

**SUMMARY OFFENCES AMENDMENT (TATTOOING
AND BODY PIERCING) BILL**

EXPOSURE DRAFT

DISCUSSION PAPER

DATE: JANUARY 2008

DEPARTMENT
OF JUSTICE

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1 Introduction

1.1 Purpose of Discussion Paper

In September 2007, the Victorian Government announced its intention to reform the law relating to the body piercing and tattooing of young people. The proposed reforms, contained in the Summary Offences Amendment (Tattooing and Body Piercing) Exposure Draft Bill (the Exposure Draft Bill), reflect the Government's commitment to protecting community health and welfare, especially of the young. The Exposure Draft Bill would amend the *Summary Offences Act 1966* (Summary Offences Act) by:

- increasing the penalty for the offence of performing tattooing or a like process on a person under the age of 18 years from 5 penalty units to 60 penalty units
- defining “like process” to tattooing to include scarification, branding and beading
- making it an offence to perform a non-intimate body piercing on a person aged under 16 years without the consent of a parent or guardian and the consent of the young person (where he or she has capacity to consent)
- making it an offence to perform an intimate body-piercing on a person aged under 18 years.

The purpose of this consultation paper is to explain, and seek community feedback on, the Exposure Draft Bill and key issues identified during its development. The Government recognises that this topic raises complex legal, civil liberty and cultural issues, and considers that broad community consultation is important to ensure that the legislation introduced into Parliament is fair and effective.

1.2 How to make comments

The Victorian Government invites comments on the Exposure Draft Bill, as well as on the issues raised in the Discussion Paper.

Throughout this Discussion Paper, a number of questions are posed on key elements of the Exposure Draft Bill. Whilst these questions may provide a framework for responses, any additional comments on the issues raised by the Exposure Draft Bill and Discussion Paper are welcome.

Please note that all comments received on the Exposure Draft Bill will be treated as public information unless you request otherwise. If you do not want your name to be identified, or if you do not want your comments attributed or sourced to you, please make this clear when providing your comments.

The closing date for comments is **Friday 14 March 2008**.

Comments may be sent by post to:

Criminal Law Policy
Department of Justice
GPO Box 4356
MELBOURNE VIC 3001

Or emailed to:

legalpolicysubmissions@justice.vic.gov.au

2 Background

2.1 Prevalence of body piercing and tattooing

Tattooing and body piercing, whilst having ancient origins, have become increasingly prevalent in Australia and other Western societies in recent years. In addition to traditional earlobe piercing, popular sites for body piercing also include the upper ears, eyebrows, neck, lips, tongue, nipples, navels and genitals. Scarification and branding are also joining tattooing as favoured forms of body decoration.

Research suggests that around 1 in 3 Australians possess some form of body decoration.¹ Approximately 30% of the Australian population aged 14 years and over have had their ears pierced, around 7% have had some other form of body piercing, and around 10% have had a tattoo. Furthermore, body piercing and tattooing is particularly popular amongst younger people. This accords with evidence provided to the South Australian Select Committee on the Tattooing and Body Piercing Industries (the South Australian Select Committee) by Australian Dental Association representatives, who noted that patients who present with oral piercings are usually aged between 16 and 35 years.²

Whilst there are few prevalence studies from other Western societies, those that are available show a similar situation to Australia. For example, studies have shown that³:

- 23% of teenagers in Canada have had a body piercing, whilst 8% have a tattoo
- 20% of adolescents in Italy have a piercing, whilst 6.6% have a tattoo
- 51% of students at a New York (United States) university had a body piercing
- 8.6% of students surveyed at 6 high schools in Texas had a tattoo, with 55% of students expressing an interest in obtaining a tattoo in 1995 compared with 33% in 1993.

2.2 Health issues associated with body piercing and tattooing

Tattooing and body piercing procedures carry a range of potential health risks. Any invasive procedure involving skin penetration carries a risk of transmission of blood-borne viruses, such as hepatitis B and C and HIV, and bacterial infections. Such risks materialise primarily where unclean or non-sterile equipment is used, where unhygienic premises or practices are maintained and/or where after-care is lacking.

¹ Makkai, T, McAllister, I 'Prevalence of tattooing and body piercing in the Australian community' (2001) 25 *Communicable Diseases Intelligence*.

² Select Committee on the Tattooing and Body Piercing Industries, Parliament of South Australia, Report of the Select Committee on the Tattooing and Body Piercing Industries (2005).

³ European Commission, *Workshop on technical / scientific and regulatory issues on the safety of tattoos, body piercing and of related practices* (2003).

Nerve damage and unintended scarring may also occur if procedures are poorly performed.

In addition to these general health risks, site specific risks are identified in the Health Guidelines for Personal Care and Body Art Industries published by the Department of Human Services (summarised in the table below) and in the literature⁴:

Piercing Site	Potential Risks
Ear	<ul style="list-style-type: none"> • Infection
Nose	<ul style="list-style-type: none"> • Infection
Mouth	<ul style="list-style-type: none"> • Infection, airway obstruction due to swelling, interference with speaking and chewing, possible oral surgery to retrieve jewellery, mouth irritation or trauma to teeth and gums including fracture to the enamel and gingival recession, tongue nerve damage, increased salivary flow, permanent numbness and loss of taste
Eyebrow	<ul style="list-style-type: none"> • Damage to nerves responsible for eyelid movement
Skin surfaces – neck, forearms, wrist	<ul style="list-style-type: none"> • Rejection, infection
Navel	<ul style="list-style-type: none"> • Risk of severe infection if the umbilicus is pierced
Nipple	<ul style="list-style-type: none"> • Infection, possible effect on ability to breast feed
Genitals	<ul style="list-style-type: none"> • Infection
Other forms of body art	Potential Risks
Scarification	<ul style="list-style-type: none"> • Infection • Rejection of foreign matter.
Branding	<ul style="list-style-type: none"> • Infection
Beading	<ul style="list-style-type: none"> • Infection • Rejection of the foreign matter

⁴See Botchway, C, 'Tongue Piercing and Associated Tooth Fracture' (1998) 64 *Journal of the Canadian Dental Association*, 803; Koenig, L, Carnes M, 'Body Piercing: Medical Concerns with Cutting-Edge Fashion' (1999) 14 *Journal of General Internal Medicine*, 379; Meltzer, D 'Complications of Body Piercing' (2005) 72 *American Family Physician* 2029.

A recent South Australian study found that of the 22 piercing studios that responded to a survey, all had treated or advised a client in relation to an infection or injury arising from body piercing during the preceding 12 months (a total of 396 clients).⁵ Furthermore, 21 of the 22 respondents reported that they had occasion to refer a client to a medical practitioner. A total of 134 General Practitioners also completed a survey, with 96% reporting that they had treated patients for an infection or injury related to body piercing during the preceding 12 months (410 patients overall).

Research suggests that in France, 10% - 20% of all body piercings are reported to lead to a local infection.⁶ This accords with an American study which found that of 450 university students with body piercings, 17% reported medical complications.

⁵ Southern Primary Health, *Healthy Body Art: Body Piercing Infection and Injury Research Report* (2006).

⁶ Demosthenes, P, Zenie, A, Schwela, D and Baumler, W 'Risks and Health Effects from Tattoos, Body Piercing and Related Practices (Working Paper, European Commission Institute for Health and Consumer Protection, 2003).

3 The existing regulatory framework

3.1 Criminal law

A number of criminal offences on the Victorian statute book are potentially relevant to the body piercing and tattooing of young people.

The only specific offence is section 42 of the Summary Offences Act, which prohibits the conduct of “any tattooing or like process” on a person under 18 years of age (presently punishable by a fine of 5 penalty units). Whilst there is no specific offence dealing with body piercing, a number of general offences may be relevant in the circumstances of a particular case.

3.1.1 Offences against the person

A number of statutory offences against the person may potentially apply to tattooing and body piercing, such as:

- assault and aggravated assault under sections 23 and 24 of the Summary Offences Act
- causing injury or serious injury intentionally, recklessly or negligently, and endangerment offences under sections 16, 17, 18, 23 and 24 of the *Crimes Act 1958*
- female genital mutilation under section 32 of the *Crimes Act 1958*.

The Victorian Supreme Court has defined an assault as the “intentional application of physical force to the victim’s body in a hostile manner without his consent and without lawful justification or excuse”.⁷

As a general rule, an assault will not occur where a person consents to the contact or the application of physical force. However, this is not always the case. Consent is not a defence where the assault is of such a nature, or is inflicted in such circumstances, that its infliction is injurious to the public as well as to the person injured. Organised sporting activities and medical procedures are common examples of situations where consent renders contact that would otherwise constitute an assault acceptable. Further, the House of Lords in England has held that the tattooing or ear-piercing of consenting adults is lawful notwithstanding that it involves actual bodily harm or may cause serious bodily harm.⁸ Legal advice submitted to the South Australian Select Committee suggests that “it is difficult to see why existing exceptions relating to tattooing and ear piercing should not be extended to other forms of body piercing”.⁹

⁷ R v Holzer [1968] VR 481 at 484.

⁸ R v Brown [1994] 1 AC 212.

⁹Select Committee on the Tattooing and Body Piercing Industries, above n 2, Appendix 8, 6.

However, the ability of children and young people to consent to contact that would otherwise constitute an assault, such as body piercing, is a more vexing question. The leading Australian authority on consent of minors in relation to medical procedures is *Secretary, Department of Health And Community Services v JWB and S.M.B (Marion's Case)*.¹⁰ In that High Court decision, the majority stated that (at 233):

The common law in Australia has been uncertain as to whether minors under 16 can consent to medical treatment in any circumstances. However, the recent House of Lords decision in *Gillick v West Norfolk AHA* (1986) AC 112 is of persuasive authority. The proposition endorsed by the majority in that case was that parental power to consent to medical treatment on behalf of a child diminishes gradually as the child's capacities and maturity grow and that this rate of development depends on the individual child...A minor is...capable of giving informed consent when he or she "achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed". This approach, though lacking the certainty of a fixed age rule, accords with experience and with psychology. It should be followed in this country as part of the common law.

McHugh J stated that (at 311):

A minor has that capacity [to consent to medical treatment] where he or she possesses sufficient intellectual capacity and emotional maturity to understand the nature and consequences of the procedure to be performed. Consequently, if a minor lacks the intellectual capacity and emotional maturity required to understand the nature and consequences of a medical procedure, his or her agreement to the carrying out of that procedure will be of no effect.

By analogy, it is arguable that a young person who does not have the intellectual capacity and emotional maturity to understand the nature and consequences of a particular body piercing will be unable to provide a valid consent to such procedure, and the procedure would constitute an assault. It does not necessarily follow that a young person's parent or guardian can provide a valid consent on that person's behalf. To quote McHugh J in *Marion's Case* (at 316):

Furthermore, because parents are given authority to act for the benefit of the child, their authority is limited to those acts which advance or protect the welfare of the child. This criterion is a matter which must be determined objectively and not by reference to the good faith opinions of the parent. A parent has no authority, therefore, to consent to medical treatment unless it can be seen objectively that the treatment is for the welfare of the child. If a parent purports to give consent to treatment which is not for the welfare of the child, the consent is of no effect. A person who acts on such "consent" is guilty of assaulting the child if the treatment involves any physical interference with the child.

Furthermore, even where a parent and/or young person purportedly consents to body piercing, a Court may hold that, in the circumstances of the particular piercing, it falls in the category of assaults to which consent does not constitute a defence.

The 'cause injury / endangerment' offences in the *Crimes Act 1958*, which effectively capture more serious assaults, are unlikely to apply to body piercing in the ordinary course of events, given the elements of intent to cause harm, or recklessness or negligence as to the harm caused. However, the offence of female genital mutilation

¹⁰ (1992) 175 CLR 218

in section 32 of the *Crimes Act 1958* may have application to body piercing procedures in certain circumstances.

3.1.2 Sex offences

It is possible that rape and sexual assault offences in the *Crimes Act 1958* may apply to genital piercings in certain circumstances. Sexual penetration is defined in section 35(b) to include “the introduction (to any extent) by a person of an object or part of his or her body (other than the penis) into the vagina or anus of another person”. This may apply to some piercing procedures, providing that the mental element of the offence is established (ie: intention to sexually penetrate).

The offences of indecent act with a child under the age of 16, and indecent act with a 16 or 17 year old child in sections 47 and 49 of the *Crimes Act 1958* may also apply when intimate body piercing is conducted on a young person. What constitutes indecency is a matter of fact to be determined in all the circumstances of a particular case. However, it is arguable that, at least in some circumstances, intimate body piercing of children could fall within the ambit of this term. Consent is not a defence to the ‘indecent act’ offences unless the accused can satisfy the Court that:

- at the time of the offence, he or she believed on reasonable grounds that the child was aged 16 years or older, or 18 years or older (as the case requires), or
- that he or she was married to the child, or
- in relation to section 47 only, that he or she was no more than 2 years older than the child.

Statistics are not available on the number of occasions on which a person has been charged, prosecuted or convicted of one of the aforementioned offences in circumstances resulting from body piercing. However, one case reported in Victoria in 2007 involved a body piercing operator who was charged with indecent assault and sexual penetration of minors, in relation to alleged assaults prior to the piercings being performed.

3.2 Health framework

The Victorian Government has implemented a comprehensive regulatory framework to assist in minimising and managing the health risks associated with body piercing. Section 366C of the *Health Act 1958* requires persons who conduct a tattooing or body piercing business to register with the local council any premises upon which that business is conducted. Registered businesses must comply with the Health (Infectious Diseases) Regulations 2001, which set a range of health standards including:

- premises must be kept in a clean and hygienic state (regulation 23, penalty: 20 penalty unit fine)
- articles intended to be used for penetrating skin must be sterile, other articles to be used on a person must be clean, and contaminated articles must be destroyed or

sterilised in accordance with the methods specified (regulation 24, penalty: 20 penalty unit fine)

- any person engaged in tattooing or body piercing must be clean and have no exposed cuts, exposures or wounds (regulation 25, penalty: 20 penalty unit fine)
- written information about the transmission of infectious diseases associated with a procedure must be provided directly to the client before the procedure is carried out (regulation 25A: 20 penalty unit fine).

The Department of Human Services has also published Health Guidelines for Personal Care and Body Art Industries. This publication is designed to assist tattoo and body piercing operators in meeting their obligations under the Health (Infectious Diseases) Regulations 2001. It is available online at:
http://www.health.gic.gov.au/ideas/regulations/hlth_guidelines

3.3 Youth employment legal framework

In Victoria, the *Child Employment Act 2003* regulates the employment of children aged under 15 years. Generally speaking, this regime prevents persons aged under 15 years of age from being employed to perform body piercing work.

3.4 Other jurisdictions

The regulation of tattooing and body piercing in other Australian jurisdictions is similar to the approach taken in Victoria. All Australian jurisdictions prohibit, either outright or in the absence of parental consent, the tattooing of persons aged under 18 years. Only Queensland has a specific offence prohibiting body piercing on persons aged under 18 years, and this only relates to intimate body piercing (genitalia or nipples).

However, Victoria is not alone in examining age of consent issues relating to body piercing. In June 2007, a Private Member's Bill was introduced into the South Australian Parliament to prohibit piercing and scarification of minors without parental consent. This followed the 2005 Report of the South Australian Select Committee on the Tattooing & Body Piercing Industries, which recommended that:

- traditional ear-piercing be exempt from any age-based restrictions
- genital, tongue, nipple, neck and other seriously invasive piercing be prohibited on any person under 18 years of age
- that all other piercings may be obtained by a minor with valid parental consent.

Body piercing regulation, including age of consent issues, are also under consideration in New South Wales (NSW).¹¹

¹¹ NSW Department of Community Services, *Statutory Child Protection in NSW: Issues & Options for Reform*, October 2006, p 33 – 34. See also Silmalis, L 'Piercing Rules Get Tough' *The Daily Telegraph* (Sydney), November 26, 2000.

4 The proposed reforms: policy rationale & issues

4.1 *Body piercing*

In summary, the Exposure Draft Bill prohibits:

- intimate body piercings on persons aged under 18 years, and
- other body piercings on persons aged under 16 years, unless written consent is provided by the young person's parent or guardian and the young person, where he or she has legal capacity.

4.1.1 Non-intimate body piercing

Prohibiting persons aged under 16 years from obtaining non-intimate body piercings without parental consent is an appropriate measure to protect the health of young people. As noted above, body-piercing carries potential health risks, including the transmission of blood borne viruses, infection, scarring, nerve damage and dental problems. Furthermore, the available evidence suggests that complications associated with body-piercing are not uncommon.

In this context, the Scrutiny of Acts and Regulations Committee of Parliament *Report on the Review of the Summary Offences Act 1966* (the SARC Review), tabled in Parliament in 2000, noted many submissions were received from parents concerned about the ease with which their children could obtain body-piercings. Such concerns, which are reflected in complaints and correspondence to the Government, are unlikely to abate given the increasing prevalence of body piercing.

Sixteen years is considered an appropriate age of consent for a number of reasons. There is no single age at which a young person is considered to have the legal capacity to make decisions that affect their lives. At times the law allows persons aged under 18 years to make complex life decisions. For example, the *Crimes Act 1958* sets 16 years as the age at which a young person may consent to a sexual relationship. Furthermore, as noted above, young people aged under 16 years may consent to medical treatments which they are capable of fully understanding.

Conversely, the law expressly prohibits certain activities by young people, either outright or in the absence of parental consent and supervision, in a number of situations. For example, the:

- *Tobacco Act 1987* prohibits the sale of tobacco products to young persons aged under 18 years
- *Liquor Control Reform Act 1998* prohibits the sale or supply of liquor to young persons aged under 18 years, subject to certain exceptions (for example, where the sale or supply occurs on licensed premises and is for consumption as part of a meal where the young person is accompanied by his or her spouse, parent or guardian)

- *Gambling Regulation Act 2003* prohibits gambling by persons aged under 18
- *Casino Control Act 1991* prohibits persons aged under 18 from entering or remaining on casino premises
- *Classification (Publications, Films & Computer Games) (Enforcement) Act 1995* prohibit the attendance of a person aged under 18 years at a film classified R18+, and contains other offences relating to the supply of certain films to minors
- *Marriage Act 1961* provides that a person aged 16 or 17 years may only be married with his or her parent's consent and a court order allowing it.

It is considered that 16 year olds are, generally speaking, able to maturely and intelligently identify and consider the short and long term risks and implications of non-intimate body piercing, and to understand and implement after-care advice. It is noted that many body piercing operators already require parental consent before piercing persons aged under 16 years.

The reforms proposed in the Exposure Draft Bill are designed to involve parents and guardians in discussions and decision-making with young people about body piercing. This will assist young people in properly identifying, appreciating, considering and managing the potential health risks of body piercing, and will promote informed decisions. It will also enable parents and guardians to assist in the selection of reputable operators, with aftercare requirements and to promptly identify and address any complications.

Question 1: *Do you agree that 16 is an appropriate age of consent for non-intimate body piercing?*

Question 2: *Do you agree that the consent of a parent or guardian should be required for the non-intimate body piercing of a young person aged under 16 years?*

Question 3: *Is statutory guidance required as to the meaning of 'capacity of a young person to consent to a body-piercing'?*

As noted above, ear lobe piercing is the most common form of body piercing in Australia, with around a third of the population undergoing this procedure at some point in their lives. On one view, ear lobe piercing should be exempt from the Exposure Draft Bill, given the prevalence, apparent social acceptance and less invasive nature of this procedure compared to other body piercings. However, the counter argument is that ear lobe piercing still involves potential health risks, and that the consent requirements in the Exposure Draft Bill are appropriate.

Question 4: *Should any piercings, such as earlobe piercing, be exempt from the proposed consent requirements?*

4.1.2 Intimate body piercing

For the purposes of the Exposure Draft Bill ‘intimate body piercing’ means the piercing of a person’s genitalia (including surgically constructed genitalia) or nipples.

Intimate body piercings raise similar health and aftercare issues to non-intimate body piercings. However, given the intimate nature of the body parts involved, a total prohibition on such procedures on young persons aged under 18 years is considered appropriate. This accords with the protection that the law affords young people against indecent or inappropriate contact by adults (such as sexual offences in the *Crimes Act 1958*). Unlike non-intimate body piercing, parental consent does not alleviate concerns about such contact. The proposed reforms also reflect community attitudes and expectations, noting that many body piercing operators already refuse to conduct intimate body piercing on persons aged under 18.

Question 5: *Do you agree that intimate body piercing of persons aged under 18 years should be prohibited?*

Question 6: *What areas of the body should be included in intimate piercing?*

4.1.3 Extracts from the Exposure Draft Bill

4 New Division 6 inserted in Part I

After Division 5 of Part I of the **Summary Offences Act 1966** insert—

"Division 6—Body piercing

43 Definitions

(1) In this Division—

body piercer means a person of or over the age of 16 years who—

- (a) carries on a body piercing business; or
- (b) is employed in a body piercing business; or
- (c) performs body piercing for a fee, wage or other remuneration;

body piercing means the piercing of the human body to create entry and exit holes for the insertion of an object;

body piercing business means a business that provides a service of body piercing, whether or not the business provides any other service;

evidence of age document, in relation to a person, means—

- (a) a proof of age card issued to the person by the Director of Liquor Licensing under section 176 of the **Liquor Control Reform Act 1998** or a corresponding law of another State or a Territory;
- (b) a driver licence or learner permit issued to the person under the **Road Safety Act 1986** or a corresponding law of another State or a Territory;
- (c) a passport issued to the person by any country;
- (d) a document that—
 - (i) bears a photograph of the person; and
 - (ii) states the person's age or date of birth; and
 - (iii) is issued by a person, or by or on behalf of a government department or an agency, approved by the Minister under subsection (2);

registered health practitioner has the same meaning as in the **Health Professions Registration Act 2005**;

registered student has the same meaning as in the **Health Professions Registration Act 2005**;

regulated health service has the same meaning as in the **Health Professions Registration Act 2005**.

- (2) For the purposes of paragraph (d)(iii) of the definition of *evidence of age document*, the Minister, by notice published in the Government Gazette, may approve a person, a government department or an agency for the purposes of this Division.
- (3) The Minister, by notice published in the Government Gazette, may vary or revoke an approval under subsection (2).

43A Application

- (1) Nothing in this Division applies to body piercing performed in good faith—
 - (a) in the course of a regulated health service provided by a registered health practitioner; or
 - (b) in the course of clinical training by a registered student.
- (2) Nothing in this Division affects liability for an offence against a provision of this or any other Act or at common law.
- (3) Consent given under this Division to body piercing does not constitute a defence to a charge for an offence against a provision of this or any other Act or at common law.

44 Intimate body piercing of persons under 18

- (1) In this section, *genitalia* includes surgically constructed genitalia.
- (2) A body piercer must not perform body piercing on the genitalia or nipples of a person under the age of 18 years.

Penalty: 60 penalty units.

- (3) It is a defence to a prosecution for an offence against subsection (2) to prove that, at the time of the alleged offence—
 - (a) the defendant had seen an evidence of age document in relation to the person whose age is material to the offence; and
 - (b) the evidence of age document indicated that the person was of or over the age of 18 years.

- (4) A body piercer must not employ or, in the course of the body piercing business, direct or allow a person under the age of 16 years to perform body piercing on the genitalia or nipples of a person under the age of 18 years, whether at the premises of the business or elsewhere.

Penalty: 60 penalty units.

44A Non-intimate body piercing of persons under 16

- (1) In this section, *consent* means consent to the number and location of piercings to be performed.
- (2) A body piercer must not perform body piercing on a person under the age of 16 years unless written consent has been given in person to the body piercer by—

- (a) a parent or guardian of the person to be pierced; and
- (b) if the person to be pierced is of or over the age of 10 years and has capacity to consent, that person.

Penalty: 20 penalty units.

- (3) It is a defence to a prosecution for an offence against subsection (2) to prove that, at the time of the alleged offence—
 - (a) the defendant had seen an evidence of age document in relation to the person whose age is material to the offence; and
 - (b) the evidence of age document indicated that the person was of or over the age of 16 years.
- (4) A body piercer must not employ or, in the course of the body piercing business, direct or allow a person under the age of 16 years to perform body piercing on another person under the age of 16 years without the written consents required by subsection (2), whether at the premises of the business or elsewhere.

Penalty: 20 penalty units."

4.1.4 Exemption for registered medical practitioners

The Exposure Draft Bill does not intend to capture existing, legitimate therapeutic procedures performed by health professionals, for example suturing or acupuncture. As such, proposed section 43A provides that the Exposure Draft Bill does not apply to body piercing performed in good faith and in the course of a regulated health service provided by a registered health practitioner under the *Health Professions Registrations Act 2005*, or in the course of training by a registered student under that Act.

Question 7: Do you think the exemption in section 43A of the Bill is appropriately framed?

Question 8: Are there other health professionals or services that need to be brought within the ambit of this exemption?

4.1.5 Defences

Evidence of age document

It is a defence to the proposed body piercing offences in the Exposure Draft Bill for the accused person to establish that, at the time of the alleged offence, he or she had seen an *evidence of age document* indicating that the young person was of or above the relevant age of consent. This defence is based on similar provisions in the *Liquor Control Reform Act 1998* and the *Tobacco Act 1987* relating to the sale and supply of alcohol and tobacco to persons aged under 18 years.

Consistent with the approach in those Acts, *evidence of age document* is defined in the Exposure Draft Bill as:

- a proof of age card
- a driver licence or learner permit
- a passport
- other photograph identification approved by the Minister.

Keypass Cards are approved *evidence of age documents* for the purposes of the liquor and tobacco regimes.

Body piercing businesses may adopt the practice of requesting to see an *evidence of age document* before agreeing to conduct a procedure if the customer appears to be under the relevant age of consent. Limiting the scope of the defence to these documents ensures that the age of prospective customers or clients can be determined with a high degree of accuracy. It also provides clear guidance on how to comply with the law. However, it is likely that 16 and 17 year olds will not have the same access to *evidence of age documents* as 18 year olds. This could be addressed by expanding the definition of *evidence of age document* either in legislation or by Ministerial approval.

Question 9: Do you agree with the definition of evidence of age document? What other documents, if any, should be included in this definition?

Acceptable proof of age

An alternative approach would be to adopt a statutory defence based on similar provisions in the *Classification (Publications, Films & Computer Games) (Enforcement) Act 1995*, *Gambling Control Act 2003* and the *Casino Control Act 1991*. This defence would be available where the accused person could show that, at the time of the alleged offence, he or she had seen *acceptable proof of age*. This term is broader than *evidence of age document*, encompassing documentary evidence that might reasonably be accepted as proving the person is at least 16 or 18 years of age, as the case requires.

This approach would offer greater flexibility, which may be particularly important for 16 and 17 years olds. However, it may lack the clarity and reliability of the approach proposed in the Exposure Draft Bill.

Honest and reasonable mistake of fact

A third approach would be to adopt the model offered by the existing ‘tattooing of a minor’ offence in section 42 of the *Summary Offences Act 1966*. This is a strict liability offence, meaning there is no requirement for the prosecution to prove that the accused knew that the young person was in fact underage at the time of the alleged offence. However, an accused could rely on the defence of honest and reasonable mistake of fact, ie: by showing he or she believed, on reasonable grounds, that the young person was 16 or 18 years of age, as the case requires, at the time of performing the procedure.

This is more flexible than the other two models discussed above, but lacks the clarity and reliability of a statutory defence, and provides little guidance on how to avoid breaking the law.

Question 10: What defence do you think should be available for the proposed body piercing offences:

- a) *the approach in the Exposure Draft Bill, ie: specified evidence of age documents?*
- b) *the ‘acceptable proof of age’ approach?*
- c) *the ‘honest and reasonable mistake of fact’ approach?*

4.1.6 Impact on other offences

Proposed sub-section 43A(2) makes it clear that the proposed reforms do not affect liability for any other offence. As such, consent purportedly provided by a young person and / or his or her parent or guardian under the Exposure Draft Bill will not provide a defence to, for example, a charge of assault if that consent would not otherwise be valid. For example, a significant or invasive body piercing carried out on a young child or teenager with a cognitive disability may still constitute an assault notwithstanding that consent requirements under the Exposure Draft Bill are met. Similarly, the Exposure Draft Bill will not impact on any offences under the *Child Employment Act 2003*.

4.1.7 Cultural practices

Body piercing may be culturally based amongst some community groups. In an ethnically diverse community like Victoria, it is important to consider whether proposed criminal laws will impact on legitimate cultural practices.

Question 11: *Will the body piercing provisions in the Exposure Draft Bill have an adverse impact on any cultural practices?*

Question 12: *If yes, is such impact justified?*

4.2 Tattooing & ‘like processes’

It is proposed to amend section 42 of the Summary Offences Act to:

- increase the penalty for tattooing a person aged under 18 years, and
- define “like processes” so that scarification, beading and branding are treated in the same way as tattooing.

4.2.1 Increased penalty for tattooing young people

It is proposed to increase the penalty in section 42 of the Summary Offences Act from 5 penalty units to 60 penalty units. This proposal will:

- ensure that the maximum penalty better reflects the gravity of this offence, and
- maintain an appropriate penalty relativity with the proposed body-piercing offences.

4.2.2 Defining “like processes” to include scarification, branding and beading

Section 42 of the Summary Offences Act prohibits tattooing and “like processes” being conducted on person under 18 years of age. “Like processes” has not been defined in the Act and has not been given judicial consideration.

However, it is considered appropriate to define “like processes” to include scarification, beading and branding. These forms of body decoration are becoming increasingly popular, and, since they are similar to tattooing in their physical effect (ie: permanency), should also be treated in the same way at law.

4.2.3 Extracts from the Exposure Draft Bill

3 Tattooing of juveniles

(1) Before section 42(1) of the **Summary Offences Act 1966** insert—

"(1AA) In this section—

beading means the cutting of the skin of a person and the insertion of an object beneath the skin to produce a lump;

branding means the application of heat to the skin of a person to produce scar tissue;

like process includes scarification, branding and beading;

person means a living human being;

scarification means the cutting of the skin of a person to create scar tissue."

(2) In the penalty set out at the foot of section 42(1) of the **Summary Offences Act 1966**, for "5 penalty units" **substitute** "60 penalty units".

Question 13: *Do you agree with the proposed definitions of scarification, beading and branding?*

Question 14: *Should any other procedures be included in the definition of 'like process' (for example, tongue splitting)?*

4.2.4 Application of the offence

Section 42(2) provides that the offence of tattooing a person aged under 18 years does not apply to any tattooing or like process performed by or at the written request of a medical practitioner under the *Health Professions Registration Act 2005*. It is noted that this is narrower than the equivalent exemption proposed for body piercing offences, which relates to services provided by *registered health practitioners*. Given that "like processes" are now being inclusively defined, it is timely to consider whether the exemption in section 42(2) is still appropriate.

Question 15: *Do you think the scope of the exemption in section 42(2) is appropriate?*

Question 16: *Should the exemption in section 42(2) be expanded to achieve consistency with that proposed in respect of body piercing offences, in proposed section 43A(1)?*

4.2.5 Cultural Issues

As is the case with body piercing, processes such as scarification and beading may be culturally based in some community groups.

Question 17: *Will the definition of "like processes" in the Exposure Draft Bill have an adverse impact on any cultural practices?*

Question 18: *If yes, is such impact justified?*