17 January 2022

Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George St
BRISBANE QLD 4000
By email: lasc@parliament.qld.gov.au

Dear Secretary,

Australia's Right to Know coalition of media organisations (**ARTK**) welcomes the opportunity to make a submission to the Committee's inquiry into the *Evidence and Other Legislation Amendment Bill 2021* (**the Bill**). Our comments have previously been solely focused on the establishment of a shield law enacted by Part 6 of the Bill as an Amendment to the *Evidence Act 1977* (QLD) (**the Act**) as this is, naturally, of the utmost concern to the group. This letter also comments on some additional clauses of the Bill which will restrain publication in relation to court proceedings.

THE SHIELD LAW

For the benefit of the Committee it is likely useful to state at the outset of this short submission that ARTK has participated in the all consultations associated with the development of the Bill to date. To that end we commend the Queensland government for its work towards enacting a journalist's shield.

ARTK is largely supportive of the Bill. However, and as expressed previously in consultations, we are concerned and disappointed that the shield is not intended apply to the Queensland Crime and Corruption Commission (**CCC**).

We repeat here material we put forward to the consultation on the exposure draft of the bill, specifically that that some of the comments in the Discussion Paper, *"Shielding confidential sources: balancing the public's right to know and the court's need to know Shield laws to protect journalists' confidential sources"* dated June 2021 (**the Discussion Paper**)[1], were not the complete picture of what occurs in other jurisdictions. This may have resulted in the incorrect decision to specifically exclude the CCC from the application of the journalist's shield. We note as follows:

[1] https://documents.parliament.qld.gov.au/TableOffice/TabledPapers/2021/5721T909.pdf

- We agree that in Victoria and Western Australian respectively, the Independent Broad-Based Anti-Corruption Commission (VIC) and Corruption and Crime Commission (WA) are the equivalent of the CCC and that the shield in those states does not apply to IBCA/CCC (WA) proceedings.

- We also agree that the Australian Capital Territory's Integrity Commission is the closest equivalent to the CCC in that jurisdiction and takes the opposite approach, allowing claims of journalist's privilege to be made against it.

- The Discussion Paper notes that "*In NSW…the legislation does not afford protection to a witness who refuses to answer a question or produce a document or thing on the ground of privilege*". That is true of the NSW Crime Commission but not true of the Independent Commission Against Corruption. *Independent Commission Against Corruption 1988* (NSW) s24 provides:

> (1) This section applies where, under section 21 or 22, the Commission requires any person--
> (a) to produce any statement of information, or
> (b) to produce any document or other thing.
> (2) The Commission shall set aside the requirement if it appears to the Commission that any person has a ground of privilege whereby, in proceedings in a court of law, the person might resist a like requirement and it does not appear to the Commission that the person consents to compliance with the requirement.
> (3) The person must however comply with the requirement despite--
> (a) any rule which in proceedings in a court of law might justify an objection to compliance with a like requirement on grounds of public interest, or
> (b) any privilege of a public authority or public official in that capacity which the authority or official could have claimed in a court of law, or
> (c) any duty of secrecy or other restriction on disclosure applying to a public authority or public official or a former public authority or public official.

The objects of the governing legislation for each NSW commission show that the NSW CC performs equivalent functions in relation to major crime as those performed by the CCC while the ICAC (NSW) performs the CCC's corruption functions. That being the case, ARTK submits the privilege applicable in the ICAC (NSW) should not be ignored.

- As for South Australia, the discussion paper provides that "legislation does not afford protection to a witness who refuses to answer a question or produce a document or thing on the ground of privilege". To the best of our knowledge, whether or not journalist's privilege applies in the Independent Commission Against Corruption (SA) has not been tested. However, we note:

  (a) An examination or inquiry by the ICAC(SA) could constitute an "…inquiry, cause, or matter, whether civil or criminal, in which evidence is or may be given" which would render it a "proceeding" sufficient to trigger the privilege: *Evidence Act 1929* (SA) s4; and

  (b) There is nothing in the *Independent Commissioner Against Corruption Act 2012* (SA) expressly dealing with or excluding the operation of the journalist's privilege (Schedule 2 of the Act refers only to legal professional privilege); but

  (c) Schedule 3 of the Act sets out a regime for dealing with search warrants and claims of privilege generally that refers the question to the Supreme Court.

- In relation to the NT – in which the only corruption body is the Independent Commission Against Corruption (NT) – the discussion paper notes "the corruption commission legislative framework provides that no obligation of secrecy or confidentiality or other restriction on disclosing information applies to giving evidence, and no privilege exists to protect the refusal to give evidence on grounds of public interest immunity. A witness is also not entitled to refuse to give

evidence on the ground that it might tend to incriminate them". The shield is not an "obligation of secrecy or confidentiality or other restriction on disclosing information": it is a privilege.[2] Consequently, there is nothing in *Independent Commissioner Against Corruption Act 2017* (NT) s 79 that provides that the shield does not apply to ICAC (NT) proceedings.

— We do not include Tasmania's legislation for comparative purposes since its professional confidential relationship privilege does not expressly refer to journalists and we do not include the Commonwealth given it has no equivalent corruption body and the functions of the Australian Crime Commission are of a broader nature than the CCC.

In summary, we say three jurisdictions have legislation disallowing the privilege in bodies equivalent to the CCC; three do allow the privilege; and, three provide no guidance.

The recent proceedings concerning "F" demonstrate how badly needed the privilege is both generally and specifically in relation to the CCC. If the shield does not apply to that body, journalists continue to risk being fined or jailed simply for doing their jobs.

With such an even division outside Queensland we would urge the Committee to reconsider this issue and let the privilege do its work in relation to the CCC. Specifically, we recommend section 14S(2) be deleted to give effect to this.

Lastly, we note the Attorney-General's comments in introducing the Bill to the Parliament, that *the government is committed to examining the shield laws as part of the ongoing work that is being undertaken regarding the operation of privileges under the Crime and Corruption Act, and that during the first half of 2022 there will be an indication of the course of action on this issue.* As we have said previously, we appreciate the Government's actions, and particularly the Attorney-General's leadership, that have brought us to where we are now.

We argue that the time is now to ensure the shield law applies in all circumstances without exception. As has been well ventilated in this thorough process, the shield is not absolute, and if it should – or should not – apply, then a judge with all evidence in the circumstances, can and will make that informed decision, including in the case of the Crime and Corruption Commission.

NEW OFFENCES FOR POSSESSION ET AL AND PUBLICATION OF CRIMINAL STATEMENTS, CRIMINAL TRANSCRIPTS, RECORDED STATEMENTS OR RECORDED TRANSCRIPTS

The companies comprising ARTK oppose all amendments to the law creating or continuing offences relevant to reporting and/or publication, particularly offences that introduce or perpetuate a risk that journalists could be imprisoned for nothing more than doing their job. ARTK therefore opposes sections 93AA, 93AC, 103Q and 103S of the Bill on principle but also raises the following particular objections:

<u>Sections 93A and 93AA of the Act and the Proposed Replacement Section 93AA</u>

Section 93A(1) of the Act currently provides, inter alia, that where direct oral evidence of a fact would be admissible, any statement in a document tending to establish that fact is admissible as evidence if the statement was made by a child who is available to give evidence in the proceeding. If a document is admissible pursuant to s93A(1) (**the main statement**) then **a related statement** – being a statement made by someone to the maker of the main statement in response to which the main statement was made and which is also in the document containing the main statement – is also admissible, again provided the maker of the related statement is available to give evidence: ss93A(2) and (2A).

[2] *Evidence (National Uniform Legislation) Act 2011* (NT) s127A

For the purposes of s93A a "child" is any person who was under 16 years of age at the time the statement/main statement was made or a person who was 16 or 17 when the statement/main statement was made and who is a special witness at the time of the proceeding (generally speaking, a person disadvantaged as a witness by mental, intellectual or physical impairment; a person likely to suffer severe emotional trauma; a person likely to be so intimidated as to be disadvantaged as a witness; a person who is to give evidence about the commission of a serious criminal offence committed by a criminal organisation or a participant in a criminal organisation; a person against whom domestic violence has been or is alleged to have been committed by another person who is to give evidence about the commission of an offence by the other person; or, a person against whom a sexual offence has been, or is alleged to have been, committed by another person who is to give evidence about the commission of an offence by the other person): ss 21A(1) and 93(5) of the Act.

It has been an offence pursuant to s93AA of the Act to possess, supply, offer to supply, copy or permit the copying of a s93A criminal statement[3] since 2003.[4] There is no defence for a journalist coming into possession of a s93A criminal statement in the ordinary course of investigations conducted in preparation to report the news. Moreover, since 2003 the applicable maximum penalties have included a 100 penalty unit fine or *2 years imprisonment* for an individual or a 1,000 penalty unit fine for a corporation.

The Bill repeals and replaces the current s93AA, simplifying the section and rendering it technology neutral by extending the offence to possession et al of a s93A transcript.[5] The new s93AA continues to potentially risk journalists going to jail for doing their jobs, without the provision of a defence let alone our preferred option of being exempted from this provision.

It is untenable that a journalist could go to jail for, for example, possessing a document access for the purposes of news gathering and reporting, including for the preparation and investigation of a potential news report.

ARTK urges the Committee to address the deficiency in this provision by providing an exemption for news gathering and reporting. Alternatively, the Committee should at least consider incorporating a defence for the purpose of news reporting.

Proposed Section 93AC

Section 93A was first inserted into the Act in 1989[6] and while it has differed in form since that time, the substance of the section has remained the same. It has not previously been an offence under the Act to publish the contents of a s93 criminal statement and ARTK is not aware of any complaints about such publications having been made to any of ARTK's member or more generally expressed.

Despite this lack of expressly articulated concern about publication, the Bill creates the offence of publishing[7] all or part of a s93A statement or transcript. There is no exception for the publication having occurred in the ordinary course of reporting the news; nor is there an exception for the publication reporting parts of a s93A criminal statement or transcript that were disclosed in open court. Rather, the only exception is that the publication is approved by the presiding court – where approval can only be granted in extraordinary circumstances – and the publication complies with any conditions imposed by the court: s93AC.

[3] Being a statement made to a person investigating and alleged offence given in, or in anticipation of criminal proceedings concerning the offence that is potentially admissible under s93A.
[4] https://www.legislation.qld.gov.au/view/html/asmade/act-2003-055#act-2003-055
[5] Being a transcript of a section 93A criminal statement including (if relevant) a copy of a transcript of a section 93A criminal statement and a summary or copy of a summary of a transcript of a section 93A criminal statement.
[6] https://www.legislation.qld.gov.au/view/html/asmade/act-1989-017#act-1989-017
[7] Where publish means to disseminate or provide access to the public or a section of the public by any means, including, for example, by television, radio, the internet, newspaper, magazine or notice: s93AC(3).

ARTK submits that this is an extraordinary and unjustified intrusion upon the open administration of justice. There are already provisions in force which prohibit the identification of children who have been harmed or alleged harmed by a parent or family member[8], who are or are alleged at risk of harm being caused by a parent or family member[9], who are reasonably likely to be witnesses in proceedings for an offence of a sexual nature or an offence of a violent nature (noting both are defined terms)[10] and who are child victims of crime[11], together with a broad discretion to order that a child who is a witness in a matter that does not concern either an offence of a sexual nature or violent nature not be identified[12].

ARTK submits that in the majority of cases one or more of these existing provisions would apply to proceedings in which s93A is potentially enlivened and operate to prohibit the relevant child from being identified. Those provisions should be left to do their work; the additional restraint on the open administration of justice imposed by prohibiting the publication of the evidence in such proceedings is unnecessary. Alternatively, if there are any possible circumstances in which one of the pre-existing identifications restraints does not apply, then a power to make non-publication order should be provided, subject to any person in relation to whom s93A applies and who is or longer a child being empowered to consent to their evidence being published, should they wish it so.

As noted in relation to s93AA, s93AC also potentially criminalises the work of journalists by including in its maximum penalties 2 years imprisonment for individuals. ARTK does not accept the assertions in the Bill's Explanatory Notes that such a penalty is "*proportionate and relevant to the actions to which the consequences are applied by the legislation*". It is **not** proportionate to put journalists at risk of imprisonment for doing their jobs particularly where that jeopardy arises from what is likely to constitute a fair reporting of open court proceedings.

For these reasons, ARTK submits that s93AC should be deleted.

Proposed Sections 103Q and 103S

ARTK members are acutely aware of the increasing occurrence of domestic violence both in Queensland and around Australia. We are supportive of measures which address this issue and again commend the Queensland government for its commitment to improving the experience of domestic violence survivors interacting with the justice system, including the pilot program to allow video recorded statements taken by police officers to be used as an adult victim's evidence-in-chief in domestic and family violence related criminal proceedings.

That said, ARTK does not support either proposed sections 103Q or 103S.

Section 103Q largely repeats section 93AA – and section 103S repeats s93AC – applying the same offences and limited exceptions to a recorded statement or transcript thereof[13]. ARTK repeats the objections it has raised about s93A in relation to s103Q.

As above, we urge the Committee to address the deficiency in this provision by providing an exemption for news gathering and reporting. Alternatively, the Committee should at least consider incorporating a defence for the purpose of news reporting.

[8] *Child Protection Act 1999* (Qld) s189(2)(a)
[9] *Child Protection Act 1999* (Qld) s189(2)(b)
[10] *Child Protection Act 1999* (Qld) s193(1)
[11] *Child Protection Act 1999* (Qld) s194(1)
[12] *Child Protection Act 1999* (Qld) s193(2)
[13] Namely a video recording or audio recording of a statement made by a complainant in relation to an alleged domestic violence offence.

In relation to s103S, the identification restraints in *Domestic and Family Violence Protection Act 2012* (Qld) s159(1)(b)[14] and/or *Criminal Law (Sexual Offences) Act 1978* (Qld) s6 would apply to the proceedings if the relevant domestic violence offence enlivens either or both sections. Again, in the event that neither applies ARTK submits that a non-publication order making power should be provided, subject to any person to whom s103S applies being empowered to consent to their evidence being published. ARTK's notes this position is consistent with past submissions made to Attorney-General Shannon Fentiman and to the Women's Safety and Justice Taskforce in which we have pressed for the exception to *Domestic and Family Violence Protection Act 2012* (Qld) s159 (**the DFVP Act**) allowing for the identification of parties to proceedings under that Act "*if each person to whom the information relates consents to the information being published*" to be amended such that any party can authorise identification of themselves.

ARTK also notes that our objection to the Act restraining the publication of evidence in proceedings concerning domestic violence offences is consistent with our objection to the current restraint in the DFVP Act s159 which provides that evidence given in relation to an order cannot be published unless one of the few exceptions relevant to media publications applies. We have previously submitted that it is vital that both sexual and family violence cases are fully reported because they are both forms of abuse that commonly occur behind closed doors. Family violence survivors need to know that they are not alone and that something can be done to stop whatever form of domestic abuse they are experiencing before it escalates.

That being the case, ARTK lastly notes that the risk presented by s103S is not limited to the media. The restraint applies to the publication of all or part of a recorded statement or transcript thereof including by means of disseminating or providing access to the public or a section of the public to that information by the internet but makes no distinction about who is doing or authorising the publishing. Section 103S consequently prohibits a survivor from using the internet to inform the public about his or her own experience of domestic violence to the extent that the same matters are included in a recorded statement be that by Facebook, Twitter, a blog, a website operated by a support group, in a submission to the Queensland government to be posted on a Queensland government website or any other equivalent means. ARTK does not support any law which has this effect.

For these reasons, ARTK submits that s103S should be deleted.

We trust this submission is useful for the Committee's consideration of the Bill. We welcome further interaction with the Committee on these important matters.

Yours sincerely,

Georgia-Kate Schubert
On behalf of Australia's Right to Know coalition of media organisations

[14] Which makes it an offence to identify a party to a proceeding under the Act, a witness to a proceedings under the Act (other than a police officer) or a child concerned in a proceeding under the Act.