BAR ASSOCIATION OF QUEENSLAND

9 December 2021

Committee Secretary
Legal Affairs and Safety Committee
George Street
Parliament House

Brisbane QLD 4000

By email: lasc@parliament.qld.gov.au

Dear Committee Secretary

Submission | Evidence and Other Legislation Amendment Bill 2021

Thank you for giving the Bar Association of Queensland ("**the Association**") the opportunity to respond to the Evidence and Other Legislation Amendment Bill 2021 ("**the Bill**"). The following response has been prepared by the Criminal Law Committee of the Association.

Return of Human Remains

The Association does not oppose the proposed amendments to the *Criminal Code Act 1899* which enact recommendation 2 of the *Inquest into the disappearance and death of Daniel Morcombe*.

Electronic Warrant Process

The Association does not oppose the proposed amendments to the *Bail Act 1980* as they relate to the use of computer warrants.

Journalist Shield Laws

The Association is in favour of allowing protections for journalists unable to reveal their sources. The Association notes with interest that these laws are not applicable in a proceeding brought under the *Crime and Corruption Act 2001*; where, for instance, an investigation into alleged corruption may stem from a whistle-blower. Whilst the Association appreciates there are significant public interest considerations in respect of this, it considers the same shield laws should apply in matters before the Crime and Corruption Commission.

Use of Recorded Evidence as Evidence-in-Chief

The Association would like to make the following response to the proposed implementation of a legislative framework for a pilot ("**the Pilot**"), enabling recorded evidence taken by trained police officers to be used as a victim's evidence-in-chief in domestic and family violence ("**DFV**") related criminal proceedings.

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The Association notes that the definition of 'recorded statement' in the Bill includes both video and audio recordings.

The Association does not consider that recorded statements used in DFV and related criminal proceedings would increase access to justice or streamline proceedings for victims. In the Association's view, the Pilot may impede the efficient administration of justice, is not required in the interests of justice and has the potential to prejudice an accused and their ability to obtain a fair trial.

DFV and related criminal proceedings are, by their very nature, difficult offences to prosecute and to defend. Often the cases will rely mainly on an allegation and a denial. Typically, there will be conflicting versions presented by the parties involved. This presents a tribunal of fact with a difficult task and requires them to make a careful assessment, in the most effective way, of the plausibility of the complaint and the credibility or reliability of the complainant.

An accused person must at all times be accorded the right to a fair trial. Recorded evidence is hearsay evidence, which is not the best evidence. Exceptions to the hearsay rule are made only in special circumstances; for example, regarding evidence given by children. These exceptions are justified because children are the most vulnerable of witnesses or complainants, who are afforded special measures because of features which are not reflected in adult witnesses or complainants. Even in the case of video recorded evidence-in-chief given by children, it is invariably done in a controlled environment according to mandated and organised procedure. The Association notes that the Bill does not mandate a similar process with respect to alleged DFV offences.

Whilst it is envisaged that these recorded statements must be taken by a trained police officer; the Bill also provides that, if an officer is not trained, that does not affect the admissibility of any evidence taken. A trained police officer is defined to mean a police officer who has successfully completed a training course approved by the commissioner of the police service.

The Association does not consider police officers to be appropriately equipped to receive video recorded and intended as evidence-in-chief, particularly when that evidence is made as soon as practicable after the events constituting the alleged domestic violence offence. Often, a complainant will not be in an emotional state which allows a cogent or fair recording of their account of what has recently transpired. Furthermore, police are not required to subsequently take a formal witness statement from an aggrieved person whose account has been recorded. It seems inevitable that some police officers will not do so. This is likely to significantly disadvantage victims, who might have otherwise been able to provide a coherent account after being given time for calm reflection. Thus, inconsistencies in their evidence are likely to emerge for the first time in the witness box, with consequently adverse impact on credibility.

Having police officers take this evidence conflates the investigative role of police attending an alleged event of domestic violence, who may not be sufficiently trained in the law of evidence, with the role of prosecutions. In the Association's view, a skilled, experienced and appropriately qualified prosecutor, relying upon a proof of evidence including a sworn statement can elicit evidence-in-chief effectively and efficiently, in a safe, supervised and appropriate setting.

The Association notes that research has found that the misidentification of the victim of domestic violence as the perpetrator has been observed in multiple case studies, causing significant repercussions for a person who is misidentified as the victim or as a perpetrator of domestic violence. The Association notes that, in its 2020-2021 Annual Report, the Domestic and Family Violence Death Review and Advisory Board recommended that the Queensland Government

implement policy and practice reform focussed on accurately identifying the person most in need of protection in domestic and family violence matters.

Theoretically, if a person who may have been the perpetrator of domestic violence is misidentified as the victim and gives evidence in the method contemplated by the Bill, that evidence would be taken:

1. In a context where police are attending on a primarily investigative basis, and who may not be properly trained to take evidence;
2. Shortly after the occurrence of an alleged domestic violence offence;
3. Without the necessary precautions which are ordinarily present when any other form of recorded evidence is taken;
4. Where that evidence will become the person's evidence-in-chief.

The Association is concerned that evidence given in that theoretical scenario may wrongly be preferred and form the basis of a prosecution, thereby worsening the consequences of misidentification.

The Association is also concerned that recorded evidence could be excluded on many occasions as inadmissible. In the Association's experience, video recorded evidence-in-chief given by children most often requires significant editing. Whilst the Consultation Draft Bill allows a court to rule as inadmissible the whole, or any part of, a recorded statement and direct that it be edited accordingly, editing should only be accepted in extraordinary or special circumstances for the protection of uniquely vulnerable witnesses, like children.

The adulteration of evidence (by editing or partial use) given by adults, is more likely to unreasonably offend established principles of fairness that would result in numerous applications to exclude all the recorded evidence on the basis that partial editing "may distort or pervert the remaining evidence".[1] The Consultation Draft Bill allows unilateral editing of recorded evidence to avoid disclosure of material that is not required to disclose, a potentially broad category of evidence.

While the Consultation Draft Bill envisages applications contesting admissibility and use of these recordings, the Association's view is it will significantly increase the number of pre-trial applications under s590AA and the associated burden on the court, as well as the cost involved in prosecuting and defending DFV matters, with no real benefit to DFV complainants or victims.

While there are safeguards proposed in the pilot Consultation Draft Bill envisaging directions being given to a jury, it is the Association's view that the interests of justice are best served by the current protective measures available for special witnesses, which allows *inter alia,* evidence to be given remotely. Evidence should, as far as practical, be given with due respect for the importance of the solemnity of the Court environment and to the quality of the evidence being given in circumstances which allow the enhanced ability of the jury to assess the nature, quality and reliability of the evidence of an engaged (and present) witness.

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[1] *R v Hasler; ex parte Attorney-General* [1987] 1 Qd R 239 at 249.

Prohibition on Copying Recorded Statements

The Association perceives there may be unintended consequences resulting from the operation of the proposed section 590AOAB of the *Criminal Code,* particularly sub-section 4(d)(i), which prohibits a lawyer, who is entitled to obtain a copy of a recorded statement in a domestic violence proceeding, from making a copy of the evidence.

In the experience of members of the Association, this evidence is usually provided in the form of a CD or, alternatively, is uploaded to cloud software used by the Queensland Police Service. A person who downloads evidence from a cloud server is, by that download, creating a copy. Additionally, many modern computers, especially laptops, do not have CD-drives. It is possible that a barrister would receive this evidence in a brief from their instructing solicitor, which would inevitably require a copy of the evidence be made.

The Association appreciates the desire to prevent the improper distribution of sensitive evidence, but views this as an unnecessary imposition on practical matters involved in criminal proceedings. For that reason, the Association suggests that s 590AOAB (4)(d)(i) be removed.

The Association would be pleased to provide further feedback or answer any questions you may have in relation to the above.

Yours faithfully

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President