LEGAL AFFAIRS AND SAFETY COMMITTEE

Members present:
Mr PS Russo MP—Chair
Ms JM Bush MP
Mrs LJ Gerber MP (virtual)
Mr JE Hunt MP
Mr JM Krause MP
Mr AC Powell MP

Staff present:
Ms R Easten—Committee Secretary
Mr Z Dadic—Assistant Committee Secretary

PUBLIC HEARING—INQUIRY INTO THE EVIDENCE AND OTHER LEGISLATION AMENDMENT BILL 2021

TRANSCRIPT OF PROCEEDINGS

TUESDAY, 1 FEBRUARY 2022

Brisbane

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The committee met at 11.01 am.

CHAIR: Good morning. I declare open the public hearing for the committee's inquiry into the Evidence and Other Legislation Amendment Bill 2021. My name is Peter Russo, member for Toohey and chair of the committee. I would like to respectfully acknowledge the traditional custodians of the land on which we meet today and pay our respects to elders past and present. We are very fortunate to live in a country with two of the oldest continuing cultures in Aboriginal and Torres Strait Islander people, whose lands, winds and waters we all share. With me today are Laura Gerber MP, member for Currumbin and deputy chair; Jonty Bush MP, member for Cooper; Jason Hunt MP, member for Caloundra; and Andrew Powell MP, member for Glass House. Jon Krause MP, member for Scenic Rim, is substituting this morning for Sandy Bolton MP, member for Noosa.

The purpose of today is to hear evidence from stakeholders who made submissions as part of the committee's inquiry. Only the committee and invited witnesses may participate in the proceedings. Witnesses are not required to give evidence under oath, but I remind witnesses that intentionally misleading the committee is a serious offence. You have previously been provided with a copy of instructions to witness, so we will take those as read.

These proceedings are similar to parliament and are subject to the Legislative Assembly's standing rules and orders. In this regard, I remind members of the public that, under the standing orders, the public may be admitted to, or excluded from, the hearing at the discretion of the committee. The proceedings are being recorded by Hansard and broadcast live on the parliament's website. Media may be present and will be subject to my direction at all times. The media rules endorsed by the committee are available from the committee staff if required. All those present today should note that it is possible that you may be filmed or photographed during the proceedings by media, and images may also appear on the parliament's website or social media pages. I ask everyone present to turn mobile phones off or to silent mode.

The program for today has been published on the committee's webpage and there are hard copies available from committee staff.

McWILLIAMS, Ms Gina, Senior Legal Counsel, News Corp Australia, Australia's Right to Know coalition of media organisations (via videoconference)

MURPHY, Mr Paul, Chief Executive, Media, Entertainment & Arts Alliance, Australia's Right to Know coalition of media organisations (via videoconference)

SCHUBERT, Ms Georgia-Kate, Head of Policy & Government Affairs, News Corp Australia, Australia's Right to Know coalition of media organisations (via videoconference)

CHAIR: I welcome representatives from Australia's Right to Know coalition of media organisations via videoconference. I ask that the first time you speak you introduce yourselves for the purposes of the recording, please. Thank you. Who would like to start with an opening statement?

Ms Schubert: I am Georgia-Kate Schubert. I am the Head of Policy and Government Affairs at News Corp Australia. I may well be followed in making this statement by my colleague Mr Paul Murphy. Australia's Right to Know coalition of media organisations thanks the Legal Affairs and Safety Committee for the opportunity to participate in today's hearing regarding this important bill, the Evidence and Other Legislation Amendment Bill, which will be referred to as 'the bill'.

Our written submissions and statement today are directed at the parts of the bill that introduced the privilege protecting journalists who are given an obligation of confidentiality from being required to disclose the identity of such sources, which I refer to as 'the shield', and the sections that criminalise the possession or publication of certain documents.

As we have previously stated, ARTK members are largely supportive of the amendments introducing the shield and commend the Queensland government, particularly the Attorney-General, Shannon Fentiman, for this work. However, the key issue with the bill is that the shield does not protect a journalist from a demand by the Queensland Crime and Corruption Commission that the identity of a

confidential source be disclosed. This is achieved by a provision in the bill that specifically exempts the CCC from the application of the shield. The exemption of the CCC from the application of the bill is nonsensical as the shield is not absolute. The decision of whether the shield should or should not apply is made by a judge considering all the evidence and the circumstances, and these decisions can and will be made to make that informed decision, including in the case of the Crime and Corruption Commission.

Further, while we appreciate that there is ongoing work occurring in relation to the operation of privileges under the Crime and Corruption Act, if the shield does not apply to the CCC from the outset, journalists with confidential sources will remain at risk for the following reasons. Firstly, as the CCC work is ongoing, we have yet to see what, if anything, will be proposed by way of amendments to the act to address this issue, or if any such amendments will attempt to offer equivalent protection as the shield. By contrast, the parliament is consulting on this bill now and the bill is an appropriate vehicle to cover the field and apply the shield in all forums. Secondly, the fact that the Queensland government has carved the CCC out of the bill's operation is likely to leave any subsequent amendments to the act vulnerable to attack, no matter how careful the drafting may be. Once a form of compulsory disclosure is excluded from the shield, any complementary protection offered to journalists' confidential sources must be viewed as distinct from, and lesser than, that offered by the shield. Were it otherwise, there would be no reason to exclude that form of disclosure from the shield in the first place. It is vital that journalists have robust protection against legislation that exposes them to a potential jail term for merely doing their job. Failing to answer a question asked by the commission is, by the contempt of the commission, an offence with a current maximum penalty that includes five years imprisonment. This is not a fanciful concern but one that is played out in the Supreme Court and Court of Appeal proceedings concerning the journalist known only as F, who could face these very penalties for doing nothing more than ensuring that a significant arrest was reported. ARTK urges the committee to amend the bill and apply the shield without any exemptions.

The second issue raised in Australia's Right to Know's written submission responding to the bill is in relation to the four sections that criminalise the possession or publication of certain criminal or recorded statements or transcripts thereof. The principal issue we take with these sections is not the same as that outlined above. Each of the four sections criminalises conduct a journalist could engage in in the ordinary course of reporting court proceedings. ARTK has set out our particular objections to each section in detail in our written submission. We do not intend to expand on them here, except to make one additional point. In the case of the proposed amendment to section 93AA of the Evidence Act, our submission notes that this is a section that was first inserted in 2003. While some of us did exist at that time, Australia's Right to Know as a coalition of media companies was not in force at that time and nor were we aware of any our Queensland members making any previous submissions about that section. Just because section 93AA has been operative since 2003 does not mean it cannot or should not be improved now. It is inherently contradictory that a bill that will afford journalists unprecedented legal protection in Queensland should, at the same time, increase the risk that they could potentially be prosecuted and jailed. There is no public interest in that outcome, nor should the potential for the outcome compromise part of what is otherwise a forward-thinking bill.

Australia's Right to Know thanks you for your time and we invite any questions you may have about our submission.

Mrs GERBER: Thank you for that comprehensive statement. I am really interested to understand a bit more why the shield law should apply to proceedings before the CCC. If you can, could you elaborate on your submission there and also provide some practical examples for the committee so that we can turn our minds to it a bit more, if possible? I address that to any of the three submitters appearing today.

Mr Murphy: My name is Paul Murphy, I am the Chief Executive of the Media, Entertainment & Arts Alliance, which is the trade union and professional association for journalists in Australia. We are a member of the Right to Know coalition. Essentially, the way I would answer that question is to say that when a journalist accepts a confidence they have a professional obligation under the professional code that applies to respect that confidence in all circumstances. They do not get to choose which circumstances they might respect it in and which circumstances they do not, and therefore it is our view that that privilege that is applied in one court or proceedings should apply in all, because journalists do not get to pick and choose.

Once the confidence is accepted, undertaking an absolute obligation to respect that confidence in all circumstances is fundamental to the operation of public interest journalism which is recognised not only in this country but also around the world. It is a fundamental obligation to respect that source because to do otherwise risks important stories not coming to light as other sources may not feel confident in coming forward.

Mr POWELL: Paul, how many instances are we talking about where a journalist would have to appear before the CCC? I know there was one case referred to in the report in the opening statement, but how many are we talking about?

Mr Murphy: I am sorry, I do not think I am able to answer that question. It is speculative as to what might occur in the future. I could not refer to any figures that I am aware of off the top of my head going back. I am sorry, I do not think I can provide any further assistance there.

Mr POWELL: That is okay. Thank you.

Ms BUSH: Your written submission details the legislation in other jurisdictions in relation to shield laws providing journalistic privilege in anti-corruption bodies, and you say that three jurisdictions provide specifically for this. I am not clear which jurisdictions. Can you remind me which jurisdictions they are?

Ms McWilliams: I am very quickly running back and checking our written submissions to make sure that I do not mislead you, because I would not want to do that. The shield in the two jurisdictions of Victoria and Western Australia does not apply to their equivalent corruption bodies. The ACT's equivalent does allow a journalist's privilege claim to be made. New South Wales is slightly different from Queensland in that there are two equivalent bodies rather than one: there is the New South Wales Crime Commission and the Independent Commission Against Corruption, and one goes one way and the other goes the other, so allowing the privilege to hold. In South Australia, the legislation does not afford protection to a witness who refuses to answer a question on the basis of privilege, but we are not aware that it has ever been tested there. In the Northern Territory, the privilege does apply to journalists, and it was tested last year in relation to the editor and a journalist who were both summonsed to answer questions at the commission and only some 12 months later were actually able to report about that because it had been confidential up until that point, but that is no longer the case. In both cases they asserted the privilege and it held.

Ms BUSH: So the ACT, one of the New South Wales equivalent bodies and the Northern Territory. Gina, do you see any key differences between the powers, functions and authorising legislation for those jurisdictions and Queensland's anti-corruption arrangements?

Ms McWilliams: I do not think so. They all tend to be slightly different because each jurisdiction likes to do their own thing in terms of drafting. The best test usually ends up being when something has gone wrong and a journalist has been summonsed and has a confidential source and all of a sudden you have a full team of lawyers who are attempting to pick holes in whichever piece of legislation it is, either to maintain the shield or to try to get around it. Put it this way: when we read the draft legislation in Queensland, we were very comfortable that it would achieve for journalists the strength of protection that we think they need, even though the legislation is slightly different, as is usually the case, from the drafting in other jurisdictions. Again, the full test of it probably will not occur until we are in the Supreme Court having a go at trying to pull it apart.

Mr KRAUSE: I am also on the committee that oversees the Crime and Corruption Commission here in Queensland. One of the issues that has previously been raised in public concerning the use of coercive measures like the star chamber is allegations about information that comes out in that forum being leaked to other parties and potentially putting at risk the personal safety of people who are in the star chamber. Are the concerns raised by your organisation about the shield not applying to those sorts of bodies more about the principle of journalism or do you also have concerns about personal safety issues and reputational issues that might arise for journalists if they are not allowed to have the shield in those star chamber bodies?

Mr Murphy: When you talk about personal safety issues, are you talking about personal safety issues for the journalist—

Mr KRAUSE: Yes, that is what I am talking about.

Mr Murphy:—or for their informant?

Mr KRAUSE: Well, both actually but the journalist to start with.

Mr Murphy: I have come to this from the perspective of the journalist being able to protect the identity of the confidential source and the safety of that individual. It is often a whistleblower taking some great personal risk in terms of bringing information forward in the public interest. I am not certain of the circumstances where the operation of this would provide safety to a journalist as such. I am not sure if you have any particular context or situation in mind. The way we are approaching it, by and large from our perspective, is ensuring that the journalist is in a position to be able to fulfil their professional obligations in protecting the identity of the confidential source in all circumstances, regardless of a court or tribunal in which proceedings may be occurring.

Mr KRAUSE: I understand.

Mr HUNT: I would like to know if there are any other professions protected by way of privilege across any of these other jurisdictions—either the ones that you have mentioned previously or any jurisdictions where this does not exist. Does this sort of privilege extend to other professions?

Ms McWilliams: It is not limited to the CCC context. There are a range of different professional privilege provisions which apply, again in different forms, throughout Australia. Queensland by comparison does not have very many. This is only the second which would be considered—if I recall correctly, there is only one other professional privilege type of provision in the Evidence Act as it currently standards.

I would be happy to try to pull together some notes about what types of privilege other jurisdictions afford different types of occupations, if you would find that useful. I could take that on notice and come back to you with further information. That sounds very evasive. The problem is that they are all different—which keeps me in a job. That is absolutely fantastic, but it is also means that every time someone asks me a question about the comparison between different states and territories I actually have to go back and look at the law and go, 'Okay. This one does this. This one does that.' Then I can give you some information in a much more accurate way.

CHAIR: I wanted to pick up on something that was said in the statement: if the shield laws do not extend to hearings before the CCC, they need to be amended now and they cannot be dealt with later, perhaps in a review of the CCC's legislation. I could not get the nexus between what would be wrong with looking at this in a global sense with the workings of the CCC.

Ms Schubert: Perhaps I will have a go and Gina can correct me. It is the equivalent of kicking me under the table if I do not get it quite right. As the CC Act is currently constructed, a privilege there would actually be a defence as opposed to a shield being applied. Our view is twofold. One is that currently there is a shield bill in front of this parliament and the best public policy outcome is for that to apply, as appropriately and broadly as it is can at this time, as the shield. Also, I think I pointed out in our opening statement, although quite clumsily, and I apologise for that, that a shield is not an absolute. It is decided on its merits each time it is invoked. Therefore, we think this bill is an appropriate place for the shield to govern across all of the instances in which a shield could be invoked in Queensland.

If it were to be dealt with under the Crime and Corruption Act, that is the level of uncertainty at this point in time in terms of what actually could or would be the case. As it would currently stand, if it were adapted into that legislation, it would be as a defence. A journalist and legal counsel would have to put on quite a significant and substantial amount of evidence and possibly even breach and identify the source in trying to attain the shield. That would be the so-called shield which would operate as a defence. It is a little bit perverse, if I could point that out. Gina, do you have anything to add?

Ms McWilliams: I will jump in with the specifics. If you look at sections 195B and 196 of the Crime and Corruption Act, it is for the person who is attempting to claim the privileges that are available under that act now to assert the privilege and prove that it should be maintained, whereas with the shield it is the other way around: it is the person who wants to breach the shield who has to bring the application and show that it is in the public interest that the shield should fall and that the disclosure should be made. It is the reversal of the onus of proof, essentially, that is going on there.

I think we would accept that Ms Fentiman, the Attorney-General, has made comments that there are many things about the act that are going to be considered. That may well be one of them. If that were to change then the position might be different. I think we would still want to see the shield in the Evidence Act cover all compulsory disclosure in Queensland to make it the strongest shield it could be.

CHAIR: That concludes this session. Thank you for your evidence. Are you able to provide the information that you said you would take on notice to the committee by 12 pm on Monday, 7 February?

Ms McWilliams: Definitely. Thank you. That is a very generous amount of time.

CHAIR: We do our best. Thank you, everybody.

PODAGIEL, Ms Kristen, Interim Chief Executive Officer, Women's Legal Service Queensland (via videoconference)

SARKOZI, Ms Julie, Solicitor, Women's Legal Service Queensland (via teleconference)

CHAIR: I now welcome witnesses from the Women's Legal Service Queensland. I invite you to make a short opening statement, after which committee members may have some questions for you.

Ms Podagiel: Thank you. The Women's Legal Service Queensland is a specialist community legal centre that provides free legal and social work primarily in the areas of family law, domestic violence, financial abuse and child protection with some aspects of sexual violence. Approximately 90 per cent of our clients have experienced domestic violence. We provide statewide assistance through our statewide domestic helpline and a priority regional remote line. Around 50 per cent of our clients are located outside the south-east corner, so it covers the state. We provide a variety of services in the domestic violence space including duty lawyering services at Holland Park, Caboolture and Ipswich. We operate the health justice partnerships within nine hospitals, and we run the specialist domestic violence units in Brisbane, Caboolture and the Gold Coast.

Mrs GERBER: Thank you for your appearance. I just wanted to expand a bit on your concern around the nature and extent of police being trained who are taking part in the pilot program. It seems to me that the bill has a lack of clarity around the nature and the extent of training that police need to undertake in order to be part of the pilot program. I just wanted to ask you for your suggestions around how that could be improved to ensure not just the safety or the protection of domestic and family violence victims but also the continuity of the evidence so that it is not ruled inadmissible and to ensure that victims of domestic and family violence are not subjected to having to repeat their testimony over and over.

Ms Podagiel: I will just flag that Julie just dropped off briefly midway through that question. Julie, can I just check that you are online again now? Can you hear us, Julie? Sorry. Can you hear us, Julie? We cannot hear you at present.

Mrs GERBER: I can repeat the question when she comes online if you want.

Ms Podagiel: It appears as though she is there on the participants but she does not appear to have sound. I am just looking at a message. Apologies.

CHAIR: I understand the video may not be working—

Ms Podagiel: I think maybe her sound is not even working.

CHAIR:—at the other end, dare I say.

Ms Podagiel: The wonders of working from home! I might continue as we wait for Julie, and I may have to take some of the question on notice. In terms of what we are seeking, it is a recognition that in order for this to be successful we need the appropriate training and that necessitates resourcing and the appropriate support for the pilot and then beyond in terms of the training aspect. In particular, we request that there be an additional definition around the concept of a trained police officer. We have put forward some suggestions in relation to that, but a couple of key elements are that there is an appropriate training program that is really directed at domestic and family violence education and awareness, recognising that it does pose a different role for police. It is an extremely specialist area, and the need for specialist training in order for police to be able to be appropriately supported if this legislation proceeds is critical. That also includes an awareness of trauma informed work practices which, again, in the domestic violence space is a particular specialist nature of awareness that we are seeking. I do not know whether that answers your question, but we are seeking specialist training that is particularly focused in the domestic violence space and we would suggest that more needs to be done to provide appropriate training for the pilot to be successful.

Mrs GERBER: Could you elaborate on what specifically the police officers' training would need to be around domestic and family violence in order to not retraumatise the victim and also to ensure that the evidence they take can be admissible and is taken in a way that ensures the integrity of that?

Ms Podagiel: Some of that relates to one of our other recommendations, which are things around the impact that, for example, having the defendant or a perpetrator in the same space or close to the victim or the person who is giving the recorded statement would have. So it is a recognition of the quite unusual situation that arises in domestic violence which can sometimes be characterised by a long history of control over the person who is giving the statement. It is not as straightforward as, for example, taking a statement from someone who might have been involved in a crime of some sort. This is a specialist area because of the nature of the trauma and sometimes the long-term nature of the trauma that the victim might have been subjected to—for example, as I say, the idea of taking the

statement in the absence of the possible perpetrator, the need for the person giving the statement to feel that they are in an appropriately safe space, the recognition that they could still be experiencing the physiological and psychological impact of that trauma as they are giving that statement. It is quite a nuanced area. There certainly are specialists in this space who work on it and I cannot proclaim to be one of those, but certainly it is critical that that training is appropriate and it goes well beyond the existing training, resourcing and support that is currently provided.

Mrs GERBER: Thank you.

Ms Podagiel: I think Julie has dropped off entirely again now, sorry.

CHAIR: Are you happy to keep going?

Ms Podagiel: Can you see that Julie is online at the moment at your end?

CHAIR: Yes.

Ms Podagiel: I think this is her calling. Give me two seconds. Let me try to put Julie on speaker. Apologies, Chair. I acknowledge this is less than optimal, sorry.

Ms Sarkozi: Hello there. I am so sorry about this. I cannot explain the difficulties. I am in the office. The office should all be working and I cannot explain it.

Ms Podagiel: Chair, can you hear Julie appropriately?

CHAIR: I can. Are the other committee members okay?

Mr POWELL: Can she hear us?

Ms Sarkozi: Yes, I can see and hear everybody.

Ms Podagiel: Thank you.

Ms BUSH: Thanks, Kris and Julie, for persevering there. At least one of the submissions we have received has cautioned the committee about the pilot use of video recordings, saying that it would be retraumatising for victims. I acknowledge that you have touched on this already, but I would just like your response to that—whether you agree or what mitigations could be put in place around that.

Ms Sarkozi: I hope everybody can hear me.

Ms BUSH: There is a bit of feedback.

CHAIR: Yes. I think Hansard would be having a huge amount of problem. If we can just stop for one second, please. The difficulty we are having is not so much hearing you, but there is a funny screeching noise coming through and it is not possible to hear what you are saying. We will quickly turn the sound system off and back on again to see whether that improves things. Okay, that seems to have improved things. Thank you. I do not know where we are at exactly. Jonty, have you finished?

Ms BUSH: Is Julie watching us on video, because I can hear feedback? She might need to mute that.

Ms Sarkozi: Somebody has disconnected me from the video anyway, so I cannot see anything now.

Ms BUSH: Yes, perfect.

Mr POWELL: That is much better.

Ms BUSH: Yes, that is better. That is fine. We have you now. We have received at least one submission that cautions the committee about the pilot use of video recordings, particularly around the fact that it would be retraumatising for victims, and I just wanted you to respond to that.

Ms Sarkozi: Yes. In relation to the research that has come out of Victoria that has reviewed very similar provisions and a pilot program, I understand that there has been real concern about not only the training or endorsing of police doing this new type of work but also the potential for the police, just in relation to them interviewing people who are survivors of trauma, doing things like just focusing on incidents, and that can really mean that the victim survivor does not get an opportunity to provide context to actually link that current incident with previous incidents. That can always be mitigated with appropriate training. For example, to specifically address the point you have raised, which is that we do not want to retraumatise or further traumatise victim survivors, my view is that the possibility of that occurring can be mitigated with adequate training, not only in terms of making sure it is admissible, so all of the legislative requirements are met, but also so that the officer taking the statement does so in a way that is trauma informed.

Ms BUSH: Great. The submitter has also stated that admitting those recordings may in fact lead to perverse justice outcomes and I was interested in your views around that.

Ms Sarkozi: Obviously everybody is very concerned about that and I know that, for example, potentially one of those outcomes may be something like a victim survivor engaging in the interview process, their statement being taken and then finding that they want to withdraw their statement and do not want the police to proceed. There is some concern that with that sort of evidence the police will go against the survivor's intentions, but I see that in the legislation it says it can only be used with the consent of the complainant. In my view, that potential adverse outcome for survivors is dealt with in that way in that the legislation itself deals with that.

The other issue happens a little bit with body worn camera evidence that turns up when police arrive at a scene, and the sorts of things that people often talk about are things like unfavourable or potentially unpleasant things that are going on in the background such as, for example, evidence of drug use and how that might actually then be contained in the video footage. Again, it is about the police being trained as to how to get the statements, to make sure the statements are being taken perhaps in a room separate to where a whole lot of other things are happening and to make sure that it is not a wide camera angle so that that sort of thing can be minimised. Does that make sense?

Ms BUSH: Yes, it does. Thank you.

Mr POWELL: In your submission you pick up clause 37 of the bill, where it refers to section 103 and that definition of a domestic violence offence. I get your concern quite clearly in this, because it looks like it is adding a two-stage process to the offence. Is that consistent with any other aspect of law or should the word 'and' be 'or', or what is your understanding of what is going on there?

Ms Sarkozi: My thought is that it should be 'or' because it is very common for people charged with domestic violence type offences to also have other offences attached to those charges. The way it is worded, from my interpretation and my reading, means that your defence lawyer would be actually suggesting not to plead guilty or to fight certain offences so that this cannot be triggered. The application of allowing witness statements in evidence cannot be triggered because of the way this is worded.

Mr POWELL: I am struggling to understand why it has been worded this way. Is there any explanation?

Ms Sarkozi: I have no idea why it has been worded that way. I am not sure whether it is equivalent legislation but it is certainly similar to legislation in Victoria. I cannot see a replica of this wording, so I just do not know.

Mr HUNT: Could you explain to me what you understand is the definition of 'trauma informed'?

Ms Sarkozi: Yes. That is a really good question. Sometimes the words 'trauma informed' can be bandied about and everybody nods their head, but really nobody knows what we are talking about. Trauma informed is essentially a practice of working with a client, in this case a survivor, that actually puts their experience of trauma at the front and centre of the way you engage with them. For example, where I would be saying that the police need to get specific training about how to do this in a trauma informed manner, it would include things like accepting that somebody who has just been traumatised or is traumatised is very likely to provide a narrative that is not chronological. A lot of research says that a symptom of trauma is speaking about an incident in a way that is not from the beginning to the end. Usually statements are taken that way. If an officer is videorecording someone who is the survivor of trauma and is expecting that narrative to run from the beginning to the end, that is not trauma informed work practice. That is just one example. Would you like me to provide more?

Mr HUNT: No, that is sufficient. Thank you very much.

Ms Sarkozi: There is another very good example. A trauma informed work practice usually goes, 'We will take the time needed for you to feel safe and to feel comfortable and to tell us what you need on this video recording' as opposed to, 'We expect you to do this in our time frame', which is 'we have an hour here'. Does that make sense?

Mr HUNT: Yes, thank you. That is excellent.

CHAIR: In relation to the question Mr Powell was asking you about clause 37—

Mr POWELL: Are you going to correct me, Mr Chair?

CHAIR: No. In relation to your concern that, in the recording of the evidence from the complainant or the aggrieved, that evidence would also include a statement about other criminal offences, my understanding is that—and correct me if I have misunderstood the legislation—it would also be able to be used for other offences relating to the incident that arose under domestic violence.

Ms Sarkozi: That is my understanding as well. My reading of this section is that you cannot use a recording for another offence unless it is also being used for a domestic violence offence. That would mean that you cite the domestic violence offence so that you do not get that offence attached to the

other offences and therefore can exclude the recording. I know that you are very experienced, Chair. I am not going to pretend to have understood this better or more clearly, but that was my reading of that section.

CHAIR: It has been a while. I am just trying to understand your interpretation.

Ms Podagiel: Our understanding is that that is a cumulative approach. I guess our concern is that you must fulfil both limbs, whereas in fact we are suggesting that it should be either/or. One limb or the other would be sufficient.

Mr POWELL: I think either way it is unclear and we probably need to unpack it a bit further in our deliberations.

CHAIR: There being no further questions, that concludes this session. Thank you for attendance and your submission and for giving evidence today.

COPE, Mr Michael, Special Counsel, Queensland Council for Civil Liberties

CHAIR: Good morning. I invite you to make a short opening statement, after which committee members may have some questions for you.

Mr Cope: Thank you, Chair, and thank you for the opportunity to appear today. I really do not have a lot to add to what is in the submission. As it stands, the bill represents the basic sort of principle we espouse which is that, in the public interest, in accordance with the right to freedom of speech, journalists should have the presumptive right to collect information and disseminate it to the public. It provides that in appropriate circumstances a court can override that presumption and order that the information be disclosed, notwithstanding the claims of freedom of speech and those of related interests. Our central critique is that it does not go far enough in that the interests which are protected here in relation to the identity of informants should be broader. They are the same interests. The bill should extend, as it does in 17 states of the United States, to all information collected by a journalist.

An incident having occurred in the public gallery—

Proceedings suspended from 11.55 am to 12.05 pm.

CHAIR: I apologise for the disruption due to a security incident.

Mr Cope: I think I basically said what I wanted to say. If anybody wants to ask some questions, that is probably the place to go.

Mrs GERBER: I would like you to expand on why the shield laws essentially should apply to the CCC or a proceeding within the CC Act. I think providing some practical examples of that for the committee of the consequences of it not applying would be helpful in the committee considering that element of the bill.

Mr Cope: I do not think I can provide you with any practical examples, but it is a classic illustration that people with extraordinary powers should not be exempt from supervision; they should have more supervision. The CCC, like any other body which has compulsive powers, should be required to demonstrate that the public interest outweighs the free speech interests of the journalist. I do not see the fact it is the CCC makes one jot of difference. The difference will come no doubt in the assessment. In the weighing of those interests the court will say, presumably, that whatever the CCC might be investigating might be more important than some ordinary court process. That is where that will be worked out and it should be worked out outside the CCC because, as I say, the CCC is basically a standing royal commission. It has enormous powers. Those powers should be subject to more supervision, not the other way around.

Mr KRAUSE: Hear, hear.

Ms BUSH: Just picking up on expanding the shield laws to journalistic privilege within CCC hearings, I am curious about the timing of that in your professional opinion, given the complexity of the issue. Given the complexity of the CCC, given the CCC is subject to upcoming reform, given the importance of getting those powers, functions and policy settings right for an independent corruption watchdog and the level of consultation it would take, do you see concerns—

Mr Cope: Sorry, I thought there was going to be another consultation.

Ms BUSH: Yes. I guess what I am saying to you is: would that be preferable, over trying to include the shield laws as part of this bill?

Mr Cope: Our position is that if it is not in this bill the CCC has to be subject to it and if you want to work out the details we are happy to talk about the details around that, but the starting point, as I say, is the CCC is a body with enormous powers and it needs to be subject to appropriate controls. Maybe the answer is that this issue could be sent off to the former justices and they can come up with a view. I do not know whether that is an option. I accept that the CCC may in some circumstances produce particular different issues. I do not practise in criminal law. I have never been to the CCC so I cannot comment on the practical things. That is why if there are practical issues that the government wishes to identify then we are happy to listen to them, but our starting point is that it is an enormously powerful body and it should not be simply allowed to wander around and tell journalists what to do. It should be subject to the same rules as everybody else. The people who want to argue that it is investigating serious crime, corruption and all those sorts of things—that is a factor to be taken into account by a court in carrying out the assessment processes provided for in the act.

Mr KRAUSE: Playing devil's advocate in some respects but also asking a question on behalf of the member for Noosa, can you elaborate on why you feel that evidence produced to the CCC should not be fulsome and include all information received by a journalist, considering the whole reason it exists is to actually provide compelled evidence so that it can have all the facts and information when it is dealing with serious crime?

Mr Cope: I think I have effectively answered that. It is an investigative body with enormous powers. Just because it is investigating serious issues does not mean that the same issues are not raised as to the right of journalists to collect information and to protect their sources, or however broad the bill may be. The methodology for dealing with the fact that they may be investigating some more serious sort of an offence is in the assessment of the public interest that is provided for under the bill. That is how that is dealt with, not by setting up the CCC as some—

Mr KRAUSE: As an exception.

Mr Cope: As some exception. Lord Acton said 'all power tends to corrupt and absolute power corrupts absolutely'. It is a body with enormous power and a journalist should not be frightened of dealing with issues that it might be involved in and therefore threatened with the prospect of it being able to override an immunity which other bodies may not be able to.

CHAIR: Something that occurred to me while you were giving that answer is: is there any overlap with protections offered to whistleblowers, or is that one step too far?

Mr Cope: There potentially is because obviously some of these people are going to be whistleblowers. I must confess that I have not looked through that. That is no doubt correct. There probably is an argument for looking at making those things mesh in a way. It is clear there will be.

CHAIR: Are you in a position to answer any questions on the amendments to the domestic violence matters? I take note of what you said in your submission.

Mr Cope: I do not practise in criminal law. These things are really about what people do on a day-to-day basis. I tried to get somebody to look at this, but they obviously wanted me to do it. All I can say is that I have read the submissions from the Bar Association and the Law Society and I thought some of the points in particular the Bar Association made had some substance to them. I do not think I can assist you very much. I think this does require somebody who does this, and I do not.

CHAIR: Thank you, and I apologise again for the disruption.

MURPHY, Mr Joseph, Lawyer, Bar Association of Queensland

O'GORMAN, Ms Ruth QC, Bar Association of Queensland

CHAIR: I now welcome witnesses from the Bar Association of Queensland. I invite you to make a short opening statement, after which committee members may have some questions for you.

Ms O'Gorman: We are grateful for the opportunity to make further submissions with respect to the matters contained in the bill. In my short opening statement I wish to address only two aspects. Firstly dealing with the proposed shield laws, as you will have seen from our submission, the Bar Association is very much in favour of the proposed work to be done in this legislative space with the introduction of the shield laws and very much supports the introduction of these provisions. In our view, as we understand some of the other submitters, we think the proposed laws could go further and would appropriately also apply to the Crime and Corruption Commission. We are heartened and pleased to see an intimation there is going to be some consideration of the merits of that in the first half of this year. The association would very much welcome the opportunity to be involved in anything that we can assist with there.

The other aspect I wish to comment on briefly is with respect to videorecorded evidence as evidence-in-chief for domestic violence related offending. As we have noted in our submission, the association does have some concerns with respect to the proposals there, particularly in relation to the impact that might have on victims. While we note that in the material available to us there has been talk of benefits that might be derived from these proposals for victims, we draw on the association's members' experience of contesting these matters in court. The association has some concerns that in fact the benefits that are hoped for may not come to fruition. If after this statement you have any questions or want me to expand on any of that, I would be pleased to.

We also have some concerns that there may be some unfairness caused to defendants, but we note the proposal is that the introduction be by way of a pilot program, and of course if it is going to proceed we very much welcome the opportunity to be involved in an assessment at the end of that program where our members may be able to contribute some feedback in terms of how those provisions actually worked in practice. Those are the matters I wish to comment on.

Mrs GERBER: I would like to give you the opportunity to elaborate on the matter you just spoke about, the pilot program, and the perceived benefits that will come from the videorecording of victims' evidence. Can you elaborate on how you think that may not come to fruition during a trial and also why the Bar Association thinks it could prejudice an accused?

Ms O'Gorman: I will deal with the first aspect; that is, the concerns we have about the disadvantages that may flow to victims if these provisions are introduced. I will deal with that aspect of it first. I will do it by drawing on what I understand to be three of the main hoped for benefits to come from the provisions.

Reading the explanatory memoranda and some of the other material that is available, it seems that one of the primary hoped-for benefits is that the provisions might reduce the trauma for a victim associated with the retelling of the story of their experience a number of times. One of the reasons we have concerns that benefit may not in fact come to pass is that these provisions will mean that, for the victim's experience as relayed in the videorecorded evidence to be available at a contested hearing, the victim will of course—as you well know—need to be there in court to confirm the truthfulness of that account. That will necessarily in practice require the victim to sit in court and watch the videorecorded evidence being played in that setting so that he or she can confirm that the evidence is in fact accurate and truthful.

Whilst the provisions would mean that in that setting the victim would not have to relay orally the account, the victim will nonetheless be reliving the experience they have already relayed on the video. One concern may be that that will be particularly difficult because—I keep using the word 'victim' here, but I mean 'alleged victim' in the context of a contested hearing, of course—not only is the victim having to relive that experience but also doing so by watching himself or herself in the moment shortly after the experience occurred. That will be quite a visceral experience for the person who is giving the evidence. The concern we have is that it may not in fact alleviate trauma but potentially add to trauma.

There were two more main benefits as we understood them which I will address now. It is hoped one benefit will be that, by playing a victim's videorecorded evidence in the hearing, the court will be able to witness the victim's demeanour and experience as it happened close in time to when it happened. There are some potential drawbacks to that situation, and it is not hard to identify a couple of them at least. One is that there is, it seems, a continuing fallacy in social attitudes that victims will react a certain way even close in time to when they have been offended against. If the alleged victim

in that video recording is sitting there relaying their experiences in a calm manner—in fact, potentially even seemingly detached—rather than in a heightened manner, will they be open to challenge in a contested hearing that perhaps the experience was not as damaging as they are saying during their evidence because of how they appeared shortly after the incident? The other concern is, of course, that victims will often be presenting in a heightened way emotionally soon in time after an incident which has caused them distress. For the reasons I have already mentioned, we are concerned that any trauma might be compounded by the replaying of the evidence in that form—that is, the victim having to watch himself or herself in that state in a courtroom setting.

Moreover, our experience is that often these sorts of offences occur in circumstances where one or both of the alleged victim and perpetrator have been consuming alcohol at the time. If that happens to be the victim in a case and they are relaying their experience in a state where they are affected to any extent by alcohol, over and above the heightened emotions they are experiencing, that could cause concerns for victims when the matter reaches a contested trial setting, where they are going to be faced with questions about their appearance and their memory or recounting of the events while they were affected by alcohol. That concern is significantly alleviated by the current court processes or investigation processes, which would see a victim being brought into a police station to provide their statement sometime after the incident has occurred when they are no longer affected by the heightened emotions of the moment and certainly no longer affected by any alcohol and, in our experience, is in a better position to properly explain their evidence than they would be either whilst in that heightened state or affected by alcohol.

The third hoped-for benefit appears to be that, by recording and playing the victim's evidence close in time to the alleged incident, the capacity of the alleged perpetrator to intimidate the victim into changing their evidence might be reduced. Of course, if that comes to fruition that is nothing but a good thing. The association is concerned that that will not in fact come to pass, because if a perpetrator is minded to attempt to intimidate a victim with respect to the evidence the victim is going to give then the capacity to do that is not done away with simply by virtue of the fact that the evidence has already been taken and recorded, because the victim can of course still come to court—must indeed still come to court—to confirm the veracity of that account and at that point can of course say, whether because he or she has been intimidated or otherwise, 'The account I gave to that police officer on that night whilst I was intoxicated by alcohol was not accurate' and that the true account is something much less severe. Those are the three concerns we have about the likelihood of the hoped-for benefits coming to pass.

I mentioned earlier having concerns that some unfairness would flow to defendants if these provisions are put into place. One of the central ones that the association is concerned about again flows from the fact that the taking of evidence from somebody in that heightened state at that emotive moment in time shortly after an alleged incident may not in fact be the evidence of the victim upon reflection. If what the defendant and the defendant's lawyers have been provided with in advance of the trial is the recording of the victim and nothing further, then the defendant in that circumstance may well be taken by surprise at trial when the victim comes along and says in fact that account is quite wrong or inaccurate in some respects or has been exaggerated or changes the evidence because he or she has had the time to reflect on it. The difficulty for the defendant and the defendant's lawyers is that they have not been given notice of that in advance of the trial. Those are the concerns we have about hoped-for benefits and prejudice to the defendant in advance of contested hearings of that kind.

Mrs GERBER: Some other submitters to the committee today have proposed that some targeted and specific education and training of police officers who are participating in the pilot program and taking the video evidence would alleviate both the concerns that you have raised in relation to survivors or alleged victims of domestic and family violence and also the alleged prejudice that might happen to a perpetrator. Essentially, the training would have to ensure that the police officers take evidence in a way that alleviates those concerns. I know that the bill is not entirely specific around the training and education of police officers participating in the pilot program. If that were something that was looked at, would that alleviate your concerns?

Ms O'Gorman: It would not completely alleviate our concerns, but we have noted that that is proposed in the legislation. We would think that at a bare minimum it is an absolute necessity. We think that if the pilot were to proceed that is a very good aspect of the initiative. I say it would not completely alleviate our concern for two reasons. One is that, as you would be aware, there is already provision for the taking of videorecorded evidence from some witnesses that is later used in contested hearings. That relates to evidence coming from children or persons with an impairment of the mind. As the association understand it, as things presently stand, police are required to undergo training in order to undertake the questioning of people who fall into that category, yet the experience of our association is that, notwithstanding the training that such police officers undertake and go through before they

participate in that questioning, more often than not there is editing required of the evidence taken in that form before it can be played in court. Difficulties flow from the editing of interviews like that because once you edit one aspect of the interview it does not always necessarily flow smoothly to the rest. We would hold concerns that, despite the training, it would still be difficult for police officers to take evidence in a way that was most useful and most beneficial to the court.

I did have another concern with respect to it. It is the fact that the provisions allow for the admissibility, as I understand it—and I would be happy to be corrected of course—of that videorecorded evidence even in circumstances where the provision requiring that police officers be trained has not been complied with. If I understand the proposed legislation correctly, if a police officer has not been properly trained or gone through that rigorous training program but nonetheless takes the prerecorded video evidence, it does not necessarily affect the admissibility. We would be concerned about that aspect of it. However, I do note that there is the residual discretion of the judge at the hearing to consider whether or not the evidence or parts of it are inadmissible for any reason, so there is that safeguard there.

Mrs GERBER: That safeguard in itself could prejudice the survivor or undo the intended consequences and may retraumatise them.

Ms O'Gorman: In terms of taking the evidence.

Mrs GERBER: That is exactly right, yes. Thank you for your submission.

CHAIR: In relation to page 4 of your submission under the heading 'Prohibition on Copying Recorded Statements', isn't the defence entitled to a copy of it? If the matter has been set for trial, part of the brief of evidence would be the recording.

Ms O'Gorman: If that is correct then our submission has misunderstood the intention of the legislation.

CHAIR: I am trying to understand the practicalities of it. Information is requested from the prosecution if you are defending a matter. Would that form part of it or would this prevent the prosecution from supplying a copy?

Ms O'Gorman: I confess that I would have to go back and check the provisions because I am not entirely clear about how they may operate. Can I come back by way of potentially some brief written memo if we continue to have a concern about that?

CHAIR: Can you take it on notice?

Ms O'Gorman: Thank you.

Mr KRAUSE: I take on board your submissions about the CCC and the application of these laws. Keeping in mind that a star chamber has those sorts of powers and it is designed to get to the full truth of any matter before it, can the Bar Association provide any details of what further protections could be applied to journalists where a source is a recognised whistleblower? Are you proposing that the present laws as proposed should simply apply within the CCC or is it more nuanced than that? Would you like some other specific provisions to be implemented in relation to the CCC?

Ms O'Gorman: It seems to us that the proposed provisions in this bill would be fairly seamlessly applied to the CCC, potentially with some minor amendments to the considerations that at present a judge—and in the case of the CCC the presiding officer—might take into account in determining whether to override a journalist's claim with respect to the shield laws. For example, the type of investigation that is undertaken and the importance of the journalist answering the questions with respect to their source could be a matter that the presiding officer could take into account. It is not presently one of the considerations that a judge would take into account at a trial because by that stage of course the investigation is well and truly concluded and it is a matter for what evidence is going to be adduced at the trial. It would require only relatively minor amendment to the provisions as they currently stand. If there is in fact to be a further consideration with respect to the privileges that apply at the CCC then, as I have indicated, the Bar Association would be very happy to give a fuller set of submissions with respect to how such legislation might be crafted.

Mr KRAUSE: It could be that there is another forum in the future that may even consider it.

Ms O'Gorman: Indeed.

Mr KRAUSE: So thank you.

Ms BUSH: We heard earlier today that just three jurisdictions provide for shield laws in their anti-corruption equivalents—ACT, one of the New South Wales equivalent bodies and the Northern Territory. I was curious about whether the Bar Association has looked at or completed any work around

the key differences between the powers and functions and the authorising legislation of those jurisdictions and the Queensland Crime and Corruption Commission? What would be the key differences between those jurisdictions?

Ms O'Gorman: To my knowledge, to date we have not, and certainly for the purposes of making these submissions we have not, done that detailed analysis. Again, if we were to be involved in providing submissions in the future, we could certainly look at that.

CHAIR: There being no further questions, that concludes this session. Could the information in regard to the question taken on notice be provided to the committee by midday on Monday, 7 February, if that is possible?

Ms O'Gorman: Thank you, Mr Russo. It is.

CHAIR: Thank you for your attendance and thank you for your written submissions.

Ms O'Gorman: Thank you for having us.

FOGERTY, Ms Rebecca, Acting Chair, Criminal Law Committee, Queensland Law Society (via videoconference)

SHUTE, Mr Andrew, Chair, Litigation Rules Committee, Queensland Law Society (via videoconference)

THOMSON, Ms Kara, President, Queensland Law Society (via videoconference)

CHAIR: I now welcome representatives from the Queensland Law Society via videoconference. I invite you to commence by making a short opening statement and then the committee will have some questions.

Ms Thomson: Thank you for inviting the Queensland Law Society to appear at the public hearing on the Evidence and Other Legislation Amendment Bill 2021. In opening, I would like to acknowledge the traditional owners and custodians of the land on which the meeting is taking place—Meanjin, Brisbane.

CHAIR: Your sound is breaking up. It has been suggested that if you have headphones it may work better.

Ms Thomson: I do not think we have them handy.

Ms BUSH: Maybe slowing down a little bit might work.

Ms Thomson: Sure. In terms of our submission, there are a few discrete issues I will mention in opening, if you can hear me sufficiently.

Mr POWELL: It is not great but keep going.

CHAIR: Could you start again and if there is still static we might have to go to a teleconference?

Ms Thomson: Sure. We can do that if need be. In terms of the submissions that we would like to talk about today, there are few discrete issues I would like to raise with you as part of the opening statement. Firstly, turning to the issue of videorecorded evidence-in-chief, or VRE as it is referred to, the Law Society is, as a general principle, supportive of the proposed VRE pilot and its aim or intended purpose to minimise trauma for victims of domestic and family violence in criminal proceedings. The Law Society acknowledges that engagement with the criminal justice system can be quite traumatic for victims and that the use of VRE may indeed be beneficial for victims. For example, it may avoid the need for victims to recount the facts of their complaint multiple times.

However, whilst we are supportive in principle, we consider there to be a number of aspects of the VRE pilot and proposed implementation which require further consideration and stakeholder consultation. In that regard we specifically refer to two things. The first is the scope of the VRE pilot and the type of offences or complaints to which it might apply—for example, whether it would include a serious offence, which we address in our written submission. We think the scope needs to consider that issue further. The second is the concept of a trained police officer and what that is intended to entail, including the nature of the position or experience of the trained police officer and the content of the training that is provided to him or her to recognise the inherent complexities of domestic and family violence.

The second issue that we would turn to is the proposed shield laws. The Law Society is broadly supportive of the proposed amendments to the Evidence Act to introduce journalist privilege. We refer the committee to our commentary in the written submission in this regard and proposed amendments to the provisions of the bill. On balance, though, we consider the amendments do strike an appropriate balance of the rights of the different parties involved in those issues. In relation to the Crime and Corruption Act, we call on the committee to recommend the bill be amended so this privilege will apply to those proceedings, particularly given that persons in those proceedings can be compelled to give evidence. Thus, a journalist should be able to call a claim for privilege with regard to those matters.

Lastly, touching on the proposed amendments to the Criminal Code relating to the disclosure of human remains, we think there is some uncertainty about how the proposed provisions would relate to samples and how they might be retained for the purpose of retesting, but we urge the committee to ensure the drafting of those amendments be reviewed so there is no loss of evidence and more broadly no leading towards any potential miscarriages of justice.

I am joined today by two of our subject matter experts to assist you in your deliberations. Rebecca Fogerty is the acting chair of the Criminal Law Committee and an accredited specialist in criminal law. Andrew Shute is the chair of our Litigation Rules Committee. Rebecca is able to speak to the issues in relation to the VRE pilot and legislation as well as the issue of warrants and the Daniel Morcombe recommendations. Andrew can speak to the shield laws.

Mr KRAUSE: Thank you for your opening statement. Your submission highlighted the potential issue of cost implications for parties involved in the pilot. Could you elaborate on that issue and, if possible, provide examples about how that may arise and any suggestions on what could be done to mitigate any cost issues for people involved in the pilot in relation to the video evidence provisions?

Ms Fogerty: It is a very good question. Our concerns in relation to costs touch on several different areas. The first is obviously—and this is one of the reasons we support the pilot program—that there is limited evidence about the effect of videorecorded evidence-in-chief for DV victims on justice outcomes. The evidence we are working off is limited, but there is some tentative support, particularly from the experience in Victoria, for there being overall gains on the justice system because videorecorded evidence can relieve some of the pressure off the system in some contexts. The experience in Victoria, and I believe also some American research, shows that videorecorded evidence can actually produce delays, particularly human resources delays, for police officers, who have to ensure that the integrity of the evidence is maintained and the chain of custody is maintained. It is also important that the IT infrastructure be sufficient to enable the evidence to be meaningful.

The other aspect of our submission, which I confess to not having in front of me so I am just going off my memory, is in relation to the fact that with any sort of videorecorded evidence—this is currently something that applies in relation to other types of witness such as children, whose evidence is routinely recorded—you have to have transcripts. There is obviously a cost associated with ensuring those transcripts are prepared and provided to defendants, particularly those who are self-represented. The society's view is that none of these are unusual issues or things that do not have solutions, but certainly evidence from some of the other jurisdictions suggests that these are things to look at to ensure that the pilot, and any laws that come of it, are of the best standard.

Mrs GERBER: Does the Law Society share the Bar Association's concerns around the perceived benefits to a survivor or victim in the courtroom not coming to fruition or their concerns around the potential for any prejudice to the perpetrator? I assume that you listened to the Bar Association's evidence.

Ms Fogerty: Yes, I did.

Mrs GERBER: I just want to understand the Law Society's view on that. Essentially, the Bar Association pointed to the videorecorded evidence already in place in relation to children's evidence and people making statements and suggested that, even with targeted training and education of police officers, that evidence still comes into some issues in a criminal trial.

Ms Fogerty: There is a lot to unpack there. It is really important to acknowledge, both in law reform and in the wider social discourse that is happening at the moment in relation to women, the criminal justice system and victims of domestic violence, that victims are not a homogenous group. Part of giving victims a voice is to give them agency and to work on the basis that different victims are going to have different responses. Our position is that the proposal is a pilot in circumstances where there is significant discourse happening in the wider community about ways in which the criminal justice system can do more for victims. Against that discourse is a real lack of empirical data about what works, and what works in such a way so as not to cause miscarriages of justice. In that regard, we particularly support any effort to investigate the issue with reference to the specific Queensland experience.

The reality with videorecorded evidence is that I do not think you can have a one-size-fits-all approach. Evidence is complex. People are complex. With the circumstances in which they will come to give a complaint and how they will give it, there is so much variation that there is something to be said for the fact that it is not so much the mode of evidence; it is the quality of the actual evidence that matters.

Mrs GERBER: Based on the quality of the evidence being what matters, allowing survivors or victims of domestic violence to have autonomy, does the society share the Bar Association's concerns in relation to videorecorded evidence?

Ms Fogerty: The concerns raised by the Bar Association are valid concerns that arise in the context of any criminal trial and any situation where we are looking to change the mode of giving evidence, particularly in the context of contested criminal trials where often credit and reliability can be a key issue. That said, there is a context to all of this as well.

There are going to be some victims who want to appear in court, who do not want to give evidence-in-chief by video; there will be others who do. What is really interesting is the research, particularly in Victoria, where police prosecutors were interviewed. Police prosecutors showed very clearly that the responses of victims were diverse. Areas that were identified of possible concern were when dealing with culturally and linguistically diverse victims and the way that sort of audiovisual technology could produce a disadvantage to them, but that issue applies equally to defendants. Did that answer your question?

Mrs GERBER: Thank you.

Ms BUSH: Rebecca, your submission states that where the domestic violence offence is also a serious criminal offence or where matters of credit and reliability are an issue it may not be in the interests of justice to present the complainant's evidence-in-chief as a recorded statement. Could you expand on that?

Ms Fogerty: That is something that touches on the concerns identified by Ms O'Gorman. It obviously goes to the importance that the reception of this evidence, the admissibility of this evidence, is subject to the overriding interests of justice and the fairness in proceedings. There will be some cases where the evidence-in-chief is not appropriate, and that may work to the advantage of the victim or the prosecution or to the advantage of the defendant. Situations may well be where the victim is intoxicated or is under the influence of drugs or in circumstances where she is in a particular state of distress. There might be environmental things happening which impact upon whether or not it is fair for that evidence to be admitted.

That is why, like I said, the society's view is that getting evidence about this, developing an empirical basis on which to fine-tune our policy in relation to this really important issue, is something that we support.

Ms BUSH: Given that this is a pilot, to the issues you have raised do you see a way, in your professional opinion, that those issues could be mitigated through the design of the pilot and/or through the evaluation process of the pilot?

Ms Fogerty: That is the really interesting question and I would take all day to answer it. I think it might be more meaningful, though, if we took that question on notice and perhaps I could provide something written. Certainly we note that the intention is for there to be an independent evaluation. The society considers that wide consultation with all justice stakeholders, including victims of crime, members of the judiciary, victim advocates and criminal defence lawyers, is really important—people who understand the day-to-day workings of the courtroom and the evidence process.

CHAIR: Rebecca, have you had the opportunity to consider the part of the submission by the Bar Association about the proposed section 590AOB, particularly subsection (4)(d)(i), about the unforeseen consequences of recording or making a copy of the evidence? I am summarising, but the Bar Association is saying that if you download a copy of the video or audio evidence you are actually committing an offence. On my understanding—and correct me if I am wrong—that would be part of the request you would make if a matter was to be defended and needed access—

Ms Fogerty: I may be wrong, but when listening to the submissions I interpreted that issue to be in relation to something in the draft bill about limiting access to the recording for a person who is unrepresented. That is something that I think we see at the moment in relation to evidence involving sexual allegations where the defendant is not legally represented. There is always an access to justice issue with a self-represented defendant who is not able to get access to what will in many cases be the evidence against them, the key evidence in the case.

The society understands that there are tensions here that have to be balanced. In our view, there is potential for miscarriages of justice if persons charged with serious offences who are not legally represented are not able to have access to the full scope of the evidence against them, and perhaps some more consideration should be given to how to best give effect to that.

CHAIR: That concludes this hearing. I would like to thank you for your written submissions and for answering our questions today. If the answer to the question that was taken on notice could be provided to the committee by 12 pm on Monday, 7 February 2022, it would be appreciated. I would like to thank the Hansard reporters. A transcript of these proceedings will be available on the committee's webpage in due course. I would like to thank the staff of the Transport and Resources Committee who have helped us here today. I declare this public hearing closed.

The committee adjourned at 1.02 pm.