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Mrs Giulia Jones MLA
Chair
Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mrs Jones

I write in response to the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) (**the Committee**) Report No 37 of 19 November 2019, which comments on the Crimes (Disrupting Criminal Gangs) Legislation Amendment Bill 2019 (**the Bill**). I have addressed each of the issues raised by the Committee below.

Effect on sentencing of membership of a criminal group

The Committee has commented that the introduction of new Part 4.6 into the *Crimes (Sentencing) Act 2005* will mean that involvement in a criminal group will have disproportionate effect on the rights of the offender by reducing the sentencing discretion of the court. New section 61K has the effect of increasing the maximum penalty for a schedule offence if an offender has committed the offence in connection or association with a criminal group. Accordingly, the provision has the effect of increasing the sentencing range available to the court. There is no statutory obligation on the court to increase the sentence that it would otherwise impose based on the sentencing factors, but the provisions increase the discretion of the court to do so if appropriate in the circumstances.

In relation to the rights to a fair trial and rights in criminal proceedings the Committee has requested justification for why there is no requirement to provide earlier notice of a possible application for an increased penalty. While there is no statutory requirement to provide earlier notice, there are no impediments preventing ACT Policing or the Office of the Director of Public Prosecutions from informing the offender that the offence they are charged with is a schedule offence that may result in an increased maximum sentence if an application is made. It is also expected that criminal defence lawyers will be aware of the provisions and advise their clients appropriately.

I am satisfied that the Explanatory Statement appropriately addresses the engagement of the right to a fair trial and rights in criminal proceedings under the *Human Rights Act 2004* (**the HRA**) in relation to new Part 4.6.

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Criminal intelligence

I note the Committee's comments on the criminal intelligence provisions in the Bill. I agree that these provisions engage the right to a fair trial under section 21 of the HRA. A revised Explanatory Statement which includes justification for the impact of these provisions on that right has been prepared for tabling. I enclose a copy of the revised Explanatory Statement for the Committee's information.

Cancellation of occupational licences

The Committee has drawn my attention to provisions in the Bill that amend section 107A of the *Construction Occupations (Licensing) Act 2004* (COLA) to allow inclusion of information relating to cancellation decisions on the public register. I agree with the Committee that these amendments engage and limit the protection of privacy and reputation provided by section 12 of the HRA. The revised Explanatory Statement also discusses the justification for the limitation.

The Committee has expressed concern that the provisions in relation to the cancellation of licences under COLA or licences or permits under the *Liquor Act 2010* engage the right not to be tried or punished more than once under section 24 of the HRA. The UN Human Rights Committee has confirmed in *General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial*, that the guarantee against double punishment applies to criminal offences only and not to disciplinary measures that do not amount to a sanction for a criminal offence. In construing whether a sanction is a criminal penalty, guidance from the Parliamentary Joint Committee on Human Rights notes that there is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law:

Step one: *Is the penalty classified as criminal under Australian Law?*

If so, the penalty will be considered 'criminal' for the purpose of human rights law.

If not, proceed to step two.

Step two: *What is the nature and purpose of the penalty?*

The penalty is likely to be considered criminal for the purposes of human rights law if:

- a) the purpose of the penalty is to punish or deter; and
- b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context.)

If the penalty does not satisfy this test, proceed to step three.

Step three: *What is the severity of the penalty?*

The penalty is likely to be considered criminal for the purposes of human rights law if the penalty carries a penalty of imprisonment or a substantial pecuniary sanction. Even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

Applying these principles to the occupational licence cancellation provisions suggests that it is not a criminal penalty, as it is not intended to punish or deter but a preventative measure to protect public safety and applies in a specific regulatory context. As such, I am of the view that section 24 of the HRA is not engaged by these provisions.

The Committee has highlighted that the Bill provides for a cancellation order to be revoked where the ACT Civil and Administrative Tribunal (ACAT) is satisfied that, as a result in a change in circumstances, the licensee is no longer engaged in criminal activity. The Committee has stated that there is a lack of clarity regarding what constitutes a change in circumstances. This will be a matter for the ACAT to determine, by reference to the evidence and information that was available at the time of the cancellation, as well as any changes over the passage of time. If, at a time after the decision to cancel a licence, the ACAT is satisfied by information or evidence that the circumstances established as the basis for the licence cancellation no longer exist and there are no other circumstances that would warrant a cancellation, the ACAT can revoke the cancellation.

I acknowledge the Committee's comments on proposed section 187L and clauses 18-21 in the Bill and confirm that the Government amendments I propose to move will address the Committee's concerns in this regard.

Exclusion orders

The Committee draws attention to the test for an exclusion order, noting that there is no requirement for a connection between the violent conduct on or in the immediate vicinity of the licensed premises, and that making the order will reduce the identified risk to public safety. This contrasts with the test for a cancellation of an occupational licence which requires a connection between the 'unacceptable risk to public safety' and the 'criminal activity'. The Committee states that it is therefore not clear that the limitation on the right to freedom of movement (section 13 of the HRA) is a reasonable one. The Committee suggests that consideration should be given to amending the Bill to explicitly connect the two elements of the test, and to clarify what a Magistrate must consider when issuing an exclusion order (ie the circumstances of the violent conduct and the nature of the risk to the community).

I have sought additional advice in relation to this matter and I am satisfied that the limitation is reasonable. A court will need to be satisfied of the two elements of the test to make an order that would limit a person's freedom of movement in terms of access to licensed premises. Furthermore, the use of the words 'the risk' as opposed to 'a risk' strongly suggest a connection between the two threshold test elements.

I also note that this test can be distinguished from the occupational licence test as it is quite narrow – it relates to specific 'violent conduct' in a specific period of time (the past year) whereas the occupational licence test relates to 'criminal activity', which is broad and can include non-conviction information.

Additionally, as noted by the Committee, a Magistrate already needs to consider a person's rights under the HRA when deciding in relation to an exclusion order. I am confident that a Magistrate will consider the circumstances of the violent conduct and the nature of the risk to the community when deciding both whether to make an order, and the duration of an order if one is made. The Magistrate has discretion to make an exclusion period for shorter than 12 months if it appropriate

having regard to the nature and seriousness of the violent conduct. For these reasons, I do not agree that amendments to the Bill are required to make this explicit.

The Committee has also drawn my attention to the use of 'change of circumstances' in relation to a revocation of an exclusion order. I reiterate the comments I have made above on this matter in relation to the occupational licence provisions.

I thank the Committee for bringing these matters to my attention.

Yours sincerely

Gordon Ramsay MLA
Attorney-General

Encl.