THE LAW SOCIETY OF TASMANIA

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Dear Madam

***Family Violence Reform Bill* 2018**

Thank you for your letter of 15 August 2018 asking for comment on the draft Bill.

This has now been considered by the Society's Criminal Law Committee. The Society wishes to record that for the reasons set out below, it supports the amendments to section 125A of the Code and supports the amendments to the *Evidence (Children and Special Witnesses Act)*. It opposes introducing to the Code the new offence of persistent family violence amendments.

PERSISTENT FAMILY VIOLENCE

The Scope of the Offence

Family violence is defined within the Family Violence Act as encompassing a broad range of conduct as a "family violence offence". Given that this new crime only requires 3 occasions of "unlawful family violence", it will encompass a very broad range of conduct including what might be considered relatively minor acts such as: (i) meeting with the person to be protected in the absence of an agreed third party but by consent (ii) the myriad of breaches that come before the court which are as a result of a lack of understanding of the operative effect of the orders by both parties concerned and (iii) technical contraventions such as exercising contact with children outside of an agreed contact arrangement or order of the Family Court. The breadth of the definition of unlawful family violence makes the proposed amendments generally and the new crime specifically, bad law.

The Definition of Family Relationship

In the definition section of the proposed amendment to the Code by way of Section 170A, the following definition of "Family Relationship" is set out:

Family Relationship has the same meaning as in the Family Violence Act 2004.

The establishment of the precondition of a family relationship is critical as the crime is committed by:

A person who commits persistent family violence in relation to another person with whom the person is, or has been, in a family relationship…

The *Family Violence Act 2004* refers to the definition of *significant relationship within the meaning of the Relationships Act 2003* as part of the definition of a family relationship. That Act, in turn, defines the concept by reference to a non-exhaustive indicative list of matters a *court* can take into account but with reference to all the circumstances of the case. This definition becomes a matter that the jury must use to be satisfied beyond reasonable doubt of a necessary ingredient of the proposed crime, namely the existence of a family relationship. Aside from the uncertainty around the definition itself and the unenviable task a trial judge will be asked to perform by giving directions as to this definition, it is also less than ideal that the definition moves from Act to Act self referentially. It is likely to lead to unjust outcomes in our view. It is laboured, poorly drafted and ill-conceived in the context of a jury trial.

Retrospective and Extra Jurisdictional Questions

The definition of unlawful family violence incorporates acts that occurred before the commencement of the legislation allowing for the prosecution, retrospectively, of a person upon indictment for acts without limitation as to how far back in time those acts may have allegedly occurred.

Further, 170A(6) allows acts that have occurred interstate or even internationally to form part of the basis of an indictment. This has the potential to cause injustice given that the standards by which unlawful acts are judged in other jurisdictions do not always meet the same rigorous standards applied within this jurisdiction, before that conduct reaches the level of criminal culpability. There is the added complication of religious, cultural and other differences internationally which may result in injustices in Australia if those acts internationally are permitted to be used as part of the basis upon which a person can be prosecuted within Australia.

To be Tried upon Indictment

Given the current backlog of matters before the Supreme Court it is surprising that the Government is considering increasing the Supreme Court workload significantly by creating a broad-ranging, loosely defined crime to bring persons before the Supreme Court who can and have been appropriately dealt with by the utilisation of the current legislative regime within the Magistrates Court. Whilst the question of over burdening the court and resourcing of the court generally is not determinative of the issue of whether new offences should be prescribed, given the pre-existing sentencing regime in place within the *Family Violence Act* and the availability of prosecution upon indictment for individual acts of significant family violence, there is simply no case for the creation of a separate and discrete crime of persistent family violence.

The Committee notes that the check/balance contained within the amendment places the responsibility upon the Director of Public Prosecutions to determine under what circumstances an indictment ought be filed with respect to s170A, but then does not provide the Director, the accused or even the court the ability to have the matter heard and determined in the Magistrates Court except by utilising s308 of the *Criminal Code* by way of an application for trial by a magistrate. The failure to provide even this basic level of discretion to allow for an election for the matter to be dealt with summarily, is a failing of the amendment to appropriately and intelligently reflect the range of "unlawful family violence acts" which could form the basis of any such indictment/charge.

Some Other Observations

There are already sufficient protections, offences and penalties in place to deal with family violence offending. If there is a view that the current regime is not meeting its legal objectives, then that can be met by amendment to the penalty provisions attaching to the *Family Violence Act*. The crime of persistent family violence appears to mirror the crime of maintaining a relationship under s125A of the Code. Section 125A was introduced to deal with cases involving historical matters and young witnesses who would have difficulty articulating with precision the allegations that form the basis of a traditional indictment. There is no compelling evidence to support placing family violence complainants into the same category. Crimes under 125A are limited to unlawful sexual acts as defined under 125A(1), all of which are crimes and all of which are serious crimes in their own right. Even the use of the terminology "unlawful family violence act" appears to try to reflect the concept of an unlawful sexual act for the purposes of 125A of the Code. There is simply no comparison that can be appropriately, logically or sensibly drawn between the facts and circumstances that give rise to a charge of maintaining a sexual relationship and the proposed amendments to create the crime of persistent family violence.

It is accepted that complainants may find difficulty in giving evidence with precision in relation to allegations of family violence. There are already, however, the offences contained within the *Act* which are much under-utilised by Police of economic abuse under S 8 of the Act and emotional abuse or intimidation under s9 of the Act, both of which prohibit a course of conduct as offences over time. There are also steps available under the *Evidence (Children and Special Witnesses) Act* to make the task of giving evidence easier where appropriate.

PROPOSED AMENDMENTS TO SECTION 125A OF THE CODE, CHIRO'S CASE

The proposed amendments within the Act directed towards s125A are in direct response to the decision of *Chiro v The Queen* [20017] HCA 37. Before considering this amendment, it is helpful to review the matters raised within *Chiro.*

It was the majority decision (Kiefel CJ, Keane and Nettle JJ) that in a case involving a charge of persistent sexual exploitation of a child contrary to s50(1) of the South Australian equivalent to our s125A that a judge ought:

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i. provide the jury with a list of the particulars upon which the charge rests by providing a list of each of the acts that form the basis of the crime;

ii. *invite* the jury to identify the underlying acts of sexual misconduct that were found to be proved beyond reasonable doubt unless it were otherwise apparent to the judge from the verdict of the jury.

The majority judgment in essence provides that the question of which criminal acts the accused has committed which forms the constituent components of the crime of maintain are matters for the jury rather than the sentencing judge. The basis of this position is that the High Court is of the view that the acts of sexual misconduct comprise the actus reus of the offence and that it is for the jury alone, not the judge, to find the acts which constitute the actus reus upon which guilt is established.

The effect of *Chiro* is that judges, in following the High Court's ruling, are required now to provide the jury with a list of the acts that comprise the occasions forming the basis of the indictment and the jury is then invited to provide answers to the question as to whether each of those occasions, in turn, have been established to their satisfaction beyond reasonable doubt. The list may be extensive.

The argument against *Chiro* is that it places an unnecessary burden on the jury in finding facts which are ultimately questions of sentence for the sentencing judge as opposed to a question of whether the charge has been proved beyond reasonable doubt in that there are 3 occasions or there are not 3 occasions. Other States have amended their criminal code to respond to *Chiro* by removing the requirement created by *Chiro*. The amendments sought by the Government in relation to s125A are broadly consistent with the amendments made in other States.

The amendments sought are appropriate. The question of which acts have been established beyond reasonable doubt upon a jury finding an accused guilty of maintain under 125A are questions for a sentencing court as opposed to the finders of fact.

The Committee supports the insertion of 125A(4)(c) as an obvious statement of the law which had somewhat become clouded by recent authority from the High Court. It has always been the state of the law that a jury need not be satisfied of the same 3 unlawful sexual acts no more than they would be required to be satisfied of the same commercial transactions in a crime of trafficking before a finding of guilt could be returned.

EVIDENCE (CHILDREN AND SPECIAL WITNESSES) ACT **AMENDMENTS**

These amendments expand the definition of a "defendant" in the Act to include applications to vary, extend or revoke a police family violence order (3(a)(ab)), application for family violence order, interim family violence order variation of the same (3(a)(ac)) and applications for bail (3(a)(ad)). The effect of the further amendments proposed is to limit the ability of a

defendant to cross-examine a complainant other than when undertaken by counsel. This amendment simply corrects a pre-existing inconsistency within the Act which allowed unrepresented defendants to cross-examine on proceedings, as outlined above, but not cross-examine the complainant on other prescribed proceedings other than through counsel. This amendment is also supported by the Committee.

An important associated consideration for Government is that the amendment will increase the burden on the Legal Aid Commission as there will be a greater number of unrepresented persons who will require the assistance of counsel, given that they will not be permitted to cross-examine within the expanded definition of "prescribed proceedings" by virtue of the amendments. These amendments should therefore be coupled with an increase in funding for grants of aid to allow for that to be properly put into effect.

Yours faithfully

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