Submission cover sheet

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

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Legal Aid ACT

The Committee Secretary
Standing Committee on Legal Affairs
Office of the ACT Legislative Assembly
GPO Box 1020, Canberra, ACT 2601

By email: LACommitteeLegal@parliament.act.gov.au

Dear Committee Secretary,

RE: INQUIRY INTO THE FAMILY, PERSONAL AND SEXUAL VIOLENCE LEGISLATION AMENDMENT BILL 2025

The Legal Aid Commission (ACT) welcomes the opportunity to make a submission to the Inquiry into the Family, Personal and Sexual Violence Legislation Amendment Bill 2025 ('the Inquiry'). I note that the Commission has been involved in several rounds of consultation during the preparation of the Bill. This submission replicates and expands on some of our previous comments where relevant.

About the Legal Aid Commission (ACT)

The Legal Aid Commission (ACT) ('the Commission') is an independent statutory authority established under the *Legal Aid Act 1977* (ACT). The Commission's function is to provide legal assistance to vulnerable members of the ACT community. The Commission's mission is to promote a just society in the ACT by:

- Ensuring that vulnerable and disadvantaged people receive the legal services they need to assert or defend their rights;
- Developing an improved community understanding of the law; and
- Seeking the reform of laws that adversely affect those we assist.

As you would know, the Commission undertakes significant work related to family, domestic and sexual violence (FDSV). This includes representing and advocating for the rights and interests of victim-survivors through our Early Intervention Legal Practice, and acting for alleged perpetrators through our Criminal Legal Practice. The comments in this submission have been developed in collaboration with both Practices and aim to balance protecting the safety of victim-survivors with preserving the rights of alleged offenders.

This submission addresses the following aspects of the Bill:

- Minor and technical amendments to the *Family Violence Act 2016* ('FVA'), *Personal Violence Act 2016* ('PVA'), and *Evidence (Miscellaneous Provisions) Act 1991* ('EMPA');
- Amendments to the EMPA regarding Protected Confidences;
- The proposed introduction of the Family Violence Safety Notices (FVSNs) scheme; and
- Consequential amendments to the *Bail Act 1992*.

Minor and technical amendments to the FVA, PVA and EMPA

The Commission is supportive of the proposed amendments to each of the three Acts.

In particular, we agree with the suggested amendments to ss 81F(2) and 81H(2) of the EMPA, which would seek to explicitly provide that audio copies of recorded statements made in relation to a family violence offence proceeding provided to an accused person must be returned. We reiterate the need for provisions to provide for instances where the audio copy has been lost, as often occurs. In our view, this may be achieved by including a further clause in the above sections providing that the defendant will return the audio copy to a nominated police station where it has not been lost. Further, the Commission notes that this proposal, in our view correctly, does not impose any criminal sanctions on any accused persons who do not return the audio copies.

Further, the Commission is supportive of the amendments to s 43(1)(b) of the FVA and s 35(1)(b) of the PVA which both clarify that a notice to return may be served via the substituted service scheme. We note that each Act currently provides that, if the Court chooses to hold a preliminary conference, it can order the application be served via the substituted service scheme where personal service is not practicable.[1] We agree that whilst personal service should be prioritised, the availability of the substituted service scheme is necessary in circumstances where personal service is not possible. Further, we consider that effort should be made to ensure the Court holds the respondent's full contact details if substituted service is to be pursued – in our experience, that is not always the case.

Amendments to the EMPA regarding Protected Confidences

The Commission is similarly supportive of the proposed amendments to the use of protected confidences as evidence under the EMPA.

The EMPA currently provides that protected confidences can only be disclosed in evidence submissions where the court has granted leave.[2] In determining whether to grant leave, a court must consider a range of factors which can be administratively burdensome, as illustrated by *R v*

[1] *Family Violence Act 2016* (ACT) s 70A; *Personal Violence Act 2016* (ACT) s 64A.
[2] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 79D(2).

NS [2016] ACTSC 36. In this context, the Commission considers that the proposed amendment may expedite this process, saving vital court time and resources.

The Commission is supportive of the proposed amendments which would serve to allow counselled persons to consent to their protected confidences being used as evidence in a civil proceeding. However, we are concerned that the amendment may create instances where clients have given consent to share their protected confidences without understanding the ramifications of such consent – particularly that the material will be shared with other parties to the matter. We note that this has been somewhat addressed by draft ss 79(1)(c), which provides that a court must be satisfied the counselled person is aware of the effect of the provision and has been given a reasonable opportunity to seek legal advice. However, in our view, this does not adequately mitigate this risk. The Committee should consider redrafting the amendment to create a process where lawyers are obligated to explain how documents are distributed, and that there is a possibility the material will be viewed by perpetrators, judges, juries, and legal staff.

Further, the Commission believes that the ability to give consent to share protected confidences should extend to criminal proceedings rather than being confined to civil proceedings as in the draft bill. Baker J's comments in *DPP v Sheridan (a pseudonym) (No 4),*[3] which prompted this amendment, were made directly in a criminal context. The Committee should consider widening the applicability of this amendment.

<u>The proposed introduction of the FVSNs scheme</u>

The Commission is broadly supportive of the introduction of the proposed FVSNs scheme. I note that this will provide police with another legislative approach to protecting victim-survivors of FDSV. Our comments regarding specific amendments are set out below.

Proposed s 13B – FVSNs prevailing where inconsistent with bail orders

The Commission is concerned about the proposed drafting of s 13B. In our view, all court orders including bail orders should prevail over an FVSN, considering they are issued by judicial officers. We consider that the current drafting of s 13B is unclear and may have concerning implications. It appears that there is an incentive to make the FVSN conditions inconsistent with any relevant bail orders, which would render the bail order unenforceable. In this context, the provision should be reconsidered and clarified to ensure that court orders – including bail orders – prevail over FVSNs to the extent of any inconsistency.

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[3] [2025] ACTSC 61.

Additionally, the Commission suggests that further consideration should be given as to how FVSNs will interact with parenting plans. We note that draft ss 13B(e) would prevent an FVSN from being inconsistent with any family law orders (including parenting orders), but the Bill does not currently address whether conditions on a FVSN or parenting plan would prevail in the event of an inconsistency.

We expect that, where there are children involved and a parenting plan in place, some conditions under an FVSN may conflict with those under the parenting plan: a FVSN may prohibit a respondent from being within a particular distance or from contacting a protected person, but such physical distance or prohibited contact may be impractical when it comes to transferring children or discussing their health or wellbeing in accordance with an existing parenting plan. The Commission believes that the Bill should be amended to provide legislative direction on this issue, rather than placing a burden on police officers to read, interpret and resolve inconsistencies when issuing FVSNs which would reduce their efficiency in protecting relevant persons. In our view, providing that FVSNs prevail over parenting plans in the event of any inconsistencies may be appropriate so long as there are adequate oversight mechanisms to provide for judicial review of a FVSN (please refer to our comments in relation to proposed s 13Y(3)).

Proposed s 13C – 4 hour detention period

The Commission agrees that there may be instances, where necessary, that respondents are removed to a separate location while a FVSN is sought. This removal allows the opportunity to effectively gather information, ask questions, and ascertain the opinion and thoughts of the affected person. We note that the suggested 4-hour limit is consistent with the current after-hours (AHO) framework, where compliance under the *Human Rights Act 2004* (ACT) is crucial and must be prioritised.

The Commission is concerned that the current composition of s 13C will unnecessarily and arbitrarily expand police detention powers. The Commission notes that s 212 of the *Crimes Act 1900* (ACT) already empowers police officers to protect and arrest suspected perpetrators in FDSV circumstances. However, we note that the Bill repeals Part 7 of the FVA which provides for after-hours orders. In this light, providing for a 4 hour detention period for FVSNs is appropriate where FVSNs seek to provide the protection after-hours orders currently provide for.

Proposed s 13E – Oral application for FVSN

The Commission considers that the ability to apply for a FVSN orally (where a written application is impracticable) is inappropriate in the circumstances where such an application is made to a senior police officer. In instances where applications have been made orally, there will be no record of the decision-making process available, nor will the decision maker's assessment of 'reasonable grounds' in issuing an FVSN be capable of review. This contrasts with an after-hours

FVO, where a written application or transcript can be made available to parties where an FVO is sought.

If this amendment proceeds in the final bill, the Commission believes there should be a requirement for body worn cameras to be activated when making the oral application. Not only would this avoid any unnecessary delay in seeking the FVSN that could prolong danger to the protected person, respondent and potentially detained person, but it would serve to ensure procedural fairness and ensure a record of the application is available.

Proposed s 13J – Issuing multiple FVSNs

The Commission is concerned that prohibiting issuing mutual FVSNs under s 13J ignores cycles of violence and the potential for a person to be both a victim and perpetrator of FDSV. In our view, the current construction of this amendment may create an arbitrary rise in orders against people who stereotypically may be offenders. If this section is included in the final draft bill, there will be a need for extensive training for police officers in cycles of violence and abuse to combat subconscious and inherent bias when considering and issuing FVSNs.

Proposed s 13L – Timeframe of FVSNs

The Commission notes that the proposed duration of a FVSN being 14 days aligns the ACT with other jurisdictions including Victoria.[4] In our experience, domestic violence incidents often result in hospital visits and recovery times for the protected person, which significantly inhibits their ability to prepare for the expiration of a FVSN or apply for further protection orders. A longer duration provides the protected person sufficient time to fully adjust to the situation and seek legal advice for further final orders. In our view, the respondent's ability to immediately apply for the notice's revocation further emphasises the need for a longer duration to meet the protected person's needs.

However, the Commission notes that a 14 day duration imposes significant restrictions on an alleged offender, especially where the order is not issued by a judicial officer and after-hour FVOs are currently only operative for 48 hours. We draw the Committee's attention to the least restrictive principle which informed the short timeframe for after-hour FVOs – at present, we are concerned that the proposed timeframe for FVSNs is not consistent with this same principle. Further consideration should, in our view, be given to modifying this timeframe to meet the protected person's needs whilst protecting the alleged offender's rights and aligning with the least restrictive principle.

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[4] *Family Violence Protection Act 2008* (Vic) ss 31(3)(b), as amended by *Family Violence Protection Amendment Act 2017* (Vic) ss 32(b).

Proposed s 13T – Respondent consenting to substituted service

In our view, the need for this section becomes questionable where detention powers are being sought to ensure personal service. This provision appears inconsistent with those for a FVO, where personal service is required and substituted service is only applicable after personal service has failed or is not reasonably practicable.[5] Should the provision remain rather than reading in the requirements of the Court Procedure Rules, the Commission believes that consent to substituted service should be recorded on body worn cameras. This would serve to ensure that adequate provision has been made for interpreters, interview friends, and other measures to ensure the respondent has understood what has been asked of them. Further, the current draft of s 13T should be amended to specify that a copy of the FVSN must be provided to the Registrar of the Magistrates Court.

Proposed s 13Y – Application to Magistrates Court to amend or revoke FVSN

The Commission considers that further amendments are required to ss 13Y(3). Currently, the Bill provides that the protected person, a senior police officer, or the respondent can apply to the Magistrates Court for amendment or revocation of the FVSN. Under s 13Y(3), the registrar of the Magistrates Court is only required to list such an application where a return date for the application is available before the FVSN expires. Where a return date is not available before the FVSN expires, ss 13(3)(b) specifies that the registrar must dismiss the application.

In our view, ss 13Y(3) should be amended to impose a requirement on the registrar to list an amendment or revocation application within 2 days unless the notice expires within that period. We note that this would mirror the listing requirement for interim FVO applications.[6] The Commission considers that a clear checks and balance system is essential considering the nature of FVSNs being issued by non-judicial officers. This is especially important where there is a risk of victim misidentification or untenable conditions, particularly for the CALD community and in same-sex relationships inherent under the proposed FVSN system, as we have noted below. These further amendments, in our view, should be prioritised.

Further, the Commission suggests that further consideration should be given to the practical process under which such applications will be made. In our view, the Court will need to introduce FSVN amendment forms, and provide clear information to applicants regarding how to access legal representation or advice in such circumstances.

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[5] *Family Violence Act 2016* (ACT) s 70A.
[6] *Family Violence Act 2016* (ACT) s 47.

Proposed ss 53, 54(2A), 54A – Applicant versus respondent not present at return of application

The Commission is concerned that the provisions between an applicant and respondent are inconsistent without an apparent basis. The amendments provide that where an applicant is not present at a first return, or where both parties were not present at the first return, the application cannot be decided. However, where a respondent is not present at the first return, the application can be made final. In our view, these provisions should be made consistent across both applicant and respondent, especially considering that no findings would have been made at this stage of proceedings. This consistency should either allow the application to be dismissed where either the applicant or neither party attends on the first return, or include the same leniency for respondents where they do not attend at the first return.

The Commission notes that these same issues arise in relation to the amendments sought to the PVA.

Proposed s 13T – Service of FVSNs

The Commission is supportive of the service arrangements provided for in Division 2A.5. In our view, FVSNs should always be served personally where possible. However, we recognise that electronic service can be beneficial in some circumstances, including the efficient use of police resources and expedited process of serving FVSNs. We note there are also not insignificant risks: respondents' contact details may be inaccurate, their access to both the internet and relevant technology may not be stable, and they may not monitor their email or text messages frequently. This could create delays in respondents being alerted to the relevant documents as well as the restrictions they impose.

Despite this, the Commission considers these concerns have been addressed by draft s 13T which provides that electronic communication can be utilised to serve FVSNs personally, where the respondent has agreed. This, in our view, provides an adequate oversight mechanism to address the above risks and ensure the respondent is aware of the notice.

Further broad comments

The Commission notes that there have been instances where the perpetrator of DFSV has mistakenly been identified as the primary victim, resulting in the victim-survivor being prosecuted. This, as studies have identified, is particularly common among Aboriginal and Torres Strait Islander women and people in same-sex relationships who report their experiences of DFSV to the police.[7] In this context, there is a need to ensure police can correctly identify victim-survivors and perpetrators of DFSV. To assist in this identification, the Commission supports the

[7] *Submission on the Domestic and Family Violence and Victims Legislation Amendment Bill 2025*, First Nations Advocates Against Family Violence, 5.

need for culturally safe training for police officers, rather than an explicit, legislative direction. It is important for decision makers to maintain discretion, so long as discretion is supported by sufficient training.

Consequential amendments to the *Bail Act 1992*

In our view, the proposed amendments to the *Bail Act 1992* (ACT) require further amendment and consideration. Regarding ss 26B(2), the Commission re-iterates our initial submission regarding court orders displacing the orders of non-judicial officers. Further, consideration of the FVSN should not be mandatory to this extent where it can create delays in a person having an application for bail heard. Finally, where such a stipulation is required by the judicial officer, some formal written notice of this must be available to the respondent to allow them a clear understanding of what conditions apply to them. The current composition of these amendments, in our view, create an unfair onus on the respondent to be aware of two sets of conditions upon their liberty and apply them in accordance with a decision of a judicial officer. This onus is particularly high for vulnerable persons.

Further, the Commission considers that ss 26A(2) requires further amendment to improve its clarity as the current drafting of this condition is unclear due to its reliance upon ss 26B(2).

Thank you for the opportunity to provide the Commission's views in relation to this Inquiry. Should you have any questions about our submission, please do not hesitate to contact me at

Yours faithfully,

[redacted]

Dr John Boersig
Chief Executive Officer
Legal Aid Commission (ACT)