Speech By

Hon. Shannon Fentiman

MEMBER FOR WATERFORD

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EVIDENCE AND OTHER LEGISLATION AMENDMENT BILL

Introduction

Hon. SM FENTIMAN (Waterford—ALP) (Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence) (11.24 am): I present a bill for an act to amend the Bail Act 1980, the Criminal Code, the Disability Services Act 2006, the Domestic and Family Violence Protection Act 2012, the Evidence Act 1977, the Justices Act 1886, the Magistrates Act 1991, the Working with Children (Risk Management and Screening) Act 2000 and the acts mentioned in schedule 1 for particular purposes. I table the bill, the explanatory notes and a statement of compatibility with human rights. I nominate the Legal Affairs and Safety Committee to consider the bill.

Tabled paper: Evidence and Other Legislation Amendment Bill 2021 1932.

Tabled paper: Evidence and Other Legislation Amendment Bill 2021, explanatory notes 1933.

Tabled paper: Evidence and Other Legislation Amendment Bill 2021, statement of compatibility with human rights 1934.

It gives me great pleasure today to introduce the Evidence and Other Legislation Amendment Bill 2021 which contains a number of important reforms to improve Queensland's justice system. Firstly, the bill delivers on the Palaszczuk government's commitment to establish a statutory framework to provide better protection of the identity of journalists' confidential sources. We recognise that a free, independent and effective media is crucial for a strong democracy, and this bill provides protections to ensure journalists can effectively fulfil their role as facilitators of free communication and report on matters of legitimate public concern.

The framework in the bill has been informed by extensive consultation, and I thank all stakeholders and community members for their time and participation in the consultation process. The feedback has been invaluable to inform the development of the contemporary, balanced and effective laws for Queensland. I am pleased to inform members that a consultation report containing a summary of feedback received on the discussion paper entitled *Shielding confidential sources: balancing the public's right to know and the court's need to know* will be published this week on the Department of Justice and Attorney-General's website.

Consistent with all other Australian jurisdictions, the bill amends the Evidence Act to introduce a qualified journalist privilege by creating a presumption that a journalist cannot be compelled to answer a question or produce a document or thing that would disclose the identity of a confidential informant or allow their identity to be ascertained. This presumption will be capable of being overridden if disclosure is in the public interest.

A confidential informant is a person who has given information to a journalist in the expectation it may be published and the journalist promised not to disclose their identity. To reflect the contemporary media environment, the bill adopts a broad function based definition of 'journalist' focused on whether the activities of the person are journalistic in nature, rather than on their employment state and organisational links. This approach also accommodates the emergence of new and innovative modes

and methods of communication into the future and ensures journalists are not excluded from the protections simply because they do not operate under the traditional concepts of journalism and news media.

The bill also extends protection to relevant people associated with the journalist such as their employer and those who work with them in relation to publishing information, such as editors, producers and camera operators. Recognising that the privilege is qualified and involves the assessment of a legal test relating to the public interest, it will apply in any proceeding before a court of record, whether or not the court is bound by the rules of evidence in the proceeding. In addition to traditional courts, this will include the Queensland Civil and Administrative Tribunal, which is established as a court of record in Queensland.

A journalist or relevant person will be able to claim privilege in the context of giving evidence at a hearing or trial, as well as in the context of disclosure requirements as part of preliminary proceedings and processes including, for example, a subpoena or interrogatories. If the claim for journalist privilege is established, the other party to the proceeding may apply to the court for an order to override the claim if satisfied the public interest in disclosing the informant's identity outweighs any likely adverse effect of the disclosure on the informant or another person and the public interest in the communication of facts and opinions to the public by the news media, including the news media's ability to access sources of facts.

The court may consider a range of factors when making this assessment including the nature and subject matter of the proceeding, any likely adverse effect on the informant and how the journalist used the information, as well as any other factor it considers relevant. This approach allows a balance to be struck between protecting confidential informants while allowing courts to require disclosure if this is in the interests of justice.

To ensure confidential informants are not vulnerable at an early stage of an investigation, the bill extends to search warrants and provides that a journalist or relevant person may object to the inspection, copying or seizing of a document on the basis of the privilege and sets out a procedure for the privilege to be determined which largely mirrors the test applying in the context of a proceeding. The provisions in the bill will not prevent the informant from self-identifying or consenting to the production of evidence that discloses their identity. The bill also does not prevent a journalist, relevant person or other witness from giving evidence that discloses the identity of the informant despite a promise of confidentiality.

It is important to note that whilst shield laws provide a framework to better protect the journalist-informant relationship, they do not mandate the protection of the identity of the informant or regulate journalists' conduct. The laws are there to provide a protection in the form of an evidential privilege from compellability. How each journalist and relevant person chooses to utilise that protection may vary. For example, a journalist may choose to claim journalist privilege while their employer, given different financial and organisational considerations, may choose not to claim the privilege and instead give evidence that may disclose the informant's identity.

There is also no restriction on a journalist or relevant person claiming privilege in relation to the same informant on multiple occasions and no requirement to maintain a privilege that has already been upheld by a court. For example, a journalist who objects to the production of a document during the preliminary stage of a proceeding may later choose not to claim the privilege in a trial if the identity of the informant otherwise becomes public knowledge. Similarly, a court is not bound to make the same decision throughout a proceeding. The facts and circumstances that weigh in favour of upholding the privilege at a preliminary stage of the proceeding may change such that the public interest at a later stage weighs in favour of removing the privilege.

Shield laws are complex and must be flexible. How each journalist and relevant person chooses to use the protection and how the court considers each claim will vary in accordance with the facts and circumstances of each particular situation. While this bill does not provide for the application of shield laws to investigations and hearings conducted by the Crime and Corruption Commission, the search warrant provisions are broad and will apply to the commission. I want to acknowledge the views of stakeholders that the consideration of journalist privilege in these matters is important to ensure the appropriate protection of journalist-informant relationships. The application of privileges in the context of Crime and Corruption Commission investigations, hearings and proceedings is again very complex. This is reflected by the fact that the position in other Australian states and territories for equivalent commissions varies and only a few expressly allow for the privilege.

As noted by the Parliamentary Crime and Corruption Commission in its recent report on the activities of the Crime and Corruption Commission, under the Crime and Corruption Act 2001 different provisions apply for a person who refuses to answer a question or produce a document or thing in crime investigations and intelligence and witness protection function hearings as well as corruption

investigations and confiscation related investigations. The government is committed to examining shield laws as part of the ongoing work that is being undertaken regarding the operation of privileges under the Crime and Corruption Act which arise from the previous recommendation of the PCCC. I can assure stakeholders that further consultation will be undertaken in relation to this work and that we will be in a position to determine the most appropriate course of action in the first half of next year.

Another key reform in this bill delivers on the government's response to the State Coroner's recommendation in the findings of the inquest into the death and disappearance of Daniel Morcombe. Daniel died in what can only be described as the most confronting and devastating circumstances which no person, let alone a child, should ever have to be faced with. Recommendation 2 in the findings in Daniel's inquest recommended that the Queensland government amend the Criminal Code to ensure that a time limit is imposed on the testing of human remains in circumstances where the prosecution and defence fail to reach agreement on the identity of the deceased. The recommendation arose because of a significant delay in the return of Daniel's remains to his family in the context of the accused's trial for murder.

Responding to the coroner's recommendation raises complex and unique legal, coronial and forensic issues. The amendments contained in the bill being introduced today follow consultation with stakeholders and seek to strike an appropriate balance between a range of competing issues and interests to achieve the underlying intent of the coroner's recommendation in Daniel's case. The bill amends the Criminal Code to clarify the process for viewing and examining a deceased person's body in a criminal proceeding and ensures that consideration can be given to both the need to protect the integrity of the remains as well as the need to release the remains by the coroner and not be unnecessarily delayed. While conditions will be able to be imposed in relation to the new testing and examination of remains, a time limit will not be mandatory. This approach ensures that the court retains discretion and flexibility to make an order that is appropriate having regard to the facts and circumstances of each case.

While the coroner's recommendation does not seek to address any systemic issues and Daniel's case was unique in many respects, there is no option simply to do nothing. Following the Day for Daniel that was recently held on 29 October, I am pleased to introduce this bill in honour of Daniel's memory in the hope that it will provide further closure and comfort to the Morcombe family. Again I want to thank Bruce and Denise Morcombe for their work with the department on this bill. While I would hope that no family ever has to endure what the Morcombes went through, if necessary this amendment will ensure that in the future Queensland families are better protected.

I now turn to the amendments in this bill that establish a legislative framework to support a pilot to enable videorecorded statements taken by trained police officers to be used as a victim's evidence-in-chief in domestic and family violence related criminal proceedings. I am extremely proud of the work the Palaszczuk government is doing to respond to the impacts of domestic, family and sexual violence in our community. Earlier this year we established the independent Women's Safety and Justice Taskforce, chaired by the Hon. Margaret McMurdo AC. We are expecting the task force's first report on coercive control and the need for a specific offence of domestic violence at the end of this month and the task force's second report on women's experience in the criminal justice system in June next year. In tandem with the critical work the task force is doing, the government has continued to deliver on its reform agenda to end domestic and family violence here in Queensland. The amendments in this bill are another important step in the reform agenda and are designed to bring benefits to victims and survivors of domestic and family violence as they navigate the criminal justice system.

Allowing victims to give their evidence-in-chief by way of videorecorded evidence taken by police seeks to reduce the trauma associated with victims having to retell their story over and over again. It may also help reduce the ability of the alleged perpetrator to intimidate their victim. While videorecorded evidence reforms for domestic violence proceedings have been introduced in other jurisdictions and are currently used in Queensland for certain witnesses, the evidence base relating to the use of videorecorded evidence-in-chief in domestic and family violence prosecutions is continuing to emerge. Allowing an out-of-court statement to be used as evidence-in-chief also represents a significant departure from the usual rules of evidence that apply in criminal proceedings, so we do need to be careful there are no unintended consequences for both victims and the accused. The provisions in the bill therefore set up a framework for a pilot which will be time limited and subject to an independent evaluation. This evaluation will be used to inform any future extension or expansion of the use of the videorecorded evidence provisions. This approach will also ensure that the government can consider any relevant recommendations made by the Women's Safety and Justice Taskforce.

The pilot will be established under a future regulation. I cannot pre-empt any ultimate decisions in relation to the making of the regulation; however, I can inform members that consideration is being given to the operation of a 12-month pilot which will run simultaneously in two Magistrates Court

locations: Ipswich and Southport. Further consultation will occur as part of the operationalisation of the pilot by the Queensland Police Service and Department of Justice and Attorney-General. The provisions in the bill apply to criminal proceedings for a domestic violence offence, which is defined to include breaches of domestic violence orders as well as other criminal offences such as assault committed in a domestic violence context.

A recorded statement must be taken by a police officer who has been trained for the specific purpose of taking recorded statements and must be taken as soon as practicable after the alleged domestic violence offence. In practice, this will usually occur via a police body worn camera placed on a tripod. To be admissible as a complainant's evidence-in-chief in a domestic violence proceeding certain requirements will also need to be met, including that the complainant has given their informed consent to the making of the statement.

The bill also includes a range of other safeguards intended to limit trauma and protect the privacy of complainants, including restrictions on the disclosure of recorded statements and offences for unauthorised possession, use and publication of recorded statements. The court will also retain the power to close the court or exclude persons from the court while a recorded statement is being played. While a complainant is required under the provisions to be available for cross-examination for a recorded statement to be admissible, these provisions will operate alongside existing protections and special measures—including, for example, permitting a support person to be present while the person is giving evidence. The bill also allows the parties to consent to the complainant not having to comply with this requirement.

It is also important to note that the bill will not override the usual rules of admissibility or the court's overriding discretion to exclude evidence. The introduction of these amendments ahead of White Ribbon Day is an important reminder of how much more we need to do to prevent and respond to domestic and family violence and keep Queenslanders safe.

The bill also contains a technical amendment to the Bail Act 1980 to support the operation of a scheme to allow the electronic transfer of warrants. Recent information technology enhancements have placed a stronger emphasis on electronically transferring warrants between the Queensland courts and the Queensland Police Service, and a new eWarrants scheme was introduced through regulation amendments last year. The amendments in the bill will clarify the relationship with provisions in the Justices Act 1886 enabling the use of computer warrants and Bail Act by making it clear there is no requirement for a judicial officer to consider the signature of the person who issued a computer warrant in the context of dealing with a defendant who fails to surrender into custody in accordance with their bail undertaking and who is apprehended under a warrant issued in relation to that failure, commits an offence.

Finally, the bill makes a minor amendment to the Magistrates Act 1991 to ensure that service as a magistrate in Toowoomba constitutes regional experience for the purpose of a transfer decision. This amendment is in response to a request made by the Chief Magistrate.

This bill delivers a number of important justice related reforms for Queensland and reflects this government's ongoing and unwavering commitment to ensure Queensland's laws and justice system remain contemporary, efficient and fair for all of the community. I commend the bill to the House.

First Reading

Hon. SM FENTIMAN (Waterford—ALP) (Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence) (11.41 am): I move—

That the bill be now read a first time.

Question put—That the bill be now read a first time.

Motion agreed to.

Bill read a first time.

Referral to Legal Affairs and Safety Committee

Madam DEPUTY SPEAKER (Ms Bush): In accordance with standing order 131, the bill is now referred to the Legal Affairs and Safety Committee.