



Australian Government

Department of Infrastructure, Regional Development and Cities

Norfolk Island: Further strengthening the justice system

Proposed changes

Consultation paper

May 2019



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ISBN 978-1-925843-02-6

April 2019 / INFRA3885

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Introduction

Work continues on enhancing the Norfolk Island justice system to ensure protections for people under Norfolk Island law are equivalent to those in other Australian jurisdictions, and that Norfolk Island police and courts can take action against people who commit crime.

The changes outlined in this paper are aimed at furthering improve court outcomes and access to justice for the Norfolk Island community.

Extensive consultation about proposed changes to evidence, forensic procedures, and sexual offence laws was carried out on Norfolk Island in 2018, facilitated by Justice Anthony Whealy. Psychologists, legal practitioners, social workers, and a range of community members participated in the consultation process and the community has been kept informed of changes as they are made. The other proposed changes outlined in this paper relate to court process and sentencing.

Purpose of this paper

This discussion paper explains proposed changes to Norfolk Island laws and gives the community an opportunity to comment.

There is an agreed process to follow when consulting with the Norfolk Island community about proposed changes to laws. This is set out in the Norfolk Island Legislation Consultation Framework published on the Department's website at www.infrastructure.gov.au/ni-legislation.

Releasing this paper and seeking feedback on the proposed changes are consistent with that framework.

Summary of proposed changes

The key changes proposed are listed below. Some of these changes have already been discussed with the Norfolk Island community and other stakeholders (items 3 and 6) so are not covered in detail in this paper. For more background on items 3 and 6, please refer to the initial consultation paper [here](#).

Improvements to court and other procedures

1. Allow the prosecution to appeal against the sentences imposed by the courts on people convicted of offences.
2. Allow the prosecution to apply for bail to be revoked and introduce a "show cause" provision, which would affect defendants who are charged with further offences while on bail.
3. Further consider changes to the *Crimes (Forensic Procedures) Act 2002* (NI) (NI Forensic Procedures Act), to ensure that Norfolk Island law is consistent with laws in the rest of Australia. This would include better protections for people who are asked or required to undergo a forensic procedure, including stricter rules about what information they should be given and greater involvement of a Magistrate in determining whether and when a forensic procedure may be carried out (these measures were consulted on previously).
4. Consider amending the *Mental Health Act 1996* (NI) (NI Mental Health Act) so that a Magistrate can order that a person appearing in court should be referred for a mental health assessment in a wider range of circumstances.

New sexual offences and improved protections for complainants

5. Place restrictions on the publication of complainants' and others' details in matters involving sexual offences.

6. Insert new offences of sexual intercourse with a person with cognitive impairment and acts of indecency with a person with cognitive impairment (consulted on previously).
7. Clarify when marriage will be a defence to the offence of sexual intercourse with a young person where the defendant is in a position of trust or authority.

Other criminal laws

8. Amend the NI Criminal Code as it relates to serious drug offences (Chapter 6), to prescribe quantities of dangerous drugs for the purposes of the meaning of ‘trafficable quantity’, ‘commercial quantity’ and ‘large commercial quantity’ under s282.

Detail of proposed changes

Prosecution right of appeal

Having the right to appeal is an issue of fairness, for both convicted persons and the prosecution. Courts hearing appeals have an important role in reviewing sentences for fairness and consistency, and this right of review should not be limited to convicted persons.

All other Australian jurisdictions have enacted legislation that allows the prosecution to appeal sentences given to convicted persons. However, the *Supreme Court Act 1960* (NI) (Supreme Court Act) only allows for an appeal to the Full Court of the Federal Court of Australia by a convicted person, not by the prosecution.

It is therefore proposed to amend the Supreme Court Act to give the prosecution the right to appeal about the sentences given to convicted persons and make Norfolk Island law consistent with the law in the rest of Australia.

Bail amendments

There is a general presumption in Norfolk Island and other Australian jurisdictions that bail should be granted, unless the prosecution can show that to allow a person to be released on bail would put the community at risk. However, for some serious offences, such as murder, the presumption is against bail being granted.

Most Australian jurisdictions also have what are called “show cause” laws, so that if a person has been released on bail and is charged with more offences, it becomes that person’s responsibility to show why they should be granted bail. It is proposed to amend Norfolk Island laws to include “show cause” provisions.

Also, Norfolk Island legislation does not currently include provisions to allow the prosecution to apply for bail to be revoked. Most other Australian jurisdictions have such provisions. The reason for this is that although a bail agreement will usually continue until a court proceeding has ended, it is important that the prosecution can request (and the court can order) that a person’s bail be varied or revoked. The prosecution might seek to do this if it has reason to believe that a person on bail does not intend to appear at court, or because that person might have committed further offences, or that if a person remains on bail they put the community at risk.

It is proposed to change the Norfolk Island laws to enable bail to be varied or revoked.

Forensic procedures legislation

The NI Forensic Procedures Act manages the way that forensic material can be obtained, tested, stored and used. Forensic material includes things like fingerprints, photographs or samples of hair, and is often used as evidence in criminal proceedings. Norfolk Island adopted its legislation from the ACT (based on the *Crimes (Forensic Procedures) Act 2000* (ACT)), as it was in 2002. However, since that time, the ACT legislation has been updated on several occasions, and those changes have not been reflected in the Norfolk Island Act.



When the Norfolk Island community was first consulted on proposed changes to the forensic procedures law in 2018, it was proposed that newer legislation from the ACT or NSW would be adopted to replace the Norfolk Island laws about forensic procedures. However, rather than apply new law, it is now proposed to amend the existing NI Forensic Procedures Act, to address any significant gaps that have emerged since the law was put in place.

The proposed amendments relate to preserving people's rights by limiting when procedures can be carried out, and how. This includes:

- better protections for people who are asked or required to undergo a forensic procedure
- greater involvement of a Magistrate in determining whether and when a forensic procedure may be carried out, and
- stricter rules about what information needs to be provided to those people who are asked or required to undergo a forensic procedure.

Ordering Mental Health Assessments

For some people with a suspected or diagnosed mental impairment, that impairment can impact on their capacity to understand circumstances, including a court process in which they are participating. The NI Mental Health Act and the *Criminal Procedure Act 2007* (NI) (Criminal Procedure Act) allow the Court of Petty Sessions to order a person appearing before it to be examined by a psychiatrist – in relation to their fitness to plead to a charge, and also once they have been acquitted, their charges dismissed, or they have been convicted.

However, the issue of mental impairment can become a concern of the Court at any stage of proceedings. Many Australian jurisdictions, including Queensland, New South Wales, and Western Australia, have provisions allowing a court to order a mental health assessment/psychiatric examination of a person at any point, or at more than one point, during court proceedings.

It is proposed to amend the NI Mental Health Act to allow the Court of Petty Sessions and the Supreme Court to be able to make an order for a mental health assessment in a greater range of circumstances during court proceedings. This will provide further protections for people who may be suffering mental impairment.

Publication of judgments in sexual offence matters

All Australian states and territories have laws that prohibit publishing names or information that might identify complainants and victims in sexual offence cases without the consent of the victim/complainant. These laws aim to reduce the trauma for victims of sexual offences who go to court, so that people are not too afraid of the process (including their community finding out that they are victims of such offences) to report these offences when they happen.

In Norfolk Island, section 167F of the *Criminal Procedure Act 2007* (NI) bans publishing a complainant's identity (or other information that would be likely to identify them) in a sexual or violent crime proceeding, unless the complainant consents to the publication. However, this does not provide as much protection to victims of sexual offences as the laws in other Australian states and territories, as it relies on a complainant giving consent to the publication rather than allowing a Judge to consider whether that information should be published. This is a particular concern in Norfolk Island where, because of the size of the community, people may be more easily identified from less information.

It is proposed to amend Norfolk Island law to more closely align with the law in New South Wales. Section 578A of the *Crimes Act 1900* (NSW) makes it an offence to publish information about a complainant's identity (or information which is likely to identify the complainant) without either their consent, or authority from the Judge. The NSW law also sets out limited exceptions for some types of publication, such as official court reports. Before a judge can give their authority to publish information about a complainant's identity, they must also consider the views of the



complainant and be satisfied that publishing the information would be in the public interest. The limitations on publishing information extends to judgments that a court publishes on its website, as well as publishing details in the media or other platforms.

These measures will make it easier for the court to protect victims and complainants, by placing stronger restrictions on information that identifies them being made public.

Sexual intercourse with a person with cognitive impairment

People with a cognitive impairment are particularly vulnerable to exploitation. The term ‘cognitive impairment’ refers to a range of disorders and mental states that may affect brain function, either temporarily or permanently, including intellectual disability, dementia, Alzheimer’s, autism and acquired brain injury as a result of an accident, an illness or substance abuse. In the context of the proposed offence, it also generally means that the person requires assistance, care or supervision with everyday living (noting that not all people with cognitive impairment necessarily need this or any assistance).

Many Australian states and territories have introduced laws that make it an offence for a person to engage in sexual intercourse with another person who has a cognitive or mental impairment, where they are responsible for the care of that person, or intend to take advantage of the person’s impairment.

A new offence of sexual intercourse with a person with cognitive impairment (and acts of indecency with a person with cognitive impairment) is proposed to be introduced to the NI Criminal Code. The offence would not criminalise sexual intercourse if a person did not know the other person had a cognitive impairment, where the person was married to or in a de facto relationship with the person with cognitive impairment, or where the act was carried out for any proper medical or law enforcement purpose. The offence would be generally modelled on Section 66F of the *Crimes Act 1990* (NSW).

Early consultations about this measure took place with the Norfolk Island community and other stakeholders in 2018. It is important to balance the rights of people with cognitive impairment, with the need to protect them from exploitation.

In this regard, an issue to be resolved is whether the limitation of the defence to married or de facto couples, which limits the agency of people with cognitive impairment by assuming they cannot engage in – or consent to – more casual intimate relationships and encounters, is appropriate.

Marriage defence: Sexual intercourse with a young person where the defendant is in a position of trust or authority

Section 113A of the Criminal Code 2007 (NI) makes it an offence to have sexual intercourse with a young person aged at least 16 but under 18, when the defendant is in a position of trust or authority to that young person. It is a defence if the defendant proves that at the time of the alleged offence, they were legally and validly married to the young person.

Consideration is being given to restricting the defence of marriage in relation to people in positions of trust or authority who engage in sexual intercourse or sexual activity with young people (16-18 years). The defence would be retained; but in addition to having to prove that they were in a valid and genuine marriage with the young person, the defendant would also have to prove that the young person was at least 16 years old when the marriage was entered into.

This is consistent with the legal marriage age under the *Marriage Act 1961* (Cth). It is proposed to amend the *Criminal Code 2007* (NI) to include this more limited defence.

Serious drug offences

Currently, the NI Criminal Code includes offences in relation to trafficking and other acts in relation to drugs, and there are different penalties that apply for different kinds of drugs and different quantities.

These quantities were meant to be set out in a regulations. However, no regulations have been made, which could make enforcement of these provisions difficult.

It is proposed to amend the NI Criminal Code to prescribe what different quantities of dangerous drugs mean, including 'trafficable quantity', 'commercial quantity' and 'large commercial quantity'. These definitions would be included in the NI Criminal Code, instead of in separate regulations.

Next steps

How can you have your say?

The Department invites your comments on the changes proposed in this paper by **Sunday 2 June 2019**. You can make comments in writing to NI_Legislation@infrastructure.gov.au.

The Department intends to publish all submissions to this consultation paper, unless a submission is confidential or contains other information that is not suitable to publish. We will publish your name and any organisation you represent, but we will not publish any personal contact details such as your private email address or residential address.

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