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Office of the President

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Our ref: LP-MC

Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street
Brisbane Qld 4000

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

Dear Committee Secretary

Evidence and Other Legislation Amendment Bill 2021

Thank you for the opportunity to provide feedback on the Evidence and Other Legislation Amendment Bill 2021 (**Bill**). The Queensland Law Society (**QLS**) appreciates being consulted on this important piece of legislation.

This response has been contributed to by the QLS Litigation Rules Committee, Domestic and Family Violence Committee and the Criminal Law Committee, whose members have substantial expertise in the areas of law amended by the Bill.

VRE Pilot

Video recorded evidence-in-chief

The Bill establishes a time-limited pilot enabling video recorded statements taken by trained police officers to be used as an adult victim's evidence-in-chief in domestic and family violence related criminal proceedings (**the VRE Pilot**). The Explanatory Notes provide that the Bill supports the Government's intention to develop a time-limited pilot that is subject to an independent evaluation, which assesses the practical and financial impacts of the VRE Pilot for courts, police and prosecutors.[1] We note that the pilot is expected to be established under a future regulation for a period of 12-months.[2] We consider a time-limited pilot-model provides the appropriate 'checks and balances' for the proposal. As such, we support the 12-month operational period for the VRE Pilot proposed in the Introductory Speech.[3] QLS would welcome the opportunity to provide feedback on the development of the VRE Pilot regulation and any subsequent amendments that relate to the regulation's scope and application. Similarly, QLS

[1] Explanatory Notes, Evidence and Other Legislation Amendment Bill 2021 (Qld) 2, 10.
[2] Introductory Speech, Evidence and Other Legislation Amendment Bill 2021 (Qld) 3481.
[3] Ibid 3481.

would also welcome the opportunity to contribute to any future reviews or evaluations of the VRE Pilot.

QLS supports measures aimed at minimising trauma for victims, noting that engaging with the criminal justice system alone can be traumatic for victims.[4] Video recorded statements and evidence from body-worn cameras are already admissible in certain circumstances and we support video recorded statements in domestic and family violence proceedings in principle, subject to the interests of justice and a fair trial. However, there are complexities with the proposal which require further consideration.

We acknowledge that there may be benefits to a victim as a result of the use of video recorded evidence-in-chief. Victims will not have to recount the facts multiple times, for instance.

However, in other cases there may be disadvantages. For example, the way a victim's evidence is presented to the court may be impacted depending on the context and timing of when the recorded statement was taken. Pre-recorded evidence can sometimes be less impactful than evidence given personally.

Further, where evidence-in-chief is recorded, parts of the recorded statement may be ruled as inadmissible and edited accordingly. Depending on the circumstances, this may have a positive or negative impact on the way in which the evidence is received.

There needs to be clarity about which cases the pilot will apply to. From the material, it seems that the VRE pilot will enable video recorded statements as evidence-in-chief in a criminal proceeding that relates to a charge for a domestic violence offence, whether or not the proceeding also relates to other offences, and where the type of criminal proceeding, and the court and place hearing the proceeding, are prescribed by regulation.[5]

Where the domestic violence offence is also a serious criminal offence, or where matters of credit and reliability are in issue, it may not always be in the interests of justice to present the complainant's evidence-in-chief as a recorded statement. As noted above, QLS would appreciate the opportunity to review the draft regulation regarding the scope and application of the pilot. In addition, any subsequent changes to the regulation should be the subject of stakeholder consultation at the earliest opportunity.

The usual rules of admissibility in relation to the contents of the video evidence should continue to apply, and the Court must retain an overriding discretion to exclude evidence or require evidence-in-chief to be given in person if it is in the interests of justice to do so. Accordingly, we

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[4] See, eg, Nicole Bluett-Boyd and Bianca Fileborn, *Victim/survivor-focused justice responses and reforms to criminal court practice: Implementation, current practice and future directions* (Research Report No. 27, April 2014) < https://aifs.gov.au/publications/victimsurvivor-focused-justice-responses-and-reforms-criminal-court-practice>; Judicial College of Victoria, *Victim of Crime in the Courtroom: A guide for judicial officers* (Report) <https://www.judicialcollege.vic.edu.au/eManuals/Victims/Victims%20of%20Crime%20in%20the%20Courtroom_Note%202.pdf>.

[5] Evidence and Other Legislation Amendment Bill 2021 (Qld) s 103C.

support section 103H(2), which allows a court to rule all or a part of a recorded statement as inadmissible where appropriate.
Consideration should be given to appropriate trial directions to ensure that a jury does not place too little or too much weight to the evidence because it was given in pre-recorded form.

Similarly, consideration should also be given to the potential cost implications for parties involved in any pilot proceedings. The time required for transcribing and/or viewing statements may add to legal costs. Where these costs become prohibitive, this may result in access to justice issues.

QLS also notes the lack of clarity around the nature and extent of training for police officers who will be participating in the process. Currently, the Bill simply provides that a recorded statement must be taken by a trained police officer, with 'trained police officer' meaning a police officer who has successfully completed a training course approved by the police commissioner.[6] Appropriate, ongoing education and training on domestic and family violence including the dynamics of domestic violence and the impact of trauma on victims is critical to a police officer's capacity to engage with victims in a way which prioritises safety and does not re-traumatise victims, whilst also ensuring that an appropriately particularised statement is able to be taken.

Finally, the proposed amendments would apply to proceedings only if the proceeding starts on or after the commencement irrespective of the date of an offence or when the recording is taken.[7] The retrospective application of such changes can create confusion and QLS would generally caution against this approach.

Journalist privilege

Part 6 of the Bill amends the Evidence Act to allow a journalist to claim privilege in relation to information or documents which would identify an informant in the context of relevant proceeding as defined in the Bill.

The Government has previously consulted on these proposed amendments in the form of the "Shielding confidential sources: balancing the public's right to know and the court's need to know - Shield laws to protect journalists' confidential sources" discussion paper.[8] QLS acknowledges that many of our recommendations put forward in response to the discussion paper are reflected in the Bill.

While we broadly support the introduction of journalists' privilege, as stated in our previous submission, there needs to be further consideration as to how this privilege will operate in defamation proceedings, whistleblower protections and where there is the potential for misuse.

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[6] Evidence and Other Legislation Amendment Bill 2021 (Qld) s 103E
[7] Ibid s 158.
[8] Department of Justice and Attorney-General, *Shielding confidential sources: balancing the public's right to know and the court's need to know - Shield laws to protect journalists' confidential sources* (Discussion Paper, June 2021) <https://www.justice.qld.gov.au/__data/assets/pdf_file/0004/686686/discussion-paper-shielding-confidential-sources.pdf>.

These issues have not been considered in the Explanatory Notes. Further, while harmonisation of 'shield laws' across Australian jurisdictions is desirable, the benefits from this harmonisation need to be balanced against the need for effective laws.

Qualified privilege and proposed section 14W

Proposed section 14V of the Bill creates a presumption of journalist privilege. Proposed section 14W(2) provides that the court hearing the relevant proceeding must decide whether the claim for privilege is established. We agree with the qualified privilege approach adopted in the Bill. Combined with sections 14X and 14Y, this will enable the court to make an order for disclosure where the public interest, and interest of the parties, in disclosing the informant's identity will outweigh any adverse effect of the disclosure or on the public interest in the communication of facts and the ability of the news media to access sources of facts.

Definitions

In our response to the discussion paper, QLS recommended that an appropriate balance be struck between a broad, effective and practical definition of "journalist" and the need to link the definition to the purpose of the legislation by adding qualifiers such as those contained within the Victorian legislation.[9] Proposed section 14R provides a definition of a 'journalist' consistent with these recommendations. Further, proposed section 14R(2) lists matters which a court may consider when determining whether a person is a journalist. These matters are largely consistent with those listed in the Victorian legislation.[10]

We consider that providing a catch-all provision in proposed section 14R(2)(d) will enable courts to consider unique factors which may be relevant to determining who is a journalist. This will ensure that the law is able to evolve in line with developments in technology and social norms.

This evolution in technology and social understanding of a "journalist" or 'publisher' were relevant issues in the recent High Court decision of *Fairfax Media Publications Pty Ltd v Voller*.[11] The High Court found comments posted by individuals on media outlets' Facebook pages were deemed to have been published by the media outlet and that these media outlets may be liable for any defamatory statements within these posts.[12]

QLS also notes the inclusion of proposed section 14R(2)(b) in meaning of journalist. This is consistent with the recommendations made by our members that there should be consideration as to whether the person complies with a recognised professional standard or code of conduct.

QLS supports the definition of "informant", which includes that person having an *expectation* the information may be published in a news medium. This definition is consistent with the majority of the other jurisdictions.

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[9] *Evidence Act 2008* (Vic) s 126J.
[10] Proposed s 14R(2)(a), (c) - (d).
[11] *Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Limited v Voller; Australian News Channel Pty Ltd v Voller* [2021] HCA 27
[12] Ibid [185].

Similarly, QLS also supports the definition of "news medium", which is consistent with the Commonwealth and the other jurisdictions.

Finally, we also agree with the definition of "relevant person" in proposed section 14T.

Types of proceedings and warrants

Proposed section 14V(1), the provision which provides for the privilege, will apply despite any other Act. This will ensure the privilege can be claimed in respect of all 'relevant proceedings'. QLS supports this drafting, noting it is similar to the provisions in the Northern Territory, New South Wales, Victorian and Tasmanian jurisdictions. However, the definition of "relevant proceeding" in section 14S(1) is limited to a hearing in a court of record and does not include a proceeding under the *Crime and Corruption Act 2001* (see below).

Proposed section 14S(3) provides that the privilege applies whether or not the court hearing the proceeding is bound by the rules of evidence. QLS supports this provision. We also generally agree with the definition of "disclosure requirement" in proposed section 14T.

The Bill also inserts Subdivision 3 into the new Division 2B which, under section 14ZC, applies in circumstances where a warrant authorises a person to deal with a document which a journalist or relevant person considers will disclose the identity of an informant. We consider that if 'shield laws' are to be introduced to allow a journalist to claim privilege in respect of a proceeding, it is appropriate that the laws are extended to evidence, which is compelled by way of a warrant, which could be used in that possible future proceeding.

Overriding the shield

Proposed section 14X provides an avenue for parties to a proceeding to apply for orders overriding the privilege granted by the court under proposed section 14W. We support the ability for parties to make such an application.

As stated above, proposed section 14Y provides that the court may make the order to override the shield if it is satisfied, having regard to the issues to be determined in the relevant proceeding, the public interest in disclosing the informant's identity outweighs—

(a) any likely adverse effect of the disclosure on the informant or another person; and

(b) the public interest in—

(i) the communication of facts and opinion to the public by the news media; and

(ii) the ability of the news media to access sources of facts.

Proposed subsections (2) and (3) outline the matters for the court to have regard to in deciding the application, while proposed subsections (4) and (5) require the court to state reasons for its decisions and allow appropriate conditions to be imposed, respectively.

The factors in proposed section 14Y(2) generally appear to be appropriate. QLS notes the incorporation of proposed section 14Y(2)(j), which provides that a court may consider whether the journalist or informant, when obtaining the information, was involved in an offence or misconduct. Victoria is the only other jurisdiction which lists this as a consideration and QLS is supportive of this factor being incorporated into the legislation, subject to the consideration of other factors such as if there are whistleblower or other public interest arguments. It may be appropriate for this qualifier to be included in the amendments.

Further, consideration should also be given to expressly including a factor relating to the extent to which the journalist kept contemporaneous records about the source and the information. If required, this information could assist the judge, on a confidential basis, to assess the credibility of the journalist and other issues, such as the impacts on the other party from the nondisclosure of this information.

Disclosure requirements

We agree with proposed sections 14Z and 14ZA subject to the other comments made in respect of these amendments.

Consent to waive confidentiality

Shield laws are premised on a covenant between the journalist and the informant, which has important public policy implications. In a practical sense, the informant is able to advise or agree with the journalist that their identity can be disclosed (this consent could be based on conditions or for a limited purpose). As such, QLS supports proposed section 14Q(2), which clarifies that the privilege does not prevent a person from disclosing the informant's identity as the source of the provided information. It is expected that this subsection will include a situation where the informant consents to disclosure.[13]

It will be important for applications under these amendments to differentiate between consent to disclose identity and an inadvertent or unintended disclosure thereof. An example of this difference was highlighted by the recent Court of Appeal in *F v Crime and Corruption Commission*.[14] In this case, the journalist continued to object to naming his source notwithstanding that the source was later compelled to identify himself.[15]

However, in our view, once the privilege is granted by the court under proposed section 14W(2), then the only way it should be overridden is by a successful application under proposed section 14X or where there is an express waiver by the relevant person.

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[13] Explanatory Notes, Evidence and Other Legislation Amendment Bill 2021 (Qld) 20.
[14] [2021] QCA 244.
[15] We note this case related to CCC proceedings which are not covered by this Bill.

The identification or purported identification of the informant by another means does not alleviate the potential consequences from the journalist being compelled to make this disclosure.

It is for these reasons QLS supports incorporation of an explicit for a waiver.

Crime and Corruption Commission proceedings

QLS notes that proposed section 14S(2) explicitly excludes a proceeding under the *Crime and Corruption Act 2001* as a 'relevant proceeding' for the purposes of this privilege. Our members are of the view that if shield laws are to be introduced, their coverage should extend to CCC proceedings where witnesses can be compelled to give evidence and where these proceedings can lead to criminal proceedings in a court.

QLS believes that a qualified privilege will allow the CCC to advocate why the shield should be overridden in a particular matter and will ensure that appropriate factors are taken into account pursuant to proposed section 14Y.

Warrants

We have some concerns with the process outlined in proposed 14ZD Procedures if objections made. Namely, we are concerned with the subject documents being given to the authorised officer, albeit sealed, until an application is made, noting this may take several days. We do not consider it is appropriate for the likely respondent to an application for privilege to already possess the documents and are concerned about the possibility of unintended interaction with the documents. It would be more appropriate for the documents to be given to the court immediately upon seizure and for these documents to remain in the possession of the court until the application is determined. There also should be a mechanism for the documents to be released by the court in the event that an application is not made. Perhaps there could be a reasonable timeframe within which the journalist or relevant person needs to make the application.

We agree with proposed section 14ZF(3) and (4) that the court should have regard to the matters in proposed section 14Y(1)(a) and (b), noting the factors in subsection (2) as well. We also agree that reasons should be provided for the court's decision under proposed section 14ZF(6).

Commencement of laws

Proposed section 157 of the Bill provides that journalist privilege applies to relevant proceedings and warrants only if the proceeding starts, or the warrant is issued, on or after the commencement of these amendments. We also note that the privilege applies to information given to a journalist by another person before or after the commencement of the Bill. QLS does not object to this approach.

Clarifying the process for viewing and testing human remains

Viewing and examination of a deceased person's body

The Bill inserts a new provision into the Criminal Code which deals specifically with the disclosure related process for human remains to ensure that the release of human remains is not unnecessarily delayed.

"Body" is defined in the Coroners Act 2003 to include 'part of a human body'. The Explanatory Notes provide that the definition of 'part of a human body' covers samples of hair, bone and blood.[16] However, it is not clear from the Bill how the proposed provisions would relate to samples, including microscopic samples, and how those samples may be retained for the purpose of retesting.[17]

In light of this uncertainty, QLS is concerned that the amendments as currently drafted, may lead to a loss of evidence and therefore, to potential miscarriages of justice. As such, it is our view that the Bill should be amended to provide further clarity as to the handling and testing of samples under the new provisions.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on [redacted].

Yours faithfully

[redacted]

Kara Thomson
President

[16] Explanatory Notes, Evidence and Other Legislation Amendment Bill 2021 (Qld) 3, 10, 17.
[17] Ibid 10, 17.