

17 March 2020

actlawsociety

Ms Madelon Rosenberg
Senior Legal Policy Officer, Criminal Law Group
Legislation, Policy & Programs
Justice and Community Safety Directorate
GPO Box 158
Canberra ACT 2601

Dear Madelon,

The Society is pleased to comment on the draft *Crimes (Offences Against Vulnerable People) Legislation Amendment Bill 2020*.

The Society has long acknowledged the need to address the serious and increasing issue of elder abuse. It is noted that the Society has written to the Attorney General on a number of occasions with specific suggestions as to actions that could be taken to combat various aspects of elder abuse. For example, in relation to witnessing requirements for Enduring Powers of Attorney. It is disappointing that the views of the Society's specialised Elder Law Committee have not been acted upon.

The Society notes the comprehensive Australia Law Reform Commission report, *Elder Abuse – A National Legal Response* (May 2017) which canvassed the issues outlined in the JACS discussion paper (*Proposed Response to Elder Abuse in the ACT*). Over 100 individuals and organisations made submissions to the ALRC. In considering the matters relevant to the draft bill, the ALRC:

- specifically declined to recommend the enactment of specific elder law offences on the basis that existing criminal laws generally adequately covered conduct which constituted elder abuse;
- noted that the creation of new offences was unnecessary and risked duplicating existing offences;
- noted that specific elder abuse offences have not been enacted anywhere else within Australia; and
- noted the views put forward by organisations such as the ACT Human Rights Commission which indicated offences limited to abuse against elder persons had the potential to be paternalistic and discriminatory.

Importantly, the ALRC considered the relative desirability of the implementation of a stand-alone offence, or the use of neglect offences, or the recognition of the specific circumstances of the victim in addressing elder abuse. The report did not recommend the use of all three devices to address elder abuse. The Society is concerned that the proposed bill seeking to implement all three elements is a situation of form over function.

In regard to the specific provisions of the bill provided to the Society on 3 March 2020, the Society makes the following comments:

the law society of the australian capital territory a member of the law council of australia

fourth floor 1 farrell place canberra act 2601
gpo box 1562 canberra act 2601
dx 5623 canberra

telephone 02 6274 0300

mail@actlawsociety.asn.au www.actlawsociety.asn.au

1. Extension of elder abuse to more generalised 'vulnerable person' in the draft bill

As previously indicated, the discussion paper and associated consultation related solely to elder abuse. The Society does not believe that it is prudent policy to proceed to legislate beyond the scope of the public consultations without the benefit of the considered views (rather than ad-hoc comments) on matters outside of elder abuse.

2. Insertion of new section 36A, abuse of a vulnerable person

The Society opposes the creation of a separate offence as provided under the proposed section 36A. In doing so, the Society notes:

- the unambiguous and comprehensive conclusions of the ALRC report and the lack of explanation from JACS as to why those findings should be disregarded;
- the unnecessary potential for confusion created by overlapping and/or duplicate offences. A number of existing laws deal with the use of force and threats, and making demands for gain. Many such offences provide for the imposition of greater penalties than contemplated in the draft bill.

3. The generalised nature of the proposed offences

The Society believes that it is important that criminalised behaviours are specified in sufficient detail, and not expressed in overly generalised terms.

To this end, the Society holds a number of serious concerns with the definition of 'vulnerable person' as follows:

- there is duplication (and confusion) in regard to the interaction of the various elements of the definition. For example, the definition applies to all adults within the meaning of the *Disability Services Act 1991* (ACT) and an overlapping class of adults aged over 50 years who have specified disorders;
- the Society notes the age specified in the definition 'is at least 50 years old'. The Society believes that this is not appropriate, given for instance the ABS generally specifies an older person as being a person over 65 years of age;
- it is not clear to the Society what the phrase '*for any other reason is socially isolated or unable to participate in the life of the person's community*' means. The phrase is incredibly vague and uncertain in its operation. In addition, each of the elements are stand-alone (socially isolated or ...), and should not be used to support a criminal charge.

Similarly, the Society notes the definition of abusive conduct (section 36A) both duplicates existing offences and is imprecise in its reach. "Sexually inappropriate" is a vague term on which to base a criminal offence.

4. Insertion of section 36B, failure to protect vulnerable persons

The Society refers to, and endorses, the comments made by the ACT Bar Association in relation to the proposed section 36B.

5. Insertion of section 36C, neglect of a vulnerable person

The Society supports the creation of a neglect offence, and notes that the ACT is the only jurisdiction in Australia that does not currently have such an offence that could apply to older people.

However, the Society would recommend that the drafting of the NSW offence be adopted as the basis for the proposed offence as it appears to be the plainest and most effective of the various offences throughout Australia.

The relevant provision, clause 44, Failure of persons to provide the necessities of life reads as follows:

A person –

- (a) who is under a legal duty to provide another person with the necessities of life, and*
- (b) who, without reasonable excuse, intentionally or recklessly fails to provide that person with the necessities of life,*

is guilty of an offence if the failure causes a danger of death or causes serious injury, or the likelihood of serious injury, to that person.

The Society does not support the drafting of 36C(3) and (4) as they reverse the onus of proof and place too heavy a burden on the defendant.

6. New section 33(1)(gb) – sentencing relevant considerations

The Society does not believe that the insertion of the proposed new section 33(1)(gb) into the *Crimes (Sentencing) Act 2005* is necessary. The Society is of the view that the existing section 33(1)(d) enables the Court to take the particular circumstances of the elder victim into account when sentencing. Sections 33(1)(a) and 33(1)(u) also allow the particular circumstances of the victim to be taken into account.

The Society does not accept that the situation of an elder person is analogous to a consideration of a pregnant victim (in section 33(1)(g)).

In summary, the position of the Society is as follows:

- proposed section 36A – opposed by the Society;
- proposed section 36B – not supported by the Society;
- proposed section 36C – supported by the Society with appropriate drafting amendments;
- proposed section 33(1)(gb) – not supported by the Society on the basis that the subject matter is already covered by section 33(1).

Please do not hesitate to contact me should you require any further information in relation to the above.

Yours sincerely,



Dianne O'Hara
Chief Executive Officer