

# **Submission**

on

## **Sexual Offences Against Young People**

to the

### **Tasmanian Law Reform Institute**

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## 1. Introduction

This inquiry arose out of a Tasmanian case in which a twelve-year-old girl was prostituted by her mother and her mother's male friend. The fact that only one of the girl's hundred or so clients was prosecuted gave rise to controversy and criticism of both the decision of the Director of Public Prosecutions and the law relating to the crime of sexual intercourse with a young person. The Attorney-General responded by referring to the Tasmanian Law Reform Institute by letter of 30 September 2011 the issue of the defence of mistake as to age for the crime of sexual intercourse with a young person.

The Institute has accepted the referral and published an issues paper addressing the mistake as to age defences for all sexual offences involving young persons as well as the unrelated issue of extra-territoriality of the crime of maintaining a sexual relationship with a young person.

The Institute has invited submissions on the matters raised in the issues paper to be received by 29 June 2012.

## 2. No defence age

The absence of a "no defence age" in Tasmanian law relating to sexual offences against children is a serious flaw that needs to be remedied.

As the issues paper points out, every other jurisdiction in Australia has a "no defence age", as do most common law jurisdictions.

It is appropriate that absolute liability apply to sexual offences against children of an age so young that it would always or virtually always be unreasonable to mistake their age by so great a margin that the offender could have a reasonable and honest belief that the child was over the age of consent.

The "no defence age" in Australian jurisdictions ranges from 10 to 16. Victoria recently raised the age from 10 to 12.

In the second reading speech commending the *Crimes Legislation Amendment Bill 2009* then Attorney General, the Hon Rob Hulls, explained the rationale for lifting the "no defence age" from 10 to 12:

*Raising the age limit for the most serious class of offences means that the statutory defences to this offence do not apply to an offence against a child under 12. While there can be a defence of marriage, reasonable mistake as to age or consensual sex between young people where the offence involves a child aged between 12 and 16, none of these will be any defence to an offence against a child aged under 12.*

*In considering these defences, it must be remembered that absence of consent is not an element of this offence. Non-consensual sex can always be charged as rape, regardless of the age of the victim and the accused. Rape carries a maximum penalty of 25 years jail.*

*The catalyst for this amendment to the Crimes Act was the County Court case of R. v. Maurice. Maurice broke into his victim's home and sexually assaulted her whilst she was sleeping in her bed.*

*The victim had only two weeks previously turned 10 years of age. Because she was over the age of 10, the available maximum penalty for the offence was 10 years imprisonment. If the offence*

*had been committed two weeks earlier, when she was under 10 years of age, the applicable maximum penalty would have been 25 years imprisonment.*

*In October 2008, I sought the advice of the Sentencing Advisory Council on the adequacy of the current maximum penalties for the offence of sexual penetration of a child under 16.*

*The council released their report in September 2009. It found that while the overall maximum penalties were appropriate, the age ranges that define the different penalties that apply should be altered in the manner I have described. The council's recommendations for restructuring the maximum penalties have been endorsed by this government and are reflected in this bill.*

*In its report, the council acknowledged that any aged-based legal definition is problematic and to some extent arbitrary. However, the majority of people consulted for the council's report considered that limiting the application of the higher maximum penalty of 25 years imprisonment to children aged under 10 did not reflect the inherent vulnerability of pre-teen children.*

*The council did find that many people who work with children consider that the transition from primary to secondary school is significant. Most children turn 12 in year 7, and children in high school are generally treated as having more independence.*

*Making the changes recommended by the council will have an impact upon sentences. Offences against 10 and 11-year-olds will now fall within the most serious of the three categories of penalty and will attract a maximum penalty of 25 years jail. I have no doubt that this reform will be welcomed as appropriately recognising the evil of sexual offences committed against such young children.*

*For these reasons this government is pleased to accept the recommendations of the SAC on this point and to amend the offence of sexual penetration of a child under 16 accordingly.<sup>1</sup>*

This rationale is persuasive.

The similarity of age defences currently in the Tasmanian *Criminal Code* apply only to children of or above the age of 12 years. If these defences are retained a “no defence age” of under 12 years is appropriate to protect younger children.

***Recommendation 1:***

***No defence, including the honest and reasonable mistake as to age defence, similarity of age defence or the marriage defence, should apply to sexual offences against a child aged under 12 years of age.***

### **3. Defence of mistake as to age**

Stephen Robertson explains that between 1880 and 1920 a reform campaign active in the United States, Britain and other Western nations succeeded in raising the age of consent. The campaign drew a link between the age of consent laws and the inducement of young girls into prostitution.

*By 1880, the first date chosen, many western nations had established an age of consent for the first time, typically of 12 or 13 years. By 1920, when the influence of reform campaigns that established a new link between the age of consent and prostitution had run its course, most had revised their age upward, to 14 or 15 in European nations, and 16 in the Anglo-American world.<sup>2</sup>*

During this period most Australian states raised the age of consent from 12 to 16.

In Britain the link between age of consent laws and the prostitution of young girls was vividly portrayed by the journalist W T Stead in his article “The maiden tribute of modern Babylon”:

*Against their [procurers of girls for prostitution] wiles the law offers the child over thirteen next to no protection. If a child of fourteen is cajoled or frightened, or overborne by anything short of direct force or the threat of immediate bodily harm, into however an unwilling acquiescence in an act the nature of which she most imperfectly apprehends, the law steps in to shield her violator. If permission is given, says Stephen's Digest of the Criminal Law, "the fact that it was obtained by fraud, or that the woman did not understand the nature of the act is immaterial."*<sup>3</sup>

In the United States a similar connection was drawn. In 1887 female physician Bessie V Cushman documented child prostitution in Minnesota labour camps. The Women's Christian Temperance Union under its president Frances Willard led the campaign for raising the age of consent to protect young girls from prostitution.<sup>4</sup>

In the light of this history, the failure to prosecute men who had sexual intercourse with a 12 year old girl being prostituted by her mother is alarming. The reason is that the law allows for a defence based on the offender having a “belief on reasonable grounds” that the girl was aged 17 years or more.

If this defence is to be retained it needs to be significantly curtailed to ensure that it is no longer available for such egregious offences as acts of prostitution with a 12 year old child.

### 3.1 Reasonable grounds

Section 124 (3) of the *Criminal Code* currently provides a defence to the offence of unlawful sexual intercourse with a person who is under the age of 17 years where it is proved that “*the accused person believed on reasonable grounds that the other person was of or above the age of 17 years*”.

This provision strikes a balance between the lesser standard of an “honest belief” which does not require that the belief be on “reasonable grounds” and the tougher standard of requiring that the accused have taken steps to ascertain the age of the person.

#### ***Recommendation 2:***

***The defence of a mistake as to age should be retained in the form that the accused person should be required to establish that they believed on reasonable grounds that the other person was of or above the age of 17 years.***

### 3.2 Onus of proof

The defence involves two aspects. Firstly that the accused had a belief that the person was aged 17 years or more and secondly that the accused had reasonable grounds for holding this belief. It seems entirely appropriate to put the onus on the accused of establishing these two facts to the satisfaction of the jury on the balance of probabilities.

It does not seem appropriate to shift the onus of proof onto the crown to establish beyond a reasonable doubt that the accused had no reasonable grounds for holding such a belief.

This does not violate the presumption of innocence. The crown must still establish beyond reasonable doubt that the relevant acts were done by the accused. However, if the accused wishes to make use of a defence then the onus of establishing the defence properly belongs with the accused.

The issues paper has highlighted the inconsistency between various offences on this matter. This should be remedied by the onus in all cases where a defence based on a belief on reasonable grounds that a person was aged 17 or more is available.

***Recommendation 3:***

***The onus of proof for establishing a defence based on a belief on reasonable grounds that a person was aged 17 or more should in all cases rest on the accused.***

### **3.3 Limited by age of accused**

The defence of reasonable belief as to age should not be available for offences as egregious as the prostitution of a 12 year old girl.

In 2001 Western Australia limited the defence to circumstances where the accused was no more than 3 years older than the child.

This is an appropriate provision. It would limit the defence to accused persons aged 17 or less in the case of 14 year old children; 18 or less in the case of 15 year old children and 19 or less in the case of 16 year old children.

***Recommendation 4:***

***The defence of a belief on reasonable grounds that a person was aged 17 or more should only be available where the accused is no more than 3 years older than the person.***

### **3.4 Similarity of age defence**

Similarity of age should not be a defence to a sexual offence against a child under the age of consent. The purpose of a legal age of consent is to protect children under that age from being seduced or enticed to engage in sexual conduct. The similarity of age defence undermines that protection if the age gap between those engaging in the conduct is small.

Without a similarity of age defence, children who do not want to engage in sexual conduct have a strong argument for resisting any approach: the conduct would be illegal. However a similarity of age defence removes from children this very useful argument for resisting unwanted approaches.

Prosecutorial discretion should be applied to whether or not to prosecute offences where there is a similarity of age and no element of coercion or exploitation of one party by another.

Similarity of age should rightly be taken into account by a court in assessing the degree of seriousness of an offence for sentencing purposes.

If the similarity of age defences are retained they should not be able to be combined with the defence of a belief on reasonable grounds as to age. In any case this would be redundant if recommendation 4 above is adopted.

***Recommendation 5:***

***The similarity of age defences should be repealed. If they are not repealed then it should be made explicit in the Criminal Code that the belief on reasonable grounds defence cannot be combined with these defences.***

## **4. Persistent sexual abuse of a child**

Section 125A of the *Criminal Code* provides that it is an offence to “maintain a sexual relationship with a young person” under the age of 17 years. This offence is committed if the accused engaged in three or more unlawful sexual acts with a child during a specified period.

### **4.1 Name of offence**

The issues paper points out that several commentators have criticised the terminology used to describe this offence as inappropriate as the word “relationship” implies a certain mutuality. Other jurisdictions have adopted the term “persistent sexual abuse of a child”. This better reflects the nature of the offence.

***Recommendation 6:***

***The offence of maintaining sexual relationship with a child should be renamed as the offence of persistent sexual abuse of a child.***

### **4.2 No reasonable belief defence**

If an accused has engaged in a three or more unlawful sexual acts with a child under 17 then there has been ample opportunity to establish the child’s actual age and less excuse for a persistent honest mistake on reasonable grounds as to the child’s age.

Therefore, the defence of a belief on reasonable grounds as to the child’s age should not apply to this offence.

***Recommendation 7:***

***The defence of a belief on reasonable grounds that the person was of or above the age of 17 years should not apply to the offence of persistent sexual abuse of a child and should be repealed.***

## **5. Child exploitation material**

### **5.1 Need to prove knowledge of age**

In proving an offence involving child exploitation material, the *Criminal Code* currently requires proof that the accused knew or ought to have known that the material was child exploitation material. This implies that the accused must also have known or ought to have known that the person depicted is “a person who is or who appears to be under the age of 18 years”.

The issues paper points out that the offences relating to child exploitation material in the Queensland *Criminal Code* do not provide a defence that the accused person did not know that the person was under that age, or believed that the person was not under that age.

There is a good case for removing the requirement to establish that the accused had or ought to have had knowledge of the age or apparent age of the person depicted. This would create a stronger incentive to avoid anything that may be child exploitation material.

**Recommendation 8:**

*Offences involving child exploitation material should each be amended to remove the requirement to prove that the accused knew or ought to have known that the person depicted was or appeared to be a person under the age of 18 years.*

## 5.2 Artistic purpose defence

Although it is not directly within the terms of reference of this inquiry it is relevant to consider removing the artistic purpose defence for child exploitation material. The corresponding Commonwealth and Victorian offences do not allow for this defence and a New South Wales inquiry has recently recommended that the defence be abolished in NSW law.

*The CPWP is of the view that the inclusion of the defence of artistic merit amongst the child pornography offences may, somewhat unhelpfully, lead to the impression that material that would otherwise constitute child pornography is acceptable if the material was produced, used, or intended to be used whilst acting for a genuine artistic purpose. The CPWP is not of the view that this should be the case. Material that is otherwise offensive because of the way in which it depicts children should not be protected because its creator claims an overriding artistic purpose for it.<sup>5</sup>*

The existence of the defence of artistic purpose for child exploitation material suggests that if the material is sufficiently artistic it somehow becomes acceptable to depict children in an offensive manner. Art should not be considered a valid excuse for child pornography.

**Recommendation 9:**

*The artistic purpose defence should be removed from all offences involving child exploitation material.*

## 6. Endnotes

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1. Legislative Assembly, Parliament of Victoria, Hansard, 10 Dec 2009, p 4605.
  2. Stephen Robertson, "Age of Consent Laws", in *Children and Youth in History*, Item #230: <http://chnm.gmu.edu/cyh/teaching-modules/230>
  3. W T Stead, "The maiden tribute of modern Babylon I: the report of our secret Commission", *Pall Mall Gazette*, 6 July 1885: <http://www.attackingthediabol.co.uk/pmg/tribute/mt1.php>
  4. Stephen Mintz, *Huck's Raft : a history of American childhood*. 2004, p 190; Bessie V. Cushman, "Another Maiden Tribute," *Union Signal*, 17 February 1887, pp 8-9: [http://www.childtrafficking.com/Docs/cushman\\_1887\\_another\\_maid.htm](http://www.childtrafficking.com/Docs/cushman_1887_another_maid.htm) ; Faith Martin, *Frances Willard: America's forgotten feminist*: <http://www.geocities.com/~svpress/articles/fwillard.html>
  5. *Report of the Child Pornography Working Party*, NSW Department of Justice, 2010, p 21: [http://www.lpclrd.lawlink.nsw.gov.au/agdbasev7wr/lpclrd/documents/pdf/final\\_child\\_pornography\\_working\\_party\\_report\\_8jan.pdf](http://www.lpclrd.lawlink.nsw.gov.au/agdbasev7wr/lpclrd/documents/pdf/final_child_pornography_working_party_report_8jan.pdf)