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26 NOV 2021

Mr Peter Russo MP
Chair
Legal Affairs and Safety Committee
lasc@parliament.qld.gov.au

Dear Mr Russo

I refer to your letter dated 22 November 2021 regarding the Evidence and Other Legislation Amendment Bill 2021 (the Bill).

Please find **enclosed** a written briefing prepared by the Department of Justice and Attorney-General (DJAG) to assist the Legal Affairs and Safety Committee in its consideration of the Bill. The briefing includes relevant background information and details of the amendments.

Should the Committee Secretariat require further information, they may contact [redacted]

I trust this information is of assistance.

Yours sincerely

David Mackie
Director-General

Enc.

Parliamentary Committee briefing note
Evidence and Other Legislation Amendment Bill 2021

Overview and policy intent

The purpose of the Evidence and Other Legislation Amendment Bill 2021 (the Bill) is to implement amendments to:

- establish a statutory framework that allows protection against the compelled disclosure of the identity of journalists' confidential informants (known as 'shield laws');
- introduce a legislative framework to support a pilot enabling video recorded statements taken by trained police officers to be used as an adult victims' evidence-in-chief in domestic and family violence (DFV) related criminal proceedings;
- provide a specific process for viewing and examining the body of a deceased person in criminal proceedings to implement the Queensland Government's response to Recommendation 2 in the findings of the *Inquest into the disappearance and death of Daniel James Morcombe* (the Morcombe inquest findings);
- clarify the operation of computer warrants in relation to bail; and
- enable service as a magistrate in Toowoomba to constitute regional experience for the purpose of a transfer decision under the *Magistrates Act 1991* (Magistrates Act).

Shield laws

Background

While journalists generally attribute the source of information in their reporting as there can be adverse impacts on the credibility of the information if the reliability of the source cannot be assessed, at times they depend on confidential informants to access sensitive information to fulfil their role as facilitators of free communication.

Promising to keep the identity of an informant confidential is a long-standing practice in journalism, which is reflected in journalist codes of ethics and practice standards.

In Queensland, there is currently no privilege under the common law that allows journalists to refuse to reveal the identity of their confidential informants. A 'privilege' is essentially the right not to reveal information that would otherwise need to be disclosed. At common law, the only professional relationship attracting privilege is the lawyer-client relationship. The Queensland *Evidence Act 1977* (Evidence Act) expands or modifies the common law in limited circumstances, however there are currently no statutory provisions regarding privilege for journalists' confidential informants.

The Commonwealth and other Australian states and territories have introduced some form of statutory protections for journalist-informant relationships. The Commonwealth and all states and territories excluding Tasmania have a specific journalist privilege. The protections in Tasmania are under a broader framework for protection of professional confidential relationships. While there are some differences, the Evidence Acts in jurisdictions with a specific journalist privilege provide for a qualified privilege that creates a presumption that a journalist cannot be compelled to disclose the identity of a confidential informant. However, the presumption is rebuttable, and the court may order disclosure if the public interest in disclosure outweighs any likely adverse effects on the informant and the public interest in ensuring news media can access informants and communicate facts and opinions to the public. The Tasmanian professional confidential relationship protections do not create a presumption against compellability but rather provide that the court may give a direction that evidence not be given if it would

disclose relevant protected confidence information. A summary of key elements of the legislative frameworks in other jurisdictions is at **Attachment 1**.

The development of the statutory shield laws framework in the Bill has been informed by the outcomes of public consultation, the review of laws in other jurisdictions and an examination of recent case law. The framework has been developed specifically for Queensland however, consideration has been given to aligning the framework with the laws in other jurisdictions where appropriate for the Queensland context. Key elements of the legislation in other jurisdictions are discussed below.

Amendments in the Bill (Clause 33, 38, 39)

Clause 33 of the Bill amends the Evidence Act to establish a statutory framework to enable the protection of the identity of journalists' confidential informants.

The Bill creates a qualified journalist privilege that applies in circumstances where an informant has given information to a journalist with the expectation it may be published in a news medium, and the journalist promises the informant not to disclose their identity as the source of the information. There is no requirement that the promise must be given in a particular form; it may be oral or written. There is also no express requirement in relation to the time at which the promise must be given.

The qualified privilege creates a presumption that a journalist or relevant person is not compellable to answer a question or produce a document that would disclose the identity of their informant or enable their identity to be ascertained. The privilege is limited to the identity of the informant, and does not apply to all journalistic material that a journalist or relevant person may wish to keep confidential.

The Bill does not mandate the protection of the identity of the informant or regulate journalists' conduct. A journalist or relevant person is not obliged to claim journalist privilege and how each person chooses to utilise the protection offered by the framework may vary.

The Bill applies the privilege to any proceeding before a court of record (a 'relevant proceeding'), except proceedings under the *Crime and Corruption Act 2001* (CC Act), and search warrants. The following are established as courts of record in Queensland: Supreme Court of Queensland, District Court of Queensland, Magistrates Courts, Coroners Court of Queensland, Childrens Court of Queensland, Planning and Environment Court, Land Court, Land Appeal Court, Industrial Court, Queensland Industrial Relations Commission, Industrial Magistrates Court, Mental Health Court, and the Queensland Civil and Administrative Tribunal.

Key definitions (new sections 14R-14T of the Evidence Act)

Journalist

The definition of a journalist is central to the framework. Proposed new section 14R of the Evidence Act defines 'journalist' as a person engaged and active in gathering and assessing information about matters of public interest and preparing the information, or providing comment or opinion on or analysis of the information, for publication in a news medium. This broad function-based definition, which is focussed on whether the activities of a person are journalistic in nature rather than on their employment and organisational links, reflects the contemporary media environment and the shift away from traditional forms of news media. A function-based approach recognises the diverse nature of journalism, including the casualisation and hybridisation of journalism roles, and allows people such as freelancers, academics, bloggers, journalism students, and citizen journalists, as well as professional journalists employed in tradition roles with media organisations to be captured.

To provide some guidance to a court in determining whether a person is a journalist as defined, the Bill sets out some matters that may be considered, including for example whether the publisher of the news medium complies with a recognised professional standard or code of practice in publishing information in the news medium.

Jurisdictional comparison

The majority of jurisdictions with a specific journalist privilege define a journalist as a person engaged in the profession or occupation of journalism in connection with the publication of information in a news medium. The Commonwealth and Australian Capital Territory (ACT) have a broader definition, similar to that in the Bill, that applies to any person engaged and active in the publication of news who may be given information by an informant. The Northern Territory (NT) also has a broad definition capturing any person who deals with noteworthy information by preparing, or providing comment, opinion, or analysis of, information for a news medium.

Victoria is the only jurisdiction that prescribes matters for the court's consideration when determining whether or not a person is a journalist.

Relevant person

Proposed new section 14T of the Evidence Act defines a 'relevant person' for a journalist as: a journalist's current or previous employer; a person who engaged the journalist on a contract for services; or a person involved, or who has been involved, in the publication of a news medium and who works, or has worked, with the journalist in relation to publishing information in the news medium.

The extension of journalist privilege to relevant persons recognises that journalism and the resulting publication of information often involves a range of people, some of whom may become aware of the identity of the informant.

However, a relevant person may only claim the privilege if they became aware of the identity of the informant in the normal course of their work with the journalist or in association with a relevant proceeding (for example, if the journalist's employer becomes aware of the identity of the informant in preparation for a defamation proceeding). The restrictions on the ways in which a relevant person becomes aware of the informant's identity ensures unnecessary or frivolous disclosures are not captured.

Jurisdictional comparison

The majority of other Australian jurisdictions extend the protection of journalist privilege to a journalist's employer. South Australia (SA) also extends the protections to a person who engaged the journalist under a contract for services. Western Australia (WA) extends the privilege to a person for whom the journalist was working at the time of the promise.

News medium

Proposed new section 14T of the Evidence Act defines 'news medium' as a medium for the dissemination of news and observations on news to the public or a section of the public. The broad definition is platform-agnostic, with no requirement for news be published in any particular format which reflects the diverse nature of journalism, wide variety of contemporary media platforms and the evolving nature of the modes and methods for communicating news and observations on the news.

While the definition of news medium is broad, the requirement that it be for the dissemination of news and observations on the news ensures it is focussed on the protection on journalistic news related activities rather than the sharing of any information.

Whether a particular medium, such as a social media platform, is a news medium will be decided by the court on a case-by-case basis considering how the platform is used generally and how it is used by a particular person or organisation. For example, in the case of *Kumova v Davidson*[1] the Federal Court of Australia, applying the New South Wales (NSW) shield laws, concluded that Twitter may in some circumstances constitute a news medium, but did not constitute a news medium on the facts of that case

[1] [2021] FCA 753 at [65].

where the self-professed purpose of the relevant Twitter account was to 'make known cynical and cranky opinions' and the account 'publishes substantial amounts of material which can in no sense be described as news'.

Jurisdictional comparison

The majority of jurisdictions with a specific journalist privilege define news medium as a medium for the dissemination of news and observations on news to the public or a section of the public. The NT takes a slightly different approach defining news medium as any medium for the dissemination of information to the public or a section of the public.

Court of record proceedings (new sections 14U-14ZB of the Evidence Act)

Trials and hearings

Proposed new section 14W of the Evidence Act provides that a journalist or relevant person may claim the privilege when giving evidence in a trial or hearing before a court of record. The court hearing the proceeding must decide whether the claim is established, with the journalist or relevant person having the onus of proving that they are entitled to claim the privilege on the balance of probabilities.

If a claim of journalist privilege is established, a party to the proceeding may apply to the court for an order overriding the privilege and requiring the journalist or relevant person to give the evidence despite the privilege. The applicant has the onus of proving, on the balance of probabilities, the grounds for requiring the evidence to be given despite the privilege. The court may make the order if satisfied that the public interest in disclosing the informant's identity outweighs:

- the public interest in the communication of facts and opinions to the public by the news media and the news media's ability to access sources of facts; and
- any likely adverse effect of the disclosure on the informant or another person.

The court may have regard to the following matters listed in the Bill, as well as any other matter it considers relevant, when deciding whether or not to make an order that the journalist or relevant person must give the evidence despite their established claim of journalist privilege:

(a) whether the provided information is a matter of public interest;
(b) the nature and subject matter of the proceeding in a court of record;
(c) the importance of the provided information and the informant's identity to the relevant proceeding and the availability of other evidence in relation to the provided information;
(d) if the relevant proceeding is a criminal proceeding—the accused person's right to a fair hearing;
(e) any likely adverse effect, such as physical, emotional, social, or financial harm, of disclosing the informant's identity on the informant or another person and whether the effect can be mitigated;
(f) whether the informant's identity as the source is already in the public domain;
(g) any decision previously made by a court about a claim, objection or application in relation to the provided information;
(h) the way in which the information has been used or kept by the journalist, including whether the journalist verified the information, or used the information in a way that is fair and accurate and minimised any likely adverse effect on another person;
(i) whether the journalist complied with a recognised professional standard or code of practice in obtaining, using or receiving the provided information;
(j) whether obtaining, using, giving or receiving the information involved an offence or misconduct by the informant or journalist, or poses a risk to national security or the security of the State; and
(k) the extent to which making the order is likely to deter others from giving information to journalists.

The court may consider a written or oral statement made by the informant about any likely adverse effect of the disclosure on them or another person.

The court must state reasons for making, or refusing to make, an order requiring the journalist or relevant person to give evidence despite a successful claim for privilege. There is no requirement that the reasons must be given in a particular form; they may be oral or written.

If the court decides to make an order requiring the journalist or relevant person to give evidence despite a successful claim for privilege, it may impose any conditions it considers appropriate.

Jurisdictional comparison

The conditions that the court must be satisfied of to make an order that the journalist or relevant person must give the evidence despite the privilege is consistent with the jurisdictions that have a specific journalist privilege. However, WA and the NT are the only jurisdictions that provide factors for the court's consideration within their legislative framework.

WA is the only jurisdiction that expressly provides that the court must state reasons for giving or refusing to give a direction that despite journalist source privilege a must person adduce evidence that discloses the identity of an informant.

Disclosure requirements

To ensure protections are available at all stages of a relevant proceeding, proposed new section 14Z of the Evidence Act provides that a journalist or relevant person may object to complying with a disclosure requirement, such as a summons, subpoena, interrogatory, disclosure duty, or notice to produce a document, in relation to a proceeding before a court of record on the ground that it would disclose the identity of the informant as the source of the provided information or enable the identity of the informant to be ascertained.

Consistent with the test in relation to trials and hearings, the court may decide the objection to disclosure is established if satisfied the journalist or relevant person is entitled to claim journalist privilege in relation to the disclosure requirement and the public interest in disclosing the informant's identity does not outweigh:

- the public interest in the communication of facts and opinions to the public by the news media and the news media's ability to access sources of facts; and
- any likely adverse effect of the disclosure on the informant or another person.

The court may have regard to the same matters in deciding this balance test (as outlined above), and may consider a written or oral statement made by the informant about any likely adverse effect of the disclosure on them or another person.

The existing processes, including those under the *Uniform Civil Procedure Rules 1999* and *Criminal Practice Rules 1999*, for claiming a privilege in relation to, or objecting to, a disclosure requirement in a proceedings will operate alongside the journalist privilege provisions in the Bill. An example is at **Attachment 2**.

The Bill provides that a disclosure requirement does not include the prosecution's duty of disclosure in a criminal proceeding. In criminal proceedings there is an ongoing obligation for the prosecution to give an accused person full and early disclosure of all evidence the prosecution proposes to rely on, and all things in the prosecution's possession that would tend to help the case for the accused person (other than things that it would be unlawful or contrary to public interest to disclose). For the prosecution to know the identity of the informant or possess information that would allow their identity to be ascertained, the journalist must either have voluntarily disclosed the information or been compelled to do so through other means. In these circumstances, it would unfairly prejudice the accused person to deny them access to the information.

Jurisdictional comparison
The majority of jurisdictions extend the application of shield laws to court processes or orders that require the disclosure of information or a document.

Search warrants (new sections 14ZC-14ZG of the Evidence Act)

A journalist or relevant person may object to a document or thing being inspected, copied, seized etc as authorised under a search warrant on the ground that it contains information that would disclose the identity of a confidential informant or enable their identity to be ascertained.

While it is expected that objections would arise mostly in relation to search warrants executed by police officers, a journalist or relevant person may object in relation to a warrant executed by any authorised officer, including for example transport inspectors, local government investigators, conservation officers, and work health and safety inspectors.

The authorised officer executing the warrant may accept the objection and decide not to deal with that material, or they may advise the journalist or relevant person that they still wish to deal with material as authorised by the search warrant and ask them to agree to the material being immediately sealed in a container or stored in another secure way and held by the officer for safekeeping.

The authorised officer must tell the journalist that if they don't agree to the material being immediately sealed/secured that it will be dealt with as authorised by the warrant, and that if they do agree they may make an application to the Supreme Court to have their objection in relation to the material decided. An application must be made within seven days from the date the material is sealed/secured; if an application is not made within seven days the sealed/secured material may be dealt with as authorised by the warrant.

An application may be made to the Supreme Court by the journalist, relevant person, authorised officer, chief executive of the entity that appointed the authorised officer (such as the Police Commissioner), a delegate of that chief executive, or another person prescribed by regulation. While it is expected in the majority of cases that an application would be made by the journalist or relevant person, the Bill provides the flexibility for other specified persons to make an application if this is necessary in the circumstances.

If an application to the Supreme Court is made, the material must be delivered to the registrar of the Court for safe keeping until the application is decided by the court.

The Court hearing the application must first decide whether the grounds for the objection are established, that is whether or not the person objecting is in fact a journalist or relevant person and whether the objection relates to information that would disclose the identity of an informant. The person making the objection has the onus of proving, on the balance of probabilities, the grounds for the objection.

If the Court decides the grounds for the objection are not established the material may be dealt with as authorised by the warrant. If the Court decides the grounds for the objection are established, it must then decide whether or not the sealed/secured material may be dealt with as authorised under a warrant. The Court may order that the material may be dealt with as authorised under a warrant if satisfied the public interest in disclosing the informant's identity outweighs:

- any likely adverse effect of the disclosure on the informant or another person; and
- the public interest in the communication of facts and opinions to the public by the news media, including the news media's ability to access sources of facts.

The court may have regard to the matters listed in the Bill, as well as any other matter it considers relevant, when deciding whether or not to make an order that the material may be dealt with as authorised under a warrant despite their established objection. The matters listed in the Bill are similar to the matters listed for decisions in relation to proceedings before a court of record with the following differences:

- Matters (b), (c), (d) from the list in relation to proceedings before a court of record , set out below, are not listed as considerations in relation to search warrants as there is not a proceeding on foot in relation to the warrant:
  (b) the nature and subject matter of the proceeding in a court of record;
  (c) the importance of the provided information and the informant's identity to the relevant proceeding and the availability of other evidence in relation to the provided information; and
  (d) if the relevant proceeding is a criminal proceeding—the accused person's right to a fair hearing.
- The following matters are instead listed as matters that may be considered in relation to a decision about search warrants:
  - the nature of the investigation to which the warrant relates;
  - the importance of the information and the informant's identity to the investigation and the availability of other evidence in relation to the information; and
  - the purposes for which the information and the informant's identity are intended to be used.

The court may consider a written or oral statement made by the informant about any likely adverse effect of the disclosure on them or another person.

The court must state reasons for its decision.

An overview of the process in the Bill for search warrants is set out in **Attachment 3**.

Jurisdictional comparison

Victoria is only jurisdiction that expressly applies journalist privilege to search warrants in its Evidence Law.

Consent and preventing disclosure (section 14Q of the Evidence Act)

The Bill clarifies that shield laws do not prevent a person from disclosing that a person is the journalist's confidential informant for the provided information. The privilege does not prevent an informant from self-identifying or consenting to disclosure of their identity. A promise of confidentiality and journalist privilege also does not prevent a journalist, relevant person, or any other person from giving evidence or producing documents that disclose the identity of the informant or enable their identity to be ascertained with or without the consent of the informant.

Jurisdictional comparison

WA is the only jurisdiction that expressly provides that journalist privilege does not prevent evidence that discloses the identity of an informant being adduced with the informant's consent. However, in relation to professional confidential relationship privilege, Tasmania, NSW, and the ACT provide that the privilege does not prevent evidence being adduced with the confider's consent.

Safeguards

To safeguard against circumstances in which a party or witness giving evidence in a trial or hearing may not be aware of their rights in relation to journalist privilege, the Bill requires that the court must be satisfied a person who may have grounds for claiming journalist privilege or making an application to require the evidence to be given despite privilege, is aware of provisions and has had an opportunity to seek legal advice.

The Bill also provides safeguards to protect the privacy of the informant and other confidential information that may be disclosed when the court is considering an application or objection in relation to journalist privilege or if the court makes an order overriding the privilege.

The safeguards include providing that the court may:

- order that all persons (other than the accused in a criminal trial) and those specified by the court be excluded from the room;
- make orders restricting access to information or a document, such as limiting who may view a document or prohibiting publication of the information, if it would disclose the identity of the informant as the source or enable their identity to be ascertained, or if the court considers it is in the public interest;
- order that information or a document provided to the court is not required to be disclosed to another party to the application and is not to be publicly accessible if for example, disclosure would prejudice a pending prosecution or other proceeding or an investigation or intelligence operation of a law enforcement agency, such as the Queensland Police Service (QPS); and
- make any other orders it considers appropriate.

Implementation

The journalist privilege provisions in the Bill commence on a date to be set by proclamation to allow time for any necessary activities, such as developing or updating court forms and operational procedures, to be undertaken.

The journalist privilege related provisions in the Bill will apply prospectively to any relevant proceeding started after the commencement of the new laws, and any search warrant issued after the commencement of the new laws regardless of when the informant gave the information to the journalist.

Video recorded evidence

Background

Recommendation 133 of the *Not Now, Not Ever: Putting an end to domestic and family violence in Queensland* report (Not Now, Not Ever report) provided that the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence (the Attorney-General), in consultation with the Chief Magistrate and Chief Judge, implement alternative evidence procedures for victims of DFV providing evidence in related criminal matters to reduce the trauma of this experience, including legislative amendment and/or procedural changes and consideration be given to allowing for admissibility of any video recordings made at the time of initial police intervention.

The Delivery of Recommendations report for the Not Now, Not Ever report published in 2019 noted the following in relation to recommendation 133:

> *On 22 October 2015, the Evidence Act 1977 definition of 'special witness' was amended to include within that definition a person who is a victim of domestic violence and who also is to give evidence about the commission of an offence committed by the person who committed the domestic violence. In addition, amendments were made in 2015 to the Police Powers and Responsibilities Act 2000 to establish the lawfulness of the use of body-worn cameras to record images or sounds by police officers acting in performance of their duties. The Attorney-General has consulted key legal stakeholders on the use of evidence obtained via police worn body camera device admissible as a complainant's evidence-in-chief in domestic violence proceedings.*

Since the delivery of the recommendations, the Department of Justice and Attorney-General (DJAG) has continued to work with the QPS on the development of a VRE pilot as part of ongoing DFV service enhancements and efficiency measures beyond the closure of the Not Now, Not Ever report recommendations.

Current position in Queensland

There are currently no legislative provisions in Queensland specifically enabling the use of recorded interviews to be used as an adult complainant's evidence-in-chief, in proceedings for domestic violence related offending, unless the adult is a person with an impairment of the mind. While body-worn camera footage taken at the scene of an incident may, in some circumstances, be admissible as evidence in a criminal proceeding it is not admissible as a complainant's evidence-in-chief and an adult complainant is required to give direct oral testimony at a trial or hearing subject to the use of special measures available for special witnesses.

Special witness measures

The definition of 'special witness' in section 21A of the Evidence Act includes a person against whom domestic violence has been, or allegedly has been committed and who is to give evidence about the commission of an offence by the other person. As outlined above, amendments ensuring 'special witness' status for DFV victims came into effect in 2015 and were made in response to recommendation 133 of the Not Now, Not Ever Report. Section 21A of the Evidence Act applies to the giving of evidence in any proceeding.

If the complainant is a special witness, then a court may make one or more orders or directions (on their own initiative or upon application made by a party to a proceeding) that the witness be able to give evidence in an alternative way. The special measures available under section 21A of the Evidence Act include, for example:

- that the defendant be excluded from the room or obscured from the view of the special witness (s 21A(2)(a));
- that non-essential persons be excluded from the courtroom (s 21A(2)(b));
- that a person approved by the court be present to provide emotional support to the special witness (s 21A(2)(c));
- that the special witness give evidence from a remote witness room from which all persons other than those specified by the court are excluded (s 21A(2)(d)); and
- that the complainant's evidence-in-chief be pre-recorded (s 21A(2)(e)).

Where the making of a video-recording of the evidence of a special witness is ordered pursuant to subsection 21A(2)(e) of the Evidence Act, the court may further order, under section 21AA(2) of the Evidence Act, that all persons other than those specified by the court be excluded from the room in which the special witness is giving that evidence. However, any person entitled in the proceeding to examine or cross-examine the special witness shall be given reasonable opportunity to view any portion of the video-recording of the evidence relevant to the conduct of that examination or cross-examination.

In addition to measures for special witnesses, Part 2, Division 3 (Examination and cross-examination of witnesses) includes provisions relating to the examination and cross-examination of witnesses generally. For example, section 20 of the Evidence Act allows the court to disallow a question as to credit put to a witness in cross-examination, or inform the witness the question need not be answered, if the court considers an admission of the question's truth would not materially impair confidence in the reliability of the witness's evidence.. Under section 21 of the Evidence Act, the court may disallow improper questions put to a witness in cross-examination. An improper question is defined for the purposes of section 21 as a question that uses inappropriate language or is misleading, confusing, annoying, harassing, intimidating, offences, oppressive or repetitive.

Section 93A statements – by child or person with an impairment of the mind

Section 93A of the Evidence Act provides for the admissibility of statements made by children and persons with an impairment of the mind.[2] A person with an impairment of the mind is defined in Schedule 3 of the Evidence Act as a person with a disability that is attributable to an intellectual, psychiatric, cognitive or neurological impairment, or combination of these, which results in substantial reduction of the person's capacity for communication, social interaction or learning and the person needing support.

This section therefore allows an out-of-court statement (e.g. taken by video) taken by police to be admissible as the evidence-in-chief of children and people with an impairment of the mind. A 'statement' is broadly defined in Schedule 3 of the Evidence Act as including any representation of fact, whether made in words or otherwise and whether made by a person, computer or otherwise.

Section 93A does not deem admissible evidence that would otherwise be inadmissible, it merely allows for an exception to the hearsay rule, (which prevents out of court statements containing representations of fact from being admitted as evidence of the truth of the representations contained within the statement), and section 93A statements are subject to the ordinary discretions of the court to exclude evidence pursuant to sections 98 and 130 of the Evidence Act. Further, section 93A of the Evidence Act does not relieve the complainant from being available for cross-examination and section 93A contains a specific requirement that the maker of the statement is available to give evidence in the proceeding.

Section 93AA of the Evidence Act provides an offence for the unauthorised use, supply or publishing of section 93A criminal statements.

Section 590AOA of the Criminal Code provides for disclosure of a statement made under section 93A to an accused person. The section provides a number of conditions that must be satisfied before an accused or their legal representative can be given a copy of the statement. It provides for the statement to be returned within 14 days of the end of proceedings for the charge.

Jurisdictional comparison

A range of other states and territories have introduced legislation facilitating the use of police recorded interviews with complainants in certain proceedings for domestic violence offences as their evidence-in-chief, particularly in the context of increased use of body worn cameras by frontline officers.

Broadly, the provisions in the Bill align with those in other jurisdictions insofar as the provisions apply to criminal proceedings for domestic violence related offences, the policy intent of the schemes is also remove the hearsay rule of evidence so that out of court statements may be admissible as evidence. There are also similarities in the requirements for making recorded statements, including that statements need to be taken by a police officer as soon as practicable after the events constituting the alleged domestic violence offence occur, complainants provide their informed consent before making a statement and there are strict disclosure requirements which ensure that an accused person is made aware of the contents of a recorded statement but are otherwise prevented from being provided a copy of a recorded statement.

In terms of key differences with the Bill, not all jurisdictions require the wishes of the complainant to be taken into account when determining whether the recorded statement should be presented as their evidence-in-chief (see new section 103D of the Evidence Act). Also, not all other jurisdictions specify that the statement be taken by a police officer who has been trained for the purpose of taking recorded statements (see new section 103E of the Evidence Act).

[2] Schedule 3, Dictionary, to the Evidence Act defines 'person with an impairment of the mind' as a person with a disability that: is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and results in a substantial reduction of the person's capacity for communication, social interaction or learning and the person needing support.

Generally, other differences across jurisdictions tend to arise in the context of existing differences in criminal procedure and drafting practices.

A table outlining relevant provisions in other jurisdictions is at **Attachment 4.**

New South Wales

In 2015, NSW became the first Australian jurisdiction to implement domestic violence evidence-in-chief (DVEC) reforms under Part 4B of the *Criminal Procedure Act 1986* (NSW).

In September 2017, the NSW Bureau of Crime Statistics and Research released a quantitative evaluation of the NSW DVEC reforms based on court outcome data for domestic violence assaults.[3] This evaluation found limited evidence of a significant impact of the NSW DVEC reforms on the probability of a guilty plea on court outcomes.

In August 2019, a further study was published in relation to the NSW DVEC reforms[4] which included key findings that:

- the presence of a DVEC statement raises the overall probability of conviction by six percentage points (an increase from about 76% to 82%);
- when analysis is restricted to one in four cases that proceed to a defended hearing, the presence of a DVEC statements raises the probability of conviction by about 17 percentage points (an increase from about 70% to 80%); and
- no evidence was found to indicate that the presence of a DVEC statement has any impact on the probability of guilty pleas.

Victoria

In October 2018, a digitally recorded evidence-in-chief (DREC) trial providing for the admissibility of statements made by a complainant in domestic and family violence offence proceedings was established in Victoria (the Victorian scheme). The establishment of the Victorian trial was in response to recommendation 58 of the Victorian Royal Commission into Family Violence (VRCFV) (March 2016).

The VRCFV was concerned about the potential unintended consequences of body-worn cameras for victims and considered it imperative that body-worn cameras be subject to a rigorous pilot and evaluation, to allow their benefits to be assessed and potential risks to be identified and managed; and that the pilot should monitor whether video footage was used against victims, either undermining their credibility or being directly used against them. The VRCFV was also concerned about the potential use of video evidence to coerce victims into participating in prosecutions against their will, and that there could be sound reasons why victims do not want to prosecute the perpetrator.

The Victorian scheme commenced on 3 October 2018, under Chapter 8, Part 8.2, Division 7B of the *Criminal Procedure Act 2009* (Vic). A range of safeguards are built into the Victorian scheme for both victims and accused persons, including requirements that victims must be over the age of 18, provided informed consent before a Victoria Police member can take a recorded statement and that only police members who have completed the family violence body-worn camera training are permitted to capture recordings from victims of family violence. Before a recorded statement can be used as a complainant's evidence-in-chief the court must be satisfied that a range of conditions have been met including requirements for making a recorded statement and requirements for the service of a recorded statement.

[3] Yeong, S & Poynton, S 'Evaluation of the 2015 Domestic Violence Evidence-in-Chief (DVEC) reforms' (Crime and Justice Bulletin No 206, NSW Bureau of Crime Statistics and Research, September 2017).

[4] Yeong, S. & Poynton, S. 'Can Pre-Recorded Evidence Raise Conviction Rates in Cases of Domestic Violence?' (Life Course Centre Working Paper Series, Institute for Social Research, The University of Queensland, August 2019).

The Victorian scheme was commenced at the Epping and Ballarat police stations and in the following court locations: Ballarat Magistrates Court; Heidelberg Magistrates Court; and Melbourne Magistrates Court.

The Victorian scheme was subject to an independent evaluation by Monash University[5] (the Victorian evaluation), pursuant to a legislative requirement for review, with a data collection phase of 12 months (3 October 2018 to 2 October 2019). No DREC was played in court during the trial period.

The Victorian evaluation noted difficulties understanding the full impact of DRECs 'in the absence of outcomes data from courts, a broader range of victim representatives' views on victim experience, or direct participation in the evaluation from victims' and because of 'the relatively low volume of DRECs taken by police and none being played at court during the trial period'. The Victorian evaluation identified a 'clear need to conduct further research, evaluation and monitoring of the use of DRECs in family violence matters… to further investigate the impact on case outcomes and the experiences of family violence victims.'[6]

However, perspectives provided by operational police and police prosecutors included that DRECs taken in temporal proximity to a family violence incident provide 'powerful evidence' and 'accurately capture the harm done to victims', and revealed a general consensus amongst police interviewed and surveyed that use of DRECs… improves frontline responses to family violence'.[7]

Recommendation 1 of the Victorian evaluation stated:

> *To improve its operation and with a view to developing a best practice model, it is recommended that the DREC Family Violence Trial continues across its current locations until recommendation 2-11 are implemented. Extending the trial may also allow Victoria Police to better ascertain the firsthand impact of the use of DRECs in family violence matters on victims, perpetrators and case outcomes.*

A range of other recommendations were made, including in relation to Victoria Police infrastructure upgrade (Recommendation 2), additional resourcing for Victoria Police to address the DREC-associated station work (Recommendation 3), enhanced police training and practice guidance (Recommendation 4), Magistrates Court Victoria building improvements (Recommendation 6) and the need for ongoing research and evaluation (Recommendation 11).[8]

Amendments in the Bill (Clauses 13 – 31, 34 – 42, 46 – 51)

The amendments in the Bill support the Government's intention to develop a time-limited pilot enabling video recorded statements taken by police officers to be used as an adult victim's evidence-in-chief in DFV related criminal proceedings (VRE pilot). To this end the Bill amends the Evidence Act and other legislation, including the Criminal Code and *Justices Act 1886* (Justices Act), to establish a legislative framework for the giving of video recorded evidence-in-chief by DFV victims.

The Bill builds on the existing framework provided under section 93A of the Evidence Act for the use of recorded statements by children and persons with an impairment of the mind. It also adopts a range of safeguards based on the Victorian scheme.

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5 Jude McCulloch et al, 'Evaluation of the Victoria Police Digitally Recorded Evidence-in-Chief Family Violence Trial: Final Report' (Monash Gender and Family Violence Prevention Centre, Faculty of Arts, Monash University, 2019).

6 Ibid, 2.

7 Ibid, 2-3.

8 Ibid, 5-6.

Application and key definitions (new sections 103B and 103C of the Evidence Act)

Clause 37 of the Bill inserts new Part 6A (Recorded Statements) into the Evidence Act which applies to domestic violence proceedings.

Domestic violence proceeding

New section 103C of the Evidence Act defines 'domestic violence proceeding' as a criminal proceeding that relates to a charge for a domestic violence offence, whether or not the proceeding also relates to other offences, and where the type of criminal proceeding and the court and place hearing the proceeding are prescribed by regulation. It is via the operation of this definition that the specifics for the VRE pilot, including the court locations, will be established.

Domestic violence offence

A 'domestic violence offence' for the purposes of the definition of 'domestic violence proceeding' is defined (new section 103Bof the Evidence Act) as an offence against Part 7 (Offences) of the *Domestic and Family Violence Protection Act 2012* (DFVP Act), which includes a contravention of a domestic violence order or police protection notice.

New section 103B further defines a domestic violence offence as an offence against another Act committed by a person where the act or omission that constitutes the offence is also:

(i) domestic violence or associated domestic violence under the DFVP Act committed by the person; or
(ii) a contravention of section 177(2) of the DFVP Act (contravention of a domestic violence order).

This limb of the definition of 'domestic violence proceeding' mirrors the definition of 'domestic violence offence' under section 1 (Definitions) of the Criminal Code and therefore incorporates the concepts of 'domestic violence' and 'associated domestic violence' as defined under sections 8 and 9 the DFVP Act.

Use of recorded statements (new section 103D of the Evidence Act)

The Bill (new section 103D of the Evidence Act) allows for a complainant's evidence-in-chief in a domestic violence proceeding to be given, wholly or partly, as a recorded statement under new Part 6A. In determining whether or not to present the complainant's evidence-in-chief in the form of a recorded statement, section 103D requires the prosecution to take into account certain factors, including the wishes of the complainant and any evidence of intimidation of the complainant by the defendant. However, the prosecution retains discretion in determining whether or not to use a recorded statement in a given domestic violence proceeding.

Requirements for making recorded statements (new sections 103E and 103F of the Evidence Act)

Under the Bill (new section 103E of the Evidence Act), a recorded statement must be made as soon as practicable after the alleged domestic violence offence and taken by a trained police officer (defined as a person who has successfully completed a training course, approved by the police commissioner, for the purpose of taking recorded statements).

While it is contemplated that in practice recorded statements will usually be via a body-worn camera which is placed on a tripod to record the statement at the scene of the domestic violence incident, the provision is designed to enable a degree of flexibility depending on the particular circumstances.

New section 103E also ensures that technical breaches of these requirements do not affect the ability to take the recorded statement or the admissibility.

Informed consent

A key safeguard for making a recorded statement is that the recorded statement be made with the complainant's informed consent. The Bill (new section 103F of the Evidence Act) provides for when a recorded statement will be made with informed consent.

This involves the police officer taking the recorded statement informing the complainant of certain matters before the recorded statement is taken, namely:

- that the recorded statement may be presented as the complainant's evidence-in-chief;
- that even if the recorded statement is not ultimately presented as their evidence-in-chief, it may still be disclosed to, and used by, the accused person and other persons; and
- where the recorded statement is presented as the complainant's evidence-in-chief in a court, they may be required to attest to the truthfulness of the contents of their statement and also give further evidence (i.e. in the form of cross-examination by the accused person or their lawyer and re-examination by the prosecution).

Admissibility (new section 103H of the Evidence Act)

Before a recorded statement is admissible in a domestic violence proceeding as the complainant's evidence-in-chief a range of pre-requisites must be met. The Bill (new section 103H of the Evidence Act) requires that:

- the statement complies with the requirements for making a recorded statement in new section 103E(3) (i.e. that a recorded statement be made with a complainant's informed consent and include an acknowledgement or declaration by the complainant as to the truth of the statement and the complainant's knowledge that they may be prosecuted for making a false statement);
- the statement is in the form of a video recording;
- the statement is disclosed under new section 590AOAB of the Criminal Code; and
- at the hearing, the complainant attests to the truthfulness of the contents of the recorded statement, and is available for cross-examination and re-examination.

Despite the requirements for admissibility of recorded statements, new section 103H gives the court hearing the proceeding a discretion to admit a recorded statement in a range of circumstances, including under section 103H(3)(b) for an audio recording to be admitted where there are exceptional circumstances, for example where there may have been a rare technical failure in the recording of the statement, and the defendant would not be unfairly prejudiced.

Even where there has been full compliance with the requirements for admissibility, the court may still exclude the whole, or any part of, the content of a recorded statement and direct that it be edited accordingly. For example, the court may determine that the admission of certain visual footage contained in the recorded statement would result in unfairness to the accused. In this case the court could order that that the recorded statement be edited so that only the audio recording for that part of the recorded statement be admitted.

Admissibility in committal proceedings (new section 103I of the Evidence Act)

The Bill (new section 103I of the Evidence Act) contains specific provisions relating to the admissibility of recorded statements in a committal proceeding.

The starting point for conducting committal proceedings under section 110A of the Justices Act is that a written statement of a prosecution witness must be admitted as evidence without the witness being required to appear at the committal proceeding to give evidence unless a direction under section 83A(5AA) has been made. New section 103I operates to ensure that a transcript of a recorded statement may be admissible in the proceeding as if it were admitted as a written statement under section 110A of the Justices Act.

In order for a recorded statement to be played to the court as a complainant's evidence-in-chief the magistrate conducting the committal hearing must first have given a direction under section 83A(5AA) of the Justices Act requiring the complainant to attend before the court as a witness to give oral evidence. Where such a direction is made, the recorded statement will be able to be admitted as the complainant's evidence-in-chief and the complainant will not be required to personally attend.

However, where a transcript of a recorded statement has been tendered as a written statement under section 110A, it will still be open for a magistrate to issue a direction under section 83A(5AA) for the complainant to be made available for cross-examination on their statement or for the prosecution or defence to agree under section 110A for the complainant to be present and be cross-examined. Where cross-examination of the complainant is to occur, new section 103L clarifies that the limitation on cross-examination of committal witnesses contained in 110C of the Justices Act will apply. This section prevents cross-examination of the witness about an issue that is not relevant to the reasons given by the magistrate under the 83A(5AA) direction requiring the prosecution to call the witness, unless the magistrate is satisfied that there are substantial reasons why, in the interests of justice, the cross-examination should be allowed.

Amendment to section 93A of the Evidence Act

Consistent with the approach taken in relation to the admissibility of recorded statements in committal proceedings, clause 35 of the Bill also amends section 93A of the Evidence Act by inserting a clarifying provision to state that nothing in this section affects the application of sections 110A to 110C in the Justices Act. This amendment ensures that where the prosecution seeks to rely on a section 93A statement, the maker of such a statement may only be called as witness at a committal proceeding where a direction has been issued under section 83A(5AA) and that any cross-examination of the witness is subject to the limitation expressed under section 110C.

Prosecution disclosure (new section 590AOB of the Criminal Code)

Clause 21 of the Bill amends the Criminal Code to insert new section 590AOB dealing with disclosure of recorded statements (consistent with the approach under section 590AOA in relation to video and audio recordings under section 93A of the Evidence Act). The provision ensures that a copy of a recorded statement can never be given to the accused person.

While limiting the disclosure of the recorded statement is an important safeguard in protecting a complainant's right to privacy, particularly noting the sensitive nature of the content, the provision ensures that an accused person can always be made aware of the contents of a recorded statement whether or not they have a lawyer acting for them.

Under new section 590AOB of the Criminal Code the prosecution must give the accused person a written notice which describes the recorded statement and stating certain other information.

If the accused person has a lawyer acting for them, the notice must state that the prosecution will give the lawyer a copy of the recorded statement subject to particular conditions, including that the lawyer must not give the copy to the accused person.

If the accused does not have a lawyer, the notice must state the prosecution will not give them the recorded statement, that the prosecution will, on request, allow an appropriate person (as defined in the provision) to view the statement and must, on request, provide the accused person with a transcript of the recorded statement that is in the possession of the prosecution.

Offences (new sections 103Q and 103S of the Evidence Act)

New Part 6A of the Evidence Act includes new offences to deal with unauthorised possession, of, or dealing in, recorded statements or transcripts of recorded statements (new section 103Q of the Evidence Act) and publishing recorded statement or transcripts of recorded statements (new section 103S of the Evidence Act).

Exceptions to the offence are provided under new section 103Q(2):

(a) for a legitimate purpose related to a domestic violence proceeding or another proceeding (for example, this could disclosure of the recorded statement in accordance with new section 590AOB of the Criminal Code, noting new subsection 590AOB(8) of the Criminal Code declares that contravention of a notice under 590AOB(4) or a direction under 590AOB(6) is not done for a legitimate purpose); or
(b) if the person is required or permitted to do the thing under an employment-screening Act (the Bill makes amendments to the *Disability Services Act 2006* and the *Working with Children (Risk Management and Screening) Act 2000* in relation to the use of a transcript of a recorded statement in the context of employment-screening decisions under these Acts); or
(c) if the person is permitted to do the thing under new section 103R (Permitted use of transcript of recorded statement by employment screening applicant or applicant's lawyer) (new section 590AOB declares that for subsection (4)(d)(i) or (7)(b), the making a transcript of the contents of the recorded statement is not making a copy of the statement for new section 103Q(1)(c)).

Subsection (3) provides a qualification on the operation of subsection (2)(b) to ensure that a person acting under an employment-screening Act for the purpose of making an employment screening decision must only supply, or offer to supply, a summary of a transcript of a recorded statement to the employment-screening applicant. This qualification is consistent with the existing limitation in current section 93AA.

Offences relating to section 93A criminal statements

The Bill replaces the existing offence provision in section 93AA of the Evidence Act with new sections 93AA and 93AB and creates a new offence relating publication of section 93A criminal statements or transcripts is also created (new section 93AC) to clarify obligations and ensure alignment with the approach in relation to recorded statements.

Implementation

The VRE pilot provisions will commence on a day to be fixed by proclamation to allow time for implementation activities to occur, including for example, the recruitment of staff, the development of police procedures and procedures (supported by operational guidance and training) that reflect the legislative framework and best practice in trauma informed interviewing techniques, development of relevant court policies and procedures for handling matters that involve recorded statements (including processes for case listings and court allocations), and engagement with magistrates and legal service providers in the pilot locations.

The provisions in the Bill will operate to proceedings prospectively (i.e. to those proceedings started after commencement), but will apply in relation to recorded statements taken and offences that occurred prior to the commencement of the provisions.

Following passage of the Bill, a regulation will be developed under the definition of 'domestic violence proceeding' along with a proclamation setting the commencement date.

The Attorney-General provided further detail in relation to the Government's intentions for the pilot and stated in her explanatory speech on introduction of the Bill:

> *I cannot pre-empt any ultimate decisions in relation to the making of the regulation; however, I can inform members that consideration is being given to the operation of a 12-month pilot which will run simultaneously in two Magistrates Court locations: Ipswich and Southport. Further consultation will occur as part of the operationalisation of the pilot by the Queensland Police Service and Department of Justice and Attorney-General.*

Viewing and examination of a deceased person's body

Background

On 5 April 2019, the State Coroner delivered the Morcombe inquest findings. As part of his findings, the State Coroner made two recommendations under section 46(1) of the *Coroners Act 2003* (the Coroners Act) which enables a coroner to comment, wherever appropriate, on anything connected with the death that relates to public health or safety, the administration of justice or ways to prevent deaths from happening in similar circumstances in the future.

Recommendation 2 was that the Queensland Government amend the Criminal Code to ensure a time limit is imposed on the testing of human remains where the prosecution and defence fail to reach agreement on the identity of the deceased. The recommendationwas predicated on a lengthy delay between when Daniel's remains were found and were returned to his family for burial (in the context of a related criminal proceeding) after the accused, Mr Cowan, had instructed his lawyers that he no longer required the remains for testing. The State Coroner considered that where an accused wishes to prevent a burial or cremation for purposes of retesting, the appropriate course would be to seek a direction from a court under section 590AS of the Criminal Code.

Section 590AS provides for the viewing of things that are original evidence, other than sensitive evidence or a device statement under section 93A of the Evidence Act, that are disclosed to an accused person under section 590AH(2)(i) or 590AJ of the Criminal Code. The section provides for the viewing or examination of the thing by the prosecution on request or court by direction by an appropriate person (defined as the accused person, a lawyer acting for the accused or another person engaged by the accused person considered appropriate by the prosecution or court to view or examine the thing).

Under section 590AH(2)(h) of the Criminal Code the prosecution must also give a written notice describing any test or forensic procedure, including a test or forensic procedure that is not yet completed, on which the prosecution intends to rely at the proceeding.

The State Coroner noted in the Morcombe inquest findings that, while the court could impose appropriate time limits to enable testing to occur under section 590AS, it is possible that a family would experience further delays while the testing occurred and recommended an amendment to the Criminal Code to ensure a time limit is imposed on the testing of human remains in circumstances where the prosecution and defence fail to reach agreement on the identity of the deceased.

The State Coroner's recommendation raises emotive, sensitive and complex issues involving a tension between two very different processes.

Section 26 of the Coroners Act provides that a coroner must release the body for burial as soon as reasonably practicable after autopsy. However, a related criminal prosecution might proceed before the remains have been returned to the family.

Coroners provide impartial, independent advice as part of an inquisitorial process. The coronial system is not focussed on whether someone should be held civilly or criminally responsible for a death. In contrast, the court in a criminal proceeding has a fundamental obligation to safeguard the accused person's right to a fair trial, to avoid miscarriages of justice and to ensure proceedings are conducted in a manner consistent with procedural fairness and natural justice.

The Government agreed in principle to the State Coroner's recommendation that there should be a reasonable time limit imposed on the testing of human remains in criminal proceedings and that a deceased person' s remains should be returned to their family and loved ones as soon as possible, irrespective of whether there are related criminal proceedings on foot, particularly where the identity of a deceased person has been established with a high degree of certainty and is not in dispute. The Government gave a

commitment to undertake further analysis, research, and consultation about how best to implement the underlying intent of the recommendation noting the complexities involved.

The Government has undertaken consultation with key stakeholders and the judiciary seeking feedback about how best to implement the State Coroner's recommendation, including whether there are any other possible options to give effect to the underlying policy intent.

Having considered the results of consultation and human rights, DJAG commenced work on developing a model to implement the recommendation.

The amendments in the Bill implements the Government response to Recommendation 2 in the Morcombe inquest findings by seeking to strike a balance between the timely return of a victim's body to their family and an accused person's right to a fair trial.

Amendments in the Bill (Clauses 9-12)

The Bill amends Part 8, Chapter 62, Chapter division 3 of the Criminal Code which deals with procedures relating to prosecution disclosure.

The Bill inserts new section 590ASA to deal specifically with the procedures relating to viewing and examining the body of a deceased person by the defence. This new section applies where prosecution disclosure has been made under section 590AH(2)(i) (i.e. a written notice to the accused person describing any original evidence on which the prosecution intends to rely at the proceeding) or section 590AJ (Disclosure that must be made on request), including where the prosecution has given a copy or notice of anything in the possession of the prosecution that is relevant to the proceeding but on which the prosecution does not intend to rely at the proceeding.

A 'body' is defined by reference to the Coroners Act, which means a human body or part of a human body.

Directions under the new section 590ASA can be sought prior to the presentation of an indictment under section 590AA of the Criminal Code. Also, under section 41 of the Justices Act, the laws relating to prosecution disclosure under the Criminal Code apply to committal proceedings in the Magistrates Court. A direction may be made in the Magistrates Court about disclosure under section 83A of the Justices Act.

Viewing or examination allowed by the prosecution

Under new section 590ASA of the Criminal Code the prosecution may, on request, allow an accused person's lawyer if they are legally represented, or the accused person themself if they are not legally represented (a 'permitted person'), to view but not examine the body for the purpose of the proceeding under the supervision of the prosecution and subject to any conditions the prosecution considers appropriate to protect the integrity of the body and to ensure that the release of the body for burial under section 26 of the Coroners Act is not unnecessarily delayed.

The prosecution may also allow a person engaged by the accused person other than their lawyer to view or examine the body if the prosecution considers it is appropriate for the person to view or examine the body (an 'appropriate person'). This approach recognises that certain persons, such as forensic pathologists, have the necessary skills and qualifications appropriate to examine the deceased person's body. The viewing or examination would, similar to viewing by a permitted person, be subject to supervision by the prosecution and any conditions the prosecution considers appropriate.

Viewing or examination directed by the court

Under new section 590ASA of the Criminal Code the court may also direct the prosecution to allow a permitted person to view, or an appropriate person to view or examine, the body for the purposes of the relevant proceeding subject to the conditions the court considers necessary to protect the integrity of the

body and ensure release of the body for burial under section 26 of the Coroners Act is not unnecessarily delayed. However, the court may make the direction only if satisfied that the terms of the direction can ensure the protection of the integrity of the body and the release of the body is not unnecessarily delayed.

Implementation

Amendments to the Criminal Code in relation to the viewing and examination of a deceased person's body will commence on assent and do not involve significant implementation activities to support their operationalisation. DJAG will work, where necessary, with the Coroners Court of Queensland and other relevant agencies to support implementation of the amendments.

Computer warrants

Background

The Justices Act authorises the use of computer warrants and the procedures for creating, storing, and otherwise managing warrants electronically. Under these provisions, a warrant may be created in the form of computer stored information under procedures prescribed by, or approved under, a regulation. The aim of computer warrants is to reduce the handling of warrants in the form of written documents. Under section 68 of the Justices Act, the creation of a computer warrant by a person under the approved procedures has the same effect as the issue of the same type of warrant under the person's hand.

The prescribed or approved procedures in relation to computer warrants only apply to the types of warrants prescribed by regulation. The following types of warrants are currently prescribed:

- a warrant issued under the Justices Act;
- a warrant issued under the Bail Act;
- a warrant of commitment issued under the *Penalties and Sentences Act 1992*;
- an arrest warrant issued under the *Police Powers and Responsibilities Act 2000*; and
- a warrant issued under the *State Penalties Enforcement Act 1999*.

Recent information technology enhancements have placed a stronger emphasis on using these provisions to electronically transfer warrants between the Queensland Courts and the QPS (known as the eWarrants scheme).

Section 68 of the Justices Act provides that the creation of a computer warrant by a person under the approved procedures has the same effect as the issue of the same type of warrant under the person's hand and that a requirement under an Act that a warrant be issued by a person, issued under a person's hand, or signed by a person, is taken to be complied with if the person creates the warrant as a computer warrant. However, the implementation of the eWarrants scheme has raised a potential ambiguity in the operation of computer warrants for the purposes of section 33 of the *Bail Act 1980* (Bail Act) as this section requires consideration of the signature of the person who issued the warrant.

Under section 33 of the Bail Act, a defendant who fails to surrender into custody in accordance with their bail undertaking and who is apprehended under a warrant issued in relation to that failure (pursuant to section 28 or 28A), commits an offence. In a proceeding for the offence:

- production to the court of the warrant issued for the defendant' s apprehension is evidence and, in the absence of evidence to the contrary, conclusive evidence of the undertaking and of the failure to surrender into custody and that the issue of the warrant was duly authorised by the decision or order of the court that issued the warrant; and
- judicial notice shall be taken of the signature of the person who issued the warrant and that that person was duly authorised to issue the warrant.

Amendments in the Bill (Clauses 3-7)

The Bill amends section 33 of the Bail Act to provide that a judicial officer does not need to consider the signature of the person who issued a warrant if the warrant is a computer warrant.

Related transitional and validating provisions also provide clarity in relation to part-heard and finalised proceedings. The amended section 33 will apply to proceedings for offences of failing to surrender into custody in accordance with their bail undertaking that start after the commencement of the provisions and all proceedings started before the commencement but not decided at the time of the commencement. For proceedings decided before commencement, it is clarified that a proceeding for the offence and any order made is not invalid merely because the court hearing the proceeding did not take judicial notice of the signature of the person who issued the computer warrant in accordance with unamended section 33.

Implementation

The amendments relating to computer warrants will commence on assent and do not require any significant implementation work. The 'eWarrants scheme' introduced efficiencies by enabling the removal of the majority of paper-based warrants thereby expediting warrant processes. The amendments in the Bill support the effective operation of the scheme.

Magistrates' regional service

Background

Section 21 of the Magistrates Act provides that the advisory committee, in conjunction with the Chief Magistrate, must make a transfer policy to guide decisions about which magistrates are to constitute Magistrates Courts at particular places. The transfer policy must set out the procedures to be used and the matters to be considered for the purposes of transfer recommendations and transfer decisions. The transfer policy must also provide that regard is to be had to a magistrate's transfer history. It must also reflect the following principles:

- magistrates are expected to serve in regional areas;
- generally a magistrate is to constitute a Magistrates Court at a place for a period of 2-5 years;
- generally expressions of interest are to be called, before making a decision about which magistrate is to constitute a Magistrates Court at a particular place;
- if no expressions of interest are received, subject to regard being had to a magistrate's transfer history, magistrates without prescribed regional experience are to be considered for constituting a Magistrates Court at a place in regional Queensland before magistrates with prescribed regional experience;
- a magistrate is to be consulted before a decision is made about where they are to constitute a Magistrates Court;
- a magistrate's personal circumstances are to be taken into account before a decision is made about where they are to constitute a Magistrates Court.

Regional Queensland is defined in section 21(6) as that part of Queensland outside the Beenleigh, Brisbane, Caboolture, Cleveland, Gold Coast, Ipswich, Maroochydore, Redcliffe and Toowoomba Magistrates Courts districts.

The Chief Magistrate requested amendments to the Magistrates Act to enable service as a magistrate in Toowoomba to be counted as regional experience for the purpose of a transfer decision under section 21. The distance of Toowoomba from Brisbane makes it unsustainable for a Brisbane-based magistrate to travel there on a daily basis.

Amendments in the Bill (Clauses 33-35)

The Bill amends the Magistrates Act to include Toowoomba in the part of Queensland that is defined as Regional Queensland, enabling service as a magistrate in Toowoomba to constitute regional service for the purpose of a transfer decision.

Related transitional provisions provide that service as a magistrate in Toowoomba prior to the commencement of the provisions in the Bill constitutes regional service.

Implementation

Amendments in the Bill regarding magistrates' regional service will commence on assent and do not require any significant implementation work to support their operationalisation. The amendments are not expected to present any significant additional administrative or capital costs for government.

Stakeholder consultation

The amendments in the Bill to establish a statutory framework to enable the protection of the identity of journalists' confidential informants were informed by public consultation, guided by the discussion paper entitled: *Shielding confidential sources: balancing the public' s right to know and the court' s need to know*. Feedback was received from a range of stakeholders including media organisations, legal stakeholders, academics, and individual community members, through responses to an online survey and written submissions.

As outlined above, targeted consultation was undertaken on Recommendation 2 in the Morcombe inquest findings and the video recorded evidence related recommendation in the Not Now, Not Ever report to inform the development of amendments in the Bill.

Targeted consultation during drafting of the Bill was also undertaken with legal, media and other interested stakeholders.

Feedback received during this process was taken into account in finalising the Bill.

The Chief Justice of Queensland, Chief Judge of the District Court of Queensland, Chief Magistrate, State Coroner, President of the Childrens Court, President of the Land Court, President of the Industrial Court, President of the Mental Health Court, and President of the Queensland Civil and Administrative Tribunal were also consulted during the drafting of aspects of the Bill and their comments taken into account in finalising the Bill.

Fundamental legislative principles

Potential breaches of the fundamental legislative principles (FLPs) raised by the amendments are considered justified. The FLP issues and justifications for the potential breaches are outlined in detail on pages 11-15 of the Explanatory Notes to the Bill.

Human rights impacts

The amendments are considered to be compatible with human rights on the basis that the Bill limits human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the *Human Rights Act 2019*. The human rights issues and justifications are outlined in detail in the Statement of Compatibility for the Bill.

Attachment 1

Shield laws - Comparison of key elements in legislative frameworks in Australian jurisdictions[9]

Evidence law – key shield law provisions

Commonwealth	New South Wales	ACT	Victoria	Northern Territory	South Australia	Western Australia	Tasmania
Evidence Act 1995	*Evidence Act 1995*	*Evidence Act 2011*	*Evidence Act 2008*	*Evidence (National Uniform Legislation) Act 2011*	*Evidence Act 1929*	*Evidence Act 1906*	*Evidence Act 2001*
Key definitions							

Journalist means a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium.	***Journalist*** means a person engaged in the profession or occupation of journalism in connection with the publication of information in a news medium.	***Journalist*** means a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium.	***Journalist*** means a person engaged in the profession or occupation of journalism in connection with the publication of information, comment, opinion or analysis in a news medium.
			In determining if a person is engaged in the profession or occupation of journalism regard must be had to whether:
			• a significant proportion of their professional activity involves:
			  ○ collecting and preparing information with the character of news; or
			  ○ commenting or providing opinion or analysis of news for a news medium;
			• information, having the character of news, collected and prepared by the person is regularly published in a news medium;
			• comments, opinion or analysis of news or current affairs is regularly published in a news medium;
			• the person/publisher must comply with recognised journalistic or media professional standards or codes of practice.
				Journalist means a person who:
				• obtains new or noteworthy information about matters of public interest; and
				• deals with the information by:
				  ○ preparing the information for a news medium; or
				  ○ providing comment, opinion or analysis of the information for a news medium.
					Journalist means a person engaged in the profession or occupation of journalism in connection with the publication of information in a news medium.	***Journalist*** means a person engaged in the profession or occupation of journalism in connection with the publication of information in a news medium.	N/A
							(Tasmania has a professional confidential relationship privilege rather than specific protection for journalists)

--	--	--	--	--	***Prescribed person*** means: • an employer of the journalist; • a person who engaged the journalist under a contract for services; or • a person prescribed by regulation.	--	--
Informant means a person who gives information to a journalist in the normal course of the journalist's work in the expectation the information may be published in a news medium.	***Informant*** means a person who gives information to a journalist in the normal course of the journalist's work in the expectation the information may be published in a news medium.	***Informant*** means a person who gives information to a journalist in the normal course of the journalist's work in the expectation the information may be published in a news medium.	***Informant*** means a person who gives information to a journalist in the normal course of the journalist's work in the expectation the information may be published in a news medium.	***Informant*** means a person who provides new or noteworthy information to a journalist for use in a news medium.	***Informant*** means a person who gives information to a journalist in the normal course of the journalist's work.	***Informant*** means a person who gives information to a journalist in the normal course of the journalist's work in the expectation the information may be published in a news medium.	***Protected confider*** means a person who made a protected confidence.
News medium means any medium for the dissemination to	***News medium*** means a medium for the dissemination to the	***News medium*** means a medium for the dissemination to the	***News medium*** means a medium for the dissemination to the	***News medium*** means any medium for the dissemination of	***News medium*** means any medium for the dissemination to	***News medium*** means a medium for the dissemination to the	--

[9] Current as at 25 November 2021. Jurisdictional comparisons considers key elements of the core legislative instrument in other jurisdictions and may not address elements of other legislative instruments or practical considerations.

Commonwealth	New South Wales	ACT	Victoria	Northern Territory	South Australia	Western Australia	Tasmania
the public or a section of the public of news and observations on news.	public or a section of the public of news and observations on news.	public or a section of the public of news and observations on news.	public or a section of the public of news and observations on news.	information to the public or a section of the public.	the public, or a section of the public, of news and observations on news.	public or a section of the public of news and observations on news.	
Privilege/protection							
If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor their employer is compellable to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be ascertained.	If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor their employer is compellable to give evidence that would disclose the identity of the informant or enable that identity to be ascertained.	If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor their employer is compellable to answer any question or produce any document that would disclose the informant's identity or enable that identity to be ascertained.	If a journalist, in the course of the journalist's work, has promised an informant not to disclose the informant's identity, neither the journalist nor their employer is compellable to give evidence that would disclose the identity of the informant or enable that identity to be ascertained.	If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor their employer is compellable to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be ascertained. Despite any provision to the contrary in the Act or in any other Act, journalist privilege applies to all proceedings before the court or a judicial entity (Civil and Administrative Tribunal), irrespective of whether the judicial entity is required to apply the rules or laws of evidence.	Despite any other provision of the Evidence Act or any other Act or law, if, in the course of proceedings, a person satisfies the court that the: • person is a journalist, or a prescribed person; and • journalist has been given information by an informant; and • informant gave the information to the journalist in the expectation it may be published in a news medium; and • informant reasonably expected their identity would be kept confidential; then the person does not incur any criminal or civil liability for failing or refusing to answer any question, or to produce any document or other material, that may disclose the identity of the informant.	If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor a person for whom the journalist was working at the time of the promise is compellable to give evidence that would disclose the identity of the informant or enable that identity to be ascertained (identifying evidence). The protection provisions apply to a person acting judicially in any proceeding even if the law by which the person has authority to hear, receive, and examine evidence provides that this Act does not apply to the proceeding. A person acting judicially means any person having, in Western Australia, by law or by consent of parties, authority to hear, receive, and examine evidence.	The court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose a protected confidence, the contents of a document recording a protected confidence, or protected identity information.
Overriding the privilege							
The court may on the application of a party order that journalist privilege is not to apply. The court may order that journalist privilege is not to apply if it is satisfied that, having regard to the issues to be determined in that proceeding, the public interest in the disclosure of evidence of the identity of the informant outweighs: • any likely adverse effect of the disclosure on the informant or any other person; and • the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.	The court may on the application of a party order that journalist privilege is not to apply. The court may order that journalist privilege is not to apply if it is satisfied that, having regard to the issues to be determined in the proceeding, the public interest in the disclosure of the identity of the informant outweighs— • any likely adverse effect of the disclosure on the informant or any other person, and • the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.	The court may on the application of a party order that journalist privilege is not to apply. The court may order that journalist privilege is not to apply if it is satisfied that, having regard to the issues to be decided in the proceeding, the public interest in the disclosure of the informant's identity outweighs— • any likely adverse effect of the disclosure on the informant or anyone else; and • the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the news media's ability to access sources of facts.	The court may on the application of a party order that journalist privilege is not to apply. The court may order that journalist privilege is not to apply if it is satisfied that, having regard to the issues to be determined in the proceeding, the public interest in the disclosure of the identity of the informant outweighs— • any likely adverse effect of the disclosure on the informant or any other person; and • the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.	The court or judicial entity may on the application of a party order that journalist privilege is not to apply. The court or a judicial entity may order that journalist privilege is not to apply if it is satisfied that, having regard to the issues to be determined in that proceeding, the public interest in the identity of the informant outweighs: • any likely adverse effect of the disclosure on the informant or any other person; and • the public interest in the communication of facts and opinion to the public and, accordingly also, in the ability of journalists to access sources of information. Without limiting the matters that may be taken into account by the court or judicial entity, it must take into account: • whether the information provided by the informant is a matter of public interest; and • how the journalist used the	The court may order that journalist privilege does not apply on the application of a party to the proceedings, or on its own motion if: • all parties to the proceedings are not legally represented; or • the court does not make orders on application by parties The court may order that journalist privilege does not apply to, or in relation to, a person if it is satisfied that, having regard to the circumstances of the case, the public interest in disclosing the identity of the informant outweighs: • any likely adverse effect of disclosure on the informant or other person; and • the public interest relating to the communication of information by the news media generally; and • the need of the news media to be able to access information held by potential informants.	A person acting judicially may direct a person to give identifying evidence. Despite journalist privilege, a person acting judicially may direct a person to give identifying evidence if satisfied that, having regard to the issues to be determined in the proceeding, the public interest in disclosure of the identity outweighs: • any likely adverse effect of disclosure on the informant or other person; and • the public interest in the communication of facts and opinions to the public by news media and, accordingly also, in the ability of the news media to access sources of facts. Without limiting the matters a person acting judicially may have regard to, they must have regard to: • the probative value of the evidence; • the importance of the	The court may give a direction: • on its own initiative; or • on the application of the protected confider or confidant (whether or not either is a party). The court must give such a direction if it is satisfied: • it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced; and • the nature and extent of the harm outweighs the desirability of the evidence being given. Without limiting the matters that the court may take into account, it must take into account: • the probative value of the evidence; • the importance of the evidence; • the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding;

Commonwealth	New South Wales	ACT	Victoria	Northern Territory	South Australia	Western Australia	Tasmania
				information provided by the informant, including whether the journalist: ○ verified the information before using the information (if reasonably practicable); ○ used the information in a manner that minimised undue harm to any person; and ○ used the information in a fair and accurate manner. This section applies even if an Act provides that the rules or laws of evidence do not apply or that a judicial entity is not bound by the rules or laws of evidence; or that a person is not excused from answering any question or producing any document or other thing on the ground of privilege or any other ground		evidence; • the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding; • the availability of any other evidence concerning the matters to which the evidence relates; • the likely effect of the evidence, including the likelihood of harm, and the nature and extent of harm that would be caused to the informant or any other person; • the means available to the person acting judicially to limit the harm or extent of the harm likely to be caused if the evidence is given; • the likely effect of the evidence in relation to: ○ a prosecution that has commenced but not finalised; ○ investigations into whether an offence has been committed; • whether the substance of the evidence has already been disclosed by the informant or any other person; • the risk to national security or to the security of the State; • whether there was misconduct on the part of the informant or journalist in relation to obtaining, using, giving or receiving information.	• the availability of any other evidence concerning the matters to which the protected information relates; • the likely effect of adducing evidence of the protected information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider; • the means available to the court to limit the harm or extent of the harm that is likely to be caused if evidence of the protected information is disclosed; • if the proceeding is a criminal proceeding, whether the party seeking to adduce evidence is a defendant or the prosecutor; • whether the substance of the evidence has already been disclosed by the protected confider or any other person; • the public interest in preserving the confidentiality of protected information.
Conditions/ancillary orders							
An order may be made subject to such terms and conditions (if any) as the court thinks fit.	An order may be made subject to such terms and conditions (if any) as the court thinks fit.	An order may be made subject to the conditions (if any) the court thinks fit.	An order may be made subject to such terms and conditions (if any) as the court thinks fit.	An order may be made subject to any conditions the court or judicial entity thinks fit.	The court may make any ancillary order the court thinks appropriate.	Without limiting any action a person acting judicially may take to limit possible harm, or extent of harm, likely to be caused evidence, the person acting judicially may: • order all or part of the evidence be heard in camera; and • make orders relating to suppressing publication of all or part of the evidence as necessary to protect the informant's safety and welfare and are in the interests of justice.	Without limiting any action the court may take to limit possible harm, or extent of harm, likely to be caused by disclosure of protected information, the court may: • order all or part of the evidence be heard in camera; and • make orders relating to suppressing publication of all or part of the evidence given before the court as necessary to protect the safety and welfare of the protected confider.
Giving reasons							
--	--	--	--	--	--	A person acting judicially must state the person's reasons for	The court must state its reasons for giving or refusing to give a

Commonwealth	New South Wales	ACT	Victoria	Northern Territory	South Australia	Western Australia	Tasmania
						giving or refusing to give a direction.	direction.
Disclosure by consent							
--	--	--	--	--	--	The protection provisions do not prevent the adducing of evidence with the informant's consent.	The protection of confidential information does not prevent the adducing of evidence with the consent of the protected confider.
Transitional arrangements							
Privilege applies in relation to a protected confidence made before or after commencement. Privilege does not apply in relation to a proceeding the hearing of which began before commencement.	Privilege extends to information given by an informant before the commencement of this Division. Privilege does not apply in relation to a proceeding the hearing of which began before the commencement. Privilege does not apply to a disclosure requirement made before the commencement.	Privilege extends to information given by an informant before the commencement. Privilege does not apply in relation to a proceeding the hearing of which began before the commencement. Privilege does not apply to a disclosure requirement made before the commencement.	Privilege applies to any proceeding that began on or after commencement. In a proceeding that began before commencement privilege applied to the part of the proceeding that occurs on or after commencement other than any hearing in a proceeding that began before commencement and continued after commencement or was adjourned until commencement.	Privilege applies to information given by an informant before commencement. Privilege does not apply in relation to a proceeding commenced before commencement.	Privilege applies to any proceedings before a court commenced before or after the commencement.	Privilege does not apply in relation to a proceeding the hearing of which began before the commencement. Privilege applies to information given by an informant whether given before or after the commencement.	Protection does not apply in relation to a proceeding the hearing of which began before the commencement. Protection applies in relation to a protected confidence whether made before or after the commencement.

Evidence law – general provisions relevant to shield laws

Commonwealth	New South Wales	Australian Capital Territory	Victoria	Northern Territory	South Australia	Western Australia	Tasmania
Evidence Act 1995	*Evidence Act 1995*	*Evidence Act 2011*	*Evidence Act 2008*	*Evidence (National Uniform Legislation) Act 2011*	*Evidence Act 1929*	*Evidence Act 1906*	*Evidence Act 2001*
Application of evidence law							
This Act applies to all proceedings in a federal court, including: • proceedings relating to bail; • interlocutory proceedings or proceedings of a similar kind; • proceedings heard in chambers; • proceedings relating to sentencing, if the law of evidence applies in the proceeding.	This Act applies to all proceedings in a NSW court including: • proceedings relating to bail; • interlocutory proceedings or proceedings of a similar kind; • proceedings heard in chambers; • proceedings relating to sentencing, if the law of evidence applies in the proceeding.	This Act applies to all proceedings in an ACT court including: • proceedings relating to bail; • interlocutory proceedings or proceedings of a similar kind; • proceedings heard in chambers; • proceedings relating to sentencing, if the law of evidence applies in the proceeding.	This Act applies to all proceedings in a Victorian court including: • proceedings relating to bail; • interlocutory proceedings or proceedings of a similar kind; • proceedings heard in chambers; • proceedings relating to sentencing, if the law of evidence applies in the proceeding.	This Act applies to all proceedings in a Territory court including: • proceedings relating to bail; • interlocutory proceedings or proceedings of a similar kind; • proceedings heard in chambers; • proceedings relating to sentencing, if the law of evidence applies in the proceeding.	The provisions of the Act, unless an intention to the contrary is expressed, appears or is implied by the context: • apply to every proceeding before any court whatever; and • are in addition to, and not in derogation of, any rules of evidence, or power, right, or duty in relation to procedure or evidence, whether at common law, or provided for by any law, at any time, in force in the State.	All the provisions of this Act, except where the contrary intention appears, shall apply to every legal proceeding.	This Act applies to all proceedings in a Tasmanian court including: • proceedings relating to bail; • interlocutory proceedings or proceedings of a similar kind; • proceedings heard in chambers; • proceedings relating to sentencing, if the law of evidence applies in the proceeding.
Federal court means the High Court or other court created by Parliament (other than the Supreme Court of a Territory) and includes a person or body (other than a court or magistrate of a State or Territory) that, in performing a function or exercising a power under a Commonwealth law is required to apply the laws of evidence. *The explanatory notes state that journalist privilege does not apply during the investigatory*	NSW court means the Supreme Court or any other court created by Parliament, and includes any person or body (other than a court) that, in exercising a function under the law of the State, is required to apply the laws of evidence.	ACT court means the Supreme Court or Magistrates Court, and includes an entity that, in exercising a function under a territory law, is required to apply the laws of evidence.	Victorian court means the Supreme Court or any other court created by Parliament, and includes any person or body (other than a court) that, in exercising a function under the law of the State, is required to apply the laws of evidence.	Territory court means the Supreme Court or any other court created by a law of the Territory, any person or body (other than a court) that, in exercising a function under the law of the Territory, is required to apply the laws of evidence.	Court includes a tribunal, authority or person invested by law with judicial or quasi-judicial powers, or with authority to make any inquiry or to receive evidence.	Legal proceeding includes any action, trial, inquiry, cause, or matter, whether civil or criminal, in which evidence is or may be given, and includes an arbitration.	Tasmanian court means the Supreme Court or any other court created by Parliament, and includes any person or body (other than a court) that, in exercising a function under the law of the State, is required to apply the laws of evidence.

Commonwealth	New South Wales	Australian Capital Territory	Victoria	Northern Territory	South Australia	Western Australia	Tasmania
stages of the justice system or in other non-curial contexts.							
Privileges and disclosure requirements							
If in response to a disclosure requirement a person claims they are not compellable to answer any question or produce any document that is privileged, a party that seeks disclosure pursuant to a disclosure requirement may apply to the court for an order that the privilege does not apply in relation to the information or document. A disclosure requirement means a court process or order that requires the disclosure of information or a document and includes: • summons/subpoena to produce documents or give evidence; • pre-trial discovery; • non-party discovery; • interrogatories; • a notice to produce; • a request to another party to produce a document. *The explanatory notes state that journalist privilege does not apply during the investigatory stages of the justice system or in other non-curial contexts.*	If a person is required by a disclosure requirement to give information or produce a document that is privileged and the person objects, the court must determine the objection by applying the relevant privilege provisions with any necessary modifications as if the objection were an objection to the giving or adducing of evidence. A disclosure requirement means a court process or order that requires the disclosure of information or a document and includes: • summons/subpoena to produce documents or give evidence; • pre-trial discovery; • non-party discovery; • interrogatories; • a notice to produce; • a request to another party to produce a document.	If a person is required by a disclosure requirement to give information or produce a document that is privileged and the person objects, the court must decide the objection by applying the relevant privilege provisions with any necessary modification as if the objection were an objection to the giving or adducing of evidence. A disclosure requirement means a court process or order that requires the disclosure of information or a document and includes: • summons/subpoena to produce documents or give evidence; • pre-trial discovery; • non-party discovery; • interrogatories; • a notice to produce; • a request to another party to produce a document.	If a person is required by a disclosure requirement to give information or produce a document that is privileged and the person objects, the court must determine the objection by applying the relevant privilege provisions with any necessary modifications as if the objection were an objection to the giving or adducing of evidence. A disclosure requirement means a court process or order that requires the disclosure of information or a document and includes: • summons/subpoena to produce documents or give evidence; • pre-trial discovery; • non-party discovery; • interrogatories; • a notice to produce; • a request to another party to produce a document; • a search warrant. *The explanatory notes state that the privileges are not extended to non-curial contexts.*	If a person is required by a disclosure requirement to give information or produce a document that is privileged and the person objects, the court must determine the objection by applying the relevant privilege provisions with any necessary modifications as if the objection were an objection to the giving or adducing of evidence. A disclosure requirement means a court process or order that requires the disclosure of information or a document and includes: • summons/subpoena to produce documents or give evidence; • pre-trial discovery; • non-party discovery; • interrogatories; • a notice to produce; • a request to another party to produce a document.	--	--	If a person is required by a disclosure requirement to give information or produce a document that is privileged and the person objects, the court must determine the objection by applying the relevant privilege provisions with any necessary modifications as if the objection were an objection to the giving or adducing of evidence. A disclosure requirement means a court process or order that requires the disclosure of information or a document and includes: • summons/subpoena to produce documents or give evidence; • pre-trial discovery; • non-party discovery; • interrogatories; • a notice to produce; • a request to another party to produce a document.
Court to inform of rights regarding privileges							
If it appears to the court that a witness or a party may have grounds for making an application or objection in relation to a privilege the court must satisfy itself that the witness or party is aware of the effect of that provision.	If it appears to the court that a witness or a party may have grounds for making an application or objection in relation to a privilege the court must satisfy itself that the witness or party is aware of the effect of that provision.	If it appears to the court that a witness or party may have grounds for making an application or objection in relation to a privilege the court must satisfy itself the witness or party is aware of the effect of the provision.	If it appears to the court that a witness or a party may have grounds for making an application or objection in relation to a privilege the court must satisfy itself that the witness or party is aware of the effect of that provision.	If it appears to the court that a witness or a party may have grounds for making an application or objection in relation to a privilege the court must satisfy itself that the witness or party is aware of the effect of that provision.	--	--	If it appears to the court that a witness or a party may have grounds for making an application or objection in relation to a, the court must satisfy itself that the witness or party is aware of the effect of that provision.

Attachment 2

Shield laws – Example: objecting to a disclosure requirement (interrogatories)

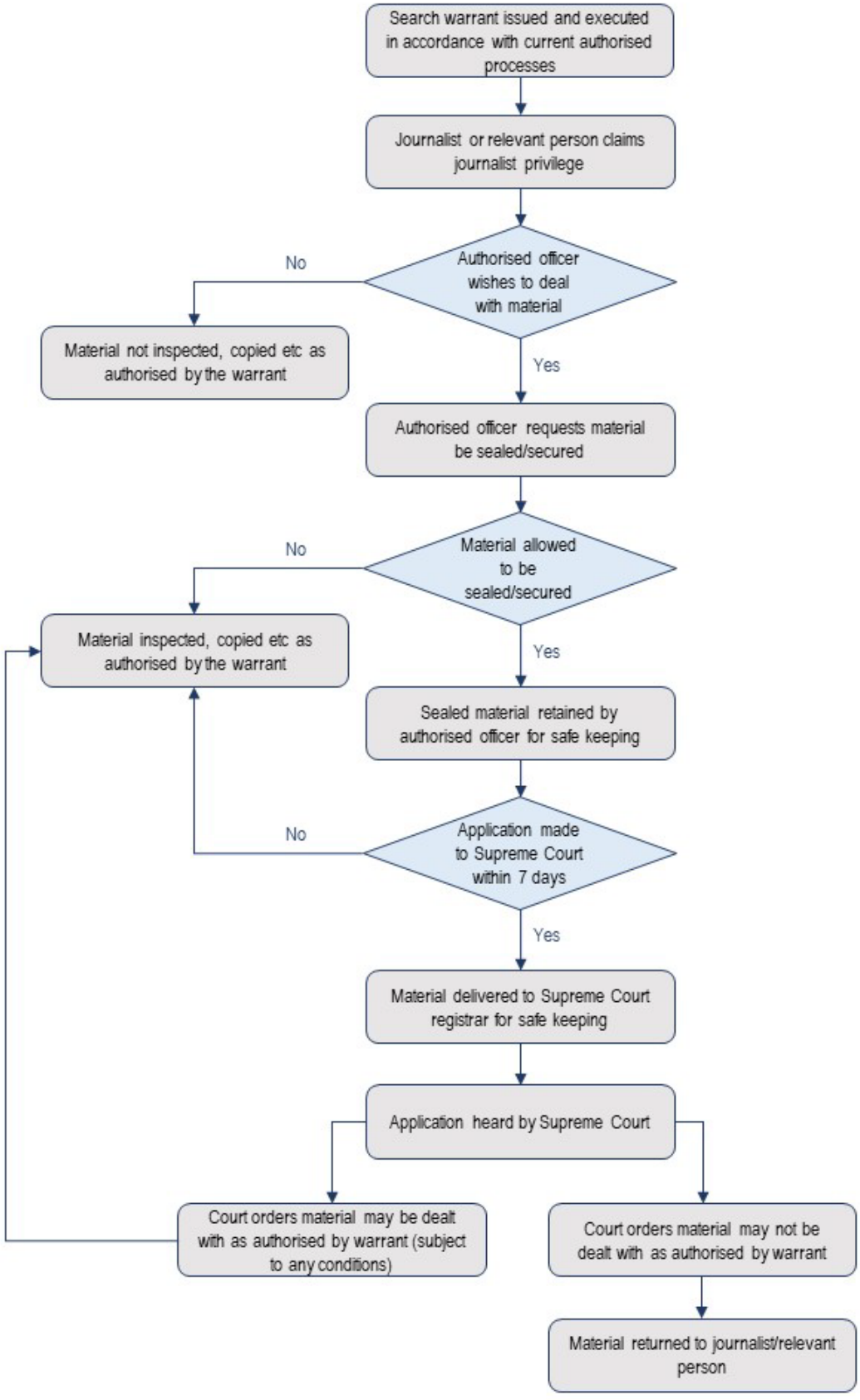
Interrogatories are written questions served by a party to a civil proceeding to obtain information about facts material to the issues in dispute. The UCPR (Chapter 7, Part 2, Division 1) sets out the framework for delivering, answering, and objecting to interrogatories, relevantly:

- Rule 229 provides that with the court's leave, a party to a proceeding may deliver interrogatories to another party, a third party to whom a third party notice has been issued, or another person for the purposed of deciding whether they are an appropriate party to a proceeding.
- Rule 230 provides that the court may give leave to deliver interrogatories if satisfied that another reasonably simple and inexpensive way of proving the matter sought to be elicited by interrogatory is not likely to be available at the trial.
- Rule 231 provides that a person to whom interrogatories are delivered is required to answer them within the time ordered by the court, by delivering a statement in answer and an affidavit verifying the statement.
- Rule 232 provides that an objection must specify the grounds of the objection and briefly state the facts on which the objection is made.
- Rule 233 provides that exhaustive list of grounds on which a person may object to answering an interrogatory, which includes a claim of privilege. This rule also provides that the court may require the grounds of objection specified in a statement in answer to interrogatories to be specified in more detail and may decide the objection. If the court decides the objection is sufficient, the interrogatory is not required to be answered.

The provisions of the Bill will operate alongside existing provisions under the UCPR. The Bill provides that journalist privilege will apply to interrogatories meaning that a journalist or relevant person may object to answering an interrogatory on the ground of journalist privilege. The process for making the objection and the requirements of the objection will be governed by the UCPR. The Bill provides the conditions that the court must be satisfied of to decide whether or not the objection is established. If the court decides the objection is established, in accordance with the requirements of the UCPR the answer to the interrogatory is not required.

Attachment 3

Shield laws – Flowchart: objecting to material authorised under a search warrant



Attachment 4

Video recorded evidence - Comparison of key elements of relevant legislation in Australian jurisdictions[10]

Cross-jurisdictional comparison of provisions providing for use of recorded statements as a complainant's evidence-in-chief in domestic and family violence related criminal proceedings[11] [12]					
	New South Wales	**Victoria**	**Northern Territory**	**Australian Capital Territory**	**South Australia**
Legislation	*Criminal Procedure Amendment (Domestic Violence Complainants) Act 2014* Amended the *Criminal Procedure Act 1986* by inserting Part 4B (Giving of evidence by domestic violence complainants) into Chapter 6 of the Act.	*Justice Legislation Amendment (Family Violence Protection and Other Matters) Act 2018* Amended the *Criminal Procedure Act 2009* by inserting new division 7B (Use of recorded evidence-in-chief of complainant in family violence offence proceedings) into Part 8.2 of the Act.	*Justice Legislation Amendment (Body-worn Video and Domestic Violence Evidence) Act 2017* Amended the *Evidence Act 1939* by inserting new Part 3A (Domestic violence proceedings) into the Act.	*Crimes (Domestic and Family Violence) Legislation Amendment Act 2015* Amended the *Evidence (Miscellaneous Provisions) Act 1991* to insert new Part 4.3 (Evidence in domestic violence proceedings). Relevant provisions now under Part 4.5 Special requirements – family violence proceedings) into Chapter 4 of the Act.	*Statutes Amendment (Domestic Violence) Act 2018* Amended the *Evidence Act 1929* by inserting new section 13BB (Admissibility of recorded evidence in domestic violence proceedings) into the Act.
Application	Under section 289F, in proceedings for a domestic violence offence, a complainant may give evidence in chief, wholly or partly in the form of a recorded statement, that is viewed or heard by the court. Section 3 defines relevant terms for the application of the provisions, including: • *domestic violence offence*, which means a domestic violence offence within the meaning of the *Crimes (Domestic and Personal Violence) Act 2007* • *domestic violence complainant*, which in proceedings for a domestic violence offence, means a person against whom the domestic violence offence is alleged to have been committed, but does not include a person who is a vulnerable person. Under section 11 of the *Crimes (Domestic and Personal Violence) Act 2007*, a domestic violence offence is an offence committed by a person against another person with whom the person who commits the offence has (or has had) a domestic relationship, being: • a personal violence offence, or • an offence (other than a personal violence offence) that arises from substantially the same circumstances as those from which a personal violence offence has arisen, or • an offence (other than a personal violence offence) the commission of which is intended to coerce or control the person against whom it is committed or to cause that person to be intimidated or fearful (or both).	Section 387D provides that Division 7B: • applies to a criminal proceeding (including a summary hearing, a committal proceeding and a trial) that relates (wholly or partly) to a charge for a family violence offence • does not apply where the accused is under the age of 18 years at the time the alleged family violence offence is alleged to have been committed. Section 387 defines *family violence offence* as: • an offence against section 37(2) (contravention of a family violence safety notice), 37A(2) (contravention of notice intending to cause harm or fear for safety, 123(2) (contravention of family violence intervention order), 123A(2) (contravention of order intending to cause harm or fear for safety) or 125A(1) (persistent contravention of notices and orders) of the *Family Violence Protection Act 2008* ; or • an offence where the conduct of the accused is family violence within the meaning of that Act. Section 5 of the *Family Violence Protection Act 2008* defines family violence.	Section 21H provides that a recorded statement may be played at the hearing of the charge for, or the trial in respect of, the domestic violence offence to which it relates. Section 21G provides key definitions relevant to the application of the provisions, including for: • a *complainant*, for a domestic violence offence proceeding, which means an adult against whom a domestic violence offence the subject of the proceeding is alleged, or has been found, to have been committed; • domestic violence, which is defined by reference to section 5 of the *Domestic and Family Violence Act 2007*; • *domestic violence offence*, which means an offence constituted by, or involving, conduct that is domestic violence or an offence against section 120(1) (Contravention of domestic violence order) of the *Domestic and Family Violence Act 2007*.	Section 81B provides that a recorded statement may be played at the hearing of a family violence offence proceeding for the offence to which it relates. Section 38 defines key definitions for the purposes of Chapter 4, including: • a *family violence offence proceeding*, which means a proceeding for a family violence offence; and • a *family violence offence*, which is defined by reference to the dictionary in the *Family Violence Act 2016* as an offence if the conduct making up the offence is family violence.	Section 13BB(2) allows for the evidence of a complainant to admitted in the form of a recording made by a police officer in proceedings for a domestic violence offence. Section 13BB(10) defines key definitions relevant to the application of the section including for: • *complainant*, which means the person against whom the domestic violence offence is alleged to have been committed, but does not include a person who is under 16 years of age or is cognitively impaired; • *domestic violence offence*, which means any offence involving domestic abuse (within the meaning of the *Intervention Orders (Prevention of Abuse) Act 2009).*

[10] Current as at 25 November 2021. Jurisdictional comparisons considers key elements of the core legislative instrument in other jurisdictions and may not address elements of other legislative instruments or practical considerations.

[11] **Western Australia** does not have legislation providing for the use of recorded statements as a complainant's evidence-in-chief in domestic and family violence related criminal proceedings. Under section 106R of the *Evidence Act 1906* (WA) a court may direct that special arrangements be made to assist persons who are deemed special witnesses to give their evidence in court, including presence of support person, giving evidence via video link or using a screen to shield the person from the accused. Domestic violence victims may be deemed special witnesses under these provisions provided, 'in the court's opinion . . . they would be likely to suffer severe emotional trauma or be so intimidated or distressed as to be unable to give evidence or give evidence satisfactorily by reason of . . . relationship to any party to the proceeding . . . '.

[12] **Tasmania** does not make specific provision for the use of recorded statements as a complainant's evidence-in-chief in domestic and family violence related criminal proceedings. However, under section 8 of the *Evidence (Children and Special Witnesses) Act 2001* (TAS) the court may make an order declaring that an alleged victim of family violence is a special witness and may make an order providing for certain matters in relation to special witnesses, including an order admitting into evidence a prior statement of the special witness as if the special witness were an affected child or prescribed witness under section 5 of that Act. Under section 5 (Admission of prior statement of affected child or prescribed witness) the court may, in a prescribed proceeding (which includes a proceeding in which a person has been charged with a family violence offence)admit into evidence a statement made by an affected child or a prescribed witness and recorded by any means if (i) the statement relates to a matter in issue in the proceeding; and (ii) the defendant has been given a copy of the record of the statement; and (iii) the defendant is given the opportunity to cross-examine the affected child or the prescribed witness**.** Section 7A provides that if an affected person or a special witness is to give evidence in any prescribed proceeding, and facilities are available, an audio visual record is to be made of the person's evidence.

Requirements for making recorded statements	Pursuant to section 289D, a recorded statement means a recording made by a police officer of a representation made by a complainant when the complainant is questioned by a police officer in connection with the investigation of the commission of a domestic violence offence if:
	• the recording is made with the informed consent of the complainant, and
	• the questioning occurs as soon as practicable after the commission of the offence.
	
	Informed consent is not further defined but section 289S allows for regulations to be made with respect to a range of matters, including the giving of informed consent to the recording of a representation for the purposes of a recorded statement.
	
	Under 289F for a recorded statement:
	• the statement must include certain statements by the complainant (including a statement as to the truth of the representation and any other matter required by the rules);
	• if the representation in a recorded statement is in a language other than English, the recorded statement must contain an English translation of the representation or be accompanied by a separate written English translation; and
	• the complainant must be available for cross-examination and re-examination.
		Under section 387C, a recorded statement means an audio visual or audio recording of a complainant answering questions put to the complainant by a trained police officer, and a trained police officer means a police officer who has successfully completed a training course approved by the Chief Commissioner of Police.
		
		Section 387G sets out the details of the requirements for making of a recorded statement, including that the recorded statement:
		• must be made as soon as practicable after the events constituting the alleged family violence has occurred;
		• must be made with the complainant's informed consent (the requirements for which are set out under 387G(3));
		• must include, at the end of the recording, an attestation by the complainant as to the truth of the content of the statement;
		• must be in the form of an audiovisual recording unless there are exceptional circumstances and having regard to whether the accused would be unfairly prejudiced; and
		• if any part of the recorded statement is in a language other than English, contain an oral translation of the part into English or be accompanied by a separate written English translation of the part.
		
		Under 387G(3) a recorded statement is made with informed consent if the trained police officer informs the complainant that:
		• the recorded statement may be used in evidence in a criminal proceeding, a proceeding for a family violence intervention order or, if a court or tribunal orders, another proceeding; and
		• the complainant may be required to give further evidence in the proceeding, including further evidence-in-chief and evidence on cross-examination and re-examination; and
		• the complainant may refuse consent to the making of the recorded statement.
		
		The complainant must also indicate in the recorded statement that the complainant understands the matters they have been informed of and consents to the making of the recorded statement.
			Section 21G defines a recorded statement, as an interview, recorded on video-tape or by other audiovisual means, in which a police officer elicits from a complainant statements of fact that, if true, would be of relevance to a domestic violence offence proceeding.
			
			Section 21J sets out the requirements for recorded statements, including that the recorded statement:
			• be made as soon as practicable after the events mentioned in the statement occurred;
			• be made with the informed consent of the complainant (the requirements for which are set out under 21J(2);
			• include a statement by the complainant as to the complainant's age;
			• be made as a statutory declaration;
			• if any part of the recorded statement is in a language other than English, contain an English translation of the part or be accompanied by a separate written English translation of the part.
			
			Under 21J(2) a recorded statement is made with informed consent if the police officer informs the complainant that:
			• the recorded statement may be used in evidence in a domestic violence offence proceeding; and
			• the complainant may be required to give further evidence in the proceeding; and
			• the complainant may refuse consent.
			The complainant must also indicate in the recorded statement that the complainant consents.
				Under section 81 a recorded statement means an audiovisual or audio recording of a complainant answering questions from a police officer in relation to the investigation of a family violence offence and made by a police officer. However, for an audio recording either the complainant must not consent to an audiovisual recording or there must be exceptional circumstances.
				
				Section 81A sets out the details of the requirements for making a recorded statement, including that:
				• a police officer must, before making a recorded statement, tell the complainant that the recorded statement may be used as evidence at a hearing, that the complainant may be called to give evidence under cross-examination in person at the hearing, and that the complainant does not have to consent to the recording;
				• the recorded statement must be made as soon as practicable after the events mentioned in the statement happened and be in the form of questions and answers;
				• the recorded statement must include details of certain matters including the name of each person present during any part of the recording and a statement by the complainant attesting to the truth of the representations made by the complainant in the recorded statement;
				• the recorded statement must not, as far as is practicable, contain an image of a child or a person who is intellectually impaired;
				• if any part of the recorded statement is in a language other than English, the recorded statement must contain an oral translation of the part into English or be accompanied by a separate written English translation of the part.
					Section 13BB(10) defines a prescribed recording means a recording as made by a police officer of a representation made by a complainant when the complainant was questioned by a police officer in connection with the investigation of the commission of a domestic violence offence where:
					• the questioning occurred as soon as practicable after the commission of the offence; and
					• the recording was made with the informed consent of the complainant (which means consent given in accordance with requirements prescribed by the regulations); and
					• the recording contains statements by the complainant as to the complainant's age; as to the truth of the representation; and any other matter required by the regulations or by rules of court.
					
					Section 3AA of *Evidence Regulations 2007* provides for certain matters with respect to recorded evidence in domestic violence proceedings, including:
					• requirements relating to the translation of recorded statements
					  ○ if the recording is in a language other than English, the statement must be translated into English, either in the recorded or in a transcript at a later time.
					  ○ where a transcript is made it must accompany the recording to which it relates if the defendant elects to listen to or view the recording before it is admitted into evidence or the recording is admitted;
					  ○ a person translating a statement is required to verify the accuracy of the translation in the form of an affidavit and must accompany the recording if it is admitted as evidence.
					• requirements for informed consent
					  ○ a police officer must tell the complainant that they are being recorded and that the recording may be used in court
					  ○ the complainant must respond (whether by words or conduct) that they consent to the making of the recording.

Use of recorded statements	Under section 289G, in determining whether or not to have a complainant give evidence wholly or partly in the form of a recorded statement, the prosecutor must take into account the wishes of the complainant, any evidence of intimidation of the complainant by the accused and the objects of the *Crimes (Domestic and Personal Violence) Act 2007*.	Under section 387E, in determining whether or not to have a complainant give evidence wholly or partly in the form of a recorded statement in accordance with Division 7B, the prosecution must take into account the wishes of the complainant, any evidence of intimidation of the complainant by the accused and the purposes of the *Family Violence Protection Act 2008.*	No specific provision.	No specific provision.	No specific provision.

Admissibility	Section 289I states that the hearsay rule and the opinion rule do not prevent the admission or use of evidence of a representation in the form of a recorded statement. Under section 289I a recorded statement may only be admitted where the accused person was given a reasonable opportunity to listen to, and, in the case of a video recording view the recorded statement in accordance with the requirements under Division 3 (Service of and access to recorded statements), unless the parties otherwise agree or there has been compliance otherwise than in accordance with Division 3 and it would be in the interests of justice. Under section 289F a complainant who gives evidence wholly or partly in the form of a recorded statement must subsequently be available for cross-examination and re-examination orally in the courtroom, o in accordance with any other alternative arrangements permitted for the complainant under the Act or any other Act. Section 289N deals with the validity of proceedings and provides that proceedings are not affected where: • a complainant fails to give evidence in accordance with a provision under Part 4B; and • a police officer fails to record a statement in accordance with any rules or regulations made under Part 4B. Section 289H applies where evidence is given wholly or partly in the form of a recorded statement in the proceedings for the domestic violence offence and allows the recorded statement to be used as evidence in any proceedings relating to an application for an order under the *Crimes (Domestic and Personal Violence) Act 2007* provided that the application is made concurrently with the domestic violence offence proceedings or arises from the circumstances of the alleged domestic violence offence.	Section 387F provides that a recorded statement is admissible in evidence as if its contents were the direct testimony of the complainant provided that: • the recorded statement complies with the requirements for making recorded statements under section 387G; • unless the parties consent otherwise, a copy or transcript of the recorded has been served in accordance with section 387H; • unless the parties consent otherwise, the court is satisfied, that where the accused is not represented by a legal practitioner, the accused was given a reasonable opportunity to view the recorded statement (or if it exists only as an audio recording and the accused has not been served with a copy – to listen to it) • at the hearing of the proceeding the complainant identifies themselves and attests to the truthfulness of the contents of the recorded statement and is available for cross-examination and re-examination Section 387F contemplates recorded statements being admissible in the proceeding for the family violence offence or any new trial of, or appeal from, the proceeding (unless the relevant court orders otherwise).	Section 21H provides that a recorded statement may be admitted as the complainant's evidence in chief, or part of the complainant's evidence in chief, in the proceeding where: • it has been played at the hearing for, or the trial in respect of, the domestic violence offence to which it relates; and • it complies with section 21J (requirements for recorded statement). Section 21H further provides that the court may refuse to admit all or part of the recorded statement if the court considers it is in the interests of justice to do so. Section 21H also provides that the complainant may (but need not) be present in the courtroom when the recording is played and that the complainant's demeanor, and words spoken or sounds made by the complainant, during the playing are not to be observed or overheard in the courtroom unless the complainant elects to be present in the courtroom for that part of the proceeding.	Section 81B provides that where a recorded statement is played at the hearing of a family violence offence proceeding for the offence to which it relates, it may be admitted as all or part of the complainant's evidence in chief in the proceeding as if the complainant gave the evidence at the hearing in person subject to: • the court refusing to admit all or any part of the recorded statement if it considers it is in the interests of justice to do so; and • the disclosure requirements in 81E and 81F being met (or the court is satisfied as required under section 81G). Section 81C specifies that the hearsay rule and the opinion rule do not prevent the admission or use of evidence of a representation in the form of a recorded statement only because it is in that form. Section 81B also provides that the complainant may choose not to be present in the courtroom while the court is viewing or listening to the recorded statement, that if the complainant is giving evidence by audiovisual link from an external place under division 4.3.5, the complainant must not be visible or audible to anyone in the courtroom by closed-circuit television or by means of similar technology while the court is viewing or listening to the recorded statement; and that where a recorded statement is admitted as part of a complainant's evidence in chief in a proceeding, the complainant may give further evidence in chief. Section 81D provides that the validity of a proceeding is not affected by: • the failure of a police officer to record a representation in the form of a recorded statement in accordance with the requirements of the division or any regulation; or • the failure of a complainant to give evidence in accordance with the part. Section 81K allows for admission of a recorded statement by the Magistrates Court in a proceeding for an application for a protection order under the Family Violence Act 2016 if the affected person in relation to the application for the protection order is the complainant in relation to the recorded statement; and the respondent to the application for the protection order is the person against whom the family violence offence is alleged.	Section 13BB(2) provides that in proceedings for a domestic violence offence, the evidence of a complainant may be admitted in the form of a recording made by a police officer provided the following requirements are satisfied (or court is satisfied that the interests of justice require the admission of the evidence despite non-compliance with any of the requirements): • the evidence is in the form of a prescribed recording; and • the court is satisfied as to the complainant's capacity to give sworn or unsworn evidence at the time the recording was made; • the court is satisfied that the defendant has been given a reasonable opportunity to listen to or view the recording; and during the course of the trial, the complainant is available, if required, for further examination, cross-examination or re-examination; and • during the course of the trial, the complainant is available, if required, for further examination, cross-examination or re-examination. Section 13BB(3) further provides that the court's discretion to exclude evidence is not affected by this section and the court may: • rule as inadmissible the whole or any part of the recording; or • before admitting the recording, order that it be edited so as to exclude evidence that is inadmissible for any reason.
Editing a statement	No specific provision.	Under section 387F the court can rule as inadmissible whole or part of the content of a recorded statement and, if so, direct that it be edited or otherwise altered to delete any part that is inadmissible. Under section 387I, the recording may also be edited only: • with the consent of the parties; or • if required to avoid disclosure of material that is not required to be disclosed to the accused,	Under section 21P, the statement may be edited or otherwise altered only if: • the parties consent; or • the court before which the domestic violence offence proceeding is taking place so orders.	Under section 81A, a recorded statement must not be edited or changed unless: • both parties consent to the edits or changes; or • the court hearing the proceeding in which the recorded statement is tendered otherwise orders.	Section 13BB(3) further provides that the court's discretion to exclude evidence is not affected by this section and the court may: • rule as inadmissible the whole or any part of the recording; or • before admitting the recording, order that it be edited so as to exclude evidence that is inadmissible for any reason.

		to comply with a direction of the court, or for the purpose of training or teaching a prescribed person or testing recording equipment.			
Disclosure	Section 289L applies if the accused person is represented by a lawyer. The prosecutor must serve a copy of the statement to the accused's legal practitioner as soon as practicable after proceedings commence or the prosecutor determines that the evidence is to be given in the form of a recorded statement, whichever occurs later. Section 289P provides that a lawyer representing an accused person must not give a video copy of a recorded statement to the accused person or permit the person to copy or obtain a copy of a recorded statement. Section 289M applies if the accused person is not represented by a lawyer. A prosecutor must provide an unrepresented person with: • an audio copy of the recorded statement in accordance with the timeframes stipulated under section 289L; and • must also, so far as is reasonably practicable, provide the accused person with an opportunity to view a recorded statement that is in the form of a video recording at a police station on at least one occasion as specified prior to the commencement of the committal proceedings or the trial, or if this is not reasonably practicable, the prosecutor must provide the accused person with an opportunity to view the recorded statement on a day on which proceedings relating to the offence are being held. Under section 289I, a recorded statement may still be admitted despite non-compliance with the disclosure requirements if the court is satisfied that the parties consent or if the accused or their legal representative (if any) were otherwise given a reasonable opportunity to view the recorded statement and it would be in the interests of justice to admit the recorded statement. Section 289Q provides that without limiting any other power of a court to adjourn proceedings, a court may adjourn any proceedings relating to a domestic violence offence for not more than 14 days to enable an accused person to view or listen to a recorded statement on the ground that the accused person has not had a reasonable opportunity to view or listen to the recording.	Section 387H establishes the requirements for the service of a recorded statement and requires that the recorded statement be disclosed to the accused or the accused's legal practitioner in accordance with Parts 3.2, 4,4 and 5.5 of the Act, as required, subject to the following modifications: • if the accused is legally represented then their lawyer must be served with an audiovisual (or audio if the statement is in audio form) copy of the recorded statement but must not give the accused, or allow the accused to be given, a copy of the recorded statement; • if the accused is not represented by a legal practitioner, the accused must be: o served with an audio copy of the statement (regardless of whether an audiovisual copy exists); or o served with a transcript of the recorded statement, if the prosecutor believes that there is a reasonably ascertainable risk that the accused might commit an offence under 387L(1) or (2) in relation to the recorded statement, or in the particular circumstances of the accused, a transcript is required. Under section 387F an unrepresented accused must also be given a reasonable opportunity to view or listen to the recorded statement. Under section 387F a recorded statement will still be admissible despite non-compliance with the disclosure requirements under section 387H or the requirement that accused be given a reasonable opportunity to view or listen to the recorded statement, where the parties consent to its use as the complainant's evidence-in-chief.	Section 21K sets out the requirements for service where a recorded statement has been made for a domestic violence offence proceeding and the defendant is represented by a legal practitioner: • the prosecution must serve a copy of the recorded statement on the defendant's legal practitioner as soon as practicable after proceeding is commenced; and • the defendant must not be given, or take a copy, of the statement. Section 21L sets out the requirements for access to a recorded statement where the defendant is not represented by a legal practitioner. The prosecution must: • serve an audio copy of the recorded statement on the defendant as soon as practicable after the proceeding is commenced; and • give the defendant a reasonable opportunity to view the recorded statement on a day before the hearing of the charge for, or before the committal date in respect of, the domestic violence offence to which the recorded statement relates. Under section 21M, failure to comply with the service or access requirements, renders a statement inadmissible, unless the court is satisfied that: • the parties consent to the recorded statement being admitted; or • the defendant or the defendant's legal practitioner has been given a reasonable opportunity to listen to or view the recorded statement and it would be in the interests of justice to admit the recorded statement. Section 21N provides that the prosecution is not required to provide a transcript of a recorded statement for the proceeding to the defendant or the defendant's legal practitioner.	Section 81E applies where a recorded statement has been made in relation to a family violence offence proceeding and the accused person is represented by a lawyer and requires that: • the lawyer of the accused must be given a copy of recorded statement as soon as practicable after proceedings commence; • the lawyer must return the copy of the recorded statement by giving it to the prosecutor not later than 16 weeks after proceedings are finalised; and • the accused must not be given or take a copy of the recorded statement. Section 81 applies where a recorded statement has been made in relation to a family violence offence that is the subject of a proceeding and the accused person is not represented by a lawyer and requires that: • the accused person must be given an audio copy of the recorded statement as soon as practicable after the proceeding is commenced; and • if it is reasonably practicable, the accused person must be given an opportunity to view a recorded statement that is in the form of a video recording at a police station on at least 1 occasion as specified in the section; or • If it is not reasonably practicable to provide the accused person with an opportunity to view the recorded statement as required, the accused person must be given the opportunity to view the recorded statement on a day on which proceedings relating to the offence are being held. Section 81G allows the court to admit a recorded statement despite non-compliance with the disclosure requirements where it is satisfied that: • the parties consent to the recorded statement being admitted; or • the accused person or the accused person's lawyer (if any) have been given a reasonable opportunity to listen to or view the recorded statement and it would be in the interests of justice to admit the recorded statement.	Under section 13BB(2)(iii) the court must be satisfied that the defendant has been given a reasonable opportunity to listen to or view the recording for a recorded statement to be admitted unless the court is satisfied that the interests of justice require the admission of the evidence despite non-compliance with this requirement.
Conduct of proceedings	Section 289J provides that if a complainant gives evidence wholly or partly in the form of a recorded statement in proceedings in which there is a jury, the judge must warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the evidence being given in that way.		Under section 21N the court may, in a jury trial, order that a transcript of all or party of the evidence given in the form of a recorded statement be supplied to the jury if the court considers that a transcript would be likely to help the jury understand the evidence. Under section 21QA leave of the court is required for unrepresented defendants to cross	Section 81I where a recorded statement is admitted as evidence in a family violence offence proceeding that is a trial by jury the court must tell the jury that admission of the statement is usual practice and that the jury must not draw any inference against the accused person, or give the evidence more or less weight.	Under section 13BB(4) cross-examination in the trial can only occur with the permission of the court on application by a party to the proceeding if: • the court is satisfied that a party to the proceedings has, since the making of the recording, become aware of a matter of which the party could not reasonably have

	Under section 289K, the court may order that a transcript of all or part of the evidence given in the form of a recorded statement be supplied to the jury if it appears to the court that a transcript would be likely to aid the jury's comprehension of the evidence. Section 289Q deals with court powers, including: • the court may make, vary or revoke an order under Part 4B on its own motion or on application by a party to the proceeding or by the complainant giving evidence. • unless a contrary intention is shown, nothing in Part 4B limits any discretion that a court has with respect to the conduct of a proceeding.		examine certain vulnerable witnesses (including vulnerable witnesses who are complainants in a domestic violence offence proceeding).	Section 81I allows the court to order that the transcript of the recorded statement be made available to the jury where satisfied this would be likely to help the jury's understanding of the evidence.	been aware at the time the recording was made; or • the complainant gives evidence in the trial apart from, or in addition to, evidence admitted under this section in the form of a recording and the court is satisfied that it is in the interests of justice that the complainant be further examined, cross-examined or re-examined; or • the court is satisfied that it is otherwise in the interests of justice to permit the complainant to be further examined, cross-examined or re-examined. Section 13BB(5) allows the prosecution, with the permission of the court, and in accordance with any directions of the court, question (where such questioning is to be conducted as if it were cross-examination) the complainant about matters including: • evidence that is unfavourable to the prosecution case; • a prior inconsistent statement. Under 13B(8) where the court admits evidence in the form of a recorded statement it must explain to the jury that the law allows the court to admit evidence in this form and warn the jury about not drawing any adverse inference or giving the evidence any particular weight because of this.
Offences	Under section 289P it is an offence to copy, permit a person to copy, the recorded statement or give possession of the statement to another person or publish the recorded statement except: • for legitimate purposes or a criminal investigation or criminal proceeding; or • if the person is a public official exercising the person's public official functions. The maximum penalty is 100 penalty units or 2 years imprisonment (section 289P).	Section 387L creates a number of offences in relation to recorded statements. It is an offence, unless permitted to do so by the section, to: • publish a recorded statement; • for any person other than the complainant, to knowingly copy a recorded statement or knowingly supply a recorded statement or copy of a recorded statement to another person; • for any person other than the complainant, to knowingly possess a recorded statement. The maximum penalties for the offences range from one to two years imprisonment. The section lists a range of permitted purposes for which a person may possess, publish, copy or supply a recorded statement.	Section 21Q makes it an offence to intentionally publish a recorded statement where: • the person (including the complainant who made the recorded statement) does not have authority to publish the recorded statement; and • the person is reckless in relation to that circumstance. A person has authority to publish a recorded statement only if the publication is in connection with the investigation of, or a proceeding for, an offence in relation to which the recorded statement is prepared; or a rehearing, retrial or appeal in relation to the proceeding. The maximum penalty for the offence is 12 months imprisonment or 100 penalty units.	Section 21Q makes it an offence for a person to publish a recorded statement if the person does not have authority to do so. The maximum penalty is 50 penalty units or 6 months imprisonment or both. A person (including the complainant) has authority to publish a recorded statement only if the publication is: • in connection with the investigation of, or a proceeding for, an offence in relation to which the recorded statement is prepared; or • a rehearing, retrial or appeal in relation to the proceeding; or • a proceeding for an application for a protection order under the *Family Violence Act 2016* if the affected person in relation to the application for the protection order is the complainant in relation to the recorded statement and the respondent to the application for the protection order is the person against whom the family violence offence, the subject of the recorded statement, is alleged.	Section 13BB allows for regulations to impose restrictions on the copying or distribution of recordings. Regulation 3AAA(5) of *the Evidence Regulations 2007* makes it an offence for a person who has possession of, or access to, a section 13BB recording to allow another person to access the recording except: • for the legitimate purposes of any proceedings in which the recording has been admitted into evidence or to which the recording relates; or • for use by a public official for purposes connected with their official functions; or • as may be authorised by the prosecution. The maximum penalty is $5000.

End