



17 February 2011

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The Honourable John Rau MP  
Attorney-General  
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ADELAIDE SA

Dear Mr Attorney

***Summary Offences (Tattooing, Body Piercing and Body Modification) Amendment Bill 2011***

Thank you for the opportunity to comment in respect of the draft of the above Bill. The Bill has been considered by the Law Society's Human Rights Committee and Criminal Law Committee.

The importance of the balance between protection of young people from harm and recognising the autonomy and individuality of young persons must be given due acknowledgment.

The Society does not have any particular view on the desirability of control or further control of the industry. However we do have the following observations to make

1. As is recognised in the explanatory notes, section 21A of the *Summary Offences Act 1953* provides an exemption in respect of tattooing for medical reasons by a legally qualified medical practitioner. The Bill preserves such exemption.
2. The ultimate questions include whether imposing new legal restrictions on availability of such procedures in respect of persons under 18 is such as to warrant a broad prohibition; whether there should be criminal sanctions; whether the nature and extent of significantly greater and intrusive police powers is an appropriate and proportionate measure.
3. It is noted that the Bill follows upon the report and recommendations of the 2005 Select Committee into the tattooing and piercing industry.
4. Consideration of the report and recommendations of the Select Committee indicates that the Bill adopts some of the Committee's recommendations.
5. It is not apparent why the various procedures would amount to assault at common law or under South Australia's various statutory provisions. It is not readily apparent why such procedures would constitute an assault if performed on a minor and if the minor consented.
6. The proposed legislation seeks to protect minors. The first question that arises therefore is whether it is desirable or appropriate to protect all persons in that category.

7. It is recognised that minors usually have certain restrictions or limitations on their capacity to enter into legal relations, make informed decisions or make responsible, mature and rational decisions. Those limitations have relied upon the notion that minors do not enjoy full legal capacity. An aspect of the philosophy behind the Bill recognises those historical and generally appropriate limitations.
8. However, it is not necessarily consonant with such limitations that legislation needs to be introduced imposing a complete ban.
9. Indeed the explanatory notes recognise the ability of children under 16 to give valid consent to medical treatment. At age 16 youth are considered to be medically emancipated from their parents/guardians; that is they can consent to medical procedures as if an adult. However potentially this legislation prohibits those in our community who are already medically emancipated from consenting to a tattoo or body modification technique. It is therefore quite illogical.
10. It is noted that earlobe piercing is not prohibited (section 21B(3)(a)) although it is not apparent why it should be confined to that part of the ear.
11. It is noted that piercing of the eyebrow, navel, nose and other part of the ear can be performed with the consent of the minor's guardian: section 21B(3)(b).
12. That leaves open the question whether there is a guardian that can give such consent. Such a guardian may not exist. Such a guardian may not have the capacity to give consent. A minor may not have anybody in that role for all sorts of other reasons including their own autonomy, self determination and self sufficiency in all respects.
13. Indeed it is such persons, which are a significant part of the 16 to 18 year old age group, that make all sorts of decisions which are personal, appropriate, legally binding, in their own interests, and as an expression of their own values. They do so in the exercise of their freewill and autonomy. Such persons may live independently in the community and make all sorts of important decisions to do with all sorts of matters. The question is whether it is appropriate to therefore impose such a prohibition on persons in that age group. That is a more complex question than for persons who are under 16 or have some other lack of capacity.
14. A significant concern is that such prohibition is more likely than not to drive such procedures underground with such procedures carried out in a backyard setting as the equipment, skill and desire for such procedures will not be affected by the legislation. It is unlikely that such a law will change behaviour, trends, fashions or self expression.
15. Such a risk will have increased consequential risks to health, etc. The health risks formed a significant part of the Select Committee enquiry and report.
16. The prohibition in section 21C(1) in respect to such a procedure on a person who is intoxicated is not effective. The term "intoxicated" has all sorts of meanings. It is an uncertain and immeasurable concept. It is not defined in the Bill. A person may be intoxicated (or stupefied) but not be apparently affected.

17. Perhaps a better consideration could be that a procedure is not to be carried out on a person whose mental faculties are impaired whether by virtue of a mental illness, the consumption of alcohol or drugs or a combination of the two.
18. Consideration could also be given to prohibiting the situation where a person is unconscious.
19. The criminal sanctions are draconian in that they criminalise certain things, for example failure without reasonable excuse to comply with a requirement of a police officer (section 21G(4)).
20. It is unclear whether criminalization of procedures in respect of minors is the only necessary response and whether alternative legislative models exist.
21. The police powers are significant, intrusive and draconian. Requiring a person believed to be a minor to state his or her name and address, produce evidence of age and state what procedure the person is seeking at the premises is intrusive (section 21G(2)). A person may not have evidence of their age immediately available to be produced but nonetheless be liable to prosecution and being criminalised. A person may never have evidence of their age available to them to produce, whether on their person or at any point. Criminalizing a person's mere failure or refusal to comply with the police in the exercise of powers under the section is problematic. The legislation is designed to protect minors. The question is whether minors are to be themselves criminalized for not complying with police requirements.
22. A related question is whether any accessorial liability will attach to a minor in respect of a breach of the law in section 21B(1) and (2). Section 267 of the *Criminal Law Consolidation Act 1935* could impose such accessorial liability on the minor seeking a procedure. One reading of the Bill would permit a minor to be considered an accessory and so criminalized. This is most likely not desirable or contemplated. If so such accessorial liability on a minor should be excluded.
23. In respect of section 21(2)(c) a person may be visiting the premises for no other reason than curiosity and so not be able to state what procedure they are seeking at the premises because they are not seeking any procedure. It ought not be presumed that all persons at such premises are seeking a procedure.
24. The explanatory notes suggest that the police are given considerable powers for the purposes of determining compliance but this is not expressed in the proposed legislation. For the proper and lawful exercise of such powers (section 21G) the Bill should express that the police officer must be in attendance for the purposes of determining whether there is compliance with the legislation as a necessary foundation for exercising these intrusive powers.
25. In exercising the power to retain records (section 21G(3)(c)) for the purposes of investigating an offence, the police should be required to permit a copy of such records to be taken as they are business records needed for the business.
26. The police powers concerning inspection, copying and retention of records should be strictly defined and limited. As presently expressed the powers are too broad, are ambiguous and not clearly related to the limited purposes concerned with compliance.
27. The Bill is of broader application and is not just concerned with procedures in respect of minors. There is a significant element of consumer protection in section 21D.

28. A written agreement concerning prescribed information and guardian's consent in prescribed form are the materials required to be produced and provided (section 21D(2)). These constitute the records which police may examine, copy and retain (section 21G(3)).
29. It is apparent that police will be concerned to carry out consumer protection work concerning compliance with section 21D and the regulatory offences thereunder and not just the investigation or prevention of criminal activity.
30. The police powers in section 21G(1) are therefore concerned with diverse and unrelated purposes, that is, investigation of a criminal offence (sections 21B and 21C) and consumer protection and compliance (sections 21E and 21F). The police powers to enter premises and to require production of records thereunder are too broad and not related to the usual exercise of police powers in the investigation of criminal activity.
31. Consideration ought to be given to exempt such procedures (other than genital mutilation) for the purposes of cultural, religious or related practices. Certain indigenous communities and certain communities of persons from overseas permit such body modification procedures as a recognised, necessary, appropriate or significant cultural or religious practice. The Bill ought to recognise that and provide exemption in the same way as exemptions are provided in respect to other practices on the same basis: see for example section 15(2a)(g) of the *Summary Offences Act 1953*.

I trust this response is of assistance. Please do not hesitate to contact me, should you wish to raise any questions.

Yours sincerely



Ralph Bönig  
**PRESIDENT**