

# Domestic and Family Violence Protection and Another Act Amendment Bill 2015

## Explanatory Notes

### Short title

The short title of the Bill is the Domestic and Family Violence Protection and Another Act Amendment Bill 2015.

### Policy objectives and the reasons for them

The objectives of the Bill are to:

1. ensure that, where there are conflicting allegations of domestic or family violence in civil applications for protection orders, courts identify and protect the person most in need of protection;
2. increase protections for victims of domestic and family violence and minimise disruption to their lives by requiring the court to consider imposing a condition excluding a perpetrator of domestic violence from the family home;
3. recognise the importance of victims of domestic violence being able to express their views and wishes in relation to decisions under the Act;
4. clarify that the use of body-worn cameras by police officers acting in the performance of their duties is lawful.

On 28 February 2015, the Special Taskforce on Domestic and Family Violence in Queensland (the Taskforce) released its report, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (the Taskforce Report).

#### Amendment of the *Domestic and Family Violence Protection Act 2012*

The Taskforce Report recommended three specific amendments to the *Domestic and Family Violence Protection Act 2012* (the DFVP Act). These were that amendments be made to:

- require courts to consider family law orders when making a domestic violence order and also consider concurrent cross applications at the same time and a later application and cross application or order (recommendation 99);
- require courts when making a domestic violence order to consider whether an order excluding the perpetrator from the home should be made, having regard to the wishes of the victim (recommendation 117).
- provide for victim impact statements to be introduced and for mandatory consideration by the courts in applications for protection orders (recommendation 129).

In addition, the Taskforce Report recommended an overarching review of the Act to ensure it provides a cohesive legislative framework that incorporates the reforms recommended by the Taskforce (recommendation 140). In making this recommendation, the Taskforce identified issues for consideration in the review. These included two minor amendments: allowing victims and police to appeal a court's decision not to make a temporary protection order; and

allowing temporary protection orders to be made to protect a person who is seeking to be added to a protection order.

The Queensland Government response accepted these recommendations. In particular, the Government committed to:

- amend the DFVP Act so that courts must consider dealing with cross applications at the same time;
- amend the DFVP Act to require a court when making a Domestic Violence Order to consider whether an order excluding the perpetrator from the home should be made, having regard to the wishes of the victim; and
- ensure that victims voices are heard in all domestic violence related legal processes.

#### Amendment of the *Police Powers and Responsibilities Act 2000*

Recommendation 131 of the Taskforce Report recommended that the Queensland Police Service (QPS) “develops and implements a strategy for increasing criminal prosecution of perpetrators of domestic and family violence through enhanced investigative and evidence-gathering methodologies”.

The Government accepted recommendation 131 and funded the roll-out of 300 body-worn cameras for police officers at the Gold Coast to assist in gathering evidence, including in relation to domestic and family violence.

The QPS currently has a number of body-worn cameras in use by frontline officers and the use of these is expanding rapidly. However, the *Police Powers and Responsibilities Act 2000* does not expressly authorise the use of body-worn cameras by police officers. Although the absence of such an express provision does not make the use of body-worn cameras by police officers unlawful, the proposed amendment to the *Police Powers and Responsibilities Act 2000* removes any doubt about the lawfulness of their use. This will be achieved by inserting a new provision into chapter 19, part 6 of the *Police Powers and Responsibilities Act 2000* to confirm that the use of body-worn cameras by police officers is lawful.

At present, monitoring, recording or listening to private conversations is regulated by the *Invasion of Privacy Act 1971*. Section 43 of the *Invasion of Privacy Act 1971* prohibits a person from using a listening device to overhear, record, monitor or listen to a private conversation. A body-worn camera could be considered to be a ‘listening device’ under this Act as it has the ability to record a private conversation. Section 43(2) of the *Invasion of Privacy Act 1971* provides a number of exceptions to this offence, such as under section 43(2)(a) where the person recording the conversation is a party to the conversation. The exceptions in this regard apply equally to police officers and other members of society.

Another exemption to the prohibition to record private conversations is provided for in section 43(2)(d) of the *Invasion of Privacy Act 1971*. This section exempts a police officer from the offence provision if the police officer is authorised to use the listening device under the provision of an Act. The amendment to the *Police Powers and Responsibilities Act 2000* provides an express authority for a police officer to use a body-worn camera for the purposes of section 43(2)(d) of the *Invasion of Privacy Act 1971*.

In the vast majority of police interactions with members of the public, police officers will not be engaging in private conversations. Additionally, in most instances where police officers are having a private conversation with a member of the public, the police officer will be a

party to the conversation and therefore would be able to rely upon the current exemption provided in section 43(2)(a) of the *Invasion of Privacy Act 1971* to record the conversation. However, there may be instances where an officer's body-worn camera inadvertently records a private conversation or records a private conversation to which the officer is not yet a party. On those occasions, the police officer would be unable to rely on the exemption in section 43(2)(a). The amendment will provide the necessary authority to invoke the exception outlined under section 43(2)(d) of the *Invasion of Privacy Act 1971* to ensure that the police officer does not commit an offence under the *Invasion of Privacy Act 1971*.

The amendment will not affect the *Evidence Act 1977*. The admissibility of any recordings made by police body-worn cameras will remain a matter to be considered by the relevant court in accordance with established common law and the provisions of the *Evidence Act 1977*.

Further, the amendment does not affect the use of other forms of recording equipment by police officers as it is limited in scope to body-worn cameras. The amendment also does not affect any covert policing powers or the use of surveillance devices by the QPS such as those found in Chapters 9 – 13 inclusive of the *Police Powers and Responsibilities Act 2000*. For example, Chapter 13 of the *Police Powers and Responsibilities Act 2000* provides for the issuing of covert surveillance warrants. A police officer would still be required to obtain a covert surveillance warrant in order to exercise powers in relation to the installation of a surveillance device and the remote monitoring and recording of images or sounds from a dwelling through this device, as this would typically not involve the use of a body-worn camera.

This amendment will not otherwise affect the ability a police officer has at common law, under the *Police Powers and Responsibilities Act 2000* or another Act to record images or sounds.

The amendment will provide certainty that the use of body-worn cameras by police officers acting in the performance of their duties is lawful. This will assist the QPS in gathering the best possible evidence in relation to matters being investigated including those involving domestic and family violence.

## **Achievement of policy objectives**

The Bill will achieve its objectives by amending the DFVP Act to:

- require a court, if it is aware of cross applications, to hear the cross applications together and determine the person most in need of protection, unless it is necessary to deal with the applications separately, in the interests of the safety, protection and wellbeing of an aggrieved;
- require the court to consider the imposition of an ouster condition to remove a perpetrator from the family home when making a protection order, taking into account the wishes of the aggrieved;
- introduce a principle that, to the extent it is appropriate and practicable, the views and wishes of people who fear or experience domestic violence should be sought before a decision is made under the Act; and
- make a small number of minor and technical changes to the Act to resolve anomalies and address operational issues — including the two recommended by the Taskforce.

The amendment of chapter 19, part 6 of the *Police Powers and Responsibilities Act 2000* achieves the policy objective of expressly outlining and providing clarity in relation to the lawfulness of police officers using body-worn cameras in the performance of their duties.

## **Alternative ways of achieving policy objectives**

The policy objectives are underpinned by the findings of the Taskforce Report. The Taskforce considered a range of options in delivering the objectives. The Taskforce also undertook extensive consultation in preparing its report. Informed by this thorough consultation process, the Taskforce ultimately determined that legislative reform represented the best way of achieving the policy objectives.

## **Estimated cost for government implementation**

Any implementation costs arising from initiatives to support the amendments to the DFVP Act will be met from existing agency resources. The future allocation of resources will be determined through normal budgetary processes.

It is not anticipated that the amendment to the *Police Powers and Responsibilities Act 2000* will incur any additional costs to the State Government.

## **Consistency with fundamental legislative principles**

The Bill is generally consistent with fundamental legislative principles. Potential breaches of fundamental legislative principles are addressed below.

**Legislation has sufficient regard to the rights and liberties of individuals (section 4(2) *Legislative Standards Act 1992*).**

Clause 10 – Mandatory consideration of ouster conditions excluding a perpetrator from the aggrieved’s usual place of residence

Clause 10 of the Bill amends section 57 of the DFVP Act to require the court to consider the imposition of an ouster condition to remove a perpetrator from the home when making an order, taking into account the wishes of the aggrieved.

The DFVP Act currently allows courts to impose an ouster condition excluding a respondent from specified places, including a property in which the respondent has a legal or equitable interest, or where the aggrieved and respondent live or have lived together. Courts can currently impose an ouster condition if the aggrieved applies for it or on their own initiative. The Bill strengthens the duty of courts by requiring them to consider the need to impose an ouster condition in all cases. This provision is potentially a departure from the principle that sufficient regard be given to the rights and liberties of individuals under section 4(2) of the *Legislative Standards Act 1992*.

This obligation is necessary to ensure that people who fear or experience domestic violence are effectively protected, disruption to their lives is minimised and perpetrators are held accountable for their actions. The existing limitations and safeguards in the DFVP Act will continue to apply to the making of ouster conditions.

In particular, courts must still consider the safety of the aggrieved and any children and the particular accommodation needs of the respondent before imposing such a condition. These considerations enable courts to balance the safety of the aggrieved and any children with any particular accommodation needs of the respondent. The requirement for courts to provide reasons ensures there is transparency and accountability in the application of the relevant considerations to the decision-making process.

**Legislation should not confer immunity from proceeding or prosecution without adequate justification – Legislative Standards Act 1992, section 4(3)(h).**

Clause 20 – Use of body-worn cameras

As outlined above, the new section 609A of the *Police Powers and Responsibilities Act 2000* provides police officers with an exemption to the general prohibition on recording private conversations under section 43(2)(d) of the *Invasion of Privacy Act 1971*. It may be argued that this amendment touches upon a fundamental legislative principle in that legislation should not confer immunity from proceedings or prosecution without adequate justification.

However, it is considered that adequate justification for the protection provided to police officers by section 609A of the *Police Powers and Responsibilities Act 2000* exists. The use of body-worn cameras by police is an important development in the investigation of offences and evidence gathering by police. Body-worn cameras may provide incontrovertible evidence to assist police protecting victims and bringing offenders to justice. The vast majority of private conversations being recorded by a body-worn camera will involve the police officer being a party to the conversation and therefore already having the right to record the conversation under the *Invasion of Privacy Act 1971*.

Notwithstanding this, it cannot be excluded that an officer's body-worn camera may inadvertently or unexpectedly record a conversation to which the officer is not a party at that time. It is considered reasonable that an officer should be protected from liability as a result of the body-worn camera being used in accordance with the authority provided by section 609A of the *Police Powers and Responsibilities Act 2000* where conversations are recorded in circumstances that would otherwise amount to an offence by the officer.

## **Consultation**

The Taskforce undertook extensive consultation in preparing its report. The consultation process included meeting with 367 difference groups of victims, service providers and community leaders. This consultation informed the Taskforce recommendations that are being implemented through this Bill.

No further consultation has occurred in relation to the amendment to the *Police Powers and Responsibilities Act 2000* as the amendment is simply designed to support the use of body-worn cameras.

The Department of Communities, Child Safety and Disability Services (DCCSDS) undertook targeted consultations with key legal stakeholders and specialist domestic and family violence service providers on the proposed amendments to the DFVP Act. The stakeholders

consulted included: Women's Legal Service; Legal Aid Queensland; Queensland Indigenous Family Violence Legal Service; DV Connect; Domestic Violence Court Assistance Network; Queensland Sexual Assault Services; Ending Violence Against Women Queensland; Brisbane Domestic Violence Service; Gold Coast Domestic Violence Prevention Centre; Services and Practitioners for the Elimination of Abuse Queensland; Immigrant Women Support Service; Australian Association of Social Workers; and Working Alongside People with Intellectual and Learning Disabilities.

## **Consistency with legislation of other jurisdictions**

### **Cross applications**

Other Australian jurisdictions have limited provisions in their domestic and family violence legislation to guide courts in relation to managing cross applications. The Bill provides guidance to courts to address the significant issues identified in the Taskforce Report in relation to cross applications.

### **Ouster conditions**

The amendments dealing with ouster conditions are similar to the Victorian approach where courts must consider including an ouster condition and, where appropriate, include one if the victim does not object. Under the Bill, victims' views will not determine the matter in Queensland and the safety, protection and wellbeing of people who fear or experience domestic violence will remain the paramount consideration.

## Notes on provisions

### Part 1 Preliminary

Clause 1 states that, when enacted, the Bill may be cited as the *Domestic and Family Violence Protection and Another Act Amendment Act 2015*.

Clause 2 provides that the Act, other than Part 3, commences on a day to be fixed by proclamation.

### Part 2 Amendment of the *Domestic and Family Violence Protection Act 2012*

Clause 3 provides that this Part amends the *Domestic and Family Violence Protection Act 2012* (the DFVP Act).

Clause 4 makes a minor edit to section 4(2)(a) for clarification purposes. It also includes the addition of a new principle at section 4(2)(b) which recognises the importance of victims of domestic violence being able to express their views and wishes in relation to decisions made under the Act which affect them.

Clause 5 inserts a new Division 1A ‘Cross applications’ into Part 3 of the DFVP Act after section 40. The clause replaces the existing section 41 with a new section 41 and inserts new sections 41A to 41F.

The new section 41 provides the following definitions for the division: ‘cross application’, ‘original application’, ‘original protection order’, and ‘variation application’. These terms are important to understand how the new sections 41A to 41F apply.

The new section 41A provides for the application of particular provisions in Division 1A.

Subsection (1) provides that sections 41B to 41E apply to the situation where there are two applications for a protection order and the same individuals are named as either an aggrieved or respondent in each application (cross applications).

Subsection (2) provides that sections 41B to 41E also apply to the situation where the same individuals have existing protection orders against each other, and each individual has made an application to the court to vary either of the current orders.

Subsection (3) provides that section 41B to 41E will also apply to a situation where a protection order currently exists and an application has been made to vary the order, and a new application for a protection order has been made involving the same individuals. In this situation subsection (4) provides that the timing of the variation application and the cross application will make no difference to the treatment of the applications.

The new section 41B provides that in circumstances where there are cross applications, a party to an original application, a cross application or a variation application, who is aware of

the other application, has an obligation to inform the relevant court of the other relevant application. This is to ensure that the court is aware of other current relevant applications. To remove any doubt, it is intended that a police officer who has made an application to the court is required to inform the court of the existence of any other relevant application the police officer is aware of.

The new section 41C provides a new framework for dealing with cross applications (including variation applications as defined in section 41) that are before the same court. The intention is where the court is aware of cross applications involving the same individuals it will be required to hear the applications together, unless hearing the cross applications separately is necessary for the safety, protection or wellbeing of an aggrieved person. If the court decides not to hear the applications together, the court is required to provide its reasons for this decision. Further, if the court adjourns the hearing of one or both of the applications, it is now required to consider whether to make a temporary protection order in relation to each application.

Under subsection (2)(b) the court will still have flexibility to issue a protection order in relation to both applications, but will be required to consider the principle under section 4(2)(e) of the DFVP Act. This principle provides that where there are conflicting allegations of domestic violence or indications that both persons in a relationship are committing acts of violence, including for their self-protection, the person who is most in need of protection should be identified. The specific requirement for the court to consider the principle in section 4(2)(e) does not exclude the application of the remainder of the principles under section 4 because under section 37(2)(a) of the DFVP Act, when considering whether it is necessary or desirable to protect the aggrieved from domestic violence, the court must always consider the principles in section 4.

The new clause 41D provides a new framework, similar to the framework under section 41C, for dealing with cross applications (including variation applications as defined in section 41) that are before different courts. The intention is to require a court that is aware of cross applications to consider whether to: hear the applications together; refer the application before it to the other court; or deal with the applications separately. In deciding how to deal with the applications, the court must consider whether it is necessary for the applications to be heard separately for the safety, protection and wellbeing of an aggrieved. If the court decides that the applications should be heard separately, the court must provide its reasons for this decision. If the court adjourns the hearing of the application before it, it must consider whether to make a temporary protection in relation to the application.

The new clause 41E applies in circumstances where there are cross applications (including variation applications as defined in section 41) and the aggrieved in the first application is not served with the subsequent application within a reasonable time period. The intention of this section is to require the court to adjourn the proceedings if it considers that the original applicant was not served with the subsequent application within a reasonable time period. However, this section allows the court to hear the relevant application if the original applicant agrees to it being heard either before the original application or with the subsequent application.

The new clause 41F provides a requirement for the court to consider any existing order and any associated court records when determining a subsequent application involving the same individuals. The intention is to ensure that the court has all available evidence, relating to any



existing protection orders in place, to inform the determination of the subsequent application. This is to assist the court in identifying the person who is most in need of protection. The section also places an obligation on any party who is aware of an existing order involving the same individuals to inform the court of the existing order.

Clause 6 amends section 48(2) to provide that a court can also make a temporary protection order to protect a person who is seeking a variation of a domestic violence order to be added as a named person.

Clause 7 replaces section 49 with a new section 49 that obliges a court to consider making a temporary protection order if it adjourns the hearing of a cross application or a variation application under the new section 41E. This provision requires that, in addition to being satisfied of the general matters under section 45 of the DFVP Act, the court must also be satisfied that it is necessary and desirable to make a temporary protection order to protect the aggrieved or another person named in the application pending a decision on the application.

Clause 8 amends section 57 to require a court making a domestic violence order to consider whether to impose an ouster condition excluding the respondent from the aggrieved person's usual place of residence. This consideration is mandatory in the making of both final and temporary protection orders.

Clause 9 amends the note in section 62(2) to update the section number referred to within it.

Clause 10 amends section 64 to remove subsection (1). This subsection is no longer necessary as a court will always be required to consider imposing an ouster condition related to the aggrieved's usual place of residence when making a domestic violence order. Section 64(1) outlines the matters which must be considered by the court in deciding whether to impose such an ouster condition when deciding an application for a domestic violence order or an application to vary a domestic violence order.

The clause also adds that in deciding whether to impose an ouster condition excluding the respondent from the aggrieved person's usual place of residence, the court must also consider any views or wishes expressed by the aggrieved about the imposition of that condition.

The clause also clarifies that the fact that the aggrieved does not express any views or wishes about such an ouster condition being imposed does not of itself give rise to an inference that the aggrieved does not have views or wishes about the condition being imposed.

Clause 11 amends section 164 to provide that a person who seeks a temporary protection order can appeal a court's refusal to make the order.

Clause 12 amends section 165 to replace references to 'clerk' with 'registrar' and require the appellant to file a copy of the notice of appeal in the court that made the decision that is being appealed.

Clause 13 amends section 166 to empower the appellate court to stay the operation of the decision being appealed in the same way as the court currently can.

Clause 14 inserts a new division heading 'Transitional provisions for Act No.5 of 2012'.

Clause 15 replaces references to ‘part’ with ‘division’ to reflect the insertion of the new division heading inserted by clause 14.

Clause 16 replaces a reference to ‘part’ with ‘division’ to reflect the insertion of the new division heading inserted by clause 14.

Clause 17 inserts a new division heading ‘Transitional provision for Domestic and Family Violence Protection and Another Act Amendment Act 2015’ and a new section 215 to provide that any changes made by the Act will apply to any applications made and not finalised prior to the date of commencement and any new applications following commencement.

Clause 18 amends the schedule dictionary to ensure that the current definition of ‘local Magistrates Court’ applies to the existing section 118.

It also clarifies the use of the terms ‘clerk’ and ‘registrar’ in the DFVP Act and introduces definitions to define new terms relating to the hearing of cross applications.

### **Part 3      Amendment of the *Police Powers and Responsibilities Act 2000***

Clause 19 provides that this part amends the *Police Powers and Responsibilities Act 2000*.

Clause 20 inserts a new section 609A (Use of body-worn cameras) into Chapter 19 Part 6 of the *Police Powers and Responsibilities Act 2000*. Subsection (1) provides that it is lawful for a police officer to use a body-worn camera to record either images or sounds in the performance of the officer’s duty.

This section may be relied upon by a police officer to provide an exemption to the general prohibition of recording private conversations under the *Invasion of Privacy Act 1971*. For example, a police officer responding to a domestic violence incident may overhear threats being made to the aggrieved party before the officer enters the house and becomes party to the conversation that is occurring. Should the officer’s body-worn camera record those images or sounds, section 609A of the *Police Powers and Responsibilities Act 2000* confirms that the recording is lawful, despite the fact the officer is not a party to the conversation.

Subsection (2) will ensure that the use of a body-worn camera may still be considered lawful even though the use of the body-worn camera occurs in circumstances that are inadvertent, unexpected or otherwise incidental to the performance of the officer’s duties. For example, an officer may inadvertently activate a body-worn camera resulting in a private conversation being accidentally recorded. Similarly, an officer may be engaging with one member of the community whilst the body-worn camera unexpectedly records images or sounds relating to an offence occurring in the distance. This section will ensure that use of the camera in this way is lawful, despite the fact that the use of the camera was inadvertent or unexpected or incidental to performance of the police officer’s duties.

Subsection (2) will also ensure that the use is not restricted to where the officer is performing a specific policing function. For example, a uniformed officer may be catching public transport to work and activate the body-worn camera to capture images of an offence

occurring. The subsection is intended to clarify that the use of the camera in this way is lawful.

Subsection (3) provides that this amendment does not affect the ability an officer has to record images or sounds under any other section of the *Police Powers and Responsibilities Act 2000*, any other Act or the common law. For example, section 325(6) of the *Police Powers and Responsibilities Act 2000* provides that nothing in Chapter 13 ‘Surveillance Device Warrants’ of that Act stops a police officer from using an optical surveillance device in a place where the presence of the officer is not an offence. Examples are provided in that section of an officer using an optical surveillance device (e.g. video camera or binoculars) to record or observe activities in a public place.

Similarly, this subsection does not affect the ability of a police officer to record conversations under the provisions of Chapter 4 of the *Invasion of Privacy Act 1971*. For example, section 43(2)(a) of that Act allows a police officer, or any other person, to record a private conversation to which they are a party.

Subsection (4) is a declaratory subsection which confirms that the use of a body-worn camera by a police officer, subject to subsection (1), will constitute an exemption under section 43(2)(d) of the *Invasion of Privacy Act 1971*.

Subsection (5) provides a definition of body-worn camera for the purposes of section 609A. A body-worn camera is restricted to a device that is worn on clothing or otherwise secured on a person and is designed to record images, or images and sounds. This definition allows a body-worn camera to be worn in several ways by a police officer. For example, a body-worn camera could be attached to an officer’s shirt or attached to the helmet of a motorcycle officer. However, section 609A of the *Police Powers and Responsibilities Act 2000* does not authorise the use of a body-worn camera where the officer is not present.