



5 February 2020

PROPOSAL PAPER ON RENAMING SEXUAL OFFENCES

INTRODUCTION

Thank you for the opportunity to comment on the Proposal Paper issued by the Department of Justice concerning *Renaming sexual offences*.

The Tasmanian Bar Inc and its members have no opposition to the proposal that certain provisions in the *Criminal Code Act 1924* be modernised to reflect contemporary community standards and expectations. However, it is our view that this objective should not take priority over the objective of ensuring clarity and purposive interpretation of the provisions of the Code which are the subject of proposed change. In particular the Bar opposes changes which cause confusion, conflict and/or inconsistency between the name of a particular crime and its elements which have well-established and understood meanings.

SPECIFIC RESPONSE TO PROPOSED CHANGES

Chapter XIV – Crimes Against Morality

It is proposed to change the title to the chapter from ‘Crimes Against Morality’ to ‘Sexual Crimes’ or ‘Sexual Offences’. We support the change to “*Sexual Crimes*”.

Section 124 – Sexual Intercourse With Young Person

The proposed change to the title of this section is opposed. In our view changing the terminology to ‘child sexual abuse’ is misleading and suggests a lesser form of conduct than that required to constitute the crime. It is our view that the title of this section ought to be amended to “*Unlawful sexual intercourse with a young person*”.

It is said in the Proposal Paper that use of the term ‘child sexual abuse’ would be consistent with terminology of the Royal Commission. Whilst that might be the case, the Royal Commission dealt with a broader range of conduct than is contemplated by the elements of the crime in s 124 of the *Criminal Code*. Amending the title to s 124 to ‘child sexual abuse’ or ‘sexual abuse of a child or young person’ risks reducing the perceived gravity of the crime contemplated by this section of the Code. The term “sexual intercourse” is defined in the code and requires an act of penetration of the mouth, anus or vagina. The term child sexual abuse can cover crimes that do not require proof of penetration. It is important, in our view, that the penetrative aspect of the offending be retained in the title to avoid the risk of inadvertently making its title reflective of less serious offending against children.

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In summary, we oppose the proposed change and instead support amendment to the title of s 124 to *“Unlawful sexual intercourse with a young person”*. We note that other jurisdictions have retained similar terminology or utilised the term “sexual penetration” presumably to retain the distinction referred to above.

Section 125 – Person Permitting Unlawful Sexual Intercourse With Young Person on Premises

For the reasons articulated with respect to s 124 we oppose the substitution of ‘child sexual abuse’ for ‘sexual intercourse’. The key element of the crime in s 124 is permitting unlawful sexual intercourse and the title of the section should reflect the elements of the crime. The Bar submits that there should be no change to the title of s 125.

Section 125A – Maintaining A Sexual Relationship With Young Person

The Bar agrees that the terminology of this crime is inappropriate and ought to be changed. However, because we do not support the terminology ‘sexual abuse’ in the relevant sections discussed in the Proposal Paper, we propose that s 125A should be amended to *“Persistent unlawful sexual acts involving a child”*.

The Bar agrees that the term “maintaining a sexual relationship with a young person” is inappropriate and should be amended. We would prefer the use of the title “Persistent sexual abuse of a child”. It is noted that this is consistent with the gravity of the crime and reflects the variety of offending that can constitute the offence. If, however, there is serious intent to properly reflect the seriousness of the offending in the title, it is our view that s 125A(2) should be amended to remove reference to maintaining a sexual relationship and substitute the words “a person who persistently sexually abuses a child (or young person) under the age of 17” etc. Amendment ought also be made to s 125A(6B) by substituting the phrase “sexual relationship maintained” with “persistent sexual abuse”. There would also need to be corresponding changes in the alternative verdict provisions.

Section 125B – Indecent Act With Young Person

The Bar opposes any amendment to the title of this section as proposed in the Proposal Paper. The terms ‘indecent’ and ‘indecent act’ are terms which are defined by the Code itself and have been frequently interpreted by the courts. The meaning of the term is well understood and is specific and clear. Abandoning use of the terminology ‘indecent’ or ‘indecent act’ will have the tendency to cause confusion and uncertainty in relation to the law which is contrary to the fair administration of justice. It is notable that in most other jurisdictions the reference to ‘indecent’ is maintained and it ought to be maintained in Tasmania.

Section 125C – Procuring Unlawful Sexual Intercourse With Person Under 17 Years

For similar reasons to those advanced previously, the amendment to the title of this section is opposed.

Section 125D – Communications With Intent To Procure Person Under 17 Years, &C.

The title of this section does not succeed in capturing the gamut of offending with which it deals. It may be worthwhile considering a general title such as “Grooming, procuring, and indecent communication with children”.

Section 126 – Sexual Intercourse With Person With Mental Impairment

The Bar agrees that it is necessary to make it clear that not all sexual intercourse with a person with a mental impairment constitutes a crime. If terminology can be arrived at that reflects absence of capacity to consent as key, we would welcome that change. A suggestion is “*Unlawful sexual intercourse with a person unable to give lawful consent due to mental impairment*”.

Section 127 – Indecent Assault

The Bar opposes amendment to the title to this section for similar reasons expressed with reference to Section 125B above.

Section 129 – Procuring By Threats, Fraud, Or Drugs

The Bar agrees that an amendment is appropriate to the title to this section but submits that the amendment to the title should reflect the elements of the crime, particularly the requirement of proof of penetration. Accordingly we propose that the title be amended to “*Procuring a person for sexual intercourse by threats, fraud, or drugs*”.

Section 137 – Indecency

Amendment to the title of this section is opposed for the reasons articulated in respect of the proposal concerning s 125B above.

Section 138 – Obscene Publications

The Bar submits that removal of the term “publications” may be appropriate as the crime now only encompasses the public exhibition of disgusting objects or indecent shows. Although the terminology ‘obscene’ may not be frequently used, it is reflective of the terminology used in s 138. It may be appropriate to revisit the necessity of such a crime in light of the offences provided for under the *Classifications (Films, Publications and Games) Enforcement Act 1995*. The retention of the disgusting objects and indecent shows provision is unlikely to capture material of an unlawful sexual nature. We expect it is unlikely that the section will be utilised, but fear that its presence in the *Criminal Code* and the threat of its use may constitute, for example, artistic censorship.

PROPOSAL TO RELOCATE CRIME

Section 139 – Misconduct in respect of human remains

The Bar agrees that the relocation of Section 139 is appropriate and supports it being removed from Chapter XIV of the *Criminal Code*. It is noted that a new chapter will be introduced for the purpose of the relocation.



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