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Mrs Guilia 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) – Scrutiny Report 48 Government Response – Comment, dated 11 August 2020, which comments on the *Royal Commission Criminal Justice Legislation Amendment Bill 2020*.

I note the Committee's further comments and request for response relating to the retrospective application of maximum penalties in section 56 of the *Crimes Act 1900* (Sexual relationship with child or young person under special care).

Maximum penalties applicable to section 56 offence that occurred between 24 December 1991 and 2 March 2018

The Committee indicates a concern that the maximum penalties outlined in the Bill for the section 56 'relationship' offence, where it occurred between 24 December 1991 and 2 March 2018 do not align with the penalties that could have otherwise been applicable at the time to the conduct in question (that is, the individual acts, themselves constituting sexual offences, had they been proven).

I note that the maximum penalties for the equivalent of the section 56 'relationship' offence that applied during the 1991 to 2018 timeframe were:

- seven years if the defendant's only offence was the relationship offence;
- 14 years, if in addition to the relationship offence, the defendant was found, during the course of the relationship, to have committed another offence punishable by less than 14 years; and

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- life, if in addition to the relationship offence, the defendant was found, during the course of the relationship, to have committed another offence punishable by 14 years or more.¹

The maximum penalties for single acts of sexual offences against children or young people applicable during the 1991 to 2018 timeframe were all seven years or greater. Following amendments to the *Crimes Act 1900*, from 8 July 1992 to 14 September 2001, penalties for sexual offences that relate to young people, ranged from the lowest maximum imprisonment of 10 years (e.g. Act of indecency against a young person aged 10-15) to 20 years (e.g. incest involving an under 10 year old). An offence of 'Using the internet etc to deprave young people' was introduced to the *Crimes Act 1900* in 2001² – with a maximum penalty of 7 years.

If a person was to be found guilty of the new section 56 offence (and no other offence) for an act during the December 1991 to March 2018 period, then the maximum penalty of seven years would apply. The penalties of 14 and 25 years would apply when a person is convicted of an additional sexual offence against a young person and the maximum penalty would reflect the lesser of either the penalty that applied to the equivalent additional offence between 24 December 1991 and 2 March 2018 and the current maximum penalty. I note that the highest penalty available is now 25 years compared to the previous maximum penalty of 'life'.

Given this, the provisions of the Bill, relating to the maximum penalties that apply where the new section 56 offence is committed between 1991 and 2018, do not breach the protection in subsection 25(2) of the *Human Rights Act 2004* (HRA).

Penalties applicable where the relationship in question was wholly before 24 December 1991

The Committee indicates an ongoing concern about the maximum possible penalty for the section 56 offence, where this occurs wholly before 24 December 1991, being based on the highest maximum penalty for the offences constituted by the sexual acts alleged to be involved in the relationship. The Committee suggests that the maximum penalty applicable under section 56 limits the right not to be subject to a penalty for a criminal offence, higher than the penalty that applied when the offence was committed (section 25 (2) HRA). The Committee seeks justification for this limitation by reference to the factors in section 28 of the HRA.

Section 28 (1) of the HRA provides that 'human rights may be subject to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.'

The amendment to section 56 means that a person may now receive a higher penalty for a sexual act against a child than they would have received at the time they committed the offence (for offences that occurred wholly before 1991).

The purpose of this limitation on rights (HRA s28 (2) (b)) is to provide courts with discretion to apply a penalty that is commensurate with the seriousness of offending. In some instances this will be the maximum penalty available for the most serious child sex offence that is alleged as part of the 'relationship', notwithstanding that a jury has not been able to agree on all of the same child sexual offences committed, for the purpose of establishing the relationship. This ensures that the penalty available to the court can sufficiently reflect the gravity of sexual offending against a child, in

¹ The *Crimes Legislation Amendment Act 2018* amended the penalty resulting in a single maximum penalty of 25 years.

² Amended by *Crimes Amendment Act 2001 (No 2)*

circumstances where the jury has agreed that multiple instances of sexual offences against the child have been committed by the defendant, but is not able to agree on all the same instances.

The nature and extent of the limitation (HRA s28 (2) (c)) is reasonable because the court may form the view that the penalty is appropriate taking into consideration the full scope of alleged offences involved in the 'relationship' offence and all the evidence that has been heard.

To the extent that the Committee's concerns arise from the maximum penalty being dependent "... only on the range of offences included in the indictment by the prosecutor", the Explanatory Statement for the Bill noted that:

"The Director of Public Prosecutions has a continuing obligation of full disclosure that requires the accused to be provided with all relevant evidence in a case, including the evidence that would be led by the prosecution to establish a sexual act. The sufficiency of particulars is decided by the court on a case-by-case basis. This is an important protection to ensure that an accused person is able to receive a fair trial. Where insufficient particulars are given, the court may rule that the accused cannot receive a fair trial, and the matter may be delayed, retried or stayed."

These protections guard against offences carrying the highest penalties being included in an indictment other than where they are justified by the evidence.

There are no less restrictive means reasonably available to achieve the purpose of the limitation (HRA s28 (2)(e)) as a lesser maximum penalty, including the Committee's suggestion of applying the second lowest maximum penalty for any of the individual sexual acts alleged. To do this would limit the extent to which the sentencing court, which has heard all the evidence, can deliver an appropriate sentence and justice for a victim who may have experienced extensive and extreme abuse in the course of the relationship. The section 56 offence is intended to recognise that people who experience ongoing sexual abuse at a young age are unlikely to always be able to particularise their experiences in a way that enables a jury to make unanimous findings relating to the acts that occurred.

The approach in the amended section 56 enables the achievement of justice for the victim *and* the accused because the court can use discretion when deciding what penalty to apply – with scope up to that for the alleged sexual act with the highest penalty. In doing so it provides for a reasonable and proportionate (potential) limitation on the right provided by section 25 of the HRA.

I remain of the view that the solution reached in the *Royal Commission Criminal Justice Legislation Amendment Bill 2020* provides a fair and just approach and any limitation on the rights provided by section 25 of the HRA is justified.

I thank the Committee for its comments and comprehensive consideration in its Scrutiny Report. I trust that the additional detail provided is of assistance.

Yours sincerely

Gordon Ramsay MLA
Attorney-General