



**Shane Rattenbury MLA**

Attorney-General

Minister for Consumer Affairs

Minister for Water, Energy and Emissions Reduction

Minister for Gaming

Member for Kurrajong

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Mr Jeremy Hanson CSC MLA

Chair

Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)

ACT Legislative Assembly

GPO Box 1020

CANBERRA ACT 2601

Dear Mr Hanson,

I write in response to the Standing Committee on Justice and Community Safety's (the Committee's) comments in Report 7 in relation to the *Crimes Legislation Amendment Bill 2021* (the Bill).

*Proposed amendment to the Crimes (Child Sex Offenders) Act 2005*

The Committee notes that the proposed amendments to add a Commonwealth offence to the list of offences that can lead to registration on the child sex offender register may limit the right to work (s 27B of the *Human Rights Act 2004* (HR Act)) and that consideration should be given to amending the explanatory statement to reference this potential limitation and its justification.

I thank the Committee for its comment. An amended explanatory statement for the Bill has been prepared to address the Committee's comment.

*Proposed amendments to the Crimes (Surveillance Devices) Act 2010 and Listening Devices Act 1992 – body-worn cameras*

The Committee has commented that the explanatory statement for the Bill does not justify why some of the substantive privacy protections for police use of body-worn cameras are to be contained in a disallowable instrument prepared by the Chief Police Officer (CPO), rather than in the Bill.

As the Committee notes, key privacy protections are included in the Bill, including an exception to the requirement that police use a body worn camera when that use would unreasonably limit a

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person's privacy. The guidelines to be developed by the CPO will, necessarily, be consistent with the Bill.

The guidelines are intended to provide the operational detail required to support use of body worn cameras by ACT police officers. It is not uncommon for such matters of detail to be included in regulations or other disallowable instruments. This approach provides flexibility to modify the guidelines in response to any emerging or apparent issues. I note that the CPO must consult the Director-General of the Justice and Community Safety Directorate before making the guidelines and that the guidelines must include a statement about how human rights have been considered. Importantly, as a disallowable instrument, the guidelines are subject to the parliamentary scrutiny process and may be disallowed.

The Committee commented that it is not clear how police accountability will be ensured, including through providing appropriate access to the recordings. All body-worn camera recordings made by ACT police officers are Australian Federal Police (AFP) records, and therefore subject to Commonwealth legislation and administrative arrangements. The *Australian Federal Police Act 1979* (Cth), the *Freedom of Information Act 1982* (Cth) and the *Privacy Act 1988* (Cth) contain key information access mechanisms and review options.

The Committee has also noted that the Bill does not provide additional means for enforcing the guidelines. While there is no legislated penalty for non-compliance with the guidelines, the Chief Police Officer and the Australian Federal Police will be able to investigate complaints and take disciplinary action for any failure to comply. Additionally, if an AFP Professional Standards investigation finds that an integrity breach or unlawful action has occurred, the matter may be referred to criminal charges.

I refer to the Committee's concern about the compatibility of body-worn camera use with the right to a fair trial (s 21 of the HRA) noting that the recordings obtained through the use of body-worn cameras will generally not be subject to the protections and exceptions set out in division 5.1 of the *Crimes (Surveillance Devices) Act 2010* (ACT) and pt 6 of the *Surveillance Devices Act 2004* (Cth). I agree that these protections will not apply, but note that they exist to protect information collected using covert surveillance devices issued under warrant or in other restricted circumstances.

I am of the view that there is an important distinction to be made between recordings made by covert devices, and those made by overt devices, such as body-worn cameras. The Bill requires that use of body worn cameras be overt subject to limited exceptions, such as where this would result in a risk to safety. In developing these amendments, it was identified that section 34 of the *Crimes (Surveillance Devices) Act 2010* and section 45 of the *Surveillance Devices Act 2004* (Cth) would not apply to the use of body-worn cameras, as they are not covert surveillance devices. These sections limit the admissibility of body-worn camera footage on the basis that information collected covertly should only be used in relatively serious matters, where the public interest may override potential prejudice to the accused person. Similar limitations on the admissibility of *overt* body-worn camera recordings are not necessary, on the basis that there is a reduced risk of unfair prejudice to a person who is filmed overtly and is aware of the recording and the limitation on their privacy at the time the recording is being made.

If it is later identified that the recordings should not be admitted as evidence for any reason, the *Evidence Act 2011* provides a range of grounds on which evidence can be excluded. Most notably, the provisions of Part 3.11 of the *Evidence Act 2011* which provide, among other things, for:

- the court's discretion to exclude evidence "if its probative value is substantially outweighed by the danger that the evidence might... be unfairly prejudicial to a party";
- the exclusion of evidence in criminal proceedings if its probative value is outweighed by the danger of unfair prejudice to the defendant;
- the exclusion of improperly or illegally obtained evidence.

In terms of preserving the integrity and security of the recordings, existing legal frameworks provide strict limits and protections for the handling of AFP records by police officers. Those records include recordings from body-worn cameras (for example, the *Archives Act 1983* (Cth) and the *Australian Federal Police Act 1979* (Cth)). In particular, section 60A of the *Australian Federal Police Act 1979* (Cth) provides it is an offence to copy or disclose AFP records without proper authorisation.

#### *Proposed amendments to the Terrorism (Extraordinary Temporary Powers) Act 2006*

In relation to the amendments to extend the sunset of the *Terrorism (Extraordinary Temporary Powers) Act 2006* (TETPA), the Committee requested further information as to why it is considered necessary and proportionate to extend the operation of the Act.

As noted by the Committee, this amendment follows a recent review of the operation and effectiveness of TETPA which concluded that it was appropriate to give further consideration to opportunities to incorporate additional rights protections in TETPA. I acknowledge that the report contemplated that the work to consider improvements to the TETPA would be undertaken before the sunset of TETPA in November 2021. However, a short extension is required to allow sufficient opportunity to consider and consult on ways in which the considerable safeguards in TETPA could be further refined or enhanced, while ensuring that it continues to support community safety. The TETPA remains consistent with human rights and any limitations on rights by the extension of the Act are reasonable and necessary to achieve the legitimate purpose of responding to the threat of terrorism.

I thank the Committee for their consideration of the Bill.

Yours sincerely

Shane Rattenbury MLA  
Attorney-General