

2020

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**CRIMES (OFFENCES AGAINST VULNERABLE PEOPLE) LEGISLATION
AMENDMENT BILL 2020**

EXPLANATORY STATEMENT

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**CRIMES (OFFENCES AGAINST VULNERABLE PEOPLE) LEGISLATION
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Outline

Outline.....	1
Overview and purpose of the Bill	2
Consistency with Human Rights.....	2
Detail.....	10
Part 1 – Preliminary	10
Part 2 – Crimes Act 1900.....	10
Part 3 – Crimes (Sentencing) Act 2005	21

CRIMES (OFFENCES AGAINST VULNERABLE PEOPLE) LEGISLATION AMENDMENT BILL 2020

The Bill is not a Significant Bill. Significant Bills are bills that have been assessed as likely to involve significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

Overview and purpose of the Bill

The policy objective of this bill is to protect people (both older people and those with a disability) from abuse and to hold institutions accountable for the level of care provided to vulnerable people.

The Crimes (Offences Against Vulnerable People) Legislation Amendment Bill 2020 (the Bill) will amend criminal laws to address the abuse of vulnerable persons including amending the *Crimes Act 1900* to create offences to:

- a) criminalise abusive conduct by carers (including corporations) of vulnerable persons which results in physical, psychological or financial harm to the vulnerable person;
- b) criminalise a person in authority (including corporations) for the failure of the institution to protect a vulnerable person from a substantial risk of a serious criminal offence; and
- c) criminalise the failure of a carer (including corporations) to provide the necessities of life to a vulnerable person, if that failure causes serious harm to the vulnerable person.

The Bill will also amend the *Crimes (Sentencing) Act 2005* to expressly make the vulnerability of the victim a relevant consideration in the sentencing of the offender.

Consistency with Human Rights

The purpose of this Bill is to improve the protection for vulnerable people who rely on the care of others by criminalising the abuse and neglect of vulnerable people in our community. The Bill defines a vulnerable person as someone over 60 years of age, or older, who has a vulnerability, as well as people of any age with a disability. Current ways of preventing abuses against vulnerable people are through regulatory, self-reporting and complaints mechanisms which are managed primarily through relevant government agencies. While relevant existing criminal offences could be charged for actions constituting, for example, assault or theft, not all forms of abuse which cause harm to vulnerable people, nor the failure of people in authority to prevent abuse, are currently subject to criminal sanctions. Criminal sanctions for the abuse of vulnerable people, or the failure to protect vulnerable people from the substantial risk of abuse, is the least restrictive measure for deterring serious human rights abuses, protecting the most vulnerable members of our society from inhuman or degrading

treatment and sends a strong message to the community that this type of behaviour will not be tolerated in the ACT.

The World Health Organisation (WHO) reported that in 2018 around one in six people aged 60 years and older experienced some form of abuse in community settings during the past year. The WHO noted that rates of elder abuse are high in institutions such as nursing homes and long-term care facilities and is predicted to increase as many countries are experiencing rapidly ageing populations.¹

Further, the WHO notes that the reported estimation of elder abuse is likely to be an underestimation due in part to the unwillingness of older people to report cases of abuse to family, friends or authorities. The WHO notes that, based on self-reports by older adults, the rate of abuse is much higher (around 64% prevalence) in an institutional setting.²

In relation to people with disability, the WHO noted that a 2012 review on violence against adults with disabilities found people with disability are 1.5 times more likely, and for people with a mental health condition four times as likely, to suffer violence than their non-disabled peers. The WHO notes:³

Factors which place people with disabilities at higher risk of violence include stigma, discrimination, and ignorance about disability, as well as a lack of social support for those who care for them. Placement of people with disabilities in institutions also increases their vulnerability to violence. In these settings and elsewhere, people with communication impairments are hampered in their ability to disclose abusive experiences.

While violence against the most vulnerable in our community cannot be eliminated through laws alone, legal measures are an essential component of any response to abuse against older Australians and Australians with a disability. The Bill balances the human rights of a person affected by changes in the law and the public interest in protecting an individual's right to safety within their home and in the community.

Rights Engaged

Broadly, the Bill engages the following HR Act rights:

- Section 8 – Recognition and equality before the law
- Section 10 – Protection from torture and cruel, inhuman or degrading treatment
- Section 13 – Freedom of movement

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

² Ibid.

³ World Health Organisation, 2012, 'Violence against adults and children with disabilities,' available online at: <https://www.who.int/disabilities/violence/en/>.

- Section 17 – Taking part in public life
- Section 18 – Right to liberty and security of person
- Section 21 – Right to a fair trial
- Section 22 – Rights in criminal proceedings

The preamble to the HR Act notes that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. Section 28 (2) of the HR Act contains the framework that is used to determine the acceptable limitations that may be placed on human rights.

International human rights law places obligations on governments to “respect, protect and fulfil” rights. The obligation to respect means governments must ensure its organs and agents do not commit violations themselves; the obligation to protect means governments must protect individuals and groups from having rights interfered with by third parties and punish perpetrators; and the obligation to fulfil means governments must take positive action to facilitate the full enjoyment of rights.

The European Court of Human Rights has considered the positive obligation of governments to uphold rights in depth, noting government must put in place legislative and administrative frameworks to deter conduct that infringes rights, and to undertake operational measures to protect an individual who is at risk of rights infringement.⁴

For example, in the case of *Dodov v Bulgaria* the European Court of Human Rights held that a failure to hold a nursing home accountable for the disappearance of a resident with Alzheimer’s disease, constituted a breach of the right to life.⁵

In the context of a carer being a family member, there is extensive case law from the European Court of Human Rights emphasising the obligation of the state to protect individuals from abuse perpetrated by family members.

For example, in 2012 the ECHR affirmed the need for governments to protect the physical and moral integrity of victims of domestic violence. In particular, when discussing the positive obligations on States to protect individuals, the court noted that private individuals may engage in domestic violence, and stated:

[t]he concept of private life includes a person’s physical and psychological integrity. Under Article 8 States have a duty to protect the physical and moral integrity of an individual from other persons. To that end they are to maintain and apply in practice

⁴ Colvin, M & Cooper, J, 2009 ‘*Human Rights in the Investigation and Prosecution of Crime*’ Oxford University Press, p.425. For more detail on positive obligations, see generally, Akandji-Kombe, J, 2007 ‘*Positive obligations under the European Convention on Human Rights*’, Council of Europe.

⁵ *Dodov v Bulgaria* [2008] ECHR, Application No. 59548/00 (17 January 2008).

an adequate legal framework affording protection against acts of violence by private individuals.

Victims of domestic violence are of a particular vulnerability and the need for active State involvement in their protection has been emphasised in a number of international instruments⁶

This responsibility supports the positive protection of the right of individuals, children and families to enjoy their human rights and supports the right to protection of family and children, and the right to liberty and security of person (ss 11 and 18 of the HR Act).

Section 28 of the HR Act requires that any limitation on a human right must be authorised by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate. Proportionality can be understood and assessed as explained in *R v Oakes*⁷. A party must show that:

[f]irst, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”⁸.

The limitations on human rights in the Bill are proportionate and justified in the circumstances because they are the least restrictive means available to achieve the purpose of protecting vulnerable victims of abuse and neglect, perpetrated by individuals and organisations.

Rights Promoted

The Bill engages and supports the following rights:

- Section 10 – Protection from torture and cruel, inhuman or degrading treatment
- Section 13 – Freedom of movement
- Section 17 – Taking part in public life
- Section 18 – Right to liberty and security of person

These are supported by all proposed amendments.

⁶ *Irene Wilson v The United Kingdom* [2012] ECHR, Application no. 10601/09 (23 October 2012) §37.

⁷ [1986] 1 S.C.R. 103.

⁸ *R v Oakes* [1986] 1 S.C.R. 103.

The primary purpose of the Bill is to protect vulnerable people from abuse by those with responsibility for their care. Often this abuse impacts the victim’s freedom of movement, ability to take part in public life, and their physical safety. By criminalising this abuse, the Bill promotes the rights outlined above.

Rights Limited

The amendments in the Bill primarily engage and limit the right to recognition and equality before the law because the offences only apply to behaviour directed at a subset of the population – namely vulnerable persons. For this reason, the limitation is discussed in detail below.

Other rights engaged and limited are discussed briefly below, or with reference to specific legislative amendments in the detail stage below.

Detailed human rights discussion

Section 8 – Recognition and equality before the law

Section 8 of the HR Act states that:

(3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination.

The nature of the right affected and the limitation (s 28 (2) (a) and (c))

This right requires that everyone is equal before the law and is entitled to the equal protection of the law without discrimination. This right is engaged because the offences in the Bill apply only to conduct directed at certain categories of people. The offences apply to conduct directed at ‘vulnerable people’ which is defined in the Bill to mean an adult who

- (a) has a disability within the meaning of the *Disability Services Act 1991*; or
- (b) is at least 60 years old and –
 - (i) has a disorder, illness or disease that affects the person’s thought processes, perception of reality, emotions or judgement or otherwise results in disturbed behaviour; or
 - (ii) has an impairment that –
 - (A) is intellectual, psychiatric, sensory or physical in nature; and
 - (B) results in substantially reduced capacity of the person for communication, learning or mobility; or
 - (iii) for any other reason is socially isolated or unable to participate in the life of the person’s community.

Accordingly, the offence does not apply to children, or adults without an added vulnerability as outlined in the provisions.

Legitimate purpose (s 28 (2) (b))

The purpose of creating offences specifically directed at this cohort of people, is to protect vulnerable people from abuse. The purpose of limiting the offences to people with disabilities and certain older people, is to target those who are reliant on others for care or assistance. The discussion above has outlined the prevalence of abuse against people with disabilities and older people, and the importance of criminalising this abuse.

Abuse against people with disabilities and vulnerable older people —such as children, or adults who do not have other vulnerabilities—is qualitatively different and requires a targeted approach. Applying the same offences to various types of abuse may be less effective than maintaining separate targeted offences and regulatory mechanisms.

With regard to non-vulnerable adults, there may be no power imbalance and so offences that are designed with a power imbalance and relationship of care in mind are not appropriate.

With regard to children there is a range of other existing criminal and non-criminal laws in place to target child abuse. This includes:

- The *Children and Young People Act 2008*, which establishes a mandatory reporting scheme requiring certain professionals who come into contact with children to report abuse;
- The Reportable Conduct Scheme under the *Ombudsman Act 1989* which requires the reporting of certain conduct for the purpose of protecting children.
- Section 66AA of the *Crimes Act 1900* which criminalises the failure to report child sexual abuse,
- Section 66A of the *Crimes Act 1900* which criminalises a failure by a person in authority to protect a child from a sexual offence;
- Section 39 of the *Crimes Act 1900* criminalises the neglect of children.

These provisions are adequate to protect children. This is particularly so given that through mandatory school attendance there are increased opportunities for professionals and others in the community to identify and report abuse. Those same opportunities may not present as readily where adults are being cared for either by an individual or organisation.

Therefore, this limitation addresses an evident gap in the current criminal law.

Relationship between the limitation and its purpose (s 28 (2) (d))

Without this limitation, the offences would not be able to specifically criminalise abuse against people with a disability and vulnerable older people. Criminalising this abuse is

necessary in light of the prevalence of abuse (as outlined in the overview section). Moreover, the harms occasioned by abuse against the elderly and other vulnerable people are far reaching and have significant impacts on the victims. Criminalisation is important for the purposes of deterrence and ensuring carers are accountable for harms inflicted upon those being cared for.

Proportionality (s 28 (2) (e))

These restrictions are proportionate to the aim of keeping people safe and are the least restrictive means to achieve this aim possible in the circumstances. Other avenues for addressing abuse include regulatory, self-reporting and complaint mechanisms. Regulatory mechanisms for the provision of care to the elderly and those with a disability are primarily managed by the Commonwealth. These mechanisms have been shown to be inadequate by the Royal Commission into Aged Care Quality and Safety (Aged Care Royal Commission).⁹ It is not within the legislative jurisdiction of the ACT to change those mechanisms. With regard to self-reporting and complaint mechanisms, while these can be effective in many instances, the law should also offer accountability avenues that are not reliant on voluntary action by a victim or on the chance that a person known to the victim will take action on their behalf. Criminalising the abuse provides a mechanism for the State to take action against abuse of its own initiative, where that abuse reaches a criminal threshold. This is proportionate given the seriousness of the abuse and its far-reaching impacts.

Other rights engaged and limited

Section 21 – Right to a fair trial; and Section 22 – Presumption of innocence

Sections 21 and 22 are closely connected. Section 21 provides a right to a fair trial broadly, in which criminal charges are decided by a competent, independent and impartial Court or tribunal after a fair and public hearing. Section 22 provides that anyone charged with a criminal offence is entitled to a number of minimum guarantees.¹⁰ These rights are engaged by placing a legal burden on the defendant to establish defences under section 36A(3) and 36C(3). The **purpose of the limitation** is to ensure those perpetrating abuse cannot escape liability simply by making unfounded claims about their circumstances. The **nature and extent of the limitation** is to place an onus on the defendant to establish that they have met the defences. The Bill places the **least restrictive limitation** on this right as the information required to prove or disprove the defences can only be known by the defendant.

⁹ Royal Commission into Aged Care Quality and Safety, *Interim Report* (31 October 2019).

¹⁰ UN Human Rights Committee General Comment 13, para. 7; *Alenet de Ribemont v. France*, 1995

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Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the Crimes (Offences Against Vulnerable People) Amendment Bill 2020. In my opinion, having regard to the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Gordon Ramsay MLA
Attorney-General

Crimes (Offences Against Vulnerable People) Amendment Bill 2020

Detail

Part 1 – Preliminary

Clause 1 — Name of Act

This is a technical clause that names the short title of the Act. The name of the Act will be the *Crimes (Offences Against Vulnerable People) Legislation Act 2020*.

Clause 2 — Commencement

This clause provides that Part 2 of the Bill (the amendments to the Crimes Act) will commence three months after the Act's notification day, and the remainder of the Bill will commence the day after notification.

This means that there will be a delayed commencement for the criminal offences to allow relevant training and processes to be established. The sentencing amendments will commence immediately.

Clause 3 — Legislation Amended

This clause lists the legislation amended by this Bill. This Bill will amend the *Crimes Act 1900* and the *Crimes (Sentencing) Act 2005*.

Part 2 – Crimes Act 1900

Part 2 creates three new offences intended to protect vulnerable people, who are reliant on the care of others, from abuse, and to provide appropriate penalties where abuse occurs.

For the purpose of all offences a **vulnerable person** is a person who has a disability (as defined under the *Disability Services Act 1991*), or a person who is 60 years of age or older and either: has a disorder, illness or disease that affects the person's thought processes, perception of reality, emotions or judgement or otherwise results in disturbed behaviour; or has an intellectual, psychiatric, sensory or physical impairment and that impairment results in a substantially reduced capacity of the person for communication, learning or mobility; or for any other reason is socially isolated or unable to participate in the life of the person's community.

The age of 60 is consistent with the eligibility for an ACT Seniors Card from July 2020. The generally accepted age for an older person is 65 in a range of other contexts (such as for the Australian Bureau of Statistics). However, 65 does not account for the fact that Aboriginal and Torres Strait Islander people have a lower life expectancy than the general population. In relation to the age limit, the Australian Law Reform Commission Report 131 *Elder Abuse—A National Legal Response* (ALRC Report) notes that Aboriginal and Torres Strait Islander people aged 50 and above tend to have poorer health, higher levels of socioeconomic

disadvantage and lower life expectancy than the broader Australian population¹¹. At the same time, the age of 50 for Aboriginal and Torres Strait Islander people is based on nation-wide aggregated statistics, including regional and remote areas, and is not necessarily representative of every Aboriginal and Torres Strait Islander population.

Selecting the age of 60 for the purposes of defining a vulnerable older person, recognises that there are some groups that may experience age-related vulnerabilities earlier, while retaining an age that is widely accepted to be appropriate for application to the broad community.

The application of the definition to a person 60 or older who is additionally “socially isolated or unable to participate in the life of the person’s community” reflects comments in the ALRC Report which note that Culturally and Linguistically Diverse (CALD) people, lesbian, gay, bisexual, transgender and intersex (LGBTI) people, people in a family violence context or people with a cognitive impairment are likely to have increased social isolation as they age which increases their vulnerability to abuse.¹²

The three new offences are directed at:

- criminalising abusive conduct by a person who is responsible for the care of a vulnerable person, which conduct is directed at the vulnerable person and results in their harm or a financial benefit to the abuser or someone associated with them;
- criminalises failure of a person in authority, in an institution, who fails to protect a vulnerable person in the institution’s care against a substantial risk of a serious offence;
- criminalising neglect of a vulnerable person by a person who is responsible for their care.

All offences apply to both individuals and corporate entities (section 161 of the *Legislation Act 2003*).

All three offences recognise that care of vulnerable people can occur in both a private setting, for example family members providing care at home, and in an institutional setting, with employees responsible for care in accordance with the dictates of the entity employing them. As a focus of these offences is to ensure that, where care is provided in an institutional setting, there is appropriate attribution of liability for abuse, failure to protect or neglect of a vulnerable person, the concept of a **relevant institution** is common to all three offences.

Relevant institution is defined in section 36A(5) to mean an entity, other than an individual, or a group of entities that operates facilities for, engages in activities with, or provides services to, vulnerable people under the entity’s care, supervision or control.

¹¹ Australian Law Reform Commission, 2017, Australian Law Reform Commission Report 131 *Elder Abuse—A National Legal Response*, p34.

¹² *Ibid*, p 46-47.

Clause 4 — Offences against Act—application of Criminal Code etc

This clause amends the note to section 7A of the Crimes Act, to list the three new offences created by the Bill as offences to which the Criminal Code applies.

Clause 5 – New sections 36A to 36C

New section 36A – Abuse of vulnerable person

The Aged Care Royal Commission heard countless case studies of the abuse of vulnerable older people, and saw video and photographic evidence of such abuse.¹³ It reported a high incidence of assaults by staff on residents, and the common use of physical restraint on residents, not so much for their safety or wellbeing, but to make them easier to manage. The Aged Care Royal Commission also highlighted the widespread practice of overprescribing drugs to sedate residents, rendering them drowsy and unresponsive to visiting family and friends.¹⁴

In the non-institutional context, the ALRC Report heard many case studies of abuse by family members who are carers.¹⁵ For example, the ALRC reported the following case study from the ACT:

Marina is an 80-year old woman from a European background. She came to Australia with her husband in the early 1950s and they prospered. Marina worked in the business and was a driving force behind its success. When her husband died Marina was left reasonably financially secure and owned her own house in an expensive part of Canberra. Marina has a daughter living abroad and a son living in Canberra. Marina has no cognitive impairment and manages her own affairs; however in late 2011 Marina had a bad fall and broke her leg and her arm resulting in long stays in hospital. Marina's son has four daughters who are now getting too old to share bedrooms and was looking to upsize his house and move to a 'better' area but needed additional finance to purchase such a property.

Marina's recovery period was going to be long but she started to progress well physically. Being in hospital with the only visitors being her son and occasionally daughter in law and grandchildren she became isolated and started to lose confidence in her ability to live alone. When her son made her an offer to live with them, sell her house and invest in their new property under a granny flat arrangement with Centrelink, it seemed tempting. Marina had been groomed by her son over a long period of time to believe she could not manage living alone any longer. A property was found by her son with a flat attached, Marina was taken from hospital to look at the flat and returned to the hospital all within the space of a few hours. She had no

¹³ Royal Commission into Aged Care Quality and Safety, *Interim Report: Neglect, Volume 1* (31 October 2019), pp. 4-5

¹⁴ *Ibid*, p 6

¹⁵ Australian Law Reform Commission, 2017, Australian Law Reform Commission Report 131 *Elder Abuse—A National Legal Response*, p.26.

opportunity to discuss a major financial decision or the suitability of the property with an independent person. Based on promises of the support the family would give her and her now complete loss of confidence in her ability to care for herself Marina agreed and invested in the son's new property.

The arrangement was doomed from the start, the promised care and support never eventuated and the flat could not have been more unsuitable. By the time ADACAS [ACT Disability, Aged and Carers Advocacy Service] became involved Marina was locked in to the Centrelink granny flat arrangement for five years and a large sum of money was paid to the son to secure the granny flat interest. ... The ADACAS advocate was able to support Marina and help her establish a new independent living arrangement. It could so easily have been a disaster for this client locked into isolation and despair for the last years of her life. This case highlights the hidden nature of financial abuse of older persons.¹⁶

As discussed above, such cases are common, with the WHO reporting that in 2018 around one in six people aged 60 years and older experienced some form of abuse in community settings during the past year, and reporting that people with a disability similarly experienced higher rates of abuse than the rest of the population.¹⁷ With an ageing population, it is likely that prevalence in Australia will only increase unless states take proactive action to prevent abuse against vulnerable people. In view of this, it is essential that the criminal law address abuse against vulnerable people.

It is important to note that abuse against vulnerable people is complex and can take many forms. This offence presents a nuanced way of capturing the breadth of abusive conduct, while still recognising the variety of circumstances in which those responsible for the care of vulnerable people may need to engage in conduct that is limiting or restrictive for the benefit of the person.

New section 36A (1) creates an offence for abusing a vulnerable person. A person commits an offence if they are responsible for providing care to a vulnerable person, they engage in **abusive conduct** towards the vulnerable person, that conduct results in **harm** to the vulnerable person or a financial benefit for the abuser or someone associated with the abuser, and the abuser is reckless about causing the harm or obtaining the benefit.

In order to prove this offence, it must be established that the **abusive conduct** (as defined in section 36A(5)) was engaged in and that harm (be it physical or psychological or financial detriment) or financial benefit for the abuser (or an associate) was as a result of the abusive conduct. Abusive conduct includes acts or omissions directed towards a vulnerable person but does not include conduct that is reasonably necessary for the safe and effective care of the vulnerable person or for the safety of another person.

¹⁶ Ibid, p. 229.

¹⁷ World Health Organisation, 2018, 'Elder Abuse,' available online at: <https://www.who.int/news-room/fact-sheets/detail/elder-abuse>.

The maximum penalty for this offence is tiered. If the person's conduct results in harm, other than serious harm (as defined in section 36A(5)), or a financial benefit the maximum penalty is imprisonment for up to 3 years. If the person's conduct results in serious harm, being harm that endangers or is likely to endanger human life, or is or likely to be significant and longstanding, the maximum penalty is imprisonment for up to 5 years.

This offence can apply to individuals as well as corporations. Under section 161(3) of the Legislation Act the maximum penalty for a corporation for an offence carrying a maximum term of imprisonment of 3 years or 5 years is 500 penalty units.

New section 36A (2) outlines the circumstances when a defendant is responsible for providing care to a vulnerable person. It is intended to cover situations where a defendant has control over any aspect of the care needed by the vulnerable person and is also intended to apply irrespective of the length of that care.

New section 36A (3) creates defences to ensure that there are protections to exculpate a carer in appropriate circumstances.

The defences provided apply where the defendant can prove that:

- the defendant's conduct was reasonable in all the circumstances; or
- where a defendant is associated (eg as a manager, or employee) with a relevant institution, the relevant conduct:
 - was in accordance with that institution's policies and procedures,
 - was at the direction of a person in authority at the institution, or
 - happened as a result of circumstances that were beyond the defendant's control.

The defence (section 36A(3)(a)), that the conduct was reasonable in all the circumstances, is intended to capture circumstances such as where a person (the carer) may be caring for a vulnerable person in good faith and to the best of their ability, but limitations relating to the carer's financial or other resources, or access to support, result in unintended harm to the vulnerable person. It recognises that there may be circumstances where individuals who assume caring roles may be ill-equipped and unsupported (and themselves vulnerable), with limited capacity or opportunity to address deficiencies in the level of care they are capable of providing.

The defences in section 36A(3)(b) are intended to ensure that workers in an institutional context are not liable where they are either following procedures, direction or practice, or may not have sufficient resources or time to adequately care for the vulnerable person. In those circumstances, the policy intent is to ensure that the 'person' held accountable for the conduct causing the harm, is the institutional entity (eg a corporation or partnership) responsible for providing the care, rather than the manager, employee or volunteer of the institution. The policy intent of this provision is to ensure that workers should not be held

accountable for the result of their actions if these are beyond their ability to control. For example, while a residential aged care institution's policies or procedures may theoretically require certain levels of care to be provided by staff, rostering and staffing levels may mean it is physically impossible for the staff to comply with those requirements. In those circumstances, the staff member should not be held accountable for the results of actions and decisions outside their control. The appropriate entity to hold accountable is the corporation.

Due to the defences requiring information that only the defendant can know, especially in relation to their circumstances surrounding the provision of care to the vulnerable person, or circumstances beyond what they can control, the defendant has a legal burden in relation to the defences.

New section 36A (4) sets out the circumstances in which a defendant is *associated* with a relevant institution. This includes being an owner, manager, employee or volunteer.

New section 36A(5) includes definitions of key terms for this provision.

Abusive conduct is conduct that is an act or omission that is directed at the vulnerable person. It includes conduct which is violent, threatening, intimidating or sexually inappropriate. This is intended to cover more overt circumstances of abusive conduct.

It also includes conduct directed at a vulnerable person or someone known to the vulnerable person, that is not reasonably necessary for the safe and effective care of the vulnerable person, or for the safety of another person who is present or nearby and is likely to:

- make the vulnerable person dependent on or subordinate to the abusive person; or
- isolate the vulnerable person from friends or family; or
- limit the vulnerable person's access to services needed by the vulnerable person; or
- deprive or restrict the vulnerable person's freedom of action; or
- frighten, humiliate, degrade or punish the vulnerable person.

It is recognised that there are some circumstances where, in caring for vulnerable adults, legitimate caring and therapeutic measures may result in some of these outcomes. For example, a vulnerable person may find certain clinical or medical procedures frightening. Travel for care or treatment may require separation from friends or family. A vulnerable person may require physical separation from others in care or carers, for their safety or that of others. For that reason, only where conduct likely to have the results in 36A(5)(b) is 'not reasonably necessary for the safe and effective care of the vulnerable person or for the safety of another person who is present or nearby' will it amount to abusive conduct. This will support carers to provide adequate care in a safe and reasonable way.

The definition of abusive conduct is to capture abuse that is subtle, and the most common, especially in relation to elder abuse. In this regard, the ALRC Report provides useful guidance on the types of abuse that older people suffer:¹⁸

- *Psychological or emotional abuse appears to be one of the most common types of elder abuse, and includes verbal abuse, name-calling, bullying and harassment. Other examples of psychological abuse include: treating an older person like a child; repeatedly telling them they have dementia; threatening to withdraw affection; and threatening to put them in a nursing home. Stopping an older person from seeing family and friends may also be psychological abuse or ‘social abuse’*
- *Financial abuse is another common type of elder abuse, and includes: incurring bills for which an older person is responsible; stealing money or goods; and abusing power of attorney arrangements. Other behaviours that may, in some circumstances, be financial abuse include: refusing to repay a loan; living with someone without helping to pay for expenses; failing to care for someone after agreeing to do so in exchange for money or property; and forcing someone to sign a will, contract or power of attorney document.*
- *Physical abuse might include pushing, shoving and rough handling. Australian crime statistics suggest that older people are less likely to be murdered or physically assaulted than younger people, but some types of physical abuse of older people may not be caught by these statistics—for example, the improper use of ‘restrictive practices’ in hospitals and residential care facilities.*
- *Sexual abuse includes rape and other unwanted sexual contact. It may also include inappropriate touching and the use of sexually offensive language.*

Serious harm imports the same definition of ‘serious harm’ as the Criminal Code 2002 to ensure consistency in legislation.

New section 36B – Failure to protect vulnerable person from criminal offence

The Aged Care Royal Commission has highlighted institutional failure to protect residents and take responsibility for the care of the most vulnerable people in our community. The Aged Care Royal Commission noted:

People become unwilling to complain for fear that care will become worse, as they or their family member will be labelled as ‘difficult’ by the provider. Several submissions have highlighted occasions where the treatment of the older person deteriorated after complaints from family members—with neglect transforming into the withholding of care. It is disturbing that the aged care sector is not sufficiently mature or professional to listen to feedback from those who use and observe its

¹⁸ Australian Law Reform Commission, 2017, Australian Law Reform Commission Report 131 *Elder Abuse—A National Legal Response*, p. 19.

services at close hand, particularly when the regulatory system appears so distant and ineffectual.

Some providers of aged care have appeared before the Royal Commission to be defensive and occasionally belligerent in their ignorance of what is happening in the facilities for which they are responsible. On many occasions when case studies were presented in hearings, providers were reluctant to take responsibility for poor care on their watch. Some providers have shown an unwillingness to accept that they could have, and should have, done better. Others have, rightly, accepted this. Those providers who have demonstrated a commitment to building relationships with people receiving care and their families stood out in sharp relief.¹⁹

Institutions have a responsibility to protect residents in their care from harm. This was accepted and acted upon as part of the Royal Commission into Institutional Responses to Child Sexual Abuse and it should be no different with vulnerable adults.

The offence in new section 36B is based on the existing offence at section 66A of the Crimes Act for institutional failures to protect against child sexual abuse.

New section 36B (1) sets out the circumstances when a person in authority in a relevant institution commits an offence for failing to protect a vulnerable person.

The offence provides a person in authority in an institution commits an offence where they fail to act, even though they are aware of a substantial risk that a **serious offence** will be committed against a vulnerable person, in the institution's care, supervision or control, by another person associated with the institution, . The term 'substantial risk' has been well established as the basis for determining recklessness. It is appropriate that the level of risk is assessed according to the circumstances of each case. It is likely that the risk would be assessed as a 'substantial risk' in circumstances where there were either multiple reports, official warnings, or admissions of the conduct of concern irrespective of legal action. It may not be reasonable to infer substantial risk from an isolated and unsubstantiated allegation that is denied. However, should a complaint not be properly investigated and a second complaint made, a level of risk may then be inferred.

In order to prove the offence, it must also be established that the person knew the risk existed, that their position allowed them to reduce or remove the risk and they recklessly or negligently failed to reduce or remove the risk. There is no requirement to prove a risk exists in relation to a specific vulnerable person. It is important to note, that in particular industries there are circumstances outside a manager's control which involve triaging risk. The power or authority to triage risk should not be considered to be the same as removing a risk. In circumstances where a person is triaging risks, and while reducing the likelihood of one risk another risk arises it is unlikely that the person triaging the risk has the relevant authority within the institution to be prosecuted. This would be especially the case if the person

¹⁹ Royal Commission into Aged Care Quality and Safety, *Interim Report: Neglect, Volume 1* (31 October 2019), p. 8.

triaging risk is required to do so as part of their employment and has no option to remove those risks.

The intention of this offence is to appropriately sanction instances where people in positions of authority in relevant institutions fail to act on a known substantial risk of vulnerable people being the victim of a serious crime by someone associated with the institution. Reporting the behaviour to police or through reportable conduct legislation does not necessarily reduce or remove such a risk, and failure to take other actions open to the person in authority to reduce or remove the risk (eg changes to staffing arrangements) would be a factor in assessing liability for this offence.

In a similar way to the new offence at s36A, this offence is not intended to disadvantage or criminalise people working in institutions who are doing their best within the resources available. This will support workers in the sector, as those in positions of authority in institutions will be held accountable for not acting on relevant risks. This should encourage adequate support for staff to allow staff to look after the most vulnerable in our community.

The offence is punishable by imprisonment for five years. This offence can apply to corporations as well as individuals. Under section 161(3) of the Legislation Act the maximum penalty for a corporation for an offence carrying a maximum term of imprisonment of 5 years is 500 penalty units.

New section 36B (2)(a) outlines the required nexus to the ACT. Given that some institutions share staffing resources under a broader management group, it is important that the legislation allows flexibility for transient arrangements. This means that the offence can be charged if the vulnerable person was in the ACT at any time the person in authority knew about the risk, or that the person in authority was in a relevant institution in the ACT at the time they knew about the risk. New section 36B(2)(b) makes clear that it is not necessary to prove that a criminal offence (against the vulnerable person) has been committed.

New section 36B (3) provides key definitions necessary for the section.

New section 36C – Neglect of vulnerable person

The Aged Care Royal Commission has shone a light on the neglect of some of the most vulnerable people in our community, and the need for action:

Older people and family members have shown great generosity and courage in recounting painful events that have shocked and dismayed all who have heard about them. We have been told about people who have walked into an aged care residence, frail but in relatively good spirits and mentally alert, only to die a few months later after suffering from falls, serious pressure injuries and significant pain and distress. We have seen images of people with maggots feeding in open sores...²⁰

²⁰ Ibid, pp. 4-5

The Aged Care Royal Commission highlighted a number of neglectful practices which were found to be common, including the following:²¹

- inadequate prevention and management of wounds, sometimes leading to septicæmia and death
- poor continence management—many aged care residences don't encourage toilet use or strictly ration continence pads, often leaving distressed residents sitting or lying in urine or faeces
- dreadful food, nutrition and hydration, and insufficient attention to oral health, leading to widespread malnutrition, excruciating dental and other pain, and secondary conditions

In providing a picture of the widespread nature of neglect, the Aged Care Royal Commission pointed to research by the Dietitians Association of Australia which estimated that 22-50 percent of people in residential aged care are malnourished.²² In addition, they pointed to research showing that pressure injuries (also called bed sores or pressure ulcers) occur in a third of the most frail aged care residents at the end of their lives.²³ These injuries are highly preventable, such as by changing position every half hour.²⁴

While the neglect highlighted by the Aged Care Royal Commission focused on institutional settings, neglect can also be perpetrated by family members, as was highlighted by the ALRC Report.²⁵

The ALRC Report further highlighted that the ACT was the only Australian jurisdiction that did not have a neglect offence which applied to older people.²⁶

New section 36C (1) creates an offence for neglecting a vulnerable person. A person commits an offence if the person is responsible for providing care to a vulnerable person and the person recklessly or negligently fails to provide the vulnerable person with the necessities of life that are a necessary part of the care the person is responsible for providing. The failure must have caused serious harm to the vulnerable person in order for the offence to have been committed.

New subsection 36C(1)(b) reflects that a defendant only commits an offence under this section if their failure to provide the necessities of life was within the scope of the care which they exercised control over.

²¹ Ibid, p. 6.

²² Ibid, p. 7.

²³ Ibid.

²⁴ SA Health, Government of South Australia, 2014, 'Consumer Fact Sheet 1: Preventing Pressure Injuries,' available online at:

<https://www.sahealth.sa.gov.au/wps/wcm/connect/58cc1380420ca0749a0cbff8b1e08c6d/13132.1-+Pressure+Injury+FS+%28v4%29Oct2014webSecure.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPAC E-58cc1380420ca0749a0cbff8b1e08c6d-mMab17j>.

²⁵ Australian Law Reform Commission, 2017, Australian Law Reform Commission Report 131 *Elder Abuse—A National Legal Response*, pp. 20-21.

²⁶ Ibid, p. 367.

New section 36C (2) outlines the circumstances when a defendant is responsible for providing care to a vulnerable person. This provision is identical in nature to 36A (2). It includes situations where a defendant has control over any aspect of the care needed by the vulnerable person and applies irrespective of the length of that care.

New Section 36C (3) sets out the defences to the offence. The defences are identical in nature to those in section 36A (3).

The defence (section 36C(3)(a)), that the conduct was reasonable in all the circumstances, is intended to capture circumstances such as where a person (the carer) may be caring for a vulnerable person in good faith and to the best of their ability, but limitations relating to the carer's financial or other resources or access to support result in unintended harm to the vulnerable person.

The defence at section 36C(3)(b) is intended to ensure that workers in an institutional context are not liable where they are either following procedures, direction or practice, or may not have sufficient resources or time to adequately care for the vulnerable person.

New section 36C (4) mirrors section 36A (4) and sets out the circumstances in which a defendant is *associated* with a relevant institution. This includes being an owner, manager, employee or volunteer.

New section 36C (5) provides relevant definitions for this section.

Necessities of life is defined by section 36C (5) to include adequate food, clothing, shelter, hygiene and health care. This is consistent with the ALRC Report which suggested necessities of life should include adequate food, clothing, shelter and medical care.²⁷ Although hygiene was not included, it has been included in the definition in view of evidence by the Aged Care Royal Commission about the serious harms that can be caused by poor hygiene practices.

The terms *relevant institution*, *serious harm* and *vulnerable person* are defined with reference to the definitions at section 36A.

Clause 6 – New Section 442C

New section 442C requires the Minister to review the operation of sections 36A (Abuse of vulnerable person), 36B (Failure to protect vulnerable person from criminal offence), and 36C (Neglect of vulnerable person) no later than 2 years after the day they commence.

The Minister must present a report of the review to the Legislative Assembly within 12 months after the review is started, and the provision expires 3 years after the day it commences.

²⁷ Ibid.

Part 3 – Crimes (Sentencing) Act 2005

Clause 7 – Sentencing—relevant considerations

In some circumstances, existing offences may be used to prosecute the abuse and neglect of vulnerable people rather than the new offences introduced by this Bill. In such circumstances, it is relevant for the sentencing court to consider the vulnerability of the victim.

Therefore, new section 33(1)(gb) inserts a new matter for the court to consider upon sentencing an offender. Where the victim is a vulnerable person, where relevant the court must consider whether the offender knew, or ought reasonably to have known, that the victim was a vulnerable person or that the victim was a vulnerable person and the extent of that vulnerability. The Court must also consider the loss or harm to the vulnerable person.

Clause 8 – Section 33(5), new definition of *vulnerable person*

New section 33(5) inserts a new definition of vulnerable person. This definition is the same as that used for new sections 36A-36C of the *Crimes Act 1900* as outlined above.