



The Law
Society
OF TASMANIA

Our ref: N3.1-247:LOR

25 July 2012

Tasmanian Law Reform Institute
Private Bag 89
Hobart, TAS 7001

Dear Sirs,

Sexual Offences Against Young People – Submissions of the Law Society of Tasmania

The Tasmanian Law Reform Institute (TLRI) has invited responses to the issues raised in its issues paper number 17, Sexual Offences Against Young People. The issues paper poses 9 questions and these submissions will address those questions in the same order as the issues paper.

The issues paper sets out the background to the paper and arguments in respect of each potential change to the law. These submissions will not repeat that background or those arguments.

Matters of Principle

The Society recognises the particular vulnerability of young persons and the obligation of the law, where appropriate to protect them. However care must be taken to ensure that the desire to identify and punish is not at the expense of the basic rights of every defendant who is the subject of a criminal charge, including the presumption of innocence, the obligation of the prosecution to prove its case and the right to a fair trial.

Questioned Posed in the Issues Paper

1. (a) Should there be a no defence age for sexual intercourse with a young person, aggravated sexual assault, indecent assault and indecent act with a young person?
(b) If so, what should the no defence age be?

These questions appear to proceed from a base that 'A number of commentators have criticised the current mistake as to age defence in Tasmania claiming that it provides a loophole for offenders who should be held accountable for their actions.'¹ This is also described as a suggestion that the Tasmanian law is too liberal in relation to mistake.²

No basis for the above claims is given, apart, it is assumed, from the view held by some that the decision of the Director of Public Prosecution's not to prosecute a number of

¹ Issues paper, page 31

² Issues paper, page ix

clients is of itself evidence of a law that is too liberal or a loophole in the law. It is the Society's view that to amend the current law based on such a perception alone is flawed.

The Society submits there should not be a no defence age for the named offences. The Society's position with respect to this question, and a number that follow is based on the proposition that a jury is in the best position to assess, on all the evidence whether a person honestly and reasonably believed in a state of affairs that if true would provide a defence to the particular offence. The criminal law needs to be very careful when it comes to dispensing with mens rea for any offence.

It is not necessary to answer question (b).

2. (a) **Should the defence of mistake as to age be retained?**
(b) **If yes, should it be retained in relation to all offences, or to some only (and if so, which)?**

The answer to both questions is yes. There is no convincing reason to deny an accused person the right to the existing defence.

3. **Assuming you favour retaining the defence of mistake as to age, would you prefer that the defence of mistake as to age be based on an honest belief (the *Criminal Code* (Cth) s272.16 formulation) or that the mistaken belief be required to be both honest and reasonable (the current Tasmanian position)?**

The Society is of the view that the current requirement of an honest and reasonable mistaken belief should be retained. The Society agrees that it is appropriate that the defendant's mistake be a reasonable as well as a genuine one. The adjunctive requirement allows a jury to apply community standards of reasonableness to the conduct of a defendant.

4. (a) **Should there be an age restriction on the age of the perpetrator who can claim the defence of mistake as to age?**
(b) **If yes, what should that age be?**

The Society repeats its submission in relation to question 1. There is no sound reason in principle to impose an arbitrary age limit to the availability of the defence. If the submissions in respect of question 3 are accepted, a jury may take into account a defendant's age in assessing whether a claimed mistake is honest and/or reasonable.

It is not necessary to answer question (b).

5. **Should there be a limitation on the defence of mistake which requires, in addition to a mistaken belief as to age, that the defendant took positive steps to find out the young person's age?**

The Society is not in favour of limiting the defence of mistake to impose a requirement of the type suggested. Each of the examples given is seen as an unnecessary restriction on a defendant's right to convince a jury on all of the admissible evidence that there existed an honest and reasonable mistake. That evidence may well include evidence of steps taken to ascertain the young person's age. It is, however, an entirely different matter to mandate that a defendant, to succeed in his or her defence must adduce evidence of a particular character.

6. Should the *Code* explicitly allow an accused person to combine the mistake as to age and consent defences?

The Society agrees that the uncertainty surrounding the scope of the defence ought to be clarified. It is the Society's view that the Code should be amended to explicitly allow a defendant to combine the consent and mistake as to age defences.

- 7. (a) Should the onus of proof in relation to mistake as to age be consistent for the crimes of sexual intercourse with a young person, aggravated sexual assault, indecent assault, indecent act with a young person and the procurement and communication offences relating to a young person under the age of 17?**
(b) Should the onus be on the prosecution to prove that the defendant had no honest and reasonable belief that the young person was under 17 or should there be a legal burden on the defendant to prove such a mistake?

The Society agrees that there is no justification on rational grounds for the current legal position and that the onus of proof ought to be consistent for the crimes referred to. It is the view of the Society that the onus of proof ought to rest with the prosecution that the accused did not have an honest and reasonable belief. It is a fundamental principle of criminal law that it is for the prosecution to prove its case.

8. Should the *Code* adopt 'knew or ought to have known that the young person was under age' as a uniform test for the age element in child sex offences in the *Code*?

The Society sees no good reason to adopt the suggested test. No compelling reason has been advanced which would justify a departure from the existing honest and reasonable test, either based on the unsuitableness of that test or any advantage in adopting the alternative.

- 9. (a) Should the defence of mistake as to age in 125A(5) be repealed?**
(b) Should maintaining a sexual relationship be redefined so that, provided at least one unlawful sexual act was committed in Tasmania, unlawful sexual act committed outside the State can be taken into account?
(c) Do you agree that the offence be renamed 'persistent sexual abuse of a child'?

The Society does not oppose the defence of mistake being repealed on the basis that it remains a defence to the particular unlawful sexual act relied upon to establish the crime.

In principle the Society does not oppose the redefining of the crime proposed in question (b). However, such a redefinition should only occur if any constitutional issues are adequately dealt with and on the basis that protection is provided to a defendant such that he or she does not face the possibility of a second set of charges arising out of the 'interstate' conduct, filed in the jurisdiction where that conduct is alleged to have occurred.

The Society has no view whether the offence should be renamed.

Yours sincerely


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