

17 January 2017

Our ref: Criminal Law Committee/BDS

Research Director  
Legal Affairs and Community Safety Committee  
Parliament House  
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Dear Research Director

***Criminal Law Amendment Bill 2016***

Thank you for the opportunity to provide a submission on the amendments to the *Criminal Law Amendment Bill 2016* (the Bill) and we apologise for the delay in providing our comments. The Society commends the government for undertaking public consultation on the proposed Bill.

As there has been only a very brief opportunity to review the amendment to the Bill, an in-depth analysis has not been conducted. It is possible that there are issues relating to fundamental legislative principles or unintended drafting consequences which we have not identified. We request that the government extend the period by which to provide feedback and also extend the reporting date of the Committee, so that the Committee has a reasonable opportunity to consider the draft legislation and provide more useful and in-depth feedback which will hopefully assist in improving the quality of the legislation being passed. The members of the Society are in a unique position to provide informed feedback based on their extensive experience in practice.

With respect to the proposed amendments, we make the following comments on specific clauses in the Bill.

**1. Clause 9**

Section 236 of the Criminal Code deals with misconduct with regard to corpses. Section 236(b) of the Criminal Code states:

*Any person who, without lawful justification or excuse, the proof of which lies on the person—*

*(b) improperly or indecently interferes with, or offers any indignity to, any dead human body or human remains, whether buried or not; is guilty of a misdemeanor, and is liable to imprisonment for 2 years.*

Clause 9 seeks to increase the maximum penalty for the section 236(b) offence of misconduct with regard to corpses from two to five years. The Society does not agree with the assertion in the Explanatory Notes to the Bill that the, ‘amendment is justified to appropriately reflect the seriousness of the offence and the community’s abhorrence of such conduct.’ The Explanatory Notes do not provide cogent evidence or persuasive data to justify this increase in penalty. In our view, seeking to increase the maximum penalty by more than double is excessive, unjustifiable and does not respect the principle of proportionality. We urge the Committee to consider making a recommendation to retain the current maximum penalty.

## **2. Clause 10**

Clause 10 seeks to amend section 304 of the Criminal Code which deals with killing on provocation. This clause proposes an amendment which would allow the exclusion of an unwanted sexual advance as a basis for defence of killing on provocation. Clause 10 states

*(2) Section 304— insert—*

*(3A) Further, subsection (1) does not apply, other than in circumstances of an exceptional character, if the sudden provocation is based on an unwanted sexual advance to the person.*

*(6A) For proof of circumstances of an exceptional character mentioned in subsection (4), regard may be had to any history of violence, or of sexual conduct, between the person and the person who is unlawfully killed that is relevant in all the circumstances.*

*(9) In this section— unwanted sexual advance, to a person, means a sexual advance that—*

*(a) is unwanted by the person; and*

*(b) if the sexual advance involves touching the person— involves only minor touching.*

*Examples of what may be minor touching depending on all the relevant circumstances— patting, pinching, grabbing or brushing against the person, even if the touching is an offence against section 352(1)(a) or another provision of this Code or another Act*

The Society commends the policy rationale and the specific amendment of section 304 (killing on provocation) provision to remove an unwanted sexual advance defence as it relates to provocation. It is recognised that this amendment is specifically intended to remove the “non-violent homosexual advance” provocation defence in common law. The use of the defence of provocation in this manner is not supported as it is prejudicial and discriminatory to lesbian, gay, bisexual, trans, and/or intersex individuals.

However, the Society is concerned that clause 10, as currently worded, will not give effect to this policy intention.

We are also concerned that the present drafting of the removal of the ‘unwanted sexual advance’ defence could potentially affect circumstances other than those comprising a ‘gay panic’ defence. For example, it would be concerning if this defence were not open to a defendant where the victim had sexually assaulted or raped the defendant, or where the victim had sexually abused the defendant as a child. In circumstances such as those, there is

support for an argument of “unwanted sexual advance” being used to support a provocation defence for murder.

It appears the legislation goes some way to addressing this concern by including subsection (3A), or ‘circumstances of an exceptional character’ as an exception to this amendment. However, we are concerned that circumstances of an exceptional character not being specifically defined, albeit clarified in a fashion by proposed subsection (6A).

If this amendment is made, it may have unintended consequences in some circumstances. Take for example where a person is propositioned for sexual intercourse, including a touching, against their will and this person has a background of having been sexually abused as a child or previously raped. Under the amendment this person would not be permitted to demonstrate to a Court, or more importantly a jury, that they had lost their self-control and responded lethally to the provocative act. This could potentially lead a Court to that previous sexual assault by the victim might not be an “exceptional circumstance”, which does not appear to be the intention of the legislation.

Furthermore, the lack of definition of “circumstances of an exceptional character” might actually lead to a Court allowing in a “unwanted sexual advance” defence to provocation by attempting to argue that a homosexual advance is an exceptional circumstance, which is entirely contrary to the intention of the legislation and would contravene the drafter’s intention.

We are also concerned about subsection 9(b) stating that an unwanted sexual advance involves only minor touching. This might potentially allow someone to run a “unwanted sexual advance” argument in circumstances where there is more than minor touching but less than sexual assault. Furthermore, “minor touching” is not defined in the legislation and it is unclear whether repeated touching would be considered minor.

### **3. Clause 21**

The Society does not support the amendment which would allow financial institutions to voluntarily provide information to the Crime and Corruption Commission. In our view, this process should proceed by way of lawful notice. A notice should only be issued on the basis of probable cause. This will allow the lawfulness of the disclosure to be challenged in court and potentially decrease the likelihood of an inappropriate disclosure of private information by a bank official.

### **4. Clause 25**

Clause 25 proposes amendments to the *Director of Public Prosecutions Act 1984* and seeks to insert a new section 23A to create a power of delegation to the director’s functions and powers. New section 23A states:

*The director may delegate the director’s functions and powers under this Act or another Act to an appropriately qualified person.*

The Society does not support the insertion of new section 23A. First, the Explanatory Notes do not provide any rationale for the proposed amendment. The Society notes that the *Director of Public Prosecutions Act 1984* already provides that certain functions of the director may be carried out by a lawyer from either within the director’s own office or one who is in private practice (section 10(4)).

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Of most concern is the fact that, there are no parameters which describe the extent to which some or all functions and powers might be delegated. In the Society's view, proposed section 23A is too wide, and the reliance on the definition of the term 'appropriately qualified' in the *Acts Interpretation Act 1954* is inappropriate. In practice, the director may even delegate is power to prosecute to a person who is not bound by the *Director of Public Prosecutions Act 1984*. If the intent of the amendment is to outline the role and responsibility of the deputy prosecutor or provide a delegation power to a senior crown prosecutor, we suggest that this be made clear. Alternatively, we suggest that an inclusive definition of 'appropriately qualified person' be included in the Bill.

The appointment of the director by the Governor in Council is an established process and it may not serve the public interest for a director to delegate some or all functions/powers to a person who has not been appointed and without additional guidance and/or supervision. The Society submits that the delegation of powers and functions should be restrained to those described in sections 10, 11, 12, 13, 16, 24B, 24C, 27 and 33(3) of the Act, and that any powers or functions which may be delegated under 'another Act' should be specifically identified and included in the drafting.

We look forward to our continued involvement in the policy and legislative process.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Senior Policy Solicitor, Ms Binari De Saram on [b.desaram@qls.com.au](mailto:b.desaram@qls.com.au) or 3842 5889.

Yours faithfully



Christine Smyth  
**President**