Mrs Giulia Jones MLA

Chair

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

ACT Legislative Assembly

London Circuit

CANBERRA ACT 2601

Dear Mrs Jones

I write in response to comments made by the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) in its *Scrutiny Report 10* published on 18 October 2017 about the   
Justice and Community Safety Legislation Amendment Bill 2017 (No 2) (the Bill).

I thank the Committee for its consideration of the Bill, and provide the following comments about the amendment to the *Court Procedures Act 2004*. I note the Committee’s comment that adding the security of court premises, including the use of electronic devices in court premises, as a new subject matter for court rules may limit the right to a fair trial under section 21 of the *Human Rights Act 2004* (HRA). In considering whether a limitation on a human right is reasonable, a person must consider the factors in section 28(2) of the HRA.

Firstly, in relation to the nature of the right affected (HRA, s 28(2)(a)), the right to a fair trial does not extend to certain situations excluded by section 21(2) of the HRA. The Committee’s report acknowledges that rules relating to the use of electronic devices in court premises are likely to fall within one of the exclusions in section 21(2) of the HRA. In addition, rules relating to court security more broadly are also likely to relate to excluding the press or members of the public from a trial to protect morals, public order or national security, and would therefore also typically fall under the exclusion in section 21(2)(a) of the HRA. However, I agree that some rules relating to court security may not fall within the exclusions in section 21(2) of the HRA. Nevertheless, any limitation on the right to a fair trial may be justified for the reasons outlined below.

In considering the reasonableness of a limitation on a human right, a person must also consider the importance of the purpose of the limitation (HRA, s 28(2)(b)). This amendment will support the right to a fair trial by allowing the court to make additional rules that facilitate the fair, safe and orderly management of court premises. The increasing use of mobile electronic devices such as smartphones as recording devices has created a risk to fair court proceedings. For example, an electronic device could be used to capture the identity of jurors or transmit witness evidence to upcoming witnesses. Electronic devices can also make sounds that may disturb the orderly conduct of court proceedings. Rules in relation to court security more broadly also support the right to a fair trial, by reducing the likelihood that a court proceeding will be disrupted through violent or disorderly conduct towards court staff or other people present during the proceeding.

In considering the nature and extent of the limitation (HRA, s 28(2)(c)), it is important to note that the *Court Procedures Act 2004* provides a range of safeguards to the right to a fair trial that relate to court security. For example, section 48 provides that an officer may only require a person who is behaving unlawfully or in a disorderly or menacing way to leave the court premises either with the court’s leave or if the officer is satisfied on reasonable grounds that the person is not required to attend the court. Any rule made under the amendment must be consistent with the existing safeguards to the right to a fair trial contained in legislation. This reduces the possible seriousness of any limitation on the right to a fair trial that may arise through a rule made under the amendment.

Finally, in deciding whether a limit to a right is reasonable, a person must consider the relationship between the limitation and its purpose (HRA, s 28(2)(d)), and any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve (HRA, s 28(2)(e)). Given the technical and ever-changing context of court security, particularly in relation to the use of electronic devices, the amendment takes the least restrictive means reasonably available to protect the right to a fair trial by leaving scope for the policy to flexibly adapt to technological advances. Any possible limitation to the right to a fair trial would be minimal, due to fact that rules on court security and the use of electronic devices would frequently fall within the exclusion to the right to a fair trial. Any limitations contained in rules that do not fall within those exclusions, would be limited to be consistent with existing legislative safeguards to the right. Therefore, on balance, any limitation on the right to a fair trial is reasonable and proportionate because of the benefits of supporting the right to a fair trial and ensuring the fair, safe and orderly conduct of court proceedings.

In response to the Committee’s comments, I will provide further justification for the proposal in the revised explanatory statement.

I trust that this response addresses the Committee’s comments in relation to the Bill.

Yours sincerely

Gordon Ramsay MLA

Attorney-General