



Attorney-General
Minister for the Arts, Creative Industries and
Cultural Events
Minister for Building Quality Improvement
Minister for Business and Regulatory Services
Minister for Seniors and Veterans
Member for Ginninderra

Mrs Guilia Jones
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's (the Committee's) comments in Report 42 in relation to the *Crimes (Offences Against Vulnerable People) Legislation Amendment Bill 2020* (the Bill).

I offer the following response to the Committee's comments.

Age limit and interaction with right to recognition and equality before the law

The Committee has queried the basis for selecting the age of '60 years or older' for the purpose of defining a vulnerable person, other than an adult with a disability. The Committee has also asked that I provide a response as to why a limit on the age of vulnerable persons is considered necessary in defining the scope of protection provided by the offences in the Bill.

As noted in the explanatory statement, the purpose of the Bill is to ensure people with a disability and certain older people who are reliant on others for care or assistance are protected and perpetrators of abuse against them are subject to appropriate criminal sanctions. It is accepted that setting any age limit must limit the application of the new laws in respect of abuse. However, existing, offences will continue to be relevant where acts resulting in harm, constituting those offences, are directed at people under the age limit. Moreover, the existence of the new offences does not prevent the use of any other existing offences if those offences more appropriately capture the scope of offending.

The age limit set was guided by research, including a 2018 World Health Organisation (WHO) report indicating that around one in six people aged 60 years and older experienced some form of abuse in

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community settings during the past year.¹ The Australian Law Reform Commission report into Elder Abuse² was also considered, including information about differences in life expectancy for Aboriginal and Torres Strait Islander people, relative to the broader Australian community.

Public and targeted stakeholder consultation on potential laws to address elder abuse acknowledged the challenges of setting a particular age as the threshold at which protective laws would apply. A number of stakeholders raised the issue of extending protections to others who were vulnerable by reason of disability unconnected with their age. Most feedback on the issue of protecting older people accepted that it would be necessary to settle on an age at which protections would apply for those whose vulnerability was not due to a disability.

The provisions in the Bill recognise that the circumstances of some older people, and adults with a disability, makes them particularly vulnerable and in need of protection from abuse, where they are dependent on others for their care.

As the Committee notes, it is important that the new offences be sufficiently accessible, precise and foreseeable, so as to protect the rights of those prosecuted for a breach.

It is commonly accepted and understood that, at 60 years of age, members of the community are able to, indeed entitled to, be treated differently, on the basis of their age. This is the age at which members of the ACT community are characterised as seniors, and subject to differential treatment in a range of respects, on that basis. The same age threshold for 'senior' status applies throughout Australia.

In all the circumstances, the Government considers the age threshold of 60 years appropriate to ensure that vulnerable older Canberrans are afforded additional protections.

Defences and interaction with rights in criminal proceedings

The Committee has sought information about the defences to offences containing a legal burden. In particular the Committee has commented on the defence that the defendant's conduct was reasonable in all the circumstances and the defence, in an institutional context, that the conduct happened as a result of circumstances beyond the defendant's control. The Committee has asked that I explain why it is considered necessary to place a legal burden on the defendant.

The purpose of this limitation is to assist the effective and efficient prosecution of offences in the Bill and the administration of justice.

The information required to prove or disprove the defences would ordinarily be expected to be peculiarly, or largely, within the knowledge of the defendant. This includes information in relation to the circumstances surrounding the provision of care to the vulnerable person, or circumstances beyond those the defendant can control: for example, information about the capacity of the defendant to provide care to the vulnerable person, known only to the defendant.

Accordingly, once the prosecution establishes the elements of the offence, the burden should pass to the defendant to show that the defendant's conduct was reasonable in all the circumstance.

¹ World Health Organisation, 2018, 'Elder Abuse,' available online at: <https://www.who.int/news-room/fact-sheets/detail/elder-abuse>

² Australian Law Reform Commission, 2017, Australian Law Reform Commission Report 131 *Elder Abuse— A National Legal Response*.

The presumption of innocence will still apply to all other elements of each offence and therefore the limitations on this right are minimal.

In relation to the Committee's request for further information about the operation of the defence, in circumstances where an institutional entity should be held accountable, should both the institutional entity and, for example, a person it employs as a carer be charged with the offence, the defences at sections 36A(3) (b) and (c) would be available to the employee, but not the institutional entity. The defences at these sections have been included to reflect that employees may have no, or limited, scope to act other than in accordance with their employer's requirements or directions.

Intended operation of offences and interaction with right to liberty and security of person

The Committee has commented on 'some potential ambiguities in the operation of the proposed offences' and asked that I respond to this, providing further information on the intended operation of the offences in the Bill.

In drafting the offences, the realities of working in a care facility were taken into account. Accordingly, the offence provisions have been developed to enable offending to be appropriately dealt with according to the facts of each case.

In relation to the questions of the Committee about proposed section 36B (Failure to protect vulnerable person from criminal offence), this offence provision was modelled on existing law (section 66A of the Crimes Act 1900 – Failure by person in authority to protect child or young person from sexual offence). The intention of this offence is to appropriately sanction instances where a person in a position of authority in a relevant institution is aware of a substantial risk that a serious offence will be committed against vulnerable people by someone associated with the institution, and the person in authority fails to act to reduce or remove the risk.

I turn now to the Committee's query about whether, in section 36B (3), paragraph (e) of the definition of 'associated' is intended to limit the preceding categories (a) to (d) of a *person associated with a relevant institution*, to where the person is in a position of some authority, or if paragraph (e) refers to an ability to influence the institution in some other way. Paragraph (e) is intended to apply to a person in a position to influence the institution other than in the capacities listed in paragraphs (a) to (d).

The Committee has asked for more information about section 36B (1) and when a person is to be regarded as being "in authority" for the purpose of being potentially liable to commit the offence or whose conduct may give rise to a substantial risk that may enliven the proposed offence. The term *person in authority* is not defined. Having regard to the ordinary meaning to the term - the right to control, command, or determine - whether a person is a person in authority will depend on the facts and all the particular circumstances. Considerations likely to be relevant include the extent to which the person is empowered to take actions, including making decisions, affecting the way in which people in the care of the institution are exposed to, or protected from, the risk of a serious criminal offence.

As the Committee will have noted, section 36B (1) (d) is to the effect that a person in authority will only commit the offence where the person can, because of the position the person occupies in the institution, reduce or remove the risk.

In response to the Committee's query about the operation of section 36C (Neglect of a vulnerable person), a person who is responsible for providing care to a vulnerable person, only commits an offence if they recklessly or negligently fail to provide those necessities of life that are a necessary part of the care the person is responsible for providing.

Section 36C (2) is not intended to render liable a person responsible for providing only some of the necessities of life to a vulnerable person, in relation to the provision of other necessities of life, if the provision of those other necessities of life is not a necessary part of the care that the person is responsible for providing.

There is a formal review mechanism in the Bill, which will enable consideration of any practical issues that arise as a result of the operation of the offences.

I thank you for taking the time to consider this Bill.

Yours sincerely

Gordon Ramsay MLA