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Mrs Giulia Jones MLA

Chair

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

ACT Legislative Assembly

London Circuit

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Dear Mrs Jones

I write in response to the Standing Committee on Justice and Community Safety's Scrutiny Report No 3 of 14 March 2017 which includes comments on the Family and Personal Violence Legislation Amendment Bill 2017 (the Bill).

The Committee's report under section 38 of the *Human Rights Act 2004* (HRA) draws a number of matters to the attention of the Legislative Assembly. I am grateful for the Committee's comments and note the recommendation that I respond.

I thank the Committee for their comments (at pages 5 -7) seeking clarification in relation to certain sections of the explanatory statement.

I propose to table a revised Explanatory Statement to clarify two issues raised. Further clarification is provided on why the right to fair trial is not engaged by new section 13A (Rules of evidence). (Page 4, paragraphs 3-4 and page 5, paragraph 1-2).

I note the Committee's suggestion that proposed the Bill at section 81H (Recorded statement—may be admitted as evidence in application for family violence protection order) may engage the right to fair trial. The explanatory statement has been amended to expressly address the interaction between the provision and the right to fair trial (page 5, paragraph 3).

Use of recorded statement as evidence

The Committee made the following additional comment with respect to the content of recorded statements used to support an application for a family violence order:

The Committee notes that in the context of domestic violence offences, the use of recorded statements is subject to the rules of evidence, with only the hearsay rule and opinion rule not

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preventing the admission of recorded evidence in that form. After the amendments proposed by this Bill, recorded statements will be available for use in an application for a protection order under the FV Act, where the rules of evidence will not apply (see further the discussion of application of the rules of evidence below). As there is no requirement that charges have been laid or an offence proved in relation to the family violence offence that was the subject of the recorded statement, the use of recorded statements in protection order proceedings could encourage questions and answers to be recorded that would not be admissible in hearings of domestic violence offences, further engaging the rights to a fair trial.

New section 81H will be inserted into part 4.3 (Evidence in family violence proceeding) of the *Evidence (Miscellaneous Provisions) Act 1991* (EMPA). This section cannot be read in isolation, and must be informed by the definitions and provisions contained in part 4.3.

Section 81H(1) provides that the section applies if a recorded statement is made in relation to an alleged family violence offence. While the *Evidence Act 2011* generally does not apply to the *Family Violence Act 2016*, in order to meet the definition in section 77 of the EMPA a recorded statement must necessarily comply with other provisions in that part.

Under part 4.3 police are not permitted to take a recorded statement for any purpose other than investigating an alleged family violence offence. Police are not permitted under this part to take a recorded statement for the purpose of assisting an affected person to gather evidence in support of an application for a family violence order. Therefore section 81H will not encourage questions and answers to be recorded that would not be admissible in a hearing for a family violence offence.

Even if a recording did contain questions and answers that may not be admissible in hearing for a family violence offence the respondent's rights to a fair trial are not limited by this provision. The new provision allows a recorded statement to be admitted by the Magistrates Court, it does not require the court to admit any or all of the recording. The court retains discretion to admit or refuse to admit any or all of the recorded statement as it sees fit. If a recorded statement contained inappropriate material a respondent could seek to have that material excluded by the court.

There is no requirement that charges have been laid or an offence proved in relation to the family violence offence that was the subject of the recorded statement. The purpose of allowing a recorded statement to be admitted in these circumstances is to ensure that an affected person's capacity to seek protection is not affected by delays in police or court processes.

I thank the Committee for its report and careful consideration of the Bill.

Yours sincerely

Gordon Ramsay MLA
Attorney-General