

# Evidence and Other Legislation Amendment Bill 2021

## Statement of Compatibility

### Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019* (HR Act), I, Shannon Fentiman MP, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence make this statement of compatibility with respect to the Evidence and Other Legislation Amendment Bill 2021 (the Bill).

In my opinion, the Bill is compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

## Overview of the Bill

The Bill's purpose is to implement amendments to:

- establish a statutory framework that allows protection against disclosure of the identity of journalists' confidential informants (known as 'shield laws');
- implement a legislative framework to support a pilot enabling video recorded statements taken by trained police officers to be used as a victim's evidence-in-chief in domestic and family violence (DFV) related criminal proceedings;
- provide a specific process for the viewing and examination of the body of a deceased person in a criminal proceeding to implement the Government's response to Recommendation 2 of the findings of the *Inquest into the disappearance and death of Daniel James Morcombe*;
- clarify the operation of computer warrants in relation to bail; and
- enable service as a magistrate in Toowoomba to constitute regional experience for the purpose of a transfer decision under the *Magistrates Act 1991* (Magistrates Act).

### Shield laws

The Bill amends the *Evidence Act 1977* (Evidence Act) to establish a statutory framework to enable the better protection of the identity of journalists' confidential informants. The Bill introduces a qualified journalist privilege which creates a presumption that a journalist is not compellable to answer a question or produce a document that would disclose the identity of a confidential informant or enable their identity to be ascertained. The Bill also extends the protection to a 'relevant person' which is defined as the journalist's current or previous employer or person who engaged them under a contract, as well as a person who is or has been involved in the publication of news and works or has worked with the journalist in relation to publishing the information, such as editors, producers, and camera operators.

The journalist privilege applies in any proceeding before a court of record (a 'relevant proceeding') except proceedings under the *Crime and Corruption Act 2001*. A journalist or relevant person may claim the privilege when giving evidence in a trial or hearing. In deciding

whether the claim is established, the court may exclude from the room all persons other than an accused person in a criminal proceeding and those it specifies may remain.

If a claim of journalist privilege is established, the court may, on the application of a party to the proceeding, make an order that the journalist or relevant person must give the evidence despite the privilege if satisfied the public interest in disclosing the informant's identity outweighs:

- the public interest in the communication of facts and opinions to the public by the news media and the ability of news media to access sources of facts; and
- any likely adverse effect of the disclosure on the informant or another person.

The court must state its reasons for making, or refusing to make, an order that the evidence must be given despite the journalist privilege. If the court decides to make an order requiring the evidence to be given, it may impose conditions on the order.

A journalist or relevant person may also object to complying with a disclosure requirement in relation to a relevant proceeding on the ground that it would disclose the identity of the informant or enable their identity to be ascertained. A disclosure requirement includes a summons or subpoena, and a process or order for disclosure or discovery of documents, including non-party disclosure or discovery, an interrogatory, or a notice to a party to produce a document.

The court may decide that the objection is established if satisfied the person is entitled to claim the privilege and the public interest in disclosing the informant's identity does not outweigh:

- the public interest in the communication of facts and opinions to the public by the news media and the ability of news media to access sources of facts; and
- any likely adverse effect of the disclosure on the informant or another person.

A journalist or relevant person may also object to a document or thing being dealt with as authorised under a search warrant, such as being inspected or copied, on the ground that it would disclose the identity of the informant or enable their identity to be ascertained. If an objection is made, the document or thing is sealed or stored in a safe and secure way until the objection is determined. Prescribed persons, including the journalist, relevant person, and authorised officer, may make an application to the Supreme Court for a determination as to whether the document or thing may be dealt with as authorised under the warrant. If an application to the Supreme Court is not made within seven days, the document or thing may be dealt with as authorised by the search warrant.

The Bill provides safeguards to protect the privacy, safety, and wellbeing of informants and to protect other confidential information, such as law enforcement operations and intelligence information, by providing that the court may restrict access to any information or document relating to a claim of privilege, application, or objection, or may make any order it considers appropriate.

### **Video recorded evidence**

The Bill amends the Evidence Act and related legislation to establish a legislative framework to support a video recorded evidence pilot (VRE pilot). Under new Part 6A of the Evidence Act, an adult victim of an alleged domestic violence offence (complainant) will be permitted to

give evidence-in-chief, wholly or partly, in the form of a video recorded statement in a ‘domestic violence proceeding’.

A ‘domestic violence proceeding’ is defined as a criminal proceeding that relates to a charge for a domestic violence offence, whether or not the proceeding also involves other non-related domestic violence charges. This definition also establishes the scope of the pilot by providing certain matters to be prescribed by regulation, including the place of the court hearing the proceeding. The provisions in the Bill commence on a day to be fixed by proclamation to allow sufficient time for implementation activities to occur for the VRE pilot, including for example police training.

The use of video recorded evidence-in-chief offers a range of potential benefits, including reducing trauma for victims associated with re-telling their experiences in court, illustrating a victim’s demeanour and experience close to the time of the event and reducing the capacity of the accused to intimidate a victim.

To ensure the best possible evidence of the complainant, the Bill requires that a recorded statement be made as soon as practicable after the alleged domestic violence offence and be taken by a trained police officer. Further, a recorded statement must meet certain requirements to be admissible, including that it be made with the complainant’s informed consent, include an acknowledgement or declaration by the complainant as to the statement’s truth and awareness of liability for providing false information, and comply with translation requirements if any part of the statement is in a language other than English. A recorded statement must generally be in the form of a videorecording, however an audio recording may be admitted in exceptional circumstances.

The proposed VRE pilot will be subject to an independent evaluation.

### **Viewing and examination of the body of a deceased person**

On 5 April 2019, the State Coroner delivered his findings of the *Inquest into the disappearance and death of Daniel Morcombe* (the *Morcombe inquest findings*).

As part of the *Morcombe inquest findings*, the State Coroner made two recommendations under section 46(1) of the *Coroners Act 2003* (the *Coroners Act*) which enables a coroner to comment, wherever appropriate, on anything connected with the death that relates to public health or safety, the administration of justice or ways to prevent deaths from happening in similar circumstances in the future.

Recommendation 2 of the *Morcombe inquest findings* is that the Queensland Government amend the Criminal Code to ensure a time limit is imposed on the testing of human remains where the prosecution and defence fail to reach agreement on the identity of the deceased.

The rationale for Recommendation 2 is outlined at paragraphs 346 to 355 of the *Morcombe inquest findings* and was predicated on a lengthy delay between when Daniel’s remains were found and were returned to his family for burial. The delay was on the basis that, as long as the accused person, Mr Cowan, contested that the skeletal remains belonged to Daniel, it was necessary for the remains to be retained in the event that they had to be retested. The Coroner considered that where an accused wishes to prevent a burial or cremation for purposes of retesting, the appropriate course would be to seek a direction from a court under section 590AS

(Viewing particular evidence) of the Criminal Code but noted, while the court could impose appropriate time limits to enable testing to occur, it is possible that a family would experience further delays while that occurred.

In response to Recommendation 2, the Queensland Government agreed in principle that there should be a reasonable time limit imposed on the testing of human remains in criminal proceedings and that a deceased person's remains should be returned to their family and loved ones as soon as possible, irrespective of whether there are related criminal proceedings on foot, particularly where the identity of a deceased person has been established with a high degree of certainty and is not in dispute. A commitment was given to undertake further analysis, research, and consultation about how best to implement the underlying intent of the Coroner's recommendation.

To achieve the underlying intent of Recommendation 2, the Bill amends Part 8, Chapter 62, Chapter division 3 of the Criminal Code which deals with procedures relating to prosecution disclosure. Section 590AB provides that this chapter division of the Criminal Code acknowledges that it is a fundamental obligation of the prosecution to ensure criminal proceedings are conducted fairly, with the single aim of determining and establishing the truth. There are a number of provisions that place mandatory disclosure obligations on the prosecution recognising the necessity of proper and timely disclosure to ensure that the accused is fully aware of the case against them. This is integral to a fair trial and aims to balance the inequity between the State and the accused person.

New section 590ASA (Viewing bodies of deceased persons), which is inserted into the Criminal Code by the Bill, is a specific provision relating to the viewing and examination of a deceased person's body which includes provision for the prosecution and court to have regard to the coroner's duties under the Coroners Act. The new provision seeks to balance an accused person's right to a fair trial with the right of the families to have the remains of their loved one returned for burial as soon as possible.

Section 590ASA, whilst modelled on section 590AS (Viewing particular evidence), contains some variations to reflect the unique and solemn nature of this type of evidence.

Section 590ASA provides that a permitted person can view, or an appropriate person can view or examine, the body of a deceased person if:

- (a) the prosecution allows it, on request, under the supervision of the prosecution and subject to any other conditions the prosecution considers appropriate to protect the integrity of the human remains and to ensure the release of the human remains under section 26 of the Coroners Act is not unnecessarily delayed;
- (b) the court directs that the prosecution allow it subject to the conditions the court considers appropriate to protect the integrity of the human remains and to ensure the release of the human remains under section 26 of the Coroners Act is not unnecessarily delayed.

Section 26(2)(f) of the Coroners Act provides that a coroner stops having control of a body when the coroner decides that it is not necessary for the coroner's investigation to keep the body after an autopsy and the coroner orders the release of the body for burial. Section 26(3) provides that, for subsection (2)(f), the coroner must release the body as soon as reasonably practicable after autopsy.

New section 590ASA, through the definitions of ‘permitted person’ and ‘appropriate person’, provides that the accused or their lawyer can view the body of the deceased but may not examine it. This approach recognises that only certain persons will have the necessary skills and qualifications appropriate to examine the deceased’s body.

A ‘body’ is defined by reference to the Coroners Act and includes a part of a human body.

Directions under the new section 590ASA can be sought prior to the presentation of an indictment under section 590AA of the Criminal Code.

Under section 41 of the *Justices Act 1886* (the Justices Act) the laws relating to prosecution disclosure under the Criminal Code also apply to committal proceedings in the Magistrates Court. A direction may be made in the Magistrates Court about disclosure under section 83A of the Justices Act.

### **Computer warrants**

The Justices Act authorises the use of computer warrants and the procedures for creating, storing and otherwise managing warrants electronically. Under these provisions, a warrant may be created in the form of computer stored information under procedures prescribed by, or approved under, a regulation. The aim of computer warrants is to reduce the handling of warrants in the form of written documents.

The prescribed or approved procedures in relation to computer warrants only apply to the types of warrants prescribed by the *Justices Regulation 2014*, which includes a warrant issued under the *Bail Act 1980* (Bail Act).

Under section 33 of the Bail Act, 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 (pursuant to section 28 or 28A), commits an offence. In proceedings for the offence:

- production to the court of the warrant issued for their apprehension is evidence and, in the absence of evidence to the contrary, conclusive evidence of the undertaking and of the failure to surrender into custody and that the issue of the warrant was duly authorised by the decision or order of the court that issued the warrant; and
- judicial notice shall be taken of the signature of the person who issued the warrant and that that person was duly authorised to issue the warrant.

The amendments in the Bill are intended to provide greater clarity in relation to the operation of computer warrants in the context of bail by removing the requirement for the judicial officer to take judicial notice of the signature of the person who issued the warrant.

### **Magistrates’ regional service**

Section 21 of the Magistrates Act provides that the advisory committee must make a transfer policy to guide decisions about which magistrates are to constitute Magistrates Courts at particular places. Under section 21, the transfer policy must take into account the amount of regional service a magistrate has undertaken within a specified period.

Section 21(6) provides that ‘regional Queensland’ means ‘that part of Queensland outside the Beenleigh, Brisbane, Caboolture, Cleveland, Gold Coast, Ipswich, Maroochydore, Redcliffe and Toowoomba Magistrates Courts districts’.

The Bill will amend the Magistrates Act to ensure that service as a magistrate in Toowoomba constitutes regional experience for the purpose of a transfer decision under section 21.

## Human Rights Issues

### Human rights relevant to the Bill (Part 2, Division 2 and 3 HR Act)

I have considered each of the rights protected by part 2 of the HR Act. In my opinion, the human rights that are relevant to the Bill are:

- Right to freedom of expression (section 21 of the HR Act);
- Right to privacy and reputation (section 25 of the HR Act);
- Cultural rights – generally (section 27 of the HR Act);
- Cultural rights – Aboriginal peoples and Torres Strait Islander peoples (section 28 of the HR Act);
- Rights in criminal proceedings (section 32 of the HR Act); and
- Right to a fair hearing (section 31 of the HR Act).

The amendments to the Bail Act and Magistrates Act do not engage human rights.

### Shield laws

#### (a) the nature of the right

##### *Freedom of expression*

The right to freedom of expression protects the right of all persons to hold an opinion without interference and to seek, receive and express information and ideas orally, in writing, in print, by way of art, or in any other medium. The forms of protected expression are broad and may include spoken or sign language, books, newspapers, pamphlets, posters, banners, dress, legal submissions, and audio-visual, electronic and internet-based expressions.

The right to freedom of expression includes journalism and commentary on public affairs. A free, uncensored, and unhindered press is essential to ensure freedom of expression and the enjoyment of other human rights. The United Nations Human Rights Committee (UNHRC) has recognised that a limited journalistic privilege to not disclose sources of information is an element of the right of freedom of expression protected by Article 19 of the International Covenant on Civil and Political Rights. However, the right to freedom of expression, including the journalistic privilege element, is not absolute and may be restricted by law.<sup>1</sup>

Clause 33 of the Bill will limit the right to freedom of expression as it does not provide an absolute protection from compelled disclosure of a journalist’s informant. Rather, the clause establishes a qualified privilege meaning that a journalist, or relevant person, cannot be

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<sup>1</sup> UN Human Rights Committee, *General comment no. 34, Article 19: Freedoms of opinion and expression*, 12 September 2011.

compelled to disclose the identity of a confidential informant who has been promised confidentiality unless a court considers that a balance of public interests requires the disclosure.

Clause 33 will also limit the right to freedom of expression if the court restricts who may have access to information relating to a claim of journalist privilege and what may be done with it. For example, the court may order that all or part of the evidence be given in closed court or may make orders relating to the non-publication of all or part of the evidence. This will limit the news media and the general public's right to seek, receive, and express information.

#### *Right to privacy and reputation*

The right to privacy protects individuals against unlawful or arbitrary interference with their privacy, family, home, or correspondence (written and verbal). Privacy is generally understood to comprise of freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy. The concept of lawfulness in the context of the right to privacy means that no interference can take place except in cases envisaged by the law, while the concept of arbitrariness extends to interferences that may be lawful but that are capricious, unpredictable, unreasonable, and disproportionate. The right to reputation protects against unlawful attacks on reputation that are intentional and based on untrue allegations. Reputation in the context of the right refers to one's appraisal by others.

Clause 33 of the Bill will limit the right to privacy if the court orders the disclosure of the confidential informant's identity or information that may enable their identity to be ascertained. Conversely, if the court decides not to make an order removing the privilege and requiring the disclosure of the confidential informant's identity or information that may disclose their identity, the Bill will limit the right to reputation. Refusing to make an order to remove the privilege may affect the outcome of the proceeding, which may be detrimental to a person's reputation, or may prevent a person whose reputation has been damaged as a result of information provided by the confidential informant from taking legal action against the informant if they are unable to discover their identity.

#### *Right to a fair hearing*

The right to a fair hearing affirms the right of all individuals to procedural fairness and natural justice when coming before a court or tribunal. It applies to both criminal and civil proceedings and guarantees that such matters must be heard and decided by a competent, impartial, and independent court or tribunal after a fair and public hearing, and that all judgements or decisions are publicly available.

What constitutes a 'fair' hearing depends on the facts of the case and requires the weighing of a number of public interest factors including the rights of the parties. Broadly, this right ensures a party has a reasonable opportunity to put their case in conditions that do not place them at a substantial disadvantage compared to the other party, and also embraces principles of unimpeded access to courts, and a justice system that can be said to be operating in a way that is predictable to the parties. The concept of a fair hearing is concerned with matters of procedural fairness, rather than substantive fairness in relation to the merits of a particular decision.

Clause 33 of the Bill will limit this right if a court considers a matter of journalist privilege in a closed court, restricting who may be present at the hearing, or restricts the release or publication of the decision or information. This right will also be limited if the court decides

not to order the disclosure of the confidential informant's identity or the production of information that may disclose the identity because denying a party to a proceeding access to this information may limit their ability to effectively present their case and may place them at a disadvantage compared to the other party.

(b) the nature of the purpose of the limitation to be imposed by the provisions, including whether they are consistent with a free and democratic society based on human dignity, equality and freedom

Protecting and promoting human rights is necessarily consistent with a society 'based on human dignity, equality and freedom' and is considered to be a proper purpose for limiting human rights.<sup>2</sup>

The foundation of the shield laws as a qualified privilege is the balancing of rights, limiting some rights to protect other competing rights. The framework under the Bill is therefore considered to strike an appropriate balance between the competing rights of confidential informants, parties to proceedings, journalists, and the public.

#### *Freedom of expression*

The purpose of the limitation on the right to freedom of expression, by providing that journalist privilege is qualified and may be removed by court order if it is in the public interest to do so, is to protect other competing rights, including:

- the right to a fair hearing, such as if the information is sought by a defendant in a criminal proceeding to support their legal defence;
- the right to life, such as if the information is sought by the Coroner in relation to the investigation of a death which may have involved the deprivation of life;<sup>3</sup> and
- the right to reputation, such as if the information is sought by a party to a defamation proceeding.

The limitation on the right to freedom of expression, by restricting who may have access to information and what may be done with it, is to protect the safety and welfare of the confidential informant, their family and any other person who may be adversely affected by the disclosure and to ensure investigations, intelligence operations and proceedings are not prejudiced.

#### *Right to privacy and reputation*

The purpose of the limitation on the right to privacy, by allowing a court to order the removal of journalist privilege and require disclosure of a confidential informant's identity or information that may disclose their identity, is to protect the parties' right to a fair hearing. Similarly, the purpose of the limitation on the right to reputation, by allowing a court to refuse to make an order removing journalist privilege and requiring disclosure, is to protect the informant's right to privacy.

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<sup>2</sup> Sharon Barak, *Proportionality: Constitutional Limits and Their Limitations* (Cambridge University Press, 2012).

<sup>3</sup> The right to life includes a positive obligation on States to investigate violations of the right to life; the investigations must be transparent and thorough (UN Human Rights Committee, *General comment no. 36, Article 6: Right to Life*, 3 September 2019). Shield laws in the form of qualified privilege allow the Queensland Coroner's Court to consider the facts of each case and balance competing rights to ensure the State meets its positive obligation under section 16 of the HR Act.

*Right to a fair hearing*

The purpose of the limitations on the right to a fair hearing, by providing that the court may consider a matter of journalist privilege in a closed court, restrict publication of decisions or information, and may decide not to order the disclosure of the confidential informant's identity, is to protect the informant's right to privacy.

- (c) the relationship between the limitation to be imposed by the provisions, and their purpose, including whether the limitation helps to achieve the purpose

*Freedom of expression*

The limitation on the right to freedom of expression will achieve its purpose of protecting other competing rights through the requirement for courts to balance the competing public interests and human rights in determining whether or not to remove journalist privilege in a particular case. The court may make an order that journalist privilege be removed only if satisfied the public interest in disclosing the informant's identity outweighs the public interest in the communication of information by the news media, including the news media's ability to access information, and any likely adverse effect of the disclosure on the informant or another person.

Similarly, the limitation on the right to freedom of expression by restricting who has access to information and what may be done with it will achieve its purpose, of protecting the privacy, safety and welfare of the confidential informant, their family and any other person that may be adversely affected by the disclosure, or ensuring investigations, intelligence operations and proceedings are not prejudiced.

*Right to privacy and reputation*

The limitation on the right to privacy will achieve its purpose of protecting the parties' right to a fair hearing and the limitation on the right to reputation will achieve its purpose of protecting the confidential informant's right to privacy through the requirement for courts to balance the competing public interests and human rights. These considerations are the foundation of the balancing test that the court must engage in when determining whether to make an order removing journalist privilege. When deciding whether to make an order to remove the privilege the court must balance the public interest in disclosing the informant's identity against any likely adverse effect of the disclosure on the informant or another person, and the public interest in the communication of facts and opinion to the public by the news media and the ability of the news media to access sources of facts.

*Right to a fair hearing*

The limitation on the right to a fair hearing will achieve its purpose of protecting the confidential informant's right to privacy, by allowing the court to consider a matter of journalist privilege in a closed court and restrict publication of decisions or information if it considers it is appropriate to do so, allowing the court to fully engage in the consideration of the claim of privilege while retaining the confidential informant's privacy.

Balancing the right to a fair hearing against the right to privacy is also the foundation of the test that the court must engage in when determining whether to make an order removing the privilege. The court must refuse to remove the privilege if the public interest in disclosing the informant's identity does not outweigh any likely adverse effect of the disclosure on the

informant or another person, and the public interest in the communication of facts and opinion to the public by the news media and the ability of the news media to access sources of facts.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the provisions

There are two broad alternatives to shield laws based on a qualified privilege: an absolute privilege; or the current legal framework with no statutory protections. Neither of these alternatives offers a less restrictive way to achieve the proper purpose of the limitations because:

- an absolute privilege would strengthen the protections of the confidential informant's right to privacy but would fundamentally limit the right to a fair hearing as the party would have no avenue to access the relevant information; and
- retaining the current legal framework would promote the party's right to a fair hearing and freedom of expression in relation to accessing information but limit the confidential informant's right to privacy as the informant would have no legal protections regarding the confidentiality of their identity, and freedom of expression in relation to protecting journalists from compelled disclosure.

The qualified privilege under the Bill is considered to appropriately balance human rights in a less restrictive manner. The foundation of the shield laws is the balancing of various rights. Options that are less restrictive for one right would be more limiting on another right. In deciding whether a journalist or relevant person should be compelled to disclose the identity of a confidential informant, or information that would allow their identity to be ascertained, the court must weigh the public interest in disclosing the informant's identity against the public interest in the communication of information by the news media, including the news media's ability to access information, and any likely adverse effect of the disclosure on the informant or another person.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

In my opinion, the amendments in the Bill relating to shield laws strike a balance between competing rights that is reasonable and demonstrably justifiable in a free and democratic society. The balance between the right to freedom of expression, the right to privacy and reputation, and the right to a fair hearing is set out in further detail below.

#### *Freedom of expression*

The limitations on the right to freedom of expression are appropriate to protect other human rights, to restrict the consequences of limiting a confidential informant's right to privacy, and to ensure investigations, intelligence operations and proceedings are not prejudiced.

A qualified journalist privilege allows the court to balance the competing human rights on a case-by-case basis, removing the privilege only when it is in the public interest to do so. An order to remove journalist privilege and require the disclosure of the identity of an informant or the production of information that may disclose their identity limits the informant's right to privacy. Limiting the right to freedom of expression by providing that a court may restrict who may have access to the information or how the information may be used or published is important to preserve, as much as is possible, the informant's right to privacy, to protect safety

and welfare of the informant, their family, and any other affected person, and to ensure investigations, intelligence operations and proceedings are not prejudiced.

*Right to privacy and reputation*

The limitations on the right to privacy and reputation will be authorised by law and are appropriate to protect a party's right to a fair hearing or right to reputation. The balancing of the competing rights is the foundation of the balancing test that the court must engage in when determining whether to make an order.

Making, or refusing to make, an order requiring the disclosure of an informant's identity or information that may enable their identity to be ascertained in accordance with the legislative framework would not be unlawful and would not be arbitrary as the court is required to balance competing public interests in deciding whether or not to make an order to remove journalist privilege and require the disclosure.

*Right to a fair hearing*

The limitation on the right to a fair hearing is appropriate to protect the confidential informant's right to privacy. The balancing of the competing rights is the foundation of the court's consideration of a claim of journalist privilege.

(f) any other relevant factors

Nil.

**Video recorded evidence**

(a) the nature of the right

*Right to privacy and reputation*

As outlined above, the right to privacy protects individuals from unlawful or arbitrary interferences with their privacy, family, home or correspondence. Relevantly for the purpose of the VRE pilot amendments, the right protects privacy in the sense of personal information but also extends to the protection of the individual's private life more generally, as is protects an 'individual's interest in the freedom of their personal and social sphere in the broad sense'.<sup>4</sup>

The video recording of a statement of a complainant in close proximity to a domestic violence incident will limit the complainant's right to privacy in the sense of both the private information of the complainant and also the interference with their family and home (if the recording takes place in a home environment). The disclosure provision under the Bill allows for the subsequent disclosure of that recorded statement in the course of a domestic violence proceeding to the accused's lawyer or for the prosecution to allow an appropriate person, who may be the accused person, to view the statement where the accused is not legally represented. This further limits the complainant's right to privacy as it will enable sharing of sensitive information about the complainant.

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<sup>4</sup> *Kracke v Mental Health Review Board (General)* [2009] VCAT 646 [619]-[620].

*Right to a fair hearing and rights in criminal proceedings*

The right to a fair hearing affirms the right of all individuals to procedural fairness when coming before a court. It also guarantees that such matters must be heard and decided by a competent, impartial and independent court. In the criminal law context, an initial requirement is that there is a clear and publicly accessible legal basis for all criminal prosecutions and penalties, so that the criminal justice system can be said to be operating in a way that is predictable to the defendant. The criminal proceeding right under section 32 of the HR Act sets out a number of minimum guarantees for persons charged with criminal offences. Many of these rights also go towards establishing a fair trial.

The right to a fair hearing and minimum guarantees in criminal proceedings include the rights of an accused to be given all of the information they require to understand the nature and reasons for the charges against them and that they have the same opportunity to examine witnesses as the prosecution does.

In terms of the limitation on these rights, the evidence of the complainant will often form a crucial piece of evidence against an accused in a domestic violence offence proceeding. The Bill will limit the right to fair hearing for an accused person by enabling a recorded statement taken by a trained police officer outside of court to be admissible as the complainant's evidence-in-chief where they would otherwise be required to appear in court to give oral testimony (subject to the use of any existing special measures such as pre-recorded evidence).

The Bill also limits the right to fair hearing by limiting disclosure of the recorded statement whereby an accused person is not allowed to be given a copy of the recorded statement (however this does not prevent the disclosure of a transcript of a recorded statement, nor does it prevent the accused from otherwise becoming aware of the contents of a statement, as outlined below).

However, it is important to weigh up of a number of public interest factors, as well as the interests of the complainant, defendant and community. In other words, the rights to a fair hearing and rights in criminal proceedings do not necessarily require a hearing with the most favourable procedures for the accused. Procedures must take account of other interests, including the interests of the victim and of society generally in having a person brought to justice and preventing crime. It is considered that the amendments appropriately balance those interests, as demonstrated below.

The amendments in the Bill also make it clear in relation to a domestic violence proceeding that the provisions do not limit the existing powers of a court under the Evidence Act or another Act to close the court and that the ability of the court, under section 21AAA of the Evidence Act, to exclude particular persons from the court while particular evidence of a special witness is presented extends to recorded statements. This does not limit the right to fair hearing, noting it is in the public interest to protect the privacy of domestic violence victims, particularly given the sensitive nature of the recorded statements. Excluding persons from hearings in the public interest or in the interests of justice is expressly contemplated by section 31(2) of the HR Act.

- (b) the nature of the purpose of the limitation to be imposed by the provisions, including whether they are consistent with a free and democratic society based on human dignity, equality and freedom

*Right to privacy and reputation*

The purpose of limiting the right to privacy of the complainant in these situations is to both illustrate the demeanour and experience of the complainant close to the time of the event and to reduce the capacity of the defendant to intimidate the complainant. This, in turn, is intended to alleviate some of the trauma, stress and anxiety for complainants in proceedings involving criminal charges against an accused person (who in many cases may be a former or current intimate partner and with whom they may have children and thereby have an ongoing connection with). These are proper purposes consistent with a free and democratic society based on human dignity, equality and freedom.

*Right to a fair hearing and rights in criminal proceedings*

The purpose of limiting the rights to a fair hearing and rights in criminal proceedings of the accused is to reduce the trauma for domestic violence victims associated with recounting events in front of the defendant, to reduce the difficulty for complainants in recalling events when being cross-examined and, in relation to limits on disclosure, to protect the privacy of complainants. These are proper purposes consistent with a free and democratic society based on human dignity, equality and freedom.

- (c) the relationship between the limitation to be imposed by the provisions, and their purpose, including whether the limitation helps to achieve the purpose

*Right to privacy and reputation*

There is a rational relationship between the limitation on the right to privacy and the identified purposes. Enabling the video recording of statements of a complainant either at the scene of the event or taken at a time proximate to the event allegedly occurring will facilitate the obtaining of evidence that clearly illustrates the demeanour and experience of the complainant both physically and emotionally. It will also ensure that the recorded statement of the complainant close to the time of the event is preserved for future criminal proceedings to minimise the ability of the defendant to influence, coerce or intimidate the complainant, or cause them to not attend at a police station at a later date to make a complaint.

The use of recorded statements will alleviate some of the trauma, stress and anxiety for complainants associated with pursuing criminal charges, including as a result of having to attend a police station or proceedings to provide evidence against a defendant, by lessening the need for the complainant to do these things (noting a complainant is still required under the Bill to be available for cross-examination and re-examination if the recorded statement is used as their evidence-in-chief).

*Right to a fair hearing and rights in criminal proceedings*

There is a rational relationship between the limitation on the right to a fair hearing and the identified purposes. By enabling the recorded statement of a complainant (either at the scene of the event or taken at a time proximate to the event allegedly occurring) to be admissible as their evidence-in-chief in domestic violence proceedings, there may be less contested matters and

therefore the likelihood of a complainant needing to attend proceedings personally (and the trauma associated with this) is reduced, noting that the complainant must still be available (subject to the parties otherwise agreeing) for cross-examination and/or re-examination where a matter proceeds to a hearing.

Where a matter does proceed to hearing, the trauma for complainants associated with re-telling events during court proceedings will be reduced a result of the recorded statement being admissible as the complainant's evidence-in-chief. Recalling events during cross-examination will be easier for complainants as they will be able to refer to their recorded statement.

An independent evaluation of the Victorian digitally recorded evidence-in-chief (DREC) trial (Victorian trial), established pursuant to amendments to the *Criminal Procedure Act 2009* (Vic), was conducted by Monash University and published on 1 September 2020. While the evaluation was not able to make conclusive findings regarding whether the Victorian trial reduced the re-traumatisation of complainants, several evaluation participants (including police, police prosecutors and a magistrate) provided anecdotal views of their perceived impact of the Victorian trial on victims, including views that the use of DREC does reduce the potential for re-traumatisation. Observations included that the use of DREC reduces the number of times that complainants had to re-tell their story and reduces pressure on the complainant to re-tell their story in as much detail during cross-examination.

Limiting the subsequent disclosure of a recorded statement in a proceeding to an accused person is directly linked to protecting the privacy of a complainant, as it will limit the extent to which the sensitive and private information in the statement is seen by others and will ensure an accused person is unable to share or misuse the video in a way that may further victimise or compromise the privacy of a complainant.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the provisions

#### *Right to privacy and reputation*

The amendments in the Bill are the least restrictive and reasonably available way to achieve the identified purposes. The amendments are reasonably adapted to ameliorate the impact on the complainant's right to privacy as much as possible.

For example, the statement must be made with the complainant's informed consent, meaning the police officer taking the statement must inform the complainant of certain matters, including that the recorded statement may be presented as the complainant's evidence-in-chief, may be disclosed to, and used by, the alleged perpetrator and other people, and that the complainant may refuse to consent to making the recorded statement. The complainant must indicate they understand these matters and consent to the making of the statement.

In determining whether or not to present the complainant's evidence-in-chief in the form of a recorded statement, the prosecution must consider certain factors, including the wishes of the complainant.

The Bill includes amendments to limit the disclosure of the videorecording to the accused. Where the accused person has a lawyer, the prosecution will give the lawyer a copy of the video recording but the lawyer will be prohibited from giving the copy to the accused and will be

subject to other strict conditions in relation to further sharing of the statement. Where an accused person is not legally represented, they will not be given a copy of the recorded statement, however, may be able to view the statement only if considered by the prosecution or the court to be an ‘appropriate person’ to view the statement.

Further, the Bill includes offences which aim to protect the complainant’s right to privacy in the context of any unauthorised possession, supply, copying and publication of recorded statements.

The VRE pilot is limited to ‘domestic violence proceedings’ and will be subject to an independent evaluation, which will allow an opportunity to assess impacts on all parties to domestic violence proceedings involving recorded statements, including the experience of complainants, and identify any unintended consequences.

*Right to a fair hearing and rights in criminal proceedings*

The amendments are the least restrictive and reasonably available way to achieve the identified purposes. The amendments are reasonably adapted to ameliorate the impact on the accused’s right to a fair trial and rights in criminal proceedings. For a recorded statement to be admissible as evidence-in-chief at the hearing of the proceeding the complainant must attest to the truthfulness of the statement and be available for cross-examination and re-examination (unless the parties consent to non-compliance with this requirement).

While the disclosure provision prevents the accused from possessing a recorded statement, it ensures that the accused is still made aware of the contents by requiring that the prosecution give the accused person a written notice which describes the recorded statement and stating certain other information, including that the prosecution must, on request, give the accused person a transcript of the recorded statement that is in the possession of the prosecution. If the accused person has a lawyer acting for them, the lawyer will be given a copy of the recorded statement. If the accused is unrepresented, the prosecution will, on request, allow the statement to be viewed by an appropriate person, who may be the accused, or another person engaged by the accused (such as an interpreter or expert) if the prosecution or court considers it is appropriate.

The provisions in the Bill do not otherwise impact on the usual rules in relation to the admissibility of evidence in a recorded statement and do not impact the court’s general overriding discretion to exclude evidence. The Bill includes a provision making it clear that certain provisions in Part 6 of the Evidence Act, which seek to clarify the operation of existing rules of evidence as to admissibility with respect to statements, apply in relation to a recorded statement.

As outlined above, the VRE pilot will be subject to an independent evaluation which will allow an opportunity for impacts on all parties to domestic violence proceedings involving recorded statements to be assessed, including any impacts on an accused person’s right to a fair hearing.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

In my opinion, the amendments in the Bill relating to the VRE pilot strike an appropriate

balance between the importance of the purposes of the amendments and the importance of preserving those human rights which are limited. This balance in relation to each of the limited rights is set out in further detail below.

#### *Right to privacy and reputation*

The importance of protecting the right to privacy for a domestic violence complainant must be balanced against the purposes of ensuring appropriate evidence is available to illustrate the demeanour and experience of the complainant proximate to the time of the event and to reduce the capacity of the defendant to intimidate the complainant, which, in turn, is intended to reduce trauma for that complainant.

While the complainant's right to privacy is limited by allowing a recorded statement to be made in close proximity to a domestic violence incident, and subsequently disclosed under the disclosure provisions, the extent of this impact is ameliorated by a range of safeguards in the Bill, such as the inclusion of offences for unauthorised possession, use or publication of a recorded statement. Importantly, the Bill requires that a complainant must give informed consent to the making of a recorded statement, which allows a complainant the opportunity to consider relevant factors, including how the statement may be used, before agreeing to what may amount to an intrusion upon their privacy.

On balance, having regard to the extent of the limitation on the right to privacy, it is considered that the importance of achieving the purposes of the amendments outweighs the harm caused to the right to privacy.

#### *Right to a fair hearing and rights in criminal proceedings*

On the one hand the amendments limit an accused person's right to a fair hearing and rights in criminal proceedings by allowing an out of court statement (the recorded statement) to be admissible as a complainant's evidence-in-chief, and by limiting the ways in which that recorded statement can be disclosed to an accused person. This must be balanced against the purposes of the limitations, which are reducing the trauma for complainants associated with having to re-tell their story multiple times, including recounting events in front of the defendant during court proceedings, and reducing the difficulty in recalling events when being cross-examined, as well as protecting the privacy of domestic violence complainants.

In striking an appropriate balance, it is relevant to note that the right to a fair hearing and rights in criminal proceedings do not necessarily require a hearing with the most favourable procedures for the accused. The Bill establishes a framework which strikes a balance between benefits and protections for a domestic violence complainant and the rights of an accused.

The extent of the impact on the accused's right to a fair trial and rights in criminal proceedings has been ameliorated by requiring that a complainant must still be available for cross-examination. While there are limits on an accused possessing a copy of the recorded statement, the amendments ensure an accused is still made aware of the case against them in other ways, including by being allowed to view the recorded statement in certain circumstances and by their right to be provided with a transcript of the recorded statement in the possession of the prosecution. Having regard to the sensitivity of the recorded statements and the significant negative impact that misuse of a recorded statement could have on a complainant's right to privacy, the amendments strike an appropriate balance in this respect.

On balance, having regard to the extent of the limitation on the rights of the defendant to a fair trial and in criminal proceedings, it is considered that the importance of achieving the purposes

outweighs the harm caused to the right to a fair hearing.

(f) any other relevant factors

Nil.

### **Viewing and examination of the body of a deceased person**

(a) the nature of the right

*Cultural rights – generally and Cultural rights – Aboriginal peoples and Torres Strait Islander peoples*

Cultural rights are directed towards ensuring the survival and continued development of the cultural, religious and social identity of minorities. Section 27 of the HR Act affirms the right of all persons to enjoy their culture, to practise or declare their religion and to use their language, either alone or with others who share their background. This right is concerned with protecting a person from being denied the right to enjoy their culture, religion or language. A person may have been denied the right in this section if their enjoyment of a right is substantially restricted. The protection of cultural and religious practices includes the maintenance of traditional beliefs and practices, such as those practices which relate to deceased persons (for example, funeral rites and rituals).

Aboriginal peoples and Torres Strait Islander peoples also have distinct rights under the HR Act. There are many hundreds of distinct Aboriginal and Torres Strait Islander groups in Australia who have their own languages, customs, laws and cultural practices.

Section 28 of the HR Act explicitly protects the right to live life as an Aboriginal person or Torres Strait Islander who is free to practise their culture. They must not be denied certain rights in relation to traditional knowledge, spiritual practices, language, kinship ties, relationship with land and resources, and protection of the environment.

Cultural rights under section 27 and section 28 of the HR Act will be limited by the amendments in the Bill where an independent examination of the remains of a victim of homicide is sought and that examination interferes with religious or cultural customs relating to deceased persons. This could include, for example, delaying burials or other similar ceremonies that may be conducted when a person dies and that person belongs to a particular class or practices a particular faith.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of limiting cultural rights is to provide a mechanism for an accused person in a criminal prosecution to, if they wish, view and examine a deceased person (which may include part of a body, such as samples of tissue or bone fragments and remains).

This purpose is consistent with fundamental rights of an accused, including the right to a fair hearing (section 31 of the HR Act) and rights in criminal proceedings (section 32 of the HR Act), in particular the right to examine, or have examined, prosecution witnesses and the right for defence to obtain the attendance and examination of witnesses on the person's behalf under

the same conditions as the witnesses for the prosecution. The amendments will continue to enable an accused person to, where a dispute arises, independently test the evidence that is being relied upon by the prosecution and should they wish to adduce evidence at trial, call those experts on their behalf.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Viewing and examination of a deceased person's body by the accused person may delay the release of the body for burial in some cases. However, the amendments will achieve the purpose by providing a clear legislative mechanism for accused persons to make an application to the prosecution or court to view or seek an independent examination of the body of a deceased person, whilst at the same time allowing the court and prosecution to have regard to the fact that the body may not have been released for burial under the Coroners Act and the need to protect the integrity of the body.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

Where a deceased person's body has not already been released for burial, it is anticipated that in most cases, the autopsy report, photographs taken during an examination and the results of any testing done on samples (including DNA analysis) will provide an adequate basis for a second opinion by expert witnesses and therefore not delay release of the body by the Coroner. However, in circumstances where the accused person believes those things are not adequate or available, the amendments in the Bill represent the least restrictive option on the cultural rights of the deceased and their family. It is anticipated that the limit on human rights will only arise where the deceased or deceased family fall into a specific class of persons whose rights are limited as a result of their culture or religion.

Alternative options may include:

- an amendment to section 26 of the Coroners Act to make it clear that, before the Coroner releases a body, they must consider the interests of a fair trial in respect of any criminal proceeding against the need to have the remains returned to the family as soon as possible (Option A);
- inserting a new provision in the Coroners Act for the Coroner to issue a certificate that is deemed conclusive evidence of the identity of a deceased (Option B);
- an amendment to section 26 of the Coroners Act to allow for a specific right of appeal about a decision to release or not release a body (Option C); or
- amend the Criminal Code to impose a time limit within which a person must make an application to undertake additional testing on human remains (Option D).

Option A is considered likely to lead to unnecessary delay in releasing a body to the family of the deceased and by creating an additional layer of decision-making for the Coroner when exercising a function under section 26 of the Coroners Act. Similarly, Option C is likely to prolong the release of the body if a Coroner is required to consider an appeal by an impacted party. Providing for a specific right of appeal in the Coroners Act would not achieve the aim of providing certainty to the family of a deceased person. These options would likely cause further

delay to the release of remains or a body to their family, which would have a greater impact on their cultural rights making it more restrictive on those rights.

Option B is problematic as the identity of the deceased is more appropriately determined by a jury and arguably entangles the functions of a criminal court and a coroners court which have separate aims and functions. This option would not achieve the purpose of the amendment and limits the accused right to a fair trial in a way which may be considered too restrictive.

Option D proposes to impose an arbitrary timeframe within which a person must make an application under section 590AS of the Criminal Code. Arguably, such an approach would have a greater impact on an accused's right to a fair trial because it effectively imposes a disclosure obligation contrary to the burden of proof on the prosecution to prove guilt beyond a reasonable doubt and is therefore more restrictive on human rights.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On the one hand there are important cultural rights of a deceased person and their family, particularly in relation to the treatment of remains, funeral and burial rights. The burial of a body is often intertwined with a family's cultural beliefs. Many religions and cultures, including Aboriginal and Torres Strait Islander cultures, have specific and important practices and beliefs relating to death and burial. Sections 27 and 28 of the HR Act affirms the right of all persons to enjoy and manifest their culture.

This must be balanced, on the other hand, against the rights of an accused person in criminal proceedings and to have a fair trial. These rights are fundamental to the criminal justice system. The purpose of the amendments is to ensure there is the ability to view and examine the body of a deceased person.

The amendments strike a fair balance between these rights by ensuring that the court and prosecution can have regard to a Coroner's obligations under section 26 of the Coroners Act and that return of the body to the deceased's family is not unnecessarily delayed.

(f) any other relevant factors

Nil.

## Conclusion

In my opinion, the Bill is compatible with human rights under the HR Act because it limits human rights only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

**SHANNON FENTIMAN MP**  
Attorney-General and Minister for Justice  
Minister for Women  
Minister for the Prevention of Domestic and Family Violence