

INFORMATION ABOUT NEW OFFENCES

CRIMES (OFFENCES AGAINST VULNERABLE PEOPLE) LEG AMDT BILL 2020

NEW OFFENCES

Legislation has been introduced for three new offences in the ACT to provide additional protections for vulnerable adults in the ACT. Abusing, neglecting and failing to protect a vulnerable person will be offences in the ACT. The new offences have been proposed to protect adults with a disability and older, vulnerable members of our community.

Do these replace other offences?

No. This does not replace any other offence that could already be charged for criminal behaviours. The new offences create additional protections within the law for vulnerable adults.

The new offences complement existing criminal provisions as well as providing alternative charges.

The penalties for the offences reflect the seriousness of the new offences, relative to existing offences and the continuum of penalties for ACT offences.

Who is a 'vulnerable person'?

A vulnerable person has been defined to mean an adult who has a disability, or someone 60 or older to whom an additional element of vulnerability applies.

Those elements are:

- > a disorder, illness or disease that affects the person's thought processes, perception of reality, emotions or judgement or otherwise results in disturbed behaviour;
- > an intellectual, psychiatric, sensory or physical impairment which results in a substantially reduced capacity of the person for communication, learning or mobility; or

- > for any other reason the person is socially isolated or unable to participate in the life of the person's community

Why is the age limited to people over 60 years of age?

The age limit set was guided by research, including a 2018 World Health Organisation (WHO) report indicating that around one in six people aged 60 years and older experienced some form of abuse in community settings during the past year.¹ The Australian Law Reform Commission report into Elder Abuse² was also considered, including information about differences in life expectancy for Aboriginal and Torres Strait Islander people, relative to the broader Australian community.

It is commonly accepted and understood that, at 60 years of age, members of the community are able and entitled to be treated differently. This is the age at which members of the ACT community are characterised as seniors, and subject to differential treatment in a range of respects. The same age threshold for 'senior' status applies throughout Australia.

Who is an 'adult with disability' under this legislation?

A vulnerable person with a disability has been defined to mirror the provisions in the *Disability Services Act 1991*. This includes a person with an intellectual, psychiatric, sensory or physical impairment disability. The disability is permanent, or likely to become permanent and means the person has a "substantially reduced capacity" for communication, learning or mobility together with the need for continuing support services. A person with a disability that is chronic or episodic in nature will still be covered under this definition if the other criteria are met.

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

² Australian Law Reform Commission, 2017, Australian Law Reform Commission Report 131 *Elder Abuse— A National Legal Response*.

Why is the definition of 'vulnerable person' so broad?

The Government consulted in late 2019 on potential criminal laws to address elder abuse. Feedback on potential reforms included suggestions that protections could be extended to people with disabilities and not limited to older people.

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. There is widespread evidence that both the elderly, as well as people with disabilities, are disproportionately vulnerable to abuse.

Do the new laws apply to children?

The offences only apply to adults. There is a range of other existing criminal and non-criminal laws in place to protect children and target child abuse, including mandatory reporting laws and the offence of neglect of children.

The existing neglect offence relating to children (section 39 *Crimes Act 1900*) has lower maximum penalties than the new neglect of a vulnerable adult person offence. This is because of differences in the elements of the respective offences. In particular, the new offence is only established where there is a **failure to provide the necessities of life** and the neglect **causes serious harm** to a vulnerable person. The offence relating to children can occur where there is ill-treatment, abuse or parental neglect and irrespective of the level of harm caused.

New offence – Abuse of Vulnerable Person

This offence criminalises abusive conduct by a person who is responsible for the care of a vulnerable person. The conduct must result in harm to the vulnerable person or a financial benefit to the abuser or someone associated with them, and the abuser must be reckless as to causing the harm or obtaining the benefit.

Abusive conduct can be an act (doing something) or an omission (not doing something). There are two types of conduct that can be abusive. The first is conduct directed at the vulnerable person of a

violent, threatening, intimidating or sexually inappropriate nature.

The second is conduct directed at the vulnerable person or someone they know, and reasonably likely to have one of the following effects:

- > make the vulnerable person dependent on the abusive person
- > isolate the vulnerable person
- > limit the vulnerable person's access to services they need
- > deprive or restrict the vulnerable person's freedom of action
- > frighten, humiliate, degrade or punish the vulnerable person.

However, in relation to the second type of conduct, resulting in one of the above-listed effects, this conduct will only meet the definition of abusive conduct if it 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.

For example, conduct that deprives or restricts a vulnerable person's freedom of action might include restricting the person's ability to leave a care facility, and be reasonably necessary to ensure the person's safety.

There are two levels of penalty for the offence of abusing a vulnerable person:

- > if the harm caused is serious harm, the maximum penalty for this offence is up to five years imprisonment.
- > in all other circumstances where harm is caused, the maximum penalty for this offence is up to three years imprisonment.

Defences are available to ensure that people acting in good faith are not criminally liable for this offence.

New offence – Failure to protect vulnerable person from criminal offence

This offence criminalises the failure of a person in authority within an institution to protect the vulnerable people in their care.

For this offence to apply, a person in authority must be aware of a substantial risk of a serious offence being committed against a vulnerable person, by a person associated with the institution, and the person in authority must negligently or recklessly fail to act to protect the vulnerable person.

A person associated with an institution is a person who:

- > owns, manages or controls the institution;
- > is employed or engaged by the institution;
- > works as a volunteer for the institution;
- > engages in an activity with or for the institution; or
- > is in a position to influence the institution due to their authority in relation to the institution.

The offence can only apply to a person who, because of their position in the institution, can reduce or remove the risk to the vulnerable person.

The term 'a person in authority' is not defined and whether someone is a person in authority will depend on the circumstances of each case. Considerations likely to be relevant include the extent to which the person is empowered to take actions, including making decisions, affecting the way in which people in the care of the institution are exposed to, or protected from, the risk of a serious criminal offence.

The maximum penalty for this offence is up to five years imprisonment.

New offence – Neglect of Vulnerable Person

This offence criminalises the neglect of a vulnerable person by a person who is responsible for the vulnerable person's care.

A carer must, under the new laws, ensure that 'the necessities of life' are provided to the person they care for. This law applies to carers that fail to provide those necessities of life that are a necessary part of the care the person is responsible for providing.

The maximum penalty for this offence is up to five years imprisonment.

What defences are available?

There are a number of defences available for the new offences.

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 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 that apply to those providing care in an institution, 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. This is so that workers are not 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 in that situation is the institutional entity.
this holds institutions to account for understaffing

Which carers do the new offences apply to?

The offences of abusing a vulnerable person and neglect of a vulnerable person apply to a person who is responsible for providing care to a vulnerable person.

A person is responsible for providing care to a vulnerable person if they exercise control over any aspect of the care needed by the vulnerable person, regardless of whether the care is short-term or long-term care.

Carers to whom the new offences could apply include those providing care services for payment as well as those providing care under less formal arrangements, such as family members.

A person responsible for providing care to a vulnerable person can be either an individual or a corporate entity, such as an institution.

How do the new offences apply to institutions?

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 included in all three offences.

Relevant institution is defined 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.

This means that institutions as well as individual carers have a responsibility to protect vulnerable people in their care.

I work in an institution - how will the laws affect me?

Those responsible for the care of a vulnerable person, in an institutional setting, should be aware of the potential for the new laws to apply to them if they abuse or neglect a vulnerable person.

Those who are both responsible for the care of a vulnerable person and in a position of authority, in an institution, should be aware of the potential application of the new 'failure to protect' offence if they do not act where they are aware of the risk that a serious offence will be committed against a vulnerable person by someone associated with the institution.

For most carers working in an institution, their moral obligations are now reflected in the law and, for many, there would be no change to their day to day practices.

Carers who work in an institution have a legal defence available to them should they find themselves charged with either of the new offences - abuse of vulnerable person or neglect of vulnerable person.

This defence means that the carer working in an institution will not be found guilty of the offence if they are able to prove that:

- > their actions complied with the institution's policies and practices; or the direction of a person in authority in the institution; or
- > the harm to the vulnerable person happened as a result of circumstances beyond the carer's control.

The carer will, generally, be the best placed person to identify relevant circumstances which were beyond their control.

I am in a position of authority in an institution - how will the laws affect me?

Even if you are not directly responsible for the care of a vulnerable person, if you are in a position of

authority, in an institution, and you are aware there is a substantial risk that a serious offence will be committed, by someone associated with the institution, against a vulnerable person in the institution's care, you have a legal duty to act to remove or reduce the risk.

A serious offence is one which is punishable by imprisonment for five years or more, or an equivalent offence in another State or Territory. These include offences such as causing or threatening grievous bodily harm, wounding and theft.

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.

Considerations of whether a person might be in authority include the extent to which the person is empowered to take actions, including making decisions, affecting the way in which people in the care of the institution are exposed to, or protected from, the risk of a serious criminal offence.

Why focus on criminal offences to deal with abuse of vulnerable people?

Criminal offences and the threat of sanctions, including imprisonment, can influence the behaviour of carers to reduce the risk of abuse of vulnerable people. This is a protective effect of the existence of criminal offences.

Where abuse or neglect does occur, the availability of offences and penalties, enables appropriate sanctions to be imposed on offenders.

While pursuing criminal charges may not always be the preferred means of dealing with abusive behaviour directed at a vulnerable person, it is important that it is available as an option where the abusive behaviour warrants criminal charges.

Why are these laws needed?

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. The ACT is currently the only Australian jurisdiction without a neglect offence that applies to adult victims of neglect. Criminal offences with appropriate penalties send a strong message to the community that this type of behaviour will not be tolerated in the ACT.

What other protections are available for older Canberrans and those with a disability?

There are existing complaints mechanisms under the *Human Rights Commission Act 2005* for complaints to be made and considered, relating to services provided to people with a disability and their carers, and services provided to older people and their carers.

These will continue to be available and appropriate avenues to seek, through conciliation, to resolve failures of service providers to meet appropriate levels of service including where they are not meeting relevant standards.

Changes to the HRC Act have recently been made giving the Human Rights Commission a power to hear and handle complaints about treatment of vulnerable people (defined in the same way as for the purposes of the three new offence provisions).

This will enable the HRC to consider and take further actions about allegations of abuse, neglect or exploitation of vulnerable people.

There are community led organisations that advocate and assist older Canberrans. You can find out more about advocacy services on the Community Services Website

<https://www.communityservices.act.gov.au/quality-complaints-and-regulation/advocacy>.

Towards Disability Justice for the ACT³ notes a number of protections available for Canberrans with a disability, including measures that have already been implemented to support people with disability in the ACT.

There are also community led organisations that advocate and assist Canberrans with a disability. You can find out more about advocacy services on the Community Services Website

<https://www.communityservices.act.gov.au/quality-complaints-and-regulation/advocacy>.

Will the Government consider other measures to protect vulnerable people?

The Government is pursuing reforms to Power of Attorney laws, to be progressed as soon as possible, recognising the significance of financial abuse of vulnerable people.

Do these laws introduce new mandatory reporting obligations?

No. The new laws do not change existing requirements for mandatory reporting.

³ For more information, see pages 71-75 of https://www.communityservices.act.gov.au/__data/assets/pdf_file/0005/1337783/Towards-Disability-Justice-

[for-the-ACT-Summary-of-research-and-consultations-2019.pdf](#)