Legislative Assembly for the
Australian Capital Territory
Standing Committee on Legal Affairs

Submission cover sheet

Inquiry into the Family, Personal and Sexual Violence Legislation Amendment Bill 2025

Submission number: 003

Submitter: ACT Bar Association

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ACT BAR ASSOCIATION

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On Legal Affairs (Scrutiny of Bills Role)
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Dear Ms Barry,

RE: FAMILY, PERSONAL AND SEXUAL VIOLENCE LEGISLATION AMENDMENT BILL 2025
ACT Bar Association Submission

1. Thank you for inviting the ACT Bar Association to comment on the *Family, Personal and Sexual Violence Legislation Amendment Bill 2025* ('the Bill').

2. The ACT Bar Association says from the outset that it condemns the scourge of family and sexual violence in the community, and wholeheartedly supports any measured and evidence based initiatives to deal with this problem.

3. The Bar Association focuses its comment on the Family Violence Safety Notice ('FVSN') scheme which the Bill would create at Part 2A of the *Family Violence Act 2016* ('the FVA'). The Bar Association opposes the scheme.

The current legislative regime

4. Currently, Part 7 of the FVA provides for an after-hours scheme where a police can obtain an emergency order from a Magistrate. Some features of the current regime include:

   - Such an order can be obtained at any time, and made by telephone[1];
   - Supporting documentation may be sent by fax or email;[2]

[1] Section 101(1) of the *Family Violence Act*
[2] Section 101(3) of the *Family Violence Act*

- The order will last for two business days;[3] and

- Either a police officer, or an 'affected person', may then apply to the court for an interim order.[4]

5. It will be appreciated that, in the ACT, there is always an 'on call' duty magistrate who is available 24 hours a day to deal with urgent applications for search and arrest warrants, applications for interim orders under the *Crimes (Forensic Procedures) Act 2000*, and urgent FVO applications. All magistrates are part of an 'on call' duty roster.

The proposed FVSN regime

6. In contrast to the current emergency after hours scheme, the FVSN scheme that the Bill would introduce would have the following features:

   - There would be no judicial oversight of the making of a FVSN. Such a notice would be issued by a 'senior police officer', being a police officer holding the rank of sergeant or above[5]; and

   - The notice would last for up to two weeks[6].

7. A sergeant making a FVSN would be able to impose any of the conditions that a magistrate would in making an emergency after hours order or an interim order. These would include removing a respondent from their own home; preventing them from seeing their children; and conditions which have the effect of preventing someone from attending their place of employment or 'job sites'.[7]

8. On any objective analysis, a police issued FVSN is equivalent to the currently available court issued emergency after hours order in terms of its scope and effect.

9. The Bill would abolish the availability of the current emergency after hours orders regime to which magistrate decision is central, leaving police issued FVSNs as the only available mechanism in which to obtain urgent relief.

The 'rationale' for the regime

10. The Explanatory Statement to the Bill provides the following rationale for the proposed FVSN scheme:

[3] Section 106(1) of the *Family Violence Act*
[4] Section 16(2) and 19A of the *Family Violence Act 2016.*
[5] Proposed new section 13H(1)
[6] Proposed new section 13L
[7] Proposed new section 13Q.

> In consultation, stakeholders including ACT Policing raised concerns with the operation of the AHFVO scheme in practice. ACT Policing considered certain elements of the AHFVO scheme had reduced their effectiveness as an immediate response to family violence. This includes the short duration of AHFVOs, the restriction of AHFVOs to outside business hours, the limitation on the issuance of an AHFVO alongside the arrest of the respondent, and the additional barriers and practical limitations imposed by the requirement to apply to a judicial officer, noting the immediacy of the need for intervention. In their submission to JACS, the Domestic Violence Crisis Service also observed that in their experience, AHFVOs were not meeting the needs of people at risk of domestic and family violence, as they had operated in a "piecemeal" way and were "difficult to access and inconsistently utilised."

11. The Bar Association notes that the reference to the "concerns" raised by police is put at an extremely vague and generalised level. Further, other than a high-level assertion that the current regime 'reduces the effectiveness' of the police response, there is no meaningful or cogent elaboration on how this is actually the case, let alone any evidence to support the assertion. It will of course be appreciated that assertions are not evidence.

The Bar Association's position

The FVSN Scheme is unnecessary and inappropriate

12. The Bar Association wholeheartedly accepts that an urgent civil family violence protective mechanism should be available. It is a critical tool in preventing harm and violence against vulnerable people.

13. However, the critical question is not whether urgent *ex-parte* should be available; rather, the question is who should be the decision maker?

14. The Bar Association agrees with the ACT Law Society that any reform should be evidence based.

15. No cogent or compelling evidence has been advanced as to how the current regime in Part 7 of the FVA is not achieving its purposes. Broad brushed and highly generalised assertions about police 'concerns' and possible ineffectiveness fall well short of the mark. No examples have been provided as to how the current scheme has failed applicants, and no analysis has been embarked upon comparing how the ACT scheme compares to those in effect in other jurisdictions.

16. ACT Policing appears to be one of the biggest champions of the FVSN scheme. It will come as a surprise to no one, and should be a matter of grave concern, that an agency falling within the executive branch of government would seek that such sweeping powers, such as those involved in the FVSN scheme, be stripped from the judiciary and given to itself.

17. As mentioned above, the power to issue a FVSN would be given to a sergeant of police. The descriptor in the Bill of a sergeant of police being a "senior officer" is a misnomer. In reality, a police sergeant falls towards the lower end of the policing rank hierarchy. Many sergeant roles are occupied by acting sergeants, some of whom have as little as 2.5 years on the job.

18. The former ACT Chief Police Officer, Deputy Commissioner Neil Gaughan APM, recently observed that:

> …The junior nature of his rank-and-file officers was "leading to non-optimal outcomes" with "matters dismissed at court" and "costs against police ... at an all-time high
>
> … "Our general duties police officer, those most likely to provide the immediate response to crime, **are the most inexperienced in the country**."[8]

19. In June 2025 the ACT Ombudsman observed the following in the context of use of force incidents by ACT Policing:

> Unfortunately, however, we also observed unhelpfully confrontational conduct by **senior officers**, where some of the first words an officer uses are highly aggressive, including swearing at a person or calling them names.
>
> … Similarly, we observed **unnecessarily dismissive conduct by officers, such as ignoring requests, failing to answer questions and not taking time to listen patiently to the person**, which increased the person's frustration and led to uncooperative behavior.[9]

20. The proposition that any police officer could make an order lasting for up to two weeks which would result in a person removed from their home, prevented from seeing their children, and/or prevented from engaging in their employment, is a matter of tremendous concern. However, the proposition that decisions with such far reaching ramifications could be potentially made by junior or inexperienced police officers is even more concerning.

21. Put simply, and with the greatest of respect, the Bar Association's position is that such a substantial power as that which would be conferred under the proposed scheme ought not be reposed in relatively junior police officers.

22. The Bar Association strongly opposes police officers having the power to make any form of protection order, however described. This power should be reserved for independent magistrates acting judicially.

23. It is important not to conflate what is 'preferable' or 'desirable' from the point of view of police, with what is objectively and realistically necessary. The Bar Association's concern is that the proposed FVSN scheme is simply directed at suiting the convenience of police at the expense of ensuring adequate safeguards against breaches of a respondent's fundamental rights. The current scheme is not problematic simply because police may be dissatisfied with the decisions of magistrates from time to time and think they would get 'better' results if applications were determined internally.

[8] ACT Ombudsman Report "Use of force by ACT Policing: more to do to lessen harm An investigation into ACT Policing's use of force 2019-2024", June 2025, page 62; quoting from Canberra Times Article "ACT's rookie police force leading to 'all-time high' poor outcomes", 16/04/24.
[9] Ibid., pages 64 – 66.

24. In circumstances where:

    i. there is already an on-call duty magistrate available 24 hours a day; and

    ii. both the current and proposed schemes require a written application from the applicant police officer,[10] –

    any suggestion that there is a demonstrable necessity that these orders be decided by police rings hollow.

25. Given a written application would have to be submitted for an urgent order is required under both schemes in any event, it should become immediately apparent that the on-call duty magistrate is equally as well positioned to be the decision maker.

The proposed scheme breaches the Human Rights Act 2004

26. As was identified in the Explanatory Statement to the Bill, the proposed FVSN scheme engages multiple human rights expressly protected by the *Human Rights Act 2004* ('the HRA'), including:

    - The right against arbitrary interference with privacy (s 12(a) of the HRA);
    - The right against arbitrary interference with one's home (s 12(a) of the HRA);
    - The right against arbitrary interference with liberty (s 18(1) of the HRA);
    - The right to freedom of movement (s 13 of the HRA); and
    - The right to a fair trial (s 21 of the HRA).

27. Most of these rights are also protected by the common law, and any unlawful interference with them may lead to tortious remedies including damages.

28. An emergency protection order, however described, which may be made *ex-parte*, is akin to a warrant. That is, both involve legal authorisation to engage in what would otherwise be tortious conduct.

29. Central to the protection of the right to privacy, the right against interference with one's home, and the right to liberty, is the concept of 'arbitrariness'.

30. The concept of 'arbitrariness' has an 'autonomous meaning' and must be applied as it is understood within both domestic and international human rights jurisprudence: ***Thompson v***

[10] See subsections 101(2) and (3) of the *Family Violence Act 2016* and proposed new section 13E.

Minogue [2021] VSCA 358 at [55] *('Thompson v Minogue')*; ***Victoria Poll Toll Enforcement v Taha*** (2013) 49 VR 1.

31. The concept of arbitrariness extends beyond unlawfulness: ***Monaghan v Australian Capital Territory (No 2)*** [2016] ACTSC 352; 315 FLR 305 at [228] – [233]. In ***HJ v Independent Broad-based Anti-Corruption Commission*** [2021] VSCA 200, the Victorian Supreme Court observed at [152] that:

> the adjective 'arbitrary' is wider than the adjective 'unlawful' in that an interference with a person's privacy may be arbitrary — for example, because it is capricious — even if it is not unlawful.

32. Accordingly, in ***Thompson v Minogue*** the Victorian Court of Appeal held at [55] that:

> …an arbitrary interference with privacy is one which is capricious, or has resulted from conduct which is **unpredictable, unjust or unreasonable in the sense of not being proportionate to the legitimate aim sought.**

33. This approach to the concept of arbitrariness has been adopted by the ACT Supreme Court in a number of cases: ***Monaghan v ACT (No 2)*** [2016] ACTSC 352; 315 FLR 305 at [228]-[231 ***Deng v ACT*** [2024] ACTCA 2010 at [64]; ***Millington v Peach (No 2)*** [2025] ACTSC 21 at [87] to [88]; ***Williams v Director-General, Justice & Community Safety Directorate*** [2025] ACTSC 396 at [226].

34. A key consideration in the assessment of whether an intrusion into one's privacy is arbitrary is whether it was authorised by a judicially issued warrant or court order, and/or the person who authorised the search was acting in a genuinely independent capacity with complete detachment in the matter.

35. Section 8 of the *Canadian Charter of Rights and Freedoms* provides that "everyone has the right to be secure against unreasonable search or seizure." In ***Hunter et al v Southam Inc*** [1984] 2 SCR 145, Dixon J of the Canadian Supreme Court observed (at 160 – 161) that:

> That purpose [of the right to privacy in the Canadian Charter] is, as I have said, to protect individuals from unjustified state intrusions upon their privacy. **That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place**. This, in my view, can only be accomplished by a system of prior authorization, not one of subsequent validation.
>
> **A requirement of prior authorization, usually in the form of a valid warrant, has been a consistent prerequisite for a valid search and seizure both at common law and under most statutes.** Such a requirement puts the onus on the state to demonstrate the superiority of its interest to that of the individual. As such it accords with the apparent intention of the Charter to prefer, where feasible, the right of the individual to be free from state interference to the interests of the state in advancing its purposes through such interference.
>
> I recognize that it may not be reasonable in every instance to insist on prior authorization in order to validate governmental intrusions upon individuals' expectations of privacy. Nevertheless, where it is feasible to obtain prior authorization, I would hold that such authorization is a precondition for a valid search and seizure.

36. In ***R v Rodgers*** [2006] 1 SCR 554 the Court noted that "the person authorising the search must be 'capable of acting judicially' in assessing in a neutral and impartial fashion whether a search is appropriate in the circumstances."

37. The Fourth Amendment to the United States Constitution exists "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals": ***Noem (Secretary, Department of Homeland Security) v Perdomo & Ors*** 606 US 1 (2025). In ***Riley v California***, 573 U.S. 373 (2014) the United States Supreme Court also squarely confronted the reasonableness of warrantless searches. The Court commenced by observing (at 5) that:

> As the text [to the Fourth Amendment] makes clear, "**the ultimate touchstone of the Fourth Amendment is 'reasonableness**.' " *Brigham City v. Stuart*, 547 U. S. 398, 403 (2006) . Our cases have determined that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . **reasonableness generally requires the obtaining of a judicial warrant**." *Vernonia School Dist. 47J v. Acton,* 515 U. S. 646, 653 (1995) . Such a warrant ensures that the inferences to support a search are "drawn by a **neutral and detached magistrate instead of being judged by the officer** engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U. S. 10, 14 (1948) .

38. Section 21 of the *Bill of Rights Act 1990* (NZ) provides that "everyone has a right against unreasonable search or seizure." New Zealand Courts have consistently affirmed the "warrant preference rule," and also observed that in some cases, whilst a warrantless search might be countenanced by statute (and thus in one sense legal), it will nonetheless still be unreasonable for the purposes of section 21 of the *Bill of Rights Act*: ***F v R*** [2010] NZCA 313 at [46]; ***R v Laugalis*** [1993] NZCA 551; 10 CRNZ 350; ***Smith v Police*** [2019] NZHC 2371.

39. When examining when intrusions into a person's private life will be compatible with Article 8 of the *European Convention on Human Rights* which protects against arbitrary interferences with privacy, the European Court of Human Rights noted in ***Camezind v Switerlan*** (1999) 28 EHRR 458 that domestic legislation which authorises searches must afford individuals with "adequate end effective safeguards against abuse" and that:

> Notwithstanding the margin of appreciation which the Court recognises the Contracting States have in this sphere, it must be particularly vigilant where, as in the present case, the authorities are empowered under national law to order and effect searches without a judicial warrant.

40. The same line of authority requiring judicial oversight over police searches and arrests (i.e. otherwise tortious conduct) is equally applicable to the additional forms of otherwise tortious conduct permitted by an FVSN which interferes with human rights. An FVSN will be arbitrary and unreasonable when made by a police officer in circumstances where it could, instead, and just as easily, have made by an impartial magistrate. In circumstances where there is an on-call duty magistrate available 24 hours a day and they can be contacted by phone or audiovisual link and material can easily be transmitted to them electronically, there is simply no justification for allowing police to authorise their own otherwise tortious conduct.

41. In the Bar Association's view, the FVSN scheme is clearly incompatible with the HRA. Having relatively junior police officers making orders which can severely impact upon the human rights of a person does not come close to being "demonstrably justified in a free and democratic society."

Alternative amendments

42. In the regrettable event that the government resolves to press ahead with the FVSN scheme, the Bar Association urges the following amendments to the Bill:

    i. **Duration of notice** – A FVSN should only be effective for 48 hours (or at most 72). The 14 day duration provided for by the Bill is excessive. Instead, the Bill should be amended to require that if a FVSN is made, the applicant police officer may apply to a magistrate for an interim family violence order within 48 (or at most 72) hours. If an application for an interim order is made, then the FVSN will remain in place until such time as the application for the interim order is heard. The Bar Association notes that an interim family violence order (which may be made *ex parte*), can last until the hearing of an application for final orders. If no application for an interim order is made to the court within 48 hours, then the FVSN would cease to operate.

    ii. **The threshold for administrative detention, its duration and place** – Proposed section 13C would create a most extraordinary power. In circumstances where there is no allegation of criminal offending, and a person has not been arrested on suspicion of committing an offence, a police officer would be able to deprive a person of their liberty in the furtherance of an administrative task incidental to a civil law process. Moreover, the detention would occur without any judicial approval or oversight.

    In order to ameliorate the potentially arbitrary draconian effect of this provision, the Bar Association urges that it be amended as follows:

    a. All of the matters provided at subsection 13C(1) be subject to a pre-condition that the police officer holds a reasonable belief of the matters (i.e. not just the matters at subsection 13C(1)(c));

    b. Subsection 13C(3) be amended such that the duration of the detention must be for the *shortest reasonable time*, and in any event not longer than 4 hours;

    c. A new subsection be inserted providing that the person is not to be detained in a police cell or caged vehicle unless there are exceptional circumstances justifying detention in such a place;

    d. A new subsection be inserted to provide that, during the period of their detention, the detained person be permitted to have access to food and water, and any mobile phone they own or are in possession of that was reasonably accessible to them immediately

prior to their detention, unless the police officer has reasonable grounds to believe it is necessary to restrict access to their mobile phone to prevent an immediate risk of serious harm to any person; and

e. A new subsection be inserted to provide that if a police officer removes a person from a place or premises as part of the detention, the police officer is obliged to return the person to the premises or place, or another reasonable premises or place nominated by the detained person.

iii. **Revocation or amendment of FVSN by police** – Proposed new section 13X provides that a police officer cannot revoke or amend a FVSN after it has been served on the respondent. This provision is absurd and suffers from legal and logical incoherence. It is inconsistent with section 180 of the *Legislation Act 2001* which provides that:

> *(1) Power given by a law to make a decision includes power to reverse or change the decision.*
>
> *(2) The power to reverse or change the decision is exercisable in the same way, and subject to the same conditions, as the power to make the decision.*

If a sergeant of police is to be trusted with the power to make orders which substantially intrude upon a person's rights and liberties, then it must follow that they should similarly be trusted with the power to amend or revoke their order if it comes to their attention that the basis on which they made the order was somehow wrong, based on inaccurate or incomplete information, or is otherwise no longer sustainable. Why should the respondent have to suffer the delay of going before a magistrate to have the matter rectified when the very person who made the order or condition agrees it should no longer stand and could remedy the situation more expeditiously?

Consider the following example: A sergeant includes, amongst others, person X as a person the respondent is prohibited from contacting or being in the presence of. The applicant police officer subsequently tells the sergeant that they made a mistake, and person X has nothing to do with the conduct in issue and should not feature in the FVSN. Why should the sergeant not be able to remove person X from the FVSN in this circumstance?

This provision should be amended such that that the person who makes a FVSN can amend or revoke it if the same criteria that a magistrate must be satisfied of to the amend or revoke an order exist.

43. We would be happy to elaborate on any of the issues discussed above.

ACT BAR ASSOCIATION

Yours faithfully,

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