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~ THE LAW SOCIETY OF SINGAPORE ~

REPORT OF THE COUNCIL OF THE LAW SOCIETY ON THE AMENDMENTS TO THE PENAL CODE PROPOSED BY THE MINISTRY OF HOME AFFAIRS

THE LAW SOCIETY
OF SINGAPORE

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1 INTRODUCTION

1.1 Background

The Senior Minister of State for Law and Home Affairs, Associate Professor Ho Peng Kee, invited the Law Society (the "Society") on 8 November 2006 to study the amendments proposed by the Ministry of Home Affairs ("MHA") to the Penal Code and the preliminary draft Penal Code (Amendment) Bill.

We thank MHA for this opportunity to give our views on the proposed amendments and draft Bill.

In November 2006, the Council of the Society ("Council") appointed an ad hoc committee (the "Committee"), comprising sixteen legal practitioners and academics, to review and comment on the proposed amendments and draft Bill. A list of the Committee members is set out at **Annex A.**

In view of the extensive proposed amendments to the Penal Code that was last substantially amended in 1984, the Society requested MHA for more time to study the proposed amendments and provide considered comments. MHA agreed to grant the Society an extension of time to 30 March 2007 to provide our views.

In total, the Committee held five meetings to deliberate and discuss the proposed amendments and draft Bill and has sought to be thorough and comprehensive in giving its response.

The Committee's written views on the matter were submitted to Council for consideration at the Council meeting on 9 March 2007. A list of the members of Council 2007 is set out at **Annex B**.

This Report now sets out Council's views and recommendations.

1.2 Executive Summary of Council's Views

The proposed reforms to the Penal Code aim to keep the law in step with changes in modern Singapore. For instance, they address new technological developments, revise fines to adjust for changes in the purchasing power of money since 1961, repeal archaic offences such as enticement and clarify important definitions such as imprisonment for life.

Council discussed the underlying legal philosophy of the criminal law. The majority view was that the role of the criminal law is twofold: to punish those who cause harm to others and to punish those whose conduct causes a breach of public order. The use of the criminal law to punish persons on the ground that their conduct is morally repugnant to another section of society is out of step with legal norms in the modern world, and represents an intrusion of morality into law. A significant minority however believed that a legitimate function of the criminal law is to determine limits to behaviour or conduct that is considered by a majority in society to be morally unacceptable. While such behaviour or conduct may be criminalized, the relevant authorities ultimately determine the efficacy and practicality of prosecution.

In our response, where appropriate, we have referred to the MHA's Consultation Paper on the proposed Penal Code amendments (the "Consultation Paper").

Our response is divided into three sections:

(a) Response to MHA's review of sexual offences in the Penal Code;
(b) Response to MHA's review of other offences, definitions, explanations and expressions in the Penal Code; and
(c) Response to MHA's review of penalties in the Penal Code.

A. Response to MHA's review of sexual offences in the Penal Code

Our response to MHA's review of sexual offences in the Penal Code is found at Part 2 of this Report.

We recognize the efforts MHA made in updating and rationalising the sexual offences in the Penal Code in the proposed amendments in this area. Historically, the Penal Code follows the structure of prescribing firstly, the basic *actus reus* and *mens rea* of an offence, secondly, the penalty involved and thirdly, the increasing degrees of penalties for various aggravating forms of such an offence. Such a structure ensures that the essential legal ingredients of the offence concerned are clear and the reader is given a systematic and graduated understanding of the offences, from the basic to the aggravated forms.

We have some significant concerns about the impact of the proposed amendments to the fundamental structure of the Penal Code, some of which are briefly set out as follows:

(a) Outrage of modesty of minors under 14 years of age under s. 354(2): Council is of the view that it is unnecessary to repeal the old s. 354 and add a new s. 354(2). If a minor's modesty has been outraged, the courts can take the aggravating circumstances into account and order an appropriate sentence accordingly. Even if it is necessary to introduce s. 354(2), the complete irrelevance of consent and the apparent lack of a *mens rea* element in s. 354(2) do not provide for a valid defence, in contrast to the defence in s. 140(5) of the Women's Charter for a carnal connection offence.

(b) Marital rape immunity under s. 375(4): The proposed amendment to s. 375(4) to withdraw the existing marital rape immunity partially is welcomed as it seeks to preserve the balance between preserving the husband-wife relationship and therefore the family unit on the one hand while not condoning marital rape as an instance of marital violence on the other. However, this balance may be better achieved by fine-tuning the drafting of s. 375(4).

(c) Concept of mental disability under s. 376E: Mental disability is a scientific and specialized concept which is susceptible to different professional views and opinions. The detection of mental disability, treatment of episodic mental disability and distinctions between the different consequences of mental disability do not appear to be sufficiently addressed by the proposed definition of "mental disability" in s. 376E(6)(a).

(d) Retention of s. 377A: The majority of Council considered that the retention of s. 377A in its present form cannot be justified. This does not entail any view that homosexuality is morally acceptable, but follows instead from the separation of law and morals and the philosophy that the criminal law's proper

function is to protect others from harm by punishing harmful conduct. Private consensual homosexual conduct between adults does not cause harm recognisable by the criminal law. Thus, regardless of one's personal view of the morality or otherwise of such conduct, it should not be made a criminal offence. Moreover, the assurance given by MHA in the Explanatory Notes to Proposed Amendments to the Penal Code that were initially issued by MHA that such conduct will not be proactively prosecuted under this section is an admission that the section is out-of-step with the modern world. The retention of offences on the statute book that covers conduct that will not in fact be prosecuted runs the risk of bringing the law into disrepute.

Council recognised that the above view did not necessarily represent the views of its members collectively. A significant minority of Council members as well as numerous members of the Society at large have an opposing view, and strongly support the retention of s. 377A in the Penal Code. They took the view that the criminal law can and should be deployed to define what the majority or a significant proportion of society believe to be unacceptable conduct, which includes the moral unacceptability of homosexual conduct even when it takes place in private between consenting adults, and that there are sufficient jurisprudential and logical grounds for this.

Differing views were expressed on the constitutionality of s. 377A. In other jurisdictions, legal discrimination based on sexual orientation has been considered against constitutional guarantees of equal protection. Council did not come to a concluded view on the constitutionality of s. 377A.

(e) Repeal of the defence of reasonable mistake as to age through s. 377D: The denial to an accused person of a statutory defence of reasonable mistake as to the age of a person upon his second trial for a similar offence may lead to severe prejudice and unfairness. s. 377D(3) creates a curious anomaly and does not promote the ideal that justice should be seen to be done.

In view of the above, it may be appropriate for MHA to consider undertaking a complete review of the sexual offences regime under the Penal Code by enacting a new chapter in the Penal Code concerning sexual offences. MHA may wish to consider the following features on which to base the reform of the sexual offences regime under the Penal Code:

(a) Sexual intercourse should be defined;

(b) The fundamental *actus reus* and *mens rea* for the offence of sexual assault *simplicitur* should be defined; and

(c) This would be followed by the prescription of additional *actus reus* and *mens rea* for aggravated offences of sexual assault of increasing severity.

Harmonization of the proposed Penal Code amendments with those of the Women's Charter is also essential. We suggest that MHA examine s. 140(1)(i) of the Women's Charter on the age of consent of a woman, as there appears to be a conflict on a woman's age of consent under the proposed amendments and the Women's Charter. Additionally, the suitability of the various ages stipulated in the Penal Code, Women's Charter and Children and Young Persons' Act as legal thresholds (e.g. the age of consent) should be carefully considered, perhaps with the assistance of statistical data.

B. Response to MHA's review of other offences, definitions, explanations and expressions in the Penal Code

Our response to MHA's review of other offences, definitions, explanations and expressions in the Penal Code is found at Part 3 of this Report.

Council recognizes that MHA has expanded and modified the scope of existing offences, as well as introduced new offences, to take into account new technological developments. Be that as it may, we are concerned about the necessity and desirability of many of the proposed amendments, some of which are briefly set out as follows:

(a) **Expanding the scope of unlawful assembly beyond offences against public tranquillity and increase in penalty:** The offence of unlawful assembly is for the purpose of protecting public order. Gathering together for the purpose of committing some other offence can be dealt with by accessory liability for that other offence. No justification has been given for the expansion of the scope of this offence, or for the fourfold increase in the term of imprisonment that it carries.

(b) **Promoting enmity between different groups on ground of religion or race under s. 298A:** While we understand the need to deal with the potential for divisive religious or racial acts or words, the reference to "communities" under s. 298A should be deleted as the constitution of such "communities" is unclear. Also, such "communities" do not appear to fall within the mischief of s. 298A that is sought to be prevented, i.e. disharmony among racial and religious groups on racial and religious grounds.

(c) **Introduction of new provisions which are adequately addressed under other Singapore criminal statutes or other provisions in the Penal Code:** It does not appear necessary to introduce a number of new provisions which are adequately addressed under other Singapore criminal statutes or other provisions in the Penal Code. For example, there is much overlap between the proposed new offences under s. 204A and s. 204B and Chapter XI of the Penal Code and the Prevention of Corruption Act and it is not explained in the Consultation Paper why the present offences under the Penal Code and Prevention of Corruption Act are inadequate.

(d) **Significant extension of extra-territorial jurisdiction:** We are concerned about the extension of extra-territorial jurisdiction to offences committed by public servants overseas and abetment of offences by persons overseas under the proposed new s. 4 and s. 108B of the draft Bill. These proposed sections will create significant practical difficulties and Council recommends that a comparative study be carried out to ascertain how other jurisdictions have dealt with this matter.

(e) **Removal of the element of prejudice to public tranquility as a pre-requisite for unlawful assembly:** Given that the very essence of the concept of an unlawful assembly is protection of public tranquility, Council is of the view that the proposed amendments to s. 141 attempt to extract and will do away with the element of prejudice to public tranquility as a pre-requisite for unlawful assembly and the penal provisions associated with it.

(f) **Clarity on the scope of repealed but re-enacted offences:** Council notes that there are several difficulties with the repeal of s. 151A and its re-enactment as s. 267C in a different part of the Penal Code, in particular, the broad wording of the alternative limb of "counselling disobedience to the law or to any lawful order of a public servant" and the apparent lack of a *mens rea* element.

(g) **Clarity on the addition or removal of key concepts:** Many of the key concepts introduced to or deleted from certain offences are not explained in the Consultation Paper. For instance, the inclusion of "death" under s. 320 as a form of "grievous hurt" appears unnecessary as "death" does not fall within the definition of "hurt", i.e. bodily pain, disease or infirmity, in s. 319 of the Penal Code in the first place. Another example is the proposed amendment to s. 415 which would not require deception as the sole or main inducement. Also, the rationale for the new distinction between "illegal" and "legal" harm under the revised s. 383 and s. 385 is unclear.

C. Response to MHA's review of penalties in the Penal Code

Our response to MHA's review of penalties in the Penal Code is found at Part 4 of this Report.

MHA's proposal to revise the fines in the Penal Code, which were last reviewed in 1952, to adjust for changes in the purchasing power of money since 1961, is plainly defensible. Council also welcomes the proposed amendments to give courts increased discretion to mete out any combination of penalties of imprisonment terms, fines and caning for offences which currently provide for a maximum of two out of the three penalties to be meted out. These amendments will increase flexibility in sentencing and it is anticipated that such flexibility will make it easier for sentencing judges to tailor sentencing to the facts of each case.

We are, however, concerned about several other proposed amendments, some of which are briefly set out below:

(a) **Justification for each and every increase in sentencing maxima of existing offences:** Paragraph 29 of the Consultation Paper states very briefly the general reasons for the proposed increased imprisonment terms for existing offences but no justification or explanation is provided for each and every increase in sentencing maxima. In the absence of full explanation and justification for the increases, Council is unable to concur that the present sentencing maxima are inadequate.

(b) **Maximum punishment of 2 years' imprisonment under s. 304A(b) for negligent causing of death:** Generally, imprisonment is not a suitable punishment for negligence and the maximum punishment of 2 years' imprisonment under s. 304A(b) for negligent causing of death appears excessive. We recommend that no imprisonment be prescribed for the negligent causing of death.

(c) **Enhancing punishment to 20 years' imprisonment under s. 304(a) for culpable homicide not amounting to murder:** Council welcomes the proposed amendment as it will give the court a greater discretion in the sentencing of offences of culpable homicide not amounting to murder, namely, a sentence of between 10 and 20 years imprisonment would now be permitted.

(d) **Introduction of caning under s. 304(b) for culpable homicide not amounting to murder without any intention to cause death:** Council notes that MHA proposes to introduce caning for the s. 304(b) variety of culpable homicide not amounting to murder. Given that s. 304(b) does not require "any intention to cause death or to cause such bodily injury as is likely to cause death", it is not clear why caning has been introduced in this section,

(e) **Repeal of mandatory minimum penalty of imprisonment of 1 year for theft of motor vehicles or parts thereof under s. 379A:** We are of the view that the repeal of the mandatory minimum penalty of imprisonment of 1 year for theft of motor vehicles or parts thereof under s. 379A is a move in the right direction.

Council suggests a concerted and comprehensive study of all mandatory minimum sentences in our criminal law, as such penalties deprive the court of the discretion to tailor a sentence to fit the offender and the offence.

In particular, Council would urge MHA to reconsider the mandatory imposition of the death penalty for the offence of murder under s. 302 of the Penal Code. Council has appointed a Review Committee on Capital Punishment which is in the process of reviewing the issue of capital punishment as a sentencing policy. Pending their forthcoming report, the following factors are highlighted:-

a) The Argument for Discretion in imposing the Death Penalty

The death penalty should be discretionary for the offences where the death sentence is mandatory - murder, drug trafficking, firearms offences and sedition - a position similar to that for the offence of kidnapping. There are strong arguments for changing the mandatory nature of capital punishment in Singapore. Judges should be given the discretion to impose the death penalty only where deemed appropriate.

Giving discretion to the judge will facilitate flexibility in sentencing. Such mitigating factors need not necessarily be statutorily listed but could be allowed to develop on a case by case basis. In this manner, the judge will be allowed to take into account the circumstances of the offence and impose an alternative sentence, for instance, life imprisonment, even if the elements of the charge are satisfied.

Changing the mandatory nature of the death penalty to a discretionary one will not reduce the perceived deterrent effect of the death penalty. The discretionary death penalty was introduced for kidnapping in 1961. Since then kidnapping has been rare. We note that the proposed s. 364A in the draft Bill, which is an offence of kidnapping to compel the Government, provides for a discretionary death penalty as well. Furthermore, this flexibility in sentencing humanizes the law and reflects the evolving standards of decency in Singapore society.

No matter how serious the offence is, the sentence should fit the offender's circumstances and take into account any particular circumstances surrounding the offence. The offender should have the opportunity to persuade the court that he deserves less than the penalty of death.

b) The Effect of s. 34 for Common Intention and s. 149 for Common Object

s. 34 is an enabling provision which facilitates the imposition of joint responsibility on all participants in a criminal endeavour for any criminal act *done in furtherance of their common intention* by any one of them. s. 149 has a similar function. This is the basis for imposing the death penalty on all the accomplices in capital offences.

The Court of Appeal has recently affirmed a line of cases rejecting any limitation that: (a) the murder has to be commonly intended; or (b) that it is relevant that the killing was or was not foreseeable or whether there was or not an express agreement not to kill. So long as the participants have the *mens rea* for the offence commonly intended, they need not possess the *mens rea* for the offence for which they are actually charged.

The purpose of s. 34 and s. 149 is to deter group crimes. The rather harsh punishment serves to deter others from participating in group crimes. Due to the constructive nature of common intention, the accused's subjective intent is not an issue. The requisite intention will be 'constructed' or attributed to the accused.

Following from the above, the meting out of the same penalty to the person who deliberately inflicted death and the person who did not even contemplate that death might be caused by a member of the group infringes the principle of proportionality. That person might have simply stood or waited elsewhere (as lookout, for example), yet he would face the same sentence as the perpetrators.

In the absence of a common intention to murder, the courts should be allowed to punish the accused in accordance with their respective culpability. This is especially so in group assault cases where a fatal injury was inflicted and death has occurred. However, "common intention" will mean that all participants will be jointly charged for that offence.

As a result of judicial construction of s. 34 and s. 149, the range of offences that one is liable to be charged under s. 300, which attracts the mandatory capital punishment, has been greatly increased. Although s. 34 may be deemed necessary to deter group crimes, a better approach might be to increase the sentence for assault and robbery respectively.

That said, the provision of common intention is not unique to Singapore and has been interpreted and applied in several cases in India and other Penal Code jurisdictions in relation to murder. However, most other Penal Code jurisdictions have either abolished the death penalty or made capital punishment a discretionary sentence.

In the absence of re-interpretation of the doctrine of common intention and murder under s. 300(c), the mandatory nature of the death penalty should be revisited. The judge should be given the discretion to take into account mitigating factors and the varying blameworthiness of each of the participants.

1.3 Consultation Process

We are grateful that MHA has consulted both the public and the Society in particular on the proposed amendments to a key criminal law statute in Singapore. As a general comment on the legislative consultation process, we note that MHA had taken into account the experiences of the police and the Attorney-General's Chambers in applying the Penal Code, court decisions and public feedback given over time.

We are of the view that the consultation process can be further improved by, for example, forming a representative commission comprising academics, criminal law practitioners and interest groups to review the reform of the Penal Code.

Naturally, we recognise that there may be constraints on the manner and timing of consultation. Nonetheless, we hope that our report will prove useful to MHA and represent a positive contribution to public consideration of and interest in this important area of law.

2 RESPONSE TO MHA'S REVIEW OF SEXUAL OFFENCES IN THE PENAL CODE

2.1 Clause 45: Amendment of section 354

MHA's Proposed Amendment	Section 354 of the Penal Code is repealed and the following section substituted therefor: **"Assault or use of criminal force to a person with intent to outrage modesty** **354.**—(1) Whoever assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with caning, or with any combination of such punishments. (2) Whoever does any act referred to in subsection (1) against a person, who is under 14 years of age, with or without the consent of that person under 14 years of age, shall be punished with imprisonment for a term which may extend to 5 years, or with fine, or with caning, or with any combination of such punishments.".
Reasons given by MHA for proposed amendment	Council notes at paragraph 14 of the Consultation Paper that the proposed amendment to s. 354 is to introduce tougher penalties for outraging the modesty of a minor under 14 years of age.
Council's Response	Council notes that the key amendment to s. 354 is to provide additional protection to young persons under the age of 14 against indecent assault, by making the consent of the victim irrelevant. The elements under the proposed new s. 354(2) appear to be: (a) "does any act referred to in subsection (1)", i.e. "assaults or uses criminal force" which is an outrage of modesty; and (b) the act is done against a person who is under 14 years of age. The consent of the person under 14 years of age is irrelevant by the words "with or without the consent". We are of the view that firstly, the proposed new s. 354(2) seems not to require *mens rea*. Secondly, the proposed new s. 354(2) should follow the approach set out at s. 140(5) of the Women's Charter, which provides a defence where an offender is charged with carnal connection with any girl below the age of 16 years under s. 140(1)(i), if he is a man below the age of 21 years and has reasonable cause to believe that the girl was

	above the age of 16. There is also no reason why consent should be completely irrelevant under s. 354(2). Consent goes to the act of the accused (i.e. assault or use of criminal force which is an outrage of modesty), and not the intention or knowledge of the accused. In addition, s. 354(2) presumes that a person under 14 years of age is able to give consent. But the law already provides that persons under the age of 12 cannot validly give consent: see s. 90(c) of the Penal Code. The proposed new s. 354(2) therefore conflicts with s. 90(c) PC.
Council's Recommendations	Council is of the view that it is unnecessary to repeal the old s. 354 and add a new s. 354(2). If a minor's modesty has been outraged, the courts can take the aggravating circumstances into account and order an appropriate sentence accordingly. However, if MHA is of the view that it is necessary to amend s. 354, Council suggests the following to provide for a valid defence in s. 354(2) cases: (a) The proposed s. 354(2) should be re-drafted to require *mens rea*; and (b) It should be provided that it is a valid defence to the proposed s. 354(2) if there was consent by the minor and the offender: (a) is below the age of 21 years; or (b) has reasonable cause to believe that the minor was above the age of 14 years. MHA may also wish to consider whether it would be appropriate to undertake a complete review of the sexual offences regime under the Penal Code, given that the concept of "outrage of modesty" is archaic and out of step with the concepts of "acts of indecency" and "sexual assault" used in other jurisdictions.

2.2 Clause 48: Repeal and re-enactment of sections 375 to 376D and new sections 376E to 376J

MHA's Proposed Amendment	Sections 375 to 376D of the Penal Code are repealed and the following sections substituted therefor: *"Sexual offences* **Rape** **375.**—(1) Any man who penetrates the vagina of a woman with his penis — (*a*) without her consent; or (*b*) with or without her consent, when she is under 14 years of age, shall be guilty of an offence. (2) Subject to subsection (3), a man who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning. (3) Whoever — (*a*) in order to commit or to facilitate the commission of an offence under subsection (1), (i) voluntarily causes hurt to the woman or to any other person; or (ii) puts her in fear of death or hurt to herself or any other person; or (*b*) commits an offence under subsection (1) with a woman under 14 years of age without her consent, shall be punished with imprisonment for a term of not less than 8 years and not more than 20 years and shall also be punished with caning with not less than 12 strokes. (4) No man shall be guilty of an offence under subsection (1) against his wife, who is not under 13 years of age, except where — (*a*) the wife was at the time of the offence living separately from him under a judgment of judicial separation or an interim judgment of divorce not made final; (*b*) at the time of the offence, there was in force an injunction restraining him from having sexual intercourse with his wife; or (*c*) at the time of the offence, there was in force a protection order under section 65 or an expedited order under section 66 of the Women's Charter (Cap. 353) made against him pursuant to an application by his wife. (5) Notwithstanding subsection (4), no man shall be guilty of an offence under subsection (1)(b) for an act of penetration against his wife with her consent. **Sexual assault by penetration** **376.**—(1) Any man (A) who —

	(*a*) penetrates, with A's penis, the anus or mouth of another person (B); or (*b*) causes another man (B) to penetrate, with B's penis, the anus or mouth of A, shall be guilty of an offence if B did not consent to the penetration. (2) Any person (A) who — (*a*) sexually penetrates, with a part of A's body (other than A's penis) or anything else, the vagina or anus of another person (B); (*b*) causes a man (B) to penetrate, with B's penis, the vagina, anus or mouth of another person (C); or (*c*) causes another person (B), to sexually penetrate, with a part of B's body (other than B's penis) or anything else, the vagina or anus of A or B or of another person (C), shall be guilty of an offence if B or C did not consent to the penetration. (3) Whoever does any act referred to in subsection (1) or (2) against a person, who is under 14 years of age, with or without the consent of that person under 14 years of age, shall be guilty of an offence. (4) Subject to subsection (5), a person who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning. (5) Whoever — (*a*) in order to commit or to facilitate the commission of an offence under subsection (1) or (2), (i) voluntarily causes hurt to any person; or (ii) puts any person in fear of death or hurt to himself or any other person; or (*b*) commits an offence under subsection (1) or (2) with a person under 14 years of age without the consent of that person under 14, shall be punished with imprisonment for a term of not less than 8 years and not more than 20 years and shall also be punished with caning with not less than 12 strokes. (6) No person shall be guilty of an offence under subsection (3) for an act of penetration against his or her spouse with the consent of that spouse. **Sexual penetration of minor under 16** **376A.**—(1) Any man (A) who — (*a*) penetrates, with A's penis, the vagina, anus or mouth of a person under 16 years of age (B); or (*b*) causes another man under 16 years of age (B) to penetrate, with B's penis, the anus or mouth of A, with or without B's consent , shall be guilty of an offence. (2) Any person (A) who — (*a*) sexually penetrates, with a part of A's body (other than A's penis) or anything else, the vagina or anus of a person under 16 years of age (B); (*b*) causes a man under 16 years of age (B) to penetrate, with B's penis, the vagina, anus or mouth of another person (C); or

	(*c*) causes a person under 16 years of age (B) to sexually penetrate, with a part of B's body (other than B's penis) or anything else, the vagina or anus of A or B or of another person (C), with or without B's or C's consent , shall be guilty of an offence. (3) A person who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 10 years or with fine or with both. (4) No person shall be guilty of an offence under subsection (1)(*a*), (2)(*a*) or (*c*) for an act of penetration against his or her spouse with the consent of that spouse. (5) No man shall be guilty of an offence under subsection (1)(*a*) for penetrating with his penis the vagina of his wife without her consent, if his wife is not under 13 years of age, except where — (*a*) the wife was at the time of the offence living separately from him under a judgment of judicial separation or an interim judgment of divorce not made final; (*b*) at the time of the offence, there was in force an injunction restraining him from having sexual intercourse with his wife; or (*c*) at the time of the offence, there was in force a protection order under section 65 or an expedited order under section 66 of the Women's Charter (Cap. 353) made against him pursuant to an application by his wife. **Prostitution of minor under 18** **376B.**—(1) Any person who — (*a*) obtains for consideration; or (*b*) communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person who is under 18 years of age, shall be guilty of an offence. (2) A person who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 7 years or with fine or with both. (3) No person shall be guilty of an offence under this section for any sexual services obtained from that person's spouse who is not under 13 years of age. (4) No woman shall be guilty of an offence under this section for allowing a man under 18 years of age to penetrate, with his penis, the woman's vagina, anus or mouth. (5) In this section, "sexual services" means any sexual services involving — (*a*) penetration of the vagina or anus of a person by a part of another person's body (other than the penis) or by anything else; or (*b*) penetration of the vagina, anus or mouth of a person by a man's penis. **Prostitution of minor under 18 outside Singapore** **376C.**—(1) Any person, being a citizen or a permanent resident of Singapore, who does, outside Singapore, any act

	that would, if done in Singapore, constitute an offence under section 376B (Prostitution of minor under 18), shall be guilty of an offence. (2) A person who is guilty of an offence under this section shall be liable to the same punishment to which he would have been liable had he been convicted of an offence under section 376B. **Organising or promoting child sex tours** **376D.**—(1) Any person who — (*a*) makes or organises any travel arrangements for or on behalf of any other person with the intention of facilitating the commission by that other person of an offence under section 376C (Prostitution of minor under 18 outside Singapore), whether or not such an offence is actually committed by that other person; (*b*) transports any other person to a place outside Singapore with the intention of facilitating the commission by that other person of an offence under section 376C, whether or not such an offence is actually committed by that other person; or (*c*) prints, publishes or distributes any information that is intended to promote conduct that would constitute an offence under section 376C, or to assist any other person to engage in such conduct, shall be guilty of an offence. (2) For the purposes of subsection (1)(*c*), the publication of information means publication of information by any means, whether by written, electronic, or other form of communication. (3) A person who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 10 years or with fine or with both. **Procurement of sexual activity with person with mental disability** **376E.**—(1) Any person (A) shall be guilty of an offence if — (*a*) A touches another person (B) who has a mental disability; (*b*) the touching is sexual and B consents to the touching; (*c*) A obtains B's consent by means of an inducement offered or given, a threat made or a deception practised by A for that purpose; and (*d*) A knows or could reasonably be expected to know that that B has a mental disability. (2) Subject to subsection (3), a person who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 5 years, or with fine or with both. (3) If the touching involved — (*a*) penetration of the vagina or anus with a part of the body or anything else; or (*b*) penetration of the mouth with the penis, a person who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 10 years, or with fine or with both.

	(4) No person shall be guilty of an offence under this section for any act with that person's spouse who is not under 13 years of age. (5) No woman shall be guilty of an offence under this section for causing a man with a mental disability to penetrate, with his penis, the woman's vagina, anus or mouth. (6) For the purposes of this section — (*a*) "mental disability" means an impairment of or a disturbance in the functioning of the mind or brain resulting from any disability or disorder of the mind or brain which impairs the ability to make a proper judgement in the giving of consent to sexual touching. (*b*) "touching" includes touching — (i) with any part of the body; (ii) with anything else; or (iii) through anything, and includes penetration. **Incest** **376F.**—(1) Any man of or above the age of 16 years (A) who — (*a*) sexually penetrates the vagina or anus of a woman (B) with a part of A's body (other than A's penis) or anything else; or (*b*) penetrates the vagina, anus or mouth of a woman (B) with his penis, with or without B's consent where B is to A's knowledge A's grand-daughter, daughter, sister, half-sister, mother or grandmother (whether such relationship is or is not traced through lawful wedlock), shall be guilty of an offence. (2) Any woman of or above the age of 16 years who with consent permits her grandfather, father, brother, half-brother, son or grandson (whether such relationship is or is not traced through lawful wedlock) to sexually penetrate her in the manner described in subsection (1)(*a*) or (*b*), knowing him to be her grandfather, father, brother, half-brother, son or grandson, as the case may be, shall be guilty of an offence. (3) Subject to subsection (4), a man who is guilty of an offence under subsection (1) shall be punished with imprisonment for a term which may extend to 5 years. (4) If the woman is under the age of 14 years, a man who is guilty of an offence under subsection (1) shall be punished with imprisonment for a term which may extend to 14 years. (5) A woman who is guilty of an offence under subsection (2) shall be punished with imprisonment which may extend to 5 years.".
Reasons for MHA's proposed amendment	Council notes the reasons given for the proposed amendments which are set out at paragraphs 11, 12, 13, 20, 21 and 25 of the Consultation Paper.
Council's Response	Council's responses on the specific sections are set out as follows: 1) Council notes at paragraph 13 of the Consultation Paper that

	because of "the changed status of women and the evolving nature of the marital relationship", MHA proposes to withdraw the existing marital rape immunity for a husband "who engages in non-consensual sexual intercourse with his wife 13 years of age and above". The proposed amendment at s. 375(4) seeks to make it an offence for a man to commit the offence of rape against his wife, who is not under 13 years of age, under s. 375(1) in 3 scenarios. Council welcomes the proposed amendment at s. 375(4) to withdraw the existing marital rape immunity partially as it seeks to preserve the balance between preserving the husband-wife relationship and therefore the family unit on the one hand while not condoning marital rape as an instance of marital violence on the other. However, this balance may be better achieved by fine-tuning the drafting of s. 375(4) as follows: "No man shall be guilty of an offence under subsection (1) against his wife, who is not under 13 years of age, except where at the time of the offence – (a) an interim judgment of divorce or nullity not made final to terminate their marriage has been granted; (b) the wife was living separate and apart from him under a judgment of judicial separation or under a deed of separation executed by both parties; (c) there was in force a protection order under s. 65 or an expedited order under s. 66 of the Women's Charter (Cap. 353) made against him pursuant to an application by his wife; or (d) there was in force an injunction restraining him from having sexual intercourse with his wife." In essence, there are two key changes to s. 375(4)(a) that we propose: 1. s. 375(4)(a) should not be restricted to the case where an interim judgment of divorce was not made final, but should also be extended to an interim judgment of nullity not made final. 2. In addition, s. 375(4)(a) (re-drafted as s. 375(4)(b) above) would be extended to be a case where the wife was living separate and apart from her husband under a deed of separation executed by both parties. The amendment would address a common scenario where the parties were living apart pursuant to a Deed of Separation but still staying together under the same roof because either party could not get alternative accommodation or could not file any divorce proceeding in the interim stage.

	Our proposals above would likewise apply to the limited marital rape immunity provisions in the proposed s. 376A(5). 2) s. 376B(4) provides that it is not an offence for a woman to procure sex from a boy. This fails to protect young boys from sexual exploitation and abuse. There is literature documenting the phenomenon of women traveling to the third world for sex with young boys. s. 376E(5), in the same vein as s. 376B(4), does not make it an offence for a woman to sexually abuse or exploit a mentally disabled man. 3) s. 376C extends extraterritorial jurisdiction only to prostitution; it does not seek to protect young persons outside Singapore. A Singaporean who goes overseas and rapes a 12 year old cannot be prosecuted in Singapore, unless he is a public servant on work-related travel under the proposed new s. 4. 4) We are of the view that there are serious difficulties with the proposed s. 376E and the tenor and effect of this proposed new provision. Mental disability is a very scientific and specialized concept. Under the law as it now stands, everyone who does not have an order made against him under the Mental Disorder and Treatment Act is presumed to be of sound mind. It is not clear whether this section only applies if the victim has an order made against him under the Mental Disorder and Treatment Act. The accused person may be unable to detect mental disability. In most cases even professional psychiatrists can have differing professional opinions about the mental state of a person in trials in which mental disability is raised as a defence. Therefore, given that professional psychiatrists can have differing professional opinions about the mental state of a person, it may be an unfair expectation for lay persons who do not have psychiatric training to detect and diagnose mental disability. In addition, it is not clear how the proposed s. 376E would treat persons who may have only episodic mental disability, which is a concept recognized by the law. Such a person may exhibit mental disability at some point in time but not all the time. The detection of such episodic mental disability may be an unfair burden on the general public at large. Although s. 376E(1)(d) appears to provide for this scenario, the courts are likely to impose an "objective test" even for s. 376E(1)(d), as they may have a very different interpretation of what "could reasonably be expected to know that B has a mental disability" from the impression formed by the accused person. Furthermore, psychiatrists are likely to get involved in endless argument about the *consequence* of a particular type of mental disability. For example, the proposed definition of "mental disability" in s. 376E(6)(a) makes no distinction between different types of mental disability, yet there are many forms and degrees of mental disabilities which does not reduce the patient's ability to tell right from wrong and make an informed decision whether to have sexual intercourse or for that matter to commit murder. A person who suffers from a certain type of mental disability may be suffering in

	specific ways (e.g. depression, schizophrenia, delusions, hallucinations, hearing voices, cannot count/read, amnesia etc) but his or her ability to give informed consent and have normal social intercourse (including the ability to form an intent to murder) is in no way affected. If it is intended that enhanced punishment be meted out to persons who takes advantage of mentally disabled persons, we propose that the courts are well placed and perfectly capable of taking the mental disability of the victim into consideration for purposes of sentencing. 5) s. 376F(4) and (5) also reveal a discrimination between genders – there is a higher penalty for a man who commits an offence against a young female, but no correlative provision for the reverse scenario. If the concern is that enhanced punishment should be meted out to persons who preys upon persons related by blood to them, we propose that the courts are already well placed and perfectly capable of taking the familial relationship of the victim with the accused person into consideration for purposes of sentencing.

2.3 Clause 49: Repeal and re-enactment of section 377

MHA's Proposed Amendment	Section 377 of the Penal Code is repealed and the following section substituted therefor: "**Sexual penetration of a corpse** **377.**—(1) Any man who penetrates, with his penis, the vagina, anus or mouth of a human corpse, shall be guilty of an offence. (2) A man who is guilty of an offence under subsection (1) shall be punished with imprisonment for a term which may extend to 5 years, or with fine, or with both. (3) Any person (A) who causes any man (B) to penetrate with B's penis, the vagina, anus or mouth of a human corpse, shall be guilty of an offence if B did not consent to the penetration. (4) A person who is guilty of an offence under subsection (3) shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning.".
Reasons given by MHA for proposed amendment	Council notes the reasons given at paragraphs 10, 22 and 23 of the Consultation Paper for these proposed amendments. In particular, we note that MHA proposes, at paragraph 10, "to repeal s. 377, re-scoping it such that anal and oral sex, if done in private between a consenting adult heterosexual couple aged 16 years old and above, would no longer be criminalized." No amendments were proposed by MHA to the existing s. 377A, which makes it an offence for "[a]ny male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person".
Council's Response	The majority of Council considered that the retention of s. 377A in its present form cannot be justified. This does not entail any view that homosexuality is morally acceptable, but follows instead from the separation of law and morals and the philosophy that the criminal law's proper function is to protect others from harm by punishing harmful conduct. Private consensual homosexual conduct between adults does not cause harm recognisable by the criminal law. Thus, regardless of one's personal view of the morality or otherwise of such conduct, it should not be made a criminal offence. Moreover, the assurance given by MHA in the Explanatory Notes to Proposed Amendments to the Penal Code that were initially issued by MHA that prosecutions will not be proactively prosecuted under this section is an admission that the section is out-of-step with the modern world. The retention of unprosecuted offences on the statute book that covers conduct that will not in fact be prosecuted runs the risk of bringing the law into disrepute.

	Council also recognized that the above view did not necessarily represent the views of its members collectively. A significant minority of Council members as well as numerous members of the Society at large have an opposing view, and strongly support the retention of s. 377A in the Penal Code. They took the view that the criminal law can and should be deployed to define what the majority or a significant proportion of society believe to be unacceptable conduct, which includes the moral unacceptability of homosexual conduct even when it takes place in private between consenting adults, and that there are sufficient jurisprudential and logical grounds for this. Differing views were expressed on the constitutionality of s. 377A. In other jurisdictions, legal discrimination based on sexual orientation has been considered against constitutional guarantees of equal protection. Council did not come to a concluded view on the constitutionality of s. 377A. Insofar as the re-scoping of s. 377 is concerned, Council is of the view that the proposed s. 377 is too narrow in its scope. Interference with a corpse has more than religio-social implications. Far more importantly, it has evidential and forensic implications, interfering with scientific/judicial findings of the true cause of death. Council recommends that there should be additional provisions in the Penal Code covering any other forms of unlawful interference with a corpse.

2.4 Clause 50: New sections 377B to 377G

MHA's Proposed Amendment	The Penal Code is amended by inserting, immediately after section 377A, the following sections: "**Intercourse with an animal** **377B.**—(1) Any person (A) who — (*a*) penetrates, with A's penis, the vagina, anus or any orifice of an animal; or (*b*) causes or permits A's vagina, anus or mouth, as the case may be, to be penetrated by the penis of an animal, shall be guilty of an offence. (2) A person who is guilty of an offence under subsection (1) shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both. (3) Any person (A) who — (*a*) causes any man (B) to penetrate, with B's penis, the vagina, anus or any orifice of an animal; or (*b*) causes the vagina, anus or mouth of another person (B) to be penetrated with the penis of an animal, shall be guilty of an offence if B did not consent to the penetration. (4) A person who is guilty of an offence under subsection (3) shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning. **Interpretation of provisions on sexual offences** **377C.**—(1) This section applies to sections 375 to 377B. (2) Penetration is a continuing act from entry to withdrawal. (3) References to a part of the body include references to a part which is surgically constructed (in particular, through sex reassignment surgery). (4) For the purposes of identifying the sex of a person — (*a*) the sex of a person as stated in that person's identity card issued under the National Registration Act (Cap. 201) at the time the sexual activity took place shall be prima facie evidence of the sex of that person; and (*b*) a person who has undergone a sex reassignment procedure shall be identified as being of the sex to which that person has been reassigned. (5) Penetration, touching or other activity is "sexual" if — (*a*) because of its nature it is sexual, whatever its circumstances or any person's purpose in relation to it may be; or (*b*) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual. (6) "Vagina" includes vulva. **Mistake as to age**

	377D.—(1) Subject to subsection (2), and notwithstanding anything in section 79, a reasonable mistake as to the age of a person shall not be a defence to any charge under section 375 (Rape), 376 (Sexual assault by penetration), 376A (Sexual penetration of minor under 16), 376B (Prostitution of minor under 18) or 376C (Prostitution of minor under 18 outside Singapore). (2) In the case of a person who at the time of the alleged offence was below the age of 21 years, the presence of reasonable cause to believe that the minor, who is of the opposite sex, was of or above — (*a*) the age of 16 years, shall be a valid defence on the first occasion on which he is charged with an offence under section 376A (Sexual penetration of minor under 16); or (*b*) the age of 18 years, shall be a valid defence on the first occasion on which he is charged with an offence under section 376B (Prostitution of minor under 18) or 376C (Prostitution of minor under 18 outside Singapore). (3) For the purposes of subsection (2), the defence under that subsection shall no longer be available if the person charged with the offence has previously been charged for an offence under section 376A, 376B, 376C, section 7 of the Children and Young Person's Act (Cap. 38) or section 140(1)(*i*) of the Women's Charter (Cap. 353). **Meaning of "consent"** **377E.** Sections 377F (Evidential presumptions about consent) and 377G (Conclusive presumptions about consent) shall apply to sections 354 (Outrage of modesty), 354A (Aggravated outrage of modesty), 375 (Rape), 376 (Sexual assault by penetration), 376A (Sexual penetration of minor under 16), 376E (Procurement of sexual activity with person with mental disability), 376F (Incest), 377 (Sexual penetration of a corpse) and 377B (Intercourse with an animal). **Evidential presumptions about consent** **377F.** Unless sufficient evidence is adduced to the contrary, a person ('the complainant') shall be taken not to have consented to a relevant act if — (*a*) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him; (*b*) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person; (*c*) the complainant was wrongfully restrained at the time of the relevant act; (*d*) the complainant was asleep or otherwise unconscious at the time of the relevant act;

	(*e*) because of the complainant's physical disability, the complainant was not able at the time of the relevant act to communicate to the person charged with the offence whether the complainant consented; or (*f*) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act, and the person charged with the offence knew that the particular circumstances relied on in paragraphs (*a*) to (*f*) existed. **Conclusive presumptions about consent** **377G.** A person ('the complainant') shall be deemed not to have consented to a relevant act if — (*a*) the person charged with the offence intentionally deceived the complainant as to the nature of the relevant act; or (*b*) the person charged with the offence intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.".
Reasons given by MHA for proposed amendment	Council notes that there were no reasons given by MHA in the Consultation Paper for these proposed amendments.
Council's Response	Council's comments on the specific sections are as follows: 1) Council is of the view that s. 377C(5)(a) is too broad. The intention of the accused should be left to judicial interpretation. As drafted, it excludes from judicial consideration the underlying circumstances or purpose of the action. This unduly restricts the courts in drawing their conclusions, and assumes that an act may be construed to be sexual without regard to the underlying circumstances or purpose of the action, which is central to the exercise of ascertaining the requisite *mens rea* of the accused. 2) The drafting of s. 377C(5)(a) and (b) is unclear. The differences between the two proposed subsections are also very subtle and we expect they would give rise to difficult interpretative challenges in the courts. The proposed amendments should clearly inform the public what acts are prohibited under the criminal law. 3) We are concerned that the defence of reasonable mistake as to age is to be repealed through s. 377D. s. 377D(3) creates a curious anomaly and we are concerned that it violates the principle of equal protection of law and fairness of trial. If an accused person is denied a statutory defence upon his second trial for a like offence, severe prejudice and unfairness may result. An accused may be charged at one occasion with say two charges, but due to the offences involving different dates, time,

	place and victims, he cannot be jointly tried. If he is tried for one offence first and convicted, that means for the second trial on the second charge he is denied the defence. In addition, in the subsequent trial, the trial judge would have to be informed by the prosecution that the defence cannot mount a certain defence. This would effectively inform the trial judge of the previous conviction of the accused, which raises a risk of prejudice. We are of the view that the rationale and necessity for the proposed repeal of the defence of reasonable mistake as to age has not been adequately explained Given that the perception of fairness is equally, if not more, important than actual fairness, we are concerned that s. 377D(3) will deny this very quality from criminal proceedings. The proposed removal of the defence of reasonable mistake as to age should therefore be carefully considered. We recommend that the defence of reasonable mistake as to age be retained, as contained in the existing Chapter IV of the Penal Code. 4) We are concerned about the imposition of a profusion of definitions and presumptions about consent in s. 377E-G. We are of the view that the provisions of s. 377E-G could be unduly restrictive in certain circumstances. Consent is akin to intention, a key concept to be inferred by the trial judge from the evidence presented in court. The judge can make one of an infinite number of findings, for example: (a) That there was consent; (b) That there was no consent on the facts as proved in court; (c) That there was initial consent but it was vitiated by subsequent change of circumstances; or (d) That there was consent to some act but not to other acts which the evidence might throw up. Like "intention", consent is a state of mind which must be decided on the evidence proved in court in every case, and not something which can be easily captured into the four walls of a statutory definition, no matter how comprehensive or well-meaning such statutory definition might seem at the outset. Such evidential issues are factors which any judge would consider. In addition, it might be appropriate for such provisions – which raise evidential issues – to be contained in the Evidence Act, instead of the Penal Code. Further, the proposed amendments may create a situation where "consent" for the specific prescribed class of offences set out in s. 377E is to be interpreted according to the presumptions in s. 377F and s. 377G, but "consent" for any other offence in the Penal Code remains to be judicially inferred. We are concerned that the rationale and necessity for this

	differentiation of treatment is not immediately apparent, and have not been adequately justified. The different treatment of persons charged with an offence falling within the specific prescribed class of offences set out in s. 377E, to which the presumptions in s. 377F and s. 377G are applicable, may prejudice other persons charged for other offences involving consent.

3 RESPONSE TO MHA'S REVIEW OF OFFENCES, DEFINITIONS, EXPLANATIONS AND EXPRESSIONS IN THE PENAL CODE

3.1 Clause 2: Proposed addition of new section 4

MHA's Proposed Amendment	The Penal Code is amended by inserting, immediately after section 3, the following section: "**Jurisdiction over public servants for offences committed outside Singapore** 4. Every public servant who, when acting or purporting to act in the course of his employment, commits an act or omission outside Singapore that if committed in Singapore would constitute an offence under the law in force in Singapore, is deemed to have committed that act or omission in Singapore."
Reasons given by MHA for proposed amendment	Council notes that MHA did not provide any reasons in its Consultation Paper for these proposed amendments.
Council's Response	Council notes that the new s. 4 will extend extra-territorial jurisdiction over public servants who, when acting or purporting to act in the course of their employment, commit acts or omissions outside Singapore which constitute offences in Singapore. The rationale for the new s. 4 was not explained in the Consultation Paper. It is therefore not clear why public servants have been singled out as a special category of offenders which require extra-territorial jurisdiction to be extended to, especially when the act or omission in question may well not be an offence in the foreign jurisdiction where it occurred. For the avoidance of doubt, any extension of extra-territorial jurisdiction to any category of persons or for any offences should be reasoned and clearly explained.
Council's Recommendations	The new s. 4 will extend extra-territorial jurisdiction to all offences where public servants are concerned and create significant practical difficulties for accused persons in the conduct of their defence, e.g. in evidence gathering, document production and compellability of foreign witnesses at trial. Council therefore urges MHA to give careful consideration to the enactment of the new s. 4. Council also recommends that a comparative study be carried out to ascertain how other jurisdictions have dealt with this matter.

3.2 Clause 5: Repeal and re-enactment of section 29 and new section 29A

MHA's Proposed Amendment	Section 29 of the Penal Code is repealed and the following sections substituted therefor: **"Document** **29.** The word "document" includes, in addition to a document in writing - (a) any map, plan, graph or drawing; (b) any photograph; (c) any label, marking or other writing which identifies or describes anything of which it forms a part, or to which it is attached by any means whatsoever; (d) any disc, tape, soundtrack or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; (e) any film (including microfilm), negative, tape, disc or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and (f) any paper or other material on which there are marks, impressions, figures, letters, symbols or perforations having a meaning for persons qualified to interpret them. **Writing** **29A.** The word "writing" includes any mode of representing or reproducing words, figures, drawings or symbols in a visible form.".
Reasons given by MHA for proposed amendment	Council notes at paragraph 27 of the Consultation Paper that the proposed amendment to the definition of "document" is meant to cover "offences committed via electronic means".
Council's Response	Council understands that the proposed amendment is similar to the definition of "document" in s. 378(3) of the Criminal Procedure Code, Media Development Authority of Singapore Act and in the Interpretation of Legislation Act of Victoria, Australia. The proposed amendment to the definition of "document" include devices "... in which sounds... are embodied ....". This can result in offences traditionally associated with 'paper-based' documents expanded to 'sound' recordings, thus creating new offences. As an example, s. 463 of the Penal Code on forgery has traditionally been associated with paper-based documents. With the proposed definition, a new offence of "forgery of sound recordings" could be created.

	There are numerous sections of the Penal Code that would be affected by the expansion of the definition of 'document' to 'sound recordings' e.g. s.151A, s.167, s.175, s.192, s.204, s.261, s.463, s.464, s.466, s.467, s.468, s.469, s.471, s.474, s.475, s.476 and s.477. The above list may not be exhaustive.
Council's Recommendations	While Council understands the need to update the definition of "document" to include electronic documents, we are of the view that if it is the intention of MHA to create new offences, then the substantive section (for example s. 463 of the Penal Code) should be amended.

3.3 Clause 6: Amendment of section 30

MHA's Proposed Amendment	Section 30 of the Penal Code is amended by renumbering the section as subsection (1) of that section, and by inserting immediately thereafter the following subsection: "(2) Notwithstanding the generality of subsection (1), "valuable security" includes credit cards, charge cards, stored value cards, automated teller machine cards and such other cards which have money or money's worth or other financial rights or privileges attached.".
Reasons given by MHA for proposed amendment	Council notes at paragraph 27 of the Consultation Paper that the proposed amendment to the definition of "valuable security" is meant to include credit cards, charged cards and stored valued cards.
Council's Response	Council is of the view that the limitation of the term "valuable security" to such cards may be too narrow because it does not take into account, for example, the possibly emerging trend towards the use of mobile phones as stored value devices.

3.4 Clause 7: New section 31A

MHA's Proposed Amendment	The Penal Code is amended by inserting, immediately after section 31, the following section: **""Die" and "Instrument"** **31A.** For the purposes of Chapters XII and XVIII — "die" includes any plate, type, tool, chop or implement and also any part of any die, plate, type, tool, chop or implement, and any stamp or impression thereof or any part of such stamp or impression; "instrument" includes any document whether of a formal or informal nature, any postage stamp or revenue stamp, any seal or die, and any disc, card, tape, microchip, soundtrack or other device on or in which information is recorded or stored by mechanical, electronic, optical or other means.".
Reasons given by MHA for proposed amendment	Council notes that there were no reasons given for this proposed amendment in the Consultation Paper.
Council's Response	Council is of the view that the new definition of "instrument" may be too narrow because it does not take into account, for example, emerging technologies, especially for payment methods. The existing, predominant method used in existing credit cards is magnetic strips, which do not in fact seem to be specifically referred to.

3.5 Clause 15: New section 108B

MHA's Proposed Amendment	The Penal Code is amended by inserting, immediately after section 108A, the following section: **"Abetment outside Singapore of an offence in Singapore** **108B.** A person abets an offence within the meaning of this Code who abets an offence committed in Singapore notwithstanding that any or all the acts constituting the abetment were done outside Singapore.".
Reasons given by MHA for proposed amendment	Council notes at paragraph 17 of the Consultation Paper that the proposed amendment is to take into account "the ease of communications via the internet and mobile phones".
Council's Response	Council notes that the proposed enactment is not restricted to Singapore citizens only, unlike the Prevention of Corruption Act. Therefore, foreign nationals can now be prosecuted in Singapore once they fall within Singapore jurisdiction (by choice or involuntarily through extradition treaties) once they abet an offence in Singapore. This imposes on all foreign nationals an onerous duty to know Singapore laws as the old adage that ignorance of the law is not an excuse still holds sway. In addition, the offence abetted may not be an offence in the domicile jurisdiction of the abettor. As such, it may be unfair and prejudicial to a foreign abettor for him to be punished in Singapore for an act/omission that would not be penalised in his own country. These are also potential issues of conflicts of law and superiority of legal systems.
Council's Recommendations	The new s. 108B will create significant practical difficulties for accused persons in the conduct of their defence, e.g. in evidence gathering, document production and compellability of foreign witnesses at trial. Impecunious accused persons are likely to have limited ability to travel overseas to prepare their defence and this may result in unwarranted pleas of guilt in view of the prohibitive costs of mounting a viable defence. Council therefore urges MHA to give careful consideration to the enactment of the new s. 108B. Council also recommends that a comparative study be carried out to ascertain how other jurisdictions have dealt with this matter.

3.6 Clause 16: Amendment of section 120A

MHA's Proposed Amendment	Section 120A of the Penal Code is amended by renumbering the section as subsection (1) of that section, and by inserting immediately thereafter the following subsection: "(2) A person may be a party to a criminal conspiracy notwithstanding the existence of facts of which he is unaware which make the commission of the illegal act, or the act, which is not illegal, by illegal means, impossible.".
Reasons given by MHA for proposed amendment	Council notes that there were no reasons given in the Consultation Paper for this amendment.
Council's Response	The rationale of the proposed s. 120A is unclear.
Council's Recommendations	Council recommends that the present s. 120A be preserved, as it can capture an agreement to commit an impossible and illegal act.

3.7 Clause 19: New Chapter VIB

MHA's Proposed Amendment	The Penal Code is amended by inserting, immediately after section 130C, the following Chapter: "CHAPTER VIB GENOCIDE **Genocide** **130D.** A person commits genocide who does any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (*a*) killing members of the group; (*b*) causing serious bodily or mental harm to members of the group; (*c*) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (*d*) imposing measures intended to prevent births within the group; or (*e*) forcibly transferring children of the group to another group.
Reasons given by MHA for proposed amendment	Council notes that there were no reasons given in the Consultation Paper for this amendment.
Council's Response	Council notes that the new s. 130D mirrors the definition of genocide under Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") and is in compliance with Singapore's obligation as a contracting State to enact national legislation in conformity with the Genocide Convention. The interpretation of s. 130D in the future may have to be based on international law as there are no local precedents currently.

3.8 Clause 21: Amendment of section 141

MHA's Proposed Amendment	Section 141 of the Penal Code is amended — (*a*) by deleting paragraph (*c*) and substituting the following paragraph: "(*c*) to commit criminal trespass;"; (*b*) by deleting the word "or" at the end of paragraph (*d*); and (*c*) by deleting the full-stop at the end of paragraph (*e*) and substituting the word "; or", and by inserting immediately thereafter the following paragraph: "(*f*) to commit any offence."
Reasons given by MHA for proposed amendment	Council notes at paragraph 8 of the Consultation Paper that the proposed amendments to s. 141 are to clarify that "an assembly of 5 or more people whose common object is to commit any offence, and not just those relating to public tranquility, would also constitute an 'unlawful assembly'" and "the offence need not be an offence involving public tranquility and is in line with Court pronouncements."
Council's Response	Council is of the view that the proposed amendments to s. 141 attempt to extract and will do away with the element of prejudice to public tranquility as a pre-requisite for unlawful assembly and the penal provisions associated with it. This causes Council concern as the very essence of the concept of an unlawful assembly is protection of public tranquility – this is evidenced by the title of the chapter of the Penal Code in which it appears (a title which is also to be done away with under clause 20 of the draft Bill). Assemblies of people who have decided to commit an offence which does not affect public peace may be dealt with by the general provisions on attempt and abetment – it has not been explained why these provisions are insufficient. Given the above, Council is also concerned that the imprisonment term for the offence of being a member of an unlawful assembly under s. 143 of the Penal Code is, at the same time, proposed to be increased from 6 months to 2 years: para (49) of the Schedule to the draft Bill.
Council's Recommendations	Council would urge MHA to give careful consideration to the proposed amendment to s. 141, as there does not appear to be a need for this amendment or to increase the maximum penalty under s. 143.

3.9 Clause 26: New sections 204A and 204B

MHA's Proposed Amendment	The Penal Code is amended by inserting, immediately after section 204, the following sections: **"Obstructing, preventing, perverting or defeating course of justice** **204A.** Whoever intentionally obstructs, prevents, perverts or defeats the course of justice shall be punished with imprisonment which may extend to 7 years, or with fine, or with both. *Explanation* - A mere warning to a witness that he may be prosecuted for perjury if he gives false evidence is insufficient to constitute an offence. **Bribery of witnesses** **204B.**—(1) Whoever — (*a*) gives, confers, or procures, promises or offers to give, confer, or procure or attempts to procure, any gratification to, upon, or for any person, upon any agreement or understanding that any person who is aware of any offence will abstain from reporting that offence to the police or any agency charged by law with the duty of investigating offences; (*b*) gives, confers, or procures, promises or offers to give, confer, or procure or attempts to procure, any gratification to, upon, or for any person, upon any agreement or understanding that any person called or to be called as a witness in any judicial proceeding will give false testimony or withhold true testimony, or will abstain from giving evidence; (*c*) attempts by any means to induce a person called or to be called as a witness in any judicial proceeding to give false testimony, or to withhold true testimony or to abstain from giving evidence; or (*d*) asks, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself, or any other person, upon any agreement or understanding that any person shall as a witness in any judicial proceeding give false testimony or withhold true testimony or will abstain from giving evidence, shall be punished with imprisonment which may extend to 7 years, or with fine, or with both. *Explanation* - A mere warning to a witness that he may be prosecuted for perjury if he gives false evidence is insufficient to constitute an offence. (2) In this section, "judicial proceeding" means any proceeding in the course of which evidence is or may be legally taken.".

Reasons given by MHA for proposed amendment	Council notes at paragraph 18 of the Consultation Paper that the proposed introductions of s. 204A and s. 204B are "to make it an offence for a person to pervert the course of justice before a trial". Presently, it is not an offence for a person to pervert the course of justice before a trial.
Council's Response	**<u>New section 204A</u>** Council understands that the new s. 204A is a "general offence": see paragraph 18 of the Consultation Paper. Given that the existing offences under Chapter XI (False Evidence and Offences against Public Justice) are already comprehensive, the new s. 204A may not be necessary. The language of the new s. 204A is also unclear. The phrases "obstructs, prevents, perverts or defeats" and "course of justice" are not defined in the draft Bill. It is not clear when the "course of justice" commences, i.e. whether it is upon the First Information Report being filed or the commencement of investigation or when an accused person has been charged in court. If the new s. 204A is enacted notwithstanding, it will be important that this section be interpreted narrowly so as not to inhibit the robust defence of accused persons by defence counsel or to invade or curtail protection of legal professional privilege. Additionally, there appears to be a disparity between the proposed sentence for the new s. 204A and the current offences under Chapter XI. **<u>New section 204B</u>** Council understands that the new s. 204B is a "specific offence to deal with persons who bribe or who try to induce witnesses from giving evidence and to deal with witnesses who accept bribes to avoid giving true testimony": see paragraph 18 of the Consultation Paper. Given that bribery is sufficiently dealt with under the Prevention of Corruption Act ("PCA"), the creation of a new offence of bribery of witnesses under s. 204B may not be necessary. Further, the proposed definition of bribery under s. 204B differs from the definition of bribery under s. 5 of the PCA. Confusion may therefore arise as to what amounts to bribery. It is not clear from the Consultation Paper whether police officers under the purview of MHA would investigate bribery offences under s. 204B. Currently, Council understands that bribery offences under the PCA are handled exclusively by Corrupt Practices Investigation Bureau ("CPIB") officers, who are specifically trained to deal with such issues.

	If police officers under the purview of MHA will be investigating bribery offences under s. 204B, such officers will only have limited investigative powers under the Criminal Procedure Code as compared to CPIB officers who are granted specific powers of investigation under the PCA. It is not clear whether the scope of the recording of statements for an offence under s. 204B would be the same as that for PCA offences, which is governed by s. 27 of the PCA that provides that witnesses or accused persons are required to give *"any information on any subject... which is in his power to give".* s. 204B appears to be an anomaly, as compared to the PCA provisions. Firstly, prosecution under s. 204B does not require the consent of the Public Prosecutor, while prosecution of any corruption offence under the PCA requires the consent of the Public Prosecutor. Secondly, the PCA also has extra-territorial jurisdiction. This raises the issue of whether the contemplated bribery offence under s. 204B (which could be considered a corruption offence) should be treated similarly when other Penal Code offences do not attract extra-territorial liability. Thirdly, sentencing comparison as between the PCA and the proposed s. 204B shows a disproportionate sentencing regime for effectively the same offence; under the PCA the maximum fine is $100,000.00 with a maximum imprisonment of 5 years, whereas under the proposed s. 204B the maximum penalties are fines of $10,000.00 and 7 years' imprisonment.

3.10 Clause 35: New sections 267A, 267B and 267C

MHA's Proposed Amendment	The Penal Code is amended by inserting, immediately before section 268, the following sections: "**Affray** **267A.** Where 2 or more persons disturb the public peace by fighting in a public place, they are said to "commit an affray". **Punishment for committing affray** **267B.** Whoever commits an affray shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to $5,000, or with both. **Posting placards, etc.** **267C.** Whoever makes, prints, possesses, posts, distributes or has under his control any document containing any incitement to violence or counselling disobedience to the law or to any lawful order of a public servant or likely to lead to any breach of the peace shall be punished with imprisonment for a term which may extend to 5 years, or with fine, or with both.".
Reasons given by MHA for proposed amendment	Council notes that MHA did not provide any reasons in its Consultation Paper for these proposed amendments.
Council's Response	Council notes that the new s. 267A, s. 267B and s. 267C re-position the current s. 159, s. 160 and s. 151A in Part XIV of the Penal Code and the latter provisions would be repealed: clauses 22 and 23 of the draft Bill. There is no explanation why s. 151A is proposed to be repealed. Currently, the current s. 151A is an extension of the current s. 151. s. 151 makes it an offence for someone to knowingly join or continue in any assembly likely to cause a disturbance after such assembly has been lawfully commanded to disperse. s. 151A furthers the mischief of the s. 151 offence by making it an offence for someone who makes, prints, possesses, posts, distributes or has under his control any document containing any incitement to violence or counselling disobedience to the law or to any lawful order of a public servant. By repealing s. 151A, it would appear that there is no intention for the prosecution of offences under s. 151A to be linked to s. 151. Council notes that there are several difficulties with the introduction of the new s. 267C. Firstly, the mischief targeted by the new s. 267C appears to be already covered by existing provisions in s. 20 of the Internal Security Act and s. 4 of the Sedition Act. In particular, s. 20 of the Internal Security Act deals with the Ministerial prohibition of the printing, publication and distribution of any document which, among other things, contains any incitement to violence or

	counsels disobedience to the law or to any lawful order. Secondly, the new s. 267C appears to create a strict liability offence as no *mens rea* seems to be required for the making, printing, possessing, posting, distributing or controlling the document in question. The lack of *mens rea* for the new s. 267C sits uncomfortably with the severe punishment prescribed, i.e. 5 years' imprisonment or fine or both. Thirdly, the alternative limb of "counselling disobedience to the law or to any lawful order of a public servant" makes the offence too broad. It should not be an offence if no violence or breach of the peace is incited or made likely. Fourthly, the element that a document be one that is "likely to lead to a breach of the peace", without specifying what the offending contents in the document are, makes it difficult to identify what the offence is. Article 14 of the Constitution guarantees freedom of speech and expression subject to such restrictions as may be imposed by Parliament in the interest of, *inter alia,* the security of Singapore or public order. The new s. 267C, in derogating from the freedom of speech and expression, should not go beyond what is necessary to secure the security of Singapore or public order.
Council's Recommendations	Council recommends as follows: (a) The new s. 267C should not be an absolute or strict liability offence but should incorporate *mens rea* as an element of the offence; (b) The alternative limb of "counselling disobedience to the law or to any lawful order of a public servant" should be deleted; and (c) The new s. 267C should state the contents of the document that is likely to lead to a breach of the peace.

3.11 Clause 39: Amendment of section 298A

MHA's Proposed Amendment	The Penal Code is amended by inserting, immediately after section 298, the following section: "**Promoting enmity between different groups on ground of religion or race, and doing acts prejudicial to maintenance of harmony** **298A.** Whoever — (*a*) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion or race, disharmony or feelings of enmity, hatred or ill-will between different religious or racial groups or communities; or (*b*) commits any act which is prejudicial to the maintenance of harmony between different religious or racial groups or communities, and which disturbs or is likely to disturb the public tranquility, shall be punished with imprisonment which may extend to 3 years, or with fine, or with both.".
Reasons given by MHA for proposed amendment	Council notes at paragraph 19 of the Consultation Paper that the proposed s. 298A is introduced to cover "an act that is likely to cause racial or religious disharmony or the promotion of enmity between different groups on the grounds of race or religion, for wider coverage".
Council's Response	Council is of the view that s. 298A deals with two fundamental rights : 1. Freedom of Speech and Expression (Article 14) 2. Freedom of Religion (Article 15) The limitations on Article 14 and 15 are dissimilar. Thus, the legislative scope in dealing with the mischief in each case is different. For the sake of legal clarity, s. 298A should be split into 2 offences, one dealing with racial and the other religious disharmony. Since the mischief is to prevent disharmony between racial groups or religious groups, the reference to "communities" should be deleted as (a) it does not fall within the mischief that is sought to be prevented i.e. disharmony among racial and religious groups on racial and religious grounds; and (b) the constitution of such "communities" is unclear. Since the provision is penal, the offence should be clearly stated so that the public is clear on the scope of each offence. For this reason, we propose the deletion of the reference to "communities" in s. 298A (a) and (b). s. 298A (a) makes it an offence for whoever by words, etc "promotes or attempts to promote, on grounds of religion or

	race, disharmony or feelings of enmity, hatred or ill-will between different religious or racial groups...". The proposed s. 298A appears to be very broadly worded. It is desirable that an objective test be applied to infer a state of mind in a particular group of people before an offence is created. In this context, the reference to "communities" creates further imponderables to the offence.
Council's Recommendations	Council suggests that the words "promotes or attempts to promote" be replaced by the word "causes". We recommend that s. 298A be re-drafted to read: "Whoever – (a) by words, either spoken or written, or by signs or by visible representations or otherwise, *causes*, on grounds of religion or race, disharmony or feelings of enmity, hatred or ill-will between different *religious or racial groups*; or (b) commits any act which is prejudicial to the maintenance of harmony between different *religious or racial groups*, and which disturbs or is likely to disturb the public tranquility, shall be punished with imprisonment which may extend to 3 years, or with fine, or with both."

3.12 Clause 41: Amendment of section 320

MHA's Proposed Amendment	Section 320 of the Penal Code is amended by inserting, immediately after paragraph (*a*), the following paragraphs: "(*aa*) death; (*ab*) penetration of the vagina or anus of a person without that person's consent, which causes severe bodily pain;".
Reasons given by MHA for proposed amendment	Council notes that MHA did not provide any reasons in its Consultation Paper for these proposed amendments.
Council's Response	Council is of the view that the proposed amendments to s. 320 are not necessary. s. 319 of the Penal Code defines 'hurt' as: "*Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.*" Grievous hurt is a sub-category of hurt. It cannot be said that a deceased person suffers from bodily pain or disease. A person must necessarily be alive to suffer bodily pain or disease. It cannot be said that a deceased person is 'infirm'. A person must be alive and healthy to be rendered 'infirm' by any act. The definition of 'infirmity' is "a bodily ailment or weakness, especially one brought on by old age", or "frailty; feebleness". The proposed addition of 'death' as a form of hurt designated as grievous hurt may therefore be unsustainable. Penetration of another's vagina or anus without consent are already punishable under other existing sexual offence provisions (and the proposed new ones) in the Penal Code for rape and unnatural sex. The commission of sexual offences under those categories does not require the causation of 'severe bodily hurt', but only the penetration of orifices with or without consent. It is thus not clear why grievous hurt, a less serious offence than rape and unnatural sex, requires the further causation of 'serious bodily pain' before the elements of the offence are made out. In any event, the causation of 'serious bodily pain' can be regarded as an aggravating factor to be considered by the court during sentencing. The proposed additional category (ab) may thus not be necessary and blurs the conventional distinction between sexual offences and non-fatal offences against the person, which could lead to public confusion and difficulty for practitioners in advising clients.

3.13 Clause 46: New section 363A

MHA's Proposed Amendment	The Penal Code is amended by inserting, immediately after section 363, the following section: **"Punishment for abduction** **363A.** Whoever abducts any person shall be punished with imprisonment for a term which may extend to 7 years, or with fine, or with caning, or with any combination of such punishments.".
Reasons given by MHA for proposed amendment	Council notes that MHA did not provide any reasons in its Consultation Paper for these proposed amendments.
Council's Response	Council welcomes the introduction of s. 363A insofar as abduction (even if not for the specific purposes presently codified) should be an offence and the existence of a less serious offence could be useful for practitioners in making representations to the Public Prosecutor.

3.14 Clause 47: New section 364A

MHA's Proposed Amendment	The Penal Code is amended by inserting, immediately after section 364, the following section: **"Kidnapping or abducting in order to compel the Government, etc.** **364A.** Whoever — (*a*) kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction; and (*b*) threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person, in order to compel the Government or any other person to do or abstain from doing any act, shall be punished with death or imprisonment for life, or with imprisonment for a term which may extend to 20 years, and shall, if he is not sentenced to death, also be liable to fine or to caning.".
Reasons given by MHA for proposed amendment	Council notes that MHA did not provide any reasons in its Consultation Paper for these proposed amendments.
Council's Response	The provisions for kidnapping and abduction are presently found at s. 359 to s. 369 of the Penal Code. s. 364A proposes to introduce a new offence of kidnapping/abduction for the purpose of compelling the Government or any other person to do or abstain from any act. The proposed punishment for s. 364A is significantly heavier than those offences of kidnapping/abduction for other purposes: 20 years imprisonment and/or with fine and/or caning. There may be some justification for a heavier penalty where the purpose of the kidnapping/abduction relates to compelling the Government to do or abstain from doing something, but there is little justification for such a heavy penalty where the act is done to compel merely 'any person' to do or abstain from doing something. A lesser penalty should be prescribed in such cases.
Council's Recommendations	s. 364A should be modified to reflect that the heavier penalty of 20 years imprisonment and/or with fine and/or caning should apply only to instances where the purpose of the kidnapping/abduction relates to the Government.

3.15 Clause 52: Amendment of section 383; Clause 53: Repeal and re-enactment of section 385

MHA's Proposed Amendment	Section 383 of the Penal Code is amended — (*a*) by deleting the words "injury to that person or to any other" and substituting the words "harm to that person or to any other person, in body, mind, reputation or property, whether such harm is to be caused legally or illegally"; and (*b*) by inserting, immediately after paragraph (*d*) of the *Illustration*, the following paragraph: "(*e*) *A*, an enforcement officer, sees *Z* committing an offence, and threatens to report the offence unless *Z* gives him money. *Z* fears that the report may result in his being prosecuted for the offence and delivers money to *A*. *A* has committed extortion.". Section 385 of the Penal Code is repealed and the following section substituted therefor: "**Putting person in fear of harm in order to commit extortion** **385.** Whoever, in order to commit extortion, puts or attempts to put any person in fear of any harm to that person or to any other person, in body, mind, reputation or property, whether such harm is to be caused legally or illegally, shall be punished with imprisonment for a term of not less than 2 years and not more than 5 years, and with caning.".
Reasons given by MHA for proposed amendment	Council notes that MHA did not provide any reasons in its Consultation Paper for these proposed amendments.
Council's Response	The rationale for the new distinction of "illegal" and "legal" harm under the proposed amendments is unclear and may not be necessary. In addition, the current s. 213 already covers the scenario provided in the proposed new illustration (e) to s. 383, thus rendering it otiose.

3.16 Clause 57: Amendment of section 415

MHA's Proposed Amendment	Section 415 of the Penal Code is amended — (*a*) by inserting, immediately after the word "person," in the 1st line, the words "whether or not such deception was the sole or main inducement,"; (*b*) by inserting, immediately after the word "omit" in the 6th line, the words "to do"; (*c*) by deleting the words "that person" and substituting the words "any person"; and (*d*) by inserting, immediately after "*Explanation 2*", the following *Explanation*: "*Explanation 3.* - Whoever makes a representation through any agent is to be treated as having made the representation himself.".
Reasons given by MHA for proposed amendment	Council notes the reasons given at paragraph 7 of the Consultation Paper.
Council's Response	Council is of the view that the proposed amendment to s. 415 is a question of fact to be determined by the judge to rule based on the facts and evidence. The proposed s. 415 appears to blur the distinction between cheating and giving of false information. We are also of the view that the new proposed Explanation 3 is too broad. It effectively makes the principal liable for all representations of the agent even though the principal may not have conspired, aided, abetted or instigated the agent to make a specific representation. This appears to introduce the tort law principles of "vicarious liability" into criminal law.

3.17 Clause 64: New sections 473A, 473B and 473C

MHA's Proposed Amendment	The Penal Code is amended by inserting, immediately after section 473, the following sections: **"Making or possessing equipment for making a false instrument** **473A.** Whoever makes or has in his custody or under his control a machine or implement, or paper or other material, which to his knowledge is or has been specifically designed or adapted for the making of any false instrument shall be punished with imprisonment for term which may extend to 5 years, or with fine, or with both. **Making or possessing equipment for making a false instrument with intent to induce prejudice** **473B.** Whoever makes or has in his custody or under his control a machine or implement, or paper or other material, which to his knowledge is or has been specifically designed or adapted for the making of any instrument, with the intention that he or another person shall make a false instrument to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice, shall be punished with imprisonment for term which may extend to 10 years, or with fine, or with both. **Meaning of "prejudice" and "induce"** **473C.**—(1) For the purposes of section 473B and subject to subsections (2) and (4), an act or omission intended to be induced is to a person's prejudice if, and only if, it is one which, if it occurs, will — (*a*) result in his permanent or temporary loss of property; (*b*) result in his being deprived of an opportunity to earn remuneration or greater remuneration; (*c*) result in his being deprived of an opportunity to gain a financial advantage otherwise than by way of remuneration; (*d*) result in somebody being given an opportunity to earn remuneration or greater remuneration from him; (*e*) result in somebody being given an opportunity to gain a financial advantage from him otherwise than by way of remuneration; or (*f*) be the result of his having accepted a false instrument as genuine or a copy of a false instrument as a copy of a genuine one, in connection with his performance of any duty. (2) For the purpose of this section, an act which a person has an enforceable duty to do and an omission to do an act which a person is not entitled to do shall be disregarded. (3) References in section 473B to inducing somebody to accept a false instrument as genuine, or a copy of a false instrument as a copy of a genuine one, include references to inducing a

	machine to respond to an instrument or copy as if it were a genuine instrument, or, as the case may be, a copy of a genuine one. (4) Where subsection (3) applies, the act or omission intended to be induced by the machine responding to the instrument or copy shall be treated as an act or omission to a person's prejudice. (5) In subsection (1)(*a*), "loss" includes a loss by not getting what one might get, as well as a loss by parting with what one has.".
Reasons given by MHA for proposed amendment	Council notes the reasons given at paragraph 16 of the Consultation Paper for the proposed amendments.
Council's Response	Council notes that there is no definition for "false instruments". This should be clarified to ensure that modification of existing instruments would be covered. Please also refer to our comments on the proposed amendment to the definition of "instrument" at paragraph 3.4 above.

4 RESPONSE TO MHA'S REVIEW OF PENALTIES IN THE PENAL CODE

4.1 Clause 72: Various paragraphs of The Schedule - Increased Discretion For Courts To Mete Out Any Combination Of Penalties Of Imprisonment Terms, Fines And Caning

MHA's Proposed Amendment	Various sections of the Penal Code are amended in the Schedule to the draft Bill by providing that the courts may mete out imprisonment terms, or fine, or caning, or any combination of such punishments: see e.g. paragraphs (7), (20), (22), (25) and (28) of the Schedule.
Reasons given by MHA for proposed amendment	Council notes that paragraph 32 of the Consultation Paper states that MHA has recommended to allow the courts greater discretion to mete out any combination of the penalties of imprisonment terms, fines and caning for offences which currently provide for a maximum of two out of the three penalties to be meted out.
Council's Response	Council welcomes the proposed amendments to give courts increased discretion to mete out any combination of penalties as this will increase flexibility in sentencing. It is anticipated that such flexibility will make it easier for sentencing judges to tailor sentencing to the facts of each case.

4.2 Clause 72: Various paragraphs of The Schedule - Increased penalties for existing offences

MHA's Proposed Amendment	Many sections of the Penal Code are amended in the Schedule to the draft Bill by providing for increased penalties.
Reasons given by MHA for proposed amendment	Council notes the reasons given by MHA at paragraphs 28 to 32 of the Consultation Paper for the proposed amendments.
Council's Response	MHA's proposal to revise the fines in the Penal Code, which were last reviewed in 1952, to adjust for changes in the purchasing power of money since 1961, is plainly defensible. Paragraph 29 of the Consultation Paper states very briefly the general reasons for the proposed increased imprisonment terms for existing offences but no justification or explanation is provided for each and every increase in sentencing maxima. In the absence of full explanation and justification for the increases, Council is unable to concur that the present sentencing maxima are inadequate.

4.3 Clause 72: Paragraph (19) of The Schedule – Section 298

MHA's Proposed Amendment	Delete the words "one year" and substitute the words "3 years".
Reasons given by MHA for proposed amendment	Council notes that no reasons were given by MHA in the Consultation Paper for the proposed amendments.
Council's Response	Council notes that MHA proposes to increase the punishment from 1 year to 3 years in respect of the offence under s. 298 of deliberate wounding of the religious feelings of another person. It is not clear if this increase is to align it with the new s. 298A. If the increase is made for the purpose of alignment, given that the nature and scope of the offences are different, it does not appear necessary for the punishment for the offences to be synchronized.

4.4 Clause 72: Paragraph (20) of The Schedule - Section 304

MHA's Proposed Amendment	(a) Delete the words "10 years" and substitute the words "20 years". (b) Delete the words "10 years, or with fine, or with both" and substitute the words "10 years, or with fine, or with caning, or with any combination of such punishments".
Reasons given by MHA for proposed amendment	Council notes that no reasons were given by MHA in the Consultation Paper for the proposed amendments.
Council's Response	s. 304(a) Council notes that MHA proposes to increase the imprisonment term for the offence of culpable homicide not amounting to murder under s. 304(a) from 10 years to 20 years. Council welcomes the proposed amendment, as it will give the court a greater discretion in the sentencing of offences of culpable homicide not amounting to murder. Judges have sometimes been put in the invidious position of choosing either to give a sentence of 10 years imprisonment or life imprisonment, with the unfortunate consequence of life imprisonment where perhaps a 15 year term would have been suitable. The amendment corrects that and permits the court to hand down a sentence of between 10 and 20 years imprisonment. In future, MHA may wish to consider narrowing the gap between 20 years' imprisonment (subject to remission) and the review of life imprisonment after 20 years (not subject to remission). s. 304(b) Council notes that MHA proposes to introduce caning for the s. 304(b) variety of culpable homicide not amounting to murder. Given that s. 304(b) does not require "any intention to cause death or to cause such bodily injury as is likely to cause death", it is not clear why caning has been introduced in this section,

4.5 Clause 40: Amendment of section 304A

MHA's Proposed Amendment	Section 304A of the Penal Code is amended by deleting the words "shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both." and substituting the following words: "shall be punished — (*a*) in the case of a rash act, with imprisonment for a term which may extend to 5 years, or with fine, or with both; or (*b*) in the case of a negligent act, with imprisonment for a term which may extend to 2 years, or with fine, or with both.".
Reasons given by MHA for proposed amendment	Council notes that no reasons were given by MHA in the Consultation Paper for the proposed amendments.
Council's Response	Council notes that MHA proposes to distinguish the penalties for the offence of causing death by a rash act and the offence of causing death by a negligent act as follows: (a) in the case of a rash act, the penalties are imprisonment for a term which may extend to 5 years, or with fine, or with both; and (b) in the case of a negligent act, the penalties are imprisonment for a term which may extend to 2 years, or with fine, or with both. Council welcomes the proposed amendment to s. 304A to separate and make distinct the sentencing regime for causing death by a rash act, in the first place, and by a negligent act, in the second. The demarcation of the two different offences (one involving an actual awareness of the risk of death - rash; and the other not requiring such awareness – negligent) is welcomed. Council is of the view that the maximum 2-year imprisonment term proposed for negligent causing of death under s. 304A is not justifiable because under the present regime, courts have held that imprisonment is not normally a suitable punishment for negligence.

4.6 Clause 51: Amendment of section 379A

MHA's Proposed Amendment	Section 379A of the Penal Code is amended — (*a*) by deleting the words "of not less than one year and not more than" in subsection (1) and substituting the words "which may extend to"; and (*b*) deleting the words ", unless the court for special reasons thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification, be disqualified for a period of not less than 3 years" in subsection (2) and substituting the words "be disqualified for such period as the court may order".
Reasons given by MHA for proposed amendment	Council notes that MHA proposes to repeal the mandatory minimum penalty of imprisonment for 1 year for theft of motor vehicles or parts thereof under s. 379A.
Council's Response	Council is of the view that the proposed amendment is a move in the right direction.
Council's Recommendations	Council suggests a concerted and comprehensive study of all mandatory minimum sentences in our criminal law, as such penalties deprive the court of the discretion to tailor a sentence to fit the offender and the offence.

30 March 2007

Annex A

LIST OF MEMBERS OF AD HOC COMMITTEE OF THE LAW SOCIETY

S/N	NAME	LAW PRACTICE/ORGANIZATION
1	Mr Peter Cuthbert Low (Chairman)	Peter Low Partnership
2	Mr Chia Boon Teck (Council Representative)	Peter Low Partnership
3	Dr Thio Su Mien	TSMP Law Corporation
4	Mr Lim Seng Siew	Ong Tay & Partners
5	Mr Wong Siew Hong	Infinitus Law Corporation
6	Mr Foo Cheow Ming	KhattarWong
7	Mr Lee Teck Leng	Lee Associates
8	Mr Mark Goh Aik Leng	Mark & Dennis
9	Mr Tito Isaac	Tito Isaac & Co
10	Mr Peter Ong	Peter Ong & Raymond Tan
11	Mr Andy Yeo	Allen & Gledhill
12	Mr Wendell Wong	Drew & Napier
13	Mr Derek Kang	Rodyk & Davidson
14	Mr Mathavan Devadas	Temasek Polytechnic
15	Professor Michael Hor	National University of Singapore
16	Dr Kumar Amirthalingam	National University of Singapore

Annex B

LIST OF MEMBERS OF COUNCIL OF THE LAW SOCIETY 2007

S/N	NAME	LAW PRACTICE
1	Mr Philip Jeyaretnam, SC (President)	Rodyk & Davidson
2	Mr Michael Hwang, SC (Vice President)	Michael Hwang
3	Ms Malathi Das (Vice President)	David Nayar & Vardan
4	Mr Michael S Chia (Treasurer)	Sankar Ow & Partners
5	Mr Gan Hiang Chye	Rajah & Tann
6	Mr Jimmy Yim, SC	Drew & Napier LLC
7	Mr Wong Siew Hong	Infinitus Law Corporation
8	Mr Alvin Yeo, SC	Wong Partnership
9	Mr Francis Xavier	Rajah & Tann
10	Mr Leo Cheng Suan	Infinitus Law Corporation
11	Mr Andrew Ong	Rajah & Tann
12	Mr Yap Teong Liang	T L Yap & Associates
13	Mr Thio Shen Yi	TSMP Law Corporation
14	Mr Pradeep Kumar Gobind	K S Chia Gurdeep & Param
15	Mr Chia Boon Teck	Peter Low Partnership
16	Mr Rajan Chettiar	Rajan Chettiar & Co
17	Ms Lisa Sam	Lisa Sam & Company
18	Mr Anand Nalachandran	Harry Elias Partnership
19	Mr Lee Terk Yang	Tan Rajah & Cheah
20	Mr Wong Tsung Wei	Amica Law LLC
21	Ms Laura Liew	Rodyk & Davidson