcement functions.

Clause 137 – Law enforcement agencies may obtain FVO information

This clause permits a local law enforcement agency (ACT Policing, or the Australian Federal Police) to obtain information about a FVO from an issuing authority or interstate law enforcement agency and to use the information for the purposes of its law enforcement functions.

Clause 138 – Information to be provided to law enforcement agencies

This clause requires a local law enforcement agency to provide, on request, information about a FVO to an interstate law enforcement agency for the purpose of exercising its law enforcement functions.

Division 9.5 – Other matters

Clause 139 – Certificate evidence—notification

This clause permits certificates to be issued stating that the making of, or variation to, a FVO has been properly notified in the ACT or another jurisdiction. The certificate is admissible in evidence in proceedings.

Division 9.6 – Application of pt 9—existing protection orders

Subdivision 9.6.1 – Preliminary

Clause 140 – Meaning of *commencement day*—div 9.6

This clause defines “commencement day” as the day the part commences.

Clause 141 – Enforcement of FVOs under other provisions

This clause clarifies that the enforceability of any FVO in the ACT is not affected by a local or interstate FVO, although an FVO made in the ACT before the commencement day can be superseded by a later in time FVO.

Subdivision 9.6.2 – FVOs to which scheme applies

Clause 142 – FVOs made in the ACT

This clause states that the commencement of the national recognition provisions applies in the ACT on or after the corresponding NSW provisions commence. NSW was the first jurisdiction to introduce the model laws and it is appropriate that recognition of ACT FVOs start on the day the first legislation commences.

Clause 143 – FVOs made in other jurisdictions

This clause states that an FVO made in another participating jurisdiction that is a recognised FVO in that jurisdiction under their corresponding law. The recognition extends to interstate and foreign orders, including amendment of those orders.

Subclause (4) states that non-local FVOs are only enforceable against a respondent in the ACT once the legislation commences.

Subdivision 9.6.3 – Extension of scheme to older FVOs

Clause 144 – FVOs declared to be recognised FVOs

This clause states that an FVO that is declared by a registrar of the ACT courts or another jurisdiction to be recognised is a “recognised FVO”.

A declared recognised FVO becomes enforceable against a respondent in the ACT when a declaration is made.

Clause 145 – FVOs declared to be recognised in other jurisdictions before commencement day

This clause clarifies that clause 144 extends to an FVO declared by a registrar of a court of another participating jurisdiction to be a recognised FVO before the commencement day, and that also extends to any amendment or revocation.

Any amendment of a declared recognised FVO is not enforceable against a respondent in the ACT until the commencement day.

Subdivision 9.6.4 – Power to declare FVO to be recognised

Clause 146 – Power to declare FVO to be recognised

This clause provides a registrar with the power to declare a FVO made in any jurisdiction as a recognised FVO. The clause outlines the matters that the court can consider and how the court can refuse to make a declaration.

Clause 147 – Application for order

This clause states the procedural aspects of applying for a declaration of a recognised FVO.

Clause 148 – Functions of registrar may be exercised by court

This clause states that a court with power to make a local FVO may exercise any of the functions of the registrar of the Magistrates Court under this subdivision.

Part 10 – Miscellaneous

Division 10.1 – Public access and publication

Clause 149 – 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 FVO. 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 150 – 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 10.2 – Other matters

Clause 151 – 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 family violence can run together.

Clause 152 – Criminal and civil liability not affected by family violence orders

This clause clarifies that the making, amendment or revocation of a FVO 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 153 – 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 154 – 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 155 – Regulation-making power

This clause remakes section 118 of the DVPO Act and provides the Executive with the power 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 – Repeals and consequential amendments

Clause 203 – Legislation repealed

This clause repeals the *Domestic Violence and Protection Orders Act 2008* (A2008-46) and the *Domestic Violence and Protection Orders Regulation 2009* (SL2009-10). A number of the provisions of the DVPO Act are remade in this Bill and the *Personal Violence Bill 2016*.

Clause 204 – Legislation amended—sch 2 and 3

This clause provides for other amendments in schedules 2 and 3.

Part 21 – Repeals and consequential amendments

Clause 203 – Legislation repealed

This clause repeals the *Domestic Violence and Protection Orders Act 2008* (A2008-46) and the *Domestic Violence and Protection Orders Regulation 2009* (SL2009-10). A number of the provisions of the DVPO Act are remade in this Bill and the *Personal Violence Bill 2016*.

Clause 204 – Legislation amended—sch 2 and 3

This clause provides that this Act amends the legislation in schedules 2 and 3.

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 149.

Schedule 2 –Family violence amendments

Part 2.1 – Bail Act 1992

[2.1] – Section 16 (5)

This clause amends the section 16 of the Bail Act and provides that where an authorised officer decided to grant bail to person accused of a family violence offence, or is notified that bail is granted to an accused person, the officer must take reasonable steps to tell each protected person as soon as practicable. The new provision reflects recommendation 10-3 of the ALRC report, which recommends that a provision be included in ACT legislation to require a relevant agency to advise victims of domestic violence promptly of decisions to grant or refuse bail and any conditions of release, where bail is granted.

Part 2.2 – Children and Young People Act 2008

[2.2] – Division 14.3.5 – Protection Orders

This clause substitutes the existing provisions for a new scheme for the making of protection orders in care and protection matters.

Section 458 sets out the definitions for the division, including definitions for “protection order” and “relevant Act”. This section updates the terminology in line with the language introduced by the Family Violence Bill 2016.

Section 459 implements recommendation 20-4 and recommendation 20-6 of the ALRC Report. This section provides power to the Court to make either a family violence order, or a personal protection order, for an affected person in care and protection proceedings, where that order could be made under the relevant Act. To reflect recommendation 20-4 this section extends the power of the Childrens Court to make protection orders to allow orders to be made in favour of siblings of the child or young person who is the subject of proceedings, or other children or young people within the same household, who are affected by the same or similar circumstances. It also provides the Court can make or amend an existing order, implementing recommendation 20-6 of the ALRC Report.

Section 460 sets out the effect of making a protection order under the Children and Young People Act 2008.

Part 2.3 – Crimes (Sentencing) Act 2005

[2.3] – Section 34 (2)

This clause amends the current provision to provide that the fact the offence is a family violence offence, or the fact that a family violence order under the *Family Violence Act 2016* or a protection order under the *Domestic Violence and Protection Orders Act 2008* (repealed) cannot be considered a mitigating factor in sentencing. This clause implements Recommendation 13-3.

Part 2.4 – Evidence (Miscellaneous Provisions) Act 1991

[2.4] – Section 37 , definition of *similar act witness*, paragraph (a)

This clause amends the definition of “similar act witness” in part 4 to include a witness in a sexual or violent offence proceeding who gives, or intends to give, evidence in the proceeding that relates to an act committed in the presence of the witness. This corrects an anomaly in relation to witnesses of act of indecency offences, which can be committed on or in the presence of the witness.

[2.5] – New section 40D (c)

This clause amends section 40D to expand the definition of a witness in a sexual or violent offence proceeding to include complainants and similar act witnesses in the proceeding.

[2.6] – New section 40D (2)

This clause inserts a new section that sets out the definitions for section 40D for the terms “complainant” and “similar act witness”. This implements recommendation 26-6 of the ALRC Report and allows adults of sexual assault offences the same rights to pre-recorded evidence in chief interviews as children and victims of family violence offences are entitled to.

Section 22 of the HR Act provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law. A person charged with a criminal offence is also entitled to a number of minimum guarantees, including the ability to cross-examine prosecution witnesses. The amendments in to section 40D (2) will engage an accused’s rights in criminal proceedings, but will not limit them, as the substantive changes affect how complainants give evidence in chief. The amendments will not limit the ability of an accused to examine witnesses or adduce evidence for their own submissions.

Schedule 3 – Consequential amendments

Schedule 3 makes only consequential amendments that are cosmetic and fall under one or more of the below categories:

- language changes – replacing references of ‘domestic violence’ with ‘family violence’
- consistency of definitions across ACT legislation to ensure updated language in the Bill and the consequential Bill
- updating references to sections or titles of the Bill and the consequential Bill.

Dictionary

This clause sets out the dictionary for the Act.

List of recommendations implemented:

| ALRC Recommendation | Clause implemented |
|--|--|
| <p><u>Recommendation 5-1</u></p> <p>State and territory family violence legislation should provide that family violence is violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful. Such behaviour may include but is not limited to:</p> <ul style="list-style-type: none"> (a) physical violence; (b) sexual assault and other sexually abusive behaviour; (c) economic abuse; (d) emotional or psychological abuse; (e) stalking; (f) kidnapping or deprivation of liberty; (g) damage to property, irrespective of whether the victim owns the property; (h) causing injury or death to an animal irrespective of whether the victim owns the animal; and (i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above. | <p><u>Part 2, Clause 8</u> – Meaning of <i>family violence</i></p> |
| <p><u>Recommendation 5-2</u></p> <p>State and territory family violence legislation should include examples of emotional and psychological abuse or intimidation and harassment that illustrate conduct that would affect—although not necessarily exclusively—certain vulnerable groups including: Indigenous persons; those from a culturally and linguistically diverse background; the aged; those with a disability; and those from the gay, lesbian, bisexual, transgender and intersex communities. In each case, state and territory family violence legislation should make it clear that such examples are illustrative and not exhaustive of the prohibited conduct.</p> | <p><u>Part 2, Clause 8</u> – Meaning of <i>family violence</i></p> |
| <p><u>Recommendation 5-4</u></p> <p>The governments of NSW and the ACT should review the offences categorised as ‘domestic violence offences’ in their respective family violence legislation with a view to:</p> <ul style="list-style-type: none"> (a) ensuring that the classification of such offences falls within the proposed definition of family violence in Rec 5-1; and (b) considering the inclusion of relevant federal offences committed in a family violence context, if they choose to retain such a classification system. | <p><u>Dictionary</u>, definition of <i>family violence offence</i></p> |

| ALRC Recommendation | Clause implemented |
|---|---|
| <p><u>Recommendation 7-1</u></p> <p>State and territory family violence legislation should contain guiding principles, which should include express reference to a human rights framework, drawing upon applicable international conventions</p> | <p><u>Preamble</u></p> |
| <p><u>Recommendation 7-2</u></p> <p>State and territory family violence legislation should contain a provision that explains the nature, features and dynamics of family violence including: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children. In addition, family violence legislation should refer to the particular impact of family violence on: Indigenous persons; those from a culturally and linguistically diverse background; those from the gay, lesbian, bisexual, transgender and intersex communities; older persons; and people with disabilities.</p> | <p><u>Preamble</u></p> |
| <p><u>Recommendation 7-4</u></p> <p>State and territory family violence legislation should articulate the following common set of core purposes:</p> <ul style="list-style-type: none"> (a) to ensure or maximise the safety and protection of persons who fear or experience family violence; (b) to prevent or reduce family violence and the exposure of children to family violence; and (c) to ensure that persons who use family violence are made accountable for their conduct. | <p><u>Part 2, Clause 6</u> – Objects of Act</p> <p><u>Clause 7</u> – How objects are to be achieved</p> |
| <p><u>Recommendation 7-5</u></p> <p>State and territory family violence legislation should adopt the following alternative grounds for obtaining a protection order. That is:</p> <ul style="list-style-type: none"> (a) the person seeking protection has reasonable grounds to fear family violence; or (b) the person he or she is seeking protection from has used family violence and is likely to do so again. | <p><u>Division 3.4, Clause 34</u> – Final orders – grounds for making</p> |
| <p><u>Recommendation 10-3</u></p> <p>State and territory legislation should impose an obligation on police and prosecutors to inform victims of family violence promptly of:</p> <ul style="list-style-type: none"> (a) decisions to grant or refuse bail; and (b) the conditions of release, where bail is granted. | <p>Schedule 2, <u>Part 2.1</u> - amendment to <i>Bail Act 1992</i></p> |

| ALRC Recommendation | Clause implemented |
|---|---|
| <p><u>Recommendation 11-1</u></p> <p>State and territory family violence legislation should make it clear that the making, variation or revocation of a protection order, or the refusal to make, vary or revoke such an order, does not affect the civil or criminal liability of a person bound by the order in respect of the family violence the subject of the order.</p> | <p><u>Division 10.2, Clause 152</u> – Criminal and civil liability not affected by family violence orders</p> |
| <p><u>Recommendation 11-3</u></p> <p>State and territory family violence legislation should include an express provision conferring on courts a power to make a protection order on their own initiative at any stage of a criminal proceeding. Any such order made prior to a plea or finding of guilt should be interim until there is a plea or finding of guilt.</p> | <p><u>Part 8</u> – Court-initiated actions</p> |
| <p><u>Recommendation 11-5</u></p> <p>State and territory legislation should provide that a court before which a person pleads guilty, or is found guilty of an offence involving family violence, must consider whether any existing protection order obtained under family violence legislation needs to be varied to provide greater protection for the person against whom the offence was committed.</p> | <p><u>Part 8, Clause 114</u> – Amendment of existing protection order if later family violence charge</p> |
| <p><u>Recommendation 11-6</u></p> <p>State and territory family violence legislation should provide expressly that one of the conditions that may be imposed by a court making a protection order is to prohibit the person against whom the order is made from locating or attempting to locate the victim of family violence.</p> | <p><u>Part 3, Clause 38</u> – conditions - general</p> |
| <p><u>Recommendation 11-9</u></p> <p>State and territory family violence legislation should provide that a court should only make an exclusion order when it is necessary to ensure the safety of a victim or affected child. Primary factors relevant to the paramount consideration of safety include the vulnerability of the victim and any affected child having regard to their physical, emotional and psychological needs, and any disability. Secondary factors to be considered include the accommodation needs and options available to the parties, particularly in light of any disability that they may have, and the length of time required for any party to secure alternative accommodation.</p> | <p><u>Part 3, Clause 39</u> – Exclusion conditions</p> |
| <p><u>Recommendation 11-10</u></p> <p>State and territory family violence legislation should require a court to give reasons for declining to make an exclusion order where such order has been sought.</p> | <p><u>Part 3, Clause 39</u> – Exclusion conditions</p> |

| ALRC Recommendation | Clause implemented |
|--|--|
| <p><u>Recommendation 11-11</u></p> <p>State and territory family violence legislation should provide that:</p> <ul style="list-style-type: none"> (a) courts have an express discretion to impose conditions on persons against whom protection orders are made requiring them to attend rehabilitation or counselling programs, where such persons have been independently assessed as being suitable and eligible to participate in such programs; (b) the relevant considerations in assessing eligibility and suitability to participate in such programs should include: whether the respondent consents to the order; the availability of transport; and the respondent’s work and educational commitments, cultural background and any disability; and (c) failure to attend assessment or to complete such a program should not attract a sentence of imprisonment, and the maximum penalty should be a fine capped at a lower amount than the applicable maximum penalty for breaching a protection order | <p>Part 3, Clause 38 – conditions - general</p> |
| <p><u>Recommendation 13-3</u></p> <p>State and territory sentencing legislation should provide that the fact that an offence was committed in the context of a family relationship should not be considered a mitigating factor in sentencing.</p> | <p>Schedule 2, Part 2.3 - amendment to <i>Crimes (Sentencing) Act 2005</i></p> |
| <p><u>Recommendation 18-3</u></p> <p>State and territory family violence legislation should prohibit the respondent in protection order proceedings from personally cross-examining any person against whom the respondent is alleged to have used family violence.</p> | <p>Part 4, clause 63 – Examination of affected person by self-represented respondent</p> |
| <p><u>Recommendation 18-4</u></p> <p>State and territory courts should require that undertakings by a person against whom a protection order is sought should be in writing on a standard form. The form should require each party to sign an acknowledgment that he or she understands that:</p> <ul style="list-style-type: none"> (a) breach of an undertaking is not a criminal offence nor can it be otherwise enforced; (b) the court’s acceptance of an undertaking does not preclude further action by the applicant to address family violence; and (c) evidence of breach of an undertaking may be used in later proceedings | <p>Part 4, clause 64 – Undertakings by respondent</p> |
| <p><u>Recommendation 20-4</u></p> <p>Where a children’s court has jurisdiction to hear a family violence protection order application (see Rec 20–3), the court should also be able to make a family violence protection order in favour of siblings</p> | <p>Schedule 2, Part 2.2 – amendments to <i>Children and Young People Act 2008</i></p> |

| ALRC Recommendation | Clause implemented |
|---|---|
| of the child or young person who is the subject of proceedings, or other children or young people within the same household, who are affected by the same or similar circumstances. | |
| <p><u>Recommendation 20-6</u></p> <p>Where a children’s court has jurisdiction to hear a family violence protection order application (see Rec 20–3), the court should also have power to vary or revoke a family violence protection order on the application of a party to the order, or on its own motion.</p> | <p>Schedule 2, <u>Part 2.2</u> – amendments to <i>Children and Young People Act 2008</i></p> |
| <p><u>Recommendation 26-6</u></p> <p>Federal, state and territory legislation should permit the tendering of pre-recorded evidence of interview between a sexual assault complainant and investigators as the complainant’s evidence-in-chief. Such provisions should apply to all complainants of sexual assault, both adults and children.</p> | <p>Schedule 2, <u>Part 2.4</u> – amendments to <i>Evidence (Miscellaneous Provisions) Act 1991</i></p> |
| <p><u>Recommendation 30-6</u></p> <p>State and territory family violence legislation should require courts exercising jurisdiction under that legislation to inquire about existing parenting orders under the <i>Family Law Act 1975</i> (Cth), or pending proceedings for such orders.</p> | <p><u>Part 3, clause 15</u> – Family Law Act order</p> |