

Domestic and Family Violence Protection and Other Legislation Amendment Bill 2025

Submission No:	39
Submitted by:	Ellie Bedells
Publication:	Making the submission and your name public
Attachments:	See attachment
Submitter Comments:	

Submission regarding the *Domestic and Family Violence Protection and Other Legislation Amendment Bill 2025*

Ellie Bedells

I appreciate the opportunity to make this submission to the Education, Arts and Communities Committee for consideration of the *Domestic and Family Violence Protection and Other Legislation Amendment Bill 2025*.

I **oppose** the Bill because the proposed Police Protection Directions (PPD) legislation is **unconstitutional**. Proposed **Subdivision 4** violates the Commonwealth *Constitution* (hereafter the *Constitution*) by exceeding the *Burns v Corbett* limitation. It is beyond the Constitutional power of Queensland Parliament to pass this legislation.

- The police commissioner will be required to exercise **federal judicial power** when reviewing PPDs.

1 SUMMARY

- Issuing or reviewing a PPD is an exercise of judicial power.
- Reviewing a PPD involves considering family law orders, which are federal matters.
- Resolving an inconsistency between a State order (PPD) and a federal order (family law order) is another federal matter.
- Recommendation: that the Bill is not passed.

2 EXPLANATION

1. PPDs require the exercise of judicial power

A member of police issuing or reviewing a PPD will be exercising judicial power because PPD conditions can be punitive, the orders are long term (lasting for 12 months), they will be final as opposed to provisional, and they require the consideration of potentially complex matters when issuing them. Additionally, such orders have historically been issued only by the courts. Judicial power is broader than adjudication, as shown by Gageler J (now CJ) in *NAAJA* [at 103] regarding the "paperless arrest" scheme:

This is not an occasion to mince words. The form of executive detention authorised by Div 4AA is punitive. Because it is punitive, the imposition of the detention involves the

*exercise of a function which our constitutional tradition treats **as pertaining exclusively to the exercise of judicial power.***¹

Issuing a PPD with, for example, a condition that prevents a mother from having contact with her child for 12 months is a punitive exercise of judicial power.

2. A review of a PPD requires the consideration of federal matters

The police commissioner will be required at times to review a PPD under **Subdivision 4** if the police become aware of the existence of a family law order (an example of the ‘*circumstances*’ warranting review). Officers must not issue a PPD where a “*child of the respondent*” is believed to be the subject of a family law order (section 100D(2)(a)(i)), however the proposed legislation allows review by the police commissioner where an error has been made.

Section 100T states:

(1) This section applies in relation to a police protection direction if a police officer—

*(a) becomes aware of circumstances, or reasonably believes there are **circumstances, that were not, or may not have been, known or considered** by the issuing police officer when the direction was issued; and*

*(b) reasonably believes that the **circumstances may have affected the decision to issue, or the conditions imposed on, the direction**, if the circumstances had been known or considered by the issuing police officer.*

*(2) **The police officer must ask the police commissioner to review the police protection direction.***

Family law orders are **federal** matters. The police commissioner will be required at times to consider and resolve **inconsistencies** between the conditions of a State order (the PPD) and a federal order (the family law order).

Section 109 of the *Constitution* states:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Addressing the effect of section 109 on the operation of State orders in *P v P*, the plurality stated:

*The practical effect of that pro tanto invalidity of the State or Territory law is that orders made in the exercise of the Commonwealth jurisdiction will **prevail over the provisions***

¹ *North Australian Aboriginal Justice Agency Ltd v Northern Territory* [2015] HCA 41.

of the State or Territory law or orders made or acts done in the exercise of power or authority which the State or Territory law purportedly confers.²

Because of this, inconsistencies between the conditions of a PPD and a family law order need to be resolved else the PPD **will be invalid**, regardless of the no-invalidity clause in proposed section 100D(4)(b). The *Constitution*, under section 109, prevails over that clause in the State legislation.

3. Proposed Subdivision 4 is unconstitutional

It has been observed by others more knowledgeable than me that there would be no need for the Judicature if the Executive could absorb all its functions. This is why Chapter III of the *Constitution* carves out the jurisdiction of State and federal courts.

The review of a PPD to resolve an inconsistency with a family law order will require the exercising of State jurisdiction by police in one or more federal matters falling under s 76(ii) of the *Constitution*:

The Parliament may make laws conferring original jurisdiction on the High court in any matter—

- (i.) Arising under this Constitution, or involving its interpretation:*
- (ii.) Arising under any laws made by the Parliament.*

As explained in *Burns v Corbett*, only courts have jurisdiction to consider these matters:

*The provisions of Ch III exhaustively identify the possibilities for the authoritative adjudication of matters listed in ss 75 and 76. **Adjudication by an organ of State government other than the courts of the States is not included within those possibilities and is therefore excluded from them.***³

Clarifying this point, their Honours quoted *Boilermakers* [at 48]:

*The organs to which **federal judicial power** may be entrusted must be defined, the manner in which they may be constituted must be prescribed and the content of their jurisdiction ascertained. These very general considerations explain the provisions of Chap III of the Constitution.*⁴

The exercise of judicial power in federal matters is certainly reserved for the courts.

² *P v P* [1994] HCA 20; 181 CLR 583 (Mason CJ, Deane, Toohey and Gaudron JJ at [21]).

³ *Burns v Corbett* [2018] HCA 15; 265 CLR 304 (Kiefel CJ, Bell and Keane JJ at [3]).

⁴ *R v Kirby; Ex parte Boilermakers' Society of Australia* [1956] HCA 10.

3 CONCLUDING REMARKS

State police will be required to exercise State jurisdiction in federal matters⁵. Subdivision 4 of the proposed legislation is therefore **unconstitutional**. It is beyond the Constitutional power of Queensland Parliament to pass this legislation. If passed, this legislation will not be a valid law.

4 RECOMMENDATION

- That the Bill is **not passed** because it is unconstitutional owing to the requirement under **Subdivision 4** for a member of the Executive to exercise **federal judicial power**.

⁵ Anna Olijnyk and Stephen McDonald, 'The High Court's Decision in *Burns v Corbett*: Consequences, and Ways Forward, for State Tribunals' (2019) (10) *Australian Institute of Administrative Law Forum* 75.