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Member for Ginninderra

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

Giulia

Dear ~~Mrs Jones~~

I write in response to the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) (the Committee) Report No 46 of 21 July 2020, which comments on the Royal Commission Criminal Justice Legislation Amendment Bill 2020 (the Bill).

I note the Committee's comments and request for a response relating to retrospective criminal laws and, in particular, the provisions of the Bill relating to the maximum penalty for the offence in section 56 of the *Crimes Act 1900 – Sexual relationship with child or young person under special care*. I provide the following information in response to the Committee's request.

Maximum penalty where relationship commences before December 1991 and ends after March 2018

The Committee comments that the table at section 56 does not establish how the penalty will be assessed where the relationship commenced prior to 1991 and continued after 2018.

As the offence is the engagement by an adult, in a relationship (involving more than one sexual act), with a **child or young person**, the relationship constituting the offence cannot extend beyond the date the child or young person turns 18 years of age. It is not possible for a relationship with a child or young person to extend from prior to 1991 until after 2018. For that reason it is not appropriate to provide for assessment of a penalty in such a circumstance.

Penalty applicable under the proposed amendments will in some cases be higher than that for the offences available at the time of the conduct in question

The Committee cites two examples of where this may occur.

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Firstly, the Committee notes, in relation to item 2 of the table, that where the relationship occurred between 1991 and 2018, engaging in a relationship involving two sexual acts would have been punishable only by the maximum penalties applicable independently to those two offences. This is because at that time the maintaining a sexual relationship offence required establishing that at least three sexual acts had been involved in a relationship. The Committee notes that the maximum penalty for the two sexual act offences may cumulatively be less than the maximum penalty for the maintaining a sexual relationship offence.

Item 2 of the table is intended to ensure that a person sentenced, in the future, for the offence of maintaining a sexual relationship, an offence which existed between 1991 and 2018, is not subject to a higher maximum penalty than existed for the offence during that period when the offence was committed. This is reflected in the language of the explanatory statement.

The second situation raised in the Committee's comments is where a relationship ended after 2018 but the sexual offences in question occurred prior to 2018 and may have been punishable, even in total, by less than 25 years imprisonment.

As the *actus reus* of the offence is the relationship, if it continues after 2018, it is considered appropriate that it be subject to the maximum penalty applicable at that time, that is a maximum of 25 years imprisonment.

Item 1(b)(ii) – an offender may be subject to the highest penalty for an alleged offence even when the jury wasn't able to agree that the offence was committed

Item 1 of the table relates to the sentence in circumstances where the period of the relationship existed wholly before the introduction of maintaining a sexual relationship offence. The intended operation of (1)(b) is that the offender be sentenced in accordance with the maximum penalties for each offence constituted by the sexual acts involved in the relationship, otherwise there is no maximum penalty for the sentencing court to have regard to for offences occurring prior to the 1991 establishment of the relationship offence.

The Committee notes that (1)(b)(ii) applies where the trier of fact is satisfied that the relationship existed, and where the trier of fact is a jury, it need not have agreed on the same sexual acts involved in a relationship.

The Committee's concern is that this allows the imposition of the highest maximum penalty applicable for any of the offences alleged, even though the jury may not have agreed that the sexual act to which the highest maximum penalty attaches has occurred.

By way of example, this situation could arise if there is an indictment as follows:

Count 1: Relationship

Counts 2 – 4: sexual intercourse with a young person

Count 5: act of indecency with a young person.

If the jury returned a guilty verdict on Count 1, and not guilty on all other counts, they must have all been satisfied that *at least one* incident of sexual intercourse had occurred, but were unable to unanimously agree on which one/s.

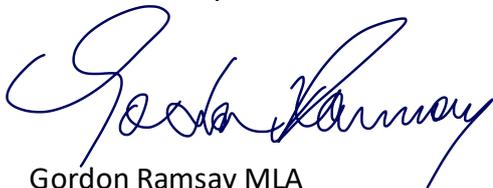
If 1(b)(ii) limited the court to the *lowest* maximum penalty, the court would be bound by the maximum penalty for the act of indecency which can only have been one of the sexual acts the jury were satisfied of. The approach taken in the Bill is that (b)(ii) allows the court to impose up to the *highest* maximum penalty, for the offences alleged, recognising that the court can still exercise a discretion to impose a lower sentence in circumstances where it would be fairer to the accused to do so.

Title of the offence

Finally, the Committee has commented on the proposed heading for section 56. The Committee's observations are noted. The construction of the section, including the reference in the name to 'relationship', has been influenced by the Royal Commission's comments supporting the approach in the Queensland equivalent provision (s 229B of the Qld Criminal Code). This was also referred to by the ACT Court of Appeal in *KN v R* as a construction where the relationship is the *actus reus*.

I thank the Committee for its comments and trust that this information is of assistance. I reaffirm that the proposed amendments to section 56, to the extent that they engage and limit the right to protection from retrospective laws, are considered necessary and justified.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Gordon Ramsay". The signature is fluid and cursive, with a large initial "G" and a long, sweeping tail.

Gordon Ramsay MLA
Attorney-General

23.7.2020