



# Criminal Lawyers Association of the Northern Territory (CLANT)

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Patron: The Hon Justice Virginia Bell • President: Russell Goldflam (telephone: 040 1119020) •  
Secretary: Catherine Voumard (PO 969, ALICE SPRINGS NT 0871) • www.clant.org.au • ABN:64391168 310

Mr Robert Bradshaw  
Director, Policy Coordination  
Department of the Attorney-General and Justice  
GPO Box 1722  
Darwin NT 0801

*Delivery by email: robert.bradshaw@nt.gov.au*

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Dear Mr Bradshaw

## **Criminal Code Amendment (Sexual Offences) Bill 2014**

Thank you for circulating the consultation draft of the *Criminal Code Amendment (Sexual Offences) Bill 2014* and giving the Criminal Lawyers Association in the Northern Territory (CLANT) the opportunity to comment.

Whilst there is general support for the harmonisation of criminal offence provisions with the Model Criminal Code, CLANT does not support new offence provisions that involve the following features:

1. increased penalties for conduct covered by existing offence provisions in the current Criminal Code (NT), and
2. maximum penalties fixed at a higher rate than those suggested in the Model Criminal Code.

### **Examples of Unwarranted Increased or Inexplicably Disproportionate Penalties**

One example of a disproportionate increase in penalties for a (new) offence provision which involves conduct identical to an existing offence provision is the new offence under section 208HC (indecent touching without consent), which covers essentially the same conduct as the offence of common assault with a circumstance of aggravation, being that the person is indecently assaulted, under section 188(2)(k) of the existing Code. Whilst the elements of these two offence provisions almost overlap<sup>1</sup>, the offence under section 208HC carries a maximum penalty of seven years imprisonment (nine years for an aggravated offence), this being two years more than the maximum penalty under the section 188 common assault offence.<sup>2</sup>

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<sup>1</sup> The major difference being that the offence under section 188 requires proof of the physical element, "direct or indirect application of force against another" whereas the offence under section 208HC (new) requires proof of "touching another"; and the fault element for the section 188 offence is intention or foresight (applying Part II of the Code) whereas the fault elements for the section 208HC offence are intentional touching (applying Part IIAA), and recklessness in relation to the touching being indecent and lack of consent (specified in the offence provision).

<sup>2</sup> Section 188(2) specifies that an offender for an aggravated assault is liable to imprisonment for 5 years if dealt with on Indictment and 2 years if dealt with summarily.

Another example of a new offence provision which involves an inexplicable variance in the maximum penalty, when compared with arguably more serious conduct covered by existing provisions, is the disjunct between the penalty for the offence under section 208HE (Indecent act directed at a person) and that under section 188(2)(k) (common assault with a circumstance of aggravation, being that the person is indecently assaulted).

These two offence provisions would appear to differ in objective seriousness. Whilst the offence under section 208HE (Indecent act directed at a person) presumably targets conduct that is *non-contact "indecent acts"* such as flashing or masturbating in a public place or in the presence of another, the offence under section 188(2)(k), involves the *actual or threatened application of force upon another* without consent, constituting an indecent assault.

However, both offences carry the same maximum penalty of five years imprisonment, with an aggravated offence under s208HE carrying a maximum of six years imprisonment.

The penalties in these instances should be revised to reflect the seriousness of the conduct targeted by the offence provision.

### **Fault Elements for Certain Offences**

CLANT notes that there are offence provisions which involve fault elements that displace default fault elements or otherwise deviate from defined fault elements under Part IIAA Criminal Code.

One example of the use of fault elements, which displace the default fault elements set out in section 43AM of Part IIAA of the Criminal Code (NT) concerns the offence of unlawful sexual penetration under section 208H (new), replacing the existing section 192 offence (Sexual intercourse and gross indecency without consent).

Section 208H(5) uses "wilful blindness" as a fault element, as it provides that "being reckless as to a lack of consent to sexual penetration includes *not giving any thought* to whether or not the other person is consenting to sexual penetration" (emphasis added).

This deviates from the definition of "recklessness" under section 43AK of the Criminal Code (NT), namely: (1) being aware of a substantial risk that a result will happen or a circumstance does or will exist; and (2) having regard to the circumstances known to the person, it is unjustifiable to take the risk. Section 43AK(4) provides that proof of intention, knowledge or recklessness satisfies the fault element of recklessness.

Another example of what appears to be a deviation from the principles enshrined in the Model Criminal Code, are the creation of offences of "attempting" to commit an offence, where application of section 43BF(4) of the Code is precluded.

Section 43BF(4) provides that, for an offence of attempting to commit an offence, "*intention and knowledge are the fault elements* in relation to each physical element of the offence attempted" (emphasis added).

However, section 208HF (Fault elements for offence of attempting to commit sexual act without consent) provides that "the fault element in relation to a physical element of the attempted offence is the same as the fault element in relation to that physical element of the non-consensual sexual crime."

CLANT hopes that you will take these points into account in drafting provisions that will align more closely with the principles and spirit of the Model Criminal Code.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'Lyma Nguyen', with a large, sweeping flourish underneath.

Lyma Nguyen  
on behalf of the CLANT President, Russell Goldflam, and the CLANT Committee