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Subject: A submission to the Tasmanian Department of Justice regarding the Proposal Paper, *Renaming Sexual Offences: Removing outdated language in Chapter XIV of the Criminal Code Act 1924*

This submission contains the opinions of the author as a legal academic and does not represent the official view of the University of Tasmania.

### **Section 124**

The offence in s 124 is premised on the existence of consent. Where there is evidence of absence of consent, the appropriate charge is rape, s 185. However, as noted in the Proposal Paper, and as provided in the offence itself, the consent of a child under 17, in many situations has no legal effect. It is only where the parties are close in age that consent will be a defence (s 124(3)). Renaming the offence as, for example, 'sexual abuse of a child', may appropriately reflect the criminality involved where there is a substantial age differential and hence greater capacity for exploitative abuse, but it will also have the undesirable effect of stigmatising many cases of otherwise non-abusive consensual sexual activity where the offender is themselves a young person and the age differential sits just beyond the maximum provided for in the legislation. I refer to cases where the offender is, for example, 3 years and a few days older than the complainant. Accordingly, whilst I would support the addition of 'unlawful' to the label of the offence, I would not support adopting a label such as, 'child sexual abuse'.

### **Section 125**

For the same reason, I would not support a change to the label of the offence in s 125.

### **Section 125A**

I agree with the proposal to rename the offence of maintaining a sexual relationship with a young person. There is some evidence that offenders are more willing to plead guilty to the offence as it is currently described, thus avoiding the trauma and expense of a trial. However, the counter argument that the offence does not currently reflect the true

criminality of the offending is more persuasive. In particular, the requirement in s 125A(2) that the prosecution prove the existence of a 'relationship' between the offender and the complainant is completely at odds with the abusive nature of the connection. It is an additional cruelty for a complainant to hear their abuse described as a 'relationship'.

### **Section 125B; s 127**

Section 125B was created to deal with improper sexual conduct with a child not involving the application of force and thus not covered by the crime of indecent assault (s 127). The offence may be committed merely by directing an indecent act *at* a child. Therefore, if the phrase 'engaging in a sexual act' was adopted it would limit the scope of the offence in a way that is at odds with the intention of the drafters. Replacing the word 'indecent' with the word 'sexual' would not have this effect. As noted in the Proposal Paper, part of the difficulty with this offence is the meaning of the word 'indecent', although there is a substantial body of case law which assists in its interpretation. To some extent, this difficulty may be ameliorated by the use of the word, 'sexual' in its place, in both s 125B and s 127. However, determining when an act is sexual in nature will also be problematic in some cases – particularly where its sexual character is not overt but derives from the sexual motive of the actor.

### **Section 125C; s 125D**

The additional element of 'procuring' establishes that these offences are in a different category of offending, one that by definition entails some degree of exploitation or undue pressure. I support a change in wording that reflects this. The term 'grooming' is well understood in this context and more accurately reflects the exploitative nature of such conduct.

### **Section 126**

I do not support the proposed change in terminology for this offence. The Proposal Paper indicates that this offence cannot be charged if the person gives consent. It is true that the offence assumes the existence of consent – otherwise, as for s 124, the appropriate charge would be rape – but while consent is necessary it is not sufficient as a defence. An accused must also prove that consent was not unduly influenced by the fact that the person was in a position of responsibility over the complainant. This is the nub of the offence and as it is currently worded it appropriately expresses the criminality involved.

Best Regards,

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