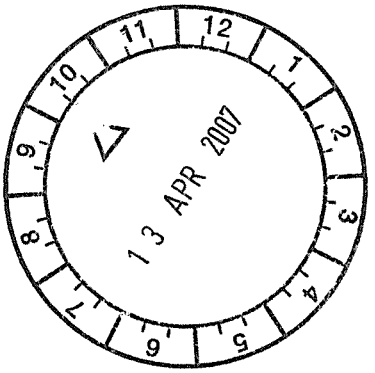
The Law Society
OF WESTERN AUSTRALIA



12 April 2007

Mr David Driscoll
Senior Committee Clerk
Standing Committee on Legislation
Legislative Council
Parliament House
PERTH WA 6000

Dear Mr Driscoll

Inquiry into the *Criminal Law and Evidence Amendment Bill* 2006 (LSWA410)

Thank you for inviting the Society to consider comment on the *Criminal Law and Evidence Amendment Bill* 2006, currently being reviewed by your Committee.

The Society's comments on the draft Bill are attached for consideration.

Also, the Society would be pleased to be represented at a hearing, should one be held at a later date. The Society nominates Mr John Prior as its representative for the hearing. Please contact him direct:

Mr John Prior
Francis Burt Chambers
Level 19, Allendale Square
77 St George's Terrace
PERTH WA 6000

Direct: 9220 0491
Tel: 9220 0444
Fax: 9325 9008
Email: jprior@francisburt.com.au

Thank you for the opportunity to participate in the review process.

Yours sincerely

Maria Saraceni
President

The Law Society
OF WESTERN AUSTRALIA

Criminal Law & Evidence Amendment Bill 2006

A Law Society of Western Australia submission in response to a request from the Legislative Council's Standing Committee on Legislation for comment on the *Criminal Law & Evidence Amendment Bill* 2006

A. The Law Society of Western Australia Inc (Society) welcomes the opportunity to provide submissions to the Legislative Council's Standing Committee on Legislation the *Criminal Law & Evidence Amendment Bill* 2006.

B. The Law Society is the professional association for Western Australian barristers and solicitors. This submission therefore is based on the experience of members of the legal profession from working within the jurisdiction of the legislation.

C. The submission is not intended to represent the interests of clients or groups of clients. The Society expects individual firms to present submissions on behalf of specific clients if those clients wish to comment on the package.

Criminal Law & Evidence Amendment Bill 2006

The Society's comments with regard to this Bill are set out below.

As to the proposed amendments to Section 321A of the *Criminal Code*, please find attached a copy of the Society's letter to the Attorney General dated 15 September 2004, which addresses these issues.

The Society also refers to the submission of the Criminal Lawyers Association of Western Australia, by way of its letter to the Attorney General dated 21 September 2006, a copy of which was provided to the Society.

The Society generally adopts the submission of the Criminal Lawyers Association, except with the following additional comments relating to Section 143 of the *Criminal Procedure Act* 2004, Section 36BE of the *Evidence Act* 1906, and the proposed additional rights of prosecution appeal by way of amendment to the *Criminal Appeals Act* 2004.

As to the proposed amendments to Section 143 of the *Criminal Procedure Act* 2004, the Society generally agrees with the Criminal Lawyers Association's submission, but makes the following further comment.

1. The proposed amendment is unclear. In the past, many judges did not allow the defence to make an opening address at the beginning of a trial, although some would permit the defence to state the essence of their case by pointing out to the jury, in a matter of a few sentences, which issues were in dispute and which were not. However, the *Criminal Procedure Act* 2004 Section 143 gave defence counsel a legislative right to open their clients' cases. The Society is concerned that the Section 143 amendments could be interpreted to mean a reversion to a limitation on the extent of the opening remarks of the defence counsel.

   In addition to the State's role in providing comments as to matters of law, like onus and standard of proof, the State invariably opens on the facts. However, dependent upon the prosecutor, this opening may be more or less by way of argument and persuasion. There is no reason to limit the defence to anything less. Should either party overstep appropriate boundaries, the judge is able to deal with the situation, as has always happened. As to the capacity to make comments about onus and standard of proof, the law is not the exclusive "property" of the State. Onus and standard is emphasised at various points in the trial and there is no reason why the defence should not be permitted to comment at this stage.

   The Society is not aware of any suggestions of abuse by defence counsel of this relatively new statutory right to make an opening address. The Society can therefore see no justification to fetter such right.

2. In regard to amendments to the *Evidence Act* 1906 by inserting Section 36BE, the Society agrees with the Criminal Lawyers Association submission. The following additional comments are made with respect to this proposed amendment.

   Juries do not need to be told by experts that children are different to adults. Courts have long held, and properly so, that expert evidence of this type is inadmissible. Juries know about the problems with evidence of children, from their own life experience.

One of the difficulties with calling psychological expert evidence is an inclination of the courts to exclude it as failing the "common knowledge" test. Further, psychological and psychiatric evidence often comes perilously close to offending the "ultimate issue" rule, which may be impractical with this field of expertise.

It should also be recognised that, if this amendment is made and if such evidence is regularly used (which is likely, given the volume of offences involving child abuse), there will be a significant cost to all involved in the justice process. The length of these types of trials will dramatically increase. Accused persons will be significantly prejudiced because they will not have the financial resources the State has to fund such experts. Limited Legal Aid resources will once again be placed under further pressure.

3. As to the proposed amendments to the *Criminal Appeals Act* 2004, allowing a greater right of prosecution appeal, the Society agrees with the submission of the Criminal Lawyers Association, which totally opposes any broadening of the scope of prosecution appeals, as further erosion of the rule against double jeopardy.

   Notwithstanding the Society's opposition, in the event the amendments to double jeopardy are to be allowed by State Parliament, the Society submits that it should be limited to offences where the maximum penalty is 20 years imprisonment or more. The present amendment proposes such appeal right for the prosecution for offences where the maximum penalty is 14 years or more. This amendment is a fundamental change to the rule against double jeopardy. The Society is concerned that, if the right of appeal is allowed to apply for the prosecution of offences where the statutory penalty includes imprisonment for 14 years or more, this would mean numerous types of offences which are the subject of acquittal could become the subject of an appeal. Such offences would include the very common offences of aggravated burglary, robbery and sexual penetration.

   Although the proposed Section 35A of the *Criminal Appeals Act* 2004 requires that the accused's reasonable costs for being represented in the Court of Appeal be paid for by the State, the Society considers that this section should go further. If the appeal is successful, the accused's reasonable costs for a retrial also should be paid by the State, given that the appeal would have succeeded - not due to fault of the accused but because the trial judge had made an error of fact or law in relation to the charge.

It must be remembered that the resources of the State are limitless, whereas the resources of an accused person are limited and a successful prosecution appeal would mean that an accused person would have to have pay for his or her legal representation in two trials. In this respect the Society endorses the Criminal Lawyers Association submission on indemnity costs for the accused both in relation to the prosecution appeal and a retrial if successful.

The Society also is concerned that there is no limit as to the number of times the prosecution may appeal, particularly if there is a trial and a successful prosecution appeal and then, at a further re-trial, another error of fact or law is made by the trial judge, there is the further right of a prosecution appeal and, if successful, a further potential for re-trial of the accused. This is another reason why the reasonable expenses of the accused's representation on a retrial also should be included in Section 35A. The Society also considers it may be appropriate that there be a limit on the number of prosecution appeals which may be allowed on one particular trial.

The Society notes that, given the width of the right of prosecution appeals that is intended by way of the amendments to the *Criminal Appeals Act* 2004, it would be incumbent on the State Director of Public Prosecutions to set down some detailed, strict, transparent and understandable guidelines as to when the right of appeal should be exercised. The Society is concerned that these guidelines do not form part of the proposed statutory amendments.

It should be noted that this Bill, which gives a further prosecution right of appeal, does not give a right of appeal where acquittals have occurred where there has been a tainted acquittal, ie, jury tampering, witnesses being pressured or there is new evidence, in particular forensic evidence, which has become available at a later stage.

Maria Saraceni
President

12 April 2007

The Law Society
OF WESTERN AUSTRALIA

15 September 2004

The Hon J A McGinty MLA
Attorney General
30th Floor, Allendale Square
77 St George's Terrace
PERTH WA 6000

Dear Attorney General

The Maintenance of a Sexual Relationship with a Child (LSWA318 – 9-27299)

I refer to your letters dated 16 February and 9 July 2004, inviting the Society's comment on the discussion paper "Maintaining a Sexual Relationship with a Child". I apologise for the delay in providing this reply but, as I indicated in earlier correspondence, these are important issues in respect of which the Society felt it appropriate to formulate a considered response.

The Society considers that it is of paramount importance that children are protected from sexual abuse and that persons who are proved beyond a reasonable doubt to have committed sexual offences against children are appropriately dealt with.

It is equally important to ensure that persons charged with sexual offences against children are tried fairly and are convicted only of offences that are particularised in a way that makes clear what is alleged against them and that the charge is proved beyond a reasonable doubt.

Section 321A of the Criminal Code presently requires the prosecution to prove that an accused person on three or more occasions, each of which is on different day, did a sexual act in relation to a child.

It is the Society's view that options B, C and D in the discussion paper, which contemplate amendments to s 321A of Criminal Code, would leave an accused person open to conviction on vague allegations of sexual acts which could be proved by leading relationship or propensity evidence without requiring the proof of any particular act.

The law as it presently stands, whilst requiring particularisation of the three occasions when a sexual offence is alleged to have occurred such as to constitute a sexual relationship, does not require a specific date to be alleged. Presently, indictments for sexual offences often allege that the offence occurred between two dates sometimes spanning a period of two or three years. The Society would be concerned if legislation were to be introduced that might allow an accused person to be convicted on evidence that did not specify or prove particular sexual acts.

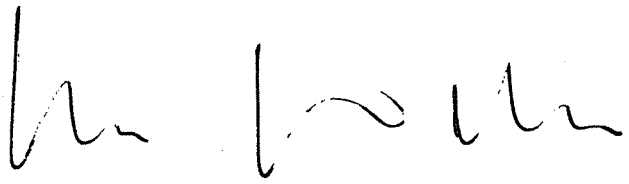
Level 4, 89 St Georges Terrace Perth WA 6000, Dx 173 Perth
Telephone: (08) 9322 7877 Facsimile: (08) 9322 7899 Email: info@lawsocietywa.asn.au
Please address all correspondence to The Law Society of Western Australia PO Box Z5345, St Georges Terrace Perth WA 6831

Prosecution of accused persons upon vague evidence of relationship and propensity has the potential to lead to injustice. The public's abhorrence of sexual offences against children makes it imperative that accused persons are not convicted on imprecise allegations. An accused person faced with allegations that are vague and not particularised is denied the opportunity to call alibi evidence or to test the credit of the complainant by reference to surrounding circumstances. This is especially the case when there has been significant delay in complaint.

It is acknowledged that there can be problems in leading evidence from children who have suffered sexual abuse over a long period of time. The difficulty of proving offences against children should not be remedied by effectively reducing the prosecution's obligation to prove its allegations beyond a reasonable doubt. If passed by Parliament, the Criminal Law Amendment (Sexual Assault and Other Matters) Bill 2004 will allow the recording of a child complainant's first interview with police to stand in whole or in part as the child's evidence in chief. This will significantly improve the process by which evidence might be addressed from a child.

It is the view of the Society that it would be preferable that no amendment be contemplated to the present law regarding sexual relationships until an evaluation is undertaken of the success or otherwise of the use of recorded interviews as evidence in chief.

Yours sincerely



Ian Weldon
President

JJ . Executive.

CRIMINAL LAWYERS' ASSOCIATION OF WESTERN AUSTRALIA

President: Belinda Lonsdale
Vice Presidents: Judith Fordham
Philip Urqhart
Treasurer: Simon Freitag
Secretary: Amanda Blackburn

Please send correspondence
c/o The President
GPO Box 2533 PERTH WA 6001
Telephone: (08) 9218 9200
Facsimile: (08) 9218 9300
Mobile: 0403 468 781
email: belindalonsdale@wolffchambers.com.au

21 September 2006

Hon J A McGinty, MLA
Attorney General
4th Floor
London House
PERTH WA 6000

BY FACSIMILE: 9422 3000

Dear Sir

CRIMINAL LAW AND EVIDENCE AMENDMENT BILL 2006

The Criminal Lawyers' Association of Western Australia has considered the *Criminal Law and Evidence Amendment Bill 2006* and would like to offer the following comments for the Parliament's consideration.

I note that the Criminal Lawyers' Association has never been invited by your office to provide submissions but I would hope that you would give them careful consideration before proceeding to further debate in the House.

PROPOSED AMENDMENTS TO CRIMINAL CODE

Amendments to Section 297

No submissions.

Section 317 – Amendments to Criminal Code Amendment (Racial Vilification) Act

The Criminal Lawyers' Association is concerned that Racial Vilification laws may not be operating as they were intended and lack clarity. This is highlighted by a recent case in the Kalgoorlie Children's Court where an aboriginal juvenile girl was charged with an offence for calling someone a "white slut". The girl was acquitted (See decision of the *Police v A Child*, a decision of Magistrate Auty on 14 September 2006) but the fact that the police sought to charge her may mean that there is need for clarification as to what is meant by "racial aggravation". It is our suggestion that this aspect of the law be reviewed before any amendments to this section are contemplated.

Amendments to Section 318

No submissions

Section 321A – Relationship Evidence

The Association does not object to the removal of the term "relationship" and replacing it with a suitable alternative.

However, the Association is vehemently opposed to any changes to the law which would reduce the State's obligation to provide particulars to an accused.

It is difficult enough as it is for a person charged with a sexual assault to properly defend a charge under this section as the State is not presently required to specify actual dates and times.

Even where some particulars are provided, it is not uncommon in such cases for accused persons to have to try and account for their movements over weeks, months and often years.

Where there has been a substantial delay in complaint, (which is often the case) this works greater unfairness as the Accused has often lost the opportunity to provide alibi or other exculpatory evidence in the form of documentation or oral testimony.

The seriously offensive aspect of the new provisions is found in sub-section (8) which provides that "*a court cannot order the prosecutor to give a person charged with an offence.....particulars of the sexual acts alleged to constitute the offence*". This is contrary to any notion of a fair trial and the right for an accused to know what he is charged with so as to mount an effective defence.

In every other criminal proceeding other than an offence under this section a person is entitled to know precisely what he is alleged to have done. There is no sound reason to place an offence under s321A in a special category of offences where the possibility of a fair trial is simply dispensed with.

The prohibition against the provision of particulars means that a person must go to trial not knowing what he has been charged with and, consequently and that he or she may not be able to prepare an adequate defence.

It is (and has always been) a fundamental principle of fairness in any trial that an accused person knows with some particularity the allegation he or she is facing.

Obviously, in some cases which come to court many years after the alleged commission of the offence, it is not possible to specify the date on which the offence is said to have occurred. In this sort of case, the prosecution is at liberty to charge the offence as having occurred "on a date unknown between (for example) 1996 and 2001". Indictments regularly take this form especially in cases involving child complaints.

Section 321A requires proof of three different acts on three different days. The current s321A (5) already provides that is not necessary to specify the dates or particularise the circumstances.

It seems the proposed amendment proposes to obviate any necessity to specify the individual acts charged at all – a situation which is bound, in many cases, to work manifest injustice.

Further, the proposed s321A (3) would seek to catch conduct which occurred outside the State of Western Australia. There are some doubts as to whether such a provision would be constitutionally valid given that the Parliament has limited power to deal with offences occurring outside Western Australia.

Sub-section (6) would allow the prosecution to prefer an additional charge during the period of the persistent sexual conduct in question. In our view there is some danger that a specific charge as well as the persistent sexual conduct charge might both be declared bad for duplicity, given that there is no necessity to nominate of particularise the offences giving rise to a charge under sub-section (4).

Sub-section (11) is another significantly offensive aspect of the proposed amendment. It proposes that jury members need not all be satisfied as to the occurrence of each of the sexual acts. The inherent unfairness in this and the dangers of this type of approach were pointed out by the unanimous decision of the in High Court *KBT v The Queen* (1997) 72 ALJR 116.

We note from the briefing notes to the Bill that this amendment is designed to "overcome the decision in KBT". In our view, there is nothing in that decision which needs to be overcome. It is a decision of the High Court which ensures substantial fairness for accused persons in ensuring that a jury is genuinely agreed on all of the relevant elements of the offence required to be proven before convicting.

It is submitted that any attempt to "overcome" the effect of that case is manifestly undesirable. The dangers in allowing cases to go to a jury without sufficient particulars is set out by their Honours at page 124 of that decision where the Court held

> "*...there is a special danger of unfairness where as here, a crime which permits imprecise and general evidence to be proved is coupled in the indictment with other sexual offences specified with particularity. This Court has noted the special risks of unfairness where a number of sexual offences are charged together.....the dangers inherent in the possibility that a jury may infer guilt of several offences from the proof of guilt of one or some requires care in the joinder of counts....*"

The inherent unfairness of a provision such s321A (11) is pointed out with precision in the joint judgment of Brennan CJ, Toohey, Gaudron and Gummow JJ at 119.

It is submitted that the proposed amendment would legalise and formalise the precise unfairness and prejudice that the High Court has warned against in KBT. We note that the briefing note to this Bill is silent as to whether or not there have been any problems with the legislation in tis current form i.e. is it commonplace that offenders are acquitted because of the shortcomings of the section in question? In our experience this cannot be said, and the writers cannot recall a single instance where the legislation in its present form has worked any injustice in any given case.

The proposed sub-section (12) is also offensive. It provides for an alternative verdict or verdicts where the "persistent sexual conduct" on three or more occasions is not proven.

For instance, where a jury finds that only one or two of the instances have been made out by the prosecution they could bring in guilty verdicts on those individual counts.

In normal circumstances there would be nothing objectionable in this. However, as the section does not require dates, particulars of the circumstances or particulars of the sexual acts to be specified and given to the accused, the provision can only serve to work manifest injustice in every case where it is likely to arise. This section, like the proposed sub-section (8) puts a person in jeopardy of a criminal conviction for a very serious charge of which he has been given no particulars whatever in relation to which he could answer the charge or mount a defence.

Sections 338C and 338E

No submissions.

Section 570

No submissions.

AMENDMENTS TO CRIMINAL PROCEDURE ACT 2004

Sections 14, 20, 50, 55, 62, 69, 77, 84, 86A, 98, 111, 129, 133

No submissions.

Section 143 Amended – Defence Addresses

The Association would object to the amendment of this section.

It is not an invariable practise that the prosecution or indeed the Judge will remind the jury of the onus and standard of proof at the commencement of a trial. Consequently, in order to inject some balance in to proceedings at an early stage, it is appropriate and desirable that the defence have an opportunity to do this. Indeed, it is often an Accused's defence that the factual elements sought to be proved by the State cannot be proven beyond reasonable doubt. In that sense, the onus and standard of proof cannot be separated from "the essence" of the defence case.

Given the adversarial nature of the proceedings, we would submit that is not appropriate for Courts' prescribe what can and cannot be said by an advocate for either side. If an advocate were to make some false or misleading representation or to otherwise act inappropriately, it would be within the power of the Judge to correct that situation by making an appropriate comment.

Section 148

No submissions

Section 169

CRIMINAL APPEALS ACT AMENDMENTS

The Criminal Lawyers' Association is opposed to any broadening of the scope of prosecution appeals.

The Association is not aware of any case where a Judge has made an error of law in which it could be said that an Accused's acquittal has resulted. As a result of that mistake alone.

In any given case there are many reasons why a person might be acquitted, so it would be impossible to show that a Judge's error alone would inevitably have led to an acquittal.

The issue of double jeopardy has been well-ventilated in a number of forums and the overwhelming majority of the legal profession would object to any diminution of the principle.

Put simply, the assets of the State and its capacity to bring prosecutions are almost limitless. In the overwhelming majority of cases, however, the capacity of a citizen to defend himself more than once is extremely limited. It is in the interests of the community at large that there be an end to litigation especially where a jury has returned a verdict of not guilty.

In our submission there is no need for any further right of appeal by the prosecution. If a judge is seen to have made a mistake, the prosecution would have had the opportunity to persuade the judge to a contrary position prior to the jury's retirement. If the perceived error is not corrected at that stage by the Judge, then the State can have the matter referred to the Court of Appeal for resolution on an Attorney-General's Reference. Whilst this will not mean that the perceived perpetrator is retried or even punished, it will mean that the mistake is never replicated or perpetuated.

Whilst there would understandably be some support (particularly from the victims' lobby groups) that in every case the perpetrator of a crime should be punished wherever possible, it is submitted that this must give way to protecting the rights of the vast majority of citizens who would see it desirable that litigation should end with a jury's verdict of acquittal, and the certainly that this brings to the legal process.

An accused person gets no costs whatsoever upon acquittal. It is inevitable that those persons will suffer some financial loss – often devastating financial loss - as a result of having to pay legal fees, and in taking time off to attend to the case. The person's reputation may be irretrievably damaged and he may also have been incarcerated whilst awaiting trial or appeal. An accused cannot ever be compensated for this.

An accused person who is acquitted gets no benefit other than the knowledge that he can get on with his life and that he cannot be tried for an offence for which he has been acquitted.

In the Associations' submission, the need for the proposed change has not been demonstrated.

Further, the Bill does not provide adequate protection in the way of compensation for accused persons who may be subject to double jeopardy in terms of appropriate compensation for legal costs thrown away.

Under current legislation (the *Suitors' Fund Act*) there are some limited circumstances where a trial is adjourned or aborted, an accused has an entitlement to a payment in respect of the adjourned or aborted trial. This comes (effectively) from consolidated revenue in the form of the *Suitors Fund* but the scale of remuneration under that Act is however far below the level of funding that would actually be expended in mounting a defence to a case or arranging representation at an adjourned trial or retrial.

In our experience, the amount payable under the *Suitors' Fund Act* will usually be a fraction of the real costs expended in a modest defence. In our submission any attempt to have the costs of the respondent to a prosecution appeal under the proposed provisions paid for along the lines currently available under the *Suitors' Fund Act* should be vigorously opposed.

It is submitted that a respondent to such a prosecution appeal should be afforded *indemnity* costs, provided they are not unreasonable, for both responding to the appeal and for the conduct of any retrial. To ensure that there be no abuse of this type of provision the rate of remuneration for any retrial should be assessed taking in to account the level of legal representation incurred by the Respondent in the original trial.

AMENDMENTS TO SECTION 36BE EVIDENCE ACT

The Association believes that this proposal would be totally unworkable, expensive and unfair.

It is suggested that this proposal be approached with great caution.

Before any such amendment is enacted, it is submitted that the experience of other jurisdictions with this type of provision be examined carefully.

There are some provisions to this effect which operate in the Family Court jurisdiction and would be worth examining before rushing in to this type of provision.

The real problem with this type of evidence is that juries are often seduced by experts or at least tend to afford them weight which transcends that given to the evidence of other witnesses.

For instance, an observation by the expert as to an otherwise normal aspect of the child's behaviour (she was distant, introverted, etc and that this could indicate she had been sexually abused) goes to a matter of opinion which is probably not universally accepted as proving unequivocally the fact of the matter in issue.

What would occur in cases such as this is that for every prosecution expert who would testify as to a certain feature of a child's behaviour being consistent with the child having been sexually abused there would be another who would testify to the contrary.

Cases would become in effect contests between experts.

Trials would become significantly longer and more expensive. Legal Aid would be required to fund experts in almost every sexual assault case involving children.

The foregoing is obviously predicated on the basis that fairness would dictate that the defence could call rebuttal evidence to evidence called by the prosecution. The section as

it currently stands however does not specifically empower the defence to call such evidence. The briefing notes to the Bill observe that the provision would allow such evidence to be admitted "*against an accused person*". The Criminal Lawyers' Association primary position would be that the provision should be rejected in its entirely. In the event that it was to be passed in some form or other it should be made abundantly clear on its face that the defence would have the same right to call rebuttal evidence as the prosecutions

In any event, such an amendment is likely to add a further strain on an already under-resourced District Court.

We trust that the foregoing may be of some assistance, and we look forward to your comments in due course.

Yours faithfully

B. Lonsdale

Belinda Lonsdale
President

cc Ms S E Walker, MLA
Member for Nedlands
Unit 1, 160- Hampden Road
NEDLANDS WA 6009

Ms M Saraceni
President
Law Society of Western Australia
PO Box Z5345
PERTH WA 6831

Mr K Martin QC
President
WA Bar Association
Allendale Square
77 St George's Terrace
PERTH WA 6000