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THE LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

SEXUAL, FAMILY AND PERSONAL VIOLENCE LEGISLATION AMENDMENT BILL 2023

REVISED EXPLANATORY STATEMENT

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SEXUAL, FAMILY AND PERSONAL VIOLENCE LEGISLATION AMENDMENT BILL 2023

Outline

SEXUAL, FAMILY AND PERSONAL VIOLENCE LEGISLATION AMENDMENT BILL 2023

The *Sexual, Family and Personal Violence Legislation Amendment Bill 2023* (the Bill) is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

OVERVIEW OF THE BILL

Sexual, family and personal violence are serious and significant issues across the ACT and Australia, with devastating impacts on the victims, their families and communities. The Bill seeks to improve how ACT laws respond to sexual violence with an aim of improving victim-survivors' access to justice and enhancing their safety.

The Bill also introduces amendments to streamline family and personal violence proceedings, promote the safety of victim-survivors of family and sexual violence, and improve access to justice for victim-survivors during family, personal and sexual violence proceedings.

The *Sexual, Family and Personal Violence Legislation Amendment Bill 2023* will:

a) Legislate neutral bail presumptions for certain sexual offences;

b) Abolish the offence of aiding and abetting family violence order breaches;

c) Assist in streamlining family protection order proceedings and better supporting parties to applications by:

   i. Allowing decisions of a Registrar to be reviewed by a Magistrate in the first instance in respect of orders made pursuant to the *Family Violence Act 2016* and *Personal Violence Act 2016*;
   ii. Allowing the court to hear and determine temporary amendments to interim and final family violence orders, and if required, on an ex parte basis where 'special or exceptional circumstances' apply, with a view that the matter returns before the court once service has been effected on the other party (this amendment only applies to the *Family Violence Act 2016,* not the *Personal Violence Act 2016)*;
   iii. Removing the obligation that the court must have a preliminary conference of an application in respect of family violence or personal violence orders;
   iv. Clarifying how long general interim family violence orders may be in force;
   v. Allowing a family violence order of a protected person to continue to apply for the life of the original order, even after the protected person turns 18 years old;
   vi. Providing that a contravention of a protection order as an offence triggers conversion of an interim family violence order into a special interim family violence order;

vii. Allowing a family violence order matter to be listed for the hearing of an application for an interim order where there has been a change in circumstances;

viii. Explicitly requiring the court to take all reasonable steps to ensure a protected person is provided a copy of court-initiated orders (this amendment only applies to the *Family Violence Act 2016,* not the *Personal Violence Act 2016)*; and

d) Correct an unintended impact on the ability of the prosecution to elect to have certain offences determined summarily in the Magistrates Court, following amendments to section 374 of the *Crimes Act 1900,* introduced by the *Family Violence Legislation Amendment Act 2022.*

The Bill uses the terms "victim" and "victim-survivor" throughout, which maintains consistency with the language of the *Listen. Take Action to Prevent, Believe and Heal* Report (the SAPR Report) published in December 2021. This terminology also aligns with the Charter of Rights for Victims of Crime in part 3A of the *Victims of Crime Act 1994*. As per equivalent mechanisms in all Australian states and territories, the ACT Charter conceptualises individuals as victims of crime – and confers rights to individuals on that basis – at each stage of their engagement with justice agencies, including prior to the laying of charges and/or the commencement of criminal proceedings.

The use of the terms "victim" and "victim-survivor" is consistent with the aim of the Bill. The use of these terms within the Bill and the Explanatory Statement does not displace the presumption of innocence or reverse the onus of proof.

CONSULTATION ON THE PROPOSED APPROACH

The amendments in the Bill were developed in close consultation with key justice stakeholders. The Justice and Community Safety Directorate (JACS) established a roundtable working group comprising of Government and external stakeholders to support development of this Bill. Two roundtables were held to enable robust discussion of the proposed amendments and to air any potential issues or unintended consequences coupled with engagement out-of-session. The comments, feedback and issued raised during consultation informed the approach to the Bill.

Amendments were circulated to the following stakeholders:

- Aboriginal Legal Service;
- Aboriginal and Torres Strait Islander Elected Body;
- ACT Bar Association;
- ACT Corrective Services;
- ACT Courts and Tribunal;
- ACT Director of Public Prosecutions;
- ACT Human Rights Commission;

- ACT Law Society;
- ACT Policing;
- Canberra Community Law;
- Chief Minister, Treasury and Economic Development Directorate (CMTEDD);
- Canberra Rape Crisis Centre;
- Domestic Violence Prevention Council;
- Domestic, Family and Sexual Violence Office (CSD)
- Justice Reform Branch (JACS);
- Human Rights and Social Policy Team (JACS);
- Legal Aid ACT;
- Office for Aboriginal and Torres Strait Islander Affairs;
- Office for Disability;
- Office for Multicultural Affairs; and
- Women's Legal Centre.

CONSISTENCY WITH HUMAN RIGHTS

During the development of this Bill due regard was given to its compatibility with human rights as set out in the *Human Rights Act 2004* (the HR Act).

Rights Engaged

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.

Rights Promoted

Broadly, the Bill engages and promotes the following HR Act rights:

- Section 8 – Recognition and equality before the law;
- Section 9 – Right to life;
- Section 11 – Protection of family and children;
- Section 12 – Right to privacy and reputation; and
- Section 18 – Right to liberty and security of person.

The Bill introduces amendments that respond to changes in social and cultural norms about family, personal and sexual violence to reflect the severity of these offences and the harm caused to victim-survivors. The amendments introduce measures to support victim-survivors and the general community to feel safe about their participation, and be safe when participating, in a more trauma-informed criminal justice system.

The right to equality and non-discrimination (section 8 in the HR Act) provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that everyone is equal before the law and entitled to the equal protection of the law without discrimination. Given the gendered nature of sexual assault and family violence, women are the main victims of sexual assault and family violence. The Bill promotes the right to equality because it seeks to ensure more women will be able to enjoy their other human rights without discrimination or distinction.

The right to life (section 9 of the HR Act) includes a positive obligation on government to take reasonable actions to safeguard life and protect individuals to address specific threats or pre-existing patterns of violence that may give rise to direct threats to life, such as by taking steps to reduce gender-based, domestic and family violence. This right is promoted by a majority of the amendments in the Bill. The Bill promotes the right to life by improving how victim-survivors of sexual, family and personal violence engage with the administration of justice and access justice and by streamlining family violence proceedings. Additionally, with the amendment to remove bail presumptions for some sexual offences, the Bill promotes the right to life by keeping victim-survivors physically safe.

The protection of family and children (section 11 of the HR Act) recognises the importance of the family unit in making up society and the benefits that come from preserving family relations. It also recognises that children and young people have particular vulnerabilities and should be given special protection in addition to other rights. The Bill protects family and children by several amendments made to streamline family violence proceedings. In particular, the Bill promotes this in the amendment to allow final family violence orders to continue operating after a protected person turns 18 years of age. Currently, the *Family Violence Act 2016* is silent on whether an order continues once a protected person turns 18 years of age, leading to inconsistent interpretations by police and justice system actors as to whether the order continues and whether the protected person remains protected or must re-apply for a new protection order. This amendment aims to address this issue to keep the family unit and children safe.

The right to security of person (section 18 of the HR Act) protects individuals against intentional bodily or mental injury. It imposes a positive obligation on government to take appropriate measures to protect individuals from foreseeable threats to bodily or mental integrity. This includes a requirement to respond appropriately to patterns of violence against categories of victims such as those of sexual violence and family

violence. The Bill promotes this right by creating consistency in bail applications for serious sexual offences. By creating a neutral presumption of bail for serious sexual offences, this amendment brings these offences in line with the approach already taken for similar offences. This indicates the seriousness with which the Government and the community views the offences and the risk associated with these offences, which judicial officers will consider as part of a determination of whether bail is appropriate for those accused of these offences. This will protect individuals and the community from foreseeable threats of sexual violence. Further, streamlining family and personal violence order applications ensures that all parties, particularly those who may be self-represented, are able to access a process that can prevent them experiencing further violence.

Rights Limited

Broadly, the Bill engages and limits the following HR Act rights:

- Section 8 – Recognition and equality before the law
- Section 13 – Freedom of movement;
- Section 18 – Right to liberty and security of person;
- Section 21 – Fair trial;
- Section 22 – Rights in criminal proceedings; and
- Section 27B – Right to work and other work-related rights.

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 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 sexual assault, domestic and family violence, and the community.

Detailed human rights discussion

Legislate neutral bail presumptions for particular offences

The Bill amends the *Bail Act 1992* to provide that a presumption of bail does not apply to the following offences in the *Crimes Act 1900:*

- Section 53 (sexual assault in the third degree);
- Section 62 (incest and similar offences);

- Section 64 (using a child for production of child exploitation material); and
- Section 66 (grooming and depraving young children).

1. Nature of the right and the limitation (s 28 (2) (a) and (c))

The amendment creates a neutral presumption for bail in relation to four additional sexual offences in the *Crimes Act 1900*. Most offences in the *Bail Act 1992* have a presumption of bail, but there are some highly serious offences such as murder and serious drug offences that carry a presumption against bail. Schedule 1 of the *Bail Act 1992* includes a brief list of offences, of a highly serious and/or sexual nature, where there is a neutral presumption of bail, meaning the presumption for bail has been removed.

The amendment does not create a presumption against bail and does not create a condition of the granting of bail on the decision-makers' satisfaction of the existence of special or exceptional circumstances favouring the grant of bail to a person. The effect of the amendment is that Division 2.2 of the Bail Act (presumption for bail) does not apply, however, the decision-maker will continue to retain discretion in assessing a person's suitability for bail against the legislative criteria under Part 4 of the *Bail Act 1992*.

Nevertheless, it is recognised that creating a neutral presumption for bail may result in a greater likelihood in an accused person being refused bail, and thus is a limitation on the right to freedom of movement and right to liberty.

Section 13 of the HR Act provides that everyone has the right to move freely within the ACT and to enter and leave it, and the freedom to choose his or her residence in the ACT. The amendment may engage and limit the right to freedom of movement (section 13 of the HR Act) as an increased likelihood of being refused bail would restrict an accused's freedom of movement where they are refused bail and remanded in custody while awaiting trial.

Similarly, section 18 of the HR Act provides that no-one may be deprived of their liberty, except on grounds and in accordance with law. Section 18(5) of the HR Act states that "[a]nyone who is awaiting trial must not be detained in custody as a general rule". This right is derived from Article 9 paragraph 3 of the *International Covenant on Civil and Political Rights* and can be understood as a presumption in favour bail.

While this amendment is not a presumption against bail, it nevertheless limits the right to liberty (section 18 of the HR Act) by removing the current presumption that bail should be granted for these offences and therefore increasing the likelihood of someone being held on remand in custody while awaiting a trial.

2. Legitimate purpose (s 28 (2) (b))

The purpose of this amendment is to indicate to judicial officers the seriousness of the offence in question and that offences of this nature may be associated with a higher risk in terms of safety for the victim-survivor and the community due to the likelihood of proximity of the victim and alleged offender.

The amendment will not create a presumption against bail but rather will create a neutral presumption of bail. The amendment seeks to improve criminal justice outcomes for victim-survivors and the community by acknowledging the increased risk of being subjected to further sexual offences, especially children who may be in the care of offenders, and to reflect that these three offences (against sections 62, 64 and 66) are on par with other serious sexual offences.

Accordingly, legislating a neutral bail presumption for the offences in sections 64 and 66 will support the right to protection of children as these offences relate specifically to sexual offences against children (Section 11(2) of the HR Act).

The amendments will also create consistency in relation to a presumption of bail for serious sexual offences which will also improve equality of treatment for those accused of similar offences, so that the community and offenders have an expectation of how these offences will be dealt with in the criminal justice system.

3. Rational connection between the limitation and the purpose (s 28 (2) (d))

There is a rational connection between the limitations on the right to freedom of movement (section 13 of the HR Act) and right to liberty (section 18 of the HR Act) by removing the presumption of bail for four sexual offences and the objective of improving criminal justice outcomes and safety for victim-survivors and the community.

The *Bail Act 1992* currently provides that there is a presumption for bail for a person charged with an offence contrary to sections 53 (sexual assault in the third degree), 62 (incest and similar offences), 64 (using a child for production of child exploitation material), and 66 (grooming and depraving young children) of the *Crimes Act 1900*.

The maximum penalties of these offences range from 7 to 20 years imprisonment. Offences under these sections are serious sexual offences that attract similar maximum penalties of imprisonment as the other sexual offences already having no presumption for bail in the *Bail Act 1992.*

The amendment will create a neutral presumption for bail for the four offences in sections 53, 62, 64 and 66 of the *Crimes Act 1900* and ensure that the decision-maker is considering these offences in a similar light as other serious sexual offences which also have a neutral presumption.

Sections 51 (sexual assault in the first degree), section 52 (sexual assault in the second degree), section 54 (sexual intercourse without consent, and section 55 (1) (sexual intercourse with young person under 10 years old) all do not have a

presumption for bail and attract maximum sentences ranging from 12 to 20 years imprisonment.

The concept of a neutral presumption for bail was first introduced into the *Bail Act 1992* by the *Bail Amendment Bill 2003* following the 2001 ACT Law Reform Commission's Report No.19 on Bail, and the 2003 Government Response. The intention was to allow the courts to hear each case on its merits without any intervening statutory basis.

In its *Report 10 - Inquiry into the Sexual Assault Reform Legislation Amendment Bill 2022*, the Standing Committee on Justice and Community Safety noted stakeholder feedback that adding these additional sexual assault offences to the list of offences to which the presumption for bail does not apply would improve the safety and security of victims.

Three of the offences that are proposed to have a neutral presumption of bail relate specifically to sexual offences against children or family members, who are especially vulnerable and may be at a particular risk of ongoing abuse and exploitation if there is a presumption in favour of bail and the perpetrator is allowed to return to the place of offending. The amendments acknowledge that given the seriousness of the offences, and the risk of continued offending, bail conditions alone may not be sufficient to prevent or deter future offending.

A neutral presumption of bail indicates to judicial officers the seriousness of this type of offending and that the consideration of whether bail is appropriate in the circumstances needs to take into account that these offences may be associated with higher levels of risk of ongoing offending, and a more significant impact on victim-survivors. This improves outcomes for victim-survivors by ensuring that evolving community standards around tolerance for sexual offences, and community understanding about the trauma and impact is reflected in our legislation, and consequently reflected in bail decisions.

Given the highly serious nature of the four offences, the increased likelihood of the refusal of bail is necessary to ensure the safety of victim-survivors during the criminal justice process. Higher rates of bail refusal will mean that victim-survivors, especially children, are able to participate in the criminal justice process without fear of further danger of being subjected to sexual assault or retribution. It also means that more people accused of these offences may be detained rather than out in the community, including where they may have access to victims, which will reduce their capacity to re-offend. The neutral presumption of bail may also indicate to judicial officers that when bail is granted, more strenuous conditions need to be attached due to the seriousness of the alleged offending. This means that where alleged offenders are in the community, their capacity to communicate with or approach the victim-survivor may be considerably limited, providing for further safety for that person.

The amendment may act as a general deterrence by potential offenders or for the accused to commit further sexual offences, thus improving overall criminal justice outcomes for the community.

4. Proportionality (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 limitation of rights is proportionate to the aim of improving criminal justice outcomes for victim-survivors and the community and creating consistent approaches to bail applications, and there are no less restrictive means available to achieve the amendment's objective.

While the amendment limits the right to liberty under section 18(5) of the HR Act, it does not provide that bail must be or should be refused for these offences. The amendment creates a neutral presumption of bail rather than a presumption against bail and does not seek to curb existing discretion held by the decision-maker in their bail determinations.

Although this amendment may result in a higher number of bail refusals, refusal of bail is not inconsistent with the right to liberty if it can be shown that the decision to remand the person in custody is guided by specific criteria set down in legislation and is a reasonable limitation in all the circumstances. This amendment does not seek to displace this process or seek to centre the question of bail around the nature of the offence rather than the risks associated with granting bail.

Instead, a person accused of these offences will only be refused bail in accordance with the law and the existing considerations in the *Bail Act 1992* which are not affected by these amendments.

The considerations that must be taken to account under the Act when making a bail decision about an adult accused include but are not limited to:

- the likelihood of the person appearing in court in relation to the offence,
- the likelihood of the person while released on bail, committing an offence, or endangering the safety or welfare of anyone or interfering with evidence, intimidating a witness, or otherwise obstructing the course of justice, and
- the likelihood of the person being given a sentence of imprisonment, the nature and seriousness of the offence, the person's background, character and community ties, the likely effect of a refusal of bail on the person's family or dependents, or any previous grants of bail to the person or the strength of evidence against the person.

These considerations align with the UN Human Rights Committee's *General comment no. 35, Article 9 (Liberty and security of person*) that detention pending trial should be specified in law and must be based on an individualised determination that it is reasonable and necessary, taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.

The effect of the amendment is that Division 2.2 of the Bail Act will not apply to persons accused of these offences. However, it does not impose a presumption against bail or require the judicial officer to be satisfied of the existence of special or exceptional circumstances favouring the grant of bail to an accused person. The discretion of judicial officers is unchanged and is not subject to any additional criteria that must be considered, this ensures that the positive duty on judicial officers remains to take appropriate measures to consider whether the refusal of bail is proportionate or whether bail is appropriate, and if it can be managed safely with conditions. The amendment will also not affect the ability of those who are detained to seek a review of the refusal to grant bail or a review of the bail conditions.

Notably, even where granted bail, an accused may have restrictions placed on their right to freedom of movement through bail conditions. The bail system naturally incurs upon rights to freedom of movement and rights to liberty, these amendments seek to increase consistency in the application of this system, rather than expand the reach of the system.

<u>Allowing the court to hear and determine temporary amendments to interim and final family violence orders, and if required, on an ex parte basis where 'special, exceptional circumstances' apply</u>

The Bill amends the *Family Violence Act 2016* to provide a procedure for applicants for a family violence order to apply to the ACT Magistrates Court for an urgent, provisional amendment to an interim or final family violence order where special or exceptional circumstances arise. The provisional amendment will be temporary in nature. The Bill provides that the court may determine these applications for a provisional amendment on an ex parte basis, which means that the respondent may not be present at a hearing of an application.

While the amendment would allow provisional amendments to a protection order to be made by the court on an ex parte basis, the amendment does not make this mandatory. The court will still be able to hear and determine applications for an amendment with the respondent present where it is appropriate to do so. It is anticipated that matters will only be heard on an ex parte basis in extreme cases or rare circumstances. It would be determined by the court on the information before it in each individual case whether the ex parte hearing is appropriate.

The Bill also provides that if the court hears and determines an application ex parte, the court must:

- Cause the service of the amended protection order upon the other party together with relevant documents; and
- Set the matter down for a return date as soon as practicable; and
- Notify all relevant parties of the return date as soon as practicable.

The respondent will only be subject to the conditions of this provisional amendment once they have been personally served with the provisional amendment to the family violence order.

Additionally, the provisional amendment will end either when the court makes a determination about the final order; the parties consent to the changes; the applicant withdraws or discontinues their application for the temporary amendments; or it reaches 12 months since the provisional amendment was made, whichever of these circumstances comes first.

1. Nature of the right and the limitation (s 28 (2) (a) and (c))

The Bill allows the court to hear and immediately determine an application for a provisional amendment in special or exceptional circumstances and may do so on an ex parte basis. This means that the application can be heard and determined without the other party appearing in court or having knowledge of the application.

The right to a fair trial (section 21 of the HR Act) is concerned with procedural fairness and includes all proceedings in a court or tribunal and all stages of proceedings. Section 21(1) states that everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent, and impartial court or tribunal after a fair and public hearing.

The right is engaged and limited by the Bill as the application for an amendment may be made on an ex parte basis, without the other parties' knowledge, meaning the respondent is not able to address the concerns in person at the time the applicant brings them to the court. The respondent's rights are also limited by not having adequate time to prepare and respond before the matter is in court. The court can determine the application without giving the other party an opportunity to be heard on the application in the first instance.

The Bill also limits the rights of the respondent as only an applicant or a protected person for a family violence order may apply for a provisional amendment to a family violence order. Article 14(1) of the *International Covenant on Civil and Political Rights* sets out that all persons shall be equal before the courts and tribunals.

Rights in criminal proceedings (section 22 of the HR Act) require that anyone charged with a criminal offence:

- be told promptly, and in detail, in a language that he or she understands, about the nature and reason for the charge,
- have adequate time and facilities to prepare his or her defence and to communicate with lawyers or advisors chosen by him or her, and
- to be tried in person, and to defend himself or herself personally, or through legal assistance chosen by him or her.

This amendment may indirectly engage and limit rights in criminal proceedings (section 22 of the HR Act). While family violence proceedings are civil rather than criminal proceedings, determining a family violence matter on an ex parte basis may engage rights in criminal proceedings by exposing the other party to potential criminal liability (noting the contravention of conditions of a family violence order is an offence). This is because any new temporary conditions made on an ex parte basis may not be reasonable in the circumstances as the court has only had the opportunity to hear submissions from one party, and the conditions but could not be immediately contested by the respondent.

2. Legitimate purpose (s 28 (2) (b))

The Bill seeks to provide applicants for a protection order with a procedure to amend an interim or final family violence order in urgent or emergency situations where special or exceptional circumstances arise. In particular, this amendment is intended for urgent circumstances where victims of violence require quick and efficient protection.

The Bill allows the protected person or the applicant to apply for a provisional amendment to an order, and for the court to hear and determine the amendment in the absence of the respondent. The amendment to the order is only enforceable upon personal service on the respondent, being the first time the respondent may be aware of the amendment proceedings.

The purpose of allowing the court to determine provisional applications for amendment on an ex parte basis is to protect the affected person from certain behaviours, to protect the applicant's safety or to prevent damage to property. In some cases, if the respondent knew that the applicant was applying for the amendment, the respondent may engage in violence to interfere with the process or prevent the applicant from seeking further protection through an amendment.

Family violence order proceedings can be highly charged, and measures must be put in place to ensure the safety of all involved. Those seeking out protection orders are often at risk of serious violence within an environment where coercion and control are involved. The ability to apply for an amendment, ex parte, ensures the court can react quickly to escalating violence while also affording adequate protection to protected persons at risk of further violence, coercion and control.

The main objective is to provide to applicants or protected persons needing urgent protection a mechanism to make necessary amendments to their existing protection orders.

The amendment also supports the right to life (section 9 of the HR Act), the right to security of person (section 18 of the HR Act) and the right to protection of the family and children (section 11 of the HR Act) by protecting applicants and protected persons. This is achieved by creating a process for a provisional amendment to be sought where violence has escalated in unforeseen ways, or the circumstances of the applicant and protected persons change. For example, an applicant may need to urgently add a child as a protected person on a family violence order because the violence of the respondent has escalated and extended towards the child, or the respondent has started making threats to endanger the safety of the child. In circumstances such as these, it is essential that applicants have a means of securing urgent protection for themselves and their children.

3. Rational connection between the limitation and the purpose (s 28 (2) (d))

The proposal to allow temporary amendments to family violence orders to be heard on an ex parte basis was suggested by stakeholders to better deal with circumstances where there is high risk of violence, control, manipulation or systems abuse by the respondent.

Stakeholders advised that in these circumstances, this would allow more efficient applications and hearings by the court, without interference from the respondent, and in a manner that is safe and secure for applicants. Additionally, allowing applications for an amendment to a family violence order to be heard quickly, and on an ex parte basis, will better ensure the safety of protected persons.

Given the highly complex, and diverse nature of domestic and family violence, as well as the ongoing and ever-changing risks of domestic and family violence,[1] flexibility to hear applications for urgent amendments to existing orders, possibly in the absence of the respondent is required to ensure ongoing protection is afforded to the party in need or to allow the court to respond flexibly to change in circumstances where urgent amendment is needed.

Where a person must wait for an amendment to be determined by the court following the usual process (which includes the making of an application, attending a preliminary conference before being heard by the court), during this period, they may not be adequately protected by their respective protection order or they may have their rights and freedom of movement unduly infringed. Delays in obtaining such amendments may have detrimental, even fatal effects on a protected person.

[1] National Domestic and Family Violence Bench Book 2022, 'factors affecting risk,' https://dfvbenchbook.aija.org.au/dynamics-of-domestic-and-family-violence/factors-affecting-risk/

In the ACT, individuals usually apply for family violence orders themselves rather than police. In other jurisdictions, it is the usual process for the police to apply for protection orders on behalf of the individual, so that the individual is protected from involvement in proceedings, and amendments can be sought by the police without compromising the safety of the protected person. The ACT approach supports empowerment of people who are already disempowered by family violence. Given the jurisdictional differences in the ACT, a different approach is needed to ensure the safety of applicants for an amendment.

As the ACT does not currently have a straightforward efficient process for triaging more urgent or serious applications for amendment, key stakeholders working in family violence in the ACT have outlined that there is a need to have some applications for amendments heard more quickly.

In *R v Chute (No 4)* [2018] ACTSC 259, it was considered whether it is essential to the lawful and fair conduct of a special hearing that the accused be present at part of or the whole of that hearing. His Honour considered other jurisdictions which have statutory provisions expressly authorising trial proceeding in the absence of the accused (*Criminal Code 1989* (Qld), s 617*; Criminal Code Act 1924* (Tas*),* s 369(2); *Criminal Code Act 1983* (NT), s 361(1); *Criminal Procedure Act 2004* (WA), s 88(4); *Criminal Procedure Act 2009* (Vic), s 330(3)). His Honour noted these provisions imply there may be circumstances in which a fair trial can be conducted without the accused being present. The key element considered was whether the special hearing would involve “unacceptable injustice or unfairness or would be so unfairly and unjustifiably oppressive as to constitute an abuse of process”.

The *Family Violence Act 2016* already provides a mechanism for parties to apply to the court for an amendment of a family violence order. The Act also provides mechanisms for the court to make an interim family violence order on an ex parte basis. This power is under section 21 of the Act and allows the court to make an interim order on an ex parte basis where it is necessary to ensure the safety of an affected person from family violence or prevent substantial damage to an affected person’s property. This amendment merely extends the power of the court to determine a further type of application, an application for provisional amendment, on a temporary, ex parte basis.

Similarly, section 84 of the *Family Violence Act 2016* allows for the court to make a temporary amendment for a final family violence order, but not an interim order. Reform is needed to provide the court with the power to be able to make a provisional amendment for a final order and an interim order to fill this gap.

Normally, hearings that are ex parte are only justified in special circumstances. However, given the significant risks associated with family violence, this amendment will provide the court the flexibility to amend family violence orders on an ex parte basis where there are special or exceptional circumstances.

The rationale behind the 12-month end date is that it allows sufficient time for the application to return to court and be determined, factoring in any potential delays. This length of time also takes into consideration that many applicants are self-represented and not aware of or understand court processes such as an application for extension. The applicant will therefore be afforded protection while the matter is being determined, similar to what occurs once an interim order is granted. However, this is only in the situation where the court has not made a determination on the application for amendment, or the applicant has not withdrawn/discontinued their application, or the parties have not consented to a final amendment. It is anticipated that any provisional amendments would return to court to be finalised well before that end date. However, the end date of 12 months ensures that a respondent is not subject to conditions with no end date, which is consistent with section 24 of the *Family Violence Act 2016* and section 21 of the *Personal Violence Act 2016* regarding the length of interim orders.

4. Proportionality (s 28 (2) (e))

Determining an application on an ex parte basis is considered the most reasonable and effective means of ensuring the safety of applicants, protecting property, and preventing interference with the court. There are no other less restrictive means of achieving this aim.

These amendments are proportionate to the aim of keeping people safe and allowing flexibility in the operation of Family Violence Orders.

There are several safeguards in place to minimise the limitation on the right to a fair trial (section 21 of the HR Act). This amendment will provide the court with the power to make an order for a provisional amendment on an ex parte basis, but it is not mandatory for the hearing to be ex parte. There may be some circumstances where it is necessary for the hearing to be ex parte for a person's safety, but there may also be circumstances where it would be of use to the court to hear both parties.

A provisional amendment of a protection order will only be exercised in the rarity where special or exceptional circumstances exist and if the court is satisfied on the matters listed in existing section 83(1). This will limit the number and nature of the applications for amendment that may be determined by the court on an urgent, ex-parte basis.

The issue of whether there are 'special or exceptional circumstances' that would justify making the amendment is not a threshold issue for the listing of a matter before the court. The court will hear and determine the matter on the facts in the provisional amendment application and determine whether there are 'special or exceptional circumstances' that justify making the amendment.

The term 'special or exceptional circumstances' is a well understood definition exercised by the judiciary of the ACT Magistrates Court in the context of other legal

frameworks, such as those arising under the *Bail Act 1992*. It provides a limited but important discretion to the judiciary of the ACT Magistrates Court. 'Special and exceptional' circumstances are still broad enough to allow the court to respond to unforeseen circumstances that may require provisional amendments.

Examples of where special and exceptional circumstances may arise are where violence has escalated, and an applicant needs immediate, further protection on an interim or final family violence order. The aim of this amendment is to provide sufficient discretion to the court to be able to react in situations where unforeseeable circumstances arise, and to ensure orders are workable, and achieve the objects of protecting the protected person. In terms of the right to a fair trial in section 21 of the HR Act, having an ex parte hearing is to protect the affected person from certain behaviours. The nature and extent of the limitation is to allow applications to be heard on a limited basis without notice only where there are special and exceptional circumstances, such as an escalation of violence. This may include the need to respond to ensure an affected person's safety or to prevent substantial damage to property. Where there are no special or exceptional circumstances, applicants for an amendment will need to follow the usual process for an amendment that currently exists in the *Family Violence Act 2016* in section 83. The limitation is the least restrictive possible to achieve a balance between the rights of the affected person and respondent in that provisional amendments are time limited.

Any amendment made will be of a provisional, temporary nature. The Bill further stipulates that if a provisional amendment is made, a copy of the provisional amendment must be served on the respondent. Regardless of whether the application is heard ex-parte, the provisional amendment will not be enforceable until it is personally served on the respondent. This will ensure respondents are not inadvertently committing contravention offences without being aware of the new conditions of the family violence orders.

The court may enliven its substituted service provisions in some circumstances. However, personal service would be the usual method of service in most circumstances. Once served, the respondent will be able to obtain legal advice so that they understand the nature of the condition and their obligations under the order for the provisional amendment.

If the court decides to hear the provisional amendment application ex-parte and makes a provisional amendment to a family violence order in the applicant's favour, a respondent is still able to seek an amendment to an order under the usual provisions under the *Family Violence Act 2016*. The court will set a return date for a preliminary conference as soon as practicable after the application is received.

If that application is unable to be agreed by the parties at preliminary conference, the application seeking to amend an order will be heard by a Magistrate. The usual processes to seek an amendment to a protection order under the *Family Violence*

Act 2016 are available to both applicants and respondents. Current processes are considered reasonably efficient for circumstances where a respondent needs to contest an amendment to a protection order. In contrast, for an applicant, provisional amendments to a family violence order would create more efficiencies and protect life and bodily security where there are serious safety concerns and risks.

The amendment is a proportionate limitation on the right to a fair trial (section 21 of the HR Act) and still affords the other party with procedural fairness, notice of the amendments to the order, and a means to respond to the application being made against them.

Removing the obligation that the court must have a preliminary conference of an application in respect of family violence or personal violence orders

The Bill will amend the *Family Violence Act 2016* and the *Personal Violence Act 2016* to dispense with the requirement that a preliminary conference must be held between the applicant and the respondent at the ACT Magistrate's Court once an application has been received in relation to (a) protection orders (regardless of whether an interim order is sought); (b) amendments of protection orders; or (c) review of protection orders. The Bill also sets out the process that the court will take when listing a preliminary conference unless satisfied that a preliminary conference should not be held.

A preliminary conference allows the parties to meet to determine whether they can agree on an outcome. Each party is in a separate room and the deputy registrar moves between the parties to discuss options such as agreed conditions, providing undertakings, consent orders, or progressing to a final hearing. There may be multiple preliminary conferences depending on the matter.

The Bill will amend the Acts to provide the court with discretion not to list an application for preliminary conference in two circumstances - (1) where holding a preliminary conference would create an unacceptable risk to a person's safety; or (2) where a preliminary conference would be unlikely to achieve its objects. There is still a presumption that a preliminary conference should be held in every matter.

In relation to the second exception, a preliminary conference may be unlikely to achieve its objects if parties are unlikely to come to an agreement at the conference for example when the parties are bringing frivolous or vexatious claims.

With respect to the first exception, it is not intended that the presence of a safety concern will automatically result in a preliminary conference being dispensed with. The nature of family violence or personal violence order applications means that there are always some safety concerns present. However, there are conceivably circumstances where it would not be appropriate to hold a preliminary conference for safety reasons – for example, circumstances where the violence alleged by the

applicant against the respondent is of such a serious nature that it would be unsafe to have the parties or the court staff participating at the preliminary conference.

Dispensing with a preliminary conference due to “unacceptable risks to a person’s safety” will be a relatively high threshold to meet and will be assessed on a case-by-case basis. An unacceptable risk to safety will be determined by identifying the nature and degree of risk and whether, with or without safeguards, it is acceptable. This aligns with a High Court decision *M v M* (1988) 166 CLR 69 referenced in the National Domestic and Family Violence Bench Book. While the decision in M v M refers to protection of a child from sexual abuse, this decision has subsequently been applied in cases of family violence and non-sexual abuse.

Current practice to ensure a preliminary conference can safely occur will continue. ACT Courts and Tribunal have safety practices in place to ensure the protection of both parties and court staff. This includes separate and distinct waiting areas, separate secure rooms for conferences to be undertaken and staggered leaving times, including security escorts where needed, to ensure the safety of parties and court staff.

1. Nature of the right and the limitation (s 28 (2) (a) and (c))

The right to a fair trial (section 21 of the HR Act) is concerned with procedural fairness and includes all proceedings in a court or tribunal and all stages of proceedings. It involves the right of all parties in proceedings to be heard and respond to any allegations made against them.

The objects of a preliminary conference are to (a) find out whether the proceeding for the order may be settled by consent before it is heard by the Magistrates Court; and (b) ensure the application is ready to be heard as soon as practicable. A preliminary conference is usually conducted by a Registrar, who conducts a shuttle negotiation with the two parties to the application at the court. The Registrar explains the parties’ rights and obligations and assists them to see if the matter can be settled, if not, the matter is listed by the Registrar for either a further conference or court mention.

The right to fair trial may be engaged and limited by the Bill as the preliminary conference provides the respondent with an opportunity to respond to the application against them and engage in a process to reach a potential settlement with the applicant prior to the matter being listed for hearing. Removing the conference may affect the procedural fairness of the proceedings in a narrow respect by removing an opportunity to have the matter dealt with on an early basis, without the costs and formalities of final hearings.

2. Legitimate purpose (s 28 (2) (b))

The purpose of this amendment is to ensure that parties engaging in family violence or personal violence proceedings can do so in a safe, secure matter.

There may be some circumstances where the violence alleged by the applicant against the respondent is of such a serious nature that it would be unsafe to have the parties attend the ACT Magistrates Court for the preliminary conference. The risk of the parties meeting may be too high in these circumstances, both for the parties as well as court staff.

There may also be some situations where the proceedings are so fraught and highly contested that there is no utility in having a conference because there is no prospect of settlement outside of a final hearing. The removal of the obligation to hold a conference in these circumstances will expedite proceedings, leading to quicker and safer outcomes for victim-survivors.

The amendment upholds and supports the right to life (section 9 of the HR Act) and the right to security of person (section 18 of the HR Act) by protecting parties and court staff from violence. There may be situations where a matter is so highly charged, or a party so dangerous that holding a preliminary conference may provoke violence rather than aid in settlement. In this way, this amendment upholds the right to life and security of person by allowing the court or parties to identify those situations where a conference may be too unsafe.

3. Rational connection between the limitation and the purpose (s 28 (2) (d))

There is a rational connection between possible limitation on the right to a fair trial (section 21 HR Act) and the objective of providing quicker, safer outcomes for victim-survivors and parties engaged in the process for protection orders.

The purpose of the amendment is to avoid bringing parties together in the same location in high-risk or highly contested situations where settlement is unlikely. In the ACT, it is generally found that conferences can be an expeditious and safe means of finalising an application for a protection order. However, there may be a narrow set of circumstances where a conference is not ideal. The amendment will provide the court with the discretion to determine whether to dispense with a preliminary conference based on two exceptions. The slight limitation on the right to a fair trial will support the court's ability to provide a safe environment for parties and court staff.

Examples of flexibility for parties attending preliminary conferences exist in other jurisdictions. For example, in Western Australia, both parties to family violence and restraining order proceedings under the *Restraining Orders Act 1997* can object to participating in a conference.

4. Proportionality (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. Given that the amendment only affects preliminary conferences and does not affect the right to have the matter heard before a court, the Bill only limits the right to a fair trial (section 21) very

narrowly in this respect. The court will only be able to dispense with the obligation to hold a preliminary conference as a last resort where there are no other appropriate safeguards that can be implemented to mitigate the risk.

If the court determines that a preliminary conference should not be held, the court must still follow the usual process in protection order proceedings that would occur had the preliminary conference be held. That is, the matter still needs to progress towards finalisation by setting the matter down for a return date.

The respondent must still be notified of the application by personal service and the return date as soon as practicable after the application for the protection order is made. The respondent will have an opportunity to appear at court at the return date, to respond to the application and to obtain information from the court on the proceedings.

Likewise, the Bill does not prevent the respondent engaging with the applicant to negotiate a settlement. Parties can still negotiate in a safe and secure manner, without having to be physically present in court at the same time. For example, parties may negotiate through solicitors, or in appropriate circumstances, via written communication.

Furthermore, decisions about conferences are intended to be point-in-time decisions, and refusing to hold a preliminary conference in respect of one application for proceedings between the same parties does not set a precedent for a future decision about whether it is appropriate to hold a conference. For example, if the court determines upon receiving an application for a family violence order that the safety risks to the protected person are too high and a preliminary conference should not be held, this does not mean that future conferences for the same proceedings cannot be held. If, for example, the respondent in these same proceedings is later incarcerated and then one of the parties seeks an amendment to the family violence order, the court could still have a preliminary conference for the amendment application via audio visual link between the parties if it seems the parties will be able to reach consent on the amendment and the safety risks of having both parties physically in court no longer exist.

<u>Providing that a contravention of a protection order as an offence triggers conversion of an interim family violence order into a special interim family violence order</u>

1. Nature of the right and the limitation (s 28 (2) (a) and (c))

Currently the *Family Violence Act 2016* and *Personal Violence Act 2016* excludes a contravention of a family violence order from being considered a “related charge” for the purpose of converting an interim protection order into a special interim protection order.

This amendment intends to ensure that interim protection orders can remain in force while there is a related charge outstanding in relation to the respondent and the

offence is against the applicant, including a charge that is for a contravention of the interim order. This amendment changes the definition of 'related charge' in the *Family Violence Act 2016* and *Personal Violence Act 2016* to provide that related charge includes a charge for the contravention of a protection order.

Section 13 of the HR Act states that everyone is entitled to move freely within the ACT, enter and leave the ACT, and has the freedom to choose their own residence. The amendment may limit the right to freedom of movement as a special interim order is permitted to operate for longer than the general order period of 12 months. This is because an interim order may have conditions stating the respondent is not able to go to the specified place or near the specified person. Breaching that condition could result in an offence which also attracts criminal penalties. Therefore, as a special interim order could extend the time that these conditions apply, it may protract the timeframes a respondent is prohibited from going within a certain distance of a specified place or contacting or going near a specified person.

Section 27B of the HR Act provides that everyone has the right to work, including the right to choose their occupation or profession freely. The amendment may limit the right to work for a respondent if the interim order has a condition preventing the respondent from attending a particular location, such as their place of work and is then converted into a special interim order. The special interim order may therefore prolong the duration the respondent is prevented from attending their place of work. Although it should be noted that it would be highly rare for a protection order to prevent a person from attending their place of work, usually judicial officers will use other conditions, such as a distance condition, to prevent the parties being near each other while at work if they work at the same workplace. A respondent would only be prevented from attending work in circumstances where there is such high risk that it would be unsafe for the respondent to be in any proximity to the applicant or protected person/s.

The amendment may indirectly engage and limit the rights in criminal proceedings especially the right to be tried without unreasonable delay (section 22 of the HR Act). Section 22(2)(c) of the HR Act provides that proceedings should take place without unreasonable delay to preserve the expectations associated with the administration of justice. The rights in criminal proceedings are limited by potentially protracting the time a respondent can be heard in relation to the application for a final protection order. In essence, a respondent cannot contest allegations against them until the related criminal proceedings are resolved – this exposes them to a longer period of potential criminal liability as they would be subject to conditions of a special interim order which may be in place for more the general interim order period of 12 months. Special interim orders are usually made on an ex parte basis, so there would be a prolonged period of time where a respondent would not be able to contest the order despite not being involved in the initial application for the order. While a respondent can seek to have the conditions of the interim order amended, the order itself cannot

be contested. The conditions on the order may also restrict and criminalise behaviour that would not usually be criminal, but for the existence of the family violence order. For example, the special interim family violence order may restrict a person's movement or communication, and it could also prohibit contact with a respondent's children. While family violence order proceedings are technically civil proceedings, it is an offence to breach a family violence order including an interim order and, as such, the prolonging of the family violence proceedings may expose the respondent to criminal liability and may have a flow on effect for the rights of the respondent in criminal proceedings.

2. Legitimate purpose (s 28 (2) (b))

General interim protection orders may be granted for a maximum of 12 months which prevents orders operating for longer than necessary. Special interim orders may be granted when there are related charges pending and allow the police investigation into related charges to take its course.

However, the definition of 'related charges' currently excludes circumstances where there has been a breach of an interim protection order. This exclusion currently applies to a breach of family violence orders under the *Family Violence Act 2016*, and personal protection orders and workplace protection orders under the *Personal Violence Act 2016*.

In practice, criminal proceedings can often take longer than 12 months to finalise. This means that should an interim protection order granted for a maximum of 12 months lapse before the criminal proceedings in relation to a breach of that interim protection order are finalised, the victim may not be adequately protected, even if there are bail conditions in place. The amendment seeks to extend the protection already afforded to related charges to include contraventions of family violence orders as well.

The exclusion of contravention of family violence orders from the definition of 'related charges' was introduced into the now repealed *Domestic Violence and Protection Orders Act 2008* by the *Crimes (Domestic and Family Violence) Legislation Amendment Bill 2015*. This exclusion was originally intended as a safeguard to the limitation on the right to move freely within the ACT (section 13 of the HR Act) by narrowing the circumstances under which special interim order protections would be triggered. When the new *Family Violence Act 2016* commenced, the exclusion in the former legislation was adopted in the new legislation. However, given the developments in understanding the nuance around and risks related to family violence, the amendment removes this exclusion.

This amendment seeks to avoid unnecessary traumatisation for the applicant should a hearing for a final order occur prior to the finalisation of criminal proceedings for breaches of that order. The amendment also seeks to protect the applicant of personal, family and workplace protection orders and vulnerable members of the

community from further violence, threats, intimidation, and abuse. It is noted that the amendments to the *Family Violence Act 2016* are also mirrored in the *Personal Violence Act 2016* to ensure victims of violence are consistently afforded protection, regardless of the relationship to the perpetrator.

As set out above, it will frequently take more than 12 months for related criminal charges to be finalised. This presents challenges when there are related criminal matters which are unlikely to be finalised before the expiration of the interim order. For example, applicants or respondents may be required to give evidence under a civil (rather than criminal) standard. Further, civil matters may be adjourned rather than set for hearing pending the finalisation of the criminal matter, which may lead to the expiry of the order if the criminal matter is not resolved within 12 months.

In absence of the current exclusion, breaching the interim order itself is highly likely to be considered a charge related to the application for the final order. However, as the breach of an order is currently excluded from this consideration, protected persons who have experienced a breach of the interim order may have to wait until the criminal proceedings are finalised before continuing with their protection order application.

The amendment avoids these challenges by removing the exclusion of the contravention of order charge from the current definition of related charge in the *Family Violence Act 2016* and the *Personal Violence Act 2016*.

There are further advantages for both the respondent and applicant in having a special interim order where there are related charges. The amendment will allow any police investigation into related charges to take its course. In addition, a hearing for a final protection order prior to criminal proceedings for contraventions of protection orders may lead to self-incrimination of the respondent and unnecessary traumatisation for the applicant. The amendment will also streamline court processes as once the court has finalised the related charges, the court may also decide the application for the final protection orders.

3. Rational connection between the limitation and the purpose (s 28 (2) (d))

There is a rational connection between the limitation of rights and the objective of protecting applicants and protected persons under interim protection orders from further harm.

The amendment facilitates the physical protection and wellbeing of an applicant by allowing an interim protection order to be in force until the finalisation of criminal proceedings for breaches of those protection orders. Conducting a hearing for a final order prior to the conclusion of proceedings for related charges may also lead to unnecessary traumatisation for the applicant. It also helps stop the accused from contacting or interfering with the victim in the related criminal proceeding.

Stakeholders highlighted the need for this amendment and referenced the recent amendments in the *Sexual Assault Reform Legislation Amendment Bill 2022* resulting from recommendation 23 (n) of the SAPR Report. This recommended that the *Personal Violence Act 2016* be amended to include the provision of 'special interim' personal and workplace protection orders, consistent with the provisions that are currently available in the *Family Violence Act 2016* (ACT) when there are ongoing related criminal proceedings. While this amendment in the Bill is not based on this recommendation, the intent was so that interim orders could remain in force as long as there is a related charge outstanding in relation to the respondent and the offence is against the applicant.

However, currently a breach of an interim protection order by the respondent in relation to the applicant or protected person cannot currently trigger this conversion to a special interim order. Stakeholders raised concerns that the exclusion it is inconsistent with affording protection to vulnerable people. As understandings about family violence risks have evolved, there is no longer a reasonable justification for excluding a breach of the interim protection order from this special interim order scheme. Stakeholders strongly recommended that this amendment be progressed.

4. Proportionality (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 Bill does not attempt to change the grounds for granting interim protection orders and all applications will be dealt with on its merits by application to the court. The respondent's rights are also unchanged, and the respondent can still apply to amend the conditions of a final order. The court would look at this application to amend on a case-by-case basis with any new evidence being put to the court for consideration. This prevents arbitrary extensions of interim orders.

While the original purpose of this exclusion was intended as a safeguard against the limit on the right to freedom of movement (section 13 of the HR Act), understanding of family and interpersonal violence has evolved since then, and the exclusion is no longer considered reasonably justifiable.

While special interim orders may extend beyond the 12-month maximum period of interim protection orders, they are not indefinite, and the court must make a decision about final orders once related charges are finalised.

<u>Allowing a matter to be listed for the hearing of an application for an interim order where there has been a change in circumstance</u>

The Bill amends the *Family Violence Act 2016* to provide that applicants may apply for an interim family violence order, at any time, while an application for a final order has commenced but is yet to be finally determined.

1. Nature of the right and the limitation (s 28 (2) (a) and (c))

Section 13 of the HR Act provides that everyone has the right to move freely within the ACT and to enter and leave it, and the freedom to choose his or her residence in the ACT. The amendment may engage and limit the right to freedom of movement (section 13 of the HR Act) because it will allow a person to apply for an interim protection order during the course of protection order proceedings after they have applied for a final order.

Section 21 of the HR Act provides that everyone has the right to a 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. While the nature of the right is absolute, many of the principles that characterise a fair trial are not absolute.

The right is engaged and limited by the Bill as an interim order may be made ex parte, where a respondent has not been made aware of proceedings.

Previously there may have been an application for a final family violence order against a respondent, but the respondent will not have been bound or restricted by any conditions because the order had not been finally determined and the applicant had not applied for an interim order. Consequently, if the court determines an interim order should be made after proceedings have commenced, the court may impose conditions on the interim order that restrict a respondent's freedom of movement. This may change the status of the respondent from unrestricted to restricted.

These conditions may involve restricting where the respondent lives, where they may travel to within the ACT, and may bar them from particular locations or being in the vicinity of particular people.

2. Legitimate purpose (s 28 (2) (b))

The Family Violence and Personal Violence schemes are designed with self-represented litigants in mind, so that people can access the court and obtain immediate, effective protection against violence without delay or the burden of paying for legal representation. This is in part because many applicants for family violence orders are vulnerable members of the ACT community who may not have access to the resources usually necessary to engage in legal proceedings. Given this, it is the aim of both Acts that they be navigable and accessible by people with limited or no understanding of the court system and the law.

As noted, following the SAPR report, the Australian Government committed to reducing barriers to access to justice as part of improving the end-to end system for domestic and family violence, and by extension the protection order scheme. This amendment seeks to implement this commitment, by upholding an applicant's entitlement to seek immediate protection by means of an interim order whenever it is necessary to address their safety concerns.

The process outlined in the legislation for making an interim order is not currently clear enough to satisfy this objective of access to justice and safety. The legislation states that an interim order may be sought on application for a final order. This has led to interpretive difficulties where judicial officers are uncertain about whether they can make an interim order after a person has made an application for a final order.

To ensure applicants have the protection and safety they need, it is important to address this issue and ensure it is clear that applicants can seek an interim order at any stage of the proceedings, where there has been a change in circumstances. This is particularly the case where an applicant omits fails or neglects to seek an interim order in the first instance as they have not had legal advice, or where violence has escalated after the initial application for a Final Family Violence Order is made and an interim order is necessary. Importantly, it is well known that violence often escalates after a person applies for a protection order, and the point at which a person seeks for a protection order can be a time of high risk for their safety.

The amendment will support the right to life (section 9 of the HR Act), the right to protection of the family and children (section 11 of the HR Act) and the right to security of person (section 18 of the HR Act).

3. Rational connection between the limitation and the purpose (s 28 (2) (d))

There is a rational connection between the limitation on the right to freedom of movement (section 13 HR Act) and the objective of ensuring access justice and the immediate safety of applicants. The objects of the protection order scheme are to prevent, reduce and protect people from violence. To do this, the scheme must be sufficiently flexible to respond to changing circumstances, particularly in family violence where the dynamics are highly complex and idiosyncratic.

The right to freedom of movement is already a right that is subject to limitations by the interim order scheme for the purposes of protection of life, safety and property. This amendment does not change the interim order scheme, but merely increases the opportunities for applicants to use the scheme by allowing them to apply for an interim order on more occasions than just the one currently available, namely when their application for a final order is commenced.

4. Proportionality (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 Acts already provide applicants with the ability to apply for an interim protection order, this amendment merely clarifies that such an application can occur at any time, while an application for a final order is on foot and yet to be determined. The amendment is not expanding the powers of the ACT Magistrate's Court. The amendment allows applicants to exercise a pre-existing right and clarifies when that right may be exercised.

A restriction on the right to freedom of movement (section 13 of the HR Act) will only arise where the court on application decides to make an interim order and imposes conditions that restrict a respondent's freedom of movement. There is a selection of conditions available for the court to place on an interim order under both Acts. Depending on the nature of the application and the court's determination of whether an interim order is needed, and the level of protection needed to address the safety concerns of the applicant, a restriction on the right to freedom of movement of the respondent may or may not arise.

Further there are existing provisions in both Acts that limit the power of the court to restrict a respondent's right to freedom of movement under section 13 of the HR Act. The decision as to whether to make an interim protection order and what conditions to place on the order is a matter of the discretion of the court. Under section 21 of the *Family Violence Act 2016* the court can only make in interim order if satisfied that the order is necessary to do either or both of the following until the application for the final order is decided:

- Ensure the safety of an affected person from family violence or personal violence;
- Prevent substantial damage to an affected person's property.

Similarly, the court may only impose conditions on an interim order where the court is satisfied that the conditions included are the least restrictive of the personal rights and liberties of the respondent as possible that still achieve the objects of each of the Acts. This consideration is mandatory and prompts the court to consider the respondent's right to freedom of movement and ensure any limitations placed upon it are proportionate to the need to protect the applicant and other affected persons. In addition, a respondent may apply to a court to amend or review the order in certain circumstances.

In terms of the right to a fair trial in section 21 of the HR Act, having an ex parte interim hearing 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.

SEXUAL, FAMILY AND PERSONAL VIOLENCE LEGISLATION AMENDMENT BILL 2023

Detail

Part 1 – Preliminary

Clause 1 — Name of Act

This is a technical clause that names the short title of the Act. The name of the Act will be the *Sexual, Family and Personal Violence Legislation Amendment Act 2023*.

Clause 2 — Commencement

This clause provides that the Act will commence on the 7th day after its notification day.

Clause 3 — Legislation Amended

This clause lists the legislation amended by this Bill. This Bill will amend the

- *Bail Act 1992*
- *Crimes Act 1900*
- *Family Violence Act 2016*
- *Personal Violence Act 2016*

The Act also amends the *Crimes (Forensic Procedures) Act 2000* (see Schedule 1).

Part 2 – Bail Act 1992

Clause 4 –Schedule 1, part 1.1

This clause inserts four offences into Schedule 1 of the Bail Act 1992: sections 53 , 62, 64 and 66 of the *Crimes Act 1900*.

Schedule 1 of the *Bail Act 1992* sets out a list of offences to which the presumption for bail does not apply (that is, there is a neutral presumption). The Bill amends the *Bail Act 1992* to provide that there is no presumption for bail in respect of offences against sections 53, 62, 64 and 66 of the *Crimes Act 1900*. This reflects the seriousness of the offences and promotes consistency with the approach to bail for other serious sexual offences in the *Crimes Act 1900.*

Part 3 – Crimes Act 1900

Clause 5 –Summary disposal of certain cases at prosecutor's election Section 374 (2)

This clause substitutes section 374 with a new subsection (2) which provides for whether the prosecution must look to the penalty for an offence in accordance with subsection (a) the penalty for the aggravated offence or, (b) the penalty for the simple offence, to determine whether a criminal matter can be disposed with summarily in the Magistrates Court.

This amendment corrects an unintended consequence of previous amendments to section 374 made by the Family Violence Legislation Amendment Bill 2022, which attempted to ensure that family violence offences that were aggravated and would have been strictly indictable, could still be prosecuted in the Magistrates Court. However, the unintended effect of the amendment was that some of these aggravated offences were not captured by the new provisions in section 374 and could not be disposed of summarily. The inclusion of subsection 374(2) in this Bill captures those aggravated offences and ensures that they can also be disposed of summarily, allowing for consistency in the treatment of similar aggravated family violence offences.

Part 4 – Family Violence Act 2016

Clause 6 –New subdivision 3.3.1A

This clause inserts a new subdivision 3.3.1A before division 3.3.1.

A new section 19A ‘Who may seek interim orders’ is inserted into the act to clarify when an applicant may seek an interim family violence order.

Section 19A outlines when an applicant for a final order may seek an interim order. Subsection (a) outlines that the interim order may be sought when making the application for the final order.

Subsection (b) outlines the process for seeking an interim order where an applicant does not seek an interim order when making the application for the final order. This is because the applicant may not seek an interim order at the same time as the application for the final order but may later need to apply for an interim order. The purpose of this amendment is to prevent a situation where the applicant would have to discontinue the original application for a final order and reapply for an application for a final order and an application for an interim order at the same time. This subsection ensures that the application for the final order can continue to progress if the applicant seeks to apply for an interim order as well after the initial application for a final order.

Subsection (c) outlines the process for seeking an interim order again in a change of circumstances where a person has previously sought an interim order and the court refuses to make an interim order. The applicant would need to provide contemporaneous evidence in support of the interim application for the court to consider.

Examples of changes in circumstances are provided. Example 1 is where an applicant obtains information or legal advice about their entitlement to seek a interim order after making an application for a final order or being refused an interim order. Example 2 is where the applicant has experienced or is likely to experience, further family violence or an escalation in family violence.

Clause 7 – Section 20

This clause substitutes a new section 20*,* to replace both the heading and content of the provision. The heading is amended to 'Interim orders – may be made any time before an application for final order is decided.' The clause removes the two subsections currently under section 20 and substitutes them with the one provision.

The purpose of this amendment is to clarify that if an application for a final family violence order is made, the Magistrate's Court may make an interim order on that application at any time before that application is finally determined. This clause is designed to work alongside clause 6 to provide for when a judicial officer is empowered to make an interim order.

Clause 8 – General interim orders - extension for nonservice of final order, Section 29 (2)

Section 24 of the *Family Violence Act 2016* provides that a general interim order must not be in force for more than 12 months plus any extensions under sections 28 (not to be extended by more than 8 weeks) and 29 (interim order extended until the final order is served on the respondent, in particular circumstances). Section 25 of the *Family Violence Act 2016* provides the circumstances in which a general interim order ends but does not include a time specified deadline.

This clause substitutes section 29 (2) with the new subsection (2) to provide an alternative that if a final order is unable to be served, that the general interim order continue for the life of the final order, had it been served. This means that the respondent will not become subject to any new conditions on the final order, but they will still be subject to the conditions they are aware of on the interim order, until they are personally served with the final order.

The intent of this amendment is to ensure victims of family violence are still afforded protection from violence, and to cover situations where, after reasonable attempts, the police cannot personally serve the final order on respondent.

Clause 9 – Offence - contravention of family violence order, New Section 43 (4)

This clause inserts the new subsection (4) to provide that a person listed as a protected person on a family violence order, does not commit an offence by aiding, abetting, counselling, procuring or is a party to the conduct that contravenes the protection order. This amendment clarifies that a protected person cannot aid and abet a breach of a family violence order that is designed to protect them.

Clause 10 – New Section 44A

This clause inserts a new section into the *Family Violence Act 2016* to explicitly provide that a family violence order continues to be in force even when the protected person attains the age of 18. The section applies when the court makes a family violence order and a protected person listed on that order is a child when the order is made, but the life of the order is to continue even after the protected person turns 18 years old.

The amendment explicitly clarifies that turning 18 years old does not stop the enforceability of the order – the order will remain in force until the end stated time, it is withdrawn by the applicant or protected person, an extension is made by the court, or new orders are made by the court.

This clause may impact a child who is a protected person under a family violence order (where the respondent is the parent) while being subject to an order or Parenting Plan made under the *Family Law Act 1975* (Cth) which contain exceptions to allow contact or communication between the child and their parent.

If the parenting order/plan expires when a child/protected person turns 18 and the family violence order extends beyond the child's/protected person's 18th birthday, the protected person may need to seek an amendment of the family violence order if they wish to have contact with the respondent parent after they turn 18 years old.

Clause 11 – Sections 46 and 47

Section 46 – Interim order not sought

This clause amends sections 46 and 47 to provide for a discretion for the court to decide whether to have a preliminary conference following the receipt of an application for a protection order.

This clause inserts section 46(1) to provide that the default position is that the court must hold a preliminary conference, but then provides the court with a discretion to not hold a preliminary conference, either on application or of the courts own initiative, if satisfied of certain grounds. Subsections (a) and (b) provide the grounds for a decision not to hold a preliminary conference; (a) where holding a preliminary conference would create an unacceptable risk to person's safety, or (b) would be

unlikely to achieve its objects.A note is inserted into section 46 to refer to the objects of a preliminary conference in section 49.

Subsection (2) sets out the steps a registrar must take where the court decides to hold a preliminary conference that are already in the Act in existing section 46. These steps include, (a) setting a return date for the preliminary conference as soon as practicable after the day the application is received, and (b) serving on the respondent as soon as practicable (i) a copy of the application for the protection order, and (ii) a timing notice for the conference. Subsection (c) provides that the applicant must be given the timing notice as soon as practicable.

Subsection (3) sets out the steps the registrar must take if the court decides not to hold a preliminary conference, which include, (a) setting a return date for the application, and (b) serving on the respondent as soon as practicable the following: (i) a copy of the application for the protection order, and (ii) notice of the return date. Subsection (c) provides that the applicant must be given notice of the return date as soon as practicable.

Section 47 – Interim order sought

This clause substitutes section 47 with a new section.

Subsection (1) provides for the process the court must take if the court receives an application for a protection order and an interim order is sought.

Subsection (2) provides that after a hearing for an interim protection order the court must hold a preliminary conference unless satisfied by application or of its own initiative, of the criteria in subsections (i) and (ii), which are that holding a preliminary conference would create an unacceptable risk to someone's safety (i) or a preliminary conference would be unlikely to achieve its objects.

A note is inserted into section 47 to refer to the objects of a preliminary conference in section 49.

Subsection (3) sets out the steps a registrar must take where the court lists the application for a preliminary conference. These steps include, (a) setting a return date for the preliminary conference as soon as practicable after the hearing for an interim order and (b) serving on the respondent as soon as practicable (i) a copy of the application for the protection order, (ii) if an interim order was made, a copy of the application for the interim order and a copy of the interim order and (iii) a timing notice for the conference. It further provides that the applicant must be given the timing notice as soon as practicable.

Subsection (4) sets out the steps the registrar must take if the court decides not to hold a preliminary conference, which include, (a) setting a return date for the application, and (b) serving on the respondent as soon as practicable the following: (i) a copy of the application for the protection order, (ii) if an interim order was made,

a copy of the application for the interim order and a copy of the interim order and (iii) notice of the return date. Subsection (c) provides that the applicant must be given notice of the return date as soon as practicable.

Subsection (5) provides that the process for setting down a preliminary conference applies to general interim orders, as well as special interim orders where related charges are laid. This wording is taken from the existing section 47 (2) in the Act. It is intended that this provision will continue to be applied in the same manner.

Clause 12 – Preliminary conferences - generally Section 49(2)

This clause omits section 49(2) from the Act.

Clause 13 – Explaining orders is protected person present, Section 67 (2) (d)

This clause removes subsection (2) (d) which provides that on making a protection order the court must explain to the protected person that if they aid or abet the respondent to commit an offence of contravening a protection order, then the protected person also commits an offence.

The effect of removing this subsection is that removes the offence of aiding and abetting the breach of a family violence order. This amendment does not remove the general offence of aid and abet from the *Criminal Code 2002.*

Clause 14 – Section 67 (2), note

This clause removes the note in subsection (2) (d) that provides the *Criminal Code 2002* pt 2.4 deals with offences of aiding and abetting.

The effect of removing this note is that it confirms a protected person will not be found guilty of aiding and abetting a breach of a family violence order.

Clause 15 – Section 82A

Section 82A - Amendment of protection orders—preliminary conferences

This clause substitutes section 82A to provide for the discretion of the court in subsection (1) to determine by application or of its own initiative whether to hold a preliminary conference for an application for an amendment of a protection order under section 82. Subsection (1) provides for the grounds for a decision not to hold a preliminary conference; (a) where holding a preliminary conference would create an unacceptable risk to person’s safety, or (b) would be unlikely to achieve its objects.

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Subsection (2) outlines the objects of a preliminary conference and provides that they are (a) to find out whether parties will settle the amendment by consent or (b) ensure the application is ready for a hearing before a magistrate as soon as practicable.

A note is inserted to provide that words spoken, or anything done at the preliminary conference are generally inadmissible as evidence in the proceedings and refers to section 62 of the Act.

Subsection (3) sets out the steps a registrar must take where the court decides to hold a preliminary conference that are already in the Act in existing section 82A. These steps include, (a) setting a return date for the preliminary conference as soon as practicable after the day the application is received, and (b) serving on the respondent as soon as practicable (i) a copy of the application for the protection order, and (ii) a timing notice for the conference. Subsection (c) provides that the applicant must be given the timing notice as soon as practicable.

Subsection (4) sets out the steps the registrar must take if the court decides not to hold a preliminary conference, which include, (a) setting a return date for the application, and (b) serving on the respondent as soon as practicable the following: (i) a copy of the application for the protection order, and (ii) notice of the return date. Subsection (c) provides that the applicant must be given notice of the return date as soon as practicable.

Subsection (5) provides that the registrar may adjourn a preliminary conference where a respondent has not yet been served but is satisfied that the respondent may be served if further time for service is allowed.

A note is inserted to direct that service may be affected by alternative means under section 70A(2) of the Act if personal service is not reasonably practicable.

Section 82B - Provisional amendment of protection order in special or exceptional circumstances.

This clause also inserts a new section 82B into the Act Provisional amendment of protection order in special or exceptional circumstances.

The effect of this provision is to allow an applicant or protected person to a family violence order (including an interim order) to apply for a provisional amendment to the family violence order that can be heard and determined immediately by the court, and then enforced once service of the application for amendment has been effected.

Subsection (1) sets out that the section applies if the Magistrates court receives an application to amend a protection order under section 82 of the Act and the protected person seeks an urgent/provisional amendment before the amendment application is decided.. Subsection (a) provides that the court may only make a provisional amendment where the applicant for the amendment is either the protected person or the applicant for the protection order. Subsection (b) provides that the court may make a provisional amendment before the application for amendment is decided.

Subsection (2) provides that the court may hear and decide the provisional amendment with or without the presence of the respondent if satisfied of certain

criteria under subsections (a) and (b). Subsection 2(a) provides that the court must be satisfied that there are special or exceptional circumstances that justify making the amendment. Subsection 2(b) provides that the court must also be satisfied of the criteria for making amendments generally under section 83(1) of the Act. The general criteria in section 83(1) include consideration of the safety of the protected person or their child.

The issue of whether there are 'special or exceptional circumstances' that would justify making the amendment is not a threshold issue for the listing of a matter before the court. The court will hear and determine whether there are 'special or exceptional circumstances' that justify making the amendment on the facts in the provisional amendment application .

Subsection (3) outlines that once the provisional amendment is made the registrar must effect service of a copy of the provisional amendment on the respondent.

A note is inserted to clarify that section 82A deals with the holding of a preliminary conference in relation to an application made under section 82. It clarifies that a preliminary conference should be held after a provisional amendment is made unless the court dispenses with a preliminary conference in accordance with section 82A.

Subsection (4) provides when the provisional amendment will end i.e. either when the provisional amendment is decided by the court (per subsection (a)) or 12 months from the date the provisional amendment is made (per subsection (b)), whichever occurs first. While the intent of the amendment is to act as a "holding pattern" until it returns to the court for further determination, the purpose of this is to ensure that the respondents rights are not arbitrarily limited by having an amendment that does not have an end date. This has been balanced with the need to protect the applicant or protected person until further determination by the court. This determination may be that the provisional amendment is to end, or that order is amended or varied.

Subsection (5) provides that more than 1 provisional amendment may be in force in relation to the same final application.

Clause 16 – Section 91A

Section 91A - Review of orders—preliminary conference

This clause substitutes section 91A with a new subsection (1) to clarify that the court must hold a preliminary conference when the court receives an application under section 87, 89 or 91 of the Act, unless satisfied of the criteria in subsections (a) and (b), which are (a) that holding a conference would present unacceptable risk to a person's safety or (b) that the preliminary conference would be unlikely to achieve its objects. This gives the court the discretion not to hold a preliminary conference. However, the court does not need to turn its mind to whether the preliminary conference should be dispensed with in every application.Subsection (2) outlines the objects of a preliminary conference, Subsection (a) provides one object is to

determine whether the parties may settle the proceeding by consent, and subsection (b) provides the second object which is to ensure that the application is ready to be heard by the court.

A note is inserted to provide that words spoken, or anything done at the preliminary conference are generally inadmissible as evidence in the proceedings and refers to section 62 of the Act.

Subsection (3) sets out the steps a registrar must take where the court decides to hold a preliminary conference that are already in the Act in existing section 91A. These steps include, (a) setting a return date for the preliminary conference as soon as practicable after the day the application is received, and (b) serving on the respondent as soon as practicable: (i) a copy of the application for the protection order, and (ii) a timing notice for the conference. Subsection (c) provides that the applicant must be given the timing notice as soon as practicable.

Subsection (4) sets out the steps the registrar must take if the court decides not to hold a preliminary conference, which include, (a) setting a return date for the application, and (b) serving on the respondent as soon as practicable the following: (i) a copy of the application for the protection order, and (ii) notice of the return date. Subsection (c) provides that the applicant must be given notice of the return date as soon as practicable.

Subsection (5) provides that the registrar may adjourn the preliminary conference if the registrar has (a) set a return date for the preliminary conference, and (b) the respondent has not been served the application, and (c) the registrar is satisfied that the respondent may be served if further time for service was allowed. This is consistent with the existing provision at section 50 which refers to adjournment of a preliminary conference. The note inserted shows that per section 70A (2) of the Act, substituted service can be enlivened if person service is not reasonably practicable.

Section 91B - Magistrate review of registrar and deputy registrar decisions

This clause also inserts a new section 91B into the Act ‘Magistrate Review of registrar and deputy registrar decisions’

This clause inserts a new section 91B into the Act to provide for a mechanism for reviews or rehearing of certain decisions of a registrar to be made before the Magistrates Court. The intent of these provisions is to legislatively enshrine Practice Direction 2 of 2018.

Subsection (1) provides that this section applies if the registrar (a) is authorised to exercise the jurisdiction of the Magistrates Court to make an interim or final protection order, and (b) the registrar or deputy registrar makes a relevant decision. A note provides for the power of the registrar to exercise this jurisdiction under the *Court Procedure Rules 2006*.

Subsection (2) provides for the obligation of the registrar to inform the applicant for a protection order about the effect of this section, that is, their right to seek a review, when they make a relevant decision.

Subsection (3) provides the period in which an applicant must request a review of the relevant decision. The intention is that the applicant requests this review immediately after the decision is made by the registrar, that is, on the same day.

A note explains how the applicant may find out the registry hours in the *Court Procedure Rules 2006.*

Subsection (4) outlines the process a registrar must follow if an applicant requests a review under subsection (3), which is that a return ate for the hearing must be heard as soon as reasonably practicable but no later than two days after the day the request is received, and that the registrar must inform the applicant of the return date, time and place of the hearing.

Subsection (5) outlines that the respondent need not be informed about the time and date of the review hearing. This is because the respondent is generally not present for the application which the registrar or deputy registrar has just heard, and in most cases the review would be heard on the same day (if practicable for the court).

Subsection (6) outlines that a review is a rehearing of the matter anew. This means that the Magistrate may consider the application and evidence provided by the applicant afresh.

Subsection (7) defines a ‘registrar decision’ as a decision by the registrar to (a) refuse to make an interim protection order; or (b) to adjourn the proceeding of a final order in an uncontested application (a decision under section 54 of the Act).

The effect of this provision is that where a registrar refuses to make an interim order or adjourns the proceeding for a final order in an uncontested application, the applicant may have that decision reviewed by a magistrate in the Magistrates Court. Previously these decisions could only be appealed to the Supreme Court to be heard by a judge. This provision will help streamline proceedings.

Clause 17 – Court-initiated interim orders, Section 112 (1), note

This clause omits the note that states interim orders must be served in accordance with section 70C. This is because this section deals with court-initiated interim orders.

Clause 18 – New section 112 (4A)

This clause inserts the new subsection (4A) into the existing section 112 to provide that the court must give the protected person a copy of the interim order, and to

ensure that all reasonable steps have been taken to confirm that the protected person is aware of the order.

This amendment is to cover situations where the protected person is not the applicant, and therefore personal service is not mandatory, or in situations where the protected person is not present when the court makes the interim order. The protected person would still need to be aware of the conditions of the order and how long it is in force, so that they are able to report any contraventions of those conditions or seek any necessary amendments to that order.

Clause 19 – Dictionary, definition of protection order, paragraph (b)(ii)

This clause substitutes an expanded definition of a protection order and states that a protection order includes an order amendment a protection order, including an order for a provisional amendment under section 82B or temporary amendment under section 84 of the Act.

Clause 20 – Dictionary, definition of related, paragraph (b)

This clause omits the phrase "*, other than an offence against section 43 (Offence—contravention of family violence order*" from the definition of 'related' regarding subsection (b), when related means an offence is against the affected person.

Section 26 of the *Family Violence Act 2016* provides that if a general interim order is in place and the respondent is charged with an offence 'related to the application for the final order', the general interim order is taken to be a special interim order. This amendment will remove the exclusion of a charge of contravention of the family violence order, so that a charge for contravention of a family violence order will trigger the conversion of the general interim order to a special interim order.

The purpose of this amendment is to ensure that the criminal charges related to the protection order, including any breach of conditions by the respondent, can be considered by the court first before finalising the protection order application. It also ensures that the interim order does not expire while the criminal proceedings are ongoing. The respondent then does not potentially have to give evidence in the civil protection order proceedings while the criminal law proceedings are still ongoing. If the respondent did have to give this evidence, this could impact the criminal law proceedings such as the defendant giving evidence that is self-incriminating under a civil rather than criminal standard. The special interim order also has the advantages of continuing to provide protection for protected persons.

Clause 18 – Dictionary, definition of return date

This clause inserts an expanded definition into the definition of return date to provide that it also applies to an application for a review of a protection order.

Part 5 – Personal Violence Act 2016

Clause 22 – General interim order - extension for non-service of final order, Section 24AB(2)

This clause substitutes section 24AB (2) with the new subsection (2) to provide an alternative that if a final order is unable to be served, that the general interim order continue for the life of the final order, had it been made with the respondent present in court at the time of making the final order. This means that the respondent will not become subject to any new conditions on the final order, but they will still be subject to the conditions they are aware of on the interim order, until they are personally served with the final order per section 27 of the Act.

The intent of this amendment is to ensure victims of family violence are still afforded protection from violence, and to cover situations where, after reasonable attempts, the police cannot personally serve the final order on respondent.

Clause 23 – New Section 38A

This clause inserts a new section into the *Personal Violence Act 2016* to explicitly provide that a personal violence order continues to be in force even when the protected person attains the age of 18.

The section applies when the court makes a personal violence order and a protected person listed on that order is a child when the order is made, but the life of the order is to continue even after the protected person turns 18 years old.

The amendment explicitly clarifies that turning 18 years old does not stop the enforceability of the order – the order will remain in force until the end stated time, it is withdrawn by the applicant or protected person, an extension is made by the court, or new orders are made by the court.

Clause 24 – Section 40 and 41

This clause amends sections 40 and 41 of the Act to provide for a discretion for the court to decide whether to have a preliminary conference following the receipt of an application for a protection order.

Section 40 – Interim order not sought

This clause inserts section 40(1) to provide that the default position is that the court must hold a preliminary conference, but then provides for the for the discretion to not hold a preliminary conference, either on application or of the courts own initiative, if satisfied of certain grounds. Subsections (a) and (b) provide the grounds for a decision not to hold a preliminary conference; (a) where holding a preliminary conference would create an unacceptable risk to person's safety, or (b) would be unlikely to achieve its objects.

A note is inserted into section 40 to refer to the objects of a preliminary conference in section 43.

Subsection (2) sets out the steps a registrar must take where the court lists an application for a preliminary conference that are already in the Act in existing section 40. These steps include, (a) setting a return date for the preliminary conference as soon as practicable after the day the application is received, and (b) serving on the respondent as soon as practicable: (i) a copy of the application for the protection order, and (ii) a timing notice for the conference. Subsection (c) provides that the applicant must be given the timing notice as soon as practicable.

Subsection (3) sets out the steps the registrar must take if the court decides not to hold a preliminary conference, which include, (a) setting a return date for the application, and (b) serving on the respondent as soon as practicable the following: (i) a copy of the application for the protection order, and (ii) notice of the return date. Subsection (c) provides that the applicant must be given notice of the return date as soon as practicable.

Section 47 – Interim order sought

This clause substitutes section 41 with a new section.

Subsection (1) provides for the process the court must take if the court receives an application for a protection order and an interim order is sought.

Subsection (2) provides that after a hearing for an interim protection order the court must hold a preliminary conference unless satisfied by application or of its own initiative, of the criteria in subsections (i) and (ii), which are that holding a preliminary conference would create an unacceptable risk to someone's safety (i) or a preliminary conference would be unlikely to achieve its objects.

A note is inserted into section 41 to refer to the objects of a preliminary conference in section 43.

Subsection (3) sets out the steps a registrar must take where the court lists the application for a preliminary conference. These steps include, (a) setting a return date for the preliminary conference as soon as practicable after the hearing for an interim order and (b) serving on the respondent as soon as practicable: (i) a copy of the application for the protection order, (ii) if an interim order was made, a copy of the application for the interim order and a copy of the interim order and (iii) a timing notice for the conference. It further provides that the applicant must be given the timing notice as soon as practicable.

Subsection (4) sets out the steps the registrar must take if the court decides not to hold a preliminary conference, which include, (a) setting a return date for the application, and (b) serving on the respondent as soon as practicable the following: (i) a copy of the application for the protection order, (ii) if an interim order was made,

a copy of the application for the interim order and a copy of the interim order and (iii) notice of the return date. Subsection (c) provides that the applicant must be given notice of the return date as soon as practicable.

Subsection (5) provides that the process for setting down a preliminary conference applies to general interim orders, as well as special interim orders where related charges are laid. This wording is taken from the existing section 41 (2) in the Act. It is intended that this provision will continue to be applied in the same manner.

Clause 25 – Preliminary conferences - generally Section 43(2)

This clause omits section 43(2) from the Act.

Clause 26 – Section 76A

Section 76A - Amendment of protection orders—preliminary conferences

This clause substitutes section 76A to provide for the discretion of the court in subsection (1) to determine by application or of its own initiative whether to hold a preliminary conference for an application for an amendment of a protection order under section 76. Subsection (1) provides for the grounds for a decision not to hold a preliminary conference; (a) where holding a preliminary conference would create an unacceptable risk to person's safety, or (b) would be unlikely to achieve its objects.

Subsection (2) outlines the objects of a preliminary conference and provides that they are (a) to find out whether parties will settle the amendment by consent or (b) ensure the application is ready for a hearing before a magistrate as soon as practicable.

A note is inserted to provide that words spoken, or anything done at the preliminary conference are generally inadmissible as evidence in the proceedings and refers to section 57 of the Act.

Subsection (3) sets out the steps a registrar must take where the court lists the matter for a preliminary conference that are already in the Act in existing section 76A. These steps include, (a) setting a return date for the preliminary conference as soon as practicable after the day the application is received, and (b) serving on the respondent as soon as practicable: (i) a copy of the application for the protection order, and (ii) a timing notice for the conference. Subsection (c) provides that the applicant must be given the timing notice as soon as practicable.

Subsection (4) sets out the steps the registrar must take if the court decides not to hold a preliminary conference, which include, (a) setting a return date for the application, and (b) serving on the respondent as soon as practicable the following: (i) a copy of the application for the protection order, and (ii) notice of the return date. Subsection (c) provides that the applicant must be given notice of the return date as soon as practicable.

Subsection (5) provides that the registrar may adjourn the preliminary conference if the registrar has (a) set a return date for the preliminary conference, and (b) the respondent has not been served the application, and (c) the registrar is satisfied that the respondent may be served if further time for service was allowed. This is consistent with the existing provision at section 50 which refers to adjournment of a preliminary conference. The note inserted shows that per section 70A (2) of the Act, substituted service can be enlivened if person service is not reasonably practicable.

A note is inserted to direct that service may be affected by alternative means under section 64A(2) of the Act if personal service is not reasonably practicable.

Clause 27– Section 83A

Section 83A - Review of orders—preliminary conferences

This clause substitutes section 83A of the Act with a new subsection (1) to clarify that the court must hold a preliminary conference when the court receives an application under section 81 of the Act. unless satisfied of the criteria in subsections (a) and (b), which are (a) that holding a conference would present unacceptable risk to a person's safety or (b) that the preliminary conference would be unlikely to achieve its objects. This gives the court the discretion not to hold a preliminary conference. However, the court does not need to turn its mind to whether the preliminary conference should be dispensed with in every application.

Subsection (2) outlines the objects of a preliminary conference, Subsection (a) provides one object is to determine whether the parties may settle the proceeding by consent, and subsection (b) provides the second object which is to ensure that the application is ready to be heard by the court.

A note is inserted to provide that words spoken, or anything done at the preliminary conference are generally inadmissible as evidence in the proceedings and refers to section 57 of the Act.

Subsection (3) sets out the steps a registrar must take where the court lists the matter for a preliminary conference that are already outlined in existing sections 76A and 83A of the Act. These steps include, (a) setting a return date for the preliminary conference as soon as practicable after the day the application is received, and (b) serving on the respondent as soon as practicable (i) a copy of the application for the protection order, and (ii) a timing notice for the conference. Subsection (c) provides that the applicant must be given the timing notice as soon as practicable.

Subsection (4) sets out the steps the registrar must take if the court decides not to hold a preliminary conference, which include, (a) setting a return date for the application, and (b) serving on the respondent as soon as practicable the following: (i) a copy of the application for the protection order, and (ii) notice of the return date. Subsection (c) provides that the applicant must be given notice of the return date as soon as practicable.

Subsection (5) provides that the registrar may adjourn the preliminary conference if the registrar has (a) set a return date for the preliminary conference, and (b) the respondent has not been served the application, and (c) the registrar is satisfied that the respondent may be served if further time for service was allowed. This is consistent with the existing provision at section 44 which refers to adjournment of a preliminary conference.

Section 83B - Magistrate review of registrar and deputy registrar decisions

This clause inserts a new section 83B into the Act to provide for a mechanism for reviews or rehearing of certain decisions of a registrar to be made before the Magistrates Court. The intent of these provisions is to legislatively enshrine Practice Direction 2 or 2018.

Subsection (1) provides that this section applies (a) if the registrar is authorised to exercise the jurisdiction of the Magistrates Court to make an interim or final protection order, and (b) f the registrar or deputy registrar makes a relevant decision. A note provides for the power of the registrar to exercise this jurisdiction under the *Court Procedure Rules 2006*.

Subsection (2) provides for the obligation of the registrar to inform the applicant for a protection order about the effect of this section, that is, their right to seek a review, when they make a relevant decision.

Subsection (3) provides the period in which an applicant must request a review of the relevant decision. The intention is that the applicant requests this review immediately after the decision is made by the registrar, that is, on the same day.

A note explains how the applicant may find out the registry hours in the *Court Procedure Rules 2006.*

Subsection (4) outlines the process a registrar must follow if an applicant requests a review under subsection (3), which is that a return ate for the hearing must be heard as soon as reasonably practicable but no later than two days after the day the request is received, and that the registrar must inform the applicant of the return date, time, and place of the hearing.

Subsection (5) outlines that the respondent need not be informed about the time and date of the review hearing. This is because the respondent is generally not present for the application which the registrar or deputy registrar has just heard, and in most cases the review would be heard on the same day (if practicable for the court).

Subsection (6) outlines that a review is a rehearing of the matter anew. This means that the Magistrate may consider the application and evidence provided by the applicant afresh.

Subsection (7) defines a ‘registrar decision’ as a decision by the registrar to (a) refuse to make an interim protection order; or (b) to adjourn the proceeding of a final order in an uncontested application (a decision under section 54 of the Act).

The effect of this provision is that where a registrar refuses to make an interim order or a final order in an uncontested application, the applicant may have that decision reviewed by a magistrate in the Magistrates Court. Previously these decisions could only be appealed to the Supreme Court to be heard by a judge. This provision will help streamline proceedings.

Clause 28 – Dictionary, definition of related, paragraph (b)

This clause omits the phrase “*, other than an offence against section 35 (Offence—contravention of family violence order*” from the definition of ‘related’ regarding subsection (b), when related means an offence is against the affected person.

Section 23 (1) of the *Family Violence Act 2016* provides that if a general interim order is in place and the respondent is charged with an offence 'related to the application for the final order', the general interim order is taken to be a special interim order. This amendment will remove the exclusion of a charge of contravention of the family violence order, so that a charge for contravention of a family violence order will trigger the conversion of the general interim order to a special interim order.

The purpose of this amendment is to ensure that the criminal charges related to the protection order, including any breach of conditions by the respondent, can be considered by the court first before finalising the protection order application. It also ensures that the interim order does not expire while the criminal proceedings are ongoing. The respondent then does not potentially have to give evidence in the civil protection order proceedings while the criminal law proceedings are still ongoing. If the respondent did have to give this evidence, this could impact the criminal law proceedings such as the defendant giving evidence that is self-incriminating under a civil rather than criminal standard. The special interim order also has the advantages of continuing to provide protection for protected persons.

Clause 29 – Dictionary, definition of return date

This clause inserts an expanded definition into the definition of return date to provide that it also applies to an application for a review of a protection order.

Schedule 1 – Technical amendments

Schedule 2 contains technical amendments of legislation initiated by the Parliamentary Counsel’s Office.

Each amendment is explained in an explanatory note in the schedule. The amendments include the correction of minor errors, such as typographical errors and outdated cross-references, updating language, updating and omitting notes,

omitting redundant provisions, renumbering paragraphs and other minor changes to update or improve the form of legislation.

Part 1.1 – Bail Act 1992

[1.1] – Schedule 1 heading

This clause substitutes a new heading into Schedule 1 of the *Bail Act 1992* to correct a minor typographical error. The amendment changes the title of Schedule 1 of the Act from 'Offences to which presumption of bail does not apply' to 'Offences to which presumption for bail does not apply' to ensure the language aligns with the heading of division 2.3 of the Act.

[1.2] – Schedule 1, part 1.5, table, item 2

This clause omits a redundant cross reference to section 233AC of the *Customs Act 1901(Cth)* in Schedule 1, part 1.5, table, item 2 of the Bail Act 1992. This cross-reference is redundant as the *Customs Act 1901 (Cth),* section 233AC was omitted by the *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005 (Cth)* as a consequence of the Commonwealth moving non-regulatory drug offences to division 307 of the *Criminal Code Act 1995 (Cth).* The *Bail Act 1992*, sch 1, pt 1.6 provides that the presumption for bail does not apply to the relevant offences against division 307 of the *Criminal Code Act 1995 (Cth).*

Part 1.2 – Crimes Act 1900

[1.3] – Section 238 (12)

This clause omits a redundant cross reference in section 238(12) of the *Crimes Act 1900* to section 84 of the *Children and Young People Act 1999,* which no longer exists*.* The *Children and Young People Act 1999* was repealed and replaced by the *Children and Young People Act 2008*. The *Children and Young People Act 2008* does not have an equivalent provision to the *Children and Young People Act 1999,* section 84.

Part 1.3 – Crimes (Forensic Procedures) Act 2000

[1.4] – Section 112 (2)

This clause omits a redundant cross reference in section 238(12) of the *Crimes Act 1900* to section 84 of the *Children and Young People Act 1999,* which no longer exists*.* The *Children and Young People Act 1999* was repealed and replaced by the *Children and Young People Act 2008*. The *Children and Young People Act 2008* does not have an equivalent provision to the *Children and Young People Act 1999,* section 84.