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ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

**Justice Legislation Amendment (Body-worn Video and
Domestic Violence Evidence) Bill 2016**

SERIAL NO. 10

EXPLANATORY STATEMENT

GENERAL OUTLINE

The Justice Legislation Amendment (Body-worn Video and Domestic Violence Evidence) Bill 2016 amends the *Evidence Act* and the *Surveillance Devices Act* and makes consequential amendments to the *Local Court (Criminal Procedure) Act*.

The amendments to the *Evidence Act* clarify that a vulnerable witness includes a complainant in a domestic violence offence proceeding and inserts new Part 3A into that Act to allow a complainant's recorded statement to be admitted as their evidence in chief in domestic violence offence proceedings. Part 3A also sets out the procedural requirements that must be met in order for that recorded statement to be admitted as evidence, makes it an offence to publish a recorded statement without authority and clarifies how Part 3A operates with regards to the other parts of the *Evidence Act*.

The amendments to the *Surveillance Devices Act* insert new section 14A into that Act to establish a procedure, compliance with which will allow police officers to use body-worn video without committing an offence against that Act. The amendments also clarify that information obtained as a result of using body-worn video is protected information for the purposes of the *Surveillance Devices Act*.

The amendments to the *Local Court (Criminal Procedure) Act* clarify how the preliminary brief and committal brief provisions in that Act operate in the event of any conflict with new Part 3A of the *Evidence Act*.

NOTES ON CLAUSES

Part 1 Preliminary matters

Clause 1. Short Title

This is a formal clause which provides for the citation of the Bill. The Bill when passed may be cited as the *Justice Legislation Amendment (Body-worn Video and Domestic Violence Evidence) Act 2016*.

Clause 2. Commencement

This is a formal clause which provides when the Act will commence. The Act will commence on a day fixed by the Administrator by Gazette notice. In accordance with the *Interpretation Act*, this clause operates so that the various provisions of the Act may be commenced on separate days.

Part 2 Amendment of *Evidence Act*

Clause 3. Act amended

This clause identifies the Act that is amended by Part 2 of the Bill, namely the *Evidence Act*.

Clause 4. Section 4 amended

Clause 4 defines various words and expressions used in the *Evidence Act*, namely 'complainant', 'domestic violence', 'domestic violence offence', 'domestic violence offence proceeding' and 'recorded statement'.

These definitions are signpost definitions that refer the reader to the relevant section of the Act where the terms are defined. In accordance with the *Interpretation Act*, 'see', when used to define a term, means the term has the same meaning as in the law or provision mentioned in that definition. Therefore those defined terms, notwithstanding that the actual definition occurs in another part of the *Evidence Act*, have application throughout the whole of the *Evidence Act*.

Clause 5. Section 21A amended

Clause 5 amends the definition of 'vulnerable witness' at section 21A(1) of the *Evidence Act* by inserting new paragraph (ca), which provides that a complainant in a domestic violence offence proceeding is a vulnerable witness. This amendment removes the need for a court to determine that a complainant in such proceedings is a vulnerable witness and automatically permits the mechanisms in Part 3 to be used to assist a vulnerable witness to give evidence, unless the court orders otherwise. This amendment is intended to make it easier for complainants in domestic violence offence proceedings to give evidence.

Clause 6. Part 3A inserted

Clause 6 inserts new Part 3A into the *Evidence Act*. Part 3A inserts new sections 21G to 21R. Those provisions relate to the admission of a recorded statement of a complainant in domestic violence offence proceedings as all, or part, of the complainant's evidence in chief. The objectives of these amendments are to reduce the trauma to domestic violence complainants caused by testifying in court, and to improve the accuracy of evidence by allowing, in most cases, a contemporaneous account to be provided by the complainant.

Section 21G Definitions

New section 21G defines various words and expressions used in Part 3A, namely 'complainant', 'domestic violence', 'domestic violence offence', 'domestic violence offence proceeding' and 'recorded statement'.

A 'complainant' is an adult against whom a domestic violence offence, the subject of a domestic violence offence proceeding is alleged, or is found to have been committed. Confining the term to adults takes account of the difficulties associated with taking statements from children without an adult guardian or support person present.

'Domestic violence' has the same meaning as in section 5 of the *Domestic and Family Violence Act*.

'Domestic violence offence' is deliberately broad so as to capture any offence constituted by, or involving, conduct that is domestic violence or

an offence against section 120(1) of the *Domestic and Family Violence Act*. Some examples of offences that may fall within the scope of 'domestic violence offence' could be sexual assault, aggravated assault, criminal damage or stalking.

'Domestic violence offence proceeding' means a proceeding for a domestic violence offence.

'Recorded statement', for Part 3A, means an interview recorded on video-tape or by other audio visual means, in which a police officer elicits from a complainant statements of fact that, if true, would be of relevance to a domestic violence proceeding. The definition is based on the existing definition of recorded statement for Part 3 of the *Evidence Act*, relating to vulnerable witnesses. However, a recorded statement under Part 3A may only be taken by a police officer. That limitation is included noting the requirement that the recorded statement must be taken as soon as practicable after the events mentioned in the statement occurred (see section 21J), for example, when police attend a domestic violence incident.

Section 21H Evidence of complainant

New section 21H expressly provides that a recorded statement that complies with section 21J may be played at the hearing of a domestic violence charge for the domestic violence offence to which it relates, or a trial in respect of that offence. If the recorded statement is played it may be admitted as the whole, or part, of the complainant's evidence in chief in that proceeding. However, the court may refuse to admit all or part of the recorded statement if it considers that it is in the interests of justice to do so. The complainant may (but need not) be present in the courtroom when their recorded statement is played in the courtroom. That provision is made so as to minimise the re-traumatisation of complainants. It mirrors section 21B(5), which applies in relation to recorded statements played in sexual offence or serious violence offence proceedings under section 21B.

Similarly, mirroring section 21B(6), the complainant's demeanour, and words spoken or sounds made by the complainant during the playing of a recorded statement are not to be observed or overheard in the courtroom unless the complainant elects to be present in the courtroom for that part of the proceeding.

Section 21J Requirements for recorded statement

New section 21J provides the process that must be followed in order for the recorded statement to be admissible as all or part of a complainant's evidence in chief under Part 3A of the *Evidence Act*. To be admitted the recorded statement must be made as soon as practicable after the events mentioned in the statement occurred and be made with the informed consent of the complainant. This requirement distinguishes a recorded statement under Part 3A from recorded statements made under section 21B of the *Evidence Act* and is consistent with one of the objectives of Part 3A, that is to capture a contemporaneous record of a complainant's version of events.

A recorded statement is only made with informed consent if a police officer informs the complainant that the recorded statement may be used in evidence in a domestic violence offence proceeding, that the complainant may be required to give further evidence in the proceeding, and that the complainant may refuse consent. The complainant must indicate in the recorded statement that they consent. This need for informed consent is important, as the complainant may be particularly vulnerable in the aftermath of a domestic violence incident. A recorded statement must also include a statement by the complainant as to their age. This is important as Part 3A only applies to adult complainants.

The recorded statement must be made as a statutory declaration in compliance with section 20 of the *Oaths, Affidavits and Declarations Act*, which requires that a witness state that their evidence is true and that they know it is an offence to make a statutory declaration that is false in any material particular.

If any part of the recorded statement is in a language other than English the recorded statement must contain an English translation of the part or a separate written English translation of the part must accompany the recorded statement.

Section 21K Service of recorded statement on defendant's legal practitioner

New section 21K applies if a defendant is legally represented and a recorded statement has been made for a domestic violence offence proceeding. The prosecution must serve a copy of the recorded statement on the defendant's legal practitioner as soon as practicable after the proceeding is commenced. This ensures that the defendant's lawyer is able to view the proposed evidence, ensuring the proceedings against the defendant are fair. The defendant must not be given, or take a copy of, the recorded statement. This section is designed to ensure that the defendant's lawyer does not provide the defendant with a copy of the recorded statement. It is one of the measures designed to prevent a defendant from communicating or publishing a recorded statement and potentially further traumatising the complainant.

Section 21L Access to recorded statement if defendant unrepresented

New section 21L applies where a recorded statement has been made for a domestic violence offence proceeding and the defendant is not legally represented. The prosecution must serve an audio copy of the recorded statement on the defendant as soon as practicable after the proceeding is commenced, and must give the defendant a reasonable opportunity to view the recorded statement on a day before the hearing of the charge or, before the committal date in respect of, the domestic violence offence to which the recorded statement relates. This provision balances the needs of complainants to be protected from re-traumatisation with the need to ensure that defendants know the case they will be required to answer and are provided with the evidence against them.

Section 21M Failure to comply with service or access requirements

New section 21M prohibits a recorded statement from being admitted as evidence unless the requirements in sections 21K or 21L have been complied with. However, despite the prohibition, provision is made for a court to admit the recorded statement if the parties consent to its admission or where the defendant or their lawyer has been given a reasonable opportunity to listen to or view the recorded statement and it

would be in the interests of justice to do so. This provision is designed to protect the interests of defendants to know the case against them and have adequate time to prepare their defence, while providing the court with an option to ensure that the interests of justice are not frustrated by a failure to comply with the service or access requirements. The question of whether a defendant or the defendant's lawyer has been given a reasonable opportunity to listen to or view the recorded statement and, if so, whether it is in the interests of justice to admit the recorded statement into evidence is a matter for the court to decide.

Section 21N Transcript of recorded statement

New section 21N provides that the prosecution in a domestic violence offence proceeding is not required to provide a transcript of a recorded statement to the defendant or their lawyer. This section applies despite any other law that requires the provision of a transcript in proceedings, for example section 105F(1) of the *Local Court (Criminal Procedure) Act*. New section 21N has been included noting that the prosecution does not have the resources to transcribe every recorded statement for domestic violence offence proceedings and that not having a transcript does not result in any unfairness to the defendant due to the service and access provisions in sections 21K and 21L and the requirement, under section 21M, that a recorded statement not be admitted if 21K and 21L have not been complied with.

In a jury trial, a court may order that a transcript of all or part of the evidence from a recorded statement be supplied to the jury, if the court considers that a transcript would be likely to help the jury understand the evidence.

Section 21P Editing or otherwise altering recorded statement

New section 21P prohibits the editing or altering of a recorded statement unless both parties agree or the court so orders. Where both parties do agree, new section 21P facilitates the removal of inadmissible or unfairly prejudicial material without causing undue delay to the proceedings.

Section 21Q Offence to publish recorded statement

New section 21Q provides that it is an offence to publish a recorded statement without authority. This is designed to further protect the complainant from abuse, such as the defendant posting the recorded statement on social media. To be found guilty of an offence under section 21Q the prosecution must prove that the person intentionally published a recorded statement, did not have authority to do so and was reckless about not having that authority. Subsection (2), of section 21Q, sets out the circumstances in which a person is authorised to publish a recorded statement. The maximum penalty for the offence is 100 penalty units and/or imprisonment for 12 months.

Section 21R Part does not affect other provisions

New section 21R provides that Part 3A does not affect any other provisions of the *Evidence Act*. This section clarifies how Part 3A operates in regard to other parts of the *Evidence Act*. In particular, Part 3A does not affect the operation of Part 3 in relation to the complainant as a vulnerable witness. This ensures complainants have access to the protections in Part 3 to assist a vulnerable witness, such as giving evidence from a remote room (where one is available) and having a support person present when giving evidence.

Part 3 Amendment of *Surveillance Devices Act*

Clause 7. Act Amended

Clause 7 identifies the Act that is amended by Part 3 of the Bill, namely the *Surveillance Devices Act*.

Clause 8. Section 4 amended

Clause 8 defines the expression 'body-worn video' when used in the *Surveillance Devices Act* as equipment worn on the person of a police officer that is capable of recording visual images or sound or both.

The definition is based on the definition of the same term in section 4 of the *Surveillance Devices Act 2007* (NSW). It is designedly broad noting that, when fully functional, body-worn video equipment will constitute both an optical surveillance device and a listening device. The separation of the recording capacity into visual images or sound or

both ensures that any malfunction by the body-worn video, for example the failure of the visual recording capacity of the equipment, will not preclude it from being body-worn video. The requirement that such equipment be worn on the person of a police officer operates to exclude certain other forms of surveillance devices, for example hand held recording devices or mobile phones, unless they are worn on the person of a police officer, from falling within the definition of body-worn video. The requirement for the person to be a police officer excludes that term from applying to ordinary members of the public. The definition of police officer in the *Interpretation Act* further restricts the use of body-worn video to mean a member of the Police Force appointed or holding office under the *Police Administration Act*.

Clause 9. Section 11 amended

Clause 9 amends section 11 of the *Surveillance Devices Act*. Subsection (1) of section 11 makes it an offence, in certain circumstances, if a person installs, uses or maintains a listening device to listen to, monitor or record a private conversation to which the person is not a party. Clause 9 amends subsection (2) of section 11 of the *Surveillance Devices Act* to except the use of body-worn video, by a police officer, from being an offence against subsection (1), if the police officer's use of body-worn video is in accordance with the requirements stated in new section 14A. An exception is necessary as body-worn video will constitute a listening device, as defined in section 4 of the *Surveillance Devices Act*. Without the exception, the use of body-worn video by police to record private conversations would be an offence, unless one of the existing exceptions in section 11(2) applies.

Clause 10. Section 12 amended

Clause 10 amends section 12 of the *Surveillance Devices Act*. Subsection (1) of section 12 makes it an offence, in certain circumstances, for a person to install, use or maintain an optical surveillance device to monitor, record visually or observe a private activity to which the person is not a party. Clause 10 amends subsection (2) of section 12 of the *Surveillance Devices Act* to except the use of body-worn video, by a police officer, from being an offence against subsection (1), if the police officer's use of body-worn video is in accordance with the requirements stated in new section 14A. An exception is necessary as body-worn video will constitute an optical

surveillance device, as defined in section 4 of the *Surveillance Devices Act*. Without the exception the use of body-worn video by a police officer to record private activities would be an offence, unless one of the other existing exceptions in section 12(2) applies.

Clause 11. Section 14A inserted

Clause 11 inserts new section 14A into the *Surveillance Devices Act*. New section 14A prescribes the procedural requirements that must be followed by police officers to permit their use of body-worn video. If police comply with the requirements in section 14A they are excepted from the offence provisions in sections 11 and 12 of the Act.

In order for a police officer's use of body-worn video to be in accordance with new section 14A, subsection (1) provides that, the police officer must be acting in the execution of the officer's duty, the use of the body-worn video must be overt and the police officer must be in uniform or, if the police officer is not in uniform, the police officer must provide evidence that the officer is a police officer to each party to the private activity or private conversation to be recorded. Subsection (2) provides that use of body-worn video is overt once the police officer informs the person who is to be recorded of the use of the body-worn video by the police officer. However, subsection (2) is phrased so as not to limit the ways that the use of body-worn video may be overt and the question of whether its use is overt may be inferred from other circumstances.

Subsection (3) provides that the use of body-worn video by a police officer is also taken to be in accordance with this section if it is inadvertent or unexpected. This provision is included so that a police officer does not commit an offence where, for example, they accidentally turn on body-worn video equipment and record a private conversation or private activity, or where they are recording a private conversation or private activity of one person and unexpectedly record the private conversation or private activity of another person.

Clause 12. Section 51 amended

This clause amends section 51 of the *Surveillance Devices Act* to include as 'local protected information', information obtained from the use of

body-worn video by a police officer, in accordance with section 14A. This means that the offences concerning the non-permitted use, communication or publication of protected information in section 52 of the Act, and the provision prescribing the permitted uses of protected information in section 53 of the Act, will apply to information obtained from the use, in accordance with section 14A, of body-worn video by police.

Clause 13. Section 53 amended

Clause 13 amends section 53(3) of the *Surveillance Devices Act* concerning the permitted uses of protected information. The amendment will allow information obtained from the use of body-worn video by a police officer, in accordance with section 14A, to be used, communicated or published in connection with the exercise of a law enforcement function by a police officer, or in connection with education and training of police officers, or for a purpose prescribed by regulation.

Part 4 Consequential amendment of *Local Court (Criminal Procedure) Act*

Clause 14. Act amended

Clause 14 identifies the Act that is amended by Part 4 of the Bill, namely the *Local Court (Criminal Procedure) Act*.

Clause 15. Section 60AE amended

Clause 15(1) inserts a note for subsection (2) of section 60AE of the *Local Court (Criminal Procedure) Act*. Section 60AE sets out the material that must be included in a preliminary brief of evidence in summary proceedings in the Local Court. The note provides that a transcript is not required for a recorded statement under Part 3A of the *Evidence Act* in a domestic violence offence proceeding and refers to the relevant section of the *Evidence Act*, namely section 21N(1). The note is included to signpost new section 21N of the *Evidence Act*, which will override the requirement of any other law regarding the provision of a transcript.

Clause 15(2) inserts subsection (3) into section 60AE of the *Local Court (Criminal Procedure) Act*. Subsection (3) provides that subsection 60AE(1)(f) does not apply in relation to a recorded statement under Part 3A of the *Evidence Act* in a domestic violence offence proceeding.

New Part 3A of the *Evidence Act* contains service provisions that conflict with the requirements in section 60EA(1)(f) of the *Local Court (Criminal Procedure) Act*. This amendment clarifies that where Part 3A of the *Evidence Act* applies, the provisions in that Part will apply instead of section 60AE(1)(f) of the *Local Court (Criminal Procedure) Act*.

Clause 16. Section 105F amended

Clause 16 inserts a note after section 105F(1) of the *Local Court (Criminal Procedure) Act*. Section 105F(1) requires a transcript of a witness' recorded statement, and a statutory declaration made by the witness declaring that the recorded statement is true, to be contained in a committal brief. That requirement to provide a transcript is inconsistent with section 21N(1) of the *Evidence Act*. The note is included to signpost new section 21N of the *Evidence Act*, which will override the requirement of any other law regarding the provision of a transcript.

Clause 17. Expiry of Act

This is a standard clause which provides that the Act expires the day after it commences. As this is an amending Act, there is no need to retain the Act on the statute book, once all the amendments to other Acts have been effected.