



Mrs Giulia Jones MLA

Chair, Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)

ACT Legislative Assembly

[By email: Giulia.Jones@parliament.act.gov.au]

CC: Mr Andrew Snedden, Committee Secretary

[By email: scrutiny@parliament.act.gov.au]

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Dear Mrs Jones

Royal Commission Criminal Justice Legislation Amendment Bill 2020

I am writing with a view to contributing to the Committee's examination of the Royal Commission Criminal Justice Legislation Amendment Bill 2020, as introduced in the ACT Legislative Assembly on 2 July 2020.

My comments are directed at the amendments to the 'maintaining a sexual relationship' offence in s 56 of the *Crimes Act 1900*. The amendments aim to remedy various concerns about the provision, which were identified by the ACT Court of Appeal (ACTCA) in the recent case of *KN v The Queen* [2019] ACTCA 37. Specifically, the amendments seek to clarify that it is the relationship that is the *actus reus* of the s 56 offence, not the individual sexual act. The operation of s 56 will also be subject to additional safeguards, such as protection against cumulative sentences (new s 56(7)(b)) and the requirement to obtain the DPP's consent to start a proceeding for a s 56 offence (new s 56(10)).

While these are significant improvements, I am however concerned that it will remain possible to include the 'maintaining a sexual relationship' offence (s 56) and a course of conduct charge (s 66B) in the same indictment. The maintaining a sexual relationship offence in s 56 is directed at the unlawful sexual relationship, rather than individual sexual acts. The course of conduct offence in s 66B is intended to address circumstances where there is an absence of specificity but there is a course of sexual conduct that is persistent or repetitive. The combination of these charges in the same indictment has the potential to be unfair to the defendant and may also give rise to concerns about double jeopardy because they both provide different mechanisms to deal with similar problems.

I note that when the course of conduct charge was introduced in 2018 by the *Royal Commission Criminal Justice Legislation Amendment Act 2018*, the accompanying explanatory statement (at pg 21) justified this approach by stating that 'any potential issues of double jeopardy that might arise from having both a maintaining offence and a course of conduct offence on the same indictment' would be addressed by the existence of s 56(9). However, as pointed out by the ACTCA in the *KN*

matter, s 56(9) (and s 56(8)) have in fact displaced the principle of double jeopardy. The explanatory statement to the current amendments, however, is silent about this issue.

In my view, to avoid any risk of inconsistency with the principle against double jeopardy and the right to a fair trial, it would be preferable to preclude the use of a course of conduct charge and the 'maintaining a sexual relationship' offence in the same indictment. At the very least, in light of the previous statements made in the 2018 explanatory statement, it would appear prudent for the current explanatory statement to be amended to provide an explanation as to why this approach remains reasonable.

Please don't hesitate to let me know if I can provide further information about these matters should that be of assistance to the Committee. For transparency, I wish to also note that I have provided similar advice about these matters to Mr Jeremy Hanson MLA, who sought my views about this bill.

Yours sincerely,



Dr Helen Watchirs OAM
President and Human Rights Commissioner