

Your Ref:  
Our Ref: 849

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The Secretary  
Office of the Secretary  
Department of Justice  
Email: [haveyoursay@justice.tas.gov.au](mailto:haveyoursay@justice.tas.gov.au)

Dear Secretary

### **Proposal Paper – Renaming sexual offences**

Thank you for the opportunity to respond to the [Proposal Paper - Renaming sexual offences](#) (the Proposal Paper) which proposes removing and replacing outdated language in Chapter XIV of the *Criminal Code Act 1924* (the Criminal Code). Thank you for the short extension of time in which to provide my comments.

The Proposal Paper seeks the views of stakeholders on the language and terminology used to name sexual crimes committed against people, including children and young people, in Tasmania. It is not intended to change the elements of the crimes themselves.

### **Support Services**

I acknowledge that the matters discussed in the Proposal Paper may be distressing for some community members and commend the Department of Justice for including the contact details for several support services on the first page of the Proposal Paper.

An additional option is Kids Helpline, a free and confidential counselling service which is especially for young people aged 5 to 25 ([kidshelpline.com.au](http://kidshelpline.com.au) or 1800 55 1800).

### **Role of the Commissioner for Children and Young People**

As you are aware, the Commissioner for Children and Young People is an independent statutory office established under Tasmania's *Commissioner for Children and Young People Act 2016* (the CCYP Act). My functions and powers, and the principles to which I must have regard in carrying out these functions and exercising these powers, are set out in that Act.

Consistent with my statutory functions, my comments below focus on matters that are particularly relevant to promoting and protecting the rights, wellbeing and best interests of children and young people in Tasmania.<sup>1</sup>

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<sup>1</sup> Pursuant to section 3 of the CCYP Act, 'child' means a person who has not attained the age of 18 years; and 'young person' means a person, who has not attained the age of 18 years, as determined by the Commissioner in accordance with section 8(4).



## Comment

As the Proposal Paper notes, the terminology used to name sexual offences in Tasmania's criminal law 'has been the subject of significant recent community discussion and concerns have been raised that the current sexual offences names do not accurately reflect the criminal conduct that they describe'.<sup>2</sup>

The importance of using appropriate language to describe sexual abuse of children is highlighted in the *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse* ('the Luxembourg Guidelines') adopted by the Global Interagency Working Group on Sexual Exploitation of Children (Interagency Working Group).<sup>3</sup> The Chairperson of the Interagency Working Group, Jaap Doek puts it like this:

Communication is of critical importance in our efforts to respect, protect and implement the rights of the child. In order to make this communication with and between children, parents, governmental officials, professionals and volunteers working with or for children as effective as possible, we need to use terms and concepts that all these actors understand and consider respectful.<sup>4</sup>

I am generally supportive of the proposal to update the terminology in the Criminal Code to more accurately reflect the criminal conduct it describes. I would be pleased if you could take into account my comments in relation to the following provisions described in the Proposal Paper.

### Chapter XIV - Crimes against morality

Chapter XIV of the Criminal Code includes all sexual crimes in Tasmania (except for the crime of Rape which is found in Chapter XX). Chapter XIV is currently titled 'Crimes Against Morality'.

I agree that the term 'morality' in the chapter heading does not appropriately reflect contemporary understanding of sexual crimes, and this is particularly the case for criminal conduct involving sexual abuse of children.

I support the proposal to rename Chapter XIV to 'Sexual Crimes'.

I would not support use of the word "Offences" in this Chapter heading because I do not believe that term accurately reflects the seriousness of the criminal conduct included in the chapter. Further, the term 'Crimes' is included in other chapter headings in the Criminal Code (e.g. Chapter XIII - Crimes Relating to Religion and Chapter XII – Miscellaneous Crimes Against Public Authority).

### Section 124 - Sexual intercourse with a young person

Section 124 of the Criminal Code makes it an offence for a person to have sexual intercourse with a young person under the age of 17 years. Sexual intercourse as it is defined in Tasmania covers a broad range of penetrative acts (see section 2B of the Criminal Code).

An option put forward in the Proposal Paper could be to rename this crime to 'Child sexual abuse' or 'Sexual abuse of a child or young person', consistent with the terminology used by the Royal Commission into Institutional Responses to Child Sexual Abuse.

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<sup>2</sup> Page 3.

<sup>3</sup> Greijer, S & Jaap, D, 'Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse', ECPAT International, jointly with ECPAT Luxembourg, June 2016, <http://luxembourgguidelines.org/>

<sup>4</sup> Ibid, v.



The term 'child sexual abuse' can involve a wide range of behaviours and can take many different forms:

Any act which exposes a child to, or involves a child in, sexual processes beyond his or her understanding or contrary to accepted community standards. Sexually abusive behaviours can include the fondling of genitals, masturbation, oral sex, vaginal or anal penetration by a penis, finger or any other object, fondling of breasts, voyeurism, exhibitionism, and exposing the child to or involving the child in pornography. It includes child grooming, which refers to actions deliberately undertaken with the aim of befriending and establishing an emotional connection with a child, to lower the child's inhibitions in preparation for sexual activity with the child.<sup>5</sup>

Although appropriate for the purposes of the Royal Commission, using terms like 'child sexual abuse' or 'sexual abuse of a child or young person' to describe the crime under section 124 may not accurately communicate that the child sexual abuse specifically criminalised by the section is sexual intercourse with a child under 17 years. As mentioned above, section 2B of the Criminal Code defines sexual intercourse by reference to penetration; the term 'child sexual abuse' on its own in this context may therefore fail to accurately convey that penetration is an essential element of the crime.

An option could be to change the title of the crime to 'Penetrative sexual abuse of a child under 17 years'. This would more accurately convey to the community that the crime involves sexual abuse of a child, without losing the focus on sexual intercourse as defined. In my opinion, there is a general understanding among community members that (leaving aside cases involving similar age circumstances as outlined in s124(3) of the Criminal Code), children are not capable of providing lawful consent to sexual intercourse.

#### Section 125 - Person permitting unlawful sexual intercourse with young person on premises

In accordance with my comments in relation to section 124 above, and to ensure internal consistency in the Criminal Code, consideration could be given to renaming the crime under section 125 to 'Person permitting penetrative sexual abuse of a child under the age of 17 years on premises', or similar.

#### Section 125A - Maintaining a sexual relationship with young person

As outlined in the Proposal Paper, the title of section 125A, which is intended to represent the most serious type of repeated sexual offending against children, has been criticised on the following bases:

- it sanitises the true nature of the offending - being repeated sexual offending against children and young people;
- it implies a level of consent by children and young people where no such consent exists, or no such consent can be given due to the age and power disparity between offender and victim;
- the word 'relationship' should and does have a positive connotation in the community, and such connotation should not be imported into child sexual offending; and
- the offence name minimises the seriousness of the crime and trauma that victims have suffered.<sup>6</sup>

<sup>5</sup> Royal Commission into Institutional Responses to Child Sexual Abuse. (2017). *Final Report: Volume 2, Nature and cause*, Commonwealth of Australia, 30. [https://www.childabuseroyalcommission.gov.au/sites/default/files/final\\_report\\_-\\_volume\\_2\\_nature\\_and\\_cause.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_2_nature_and_cause.pdf)

<sup>6</sup> Proposal Paper, p8.



An option put forward in the Proposal Paper is to rename the title of section 125A to 'persistent child sexual abuse' or 'persistent sexual abuse of a child'.

This terminology would be consistent with that of the Royal Commission described above. While the term 'child sexual abuse' has historically been defined in varying ways, the Luxembourg Guidelines provide that this term appears to have a generally agreed meaning and/or can be used without stigmatising and/or otherwise harming the child.

I am conscious that in 2012, the Tasmania Law Reform Institute (the TLRI) recommended in the final report of its project on sexual offences against young people that the crime of 'maintaining a sexual relationship with a young person' not be renamed 'persistent sexual abuse of a child (or young person)'. For the sake of completion, I set out the relevant text below:

4.9.13 The Institute agrees that the name 'maintaining a sexual relationship with a young person' tends to understate the seriousness of the crime because it fails to convey the exploitative and abusive nature of the crime and that consent was compromised or even possibly totally absent. However, it is concerned that changing the name to persistent sexual abuse of a child could have the adverse consequence of discouraging guilty pleas. It is plausible that a defendant would be more likely to plead guilty to maintaining a sexual relationship than to multiple counts (or even a single count) of rape of a child or young person. The benign terminology may even make a conviction for maintaining a sexual relationship more palatable to a defendant than conviction of sexual intercourse with a young person or indecent assault. It is also possible that vagueness associated with the precise number of acts makes a plea of guilty to the composite crime attractive. In the Institute's view the laudable aims of giving the crime a label that better reflects the gravity of the offence is trumped by the concern not to discourage guilty pleas.<sup>7</sup>

Although I acknowledge the concerns of the TRLI, on balance I believe inclusion of the term 'sexual relationship' in the title of this crime is harmful to survivors of what is best described as persistent child sexual abuse. As former Commissioner for Children Ashford said in her submission to the TRLI's Issues Paper:

The use of the word 'relationship' connotes an emotional and sexual association or partnership between two people and fails in my view to convey the abusive and exploitative nature of such conduct.<sup>8</sup>

Given the concerns that changing the title of this crime may discourage pleas of guilty, I recommend contact be made with those jurisdictions where the equivalent offence has already been renamed to 'persistent sexual abuse of a child' to ascertain whether this terminology has acted as a disincentive to pleas of guilty. I would also be interested in any expert opinion that may be available on this issue. Leaving aside those concerns, my clear preference would be for the crime under s125A to be renamed 'persistent sexual abuse of a child'.

#### Section 125B – Indecent act with young person

The Proposal Paper explains that the terms 'indecent' and 'indecent' have fallen out of modern use, can be confusing, and carry a moralistic connotation which does not sit well in the context of the criminal law.

The alternative title proposed for the crime under section 125B is 'Engaging a child in a sexual act'. I would support this change given the outdated nature of the current terminology.

<sup>7</sup> Tasmanian Law Reform Institute. (2012). *Sexual Offences Against Young People – Final Report No 18*, 4.9.13.

<sup>8</sup> Tasmania Law Reform Institute, *Sexual Offences Against Young People – Final Report, No 18*, 4.9.9



Section 125C – Procuring unlawful sexual intercourse with person under 17 years

Consistent with my proposal regarding section 124, the title of this section would be changed to 'Procuring penetrative sexual abuse of a child under 17 years'.

Section 125D – Communications with intent to procure person under 17 years, &C.

I agree that the first charge under this section, 'Communicating with intent to procure a person under the age of 17 years to engage in an unlawful sexual act' should be changed to 'Grooming for child sexual abuse'.

The second charge, 'Making a communication with the intention of exposing a person under the age of 17 years to indecent material' should be changed to 'Making a communication with the intention of exposing a child under the age of 17 years to sexual material'.

I appreciate the opportunity to provide my views on this important area of policy and law. I would be very pleased to discuss my comments in more detail if this would be of assistance.

Yours sincerely

**Leanne McLean**

Commissioner for Children and Young People

cc *The Hon Elise Archer MP, Attorney General, Minister for Justice*  
*The Hon Roger Jaensch MP, Minister for Human Services*