

**2021**

**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**CRIMES LEGISLATION AMENDMENT BILL 2021**

**REVISED EXPLANATORY STATEMENT**

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# CRIMES LEGISLATION AMENDMENT BILL 2021

## Outline

Outline.....	1
CRIMES LEGISLATION AMENDMENT BILL 2021 .....	1
OVERVIEW OF THE BILL.....	1
CONSULTATION ON THE PROPOSED APPROACH.....	1
CONSISTENCY WITH HUMAN RIGHTS .....	2
Detail.....	20
Part 1 – Preliminary.....	20
Part 2 – Crimes (Child Sex Offenders) Act 2005.....	20
Part 3 – Crimes (Sentencing) Act 2005.....	21
Part 4 – Crimes (Surveillance Devices) Act 2010.....	23
Part 5 – Inspector of Correctional Services Act 2017.....	25
Part 6 – Listening Devices Act 1992.....	25
Part 7 – Terrorism (Extraordinary Temporary Powers) Act 2006 .....	26

## **CRIMES LEGISLATION AMENDMENT BILL 2021**

The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to involve significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004* (HR Act).

### **OVERVIEW OF THE BILL**

The policy objective of this bill is to improve the clarity and effectiveness of criminal justice legislation.

The Crimes Legislation Amendment Bill 2021 is comprised of provisions which amend:

- a) the *Crimes (Child Sex Offenders) Act 2005* to facilitate the registration of offenders convicted of possession of child-like sex dolls;
- b) the *Crimes (Sentencing) Act 2005* to:
  - i) ensure that family violence is a matter which the courts must consider appropriately in the sentencing process; and
  - ii) rectify an anomaly which prevents appeal courts from amending a nonparole period where the sentence for one or more offences is set aside or amended on appeal;
- c) the *Crimes (Surveillance Devices) Act 2010* and the *Listening Devices Act 1992* to explicitly state the circumstances in which body-worn cameras (BWCs) may or must be used by police officers;
- d) the *Inspector of Correctional Services Act 2017* to change the review period for the examination and review of correctional centres and places of detention from at least once every two years to at least once every three years; and
- e) the *Terrorism (Extraordinary Temporary Powers) Act 2006* to extend the operation of the Act for 12 months.

### **CONSULTATION ON THE PROPOSED APPROACH**

The Crimes Legislation Amendment Bill 2021 amendments were identified by, and developed in consultation with, justice stakeholders, including the Director of Public Prosecutions (DPP), ACT Courts and Tribunal (ACTCT), ACT Policing, the ACT Human Rights Commission (ACT HRC) and the Inspector of Correctional Services.

All amendments were circulated to the following stakeholders:

- Aboriginal Torres Strait Islander Elected Body
- ACT Bar Association

- ACTCT (including Magistrates Court and Supreme Court)
- ACT HRC (including Victims of Crime Commissioner, Public Advocate and Children & Young People Commissioner)
- ACT Law Society
- ACT Policing
- Coordinator-General for Family Safety
- DPP
- Domestic Violence Crisis Service
- Legal Aid ACT
- Office of Aboriginal & Torres Strait Islander Affairs
- Women’s Legal Centre

Other proposals were also circulated, where relevant to additional stakeholders including:

- ACT Corrective Services
- ACT Ombudsman
- Canberra Health Services (Justice Health Services)
- Civil Liberties Australia
- Community Services Directorate
- Sentence Administration Board

The proposal relating to BWCs has been the subject of community consultation through a YourSay Community Panel survey process. In consultation with ACT Policing, the Justice and Community Safety Directorate (JACS) also prepared an information paper to seek broader community views. This paper was published on the JACS website and was the subject of a media release inviting views on the BWC reforms.

### **CONSISTENCY WITH HUMAN RIGHTS**

International human rights law places obligations on governments to “respect, protect and fulfil” rights. The obligation to respect means governments must ensure

its organs and agents do not commit violations themselves; the obligation to protect means governments must protect individuals and groups from having rights interfered with by third parties and punish perpetrators; and the obligation to fulfil means governments must take positive action to facilitate the full enjoyment of rights.

The European Court of Human Rights has considered the positive obligation of governments to uphold rights in depth, noting government must put in place legislative and administrative frameworks to deter conduct that infringes rights, and to undertake operational measures to protect an individual who is at risk of rights infringement.<sup>1</sup>

## **Rights Promoted**

The Bill engages and supports the following rights:

- Section 10 – Protection from torture and cruel, inhuman or degrading treatment
- Section 11 – Protection of family and children
- Section 12 (a) – Right to privacy
- Section 18 – Right to liberty and security of person
- Section 22 – Rights in criminal proceedings

These are supported by the proposed amendments discussed below.

### Crimes (Child Sex Offenders) Act 2005 – child-like sex doll amendments

These amendments will ensure that unless an exception applies, a person convicted of the Commonwealth offence of possession of a child-like sex doll or other similar object, will be a ‘registrable offender’ and subject to the reporting requirements under the *Crimes (Child Sex Offenders) Act 2005* which results in registration on the child sex offender register.

The registration scheme is intended to protect children and reduce the likelihood that registrable offenders will re-offend by targeting those offenders who engage in concerning conduct and prohibiting them from engaging in that conduct. Registration as a child sex offender means that offenders have less opportunities to be in situations that facilitate reoffending which can reduce the likelihood that a person will

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<sup>1</sup> Colvin, M & Cooper, J, 2009 *‘Human Rights in the Investigation and Prosecution of Crime’* Oxford University Press, p.425. For more detail on positive obligations, see generally, Akandji-Kombe, J, 2007 *‘Positive obligations under the European Convention on Human Rights’*, Council of Europe.

reoffend. Registration and associated reporting requirements can facilitate the investigation and prosecution of child sex offences and mitigate the risk of an offender to the 'lives or sexual safety of children'. In this context, the amendments engage and promote the right of protection of children due to their particular vulnerability, as well as their right to protection from torture and cruel, inhuman or degrading treatment (sections 11 (2) and 10 of the HR Act).

### Crimes (Sentencing) Act 2005 – family violence amendments

Appropriate sentencing for family violence offending engages and supports the right to protection from torture and cruel, inhuman or degrading treatment (section 10 HR Act), protection of family and children (section 11 HR Act), right to privacy (section 12 HR Act) and the right to liberty and security of person (section 18 HR Act).

In 2012 the ECHR affirmed the need for governments to protect the physical and moral integrity of victims of domestic violence. In particular, when discussing the positive obligations on States to protect individuals, the court noted that private individuals may engage in domestic violence, and stated<sup>2</sup>:

*[t]he concept of private life includes a person's physical and psychological integrity. Under Article 8 States have a duty to protect the physical and moral integrity of an individual from other persons. To that end they are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals.*

*Victims of domestic violence are of a particular vulnerability and the need for active State involvement in their protection has been emphasised in a number of international instruments.*

Domestic and family violence provisions necessarily engage the right to privacy and the right to family. Domestic, family and sexual violence is inherently personal and relationship-based and largely occurs in the private sphere. The amendments seek to support existing criminal and civil laws intended to promote lawful conduct within family relationships, which needs careful balancing of human rights considerations.

The primary purpose of the amendments is to recognise the particular characteristics of family violence offending when sentencing perpetrators. This purpose supports the right to protection from torture and cruel, inhuman or degrading treatment, protection of family and children, and the right to liberty and security of person (sections 10, 11 and 18 of the HR Act) by putting in place measures to adequately

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<sup>2</sup> *Irene Wilson v The United Kingdom* [2012] ECHR, Application no. 10601/09 (23 October 2012) §37.

address perpetrator behaviour on sentence and minimise the risk of further physical and psychological harm to victims of abuse.

### Crimes (Sentencing) Act 2005 – nonparole period amendments

This amendment will enable an appeal court to modify or set a nonparole period where a sentence of imprisonment is set aside or amended as a result of an appeal. The amendment engages and promotes the right to have a conviction and sentence reviewed by a higher court (subsection 22 (4) of the HR Act) by ensuring that a nonparole period can be adjusted appropriately following a successful appeal.

### Crimes (Surveillance Devices) Act 2010 & the Listening Devices Act 1992 – body-worn camera amendments

These amendments promote the rights to protection from torture and cruel, inhuman or degrading treatment (section 10), liberty and security of person (section 18) and in criminal proceedings (section 22).

BWCs are used by law enforcement around Australia and internationally. They have been demonstrated to support accountability and transparency in police interactions with members of the community.

The scrutiny of police behaviour, including use of force, afforded by BWCs promotes the right to protection from torture and cruel, inhuman and degrading treatment and the right to the liberty and security of person.

The evidence captured by BWCs can afford evidence that assists all parties in criminal proceedings, including a defendant, and so, indirectly supports a person's right in criminal proceedings.

### **Rights Limited**

The Bill engages and limits the following rights:

- Section 8 – Recognition and equality before the law
- Section 12 (a) – Right to privacy
- Section 13 – Freedom of movement
- Section 19 – Humane treatment when deprived of liberty
- Section 28B - The right to work

The limitations on human rights in the Bill are reasonable and demonstrably justified pursuant to section 28 of the HR Act, because they are the least restrictive means available to achieve the purpose of the amendments.



The right to privacy is engaged and limited by the amendments to:

- *Crimes (Child Sex Offenders) Act 2005*;
- *Crimes (Surveillance Devices) Act 1992*; and
- *Listening Devices Act 1992*.

A discussion of how each amendment limits the right to privacy is outlined under the specific amendment, with a broad discussion about the nature of the right to privacy outlined below.

Section 12 of the HR Act states that:

Everyone has the right—

- a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- b) not to have his or her reputation unlawfully attacked.

An interference can only take place where authorised by the law, and any interference with privacy, even provided by law, must not be arbitrary, and must be reasonable, necessary, and proportionate in the circumstances.

The right to privacy and reputation is “one of the broadest and most flexible of human rights”,<sup>3</sup> and can encompass personal identity and lifestyle, reputation, family life, the home and home environment and all forms of communication.<sup>4</sup> The United Nations Human Rights Committee’s General Comment 16 states:<sup>5</sup>

*as all persons live in society, the protection of privacy is necessarily relative. However, the competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society*

While the right to privacy is broad, it is not absolute.

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<sup>3</sup> Gans et al, *Criminal Process and Human Rights*, 2011, The Federation Press, Sydney, para 8.1, p 301.

<sup>4</sup> Lester QC., Pannick QC (General editors), 2005, *Human Rights Law and Practice*, Second edition, LexisNexis UK, p 261.

<sup>5</sup> UN Human Rights Committee, *General Comment 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art 17)*, UN Doc CCPR General Comment 16 (1988), para 7.

## **Detailed human rights discussion**

### **Crimes (Child Sex Offenders) Act 2005 – child-like sex doll offence amendments**

The Bill adds a new offence to the existing list of registrable offences in the *Crimes (Child Sex Offenders) Act 2005* (CSO Act) to include the Commonwealth offence of ‘possession of a child-like sex doll or other (similar) object’. The Bill includes this offence as a class 2 offence.

The amendments to the CSO Act engage the human rights of a section of the ACT community - namely people convicted of the Commonwealth offence. However, this engagement is proportionate and justified in the circumstances because it is the least restrictive means available to achieve the purpose of protecting the human rights of others – children and young people. This view is reached based on a section 28 (2) analysis on the limitations for each human right that the Bill engages detailed below.

Because this amendment will have the effect that people convicted of the Commonwealth offence of possessing a child-like sex doll will be added to a register, unless they come within limited exceptions, it engages and limits the same rights that the existing provisions for registration engage. The amendments engage and limit the right to recognition and equality before the law (section 8 HR Act), the right to privacy and reputation (section 12 HR Act), the right to freedom of movement (section 13 HR Act), and the right to work (section 27B HR Act).

#### **1. Nature of the right and the limitation (ss 28 (2) (a) and (c))**

##### *Right to recognition and equality before the law*

Section 8 of the HR Act provides:

- (1) Everyone has the right to recognition as a person before the law.
- (2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
- (3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

The registration scheme and the proposed amendments engage section 8 of the HR Act because they only apply to a particular category of people (registrable offenders). The limitations imposed by these provisions apply only to registrable offenders.

Section 8 of the HR Act is based on Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR). In order to provide guidance with the application and interpretation of the ICCPR, the Office of the High Commissioner for Human Rights

has issued general comments, one of which addresses the right to non-discrimination.

*General comment 18* notes that:

*'non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights'.<sup>6</sup>*

However, the Committee also observes at paragraph 14 of the general comment that:

*'not every differentiation of treatment will constitute discrimination, if the criteria for such discrimination are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.<sup>7</sup>*

In addition, while section 7 (o) of the ACT's *Discrimination Act 1994* (the Discrimination Act) prohibits discrimination on the ground of a spent conviction, section 8 (2) provides that a person does not discriminate by imposing a condition or requirement on a person with a protected attribute, if the condition or requirement is reasonable in the circumstances.

Therefore, it is reasonable to interpret section 8 of the HR Act as not prohibiting all kinds of distinction or differential treatment. However, the criteria for this distinction or differential treatment must be reasonable and intended to achieve a legitimate aim.

### *Right to privacy*

The nature of the right to privacy is discussed in detail above.

The amendments proposed engage and limit the rights to privacy of people convicted of the Commonwealth offence of possession of a child-like sex doll or other object, unless the exceptions apply, as it requires them to:

- register on the Child Sex Offender Register; and
- abide by the set of reporting requirements, as outlined in the CSO Act, required of a person registered on the Child Sex Offender Register.

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<sup>6</sup>Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, 1989 'General Comment No.18: Non-discrimination. Available: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/3888b0541f8501c9c12563ed004b8d0e?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument)

<sup>7</sup> Ibid.

### *Right to freedom of movement*

Section 13 of the HR Act provides that everyone has the right to move freely within the ACT, to enter and leave it, and the freedom to choose his or her residence.

The right to freedom of movement is linked to the right to liberty. It can be interpreted as providing that a person's movement across borders should not be unreasonably limited by the state, including through procedural impediments. This right is not absolute and so may be subject to reasonable limitations pursuant to section 28 of the HR Act. The need for reasonable limitations on this right is acknowledged at subsection (3) of article 12 of the *International Covenant on Civil and Political Rights* (the equivalent right to section 13 of the HR Act):

*'the rights to liberty and freedom of movement shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights or freedoms of others and are consistent with the other rights recognised in the Covenant.'*

This right is engaged and limited for any offenders who are placed on the register due to their conviction of the Commonwealth offence. It is noted that the limitations on this right exist already for all registered offenders and this has previously been justified as part of the development of the registered offender scheme.

The amendments proposed engage and limit the right to freedom of movement of people convicted of the Commonwealth offence of possession of a child-like sex doll, as registration on the basis that a person is a risk to the lives or sexual safety of children has a significant impact on the right to freedom of movement by imposing a range of restrictions and reporting requirements.

### *Right to work*

Section 27B of the HR Act provides that:

- (1) Everyone has the right to work, including the right to choose their occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.
- (2) Everyone has the right to the enjoyment of just and favourable conditions of work.
- (3) Everyone has the right to form or join a work - related organisation, including a trade union, with the objective of promoting or protecting their economic or other social interests.
- (4) Everyone has the right to protection against acts of anti-union discrimination in relation to their employment.
- (5) Everyone is entitled to enjoy these rights without discrimination

The right to work is reflected in Article 6 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The UN Committee on Economic, Social and Cultural Rights has stated that the right to work is essential for realising other human rights and forms an inseparable and inherent part of human dignity.<sup>8</sup> It encompasses all forms of work, including self-employment or dependent wage-paid work.<sup>9</sup> It includes freedom to choose and accept work where it is available, the right not to be unfairly deprived of work (including on discriminatory grounds), an implied prohibition on forced labour, and the obligation to provide for a system of access to employment or employment opportunities progressively over time. This right is not absolute and so may be subject to reasonable limitations pursuant to section 28 of the HR Act.

This right is engaged and limited for any offenders who are placed on the register due to their conviction of the Commonwealth offence. The amendments proposed engage and limit the rights of people convicted of a sexual offence against children from working in employment with children. In relation to the specific amendment contained in this Bill, people convicted of the Commonwealth offence of possession of a child-like sex doll, who are also registered on the basis that a person is a risk to the lives or sexual safety of children has an impact on the right to work by imposing a restriction that the registered offender is prohibited from working with children.

## **2. Legitimate purpose (s 28 (2) (b))**

The purposes of the CSO Act are described at section 6 of the Act. The purposes are to:

- reduce the likelihood that certain offenders who commit sexual offences against children will reoffend;
- facilitate the investigation and prosecution of future offences that these offenders may commit;
- prevent registrable offenders from working in child related employment; and
- prohibit registrable offenders from engaging in conduct that poses a risk to the lives or sexual safety of children.

The scheme and the amendments proposed in the Bill are directly linked to the purpose of reducing the likelihood that registrable offenders will re-offend, including

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<sup>8</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 18: The Right to Work (2006) ('General Comment No. 18') [1].

<sup>9</sup> General Comment No. 18, [6].

any escalation of offending. Examples of escalation of offending include progressing from non-contact offences like possession of a child-like sex doll to contact offending, including indecent or sexual assault of children. It reflects the expectation of the community that laws support the safety and protection of children from sexual assault and violence.

The recidivism rates of sex offenders were analysed in a 2007 research paper for the Victorian Sentencing Advisory Council.<sup>10</sup> The paper examined a 2002 Western Australia study of male sex offenders which found that by the end of the seventh year of follow-up, 10.7% of the sex offenders had been arrested for a sexual offence as their first arrest after release, 16.8% had been arrested for a violent offence and 49.7% had been arrested for any criminal offence.<sup>11</sup> This study was in relation to all sex offences, not specifically child sex offences.

The September 2011 'Trends & Issues in crime and criminal justice' paper published by the Australian Institute of Criminology focussed on 'misconceptions about child sex offenders.'<sup>12</sup> The paper discusses a study on recidivism rates amongst extra-familial child sex offenders over a 25-year period. The study, conducted by Prentky et al, found that 52% of child sex offenders reoffended (they were charged with a further sex offence) in the 25 year at risk period following the original conviction. However, this study also notes the limitations of sex offender recidivism studies, and notes that the 52% recidivist figure could be higher.<sup>13</sup>

These statistics should be viewed with caution given the fact that child sex offences have very low rates of reporting, detection, arrest and successful prosecution. However, what can be said is that the research indicates that a significant proportion of child sex offenders will reoffend.

The Australian Institute of Criminology (AIC) has reported an increase in the number of child-like sex dolls detected at importation.<sup>14</sup> The AIC noted that the use of child-like sex dolls may entrench an offender's sexual objectification of children and may form part of an escalation towards more extreme behaviour.<sup>15</sup>

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<sup>10</sup> Gelb, G, January 2007, 'Recidivism of Sex Offenders Research Paper', Sentencing Advisory Council. (Available at: [www.sentencingcouncil.vic.gov.au](http://www.sentencingcouncil.vic.gov.au)).

<sup>11</sup> Ibid, p.22.

<sup>12</sup> Richards, K 'Misperceptions about child sex offenders' *Trends and Issues in Crime and Criminal Justice*, issue number 429, Australian Institute of Criminology, September 2011.

<sup>13</sup> Ibid, p5.

<sup>14</sup> Brown, Rick and Shelling, Jane, 'Exploring the Implications of Child Sex Dolls', *Trends & Issues in Crime and Criminal Justice*, No. 570 (March 2019), p 2.

<sup>15</sup> Brown, Rick and Shelling, Jane, 'Exploring the Implications of Child Sex Dolls', *Trends & Issues in Crime and Criminal Justice*, No. 570 (March 2019), pp 4-8.

### **3. Rational connection between the limitation and the purpose (s 28 (2) (d))**

There is a rational connection between the limitation on rights and the purpose of the amendments.

Adding the Commonwealth offence to the list of Schedule 2 registrable offences is directly related to the purpose of protecting children. The limitations aim to reduce the likelihood that a person will reoffend, including an escalation of offending, and can facilitate the investigation and prosecution of child sex offences and mitigate the risk of an offender to the lives or sexual safety of children.

For example, based on the findings of the AIC, a conviction for the possession of a child-like sex doll can indicate that the person poses a risk to the lives or sexual safety of children, and a willingness to act on this despite legal and other risks of doing so. Therefore, the requirement to register on the Child Sex Offenders Register for people convicted of the Commonwealth offence of possession of a child-like sex doll is related to the aim of the protection of children.

The imposition of conditions which limit an offender's freedom of movement, privacy, equality before the law and right to work with children is a fundamental aspect of the child sex offenders registration scheme and its aim of protecting children from people who have offended in a way which makes them a risk of sexually offending against children. These limitations allow police to monitor registrable offenders in order to protect the lives and sexual safety of children in the ACT and across other Australian jurisdictions. It is thereby rationally connected to the legitimate legislative aim of protecting children.

### **4. Proportionality (s 28 (2) (e))**

There are existing privacy and security safeguards in place which were built into the CSO Act when the registration scheme was developed.

In balancing the respective rights of children and registrable offenders, these amendments do not unreasonably or unnecessarily infringe on the human rights of offenders. This is because the ACT's children are entitled to special protections because of their status as children.

Under section 9 of the CSO Act and the amendments made by the Bill, the requirement to register following conviction for the class 2 offence (possession of a child-like sex doll) only applies to offenders:

- who have been sentenced to a term of imprisonment; or
- whose sentence includes a requirement to be under supervision; or
- who have been convicted of more than one registrable class 2 offence; and

- who have not satisfied the court that they are not a risk to the sexual safety of children.

The amendment that adds the Commonwealth offence as a registrable offence includes an additional safeguard against unreasonable or disproportionate limitations, namely:

- the ability for the offender to satisfy the court that they do not pose a risk to children, even if they have been convicted for one or more offences of possession of a child-like sex doll. This may be relevant in circumstances where, for example, the only reason for possession of the item was for financial gain, rather than any sexual gratification. In such circumstances, the amendment allows for a case-by-case assessment of the risk posed by the individual offender.

The presumption to include an offender on the register can be displaced and allows for consideration of the particular circumstances in which the offender came into possession of a child-like sex doll and the offender's motivation for possessing it, and the relevance of this to the risk the offender poses to the lives or sexual safety of children.

This balances the amendment to the legislation in favour of protecting children while also ensuring the court can consider the risk posed by the offender and, where appropriate, not require their registration.

The amendments are the least restrictive to achieve the purpose of protection of the safety of children, and do not apply to a person convicted of the Commonwealth offence of possession of a child-like sex doll where the person satisfies the court that they are not a risk to the lives or sexual safety of children.

#### Crimes (Sentencing) Act 2005 – family violence amendments

The amendments to require a court to consider family violence factors when sentencing a convicted perpetrator of a family violence offence may engage the right to equality before the law. This is due to the need for the courts to consider specific factors in addition to the general overarching factors outlined in section 33 (1) of the Crimes (Sentencing) Act. Despite this, it is unlikely that the amendments limit this right as they do not create a mandatory sentencing regime, nor do they increase the maximum penalty available. The amendments are designed to recognise and draw attention to the complex nature and dynamics of family violence offences to ensure that offenders are appropriately sentenced. The availability of ultimate judicial discretion to consider other factors in addition to the new factors prescribed through



these amendments ensures there is the least restrictive impact of the right to equality before the law.

### Crimes (Surveillance Devices) Act 2010 & the Listening Devices Act 1992 – body-worn camera amendments

The amendments to the *Crimes (Surveillance Devices) Act 2010* (CSD Act) and the *Listening Devices Act 1992* support the use of BWCs by police in the course of their duties, including in private premises without the occupier's consent.

The amendments supporting the use of BWCs engage and limit the right to privacy.

#### *Right to privacy*

##### **1. Nature of the right and the limitation (ss 28 (2) (a) and (c))**

The nature of the right to privacy is discussed in detail above.

The amendments confirm police use of BWCs and allow people to be filmed and their conversations to be recorded potentially in circumstances or locations where they may expect a right to privacy. In particular, under the new proposed provisions, a police officer acting in the course of their duties may use a BWC in a person's home without their permission, and in dealing with people in a range of other private and vulnerable circumstances. The use of BWCs to record these interactions, as well as the retention and use of footage by police, can constitute a limitation on privacy.

##### **2. Legitimate purpose (s 28 (2) (b))**

The purpose of supporting the use of BWCs in public and private places recognises that police are required to undertake their duties in a wide variety of locations and circumstances. Clear provisions about when police may or must use BWCs supports:

- police in gathering evidence in a timely way;
- police and community safety through the de-escalating effects of using BWCs; and
- accountability and transparency around police conduct.

Research on BWC use has found that where police have high levels of discretion on when to activate BWCs, the accountability potential of BWCs is significantly reduced and rates of police use of force can increase.<sup>16</sup>

### **3. Rational connection between the limitation and the purpose (s 28 (2) (d))**

The limitation on privacy involved in police collecting audio-visual evidence of a person's behaviour and their environment is required to ensure BWCs can be used in the wide range of circumstances in which police can be involved. The limitation means the benefits of the use of BWCs can be extended to all areas of the community policing environment. Audio-visual evidence of dealings police have with members of the community, which may occur in the person's home, can provide the most accurate record of events involving police.

### **4. Proportionality (s 28 (2) (e))**

Legislating to clarify the circumstances in which police may or must use BWCs is intended to ensure that any limitation on the right to privacy arising from the use of BWCs will be proportionate. The framework in the proposed amendments comprises a range of measures to ensure that BWC use achieves its purposes, and a range of safeguards to address the impact on the right to privacy. The framework is balanced to deliver on the purposes of BWC use while avoiding disproportionate or arbitrary impact on the right to privacy.

The safeguards built into the BWC provisions include:

- The requirement that police use their BWCs in circumstances where they are dealing with the public, subject to specified exceptions. These exceptions are limited to circumstances where the use:
  - is not reasonably practicable;
  - could cause or increase a risk to a person's safety; or
  - would unreasonably limit a person's privacy.
- Police may only use BWCs in the course of their duties.
- Other than in limited circumstances, BWC use must be overt, including through police advising people that the BWC is recording. The exceptions to this requirement for overt use are:

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<sup>16</sup> Barak Ariel, Alex Sutherland, Darren Henstock, Josh Young and Gabriela Sosinski, 'The Deterrence Spectrum: Explaining Why Police Body-Worn Cameras "Work" or "Backfire" in Aggressive Police-Public Encounters' *Policing: A Journal of Policy and Practice* (January 2017), p. 15.

- when a firearm or conducted electrical weapon is drawn or used. The value of this footage is crucial to police accountability such that it outweighs the increased privacy impact on people who may not be aware they are being filmed using BWC;
- if it would create or increase a risk to a person's safety. This ensures that if a police officer has activated a BWC, the officer is not required to announce or otherwise draw attention to the BWC if it would be unsafe to do so.

Further safeguards around the circumstances of BWC use are to be set out in guidelines, which will include specific requirements detailing the access, storage, retention and use of the recordings to ensure that the right to privacy is protected. It is also anticipated that the guidelines will include greater detail about the exceptions that apply to BWC use, and when BWCs will generally be used and not. The guidelines can also include 'any other relevant matters and may include expectations on complaints processes and reporting. Although not required by the amendments, ACT Policing will seek to regularly review complaints regarding BWC use to ensure that these amendments are being implemented effectively and identify any areas for improvement.

In developing the guidelines, the Chief Police Officer is required to consult with the Director-General about the content and must also include a statement in the guidelines about how human rights have been considered. These guidelines will be in a disallowable instrument, which means that there is an opportunity for the Legislative Assembly to consider the content and the extent to which this is compatible with human rights.

The limitation to the right to an individuals' privacy is proportionate to the benefits of using BWCs, including improvements in evidence-gathering, policy and community safety, and accountability and transparency, and is the least restrictive approach available that appropriately balances the operational requirements of using BWCs with the right to privacy. The amendments will have positive effects for evidence-gathering particularly inside people's homes, specifically for victim-survivors of family violence. The safeguards to be provided in the guidelines further ensure any limitation on privacy is proportionate.

### Inspector of Correctional Services Act 2017 – examination and review of correctional centres and detention places

The amendment to the Inspector of Correctional Services Act (ICS Act) extends the time allowed for the Inspector of Correctional Services (the Inspector) to undertake periodic reviews of specific, defined correctional centres and detention places, from at least once every two years, to at least once every three years, with the proviso

that the first review of such a facility must be within two years of the facility being declared.

Allowing a longer time period for each subsequent periodic review could mean there could be an equally longer period of time before any human rights concerns or limitations at a correctional centre can be identified and responded to. This amendment may therefore engage and potentially limit the right to humane treatment when deprived of liberty (section 19 of the HR Act). It may also engage and potentially limit other human rights insofar as an extension to the period of time before the Inspector is required to conduct an examination and review of correctional centres and detention places in the ACT will allow for any unidentified human rights impacts to continue at the correctional centres and detention places.

### *Right to humane treatment when deprived of liberty*

#### **1. Nature of the right and the limitation (ss 28 (2) (a) and (c))**

Section 19 of the HR Act states:

- (1) Anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.
- (2) An accused person must be segregated from convicted people, except in exceptional circumstances.
- (3) An accused person must be treated in a way that is appropriate for a person who has not been convicted.

The right to humane treatment when deprived of liberty requires anyone deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person. The nature of the right is not absolute.

Rights may be engaged and potentially limited as the review function of the Inspector operates as a safeguard against mistreatment of detainees, and the amendment extends the period of time between which the Inspector is required to conduct examinations and reviews of correctional centres and detention places. An extended time period between examinations and reviews could potentially result in a delay in human rights concerns being identified by the Inspector.

#### **2. Legitimate purpose (s 28 (2) (b))**

The legitimate objectives of the amendment are to:

- enable the Inspector's review cycle to work as effectively as possible to ensure that any human rights concerns are identified and properly rectified. This amendment was requested by the Inspector, informed by experience from the first years of operation of the Inspectorate, to ensure that an

appropriate period of time is allowed for the full implementation of recommendations before the commencement of a subsequent cyclical review. This timing will ensure that a subsequent review will be able to properly assess the effectiveness of implementation approaches, rather than overlapping with the implementation phase;

- enable sufficient time for relevant directorates and agencies to implement review recommendations, particularly where recommendations may have budget implications; and
- reduce the administrative burden involved in preparing for and responding to the Inspector's reports by staggering the review and response timeframes.

Extending the review cycle will grant additional time for relevant directorates and agencies to implement recommendations, particularly where the recommendations require lengthy implementation processes. This is favourable to the alternative, in which the implementation phase would overlap with the subsequent review phase, affecting the implementation of previous recommendations. Furthermore, the subsequent review would not be able to assess the operation of the recommendations which have not yet been implemented.

### ***3. Rational connection between the limitation and the purpose (s 28 (2) (d))***

This amendment is capable of achieving the objective in practice because it will grant one extra year to support directorates and agencies to implement report recommendations. This allows time to ensure that agencies are acting on any recommendations to improve human rights. Extending the time between reviews achieves the objective of a thorough consideration and implementation of recommendations for specified centres and detention places.

### ***4. Proportionality (s 28 (2) (e))***

To the extent that this amendment may limit human rights, the limitation is reasonable and proportionate, and the least restrictive means reasonably available to achieve the objectives. It is the minimum amount of time considered to be required to extend the review cycle to achieve the legitimate purpose. Legislative safeguards have also been incorporated in the amendment, which retain:

- a review within the first two years for a newly declared correctional centre or and detention place, and
- the ability for the Inspector to initiate more than one review within the three-year cycle, at the Inspector's discretion.

Moreover, the amendment does not affect the Inspector's powers to initiate reviews of critical incidents, conduct two-yearly reviews of correctional services, and enter and inspect a correctional centre at any time.

There are also other oversight entities such as Official Visitors, the ACT Human Rights Commission and the ACT Ombudsman who visit correctional facilities regularly and have contact with detainees and share information with the Inspectorate regarding systemic concerns. Accordingly, there will be a range of opportunities for emerging human rights concerns to be addressed outside the formal review cycle.

#### Terrorism (Extraordinary Temporary Powers) Act 2006 – Extension of the Act

The amendment to the *Terrorism (Extraordinary Temporary Powers) Act 2006* (TETP Act) extends the operation of the TETP Act for 12 months. The TETP Act engages and limits a number of human rights, and these are addressed in the original Explanatory Statement for the TETP Bill.

# Crimes Legislation Amendment Bill 2021

## Detail

### Part 1 – Preliminary

#### Clause 1 — Name of Act

This is a technical clause that names the short title of the Act. The name of the Act will be the *Crimes Legislation Amendment Act 2021*.

#### Clause 2 — Commencement

This clause provides for commencement of the amendments.

Other than the amendments that introduce BWCs, all provisions will commence on the day after notification.

The provisions relating to the use of BWCs (Part 4 and Part 6 of the Bill) have a delayed commencement of up to six months, on a day fixed by the minister by written notice. If the provisions have not commenced within six months after notification, the provisions will automatically commence. This will allow time for any training of police officers to be aware of the new provisions and the supporting guidelines.

#### Clause 3 — Legislation Amended

This clause lists the legislation amended by this Bill. This Bill will amend:

This Bill will amend the:

- *Crimes (Child Sex Offenders) Act 2005*;
- *Crimes (Sentencing) Act 2005*;
- *Crimes (Surveillance Devices) Act 2010*;
- *Inspector of Correctional Services Act 2017*;
- *Listening Devices Act 1992*; and
- *Terrorism (Extraordinary Temporary Powers) Act 2006*.

### Part 2 – Crimes (Child Sex Offenders) Act 2005

The amendments made by this part of the Bill give effect to the requirement for offenders, convicted of the Commonwealth offence of possession of a childlike sex doll or similar object, to be registered as a child sex offender, unless they satisfy a court that they are not a risk to the sexual safety of children.

#### **Clause 4 – Registrable offender—exceptions**

The CSO Act establishes a scheme for the registration of those convicted of child sex offences or other offences (set out in Schedules to the CSO Act) that make offenders a risk to the lives or sexual safety of children.

Section 9 of the CSO Act sets out circumstances in which a person who commits one or more of the offences listed in the Schedules is not necessarily a registrable offender.

This clause inserts a new section 9 (1A) to provide new exception to the requirement to register as a child sex offender. This exception provides that if an offender has been convicted of the Commonwealth offence of ‘possession of a child-like sex doll etc’, the offender may apply to the court for a decision that they are not required to register on the grounds that the person is not a risk to the lives or sexual safety of children. The court may decide that the offender is not required to register if satisfied that the offender does not ‘pose a risk to the lives or sexual safety of one or more children, or of children generally’.

An offender may be exempted from the requirement to register as a child sex offender on the basis of either this new exception, or an existing exception within section 9 of the CSO Act, or both.

#### **Clause 5 – Class 2 offences**

This clause amends Schedule 2, part 2.2 to insert a new item adding the Commonwealth offence of possession of child-like sex dolls etc. to the list of class 2 offences

### **Part 3 – Crimes (Sentencing) Act 2005**

The amendments made by part 3 of the Bill are:

- to ensure that family violence is a matter which the courts must consider appropriately in the sentencing process; and
- rectify an anomaly which prevents appeal courts from amending a nonparole period where the sentence for one or more offences is set aside or amended on appeal.

#### **Clause 6 – Sentencing—irrelevant considerations Section 34 (2)**

This is a consequential amendment as a result of the amendments to new section 34B that removes existing sections 34 (2) (a) and (b) and relocates them into the new section 34B (2).



## **Clause 7 – New section 34B**

This clause inserts new section 34B which mandates that the court must consider certain factors when sentencing for a family violence offence. The insertion of new section 34B as a separate sentencing consideration in addition to the factors outlined at section 33 is modelled on existing section 34A which specifically draws out additional sentencing factors for child sex offenders. The new section is not intended to reduce a judicial officer's discretion when considering sentencing factors, but ensure that they are required, when sentencing for family violence offences, to consider additional factors as part of the sentencing process.

**New section 34B (1)** outlines the factors that the court must consider, which includes reference to the preamble in the *Family Violence Act 2016*, which notes principles in relation to recognising family violence and also key features associated with family violence matters. Including this reminds the court of the legislature's commitment and intent for family violence matters to be treated as serious matters with complex, but well documented, dynamics that are not present in other types of offending.

This clause allows the court to take into account some of the more serious features of family violence offending, such as whether this is one of a series of serious family violence matters, whether children were present when the offending occurred, and whether it was "behind closed doors", or in a private home setting, including for example outside at someone's home. A home has been specifically referenced because it is usually a private setting, where there are less likely to be witnesses, and therefore a situation of increased vulnerability.

This clause also recognises that family violence could be considered not only as an aggravating factor, but also as a mitigating factor. It is open to make submissions about the nuance of family violence relationships as part of the 'nature of family violence and the context of the offending' which could include issues around identification of the primary perpetrator and contextualising incidents of violence within a broader history of family violence. People charged with family violence, when committed in circumstances of self-defence, should not necessarily be subject to the same levels of aggravation as a primary perpetrator.

**New section 34B (2)** is a consequential amendment that moves existing section 34 (2) (a) and (b) into the new section 34 (2).

**New section 34B (3)** contains important definitions for new section 34B.

## **Clause 8 – New section 67A**

This clause inserts section 67A to clarify the operation of nonparole periods.

**New section 67A (1)** (a) provides that if a sentence of imprisonment is set aside or amended on appeal, then any nonparole period to which the offender is subject is automatically cancelled. New section 67A (1) (b) provides that the provisions in Part 5.2 (Imprisonment-nonparole periods) apply in the setting of any new nonparole period.

**New section 67A (2)** creates an exception that section 65 (4), which allows the court to decline to set a nonparole period, does not apply if a nonparole period applied to the sentence before the appeal.

The nonparole period to which the offender is subject is automatically cancelled and the appeal court, in setting a new nonparole period, is guided by the existing provisions in Part 5.2 that apply to the setting of a nonparole period, with one exception. If the original sentencing court determined that it was appropriate to set a nonparole period, the appeal court may not override this decision. This exception ensures that an offender does not lose their ability to apply for parole as a result of a successful appeal.

#### **Clause 9 – Amendment of start of sentences on setting aside or amending other sentences Section 74 (5)**

This clause amends section 74 (5) to remove the words ‘or the nonparole period of a sentence’ to ensure consistency and reduce uncertainty about the operation of section 74.

### **Part 4 – Crimes (Surveillance Devices) Act 2010**

This part makes amendments to support the use of BWCs by police in the performance of their duties. This complements existing legal frameworks that govern the use by law enforcement of devices with the same or similar functionality, to make audio or visual recordings, in a range of circumstances and locations.

#### **Clause 10 – Purposes of Act New section 6 (e)**

This is a consequential amendment to reflect that the purposes of the CSD Act now include providing for the use of BWCs.

#### **Clause 11 – Relationship to other laws and matters Section 7 (1), except note**

This is a consequential amendment to reflect that the provisions for the use of BWCs, in new Part 5A, affect other territory laws that prohibit or regulate the use of surveillance devices within the ACT.

## Clause 12 – New part 5A

This clause inserts new Part 5A into the Act to set out the provisions for the use of BWCs by police officers.

**New section 43A** inserts a definition of a BWC.

**New section 43B** prescribes the circumstances in which a police officer may or must use a BWC. Key features of this provision are:

- a BWC can be used in the course of a police officer's duties;
- use must be overt, subject to limited exceptions; and
- where an officer is wearing a BWC it must be used in dealings with members of the public, subject to limited exceptions.

New section 43B(3) provides that those exceptions are where the use of a BWC:

- is not reasonably practicable;
- could cause or increase a risk to a person's safety; or
- would unreasonably limit a person's privacy.

Where a police officer is dealing with a member of the public and any of those circumstances exists the requirement in section 43B (2) to use the camera does not apply. If, during the course of dealing with a person, the circumstances of exception exists for only part of the period of interaction between the police officer and a member of the public, during the period that the circumstances of exception do not exist section 43B (2) applies, requiring the use of the BWC.

**New section 43B(7)** disapplies the provisions of parts 2 to 5 of the CSD Act, which prohibit use of surveillance devices in certain circumstances, to the use of a BWC in accordance with section 43B.

**New section 43C** establishes that guidelines must be made by the Chief Police Officer about the use of BWCs by police officers.

The guidelines must include:

- requirements for storage, use and disposal of a recording from a BWC;
- information about how a person may access a recording;
- guidance about the circumstances in which BWCs may or must be used;

- a statement about how human rights have been considered in making the guidelines.

This clause outlines that a guideline is a disallowable instrument.

### **Clause 13 – Dictionary, new definition of body-worn camera**

This is a consequential amendment to insert the new definition of BWC into the Dictionary.

## **Part 5 – Inspector of Correctional Services Act 2017**

This part amends the ICS Act to change the period in which period reviews of correctional centres or places of detention must be undertaken from at least once every two years to at least once every three years, following an initial review within the first two years of declaration of the facility.

### **Clause 14 – Functions—examination and review Section 18 (1) (a)**

This clause substitutes a new section 18 (1) (a) to change the review cycle for an examination and review of a correctional centre declared under section 24 of the *Corrections Management Act 2007* and a detention place declared under section 142 of the *Children and Young People Act 2008*, from at least once every two to at least once every three years. This timeframe will support for the full implementation of recommendations of a review before the commencement of a subsequent review.

This clause also requires that a newly declared correctional centre or detention place must be examined and reviewed within two years of its declaration. The shorter review period for an initial review will enable early identification of any human rights issues, and allow for those to be reduced or eliminated in a timely manner.

While this clause lengthens the review period, it retains the ability for the Inspector of Correctional Services to undertake more than one review within the three-year period.

## **Part 6 – Listening Devices Act 1992**

This part makes consequential amendments to the *Listening Devices Act 1992* to support the amendments made by Part 4 in relation to the use of BWCs.

### **Clause 15 – Sections 4 (2) (a) and 5 (2) (f)**

Section 4 of the *Listening Devices Act 1992* makes it an offence to use a listening device to record a private conversation in particular circumstances. Section 4 (2) (a)

disapplies the offence to the use of a listening device granted by or under a law of the Commonwealth.

This clause amends that provision to the effect that it also disapplies the offence where use of a listening device is granted under a Territory law, such as the new provisions of the CSD that provide for the use of BWCs (noting these have the attributes of a listening device) by police officers.

This clause makes a similar amendment to section 5 (2) (f) of the *Listening Devices Act 1992* to disapply the offence in section 5 of divulging or communicating a record of a private conversation, in circumstances where the communication was made under an authority granted by or under a law in force in the Territory.

#### **Clause 16 – Dictionary, note 2**

This amendment is consequential on the amendments to sections 4 (2) (a) and 5 (2) (f) which result in references to the Commonwealth being omitted.

### **Part 7 – Terrorism (Extraordinary Temporary Powers) Act 2006**

#### **Clause 17 – Expiry of Act etc Section 101 (1)**

This clause extends the operation of the TETP Act by an additional year.