

**TASMANIA**  
**LAW REFORM**  
**INSTITUTE**

**Sexual Offences Against Young  
People**

FINAL REPORT NO 18

OCTOBER 2012



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## **Information about the Tasmania Law Reform Institute**

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000.

The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself.

The Institute's Director is Professor Kate Warner of the University of Tasmania. The members of the Board of the Institute are Professor Kate Warner (Chair), Professor Margaret Otowski (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice AM Blow OAM (appointed by the Honourable Chief Justice of Tasmania), Ms Lisa Hutton (appointed by the Attorney-General), Ms Terese Henning (appointed by the Council of the University), Mr Craig Mackie (nominated by the Tasmanian Bar Association), Ms Ann Hughes (community representative) and Mr Rohan Foon (appointed by The Law Society). Ms Kim Baumeler was the Law Society representative during the life of this project.

## **Acknowledgments**

This Report was prepared for the Board by Professor Kate Warner. The Institute acknowledges the research assistance of Kate Stewart and Dr Caroline Spiranovic in preparing the Issues Paper and the assistance of Dr Helen Cockburn, Philippa Shirley, George Zdenkowski and Jenny Rudolf in preparing the Final Report. The Institute would also like to thank Bruce Newey for proofing and editing the Report.

## **Background to this Report**

This project 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 clients was prosecuted gave rise to controversy and criticism of both the Director of Public Prosecution's decision not to prosecute and the law relating to the crime of sexual intercourse with a young person. The Attorney-General responded to criticisms of the law by referring to the Institute (by letter dated 30 September 2010) a review of the defence of mistake as to age for the crime of sexual intercourse with a young person, together with any other legal

issues raised by the case. The Issues Paper (IP 17) was published in May 2012 with a call for submissions by 29 June. Twenty responses were received to the IP. The questions raised by the IP were explained in presentations to a Legal Studies Professional Development Forum on 28 May and at a Law Society Criminal Law Conference on 22 June. In addition a consultation meeting was held with Sexual Assault Services, Hobart on 26 September.

The following made submissions:

Ms Aileen Ashford, Commissioner for Children  
Alliance for Forgotten Australians  
Anonymous 1 – name and address provided to the Institute  
Ms Caroline Carroll, Chair, FamilyVoice Australia  
Coalition Against Trafficking in Women Australia  
Mr Darren Hine, Secretary and Commissioner for Police, Department of Police and Emergency Management  
Mr Frank Moore, President of the Law Society of Tasmania  
Mr Graham Davis (Manager of DPP Witness Assistance Service Tasmania)  
Mr Greg Barns, National President, Australian Lawyer’s Alliance  
Ms Hetty Johnston (Founder & Executive Director) and Ms Carol Ronken (Research & Policy Manager), Bravehearts Inc  
Hobart Community Legal Service  
Hobart Women’s Health Centre  
Mr John Green, Lawyer  
Ms Marg Dean and Ms Rachael Portsmouth, Laurel House, Northern Sexual Assault Group Inc  
Mr Mark Brown, Tasmanian Director, Australian Christian Lobby  
Ms Mary Binks, State Secretary, Catholic Women’s League Tasmania Inc  
Ms Patmalar Ambikapathy,  
Dr Philip and Mrs Pam Dawson  
Mr Tim Ellis SC, Director of Public Prosecutions  
Rodney Skiller (Tasmanian Bar) (oral submission)

The Institute thanks all those who responded.

This report is available on the Institute's webpage at: [www.law.utas.edu.au/reform](http://www.law.utas.edu.au/reform) or can be sent to you by mail or email.

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## List of Recommendations

|                         |   |
|-------------------------|---|
| <b>Recommendation 1</b> | That the defence of mistake as to age not be abolished for any of the child sexual offences in the <i>Code</i> .  |
| <b>Recommendation 2</b> | The Institute does not recommend a ‘no defence age’ for the defence of mistake as to age for child sexual offences (by a majority decision).  |
| <b>Recommendation 3</b> | If a ‘no defence age’ is introduced (contrary to recommendation) it should be 12. (‘No defence age’ is defined in 1.1.3).   |
| <b>Recommendation 4</b> | That a limitation on the defence of mistake as to age be introduced which requires, in addition to the requirements that the mistake be honest and reasonable, that the defendant took all reasonable steps to find out the young person’s age.   |
| <b>Recommendation 5</b> | That no age restrictions on the age of the perpetrator who can claim the defence of mistake as to age be introduced.  |
| <b>Recommendation 6</b> | That the mistake as to age defence not be limited to circumstances where the young person has deceived the accused as to their age.   |
| <b>Recommendation 7</b> | The Institute recommends that the uncertainty in relation to the scope of the defence of mistake as to age be clarified. A majority recommends that the <i>Code</i> be amended to explicitly disallow an accused person from combining the mistake as to age and age similarity consent defences. |

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| <b>Recommendation 8</b>  | That s 35(3) of the <i>Police Offences Act 1935</i> be amended to read ‘a person who unlawfully and indecently assaults another person is guilty of an offence’. This would make it clear that the <i>Code</i> applies to this offence, including provisions relating to defences.                           |
| <b>Recommendation 9</b>  | That 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>Recommendation 10</b> | That the onus of proof for the defence of mistake as to age for all the child sex offences in the <i>Code</i> should be on the Crown.  |
| <b>Recommendation 11</b> | That the <i>Code</i> not adopt the ‘knew or ought to have known’ that the young person was under age formulation as the uniform fault element with respect to age of the young person for child sex offences in the <i>Code</i> .  |
| <b>Recommendation 12</b> | That the ‘knew or ought to have known’ test for age in child exploitation offences not be changed in favour of the defence of honest and reasonable mistake as to age.   |
| <b>Recommendation 13</b> | That the mistake as to age defence not be changed from requiring that the mistake be both honest and reasonable to only requiring that the mistake be honest (the <i>Criminal Code</i> (Cth) s 272.16 formulation).  |

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| <b>Recommendation 14</b> | That the defence of mistake as to age in s 125A(5) be repealed.  |
| <b>Recommendation 15</b> | <p>(a) That the crime of maintaining a sexual relationship with a young person be amended to include an extra-territorial provision to make it clear that, provided at least one unlawful sexual act was committed in Tasmania, unlawful sexual acts committed outside the State can be taken into account.</p> <p>(b) That the definition of unlawful sexual act be amended to make it clear that to qualify as an unlawful act, any unlawful act committed outside Tasmania must be both an offence under the law outside Tasmania and a sexual offence in Tasmania.</p> |
| <b>Recommendation 16</b> | That the crime of ‘maintaining a sexual relationship with a young person’ not be renamed ‘persistent sexual abuse of a child (or young person)’.   |

# Introduction

## 1.1 Scope and background

### *Scope of the project*

*1.1.1* As explained in the Issues Paper (IP 17), this project arose out of a Tasmanian case in which a 12-year-old girl (C) was prostituted by her mother (M) and her mother's friend (Gary Devine) over a period of two months in 2009. The controversy following the decision of the Director of Public Prosecutions to prosecute only one of the girl's clients led to criticisms of the law to which the then Attorney-General responded by requesting the Tasmania Law Reform Institute to review the sections of the *Criminal Code* dealing with the crime of sexual intercourse with a young person and the defence of mistake as to age.<sup>1</sup> A second letter enclosed a copy of the de-identified memorandum from the DPP regarding the case and requested the Institute to consider whether any other issues raised by the case required reform.<sup>2</sup> It also requested that a copy of this memorandum be attached to any review. The memorandum was included in Appendix 1 of the Issues Paper. The Issues Paper also included a summary of the criminal proceedings arising out of the child prostitution case (see IP 17 at 1.1.8 – 1.1.15).

*1.1.2* Because the defence of mistake as to age also applies to other offences against children, the Institute determined to broaden the scope of the project to consider mistake as to age in relation to all sex offences involving children. The project plan accepted by the Institute defined the scope of the project as follows:

to review the mistake and consent defences for sexual offences involving young persons to ensure that the *Criminal Code* achieves an appropriate balance between the need to protect young persons from sexual exploitation and the rights of the accused person.

At the suggestion of Justice Blow, the Institute also resolved to consider an issue in relation to the extra-territorial application of the crime of maintaining a sexual relationship with a young person.

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<sup>1</sup> Letter from the then Attorney-General, Lara Giddings, dated 30 September 2010.

<sup>2</sup> Letter from the then Attorney-General, Lara Giddings, dated 1 October 2010.

1.1.3 The IP isolated the following questions in relation to the defence of mistake as to age for child sexual offences:

- When a child is below a prescribed age (10, 11, 12 or 13 for example) should there be no defence of consent or mistake as to age (a ‘no defence age’)?
- Should a mistaken belief that the young person was over the age of consent continue to be a defence for people charged with sexual offences;
- If so, should the mistake as to age defence only be available to people below a certain age?
- Should there be other restrictions on the mistake as to age defence or a different formulation of the defence?
- Should an accused who is under the age of 21 be able to rely upon the defence of a mistaken belief as to age which if true would make the sexual intercourse lawful?
- Should the law be amended so that the onus of proof in relation to mistake as to age is consistent for all sexual offences involving young persons?

1.1.4 In relation to the crime of maintaining a sexual relationship with a young person, the IP asked:

- Should the section in the *Code* dealing with the offence be amended to allow a court to take into account unlawful sexual acts committed outside Tasmania?
- Should the name of the crime be changed to ‘persistent sexual abuse of a child’?

***Matters not included***

1.1.5 There are a number of contentious matters relating to consent and mistake defences to sexual offences involving children which the Institute excluded from the scope of the project. First, as explained in the IP the Institute has taken the view that it is not necessary to review the age of consent for the purposes of this project. It observed that the general age of consent needs to be viewed along with the age similarity defences to gain a more accurate understanding of the age at which the law allows young people to exercise autonomy and freedom of choice in sexual relationships. So, while 17 (the

general age of consent in Tasmania for sexual conduct) is a higher age than in most other Australian jurisdictions, there is a good argument that it does not inappropriately overcriminalise teenage sexual relationships. In fact by reason of the age similarity defences, young people aged 13 to 15 in Tasmania have greater freedom in sexual relationships than their counterparts in New South Wales. In that State not only is same age sexual contact an offence for this age group, it is automatically aggravated because it is designated a ‘child sex offence’ and attracts the provisions of the Child Protection Register. It should also be noted that 17 as the age of consent is not unprecedented in modern sexual offence laws – in South Australia and Ireland the age of consent is 17.<sup>3</sup>

*1.1.6* Secondly, the project does not cover the issue of the non-application of same age consent defences to anal intercourse (see 2.1.4). This issue was addressed by Tasmania Police in their response to the IP with a recommendation that s 124(5) be repealed because it discriminates between homosexual and heterosexual youths who wish to experiment with anal sex. While there is merit in this recommendation, the IP specifically excluded consideration of the issue in this project.

### ***Other matters raised by submissions which were not canvassed in the IP***

*1.1.7 Age similarity consent defences.* One response addressed the age gap for the age similarity consent defences and suggested that it should be no more than two years.<sup>4</sup> As the focus of the project is the defence of mistake, the IP did not discuss the possibility of amending or repealing the age similarity consent defences.

*1.1.8 Sexting.* Sexting involves sending intimate images in a text message via mobile phone. The problem of the crime of production of child exploitation material capturing sexting between consensual young people of a similar age was raised by Tasmania Police and it was suggested that consideration be given to applying the same age consent defences in s 124 to the child exploitation material offences. The problem of sexting was adverted to in the IP (see 3.4.3). Tasmania Police’s recommendation has merit. However, it should be noted that the similar age consent defences in s 124(3) would require adjustment to accommodate the higher age of consent for child exploitation material.

*1.1.9 Child Prostitution Offences.* A submission was received from the Coalition Against Trafficking in Women Australia suggesting that given that the

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<sup>3</sup> *Criminal Law Consolidation Act 1935 (SA) s 49(3); Criminal Law (Sexual Offences) Act 2006 (Ireland) s 3.*

<sup>4</sup> Patmalar Ambikapathy.

case that motivated this project was about prostitution of a 12-year-old girl, it was appropriate to address the issue of child prostitution offences. It recommended an offence which would criminalise the clients of child prostitutes which expressly excluded a defence of mistake as to age. The Institute acknowledges that the *Sex Industry Offences Act 2005* (Tas) contains an offence in relation to procuring or permitting a child to provide sexual services with a defence of mistake as to age. To include a discussion of this recommended option falls within the scope of a review which focuses on the defence of mistake in relation to all sex offences involving children.

### ***Overview of the paper***

*1.1.10* Part 2 of the paper sets out the current law in relation to sexual offences involving children so that the current law and its deficiencies can be highlighted. Part 3 then sets out the need for reform and Part 4 deals with options for reform and the Institute's recommendations. To provide context and background for the review of the law, the remainder of Part 1 explains the rationale for child sexual assault offences, reviews the evidence in relation to the age at which young people reach puberty and become sexually active and reviews the empirical evidence of the harm caused to children by sexual assault and premature sexual activity.

*1.1.11* The Institute acknowledges that the subject matter of this IP is confronting. Many members of the public are of the view that people who commit offences against children should be very severely punished. However, the Institute is required to consider the legal issues referred to it dispassionately and objectively. It notes at the outset that not all child sex offenders and offences are the same. Child specific sexual offences catch paedophiles in the true sense of the word but they can also criminalise teenagers for same age sex and prepubescent children of at least 10 years of age<sup>5</sup> who are exploring each other's genitals. For these reasons considerable care needs to be taken to respond in a careful and principled manner to the concerns that this case generated. The Institute is aware that while the criminal law has an important role in defining the standards of appropriate behaviour in relation to children, the protection of children from sexual abuse requires a much broader response than criminal justice interventions such as adjusting the principles of criminal responsibility for child sexual offences.<sup>6</sup>

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<sup>5</sup> Ten is the age of criminal responsibility: *Criminal Code* s 18(1).

<sup>6</sup> See the National Framework for Protecting Australia's Children referred to in 1.3.13 below.

## **1.2 The rationale for child sexual assault laws**

### *1.2.1* As the Western Australian Law Reform Commission has explained:

The rationale underpinning child-specific sexual offences is that ‘children due to their dependency and immaturity, cannot give consent to sexual activity in the same way as adults’ and that sexual activity can be ‘both psychologically and physically very harmful to children’. The prohibition against engaging in sexual conduct with children is designed to protect children from themselves because it is ‘undesirable that young people should embark upon sexual activity at an age at which they may be unable to fully comprehend or to cope with the social and emotional consequences of that activity’. However, far more critically, child-specific sexual offences are designed to protect children from sexual abuse by more mature persons.<sup>7</sup>

*1.2.2* So while the object is to protect children from premature sexual activity of all kinds, the primary focus is on conduct that is predatory or exploitative. This is evident in the provisions which provide a consent defence in circumstances where the participants are of similar age. Mistake as to age defences could be similarly rationalised. In such cases, sexual activity tends to lack the predatory or exploitative element that characterises sexual acts committed by adults on children.

## **1.3 Empirical evidence relating to under-age sex**

*1.3.1* The legal issues in this report should be considered in the light of evidence of two matters. The first is the age at which young people become sexually active. In considering the circumstances in which the law should proscribe the sexual conduct of minors, the Institute is mindful of the need to ensure that the focus is on the appropriate prosecution and punishment of sexual abuse and exploitation of young people by adults, without criminalising consensual sexual activity which is engaged in by a significant proportion of young people. The criminal justice system is not an appropriate way to regulate same age sexual conduct of adolescents. The second matter relates to the harm of underage sex.

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<sup>7</sup> Law Reform Commission of Western Australia, *Community Protection (Offender Reporting) Act 2004*, Project No 101, Discussion Paper 80 (footnotes omitted).

### ***When do young people become sexually active?***

1.3.2 Establishing a principled basis for fixing the age below which it is absolutely wrong for children to engage in sexual activity is problematic and any ‘no consent age’ will inevitably be arbitrary to a degree. However, it is argued that one of the factors which must be taken into account is the actual age at which young people become sexually active.

1.3.3 A national survey of Australian secondary school students in 2008 found that over 50% of Year 10 students (many of whom would be under 16 years) had engaged in sexual touching, 33% had engaged in oral sex and more than 25% had engaged in sexual intercourse.<sup>8</sup> While these data do not necessarily indicate that the sexual activity was unlawful (age similarity defences could be applicable) it does suggest that many young people under the age of 17 years are sexually active. The provision of similar age defences is a clear acknowledgment that arguments for criminalising sexual activity with children based on the protective principle carry less weight where young people who are close in age engage in consensual sexual activity.

### ***Age of puberty***

1.3.4 The biological changes that come with puberty tend to be accompanied by an intense and novel interest in sex.<sup>9</sup> Thus, the age of puberty onset may be another important point of reference in setting a no-consent age. In its comprehensive review of sexual offences in the United Kingdom, the House of Commons noted that protective laws should target pre-pubertal children and those who were entering puberty rather than older children.<sup>10</sup> Determining the age of puberty, however, presents difficulties. The timing of puberty is highly individual and the average age of onset varies around the world. It may be influenced by a range of genetic and environmental factors including differences in body weight and levels of nutrition. A distinction must also be made between the average age at which girls start to develop breasts (thelarche) and the

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<sup>8</sup> A Smith et al, Australian Research Centre in Sex, Health and Society, La Trobe University, Melbourne, *Secondary Students and Sexual Health 2008: Results of the 4<sup>th</sup> National Survey of Australian Secondary Students HIV/AIDS and Sexual Health* (2009) 26. See also A Smith, Australian Research Centre in Sex, Health and Society, La Trobe University, Melbourne, *Sex in Australia: Summary Findings of the Australian Study of Health and Relationships* (2003). This survey of nearly 20,000 young Australians found that the median age of first sexual intercourse for both men and women was 16.

<sup>9</sup> J DeLamater and W Friedrich, ‘Human Sexual Development’ (2002) 39(1) *Journal of Sex Research* 10, 11.

<sup>10</sup> Home Office (United Kingdom), *Setting the Boundaries: Reforming the Law on Sex Offences, Vol 1* (2000) [3.5.10].

average age at which they begin to menstruate (menarche). Both have been used as measures of the onset of puberty but commonly menarche may trail thelarche by as many as 2 or 3 years.<sup>11</sup> Estimates of the mean age of menarche in North America and Western European countries range from 12.7 years in Canada<sup>12</sup> to 13.0 in Denmark.<sup>13</sup> A small-scale study in Western Australia investigating the impact of sibling composition on the age of onset of puberty suggests that the average age in Australia is likely to be similar.<sup>14</sup> In less developed countries, however, the average age is higher. In India, for example, it is 15.4 years.<sup>15</sup>

### ***Transition to secondary school***

1.3.5 The transition from primary school to secondary school often roughly coincides with the onset of puberty and this progression has been recognised as a watershed in a child's developmental maturity. Several contributors to a Victorian Sentencing Advisory Council report on the offence of sexual penetration of a young child viewed this transition as significant, with high school age children considered generally more independent and better able to make their own decisions.<sup>16</sup> In Victoria most children turn 12 in their first year of secondary school.<sup>17</sup> It can be argued on that basis that it is not until the age of 12 that a child is sufficiently mature to make reasoned decisions about engaging in sexual activity or experimentation. The Sentencing Advisory Council report also notes that sentencing data tends to confirm that children under the age of 12 do not engage in consensual sex.<sup>18</sup> A similar conclusion may be drawn from Tasmanian sentencing data, subject to a caveat about the relatively small data set. For the period 2002-11 there is only one case which might be classified as consensual offending involving a 12-year-old complainant and no instances of

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<sup>11</sup> A-S Parent et al, 'The Timing of Normal Puberty and the Age Limits of Sexual Precocity: Variations around the World, Secular Trends, and Changes after Migration' (2003) 24(5) *Endocrine Reviews* 668.

<sup>12</sup> B A C Al-Sahab, M J Hamadeh and H Tamim, 'Age at Menarche in Canada: Results from the National Longitudinal Survey of Children & Youth' (2010) 10 *BMC Public Health* 736.

<sup>13</sup> Parent et al, above n 11, 671.

<sup>14</sup> F H Milne and D S Judge, 'Brothers Delay Menarche and the Onset of Sexual Activity in their Sisters' (2011) 278 (1704) *Proceedings of the Royal Society B* 417.

<sup>15</sup> Parent et al, above n 11, 673.

<sup>16</sup> Sentencing Advisory Council (Victoria), *Maximum Penalties for Sexual Penetration with a Child under 16* (2009) 77.

<sup>17</sup> This is not necessarily the case nation-wide. Different age limits for commencing school may apply and in some states children transition to secondary school in year 8 rather than year 7.

<sup>18</sup> The Council's sentencing data for the period July 2006 to June 2008 did not include a single instance of 'consensual' offending with a child under the age of 12: Sentencing Advisory Council, above n 16.

such offending involving victims younger than 12.<sup>19</sup> Victorian sentencing data also suggest that courts recognise a distinction in offending seriousness between offending against victims younger than 12 and offending against victims aged 12 or over.<sup>20</sup>

### ***How harmful is under-age sex?***

1.3.6 The harm to children from prematurely engaging in sexual conduct is generally assumed by decisional law relating to child sexual offences. Policy makers also tend to assert its harmfulness without debate. For example, in a recent Victorian decision dealing with the issue of whether the complainant's consent is a mitigating factor in cases of child sexual offences, the Court of Appeal said:

The absolute prohibition on sexual activity with a child is founded on a presumption of harm. The prohibition is intended to protect children from the harm presumed to be caused by premature sexual activity, that is, activity before the age when a child can give meaningful consent.<sup>21</sup>

1.3.7 In a Canadian decision<sup>22</sup> McLachlin J elaborated on the harm which laws criminalising sexual intercourse with a young person are directed at and her comments have been cited on a number of occasions. Her Honour said:

What then is the objective of [the crime of sexual intercourse with a female under 14]? It has two aspects. The first is the protection of female children from the harms which may result from premature sexual intercourse and pregnancy. The second is the protection of society from the impact of the social problems which sexual intercourse with children may produce.

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<sup>19</sup> The sentencing data were obtained from the Institute's own sentencing database. The database is compiled from the Comments on Passing Sentence produced by the Supreme Court. It records sentencing outcomes and some case details for all sentences handed down in the Supreme Court of Tasmania.

<sup>20</sup> For the period 2006-07 to 2007-08 the imprisonment rate for offenders convicted of sexual penetration charges involving a victim between the ages of 10 and 11 was 93.8%. For convictions involving a child between the ages of 12 and 13 the rate was 60.7%: Sentencing Advisory Council (Victoria), *Sentencing for Sexual Penetration Offences: A Statistical Report* (2009) 18.

<sup>21</sup> *Clarkson v The Queen; EJA v The Queen* [2011] VSCA 157, [3].

<sup>22</sup> *R v Hess; R v Nguyen* [1990] 2 SCR 906, [102]-[104] cited in *Clarkson v The Queen; EJA v The Queen* [2011] VSCA 157, [29] and *R v G* [2009] 1 AC 92, [21], [45].

I adhere to the view that I expressed in *R v Ferguson* that the protection of children from the evils of intercourse is multi-faceted and so obvious as not to require formal demonstration. Children merit this protection for three primary reasons. The first is the need to protect them from the consequences of pregnancies with which they are ill-equipped to deal from the physical, emotional and economic point of view. The second is the need to protect them from the grave physical and emotional harm which may result from sexual intercourse at such an early age. The third is the need to protect them from exploitation by those who might seek to use them for prostitution and related nefarious purposes.

Each of these reasons to protect children against premature sexual intercourse is reflected in corresponding social problems. Juvenile pregnancies adversely affect both family and society. It is society which bears the cost of abortions, society which often pays for the care of infant and mother. The physical and emotional trauma inflicted on children through premature sexual intercourse are reflected in increased medical and social costs and decreased productivity. Finally, juvenile prostitution is a notorious problem in many of our larger cities. We must not blind ourselves to the reality of drug addiction and virtual enslavement of young girls which all too often results from their prostitution. Section 146(1) and its equivalents in other countries are aimed at combating such prostitution by prohibiting sexual activity with very young girls.

*1.3.8* Having earlier in her judgment referred to McLachlin J's explanation for child sexual offence laws which legally disable the child from consenting, Baroness Hale in *R v G* added further justifications:

Penetrative sex is the most serious form of sexual activity, from which children under 13 (who may well not yet have reached puberty) deserve to be protected whether they like it or not. There are still some people for whom the loss of virginity is an important step, not to be lightly undertaken, or for whom its premature loss may eventually prove more harmful than they understood at the time. More importantly, anyone who has practised in the family courts is only too well aware of the long term and serious harm, both physical and psychological, which premature sexual activity can do.<sup>23</sup>

*1.3.9* With or without evidence of harm, the wrongfulness of adults engaging in sexual activity with under-age children has broad acceptance. Such conduct is regarded as deeply abhorrent. While the same sentiments are not aroused by similar age sexual conduct between young people when they are under the age

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<sup>23</sup> *R v G* [2009] 1 AC 92, 109 [49].

of consent, it is easy to accept, to use McLachlin J's words, that the protection of children from the evils of premature sex are 'so obvious as not to require formal demonstration'. However, this assertion does not mean that empirical evidence of the impact of such behaviour on a child's wellbeing should not be considered. The following discussion offers a brief review of the literature on the harmful effects of premature sexual activity, noting that empirical studies refer to this as 'child sexual abuse', terminology which tends to conflate consensual and non-consensual abuse and would appear to exclude similar age sex.

### ***The empirical evidence***

1.3.10 The evidence base concerning the harmful effects of childhood sexual abuse (CSA) is limited by a number of methodological issues. Retrospective studies predicate the occurrence of abuse on what may be a spurious history given in adulthood and thus may inflate the actual rate of abuse. On the other hand, reported rates of abuse may under-estimate the true figure as some victims choose not to disclose abuse or repress traumatic memories of the experience. Other difficulties are created by the use of non-representative study cohorts such as college/university students or clinical populations. For example, as CSA has been linked with poor academic outcomes, it can be argued that reliance on college samples would exclude many individuals who have been affected by experiences of CSA.<sup>24</sup> Since studies do not adopt a consistent definition of CSA and many studies fail to control for confounding effects such as family environment it is difficult to decipher with any certainty the link between CSA and adverse sequelae in adulthood. In his systematic review of 13 recent meta-analytic reviews, Maniglio stated:

Although the results of this systematic review provide clear evidence that the relationship between child sexual abuse and health problems does exist, the presence of confounding variables and the generally poor quality of the studies included in each review do not allow for causal inferences to be made, thus findings must be interpreted with caution.<sup>25</sup>

Nevertheless, despite these methodological shortcomings, there is a growing body of increasingly robust empirical evidence confirming that childhood sexual abuse is at least a risk factor for a range of long-term adverse medical,

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<sup>24</sup> See, eg, S J Dallam, D H Gleaves, A Cepeda-Benito, J L Silberg, H C Kraemer and D Spiegel, 'The Effects of Child Sexual Abuse: Comment on Rind, Tromovitch, Bauserman 1998' (2001) 127(6) *Psychological Bulletin* 715.

<sup>25</sup> R Maniglio, 'The Impact of Child Sexual Abuse on Health: A Systematic Review of Reviews' (2009) 29(7) *Clinical Psychology Review* 647, 654.

psychological and behavioural outcomes.<sup>26</sup> Whilst not all victims report adverse consequences<sup>27</sup> and a causal nexus between CSA and the development of behavioural and mental health problems has not been established, the association between CSA and more common mental health disorders is widely recognised.<sup>28</sup>

*1.3.11* A recent Victorian study by Cutajar et al confirms that the association also exists for more serious psychotic disorders.<sup>29</sup> The study cohort of sexually abused children was identified using historical forensic medical records maintained by the Police Surgeon's Office and the Victorian Institute of Forensic Medicine rather than self reported histories, thereby overcoming some of the methodological limitations of other studies. These records were data matched with the Victorian Psychiatric Case Register which stores information about individual contacts with mental health services. The data-matching exercise identified those in the CSA cohort who went on to develop mental health problems. Data-matching was also carried out on a control sample randomly drawn from the Victorian electoral roll which approximately corresponded with the CSA cohort in terms of age and sex. The finding that the rate of psychotic or schizophrenic spectrum diagnoses is significantly higher among the CSA cohort suggests that CSA is a substantial risk factor for the development of serious psychiatric disorders.

*1.3.12* Other studies have identified a link between CSA and sexual dysfunction in adulthood. Najman et al confirm a significant association between a reported history of CSA and an increase in the frequency of self-reported sexual dysfunction symptoms in adulthood.<sup>30</sup> Moreover, the authors found that adult sexual dysfunction was *substantially* more likely to be reported by women who had experienced penetrative sexual abuse in childhood.<sup>31</sup>

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<sup>26</sup> In relation to the association between early age at first sexual intercourse and higher rates of sexually transmitted infection see Kaestle et al, 'Young Age at First Sexual Intercourse and Sexually Transmitted Infections in Adolescents and Young Adults' (2005) 161(8) *American Journal of Epidemiology* 774.

<sup>27</sup> See Najman, J et al, 'Sexual Abuse in Childhood and Sexual Dysfunction in Adulthood: An Australian Population-Based Study' (2005) 34(5) *Archives of Sexual Behavior* 517, 518.

<sup>28</sup> See, eg, S Jonas et al, 'Sexual Abuse and Psychiatric Disorder in England: Results from the 2007 Adult Psychiatric Morbidity Survey' (2011) 41(4) *Psychological Medicine* 709.

<sup>29</sup> M C Cutajar et al, 'Psychopathology in a Large Cohort of Sexually Abused Children Followed up to 43 Years' (2010) 34(11) *Child Abuse & Neglect* 813; M C Cutajar et al 'Schizophrenia and Other Psychotic Disorders in a Cohort of Sexually Abused Children' (2010) 67(11) *Archives of General Psychiatry* 1114.

<sup>30</sup> J Najman et al, 'Sexual Abuse in Childhood and Sexual Dysfunction in Adulthood: An Australian Population-Based Study' (2005) 34(5) *Archives of Sexual Behavior* 517.

<sup>31</sup> Ibid 521.

*1.3.13* Despite some perceived limitations in the empirical research there is nonetheless sufficient evidence to support the legal, political and moral stance adopted in many Western democratic nations that sexual contact between adults and children may be associated with poor psychological adjustment in children as they develop and is thus a harmful behaviour that ought to be prohibited and should be treated seriously. The evidence also highlights a need for support for victims of CSA to mitigate the risk of both short-term and long-term harm. This has been recognised at a national level with the recent endorsement of a co-ordinated response to the problems of child sexual abuse, as an aspect of the National Framework for Protecting Australia's Children.<sup>32</sup> The national framework is an initiative of the Council of Australian Governments. It establishes a primary goal that Australia's children and young people are safe and well, and a series of 'supporting outcomes' that together build towards that goal. Supporting outcome 6 articulates strategies for preventing child sexual abuse and exploitation and these are underpinned by the understanding that CSA poses serious short and long-term risks to children. For example, initiatives to raise awareness of the risks of abuse are calculated to foster protective behaviours in children themselves, in families and in the community (Strategy 6.1) and Strategy 6.4 proposes that both child victims and adult survivors of abuse have access to effective treatment and adequate support. A recent AIC report which found a strong association between CSA and the likelihood of being charged for sexual or other violent offences in adulthood highlights the need for therapeutic interventions for the victims of CSA.<sup>33</sup>

## 1.4 Terminology

### *Strict and absolute liability*

*1.4.1* The discussion of criminal liability and a no defence age for child sexual offences requires some understanding of the legal terminology, strict and absolute liability. The use of this terminology differs between Australia, Canada and the United Kingdom, a point to note when the position in these jurisdictions is discussed in Part 4.

*1.4.2* In Australia and Canada, absolute liability describes the situation where conviction follows from proof of the commission of the prohibited act. Strict

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<sup>32</sup> Council of Australian Governments, *Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009–2020* (2009).

<sup>33</sup> J R Ogloff, et al, 'Child Sexual Abuse and Subsequent Offending and Victimization: A 45 Year Follow-Up Study' (2012) 440 *Trends & Issues in Crime and Criminal Justice*.

liability refers to offences where fault is based on negligence.<sup>34</sup> The terminology is most used in the context of regulatory offences but it is also used in discussion of criminal responsibility for traditional crimes. In this context strict liability generally refers to the situation where there is no mental element in relation to an ingredient of an offence but the accused can raise the defence of mistaken belief in relation to an external element. Take the example of the offence of sexual intercourse with a person under the age of 17. If this offence does not require proof of knowledge that the young person was under 17 but allows the defendant to argue that they had a mistaken belief on reasonable grounds that the young person was 17 or over, the offence would be described as strict liability. If the offence requires neither proof of knowledge of the age of the young person nor allows honest and reasonable mistake as to age as a defence, it would be described as absolute liability (at least in relation to the age element).

*1.4.3* The terminology ‘absolute liability’ is not widely used in the United Kingdom. Strict liability seems to be a wider category which refers to the situation where a person may be convicted without proof of intention, knowledge, recklessness or negligence and to offences which prescribe liability without fault but allow a defence of reasonable mistake of fact or due diligence.<sup>35</sup>

### ***Absolute liability under the Commonwealth Criminal Code***

*1.4.4* The terms absolute liability and strict liability are used in the Commonwealth *Criminal Code*. The term absolute liability under this *Code* means that there is no mental element in relation to a particular physical element and that the defence of honest and reasonable mistake is not available. But rather confusingly, it also covers the situation where the *defendant* has the legal burden of proving a genuine mistaken belief in relation to a mental element. This is exemplified by the offences of sexual intercourse with a child outside Australia and engaging in sexual activity with a child outside Australia.<sup>36</sup>

*1.4.5* This discussion oversimplifies the varieties of fault. As Ashworth explains, when account is taken of the shifting onus of proof and the various ways in which fault can be established or denied, the permutations of liability

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<sup>34</sup> S Bronitt and B McSherry, *Principles of Criminal Law* (Thomson Reuters, 3<sup>rd</sup> ed, 2010) 214; Kent Roach, *Criminal Law* (Irwin Law, 4<sup>th</sup> ed, 2009) 194-95.

<sup>35</sup> A Ashworth, *Principles of Criminal Law* (Oxford University Press, 6<sup>th</sup> ed, 2010) 160; see also Stuart P Green, ‘Six Senses of Strict Liability: A Plea for Formalism’ in A P Simester (ed) *Appraising Strict Liability* (Oxford University Press, 2005).

<sup>36</sup> *Criminal Code* (Cth) s 272.8(1); s 272.9(1); see 4.3.1.

are many.<sup>37</sup> However, because of the different uses of these terms in different jurisdictional contexts, it will be important to employ the relevant terms with some specificity in the discussion of the current law and any proposed reforms. In this Report the Australian meaning of the terms strict liability and absolute liability is used.

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<sup>37</sup> Ashworth, above n 35, 160-61.

## Part 2

# The Current Law

## 2.1 Introduction

### *Overview of current sexual offences relating to children*

2.1.1 Tasmania's *Criminal Code* contains a number of child-specific sexual offences such as sexual intercourse with a young person (s 124), indecent act with a young person (s 125B), and procuring sexual intercourse with a young person (s 125C). For these offences the presence or absence of consent is generally irrelevant in determining guilt. In addition there are sexual offences which have general application in the sense that they can involve either adult or child victims. Rape, incest and sexual intercourse with a person with a mental impairment are examples. A third category of offence is general in the sense that it can involve either adult or child victims, but absence of consent is an essential ingredient in the case of adults but not children. In other words, the fact the complainant is under the age of consent provides an alternative way of proving the ingredient of unlawfulness. In this third category are the offences of indecent assault (s 127) and aggravated sexual assault (s 127A). Maintaining a sexual relationship with a young person (s 125A) is also a child specific offence. It requires proof of at least three offences which can be sexual intercourse with a young person (s 124), indecent act with a young person (s 125B), sexual intercourse with a person with mental impairment (s 126), indecent assault (s 127), aggravated sexual assault (s 127A), incest (s 133) or rape (s 185). The *Code* also contains a group of child pornography offences (s 130 – 130E). Finally, it is an indictable offence in s 9(1) the *Sex Industry Offences Act 2005* to procure, cause or permit a child to provide sexual services in a sexual services business. However, there is no specific offence in this Act which makes it an offence to pay a child for sexual services. A list of these offences is set out for easy reference in Appendix 1.

### *Historical background*

2.1.2 From the time of its enactment in 1924, the *Criminal Code* has contained child specific sexual offences. At first these offences were limited to the offences of defilement of a girl under 18 (s 124), permitting defilement of a

young girl on premises (s 125), encouraging seduction of a girl under the age of 18 (s 132) and abduction of a young girl with intent to defile (s 188). Section 124 had specific defences for mistake as to age and consent. Section 124(1) provided that it was a defence for the accused to prove that he had an honest and reasonable belief that the girl was over the age of 18 if he was under the age of 21. Three separate ‘age similarity consent defences’<sup>38</sup> also applied to this crime. Indecent assault only applied to female victims, and in the case of females under the age of 18, consent was no defence unless one of the ‘age similarity consent defences’ applied. In common with other jurisdictions, prior to decriminalisation of homosexuality, there were no child specific sex offences for male victims. Anal sexual intercourse between males irrespective of the age of the person ‘carnally known’ was a crime (s 122: unnatural carnal knowledge). Similarly, indecent acts between males were also prohibited (s 123: indecent practices between males).

*2.1.3* The age of consent was lowered to 17 in 1974 and the age similarity defences were amended.<sup>39</sup> A new s 124 was substituted in 1987 which made the offence gender neutral and broadened the age similarity defences.<sup>40</sup> The offence of maintaining a sexual relationship with a young person (s 125A) was inserted into the *Code* in 1994.<sup>41</sup> In 1997, when homosexuality was decriminalised by the repeal of s 122 and 123, the operation of s 124 was made retrospective by the insertion of s 124(4). This ensured that sexual intercourse with a male under the age of 17 occurring before the repeal of s 122 could still be prosecuted. Section 124(5), which provides that the age similarity defences do not apply to anal sexual intercourse, was also inserted.<sup>42</sup> In 2001, the new offence of indecent act with a young person was added to the *Code*.<sup>43</sup> Procuring unlawful sexual intercourse with a person under 17 years was added in 2005 together with a series of child exploitation offences.<sup>44</sup>

### *Age of consent*

*2.1.4* Currently the age of consent in Tasmania is 17 and it is the same for males and females. However, because the age similarity defences do not apply

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<sup>38</sup> ‘Age similarity consent defence’ refers to a defence of consent which applies when the perpetrator and the young person are of a similar age.

<sup>39</sup> No 6 of 1974, s 2.

<sup>40</sup> No 71 of 1987, s 7.

<sup>41</sup> No 72 of 1994.

<sup>42</sup> No 12 of 1997, s 6.

<sup>43</sup> No 83 of 2001.

<sup>44</sup> No 29 of 2005.

to anal sexual intercourse, arguably, in effect, the provisions discriminate on the basis of sexuality as young homosexual males are prohibited from having anal sex with underage males whereas young heterosexual males can legally have sexual intercourse (other than anal sex) with underage females in cases where the age similarity defences apply. Tasmania Police noted this difference in their submission and recommended consideration be given to the repeal of s 124(5). As noted above (see 1.1.6), as the focus of this project is the defence of mistake, views on this issue were not sought in the IP.

## 2.2 Sexual intercourse with a young person

2.2.1 Section 124(1) makes it an offence for any person to have ‘unlawful’ sexual intercourse with a person under the age of 17 years (s 124 is set out in full in Appendix 1). The external elements are that the person charged had sexual intercourse with another person who was under the age of 17 years. The only mental element is that the act of sexual intercourse was voluntary and intentional. Proof of knowledge that the young person was under-age is not necessary. Instead, s 124(2) makes an honest and reasonable belief that the other person was of or above the age of 17 years a defence if it is proved by the accused on the balance of probabilities.<sup>45</sup>

2.2.2 Consent is generally not a defence. This is made clear by s 124(3) which provides that consent is only a defence when the age similarity defences apply. In the context of s 124(1) the requirement for ‘unlawful’ sexual intercourse with a person under the age of 17 years provides a defence to an accused who is married to a person under the age of 17 years.<sup>46</sup> The age similarity defences in s 124(3) apply when:

- (a) the person against whom the crime was alleged was of or above the age of 15 years and the accused person was not more than 5 years older than that person; or

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<sup>45</sup> Reading s 124(2) as imposing a legal burden on D does not infringe ‘the principle of legality’: *Momcilovic v The Queen* [2011] HCA 34: see eg [44]-[45] (French CJ).

<sup>46</sup> In Australia, 18 is the marriageable age but a person may marry at 16 with parental consent and by judicial order in exceptional circumstances: *Marriage Act 1961* (Cth) ss 11 and 12. Issues in relation to the recognition of overseas and Aboriginal traditional marriages were discussed by the Model Criminal Code Officers Committee (MCCOC) report as was a reasonable belief in marriage: See, MCCOC, *Model Criminal Code Report*, Chapter 5 (May 1999) 143. The marriage defence is also relevant to couples who entered into a valid marriage in another country provided neither party was under the age of 16 at the time of marriage: *Marriage Act 1961* (Cth) s 88D(1) and (3).

- (b) the person against whom the crime was alleged was of or above the age of 12 years and the accused person was not more than 3 years older than that person.

The age differences of five years and three years refer to the precise age difference in years, months and days rather than whole years. So a defendant who is 17 years and 6 months old who has sexual intercourse with a 14-year-old cannot claim that the difference between 14 and 17 is not more than three years.<sup>47</sup> Section 124(5) provides that subsection (3) is not a defence to a charge under this section in a case of anal sexual intercourse. As discussed above, this provision was inserted into s 124 when the section proscribing anal sexual intercourse was repealed in 1997.

### ***The scope of the defence of mistake as to age***

2.2.3 As explained in the IP, the scope of the defence of mistake as to age is not clear from a reading of the *Code*. The question has arisen as to whether an accused person has a defence if he makes a mistake as to the age of a person, which if true, would make consent a defence under s 124(3)(a) or (b). For example, does an accused ('A') have a defence if A was 19 and the complainant/child ('C') was 14 but he thought C was 15? In this case he could not rely upon the similar age consent defence in s 124(3)(b) because he was more than 3 years older than C. And he cannot rely on s 124(3)(a) because she is 14 and it only applies if C was of or above the age of 15. However, s 14 provides for the defence of mistake of fact if an act is done under an honest and reasonable but mistaken belief in the existence of a state of facts the existence of which would excuse such act or omission if, as a matter of law, such a defence is open. Can A rely on a combination of the general mistake defence in s 14 and the consent defence in s 124(3)(a) by arguing that he believed on reasonable grounds she was 15 and if this were true the defence of consent would be open to him? The answer depends upon whether this defence is available as a matter of law, which according to s 14 must be 'determined on the construction of the statute constituting the offence'.

2.2.4 In the IP detailed consideration was given to this question without being able to resolve it. In *McCabe*<sup>48</sup> Crawford J considered the issue under an earlier version of s 124 (defilement of a young person). He held that the defence of mistake in s 14 was not available to provide a defence to a 20-year-old who believed that the girl he had sexual intercourse with was 16, an age which if true would have meant that his conduct was lawful. There are grounds upon which

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<sup>47</sup> *Stannard v DPP* (2010) 28 VR 84.

<sup>48</sup> [1980] Tas R 134.

this decision could be challenged today. First, Crawford J relied upon the common law principle in *Reg v Prince*<sup>49</sup> that a mistake as to age is only a defence to age-based sexual offences if expressly provided for. However, this principle is no longer good law.<sup>50</sup> Secondly, in *CTM v The Queen*,<sup>51</sup> the High Court made it clear in a case of sexual intercourse with a young person, that if parliament intends to abrogate the principle that an honest and reasonable mistake as to age is a defence, it must make its intention plain by express language or necessary implication. It is not clear that the ‘necessary implication’ can be found in the words of the *Code*. The words in the consent defence to the effect that consent is a defence ‘only where’ the specified age difference exists may not be enough to exclude the defence of mistake. By limiting the consent defence to circumstances where ‘as a matter of fact the age between the alleged offender and the child or young person does not exceed a specified period’,<sup>52</sup> Parliament may not have been implying that the ‘long-standing and well-understood principle’ of mistake was to have no application.<sup>53</sup>

## 2.3 Aggravated sexual assault and indecent assault

### *Indecent assault*

2.3.1 Indecent assault has been a crime in s 127 of the *Criminal Code* since the *Code*’s enactment in 1924 (s 127 is set out in full in Appendix 1). Originally limited to female victims, it now provides that any person who unlawfully and indecently assaults another person is guilty of a crime. The prosecution is required to prove that there was an assault (which is defined in s 182(1)) and

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<sup>49</sup> (1875) LR 2 CCR 154.

<sup>50</sup> *B v DPP* [2000] 2 AC 428; *R v K* [2002] 1 AC 462, where Lord Steyn at [30] described *R v Prince* as a ‘spent force’; *CTM v The Queen* (2008) 236 CLR 440, Hayne J at [160] noting that *R v Prince* is contrary to *Thomas v The Queen* (1937) 59 CLR 279; *CC v Ireland & Ors* [2005] IESC 48, Denham J at [37]: ‘*R v Prince* is unsound and bad in law’.

<sup>51</sup> (2008) 236 CLR 440.

<sup>52</sup> *Stannard v DPP* (2010) 28 VR 84, Redlich JA at [14]. This case is authority for the proposition that ‘not more than two years older’ than the child does not mean two whole years; therefore a defendant who is 17 and 11 months cannot rely upon the similar age consent defence when charged with sexual penetration of a child aged 14. This case has nothing to say about the defence of mistake as to age.

<sup>53</sup> *CTM v The Queen* (2008) 236 CLR 440, Gleeson CJ, Gummow, Crennan and Kiefel JJ at [30].

that the assault was both unlawful and indecent.<sup>54</sup> ‘Unlawful’ means that the assault was not justified or excused. Whilst in general consent is a defence to an assault,<sup>55</sup> the fact that the person assaulted is under the age of 17 years is a situation in which it is expressly provided that consent cannot be given.<sup>56</sup> So indecent assault is not a child specific sexual offence in the same way sexual intercourse with a young person is, although when it applies to situations where it is alleged that the person assaulted is under 17, the external elements differ. Rather than proving absence of consent, the prosecution can prove that the person assaulted is under the age of 17 years to satisfy the element of unlawfulness. Section 127(2) picks up the age similarity consent defences from s 124. It provides:

In any case in which it is provided that the consent of a person to the act charged shall be a defence to a charge under section 124, the like consent to an act charged under this section given under the like conditions as to the age of the parties shall be a defence to a charge under this section.

The situation in relation to mistake as to age will be discussed below in 2.3.3.

### ***Aggravated sexual assault***

2.3.2 Aggravated sexual assault (s 127A) was inserted into the *Code* in 1987. It provides that any person who unlawfully and indecently assaults another person by the penetration to the least degree of the vagina, genitalia or anus of that other person by any part of the human body other than the penis or by an inanimate object is guilty of a crime.<sup>57</sup> The section is structured in the same way as the indecent assault provision, with subsection (2) picking up the age similarity defences from s 124. The provision is set out in Appendix 2.

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<sup>54</sup> The meaning of ‘indecently’ has not been examined in any reported Tasmanian decisions, however, in other jurisdictions it has been said to be ‘unbecoming or offensive to common propriety’, offending contemporary standards of propriety, see J Blackwood and K Warner, *Tasmanian Criminal Law: Text and Cases* (University of Tasmania, 2006) vol 2, 700 citing *Purves v Inglis* (1915) 34 NZLR 1051; *Bills v Brown* Unreported Serial No 54/1974.

<sup>55</sup> Section 182(4).

<sup>56</sup> Section 127(3).

<sup>57</sup> The Tasmanian Law Reform Commission had recommended that the definition of sexual intercourse be widened to include within its scope penetration of the anus or vagina by a part of the body or an inanimate object so that when this was done without consent it would be rape. However, the legislature preferred instead to confine rape to penile penetration of the anus, vagina or mouth and to create a separate crime of aggravated sexual assault for other kinds of penetration.

### ***Mistake as to age***

2.3.3 The position in relation to the defence of mistake as to age under s 127 and s 127A (indecent assault and aggravated sexual assault) is different from s 124 (sexual intercourse with a young person). Sections 127 and 127A do not pick up the mistake as to age defence from s 124(2) because subsections (2) of both s 127 and s 127A only refer to the ‘consent defence provision’ in s 124. In the absence of an express provision as to mistake as to age the question arises as to whether the general mistake defence in s 14 applies to provide a defence of mistake as to age for these offences. This raises two questions:

- Is an honest and reasonable belief that C was over 17 years of age a defence?
- Can an accused combine the consent defence with the general mistake defence in s 14?

In summary, the following discussion argues that an honest and reasonable belief that C was over 17 is a defence but it is unclear whether an accused can combine the similar age consent defence with the general mistake defence. Those not interested in the technical detail of the discussion of these questions can skip to Part 2.4.

2.3.4 The first question is whether a mistaken belief that the young person was over 17 is a defence to the crimes of indecent assault and aggravated sexual assault. As discussed above, s 14 makes this a question of law to be determined on the construction of the statute creating the offence. The only ground upon which it could be argued that the defence of mistake in relation to the particular external element of the crime being here considered (that the other person was 17 years old) is not open would be that, in contrast with s 124, there is no express provision and this indicates the defence is inapplicable. If s 127 were to be interpreted in the light of the common law decision in *Reg v Prince* (using Crawford J’s reasoning in *McCabe*), mistake as to age would not be a defence. However, as explained in 2.2.4, the principle in *Prince’s* case has been discredited. Not surprisingly, the argument was not even raised by the Prosecution in the recent trial of Terry Martin – it was assumed mistake as to age was open as a defence. It follows that s 14 is a defence and that the onus of proof in this respect is on the Crown to prove that the accused person did not have an honest or reasonable belief that the other person was 17 years of age.<sup>58</sup> The difference in relation to the onus of proof between mistakes as to age in s 124 and s 127 and s 127A is clearly an anomaly.

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<sup>58</sup> *Attorney-General’s Reference No 1 of 1989, Re Brown* [1990] Tas R 46.

2.3.5 The second question relates to the possibility of combining s 14 and the consent defences. In this instance the argument that such a defence applies is perhaps stronger than in relation to s 124.<sup>59</sup>

## 2.4 Assault with indecent intent

2.4.1 The IP did not include a discussion of the offence of assault with indecent intent. However, in the light of Tasmania Police's submission that consideration be given to the need for a no defence age for this offence it has been included in the final report. In common with offences like assault and damage to property, Tasmanian criminal law has separate summary (tried in the Magistrates Court) and indictable (generally tried in the Supreme Court) offences for assaults with an indecent element. Assault with indecent intent is a summary offence in the *Police Offences Act 1935*, s 35(3) and indecent assault is an indictable offence in s 127 of the *Code*. The crime of indecent assault in s 127 can also be tried summarily if the accused elects summary proceedings.<sup>60</sup> In other words there are two ways in which an indecent assault can be dealt with in the Magistrates Courts: if the charge is laid as an offence under the *Police Offences Act* rather than the *Code*, or if the charge is laid under the *Code* and the defendant elects to have the matter heard in the Magistrates Court.

### *Is the age of the child relevant to assault with indecent intent?*

2.4.2 The general rule is that the *Code* principles of criminal responsibility (including such provisions as the defence of mistake in s 14) do not apply to summary offences unless there is a like indictable offence in the *Code*.<sup>61</sup> So for an offence such as driving in excess of .05, the common law applies and the general principles of criminal responsibility, such as the mental element and the availability of defences such as mistake of fact, are sourced from the common law. However, if the *Code* applies on the basis that a like indictable offence exists in the *Code*, general principles of criminal responsibility come from the *Code*. For example, the offence of assaulting a police officer contrary to s 34B of the *Police Offences Act 1935* finds a parallel in s 114 of the *Code*. Therefore, the defence of mistake of fact in s 14 of the *Code* provides a defence to a person who mistakenly believes that the person assaulted was not a police officer. In

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<sup>59</sup> The statutory maxim *expressio unius exclusio alterius* is a possible ground for excluding the general defence of mistake as to age in relation to s 124 (see IP 17 at 2.2.6 – 2.2.7) but it can have no application to s 127.

<sup>60</sup> *Justices Act 1959* (Tas) s 72(1)(a).

<sup>61</sup> *Criminal Code Act 1924* (Tas) s 4(3); *Acts Interpretation Act 1931* (Tas) s 36; *Gow v Davies* [1992] 1 Tas R 1.

the case of assault with indecent intent, if indecent assault in s 127 could be said to be a 'like offence',<sup>62</sup> the *Code* principles would apply. This would mean that consent is not a defence where the person assaulted was under the age of 17 but mistake as to age is a defence by virtue of s 14. In an unreported decision, *Lynch v Hennicke*,<sup>63</sup> Nettlefold J held that *Code* principles applied to an earlier version of this offence (assaulting any child apparently under the age of 14 years or any female with indecent intent). This is perhaps a surprising finding given that the elements of the two offences had significant differences: s 35(3) of the *Police Offences Act 1935* applied to children under 14 and females whereas s 127 of the *Code* only applied to females and s 35(3) did not require that the assault be 'unlawful' or that it be indecent (indecent in itself or committed in indecent circumstances).<sup>64</sup> Instead the 'assault' must be committed with an indecent intent which is not necessary for the crime in s 127. Section 35(3) has since been amended to make it applicable to male and female victims of any age and s 127 has also been made gender neutral. Despite these changes it is by no means clear that the two offences are sufficiently alike to engage s 36 of the *Acts Interpretation Act 1931*. An alternative interpretation of s 36 is that it applies in a case where the act alleged is capable of being both the summary offence and the indictable offence. On the facts of *Lynch v Hennicke*, this was the case. The alleged assault was the defendant assaulted a female aged 4 years 'by rubbing his penis against her vagina'. In other words, whether or not the *Code* applies depends on the details of the alleged assault.

2.4.3 In summary, whether the *Code* applies to the summary offence of assault with indecent intent is unsettled. If the *Code* has no application, the fact that the person assaulted is under the age of 17 years does not make the offence unlawful and neither the similar age consent defences nor a mistake as to age is relevant. If the *Code* applies, the similar age consent defences and the defence of mistake as to age do apply.

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<sup>62</sup> *Acts Interpretation Act 1936* (Tas) s 36.

<sup>63</sup> Unreported, Serial No B10/1985.

<sup>64</sup> *Risely v The Queen* [1970] Tas SR 41. It seems that an indecent motive is not enough to supply the circumstances of indecency if the assault is not indecent in itself: *R v George* [1956] Crim LR 52 but such a motive may be relevant where the assault is ambiguous: *R v Court* [1988] 2 WLR 1071.

## 2.5 Indecent act with young person and procuring offences

### *Indecent act with a young person*

2.5.1 The crime of indecent act with a young person was inserted into s 125B of the *Code* in 2001 to fill a gap in the protection of children from predatory and exploitative behaviour which is neither sexual intercourse nor an assault. As indicated in the Second Reading speech, indecent acts with children or in the presence of children may fail to satisfy the definition of assault because there may be no touching of the child to fulfil the requirement of an application of force.<sup>65</sup> For example, an adult who masturbates in front of a child or who invites a child to touch his exposed penis could not be charged with an indecent assault.<sup>66</sup> The section provides that any person who does an indecent act with, or directed at, another person who is under 17 years of age is guilty of a crime. The section is constructed in the same way as s 124. Section 125B(2) provides that it is a defence to prove that the accused person believed on reasonable grounds that the other person was of or above the age of 17 years. It clearly indicates that the onus of proof is on the accused. It follows that the standard of proof is on the balance of probabilities. Section 125B(3) sets out the same similarity of age defences as s 124(3). Therefore, the same issue in relation to the scope of the defence of mistake as to age arises as in relation to sexual intercourse with a young person.

### *Procuring unlawful sexual intercourse and sexual acts with a person under 17 years*

2.5.2 Three child specific procurement offences were added to the *Code* in 2005 together with offences in relation to child exploitation material.<sup>67</sup> These

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<sup>65</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 28 March 2001, 33 (Dr Patmore, Minister for Justice and Industrial Relations).

<sup>66</sup> *Riseley v The Queen* [1970] Tas SR 41, 46 (Crisp J) citing *Fairclough v Whipp* (1951) 35 Cr App R 138.

<sup>67</sup> The crime of procurement has a long history. At the time of the enactment of the *Criminal Code* in 1924 procurement was a crime in s 128 of the Code with four alternative definitions of conduct which amounted to procurement. Section 128(a) made it an offence to procure a female under the age of 21 years, 'who is not a common prostitute or of known immoral character, to have unlawful carnal connection with another person, either in this State or elsewhere'. This provision was omitted by the *Criminal Code Amendment (Sexual Offences) Act 1987* together with a number of other archaic and obsolete sexual offences such as abduction of a female with motives of lucre. The Tasmanian Law Reform Commission recommended repeal of s 128(a) on the ground that young females were adequately protected

changes were made in recognition of an increasing concern, or a revival of concern, about the exploitation of young people for commercial purposes. While rarely prosecuted in Tasmania, the case of *Gary John Devine and M*, discussed in Part 1, demonstrates the mischief at which these offences are directed.<sup>68</sup> Section 125C(2) provides that any person who procures a young person to have unlawful sexual intercourse with another person, either in this State or elsewhere, or another person to have unlawful sexual with a young person, either in this State or elsewhere is guilty of a crime. A ‘young person’ is defined in subsection (1) as a person under the age of 17 years. Subsection (3) contains a similar offence in relation to procuring the commission of an indecent act. Subsection (4) incorporates the similarity of age consent defences from s 124(3), and subsection (5) expressly provides that it is a defence to a charge under this section to prove that the accused person believed on reasonable grounds that the young person was of or above the age of 17 years. Section 125D(1) defines the offence of communicating with intent to procure a person under the age of 17 years to engage in an unlawful sexual act and the offence of making a communication with the intention of exposing a person under the age of 17 to indecent material is contained in s 125D(2). As with the crimes of sexual intercourse with a young person and indecent act with a young person, the scope of the defence of mistake as to age is unclear in relation to these four offences.

## 2.6 Maintaining a sexual relationship with a young person

2.6.1 As explained in the introduction to Part 2, the crime of maintaining a sexual relationship with a young person contrary to s 125A of the *Code* requires proof of an unlawful sexual act on at least three occasions. The unlawful act can be sexual intercourse with a young person, indecent act with a young person, sexual intercourse with a person with a mental impairment, indecent assault, aggravated sexual assault, incest or rape. Section 125A(4)(a) provides that it is not necessary to prove the dates on which any of the unlawful sexual acts were committed or the exact circumstances in which any of the unlawful sexual acts were committed. Instead the indictment must specify the particular period during which it is alleged that the sexual relationship between the accused and

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by other child specific sexual offences: Law Reform Commission of Tasmania, *Report and Recommendations on Rape and Sexual Offences*, Report No 31 (1982).

<sup>68</sup> In his comments on passing sentence on Devine, Evans J noted that the Supreme Court’s sentencing database did not include any sentences imposed for either procuring unlawful sexual intercourse with a young person or permitting unlawful sexual intercourse on premises: *Tasmania v Devine* 25 March 2010, 2 (Evans J).

the young person was maintained.<sup>69</sup> While three unlawful sexual acts is the minimum, if more are alleged this is relevant to sentence – in imposing sentence the judge is required to determine the number of identifiable occasions on which unlawful sexual acts were committed.

### ***Unlawful sexual acts committed outside Tasmania***

2.6.2 There is a presumption that Acts of Parliament are intended to operate only within the territorial limits of the jurisdiction.<sup>70</sup> Problems arise however, when a crime is committed partly in one jurisdiction and partly in another.<sup>71</sup> The *Criminal Law (Territorial Application) Act 1995* (Tas) is relevant in determining whether there is sufficient territorial nexus for the State to have jurisdiction. Section 4 provides that a crime against the law of the State is committed if all elements of the crime exist and a territorial nexus exists between the State and at least one element of the crime. It is not clear whether or not this provision would allow an unlawful sexual act committed outside the State to be included as one (or two) of the three unlawful sexual acts needed to satisfy the requirements of the offence. On one view, each separate unlawful sexual act is an element of the offence and hence only one of the unlawful sexual acts would need to be committed in Tasmania. But it could also be argued that for the *Criminal Law (Territorial Application) Act 1995* to be engaged, one element of *each* of the unlawful sexual acts would have to be committed in Tasmania. It is possible that jurisdiction could be claimed on the basis of the common law test of a ‘real and substantial link’ between the offence and the jurisdiction seeking to try it. However, uncertainties and criticism surround this common law test.<sup>72</sup> In the absence of a statutory provision expressly stating that it is not necessary that all three unlawful sexual acts be committed in Tasmania, it seems that the crime requires proof that at least three unlawful acts were committed in this State. Moreover, where at least three unlawful sexual acts were committed in Tasmania, any additional unlawful sexual acts committed outside Tasmania cannot form part of the criminal conduct for the purposes of sentence.<sup>73</sup> The inability of the Tasmanian Supreme Court to take into account unlawful sexual acts committed outside the State

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<sup>69</sup> *Criminal Code* (Tas) s 125A(6)(a).

<sup>70</sup> *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association* (1908) 6 CLR 306, 363.

<sup>71</sup> In the leading case of *Ward v The Queen* (1980) 142 CLR 308 (where D, who was standing on the Victorian bank of the Murray River, shot V who was standing on the New South Wales bank) the High Court examined the common law principles governing criminal jurisdiction and applied the terminatory theory. This has since been modified by both statute and common law: see Bronitt and McSherry, above n 34, 98-103.

<sup>72</sup> Bronitt and McSherry, above n 34, 102-3 discussing *Lipohar v The Queen* (1999) 200 CLR 485.

<sup>73</sup> *Tasmania v S*, COPS, Blow J, 30 November 2005.

when dealing with this crime led to Justice Blow's referral of this issue to the Institute.

### ***Mistake as to age***

2.6.3 Defences are specifically set out in the section creating the offence of maintaining a sexual relationship with a young person. As well as providing a marriage defence in subsection (3)(a), the defence of mistake as to age is expressly provided for in s 125A(5). In cases where the unlawful sexual act was sexual intercourse with a young person, assault or an indecent act, such a mistake as to age would preclude the individual act from being an unlawful one. The defence of mistake as to age is redundant in relation to such offences. But in the case of rape or where the element of unlawfulness is established by absence of consent, a mistake as to age seems an inappropriate defence.

## **2.7 Child pornography offences**

2.7.1 Child pornography has emerged as an important new issue for the criminal justice system in the last decade. Computer technology and the internet have facilitated its production, distribution and storage. In response, offences in relation to production, distribution and possession of 'child exploitation material' were introduced into the *Code* in 2005. Discussion of these particular child specific sex offences is included here because these offences treat fault elements in a different way from the child specific sex offences discussed above. As an example, s 130A, which defines the crime of production of child exploitation material provides that a person who produces, or does any thing to facilitate the production of child exploitation material, and *knows or ought to have known* that the material is or will be child exploitation material is guilty of a crime. Child exploitation material is defined in s 1A of the *Code* as material that describes or depicts, in a way that a reasonable person would regard as being offensive, a person who is or who appears to be under the age of 18 years engaged in sexual activity or in a sexual context, etc. This is the offence with which Terry Martin was charged in relation to photographing the complainant having oral sex with him and in various sexual poses. His alleged belief that C was 18 years old was relevant to whether the Crown had proved that he ought to have known that the material was *child* exploitation material, an element which requires proof that he knew or ought to have known she was a person under the age of 18 years. In the context of this offence, mistake as to age amounts to a denial of the subjective knowledge element of the mental element of the crime (the actual knowledge limb). However, a belief that she was 18 would not

necessarily provide an answer to imputed knowledge or, in other words, to the objective 'ought to have known' limb of the provision.<sup>74</sup>

## 2.8 Child prostitution offences

Paying children and young people under the age of 17 for sexual services and procuring them for sexual services is caught under the general child sex offences in the *Code*. In addition, the *Sex Industry Offences Act 2005* s 9 makes it a crime to procure, cause or permit a child to provide sexual services in a sexual services business. A 'sexual services business' means a business providing sexual services for fee or reward; 'sexual services' means sexual intercourse and physical contact for the purposes of sexual gratification; and a 'child' means a person under the age of 18.<sup>75</sup> The maximum penalty for the offence is 15 years imprisonment. A mistake as to age is a defence to the charge if the accused proves, that having taken all reasonable steps to find out the age of the person concerned, the accused believed on reasonable grounds that the person concerned was of or over the age of 18. The crime in the *Sex Industry Offences Act* is wider than the *Code* procurement offences in some respects: it includes 17-year-olds; it covers causing or permitting as well as procuring; and it has no similar age consent defences. However, it does not purport to cover the client of the child.

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<sup>74</sup> In *Martin*, the child was under the age of 18. In a case where the 'child' appeared to be under the age of 18 the Crown would be required to prove beyond reasonable doubt that the accused knew the child appeared to be under 18 or ought to have known this.

<sup>75</sup> *Sex Industry Offences Act 2005* (Tas) s 3.

## Part 3

# The Need for Reform

### 3.1 Criticisms that there is a loophole in the current law

#### *Is there a need for a 'no defence age'?*

3.1.1 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.<sup>76</sup> The fact that only one of the clients in the child prostitution case was charged was the subject of intense media debate. While the police and the DPP were criticised for failing to prosecute the other men involved, the law itself was also subject to scrutiny. Although some of the criticism of the law was ill-informed,<sup>77</sup> the case highlights a number of questions in relation to the current law. The first point to note is that under Tasmanian law there is no 'no defence age' for the defence of mistake as to age. In other words, it is possible for an accused person to raise the defence of mistake as to age as a defence to a charge of sexual intercourse with a young person no matter what age the young person is. Even if the young person is under the age of 12, such a defence is a theoretical possibility. Nor is there any limit to the age of the accused. So an accused who is over 50 years of age can argue that he believed the young person was 17 years old even if that young person was 12 or younger.

3.1.2 Most jurisdictions have a no defence age which means an age of the young person below which there is no defence of consent or mistake. In legal terminology this is described in Australia as 'absolute liability'. It is contrasted with 'strict liability' which describes the situation where a defence of honest and reasonable mistake is open.<sup>78</sup> In the Australian Capital Territory, where the

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<sup>76</sup> 'Editorial: Close legal loophole', *The Mercury* (Hobart), 29 September 2010; Damien Brown, 'Mum of girl prostitute jailed', *The Mercury* (Hobart), 15 May 2010; Sarah Bester, 'Child sex raised legal questions', *ABC News*, 26 September 2010; 'Expert calls for law reform after Tas child sex case', *ABC PM*, 29 September 2010.

<sup>77</sup> Such as assuming the onus of proof was on the Crown in relation to mistake as to age in s 124.

<sup>78</sup> See discussion above in 1.4.

young person is under the age of 10, liability is absolute.<sup>79</sup> The prosecution must simply establish that the accused had sexual intercourse with the young person and that the young person was under the age of 10. Both the young person's consent and the accused's belief as to his or her age are irrelevant to criminal liability. At least prior to *CTM*,<sup>80</sup> the position was assumed to be the same in New South Wales in the absence of an express mistake as to age defence for sexual intercourse with a child under 10. Now the existence of a no defence age in New South Wales is in doubt.<sup>81</sup> In other jurisdictions the no defence age is higher than 10, for example it is 12 in Queensland and Victoria,<sup>82</sup> 13 in Western Australia,<sup>83</sup> 14 in the Northern Territory<sup>84</sup> and 16 in South Australia.<sup>85</sup> For the crime of sexual intercourse with a child outside Australia contrary to s 272.8 of the Commonwealth *Criminal Code* there is no 'no defence age' – an honest mistake that the child was at least 16 is a defence without restriction on the actual age of the child.

3.1.3 The Institute has also explored the position in relation to the existence of a no defence age in other common law jurisdictions. This revealed that there is a no defence age of 12 in New Zealand by virtue of the fact that neither consent nor mistake as to age is a defence to a charge of sexual conduct with a child under 12.<sup>86</sup> In the United Kingdom, the no defence age is 13. The offence of rape of a child under 13 contrary to s 5 of the *Sexual Offences Act 2003* provides that a person commits an offence if he intentionally penetrates the vagina, anus or mouth of another person with his penis and the other person is under 13. The maximum penalty is life imprisonment. The mental element is that penetration must be intentional but there is no requirement that the accused

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<sup>79</sup> *Crimes Act 1900* (ACT) s 55(1). In contrast with the crime of sexual intercourse with a person under 16 in s 55(2), sexual intercourse with a young person under 10 contains no express mistake as to age defence.

<sup>80</sup> *CTM v The Queen* (2008) 236 CLR 440.

<sup>81</sup> *Crimes Act 1900* (NSW) s 66A. See *CTM v The Queen* (2008) 236 CLR 440, Heydon J at [230].

<sup>82</sup> *Criminal Code* (Qld) s 215; *Crimes Act 1958* (Vic) s 45. Neither Victoria nor Queensland have separate offences for sexual penetration of a child under the no defence age of 12. In Victoria, the no defence age is achieved by providing that the defences of consent, mistake as to age and mistake as to marriage are all conditional on the fact that the child was aged 12. The no defence age was changed from 10 to 12 in 2010 (see No 7/2010 s 3(5)).

<sup>83</sup> *Criminal Code* (WA) s 320.

<sup>84</sup> *Criminal Code* (NT) ss 127(4), 139A.

<sup>85</sup> *Criminal Law Consolidation Act 1935* (SA) s 49. The section only provides a defence for mistake as to age when C was 16. By implication this would appear to exclude mistake as to age when C was under 16.

<sup>86</sup> *Crimes Act 1961* (NZ) s 132(4).

knew that other person was under 13 and it is no defence that the accused believed the other person to be 13 or over.<sup>87</sup> The position is similar in Scotland.<sup>88</sup> An alternative charge is sexual activity (including penetration) with a child, but again neither mistake as to age nor consent is a defence if the child is under 13.<sup>89</sup> There is no ‘no defence age’ in Canada or Ireland.<sup>90</sup>

***Is there a need for restrictions on the defence of mistake as to age?***

3.1.4 In Tasmania, other than requiring that the onus of proof is on the accused in relation to the defence of mistake as to age, there are no other restrictions on the defence. In some jurisdictions, as well as limiting the defence by a no defence age, there are other restrictions imposed. Western Australia and South Australia have the strictest laws and both limit the availability of the mistake as to age defence to a particular age group. In Western Australia, as indicated above, the defence is not available in respect of children under the age of 13 years. For children between the age of 13 and 16, the defence is available only if the accused is no more than three years older than the complainant.<sup>91</sup> The effect is that anyone aged 19 years or older is precluded from relying on the defence. The policy underpinning the amendment that limited the defence was the need to protect vulnerable children from abuse and to ensure that adults who choose to embark on sexual relationships with young persons make genuine and adequate attempts to find out the person’s age.<sup>92</sup> Interestingly, when the Tasmanian *Code* was first enacted, the mistake as to age defence in s 124(2) was restricted to an accused person under the age of 21 years. This was further limited to an accused person under the age of 18 in 1974,<sup>93</sup> but the age restriction was omitted when the offence was remodelled by the 1987 reforms. In South Australia, the scope of the defence is very narrow. It is only available if the complainant is actually between 16 and 17 years.<sup>94</sup> An alternative approach is taken in Canada and New Zealand where the law requires that the

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<sup>87</sup> *R v G* [2009] 1 AC 92 (HL). In UK terminology this is called strict liability.

<sup>88</sup> *Sexual Offences (Scotland) Act 2009* s 27.

<sup>89</sup> *Sexual Offences Act 2003* (UK) s 9(1)(c)(ii) and s 13 (this applies if the perpetrator is under 18).

<sup>90</sup> *Criminal Code* (Can) s 151; *Criminal Law (Sexual Offences) Act 2006* (Ireland) ss 2 and 3.

<sup>91</sup> *Criminal Code* (WA) s 321(9).

<sup>92</sup> Law Reform Commission of Western Australia, above n 7, 93.

<sup>93</sup> No 6 of 1974, s 2.

<sup>94</sup> *Criminal Law Consolidation Act 1935* (SA) s 49.

accused had made inquiries in relation to age rather than simply requiring that the accused held a reasonable belief.<sup>95</sup>

## 3.2 Undue inconsistency

3.2.1 The discussion of the current law in Part 2 indicates that there are inconsistencies in the mistake as to age defences between the various child specific offences in Tasmania. This was highlighted in the case of *Tasmania v Martin* where the trial judge was obliged to direct the jury differently in relation to the three offences of indecent assault, sexual intercourse with a young person and production of child pornography. In each case the conduct elements of the offences were admitted. The accused's defence was that he believed that the complainant was 18 years old. In other words the only fact in dispute was whether the accused held a belief on reasonable grounds that she was old enough for the conduct to be lawful. In relation to the indecent assault charge this required the judge to direct the jury that they had to be satisfied beyond reasonable doubt that the accused did not have an honest belief based on reasonable grounds that the complainant was at least 17 years of age. However, in relation to the charge of sexual intercourse with a young person, to be acquitted the accused had to persuade the jury on the balance of probabilities that he was honestly and reasonably mistaken about the girl's age. In other words the onus of proof as to mistake differed between the two offences; for sexual intercourse the onus was on the accused to prove mistake; for indecent assault, the onus of proof was on the Crown to *disprove* the 'defence'. The third offence, production of child exploitation material, required a different direction. For this charge the jury had to be satisfied that the accused knew or ought to have known that the accused was filming a person who was under the age of 18 years. Note that, not only is the test different, the age of the young person is different. Such complexities are unnecessarily confusing.

3.2.2 The inconsistency between the onus of proof in relation to sexual intercourse with a young person, aggravated sexual assault, indecent assault, indecent act with a young person and the child procurement sexual offences has an historical explanation. At the time the *Code* was enacted in 1924, a statutory defence which placed the onus of proof on the accused was the norm. Uncertainty about the onus of proof in relation to the general defence of mistake in s 14 was not finally resolved until the Court of Criminal Appeal in *Attorney-General's Reference No 1 of 1989, Re Brown*,<sup>96</sup> reversed its earlier ruling in

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<sup>95</sup> *Criminal Code* (Can) s 159.1(4); *Crimes Act 1961* (NZ) s 134A.

<sup>96</sup> [1990] Tas R 46.

*Martin's* case<sup>97</sup> and held that in light of the High Court's decision in *He Kaw Teh*,<sup>98</sup> the onus was on the Crown to disprove mistake. When the crime of aggravated sexual assault was inserted in the *Code* as one of the 1987 sexual offence reforms, it made some sense to follow the model of the crime of indecent assault rather than to set out the defences separately as s 124 does. Both s 127 and s 127A were similar in construction in that they were not exclusively child specific offences – they also applied to adult victims but in the case of child victims the element of absence of consent was not an element of the offence. When the exclusively child specific crime of indecent act with a young person (s 125B) was inserted in 2001, there was the choice of using the s 124 model or the s 127 model. It is unlikely that the difference in relation to the onus of proof as to mistake was appreciated. The drafter opted for the s 124 model which repeats the defences rather than the s 127 model. Similar comments could be made in relation to the child procurement offences and the offence of exposing a young person to indecent material (s 125C and s 125D) which were introduced in 2005. In this case while the s 127 model was adopted in relation to the consent defences, the s 124 model was adopted in relation to mistake as to age by expressly providing for this defence with the onus on the accused.

3.2.3 The end result is that for indecent assault and aggravated sexual assault, the onus of proof in relation to mistake as to age is on the Crown to disprove the existence of an honest and reasonable mistake as to age; for sexual intercourse with a young person, indecent act with a young person, procuring unlawful sexual intercourse or an indecent act with a young person, communicating with intent to procure a young person to engage in a sexual act and communicating with intent to expose a young person to indecent material, the onus of proof in relation to mistake as to age is on the accused. There is no principled reason for such a distinction; it creates unnecessary complexity and has the potential to confuse a jury. Uniformity is clearly desirable. The further question of whether this uniformity should be extended to cover the child pornography offences is also an issue that should be explored. This question is a wider one than the issue of onus of proof and raises the possibility of a different but uniform mental element for all of these offences.

### ***Maintaining a sexual relationship and mistake as to age***

3.2.4 The problems of interpretation presented by the mistake as to age defence in s 125A(5) have been adverted to. Presumably if mistake as to age does arise in relation to any of the individual acts relied upon by the

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<sup>97</sup> [1963] Tas R 103.

<sup>98</sup> (1985) 157 CLR 523.

prosecution, the trial judge would give a direction as to mistake as to age when it arises in accordance with the onus of proof in s 125A(5), namely that the onus is on the accused. In directing a jury on the alternative verdicts for s 125A in a case where there was some evidence of a mistake as to age, the trial judge will be obliged to give a different direction in relation to mistake as to age in relation to the unlawful sexual acts when considered as individual counts of indecent assault. As an element of the maintaining charge, the onus is on the accused, but as an individual count, the onus is on the Crown for indecent assault and aggravated sexual assault. Such complexity is totally unnecessary and would most certainly be confusing to the jury.

### 3.3 Uncertainty of the law

#### *The relevance of other mistakes as to age*

3.3.1 The analysis of the law in Part 1 reveals that the *Code* is silent in relation to mistake as to age by a person who believed that the young person he (or she) had sex with was over the age at which she (or he) could lawfully consent by reason of the age similarity consent defences. In *McCabe*<sup>99</sup> Crawford J held that such a defence is not open, so the 20-year-old accused who had sex with a girl who was 13, could not avoid guilt by arguing that he had made a mistake as to her age because she had told him she was 16. In 2.2.4 above the question was raised whether the decision in *McCabe* still represents the law. It was suggested that in the light of the High Court's decision in *CTM*, this is doubtful. *CTM* highlights the fundamental importance of the presumption that proof of absence of an honest and reasonable mistake of a fact which would render the conduct innocent is an element of the crime.<sup>100</sup> Unless there is an indication, which is plain and unambiguous, that such a defence is unavailable, the defence will not be ousted. This uncertainty in the law is undesirable and should be addressed by clarifying the position. It is worth noting that in the Canadian *Code*, which has both express age similarity and mistake as to age defences for child sex offences, combining these defences is envisaged by a provision which requires that the defence of mistake as to age requires that the accused take reasonable steps to ascertain the age of the complainant.<sup>101</sup>

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<sup>99</sup> [1980] Tas R 134.

<sup>100</sup> This has been criticised on the grounds that it misstates the presumption of *mens rea*: Susannah Hodson, 'CTM v The Queen: A Challenge to the Fundamental Presumption of *Mens Rea*' (2010) 34 *Criminal Law Journal* 187. However, as far as the Tasmanian *Criminal Code* is concerned, the 'initial' presumption of *mens rea* has no application.

<sup>101</sup> *Criminal Code* (Can) s 150.1(6).

### *Assault with indecent intent*

3.3.2 The discussion of the law in relation to the summary offence of assault with indecent intent in Part 2.4 revealed another area of uncertainty. On the face of it, this is a summary offence and criminal responsibility for it is determined by common law principles and the *Code* has nothing to say in relation to it except to provide the definition of assault from s 182(1).<sup>102</sup> In the absence of an element of unlawfulness, neither consent, the age of the person assaulted, nor mistake as to age is relevant to criminal responsibility. However, there is authority that the *Code* applies by virtue of s 36 of the *Acts Interpretation Act 1931*. If this is correct, then the law relating to the summary offence of assault with indecent intent is the same as that relating to indecent assault – namely consent is a defence but not (subject to the age similarity consent defences) when the person assaulted is under the age of 17; and mistake as to age is a defence. This uncertainty in the law should be clarified.

## **3.4 Problems with the crime of maintaining a sexual relationship with a young person**

### *Problems with the defence of mistake as to age*

3.4.1 In the discussion of the crime of maintaining a sexual relationship with a young person (s 125A), problems with the defence of mistake as to age were highlighted. First, it seems inappropriate for this defence to have any operation in cases where the unlawful sexual acts relied upon are non-consensual. Secondly, the defence seems to be redundant in cases in which the sexual conduct is consensual. Thirdly, it poses unnecessary complexities in jury directions by requiring different directions for the crime of maintaining a sexual relationship and for the alternative verdicts for indecent assault and aggravated sexual assault where these are relied upon as the unlawful sexual acts.

### *Unlawful sexual acts in another jurisdiction*

3.4.2 The discussion of the crime of maintaining a sexual relationship in Part 2 has shown that if there is evidence in a case that some of the alleged unlawful sexual acts occurred in another jurisdiction, such acts may not qualify for inclusion as any one of the three unlawful sexual acts needed to prove the offence of maintaining a sexual relationship. Nor can they be taken into account in imposing sentence as uncharged acts if at least three unlawful sexual acts

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<sup>102</sup> The *Police Offences Act 1935* (Tas) s 3(3) provides that the ‘definitions set forth in the *Criminal Code* ... shall be applied in the construction of this Act.’

were committed in Tasmania. In the Draft Criminal Code prepared by the MCCOC, the offence of persistent sexual abuse of a child specifically provides that it is immaterial that the conduct on any of those occasions occurred outside the jurisdiction, so long as the conduct on at least one of those occasions occurred in the jurisdiction.<sup>103</sup> The commentary argues that this extension of jurisdiction will ensure that accused persons do not escape punishment for engaging in persistent child sexual abuse, simply because the child complainant is uncertain about the jurisdiction in which all of the alleged sexual acts occurred.<sup>104</sup> Provided there is a territorial nexus with Tasmania, with at least one of the unlawful sexual acts committed in this State, it is desirable that the court deal with the totality of offending through the crime of maintaining a sexual relationship to avoid the accused escaping punishment for the alleged sexual acts committed outside the jurisdiction or the need to prosecute the offender in the jurisdiction where the other unlawful sexual acts were committed.

***Is maintaining a sexual relationship with a young person an appropriate offence description?***

Rather than calling the offence maintaining a sexual relationship with a young person, New South Wales, Victoria and Western Australia call it ‘persistent sexual abuse of a child’. The Victorian Law Reform Commission expressed the view that it was inappropriate to describe child sexual abuse as a ‘sexual relationship’ and recommended that it be renamed ‘persistent sexual abuse of a child’, as recommended in the Model Criminal Code.

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<sup>103</sup> Model Criminal Code s 5.2.14(3).

<sup>104</sup> MCCOC, above n 46.

## Part 4

# Options for Reform

## 4.1 Overview

*4.1.1* The Issues Paper and Part 3 above, identified four possible problems with the current law. First, the claim that there are loopholes in the current law which allow adults to escape criminal punishment in situations where children have been sexually exploited was discussed. Secondly, it was argued that because of inconsistencies in the law, judicial directions in relation to the fault element relating to belief in age of the young person have the potential to cause confusion. Thirdly, that in at least one respect the law in relation to mistake as to age is unclear – namely it is uncertain whether it is permissible to combine the consent defences in s 124(3) with the general defence of mistake. The fourth point related to issues with the crime of maintaining a sexual relationship with a young person including the difficulties that arise when the unlawful sexual acts are committed in more than one jurisdiction. For some of these problems more than one possible solution was suggested in the IP. This part begins with a discussion of options to tighten the defence of mistake by:

- abolishing the defence of mistake as to age;
- introducing a no defence age;
- limiting the defence by age restrictions on the age of the accused; and
- adding a requirement of taking all reasonable steps to ascertain age.

Part 4 then canvasses other possible reforms including:

- clarifying the current uncertainty as to the scope of the defence of mistake as to age; and
- enacting a uniform onus of proof for the defence of mistake as to age.

As an alternative to the defence of honest and reasonable mistake as to age, the following options are also considered:

- reformulating the mistake as to age defence as an ‘ought to have known’ test; and
- replacing it with a defence of honest belief that the young person is over the age of consent.

Finally, submissions were also sought on three changes to the crime of maintaining a sexual relationship.

## 4.2 No mistake as to age defence

4.2.1 The option of abolishing the defence of mistake as to age was discussed in the IP and submissions were sought on the question of whether it should be retained and, if so, whether this should be the case for all child sexual offences.

4.2.2 Abolishing the defence of mistake as to age for child sexual offences would entail omitting the mistake as to age defence in child sexual offence provisions<sup>105</sup> and, to make it clear that the general mistake defence in s 14 is unavailable, including for each child sex offence a provision which expressly provides that mistake as to age is not a defence. As explained in the IP, some submissions to the joint ALRC and NSWLRC national inquiry into family violence suggested that there should be no defence of mistake as to age. The Canberra Rape Crisis Centre observed that ‘the impact on the young victim is the same regardless of the belief of the perpetrator and this should be the primary consideration’.<sup>106</sup> The National Association of Services Against Sexual Violence also argued against the availability of the defence of honest and reasonable belief that a person was over a certain age arguing that ‘it was at best irrelevant and at worst likely to be used as a difficult-to-challenge defence of the heinous crime of engaging sexually with children’.<sup>107</sup> Only one response to the IP supported abolishing the defence of mistake as to age. Laurel House endorsed the views of the Canberra Rape Crisis Centre and the National Association of Services Against Sexual Violence that there should be no defence of mistake as to age, arguing that the intention or belief of the

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<sup>105</sup> Sexual intercourse with a young person (s 124(2)); indecent act with a young person (s 125B(2)), procuring sexual intercourse with a young person (s 125C(5)), communicating with a young person with intent to procure etc (125D(5)).

<sup>106</sup> Australian Law Reform Commission (ALRC) and New South Wales Law Reform Commission (NSWLRC), *Family Violence - A National Response*, ALRC Report 114, NSWLRC Report No 128, para 25.46 quoting the Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010.

<sup>107</sup> *Ibid* quoting the NASASV, *Submission FV195*, 25 June 2010.

perpetrator is irrelevant in regard to the impact on the victim and because claims of mistake are often spurious:

Our experience of working with victims of sexual assault of all ages supports the view that the claim of mistake as to age is frequently made in an attempt to avoid punishment. Our experience supports the view that the sexual exploitation of minors is widespread and intentional. (*Laurel House, Northern Sexual Assault Group*)

4.2.3 While all but one of the responses to the IP supported retaining the defence of mistake as to age, many did so subject to the qualification that additional restrictions be placed on the defence. For example:

On balance, while I do not believe that the defence should be abolished outright I do not support the current lax situation in Tasmania which in my view unduly favours those charged with sexual offences against young people. In circumstances where the defence may still be available, additional restrictions should be placed on it so as to afford stronger protections to children and young people. (*Commissioner for Children*)

It is Bravehearts' position that Tasmanian legislation should retain the defence of mistake of age, based on an honest and reasonable belief ... for all sexual offences, but that it should be likewise amended to include a 'no defence age' of 12 or 13 years (with our preference for 13 years of age). (*Bravehearts*)

Others supported its retention without qualification:

There is no convincing reason to deny an accused person the right to the existing defence. (*The Law Society*)

The defence of mistake has been available for most crimes in Tasmania since at least the enactment of the Criminal Code in 1924. There is no evidence that the availability of that defence has led to any crime wave or made it difficult to obtain convictions. No doubt that is because the mistake must be reasonable as well as honest and juries are sceptical of people who confess to committing the acts which constitute a crime and then claim it has all been a mistake. (*John Green*)

### ***The Institute's view***

4.2.4 The Institute does not support the abolition of the defence of mistake as to age for child sex offences. This would have the effect of removing any fault requirement and making these offences of absolute liability. The interests of justice require that some form of defence of mistake as to age be available. As the MCCOC has argued, it would be wrong to automatically punish as a child

sex offender, a person who believed that he or she was having sexual contact with an adult and therefore was doing nothing legally or morally wrong.<sup>108</sup> While there is a need to recognise the particular vulnerability of children and the social need to protect them from abuse and exploitation, there is a strong argument that the interests of justice require that there be some fault element for these crimes such as the mistake as to age defence. As is argued below, (see 4.3.14) there is no evidence that imposing absolute liability rather than strict liability as to age would increase the law's protection for children and young people from sexual abuse and exploitation. A desire to express society's condemnation of child sexual abuse needs always to be balanced with the rights of those accused of criminal conduct. If fault requirements are removed entirely, there is no balancing of conflicting interests - the right of the accused not to be convicted of a serious crime in the absence of fault is extinguished.

4.2.5 Another possibility canvassed in the IP was that the defence of mistake as to age should apply to some offences, but not others. For example, in Queensland, mistake as to age is relevant to offences such as carnal knowledge with a child under 16 (*Criminal Code* (Qld) s 215), and also to maintaining a sexual relationship with a child (s 229B), but is not relevant (see s 229) to:

- procuring a young person for carnal knowledge (s 217);
- involving a child in making child exploitation material (s 228A); or
- making, distributing and possessing child exploitation material (ss 228B, 228C and 228D).

This option was only supported by the Australian Christian Lobby, which recommended against allowing the defence of mistake as to age for procurement and child exploitation offences. The Institute can see no principled basis for making these offences absolute liability offences. As explained in Part 2.7, child pornography offences in the Tasmanian *Criminal Code* have a different fault element from other child sex offences – the prosecution must prove that the defendant knew or ought to have known the material was *child* exploitation material, an element which requires proof of knowledge or imputed knowledge that material related to a child (defined as a person under the age of 18). Whether this fault element should be modified to achieve consistency with other child sex offences will be considered in Part 4.7.

**Recommendation 1**

That the defence of mistake as to age not be abolished for any of the child sexual offences in the *Code*.

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<sup>108</sup> MCCOC, above n 46, 159.

### 4.3 A ‘no defence age’

4.3.1 As discussed in 3.1.2 above, except for Tasmania, possibly New South Wales and the Commonwealth offence of sexual intercourse with a child overseas, all Australian jurisdictions have a ‘no defence age’ for child sex offences, namely an age of the child below which mistake as to age is not a defence. A no defence age means that for an offence such as sexual intercourse with a young person or indecent assault, liability is absolute in cases where the young person is below the no defence age. In the case of sexual intercourse with a young person, the prosecution need only establish that the accused had sexual intercourse with the young person in question and that the young person was below the no defence age. The only mental element for this offence is that the act of sexual intercourse was intentional. The Tasmanian *Criminal Code* has never had a no defence age in relation to mistake, although there have always been age limits on the defence of consent and until 1987 the defence of mistake as to age was limited to males under the age of 21. The *Offences Against the Person Act 1885* (Tas), which was repealed by the *Criminal Code*, had separate offences for unlawful carnal knowledge of girls under the age of 13 years, girls over the age of 13 years and under 14, and girls over 14 and under 16. A mistake as to age was only a defence for the latter crime.<sup>109</sup> The *Criminal Code* replaced the three offences with one, raised the age of consent to 18 years, and expressly provided age limited defences of consent and mistake as to age.

#### *Arguments in favour of a no defence age*

4.3.2 In favour of a no defence age (no fault or absolute liability) it can be argued that there should be a child’s age below which a perpetrator of an intentional sexual act with a child is denied a defence. Sexual exploitation and abuse of children is so harmful that on policy grounds absolute liability is justified when persons engage in sexual activity with the very young in order to protect them. Moreover, when such conduct is engaged in by adults it is so abhorrent that a belief that the young person is over the age of consent should not be a defence. Those who engage in sexual activity with a young person take the risk that he or she is much younger than he or she says or appears. The aim of a no defence age is to encourage those who engage in sexual activity with young people to take responsibility for their conduct in the hope of preventing children from being involved. In other words, it is argued that a no defence age would deter sexual conduct with children. Proponents of a no defence age could also argue that it would prevent adults who are involved in sexual activity with children from escaping prosecution and punishment. In the child prostitution

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<sup>109</sup> Sections 4-6. Section 4 proscribed carnal knowledge ‘and abuse’. The age of consent was raised to 16 by an amendment in 1910.

case which was the catalyst for the TLRI's current inquiry, a no defence age of 13 would have meant that those males who admitted to sexual intercourse with the complainant could have been prosecuted. Any claimed belief that she was over the age of 17 would not have been a defence, it would only have been a relevant factor in mitigation of sentence. The difficulty of proving fault or disproving a mistake as to age is also an argument frequently raised to support absolute liability.

4.3.3 Baroness Hale's defence of a no defence age in *R v G* sums up the argument neatly:

Every male has a choice about where he puts his penis. It may be difficult for him to restrain himself when aroused but he has a choice. There is nothing unjust or irrational about a law which says that if he chooses to put his penis inside a child who turns out to be under 13 he has committed an offence (although his state of mind may again be relevant to sentence). He also commits an offence if he behaves the same way in relation to a child of 13 but under 16, albeit only if he does not reasonably believe that the child is 16 or over. So in principle sex with a child under 16 is not allowed. When the child is under 13, three years younger than that, he takes the risk that she may be younger than he thinks she is. The object is to make him take responsibility for what he chooses to do with what is capable of being an instrument of great pleasure, but also a weapon of great danger.<sup>110</sup>

4.3.4 A majority of respondents favoured a no defence age. Those who gave reasons argued that it would reinforce the message that to protect children adults have a responsibility to take great care to ascertain the age of potential sexual partners:

AFA ... wants to reinforce for adults their responsibilities in making sure they are aware of the age of a young person with whom they are planning to have sex. (*Alliance for Forgotten Australians*)

This provides enhanced public protection for children. .. [It] seeks also to encourage adults to be responsible and accountable for their actions and to deter them from sexual conduct with young people. (*Tasmania Police*)

The law should ... encourage adults to take responsibility for their conduct and deter them from taking the risk that the young person is underage. (*Catholic Women's League Tasmania*)

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<sup>110</sup> [2009] 1 AC 92, 109.

The introduction of a ‘no defence age’ ... will provide a clear expression of the degree to which sexual offending against young people is condemned by our community and the extreme level of care that must be taken by a person considering whether to engage in sexual activity with a young person. (*Commissioner of Children*)

4.3.5 Some respondents supported a ‘no defence age’ on the grounds that Tasmania is the only State without one: (*Patmalar Ambikapathy; Family Voice Australia; Catholic Women’s League Tasmania*). Elizabeth Little (*Sexual Assault Support Services Inc*) argued that that a no defence age of 10 or 12 was appropriate because below this age there could be no question of the child having ‘agency’ in relation to the conduct and both consent and mistake should be irrelevant.

4.3.6 The degree of harm caused to children by sexual assault was cited as a reason for a ‘no defence age’. The Hobart Women’s Health Centre provided the Institute with a summary of the research relating to the impact of sexual assault on women in support of a ‘no defence age’. Echoing the argument in favour of a no defence age in para 4.2.2 of the IP, the Catholic Women’s League said:

CWL is compelled by the principle that sexual exploitation and abuse of children is so harmful and abhorrent that on policy grounds absolute liability is justified where young children are concerned.

### ***Arguments against a no defence age***

#### *Absolute liability is contrary to fundamental principle*

4.3.7 Four responses rejected a ‘no defence age’. All did so on the grounds that to impose absolute liability for a serious offence is contrary to the fundamental principle of *mens rea* and to human rights principles. For example:

The principle, endorsed by the High Court in a long line of authority running from *Proudman v Dayman* [1941] HCA 28 through to *He Kaw Teh* [1985] HCA 43, is that the morally blameless should not be held legally responsible. ... As the court noted in *He Kaw Teh*, there are serious consequences for removing the mental element to serious offences which lead to imprisonment. (*Hobart Community Legal Service*)

The Law Society challenged any suggestion that there was a ‘loophole in the law’:

It is the Society's view that to amend the current law based on such a perception is flawed... the Society submits that there should not be a no defence age for named offences. ... The criminal law needs to be very careful when it comes to dispensing with mens rea for any offence.

4.3.8 In addition to opposing absolute liability for these offences, the need for change was questioned:

The first question in response to this proposal is to ask, why is this necessary? The circumstances of the case involving the 12-year-old girl were highly unusual. There is no evidence that defendants in criminal trials are utilising the defence of mistake as to age in relation to young people below the age of 15. ... If there is no evidence besides one unusual case, then how can the stripping away of the rights of an accused person be justified? Particularly when, if found guilty of an offence that involves sexual activity with a person under the age of 17, the accused is likely to lose their liberty. (*Australian Lawyers Alliance*)

The law should not be changed just because there is some unusual case which crops up, the old adage 'hard cases make bad law' applies. Also the fact that some politicians make political capital out of this most unfortunate occurrence is not a reason to change the law. (*John Green*)

4.3.9 The IP discussed in some detail the principled objections to absolute liability for offences which are punishable by imprisonment – why it is regarded as fundamentally unjust to find someone guilty of an offence when they believed that what they were doing was lawful. This is not a matter of ignorance of the law,<sup>111</sup> rather it is imposing criminal liability on a person who may have made a reasonable mistake about a factual situation and even may have been positively and convincingly misled. In *State of Wisconsin v Jadowski*,<sup>112</sup> for example, the 35-year-old defendant was convicted for sexual intercourse with a 15-year-old girl who had shown him what appeared to be a state-issued identification card showing her to be 19. There was evidence she had told him and others she was 19 and that she appeared to be 19 years old.

4.3.10 The IP discussed the foundational arguments for the principle of *mens rea*. First, there is the rule of law or respect for autonomy argument. Briefly, this argument posits that individuals should not be exposed to conviction if they have not adverted to the wrongness of what they are doing because to do so constitutes contempt for a value (individual autonomy) which the law should

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<sup>111</sup> One submission questioned why ignorance of the law should be an excuse in the context when this is not so in other parts of the law (Philip and Pam Dawson).

<sup>112</sup> [2004] WI 68.

respect.<sup>113</sup> This is linked with the constitutional values of legality and the rule of law by the claim that *mens rea* enhances these values by reassuring citizens that they will be liable to conviction and punishment only if they knowingly cause or risk causing a prohibited harm.<sup>114</sup> Ashworth's censure-based argument is that a requirement of fault should be a precondition of the public condemnation involved in conviction and liability to state punishment.<sup>115</sup> A no defence age removes the element of fault for the offence of sexual intercourse with a young person.

*A 'no defence age' is an infringement of human rights*

4.3.11 Tasmania does not have human rights legislation comparable to the Australian Capital Territory's *Human Rights Act 2004* or Victoria's *Charter of Human Rights and Responsibilities 2006*. This does not mean human rights arguments are irrelevant. Law reform proposals should aspire to be human rights compliant.<sup>116</sup> For this reason alone they should be carefully analysed to ensure they do not infringe human rights. In any event statutory provisions will be interpreted in accordance with principles of statutory interpretation such as the principle of consistency and the principle of legality. The latter principle is particularly relevant in the context of arguments about absolute liability. It requires that the legislature is presumed not to intend to abrogate or curtail fundamental rights or freedoms such as the right to a fair trial and the presumption of innocence unless such an intent is clearly manifested by unmistakable and unambiguous statutory language.<sup>117</sup> Moreover, it is well-established that ambiguous penal statutes (particularly provisions involving the risk of imprisonment) should be strictly construed and any ambiguity resolved in favour of the potential subject of the penal consequences.<sup>118</sup> This is similar to the principle of consistency, which requires that where there is ambiguity or uncertainty in a statutory provision, an interpretation should be favoured which complies with principles of international law.<sup>119</sup>

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<sup>113</sup> A Ashworth, 'Should Strict Criminal Liability be Removed for all Imprisonable Offences?' (2010) 45 *Irish Jurist* 1, 5-6; Ashworth, above n 35, 155.

<sup>114</sup> Ashworth, above n 113, 5-6; Ashworth, above n 35, 155.

<sup>115</sup> Ashworth, above n 113, 6; Ashworth, above n 35, 63, 171.

<sup>116</sup> See *Australian Law Reform Commission Act 1996* (Cth) s 24(1)(a).

<sup>117</sup> J Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 30.

<sup>118</sup> See D C Pearce and R S Geddes, *Statutory Interpretation in Australia*, (Butterworths, 7<sup>th</sup> ed, 2011) 297-300; *Beckwith v The Queen* (1976) 135 CLR 569, 576; *Westpac Banking Corporation v Australian Securities and Investment Commission* (2009) 181 FCR 379.

<sup>119</sup> In this context 'ambiguity' has been interpreted broadly, so if a provision is susceptible to a construction which is consistent with international law principles, then that construction should prevail. See Gans et al, above n 117, 26-7.

4.3.12 In both Canada and Ireland the presumption of *mens rea* has been elevated by human rights legislation from a presumption of statutory interpretation to a constitutionally mandated element of a criminal offence under the umbrella of the right to liberty. This has the consequence that the right to liberty prohibits the existence of offences that are punishable by imprisonment which do not allow the minimum of a due diligence defence. Thus the Canadian Supreme Court has struck down the offence of sexual intercourse with a female under 14 which expressly excluded the defence of a mistaken belief as to age.<sup>120</sup> Similarly in *CC v Ireland & Ors*<sup>121</sup> the Supreme Court of Ireland held that the crime of sexual intercourse with a girl under the age of 15 which did not provide a defence of mistake as to age was unconstitutional. Hardiman J stated:

It appears to us to criminalise in a serious way a person who is mentally innocent is indeed ‘to inflict a grave injury on that person’s dignity and sense of worth’ and to treat him as ‘little more than a means to an end’, ... It appears to us that this, in turn, constitutes a failure by the State in its laws to respect, defend and vindicate the rights to liberty and to good name of the person so treated, contrary to the State’s obligations under Article 40 of the Constitution.<sup>122</sup>

In that case the 19-year-old defendant has admitted to sexual intercourse with a girl aged 13 years and 10 months. He said she had told him she was 16 and she had initiated the contact between them after their first (non-sexual encounter). As explained in the IP,<sup>123</sup> a challenge to a no defence age for sexual intercourse with a young person under the age of 13 failed in the United Kingdom where a 15-year-old boy had sexual intercourse with a 12-year-old girl who had claimed she was 15. Both the House of Lords and the European Court held that there was no infringement of either art 6(1) or art 6(2) of the *Convention for the Protection of Human Rights and Fundamental Freedoms* because the former (the right to a fair trial) guarantees procedural fairness but not the content of the substantive law and the latter (the presumption of innocence) is not concerned with the mental element or the defences available to a criminal offence.<sup>124</sup>

4.3.13 In the responses to the IP both the Australian Lawyers Alliance and the Hobart Community Legal Centre relied upon human rights arguments in opposing a no defence age and argued the absence of human rights legislation

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<sup>120</sup> *R v Hess; R v Nguyen* [1990] 2 SCR 906.

<sup>121</sup> [2005] IESC 48.

<sup>122</sup> *CC v Ireland & ors* [2006] IESC 33, Hardiman J, [44].

<sup>123</sup> IP para 4.2.12.

<sup>124</sup> *R v G* [2009] 1 AC 92; *G v United Kingdom* [2012] Crim LR 46.

made the argument for law reform proposals to be human rights compliant stronger:

From a human rights protection perspective there can be no justification for amending the current law. In fact, given that Tasmania has ‘dropped the ball’ on developing a Human Rights Act, there is even more reason to ensure such protections are the guiding force in any discussion about rights of the accused as opposed to those of the state. (*Australian Lawyers Alliance*)

Due to the lack of human rights or civil liberties protections enshrined in Tasmanian law, an individual who has his or her rights infringed may not appeal to the courts on this basis. Given this fact (and it is the belief of the authors that the lack of enshrined human rights protections is now a significant shortcoming and increasingly an anachronism of Tasmanian law) it is submitted that the legislature has an additional duty to ensure that laws do not infringe human rights. (*Hobart Community Legal Centre*)

*There is no evidence a ‘no defence age’ is a deterrent?*

4.3.14 One of the arguments in favour of a ‘no defence age’ is that removing fault requirements will encourage those who have sex with young people to take greater care to ascertain the young person’s age and to desist in cases where there is no certainty that they are over the age of consent. As explained in the IP, judicial opinion on the efficacy of deterrence in this context is divided. In her dissenting judgment in *R v Hess*, McLachlin J was convinced of the deterrent effect of making liability absolute:

The defence of due diligence would require him to make inquiries to avoid conviction, but still leaves open the possibility that the girl may lie as to her age or even produce false identification, not an uncommon practice in the world of juvenile prostitution.

The imposition of [absolute] liability eliminates these defences. In doing so, it effectively puts men who are contemplating intercourse with a girl who might be under fourteen years of age on guard. They know that if they have intercourse without being certain of the girl’s age, they run the risk of conviction, and may conclude they will not take the chance. That wisdom forms part of the substratum of consciousness with which young men grow up, as exemplified by terms such as ‘jail-bait’. There can be no question but that the imposition of absolute liability in s 146(1) has an additional deterrent effect.<sup>125</sup>

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<sup>125</sup> [1990] 2 SCR 906, [110].

Wilson J in the same case disagreed:

When one is dealing with the potential for life imprisonment it is not good enough, in my view, to rely upon intuition and speculation about the potential deterrent effect of an absolute liability offence. We need concrete and persuasive evidence to support the argument.<sup>126</sup>

In *CC v Ireland*, Hardiman J refused to accept McLachlin J's argument for a deterrent effect derived from an awareness of the need to avoid being caught by 'jail bait':

The measure, or its predecessors, is thought to be effective because its *in terrorem* effect has been so successful that it has entered 'the substratum of consciousness with which young men grow up'.

The psychology of this is debatable. Certainly it is also wholly unsupported by evidence, so far as one can tell in the Canadian case and certainly in this case.<sup>127</sup>

4.3.15 In responding to the IP, the Catholic Women's League supported a 'no defence age' to 'deter [adults] from taking the risk that the young person is underage'. Other respondents who supported a 'no defence age' did not explicitly rely upon deterrence although there were references to the need to 'reinforce for adults their responsibilities to make sure they are aware of the age of potential sexual partners' (*Alliance for Forgotten Australians*) and 'to provide a clear expression ... of the extreme level of care that must be taken by a person considering whether to engage in sexual activity with a young person' (*Commissioner for Children*).

### ***The Institute's view on deterrence***

4.3.16 There is no empirical evidence that fear of being wrong will deter adults who are contemplating sex with young people to desist or to take greater care to determine their age and desist if they are uncertain they are over the age of consent. General deterrence depends for its effectiveness on knowledge that the conduct is forbidden. It is unclear whether the age of consent is a matter of common knowledge. Arguably at least there is community awareness that there is an age of consent although not necessarily an awareness of precisely what this is.<sup>128</sup> Arguably too, the age of a person with whom one is contemplating sexual

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<sup>126</sup> [1990] 2 SCR 906, [24]-[26].

<sup>127</sup> [2006] IR 1, 84.

<sup>128</sup> A national representative survey found that 1 in 6 (16%) of respondents were unclear about whether or not sex between an adult and 14 year old would constitute sexual abuse: J Tucci, J

intercourse is a matter to which one addresses some attention, although this may not be the case with peer sex between teenagers. However, the deterrence argument assumes that a higher standard of care will result from absolute liability than strict liability. If a person has taken every reasonable precautionary measure to be sure that a person is over the age of consent, is he (or she) likely to desist just in case he is wrong? And if reasonable care has been taken, will conviction have a deterrent effect upon others?<sup>129</sup>

4.3.17 The Institute accepts that the deterrence argument for absolute liability is speculative and there is a lack evidence to support either a general or specific deterrent effect. There is also the possibility that ‘the injustice of a conviction will lead to cynicism and disrespect for the law, on the [offender’s] part and on the part of others’.<sup>130</sup> Finally, there are principled arguments against general deterrence. Making a person a scapegoat in order to discourage others is unfair.<sup>131</sup> In Wilson J’s words, ‘It is to use the innocent as a means to an end’.<sup>132</sup>

*Difficulty of proof does not justify a ‘no defence age’*

4.3.18 The second argument for departing from the requirement of *mens rea* is the abnormal difficulty of proving knowledge that the child was under the age of 13. The counter argument to this is that even if there is such a difficulty, it is certainly not the only instance of such a difficulty in the criminal law, and a less harsh response would be to impose some other kind of fault element, such as a defence of reasonable mistake. To go further and dispense entirely with *mens rea* and fault in relation to the age element needs peculiarly strong reasons.<sup>133</sup> A flaw in the difficulty of disproving mistake as an argument for absolute liability was long ago recognised in the following much cited remarks of Dixon CJ in *Thomas v The King*:

The truth appears to be that a reluctance on the part of courts has repeatedly appeared to allow a prisoner to avail himself of a defence depending simply on his own state of knowledge and belief. The reluctance is due in a great measure, if not entirely, to a distrust of the Tribunal of Fact – the jury. Through a feeling that, if the law allows such a defence to be submitted to the jury, prisoners may too

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Mitchell and C Goddard, *Out of Sight – Out of Mind: Community Attitudes about Child Abuse and Child Protection in Australia* (Australian Childhood Foundation, 2006) 21.

<sup>129</sup> Wilson J in *R v Hess* at [26]-[27] citing Dixon J in *R v Sault Ste Marie* [1978] 2 SCR 1299, 1311.

<sup>130</sup> Dixon J in *R v Sault Ste Marie* [1978] 2 SCR 1299, 1311.

<sup>131</sup> Ashworth, above n 113, 12-13.

<sup>132</sup> *R v Hess* at [28].

<sup>133</sup> Ashworth, above n 113, 10.

readily escape by deposing to conditions of mind and describing sources of information, matters upon which their evidence cannot be adequately tested and contradicted, judges have been misled into a failure steadily to adhere to principle. It is not difficult to understand such tendencies, but lack of confidence in the ability of a tribunal correctly to estimate evidence of states of mind and the like can never be sufficient ground for excluding from inquiry the most fundamental element of a rational and humane criminal code.<sup>134</sup>

As one of the respondents to the IP remarked:

Simply because a defence exists (in this case the mistake as to age defence) does not mean a jury will automatically accept that defence. This was Terry Martin's defence and the jury did not accept it. (*Anon 1*)

*The thin ice principle*

4.3.19 The Institute considered Baroness Hale's argument that a person who has sex with a young person takes the risk that he or she is younger than thought.<sup>135</sup> Underlying this is the inference that being involved in sexual activity with young people is morally dubious and attended with well-known risks and people cannot really complain when the risk materialises.<sup>136</sup> This is referred to as the 'thin ice principle': 'those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where he will fall in.'<sup>137</sup> This 'principle' has superficial attraction but opponents of a no defence age argue that it is not persuasive when the subject matter is drawing the boundaries of the criminal law. As Ashworth has argued, we may strongly disapprove of older men having sex with 17-year-olds but it is lawful. And it is particularly harsh to criminalise someone for doing something they reasonably believed to be lawful:

the legislature has not moved to criminalise older men who have consensual sex with 17 year olds (however much some of us may deprecate that activity). ... If and insofar as the law specifies the age of 17 as the dividing line, any moral disapproval that some people may have for an older man who wants to have sex with a particular 17 year old should not be allowed to convert a reasonable belief into an unjustified belief sufficient for criminalisation.<sup>138</sup>

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<sup>134</sup> (1937) 59 CLR 279, 309.

<sup>135</sup> [2009] 1 AC 92, 109 (see 4.3.3 above).

<sup>136</sup> Ashworth, above n 113, 12-13. He also discusses the thin ice principle in Ashworth, above n 35, 63.

<sup>137</sup> Ibid quoting Lord Morris in *Knulier v DPP* [1973] AC 435.

<sup>138</sup> Ashworth, above n 113, 14.

*The gravity of the offence does not justify a 'no defence age'?*

4.3.20 An argument in favour of a no fault element in relation to age is that engaging a young person in sexual conduct is so harmful and so reprehensible that society should condemn it without the need to prove fault to reinforce society's condemnation of such conduct. In response to the IP the Commissioner for Children submitted:

The introduction of a 'no defence age' which effectively provides absolute liability for those who engage in sexual activity with young people below a set age will provide a clear expression of the degree to which sexual offending against young people is condemned by our community'...

The serious harmful physical, psychological, emotional, social and economic consequences of sexual assault were emphasised by the Hobart Women's Health Centre in their submission advocating a no defence age. The Institute acknowledges the seriousness of the harm of under-age sex is a proper concern. Empirical evidence of this is summarised above in Part 1. However, as Ashworth argues, using the stigma of conviction carried by the 15-year-old boy in *R v G* as an example, the seriousness of the offence cuts both ways: 'The harm is very serious for the victim, but to register a conviction without culpability as to this material element is also a great injustice to the defendant.'<sup>139</sup> He argues that conviction is an act of public censure of the individual, and that this should not be imposed in the absence of fault and it is not a deficiency that can be cured by the possibility of favourable treatment at the sentencing stage (or by police or prosecutorial discretion in choosing not to initiate proceedings).

4.3.21 Irrespective of deterrence, a no defence age may be supported as a statement of societal principle – that sexual conduct with a young person is so reprehensible that society has chosen to condemn it despite an absence of evidence to show its preventative efficacy. However, it must be recognised that if a no defence age is introduced, to do so is contrary to fundamental principle. A person, even if only a few years older than a young person, who specifically thinks about their age and who is freely shown documentation appearing to show the young person is of legal age (as in the case cited in 4.3.9), will be guilty of a serious crime and any injustice will have to be addressed at the sentencing stage.

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<sup>139</sup> Ibid.

***The Institute's view on a 'no defence age'***

4.3.22 The Institute was divided on the issue of a 'no defence age'. A majority is not persuaded that a 'no defence age' should be introduced for the defence of mistake as to age. Rather than absolute liability, an offence such as sexual intercourse with a young person should continue to have a fault element. Fairness and rule of law values dictate that there should at least be some element which relates to culpability. The defence of honest and reasonable mistake of fact as to age provides at least a minimum fault element. Even if a 'fear of skating on thin ice' leads some to desist, for those who don't, conviction of a person who believes they were acting lawfully is a possibility. The argument that absolute liability will have a greater deterrent effect than strict liability and so better protect children and young persons from premature sex and abuse remains speculative. Nor is the Institute persuaded by the argument that making prosecution easier justifies absolute liability. This places too little faith in juries who are well able to judge the reasonableness of any mistake. Rather than ousting consideration of fault, the Institute recommends qualifying the defence of mistake by a 'reasonable steps' requirement (see below). While sexual conduct with a child is both reprehensible and harmful, the Institute's majority view is that liability should not be imposed irrespective of fault for the purpose of reinforcing this message. First, society needs no convincing about the wrongfulness of engaging children<sup>140</sup> in sexual acts; it is widely condemned and perpetrators are stigmatised and reviled. Moreover, as explained above, the seriousness of the offence cuts both ways. The harm is very serious to the victim but recording a conviction for such a serious offence can result in great injustice to a defendant. The Institute acknowledges that Tasmania is perhaps the only State without a 'no defence age' for the defence of mistake as to age. In general, the Institute is in favour of harmonisation of Australian criminal laws. However, it should be noted that while all other Australian jurisdictions have a 'no defence age', this is far from uniform.

4.3.23 The Institute acknowledges that the availability of the defence of mistake as to age for the male clients who admitted to having sex with the girl in the case which precipitated this inquiry, was viewed with dismay by many members of the community. However, a majority of Board members of the Institute is of the view that a 'no defence age' for the defence of mistake as to age is not the best way to achieve the object of protecting young people from exploitation and abuse. Tasmanian law currently has a no defence age of 12 for the defence of consent. In other words the similar age defences have no application to children under 12. While there is no 'no defence age' for mistake as to age, it is less likely that a child under 12 could credibly be genuinely mistaken for one who is 17. And this is more unlikely if the mistake must also

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<sup>140</sup> At least those under the age of 14 or so.

be reasonable. Further strengthening the requirement of reasonableness with a reasonable steps requirement would also have the effect of increasing the onus on those contemplating (or interested in) sex with young people. In the Institute's view such a measure would be better than one which flies in the face of fundamental principles and has the potential for grave injustice. It is no answer to say that prosecutorial or judicial discretion can be relied upon to avoid such injustice.

### **Recommendation 2**

The Institute does not recommend a 'no defence age' for the defence of mistake as to age for child sexual offences (by a majority decision).

### ***Setting the 'no defence age'***

4.3.24 While a majority of the Institute has recommended not introducing a 'no defence age', it may be useful to record the responses to the IP in relation to setting that age. Responses suggested a range of ages: 10 (*Anon*), 12 (*Tasmania Police; Family Violence Australia*), 'at least 12 (*Catholic Women's League*), 13 (*Bravehearts; Ambikapathy*), 14 (*Australian Christian Lobby*) and 16 (*Hobart Women's Health Centre*). Elizabeth Little selected somewhere between 10 and 12 as this is the age when children are beginning to exercise agency in peer sexual behaviour. In recommending a 'no defence age' of 12, Tasmania Police said:

It is reasonable to assume that a child under 12 years is sufficiently immature in both their actions and their appearance that it should be apparent to an adult that they are not of lawful age for sexual conduct.

FamilyVoice Australia (FVA) also recommended a 'no defence age' of 12 arguing:

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.

FVA agreed with the rationale for lifting the 'no defence age' from 10 to 12 in Victoria, quoting from the Attorney-General's Second Reading speech referring to the inherent vulnerability of pre-teen children:

In its report, the [Sentencing Advisory] 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 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,<sup>141</sup> and children in high school are generally treated as having more independence. (*FamilyVoice Australia*)

In the Institute's reading of the Sentencing Advisory Council's report, increasing the age of 10 to 12 for the younger age sexual penetration offence was more to do with including 10 and 11 year-olds in the most serious of the three categories of sexual penetration offences attracting the highest maximum penalty than with raising the 'no defence age', although the need to select an age which would not capture children in consensual relationships with people of a similar age within the higher penalty category was a relevant consideration.<sup>142</sup> FVA's point is that this age category (under 12) 'is appropriate to protect younger children'.

The Commissioner for Children, while supportive of a 'no defence age', declined to express a view as to what that age should be, noting the variation between Australian and international jurisdictions on this issue. She added:

Clearly there is no agreement as to where the cut-off point or 'no defence age' should be. To exacerbate this difficulty, international research on changes in maturation rates over time show that 'changes in the timing of puberty, the nature of social-role changes, and the hopes and aspirations of adolescents across the world are widely affected by economic and sociocultural factors'.<sup>143</sup>

4.3.25 If there is to be a no defence age, it should be set at such level that any chance of injustice to a defendant is remote. Ten is the no defence age for a mistake as to age in New South Wales and the ACT. It is highly unlikely that a person under the age of 10 could be reasonably mistaken for a person of 17. It is also unlikely that a child under the age of 12 could be reasonably mistaken for a person of 17. But it is possible that a girl of 12 could be mistaken for someone much older, as the case which was the catalyst for this project demonstrates. The Institute also notes that in Australia the mean age of puberty for girls in Australia is likely to be closer to 13 than 12 years old.<sup>144</sup> If, contrary to our first

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<sup>141</sup> In Tasmania, most children turn 12 in Year 6.

<sup>142</sup> Sentencing Advisory Council, above n 16, 79.

<sup>143</sup> Citing S Sawyer et al, 'Adolescence: a Foundation for Future Health' (2012) 379(9826) *The Lancet* 1630.

<sup>144</sup> See 1.3.4 above.

recommendation, the government were to enact a no defence age for the defence of mistake, it should be no higher than 12. Twelve is the ‘no defence age’ in Victoria and Queensland. An age of 12 would also be consistent with the no defence age of 12 for similar age consent defences in the Tasmanian *Criminal Code*. In reviewing the ‘lower age’ range at which higher maximum penalties apply in Victoria, the Sentencing Advisory Council declined to include 12-year-olds in the higher penalty category on the grounds that professional advice they received and sentencing data compiled by the Council revealed that children from the age of 12 begin to become involved in peer consensual sexual relationships.<sup>145</sup>

**Recommendation 3**

If a ‘no defence age’ is introduced (contrary to recommendation) it should be 12. (‘No defence age’ is defined in 1.1.3).

## 4.4 Other restrictions on the mistake as to age defence

4.4.1 Currently the only restrictions on the defence of mistake as to age in Tasmania are that the mistake be based on reasonable grounds and, in the case of sexual intercourse and indecent act (but not aggravated sexual assault or indecent assault) that the onus is on the accused in relation to the defence. In addition to a ‘no defence age’, which would restrict the defence of mistake as to age to cases where the child or young person was over the ‘no defence age’, the IP canvassed three other possible restrictions on the defence:

- a reasonable steps requirement;
- age restrictions on perpetrators; and
- a deception requirement.

### *A reasonable steps requirement*

4.4.2 In Canada the defence of mistake is not available to child specific sex offences ‘unless the accused took all reasonable steps to ascertain the age of the complainant’.<sup>146</sup> The onus of proof is on the prosecution, so for the defence of mistake to succeed the accused need only raise a reasonable doubt (an evidential

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<sup>145</sup> Sentencing Advisory Council, above n 16, 77.

<sup>146</sup> *Criminal Code* (Can) s 150.1(4).

burden). This means that when the defence has been raised, the Crown must prove beyond reasonable doubt that the accused did not take all reasonable steps to ascertain the complainant's age or did not have an honest belief as to the complainant's age.<sup>147</sup> In applying these provisions, it has been held that the accused must have made an earnest inquiry or there must be some compelling factor that obviates the need for such an inquiry. The accused must show what steps he or she took and that those steps were all that could have been reasonably required in the circumstances.<sup>148</sup> What is reasonable will depend on the circumstances and in some cases a visual observation may suffice.<sup>149</sup> However, 'the difference in ages between the accused and the complainant [is] relevant in deciding what [constitutes] reasonable steps, and ... the greater the disparity in ages between the two parties, the greater the level of inquiry to be called for on the accused's part'.<sup>150</sup>

4.4.3 In New Zealand it is a defence to a charge of sexual conduct with a person under the age of 16 to prove that the accused 'had taken reasonable steps to find out whether the young person was of or over the age of 16 years' and that he or she believed on reasonable grounds that the young person was of or over 16.<sup>151</sup> The defence is not available in relation to sexual conduct with a child under 12.<sup>152</sup> In common with the Canadian provision the law requires that the accused has made reasonable inquiries in relation to the age of the child rather than simply requiring that the accused (reasonably) believed he or she was 16 or older. There have been no reported decisions dealing with s 134A of the New Zealand *Crimes Act 1961* which was one of a number of sexual offence amendments passed in 2005. The reasonable steps requirement was regarded as toughening the law. In the course of the Second Reading debate, the Minister for Justice said:

I refer to the defence of 'I reasonably believed that she was over 16'. It is too easy to say: 'I reasonably believed that to be the case'. Now a person has to go through the steps that the person took to ascertain whether a person was 16 or over. So this law is, again, tougher in protecting those who are under age.<sup>153</sup>

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<sup>147</sup> *R v P (LT)* (1997) 113 CCC (3d) 42, [19].

<sup>148</sup> *R v Osborne* (1992) 17 CR (4<sup>th</sup>) 350.

<sup>149</sup> *R v P (LT)* (1997) 113 CCC (3d) 42, [20].

<sup>150</sup> *Ibid* [18].

<sup>151</sup> *Crimes Act 1961* (NZ) s 134A.

<sup>152</sup> *Ibid* s 132(4).

<sup>153</sup> New Zealand, *Parliamentary Debates*, House of Representatives, 12 April 2005, 20005 (Phil Goff, Minister of Justice).

4.4.4 The New Zealand provision can be compared with the requirement in s 14A(1)(c) of the Tasmanian *Criminal Code*, which requires in relation to a mistaken belief as to consent in sex offences that a mistake is not honest and reasonable if the accused did not take reasonable steps, in the circumstances known to him or her at the time of offence, to ascertain that the complainant was consenting. This provision was modelled on s 273.2 of the Canadian *Criminal Code*, which was inserted into that *Code* in 1992 to restrict the availability of the defence of honest mistake as to consent.<sup>154</sup> According to Justice L'Heureux-Dube in *R v Ewanchuk*<sup>155</sup> s 273.2(b) requires the accused to take reasonable steps to ascertain consent in all cases. A closer analogy is found in the *Sex Industry Offences Act 2005* (Tas) s 9(4). Procuring, causing or permitting a child to provide sexual services in a sexual services business is a crime contrary to s 9(1). Subsection (4) provides that it is a defence to this charge to prove that, having taken all reasonable steps to find out the age of the person concerned, the accused believed on reasonable grounds, at the time the offence is alleged to have been committed, that the person concerned was of or over the age of 18 years.

#### ***Responses to the IP on a reasonable steps requirement***

4.4.5 Most respondents were in favour of adding a reasonable steps requirement to the defence of honest and reasonable mistake as to age. In many instances this was in addition to other restrictions such as a no defence age. None of the responses gave reasons for this view other than to say it was appropriate. Bravehearts also stated:

It is our position that such reasonable steps should be clearly defined and include steps other than simply asking the young person their age. We know that some young people will deliberately misrepresent their age, or in matters where they believe that they are in a relationship with the older person, will defend that older person by saying that they told them they were of age. This may include sighting identification or the circumstances where they met (for example, meeting a young person in a nightclub). (*Bravehearts*)

4.4.6 Two respondents explicitly opposed the option. The Law Society submitted:

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<sup>154</sup> Roach, above n 34, 392. Section 14A(1)(c) differs though because it also has the requirement that the mistake is reasonable. In Canada the mental element for sexual assault requires subjective recklessness or wilful blindness in relation to absence of consent.

<sup>155</sup> [1999] 1 SCR 330 [99].

The Society is not in favour of limiting the defence of mistake to impose a requirement of the type suggested. Each of the [models] given is seen as an unnecessary restriction on a defendant's right to convince a jury on all 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. (*Law Society of Tasmania*)

Tasmania Police said:

Tasmania Police believes that establishing provisions like this within legislation places further restrictions on either the prosecution or the defence to prove or disprove the positive steps that were taken. This creates lack of clarity and requires determination of what is reasonable and what positive steps should be taken. For example, does reasonable including asking for a birth certificate or merely asking age before sexual activity? Such provisions are not clear and are subjective. What one considers reasonable positive steps, another will consider unreasonable.

Introducing legislation along this line makes the legislation even harder to enforce, and harder also to comply with. Tasmania Police is of the opinion that introducing the defence of an 'honest and reasonable' mistaken belief as to age can incorporate such positive steps that the accused took to ascertain the age of the victim. (*Tasmania Police*)

4.4.7 Three further responses opposed a 'reasonable steps' requirement implicitly because they were opposed to altering the status quo. Each was critical of changing the law in response to alleged community outrage fanned by the media. For example:

HCLS suggests that community outrage should be viewed in the light of this campaign of misinformation, and that a response to calls for legal reform in this environment should be treated with caution. HCLS contends that it is not in the interests of justice to pursue major legislative reform in response to an inflammatory campaign by media interests. (*Hobart Community Legal Service*)

The law should not be changed because the tabloid media sees fit to run a lot of stories about a 12 year old girl who was prostituted by her mother and her mother's boyfriend. ... I suggest the [Institute] bring down its report shortly after the next state election recommending there be no change and no one will make any fuss about that because there is no vested interest in making a fuss about it. (*John Green*)

### ***The Institute's view***

4.4.8 The Institute has carefully considered the option of adding a reasonable steps requirement to the defence of mistake as to age. In the Institute's view narrowing the defence by adding a reasonable steps requirement serves the symbolic function of reinforcing the message that children and young people under the age of 17 are protected by the criminal law from sexual exploitation and those who are contemplating sexual activity with a young person have a duty to ensure that the young person is over the legal age. It also helps counter the perception that the defence is easy to claim and hard to disprove by adding a restriction that does not compromise the need for fairness to accused.

4.4.9 The Institute does not agree with Tasmania Police that such a requirement should not be added because it is unclear and subjective. An objective standard of reasonableness is a common standard against which behaviour is required to be measured and trial judges are accustomed to directing juries in relation to it. It is true that jurors set the standard of what is reasonable, and to this they bring their own experiences and judgement, but this does not mean that objective standards of reasonableness should not be used. Moreover, this is an area where courts could provide guidance as to what steps are reasonable as they have done in Canada (see 4.4.2 above). The Institute acknowledges the critique of law's claims to objectivity and neutrality in imposing tests of what is reasonable, and of the need to reconstruct more inclusive versions of reasonable and ordinary standards. Again, this critique does not mean that reasonable steps and reasonable person standards should not be used to provide an external objective assessment of community standards.

4.4.10 Tasmania Police's objection to a reasonable steps requirement may also be read as suggesting that it is redundant because the requirement that the mistaken belief in age be reasonable incorporates consideration of what positive steps were taken to ascertain age. The Law Society's view on the other hand suggests that the provision does add something, and that it makes adducing evidence of what reasonable steps were taken mandatory. The Institute considers that a reasonable steps requirement does tighten the defence and make it more onerous, particularly if the formulation requires the accused to take 'all reasonable steps to ascertain the age of the complainant' (the Canadian provision) or 'all reasonable steps to find out the age' of the complainant (as in the *Sex Industry Offences Act 2005* (Tas)).<sup>156</sup> What satisfies the reasonable steps requirement will depend on the circumstances. In the context of prostitution, a

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<sup>156</sup> In the context of a mistake as to age this is more appropriate than the formulation in s 14A that a mistaken belief as to consent is not honest and reasonable if the accused did not 'take reasonable steps *in the circumstances known to the accused at the time of the offence*' to ascertain that the complainant was consenting.

claim that ‘I thought she was over the age of consent because she was advertised as being 18, she looked that age and it was dark so I was not able to see clearly’, would not satisfy the reasonable steps requirement. In the prostitution context, misrepresentation of age and even false identification appear to be common. Other circumstances, such as presence in a bar or nightclub, presence in licensed premises should not be enough to satisfy the requirements of the defence given the frequency with which underage teenagers are illegally present. Moreover, as Finch J stated in *R v P (LT)*, ‘the greater the disparity in ages between the two parties, the greater the level of inquiry to be called for on the accused’s part.’<sup>157</sup>

**Recommendation 4**

That a limitation on the defence of mistake as to age be introduced which requires, in addition to the requirements that the mistake be honest and reasonable, that the defendant took all reasonable steps to find out the young person’s age.

***Age restrictions on perpetrators***

*4.4.11* As explained in 3.1.4, in Western Australia the defence of mistake as to age is restricted to perpetrators who are no more than three years older than the complainant, who must be at least 13. Such a restriction on the mistake defence would be redundant in Tasmania, because the defence of consent would be available under s 124(3). For example, if C was 13 and A three years older, A would have the defence of consent under s 123(2)(b). However, the defence of mistake as to age under s 124(2) could be limited by restricting it to persons under the age of 21, as was the case prior to the 1987 amendments. So in the hypothetical case that A was 20 and C was 12 but A believed that C was 17, A would have a defence. In the 2009 child prostitution case which was the genesis for this inquiry, this would mean that of the eight males who admitted having sexual intercourse with C in video interviews, only one of them (the 18-year-old) would have a defence. As explained in the IP, it can be argued that restrictions limiting the availability of the defence based on the defendant’s age are justified because age disparity is a measure of exploitation and harm, so denying the mistake defence to older perpetrators is justifiable.

*4.4.12* Four respondents to the IP favoured restrictions on the age of a defendant entitled to rely upon mistake as to age. The Australian Christian Lobby submitted that the defence should not be available if the defendant was over the age of 20 and Patmalar Ambikapathy submitted it be limited to those

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<sup>157</sup> *R v P (LT)* (1997) 113 CCC (3d) 42 [18].

under the age of 18. Bravehearts suggested the application of the defence should be limited to matters where the accused is not more than ten years older than the victim and FamilyVoice Australia recommended adoption of the WA position of limiting the defence to those not more than three years older than the child. A majority of respondents opposed such limits. Reasons given included that it was too arbitrary (*Catholic Women's League; Law Society*); an unnecessary complication if other elements of the defence are robust (*Commissioner for Children*), and that it would be discriminatory. In elaborating on this point Tasmania Police said:

Tasmania Police do not support placing an age restriction on the age of the perpetrator who can claim the defence of mistake as to age. The social culture and behaviour for younger and older people are entirely different. It can be argued that it may be more difficult for an older person to determine the age of a younger person due to these social differences. For example, a 21 year-old, who is closer in age, social behaviour and customs to a 14 year-old, should in reality make it easier for them to identify the relevant age of the 14 year-old. The disparity in ages between a 50 year-old and a 14 year-old, taking into account the social behaviours of both, would in some cases make it harder for the 50 year-old to determine age.

### ***The Institute's view***

4.4.13 The Institute does not recommend restricting the availability of the defence of mistake as to age to younger defendants on the grounds that to do so would be unfair and arbitrary. A provision restricting the defence of mistake to perpetrators under the age of 21 would mean that the child specific sex offences would be absolute liability offences for defendants over the age of 21 who engaged in sexual conduct with a person under 17. The same arguments that have been canvassed against absolute liability above in Part 4.3 also apply here. Sex between a 15-year-old and a 21-year-old would be a crime, despite the existence of an honest and reasonable mistaken belief that the 15-year-old was 17. Such an outcome is too draconian and would catch too many relationships which are neither exploitative nor abusive. Protecting young people from themselves can be taken too far. One may not be convinced that the case against defendant age limits is assisted by the argument (see Tasmania Police, above) that the ability to determine age diminishes rather than increases with age.<sup>158</sup> Rather it could be argued that one expects an older person to compensate for this and to take greater responsibility and exercise greater care. However, in the

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<sup>158</sup> See also New Zealand, *Parliamentary Debates*, House of Representatives, 12 April 2005, 20005 (Marc Alexander): '[i]t makes no sense arbitrarily to restrict such a defence to a particular age subset, when it can easily be argued that the practical ability to differentiate age may actually diminish with age rather than increase.'

Institute's opinion, consideration of the diminishing ability to distinguish age and the expectations of greater wisdom and responsibility that accompanies maturity is better reflected in the flexible standard of a reasonable belief than an arbitrary cut off point for the availability of the defence of mistake determined by the age of the defendant. As the Law Society submitted in opposing perpetrator age restrictions on the defence, 'a jury may take into account a defendant's age in assessing whether a claimed mistake is honest and reasonable'.

4.4.14 A maximum age disparity of say five years or an age of 20 (or 25) for perpetrators is arbitrary and would operate to deny the defence to a person one day over the age limit. In the United Kingdom, the so-called 'young man's defence' was abolished in favour of a generally available defence of mistake because it was arbitrary, confusing and did not necessarily provide justice. It was also abandoned in New Zealand on similar grounds.<sup>159</sup>

**Recommendation 5**

That no age restrictions on the age of the perpetrator who can claim the defence of mistake as to age be introduced.

***A defence of deception***

4.4.15 The IP set out the South African position in relation to the defence of deception. The South African Law Commission recommended that it should be a defence to a charge involving sexual activity with a child aged between 12 and 16 years to prove on the balance of probabilities that the child 'deceived the accused into believing that such child was over the age of 16 years at the time of the alleged commission of the offence ... and the accused reasonably believed that the child was over the age of 16 years'.<sup>160</sup> This recommendation was implemented in 2007, although the provision expressly placing the onus on the accused was omitted.<sup>161</sup> This may have been due to the Constitutional Court's apparent disapproval of reverse onuses.<sup>162</sup> While this provision does require more than a belief by the accused, it allows the accused to rely upon the assertion of the young person as to their age. Arguably in some circumstances the deception of the young person should not be enough to absolve the

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<sup>159</sup> Ibid.

<sup>160</sup> South African Law Commission, *Sexual Offences*, Report, Project 107 (2002) 68.

<sup>161</sup> *Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007* (South Africa) s 56(2)(a).

<sup>162</sup> South African Law Commission, above n 160, 62.

perpetrator from inquiring further. The IP did not specifically ask for views on this option and none of the responses addressed it. In the Institute's view it suffers from the deficiency that it allows an accused to rely upon an assertion of the young person whereas it should be the responsibility of the perpetrator to do more than ask the age of the young person.

**Recommendation 6**

That the mistake as to age defence not be limited to circumstances where the young person has deceived the accused as to their age.

## **4.5 Clarifying the scope of the defence mistake**

*4.5.1* In the IP it was argued that whether or not the defence of mistaken belief that the young person was 17 years of age or older is qualified in some way, the uncertainty surrounding the scope of the defence should be clarified (see 3.3.1). There are two options: either to expressly limit the defence to a belief that the young person was at least 17, or to expressly allow a defendant to combine the age similarity and mistake as to age defences. The latter is the position in Canada.<sup>163</sup> As the IP argued, allowing a defendant to combine the general defence of mistake in s 14 with the similar age consent defence is supported by a discrimination argument. Older offenders (over the age of 21 under the current law) are allowed to argue a mistake as to age which if true would exonerate them, but younger offenders cannot always argue this. So a 60-year-old who believes he is acting lawfully because he mistakenly believes a 15-year-old is 17 has a defence. But a 21-year-old who believes he is acting lawfully because he mistakenly believes a 15-year-old is 16 has no defence.

*4.5.2* Only a third of respondents to the IP addressed the question about the scope of the defence. All but one (who claimed there was no ambiguity to address) were in favour of clarifying the position. Bravehearts did not favour the option of combining the two defences. Their position is that the defence should only be available for a reasonable belief that the young person was 17, where the young person is 13 or older and where the accused was not more than ten years older. Patmalar Ambikapathy favoured clarification and combining the defences in limited circumstances: only for defendants under 17; only on the basis that the age similarity defences were limited to an age disparity of two years and subject to a 'no defence age' of 13. In other words, a 17-year-old, for

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<sup>163</sup> *Criminal Code* (Canada) s 150(6).

example, who thought a 13-year-old was 15, would have a defence. The Law Society submitted that the *Code* should be amended to explicitly allow a defendant to combine the mistake as to age and consent defences. The Australian Lawyers Alliance agreed:

To argue that the accused person should not have a defence available to him or her, without a compelling reason, is unfair.

Tasmania Police also supported combining the defences:

The situations outlined in the Issues Paper provide compelling argument for this amendment in situations where the age similarity defences apply. This is especially relevant for child offenders, where it can be argued that immaturity and lack of experience plays a part in the likelihood that an offender may mistake the age of a partner.

### ***The Institute's view***

4.5.3 There is a disparity argument in favour of allowing combination of the defences. Offenders aged from 12 to 21 are denied the possibility of arguing a mistake as to age which if true would have made their conduct lawful. However, against this it can be argued that in comparison with other jurisdictions, the Tasmanian similar age consent defences are very liberal. Allowing the defences to be combined makes these similar age consent defences even more liberal and it has the effect of eroding the no defence age for similar age consent defences of 12. A 21-year-old would be able to argue that he thought an 11-year-old was 16 (an age disparity of ten years); and a 17-year-old could have a defence if he thought a 10-year-old was 14, (an age disparity of 7 years). If there were to be a no defence age of 12, this would mean that the extent of the disparity in these two examples would be reduced to nine years and five years. Increased age disparity increases the risk of exploitation and it may be thought that combining the defence blurs the lower age limit at which sexual activity is absolutely wrong. It is also likely (given the prevailing view that mistakes as to age required an express provision) that when the section was redrafted in 1987 Parliament intended that the similar age consent defences would be absolute and not broadened by combining them with a defence of mistake as to age. Parliament now has the opportunity to review the position and to make the position clear. The Institute notes that to disallow the combination of the two defences has the effect of making liability absolute for young offenders whose mistaken belief that their sexual partner was of an age which if true would provide them with a similar age consent defence. To recommend this may technically run counter to the Institute's recommendation against a no defence age. However, increasing the age disparity for the similar age defences by allowing mistakes to age in relation these ages does increase the risk of exploitation. Disallowing combined defences also has the virtue of preserving

the scheme of the legislation to make mistake as to age only available when this is done explicitly. The Institute therefore recommends against allowing combination of the defences. Another possibility would be to provide that the defences can be combined but to limit this to offenders who are under the age of 18 (or 17) thus reducing the age disparity and potential for exploitation. However, the laws are already quite complex and this would introduce further complexity.

**Recommendation 7**

The Institute recommends that the uncertainty in relation to the scope of the defence of mistake as to age be clarified. A majority recommends that the *Code* be amended to explicitly disallow an accused person from combining the mistake as to age and age similarity consent defences.

## **4.6 Clarifying any uncertainty around the offence of assault with indecent intent**

*4.6.1* In Parts 2.4 and 3.3, some uncertainty in relation to the elements of the summary offence of assault with indecent intent was discussed. There are three possible options:

- repeal the offence;
- retain the offence but make it clear the *Code* does apply;
- retain the offence but make it clear the *Code* does not apply.

*Repeal the summary offence of assault with indecent intent*

*4.6.2* Given that the crime of indecent assault can be tried summarily,<sup>164</sup> there is an argument that there is no need for the separate summary offence of assault with indecent intent. As against this, it can be argued that abolishing the offence would mean that while the defendant would still have the option of summary trial before a magistrate, the prosecution would not have the option of having the matter dealt with summarily as an offence with a higher maximum penalty than assault. And assuming that assault with indecent intent has different ingredients than the crime of indecent assault, repealing the section may also deny the prosecution the option of an offence that may better suit the factual scenario than indecent assault.

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<sup>164</sup> *Justices Act 1959* (Tas) s 72(1)(a).

*Retain the offence but make it clear the Code does apply*

4.6.3 The simplest way of retaining the offence and clarifying the law would be to amend the summary offence so that it reads ‘a person who unlawfully and indecently assaults another person is guilty of an offence and liable to ...’. This would retain the prosecution’s discretion to lay a charge for a summary offence. However, applying this option may restrict the ability of the prosecution to lay a charge for an offence which may be easier to prove than indecent assault.

*Retain the offence but make it clear the Code does not apply.*

4.6.4 The third option is to make it clear that neither the *Code* nor s 127 applies to determine criminal responsibility for the summary offence of assault with indecent intent. This could be done by stating that for the removal of doubt, this offence is not ‘like’ s 127 for the purposes of s 36 of the *Acts Interpretation Act 1931*. This would then make it clear that absence of consent is not an element of the offence. Any mistake as to consent or age of the person assaulted could be relevant to whether or not the intent was an indecent one but would not be a separate defence.

### ***The Institute’s view***

4.6.5 The Institute favours the second option. This would make it quite clear that the offences are ‘like’ and that the *Code* applies. It would mean that the summary offence of indecent assault in s 35(3) would no longer be applicable to an assault which is not itself indecent such as pulling the victim’s arm with an intent to indecently assault. However, in this situation the prosecution could still charge the defendant with common assault and the indecent motive if proved would be an aggravating factor. It would seem that the summary offence of assault with indecent intent is generally used for less serious assaults where there is an indecent element, such as an indecent touching on the outside of the victim’s clothing, rather than assaults where the only element of indecency is found in the defendant’s motive or intent. This suggests that the loss of the offence of assault with indecent intent is unlikely to be viewed as a problem by the prosecution.

### **Recommendation 8**

That s 35(3) of the *Police Offences Act 1935* be amended to read ‘a person who unlawfully and indecently assaults another person is guilty of an offence’. This would make it clear that the *Code* applies to this offence, including provisions relating to defences.

## 4.7 A uniform onus of proof for mistake as to age

4.7.1 The inconsistency of the onus of proof in relation to the defence of mistake has been explained above (3.2). This cannot be justified on rational grounds. Accepting this proposition, the question is whether the onus should be on the prosecution or the accused. Commonly in Australia, where the defence of a mistake as to the age of the young person is expressly included as a defence to a sexual offence, the onus is on the accused to prove on the balance of probabilities an honest and reasonable belief that the young person was over the age of consent.<sup>165</sup> In New South Wales, where mistake as to age has been held to be a defence by virtue of the common law, the onus is on the prosecution to prove that the accused did not have an honest and reasonable belief that the other person was under the age of 16 (once an evidentiary foundation for the defence has been laid by the defence).<sup>166</sup> Similarly, in Tasmania, where the general defence of mistake of fact in s 14 applies to provide that a mistaken belief as to age is a defence to a sexual offence, the onus of proof is on the prosecution by virtue of common law principles.<sup>167</sup>

4.7.2 In favour of placing the onus on the accused, it can be argued that it is unacceptable for the accused to raise the defence of mistake without having to justify why he or she held that belief. However, blunt assertions that ‘it is unacceptable’ need further elaboration. The Victorian Law Reform Commission’s position was that standards should be set particularly high for people who engage in sexual activity with young people over the age of 10 (the no defence age in Victoria) and under 16. The Commission argued:

The accused’s belief is a fact ‘peculiarly within his own knowledge’ and he or she should be required to convince the jury on the balance of probabilities that the defence is established. In coming to this recommendation, we also take into account the fact that this defence is only available when the complainant consented to penetration.<sup>168</sup>

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<sup>165</sup> See table in Appendix 2 for provisions in other jurisdictions.

<sup>166</sup> *CTM* (2008) 236 CLR 440.

<sup>167</sup> *Re Attorney-General’s Reference, No 1 of 1989, Re Brown* [1990] Tas R 46.

<sup>168</sup> Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Final Report (2004) 454.

4.7.3 The recommendation to clarify the position in relation to the onus of proof was accepted by the Victorian government, and the *Crimes Act 1958* (Vic) s 45 was amended in 2006 to place the onus of proof on the accused.<sup>169</sup>

4.7.4 The onus of proof in relation to the issue of mistake as to age has also been placed on the accused in relation to the offence of sexual intercourse with a child outside Australia in s 272.8 of the Commonwealth *Criminal Code*.<sup>170</sup> Section 272.8(4) provides that absolute liability applies in relation to the element that the child is under the age of 16.<sup>171</sup> As explained above, under the Commonwealth *Criminal Code* absolute liability means that the defence of mistake of fact under s 9.2 is unavailable but it does not make other defences unavailable.<sup>172</sup> Section 272.16 expressly provides for the defence of mistake as to age. The legal burden is on the defendant to prove that he or she believed that the child was at least 16.<sup>173</sup> Absolute liability for the age element was justified in the Explanatory Memorandum on the grounds ‘it was appropriate and required ... given the intended deterrent effect of these offences and the availability of a specific “belief about age” defence under s 272.16.’<sup>174</sup> So whilst the offence is one of absolute liability in relation to age, this is ameliorated by the belief about age defence. As to why it was considered appropriate to impose a legal burden of proof on the defendant, the Explanatory Memorandum states, ‘[a] legal burden is appropriate because the defence relates to a matter that is peculiarly within the defendant’s knowledge and not available to the prosecution.’<sup>175</sup> However, the peculiar knowledge argument has been criticised, and its logic is not followed in many (if not most) instances where it could be applied. *Mens rea* is peculiarly within a defendant’s own knowledge, so according to this argument he or she should have to disprove it. Moreover, to reverse the onus is contrary to the fundamental principle in *Woolmington’s Case* that it is for the prosecution to prove the elements of the offence including fault elements.

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<sup>169</sup> No 2/2006 s 9(1).

<sup>170</sup> And also in relation to the offence of sexual intercourse with a young person outside Australia – defendant in a position of trust or authority (s 272.12).

<sup>171</sup> The availability of the defence of honest and reasonable mistake of fact under s 9.2 of the *Code* (with an evidentiary onus on the accused but the legal burden of proof on the prosecution) makes an offence one of strict liability.

<sup>172</sup> *Criminal Code* (Cth) s 6.2(3).

<sup>173</sup> *Criminal Code* (Cth) s 272.16(1) and s 13.4(b). The belief need only be an honest belief.

<sup>174</sup> *Crimes Legislation Amendment (Sexual Offences against Children) Bill 2010*, Explanatory Memorandum, 16.

<sup>175</sup> *Ibid* 36.

4.7.5 It has also been argued that it is difficult for the prosecution to prove sexual offences, and that the burden of negating a defence of reasonable belief about the age of the complainant is another obstacle to obtaining convictions in sexual offences involving children.<sup>176</sup> While in theory such a difference in the onus of proof should have an impact on the difficulty of securing convictions, it is less clear what impact it has in practice. Juries may not carefully weigh the evidence of an accused's belief in accordance with the judge's directions as to the onus and standard of proof. The case of *Tasmania v Martin* is of some relevance in this context. The jury was unable to reach a verdict on the count of indecent assault, where raising a reasonable doubt as to whether Martin believed on reasonable grounds that C was at least 17 was all that was required for Martin's defence to succeed. However, for the count of sexual intercourse, which he was found guilty of, to succeed he had to affirmatively satisfy the jury that he honestly and reasonably believed C was at least 17. In other words the prosecution's task was easier in relation to the sexual intercourse charge and so, in theory, a conviction was more likely.

4.7.6 However, it may not have been the difference in the onus of proof which explained the verdicts in *Martin's* case. The sexual act which was the basis of the indecent assault charge occurred just after the complainant arrived at the defendant's house. This act lasted 'quite a time'.<sup>177</sup> After this, C talked about it before the photography session started. As well as posing for him, this session included photographs of C performing oral sex on him.<sup>178</sup> The jury may have differentiated the two counts on the basis that by the time of the acts of oral sex, they were not satisfied he believed she was 17 or more, or they were not satisfied that he had reasonable grounds for such a belief. Some jury members may simply have been unsure as to whether he should have known she was underage at the time of the first act, but all were sure of this at the time of the second act. The different verdicts do not necessarily support the proposition that placing the onus on the accused made it easier to prove the offence. To put this another way, the explanation for the verdicts may not have been because of the difference between satisfaction beyond reasonable doubt that there was either no honest or no reasonable mistake and being affirmatively satisfied that there was such an honest and reasonable mistake.

4.7.7 The argument that the burden of proof should remain with the prosecution is a plea for the application of general principles. Placing the burden on the accused is contrary to the common law presumption of innocence and the

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<sup>176</sup> Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Discussion Paper (2001) 90-1.

<sup>177</sup> *Tasmania v Martin*, COPS, Porter J, 29 November 2011.

<sup>178</sup> *Ibid.*

decision of the High Court in *He Kaw Teh*.<sup>179</sup> Reversing the onus of proof gives rise to the argument that this is contrary to the fundamental principle that it is for the prosecution to prove the case and not for the accused to disprove it. Whilst the common law is amenable to statutory reversals of the onus, human rights principles are not so flexible. Placing the onus of proof on the defence rather than the prosecution can amount to an infringement of the presumption of innocence in art 14(2) of the *International Covenant on Civil and Political Rights* (ICCPR)<sup>180</sup> if the incursion into the presumption of innocence cannot be justified. As decisions such as *R v Momcilovic*<sup>181</sup> and *R v Oakes*<sup>182</sup> demonstrate, this requires clear, cogent and persuasive evidence. In those cases, in the context of the possession of drugs, ‘deemed possession’ provisions which require a defendant to satisfy the court that drugs found on premises occupied by him or her were not in their possession, were found to constitute an unjustifiable infringement of the right to be presumed innocent.<sup>183</sup>

***Does a statutory reversal of the onus of proof in relation to mistake as to age infringe the right to be presumed innocent?***

4.7.8 The answer to this question depends on whether such a limitation on the right to be presumed innocent is reasonable and justifiable in a free and democratic society. Whether or not a human rights instrument has a reasonable limits provision, courts have read the right to be presumed innocent as subject to one.<sup>184</sup> The Victorian Charter is instructive as to what is required to satisfy the reasonable limits test, namely:

- the nature of the right;
- the importance of the purpose of the limitation;

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<sup>179</sup> (1985) 157 CLR 523.

<sup>180</sup> ICCPR, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Repeated in the *Human Rights Act 2004* (ACT) s 22(1) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(1).

<sup>181</sup> [2010] VSCA 50; 25 VR 436.

<sup>182</sup> [1986] 1 SCR 103.

<sup>183</sup> [2010] VSCA 50; 25 VR 436 (CA); [2011] HCA 34; 280 ALR 221: while the High Court held that the offence of trafficking did not infringe the presumption of innocence in s 25(1) of the Charter, this was because a majority held that the deemed possession provision did not apply to the trafficking offence. A number of judges explicitly stated (obiter) that the deemed possession provision did infringe the presumption of innocence – see Crennan and Kiefel JJ at [581]; Bell J at [659].

<sup>184</sup> See for example under art 6(2) of the *European Convention on Human Rights*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953); *Salabiaku v France* (1988) 13 EHRR 379 [28]; *Janosevic v Sweden* (2004) 38 EHRR 22 [101].

- the nature and extent of the limitation;
- the relationship between the limitation and its purpose; and
- any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.<sup>185</sup>

4.7.9 As to the nature of the right, it is a ‘hallowed principle lying at the very heart of criminal law’; it protects the ‘fundamental liberty and human dignity of any and every person accused by the State of criminal conduct.’<sup>186</sup> What is the purpose of the limitation? Presumably it is the difficulty of proving that the defendant had no honest and reasonable mistake as to age (and had not taken all reasonable steps to find out that the young person was over the relevant age). Without going into the importance of the limitation,<sup>187</sup> it is clear there are obstacles to establishing that reversal of the onus of proof is justified for this offence. In regards to the relationship between the limitation and its purpose, there is difficulty in establishing that the effective prosecution of the offence depends upon the ability to rely upon the reverse onus. The other obstacle is that it is not clear that there is no less restrictive means of achieving the purpose the limitation seeks to achieve. It is not clear that a change of onus from a persuasive to an evidentiary onus would make much difference to the effective prosecution of the offence(s).

### ***Responses to the Issues Paper***

4.7.10 All of the responses to the IP which addressed the issue of the onus of proof agreed that the onus of proof for mistake as to age should 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. For example the Director of Public Prosecutions:

... [made] the predictable wish that the location and effect of the onus of proof be harmonised and uniform across crimes and offences to which it applies, in order that the intellectual gymnastics required of juries confronted by different onus provisions will cease.

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<sup>185</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

<sup>186</sup> *R v Oakes* [1986] 1 SCR 103, 119 (Dickson CJ).

<sup>187</sup> As to this see *R v Momcilovic* (2010) 25 VR 436 [140] and *HKSAR v Hung Chan Wa* (2006) HKCFAR 614, 646.

4.7.11 Only two respondents supported the position that the onus be on the prosecution (the Law Society and Patmalar Ambikapathy).<sup>188</sup> The Law Society submitted:

It is of 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.

4.7.12 Six respondents argued that the onus should be on the accused. FamilyVoice Australia submitted:

It seems entirely appropriate to put the onus of proof on the accused of establishing these two facts [that the belief was honest and reasonable] beyond reasonable doubt. ...

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. (*FamilyVoice Australia*)

The legal burden should always remain with the defendant with regard to such defences. Adults who choose to engage in sexual activity with young people should be aware that it is their responsibility to ensure that they are engaging in lawful sexual activity with a partner that is of a legal age to consent. (*Tasmania Police*)

... on balance my preference would be for the legal burden to be placed on the accused to prove mistake as to age. In saying this, I acknowledge the Institute's very considered discussion regarding which party should bear the onus of proof. I note the burden of proof, if placed on the accused, would be on the balance of probabilities.

My strong opinion is that it is appropriate to set the bar particularly high for people accused of sexual offences against young people; consequently, the accused should be required to discharge the onus of proving an honest and reasonable mistake as to age. (*Commissioner for Children*)

4.7.13 Elizabeth Little (*Sexual Assault Support Services Inc*) supported placing the onus on the accused as this was more equitable for victims and provided

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<sup>188</sup> It should be noted that this respondent would strictly limit the defence of mistake as to age to defendants under 18.

some balance to redress the specific systemic bias in the criminal justice system against victims of ‘relational crimes’ (sex and family violence offences). She noted that a reverse onus provision of this nature is not unprecedented in the criminal law.

### ***The Institute’s view***

4.7.14 There is no principled reason for the current inconsistency in the law relating to the onus of proof in relation to mistake as to age. It is an historical accident which results in complexity and confusion. However, the issue of where the onus should lie is a contentious question. Principle dictates that it should be on the prosecution. And this is consistent with the general law in relation to mistake. Historically however, specific statutory defences of mistake as to age have placed the onus on the accused. While this is in part due to the fact that it was assumed that this was in accordance with the general defence of mistake, some more recent enactments have consciously chosen to reverse the general rule.<sup>189</sup> Both Victoria and the Australian Capital Territory have reverse onus provisions for the defence of mistake as to age and this is despite the existence of human rights legislation.<sup>190</sup> Neither of these provisions has been challenged on the ground that they infringe the presumption of innocence, although as *Momcilovic* indicates, they would be open to challenge on this ground.

4.7.15 The Institute’s Board was unable to reach a unanimous view as to where the onus of proof in relation to mistake as to age should be placed. However, a majority was in favour of the onus being on the Crown. The majority was concerned that to reverse the onus would inevitably force an accused person into the witness box to give evidence of a mistaken belief as to age to enliven the defence. Given that the majority decision in *CTM v The Queen*<sup>191</sup> has already enlarged the obligation upon an accused to give or adduce evidence to enliven the issue of mistake as to age when the onus is on the Crown, to take this further and increase the burden on the accused at trial by reversing the onus is inconsistent with the accusatorial character of a criminal trial and flies in the face of the presumption of innocence. Moreover, given the High Court’s views on what is needed to enliven the ‘defence’ it is unnecessary.<sup>192</sup> To place the onus

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<sup>189</sup> For example: *Crimes Act 1958* (Vic) s 45(4)(a), as amended by *Crimes (Sexual Offences) Act 2006* s 9; *Crimes Act 1961* (NZ) s 134A, as amended by *Crimes Amendment Act 2005* (NZ).

<sup>190</sup> *Crimes Act 1958* (Vic) s 45(4)(a); *Crimes Act 1900* (ACT) s 55(3)(a).

<sup>191</sup> (2008) 236 CLR 440, see Kirby J at [108]-[109] for a critique of the majority position.

<sup>192</sup> A majority held that the defence of mistake as to age was not enlivened in the case by the fact that the accused in a police interview stated that the victim was 16 and that she had told him that was her age.

on the defence is also contrary to human rights principles and is not reasonably justified. The minority view was that to place the onus on the accused places the responsibility where it belongs. It strengthens the message to the community that those who have sex with young people are under an obligation to ensure that the person they are engaging with sexually is over the legal age of consent. The goal is to make at least some people make more inquiries as a consequence of reverse onus.

**Recommendation 9**

That 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.

**Recommendation 10**

That the onus of proof for the defence of mistake as to age for all the child sex offences in the *Code* be on the Crown.

## **4.8 Reformulating the mistake defence as an ‘ought to have known’ test or an honest belief test**

### ***The ‘knew or ought to have known’ test***

*4.8.1* As explained in Part 2.7, the child pornography offences in the *Code* are formulated in a different way from the child sexual assault offences with respect to the element of the age of the child. Rather than making the age of the child or young person merely an external element of the offence, the child pornography offences also require proof that the accused knew or ought to have known that the material was ‘child exploitation material’. This requires knowledge (actual or constructive) that the material depicts a child who is or appears to be under the age of 18. In addition to the different fault element, there is also a difference in respect of the age of young people protected. Child exploitation material

offences protect children who are or appear to be under the age of 18.<sup>193</sup> Child sexual assault offences protect children under the age of 17. Given that the Commonwealth *Criminal Code* and child pornography offences nationally apply to material depicting a person under the age of 18, the Institute does not recommend lowering this age to 17 to comply with the age of consent under the *Code*, noting the age is 18 to comply with ILO Convention 182.<sup>194</sup>

The IP explained the ‘knew or ought to have known’ test (see IP at 4.5.2) and put up the option of replacing the defence of mistake as to age with the knew or ought to have known test as the uniform fault element in relation to age for all child sex offences in the *Code*. Only four responses addressed this option and none was in favour of it.<sup>195</sup> For example:

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. (*The Law Society of Tasmania*)

Bravehearts do not support the adoption of a ‘knew or ought to have known that the young person was under age’ test in place of the defence of mistake. As outlined in our response under Question 5, we accept that some people look older than they are and as such we believe that the responsibility must remain with the accused to ascertain the age of the young person. (*Bravehearts*)

### ***The Institute’s view***

4.8.2 The Institute does not recommend that the ‘knew or ought to have known’ test replace that of honest and reasonable mistake because the policy objective of requiring those who engage in sexual acts with young people to take steps to ensure that they are not involved with a person under the age of consent is better promoted by the defence of honest and reasonable mistake with a reasonable steps requirement. As is clear from *Boughey’s* case, the ‘knew or ought to have known’ test is only ‘a stop to think test’. It does not ‘refer to what an accused person would have found out if he or she had taken the trouble to ... inquire of others.’<sup>196</sup> In comparison with the New Zealand and Canadian tests

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<sup>193</sup> *Criminal Code (Tas)* s 1A.

<sup>194</sup> See IP at 3.4.1.

<sup>195</sup> Elizabeth Little, Sexual Assault Services Inc, also rejected the ought to have known test (Consultation 26 September 2012).

<sup>196</sup> *Boughey* (1986) 65 ALR 609, 623 (Mason, Wilson and Brennan JJ).

which require the accused to take (all) reasonable steps to ascertain the complainant's age, this sets the bar too low.

4.8.3 The Institute has also considered whether or not the child exploitation offences should be amended to replace the 'knew or ought to have known' test with the defence of honest and reasonable mistake plus reasonable steps requirement. This would have the advantage of simplifying the law by having a consistent fault element in relation to age in sex offences against children. However, the Institute does not recommend this. First, 'child exploitation material' is defined to include a person who 'appears to be under the age of 18 years' as well as a child who is under the age of 18.<sup>197</sup> The mistake defence seems redundant, or at least does not fit comfortably, in cases where material relates to a person who appears to be under 18. If they appear to be under 18 then it is hard to see that there is room to argue an honest and reasonable belief that they were 18 or did not appear to be under 18. In such a case the defence could only be that the person depicted did not appear to be under 18. Secondly, while the reasonable steps requirement makes sense for offences which require an act (for example, production or distribution), it does not fit easily with 'possession' which is a state of affairs rather than an act. Finally, there remain obstacles to uniformity. In addition to the difference between 17 and 18, changing the fault element for child exploitation offences to achieve some uniformity with the child sexual assault offence would still leave inconsistencies with the Commonwealth child pornography offences which have the fault element of recklessness in relation to the element that the material is child pornography.<sup>198</sup>

#### **Recommendation 11**

That the *Code* not adopt the 'knew or ought to have known' that the young person was under age formulation as the uniform fault element with respect to age of the young person for child sex offences in the *Code*.

#### **Recommendation 12**

That the 'knew or ought to have known' test for age in child exploitation offences not be changed in favour of the defence of honest and reasonable mistake as to age.

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<sup>197</sup> *Criminal Code* (Tas) s 1A.

<sup>198</sup> *Criminal Code* (Cth) s 474.18(2)(b).

***A defence of honest belief that the young person is over the age of consent***

4.8.4 The IP asked for views on the appropriateness of changing the mistake defence for sexual offences from one which requires both an honest and reasonable belief that the other person was over the age of consent to one which only requires that the belief be an honest one. A precedent for a subjective test for mistaken belief as to age is found in the Commonwealth *Criminal Code* which has an unrestricted mistake as to age defence for the crime of sexual intercourse with a child outside Australia contrary to s 272.8(1) which need only be an honest mistake.<sup>199</sup> How this is achieved has been explained above (see 4.7.4).

4.8.5 The submissions to the IP provided no support for changing the mistake defence from an objective test to a subjective one. For example:

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 one as well as a genuine one. The adjunctive requirement allows a jury to apply community standards of reasonableness to the conduct of a defendant. (*Law Society*)

***The Institute's view***

4.8.6 The Institute does not recommend changing the formulation of the mistake as to age defence from an objective test to a subjective one. In all Australian states and territories, the defence of mistake as to age for sexual penetration and other sexual offences requires that the mistake be reasonable as well as honest. In the same way that there is nothing unjust in requiring a person to have reasonable grounds for a belief in consent in a case of rape, there is nothing unjust in requiring reasonable grounds for a belief that a young person is over the age of consent in age specific sex offences. Moreover, the 'honest mistaken belief as to age' formulation from the Commonwealth *Criminal Code* structure is quite foreign to the Tasmanian *Criminal Code* and would introduce a new form of defence, unnecessarily complicating principles of criminal responsibility. It is also less stringent than the current formulation. Therefore, not only would the honest mistake formulation be anomalous in the Tasmanian *Criminal Code* context, it would be seen as being less protective.

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<sup>199</sup> *Criminal Code 1995* (Cth) ss 272.8(1) and 272.16(1). Compare the Model Criminal Code which requires that a belief that a child is over the age of consent must be both honest and reasonable: s 5.2.19, MCCOC above 46, 156-61.

**Recommendation 13**

That the mistake as to age defence not be changed from requiring that the mistake be both honest and reasonable to only requiring that the mistake be honest (the *Criminal Code 1995* (Cth) s 272.16 formulation).

## **4.9 Amending the offence of maintaining a sexual relationship**

### ***Omitting s 125A(5)***

*4.9.1* In the IP it was suggested that one avenue to address the anomalies and problems associated with the mistake as to age defence for the crime of maintaining a sexual relationship would be simply to repeal the provision in s 125A(5) that makes mistake as to age a defence. This would mean that mistake as to age could still be a defence if it was relevant to the particular unlawful sexual act relied upon to establish the crime. In such cases, successfully raising the defence would mean that the sexual act would not be unlawful. However, in cases where age was not an element of the offence, such as in a case of rape, it would remove the possibility of arguing mistake as to age as a defence.

### ***Responses to the Issues Paper***

*4.9.2* Seven respondents to the IP supported omitting s 125A(5) on the grounds it was redundant for child sexual offences with no element of absence of consent (such as sexual intercourse with a young person) and inappropriate for offences which do (such as rape). For example:

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. (*The Law Society*)

Non-consensual crimes such as rape can be relied upon as one or more of the three unlawful sexual acts required for a conviction pursuant to s 125A. It therefore appears to me that inclusion of a defence of mistake as to age in s 125A(5) is confusing and inappropriate. (*Commissioner for Children*)

***The Institute's view***

4.9.3 If Recommendation 7 is adopted (consistency as to onus proof) omitting s 125A(5) would have the effect of removing the current 'intellectual gymnastics required of juries confronted by different onus provisions'.<sup>200</sup> In cases where the unlawful acts relied upon already have a mistake as to age defence, express provision for the defence s 125A is redundant. In the IP the Institute also suggested that a mistake as to age defence was inappropriate where the crimes alleged were rape. In one sense this is true. Mistake as to age is not a defence to the crime of rape and it follows it should not be a defence to maintaining a sexual relationship based upon unlawful acts which were rape. However, there is a possible objection to denying an accused the defence of mistake as to age in such a case. This is that it would make the crime one of absolute liability with respect to age. On this view the defence of mistake should be retained and if successful the appropriate verdict would be guilty of rape rather than guilty of a child specific sexual offence of maintaining a sexual relationship with a young person. The counter argument is that the prosecution would then lose the advantage of being able to avoid the necessity of proving the dates on which the unlawful acts were committed and the exact circumstances. This advantage was the rationale for introducing the crime of maintaining a sexual relationship.<sup>201</sup> As the Model Criminal Code Officers Committee concluded:

In short, because of the gravity of child sexual assault, and the reality that those who are victims of such offences cannot be expected to be overly particular in their evidence about them, special rules must apply.<sup>202</sup>

4.9.4 The Institute is of the view that removing the defence of mistake as to age in cases where the offence of maintaining a sexual relationship with a young person is based on crimes where the element of unlawfulness lies in absence of consent would not constitute any significant injustice to an accused person. It therefore recommends that the defence of mistake as to age be omitted from s 125A of the *Criminal Code*.

**Recommendation 14**

That the defence of mistake as to age in s 125A(5) be repealed.

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<sup>200</sup> Submission of the Director of Public Prosecutions.

<sup>201</sup> *Criminal Code* s 125A(4)(a); MCCOC, above n 46, 133-137.

<sup>202</sup> MCCOC, above n 46, 137.

***Extra-territorial application of the crime of maintaining a sexual relationship with a young person***

4.9.5 As explained above in para 2.6.2, there are doubts as to whether unlawful acts committed (or possibly committed) outside Tasmania can be considered as one of the three unlawful acts to satisfy the ingredients of the crime of maintaining a sexual relationship, or as an additional unlawful act for the purpose of sentencing. To avoid this, the *Code* could be amended to include a provision along the lines of the Model Criminal Code to specifically provide that it is immaterial that the conduct on any one of those occasions occurred outside Tasmania, so long as the conduct on at least one occasion occurred in this jurisdiction.

***Responses to the Issues Paper***

4.9.6 Seven written responses addressed the questions of extra-territorial application of s 125A.<sup>203</sup> All agreed that it should include consideration of unlawful sexual acts committed outside Tasmania. For example, the Commissioner for Children stated:

By precluding consideration of unlawful acts which occurred outside Tasmania, we may arbitrarily fail to legally recognise the true extent of a child's experience of sexual abuse, as was the case in *Tasmania v S*. This is of particular relevance when one considers the mobility of Australians across state boundaries for employment, tourism, family visits or other purposes.

The express provision in New South Wales in relation to the equivalent charge of persistent sexual abuse of a child is that it is immaterial that conduct constituting a sexual offence occurred outside New South Wales, provided the conduct on at least one occasion occurred in New South Wales.<sup>204</sup> I note that this provision is consistent with the provisions of the Model Criminal Code.<sup>205</sup>

In my opinion, provided at least one unlawful sexual act occurred in Tasmania, others committed outside of Tasmania should be taken into account for the purpose of conviction and sentence. To that end, it is my view that s 125A should be redefined to enable the Court to take into account unlawful sexual acts committed outside Tasmania.

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<sup>203</sup> In an oral submission, Elizabeth Little on behalf of Sexual Assault Support Services (Inc) agreed.

<sup>204</sup> *Crimes Act 1900* (NSW) s 66EA(3).

<sup>205</sup> Model Criminal Code, s 5.2.14(3).

I note that in the event such an amendment is contemplated, consideration would need to be given to the way in which offences committed outside Tasmania are defined. I note that in New South Wales a sexual offence includes an offence under the law of a place outside New South Wales that would, if it had been committed in New South Wales, be a sexual offence. (*Commissioner for Children*)

The Law Society were also supportive of a provision for extra-territorial application but added:

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 other jurisdiction].

### ***The Institute’s view***

4.9.7 The Institute recommends that s 125A be amended to insert a provision to ensure that there is the sufficient territorial nexus to bring a charge provided at least one of the alleged three unlawful acts is committed in Tasmania. This ensures that the purpose underlying the offence is achieved, namely to ensure that all the acts of sexual abuse can be taken into account by the court, notwithstanding the victim’s inability to clearly distinguish and particularise the individual acts of abuse. The Institute agrees with the Commissioner for Children’s suggestion that the definition of an unlawful act be amended to make it clear that the unlawful act is both a crime in the place where it is committed and a crime in Tasmania. This could be achieved by providing:

125A(1) In this section “unlawful sexual act” means:

- (a) an act that constitutes an offence under s 124, 125B etc; and
- (b) an offence under the law of a place outside Tasmania that would, if it had been committed in Tasmania, be an offence referred to in paragraph (a).

4.9.8 The constitutional and double jeopardy concerns of the Law Society have not been perceived to be an obstacle to the growing number of ad hoc exceptions in favour of extra-territoriality provisions for specific offences including theft (eg *Crimes Act 1958* (Vic) s 80A) computer offences (*Criminal Code* (Tas) s 257F) and some prostitution offences (*Sex Industry Offences Act 2005* (Tas) s 10). In the context of maintaining a sexual relationship with a young person (or persistent sexual abuse of a child) New South Wales and Western Australia expressly provide for the extra-territorial application of the

crime.<sup>206</sup> Extra-territorial provisions increase the possibility of concurrent claims of jurisdiction between States and Territories and jurisdictional challenges. Bronitt and McSherry suggest that these uncertainties in the law do not impair its functioning, rather it provides a flexible framework within which police, prosecutors and defence negotiate jurisdiction.<sup>207</sup> The Institute acknowledges the possibility of an offender being charged in one jurisdiction when they have already been acquitted or convicted for an unlawful act committed in another. However, the law constituted by *res judicata*, the pleas in bar, the rule against double jeopardy and the doctrine of abuse of process provides protection to an accused person in such a situation.<sup>208</sup> The pleas in bar (autrefois convict and autrefois acquit) are admittedly narrow. However, the Supreme Court (as a court of superior jurisdiction) has a broad discretion to stay proceedings to prevent abuse of process and the rules against double punishment prevent an offender being punished twice for the same conduct where the boundaries of offences overlap, notwithstanding that multiple convictions may be technically possible.<sup>209</sup>

**Recommendation 15**

- (a) That the crime of maintaining a sexual relationship with a young person be amended to include an extra-territorial provision to make it clear that, provided at least one unlawful sexual act was committed in Tasmania, unlawful sexual acts committed outside the State can be taken into account.
- (b) That the definition of unlawful sexual act be amended to make it clear that to qualify as an unlawful act, any unlawful act committed outside Tasmania must be both an offence under the law outside Tasmania and a sexual offence in Tasmania.

***Renaming maintaining a sexual relationship with a young person***

4.9.9 In light of the criticism that maintaining a sexual relationship was an inappropriate label, the IP asked whether the crime of maintaining a sexual relationship should be renamed ‘persistent sexual abuse of a child’ to more clearly reflect the fact that the crime is dealing with sexual exploitation of a young person. Eleven respondents addressed this issue. Nine were in favour of

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<sup>206</sup> *Crimes Act 1900* (NSW) s 66EA; *Criminal Code* (WA) s 321A.

<sup>207</sup> Bronitt and McSherry, above n 34, 101.

<sup>208</sup> J Hunter, C Cameron and T Henning, *Litigation II: Evidence and Criminal Process* (Butterworths, 7<sup>th</sup> ed, 2005) 1258-69.

<sup>209</sup> *Pearce v The Queen* (1998) 194 CLR 610.

the change. The current wording was described as ‘euphemistic’ (*Hobart Community Legal Service*). Renaming ‘more accurately describes that behaviour and status of the victim’ (*Laurel House*) and would more clearly reflect the exploitative nature of the crime (*Hobart Women’s Health Centre* and *Catholic Women’s League*).

Tasmania Police submitted:

The current wording implies, through the use of the word ‘relationship’, that the sexual act is consensual between both the victim and the offender. This is not acceptable, and legislation needs to reflect the type of offending behaviour that it is criminalising. It also needs to be noted the subtle effects that such labelling and wording can have on victims, particularly with their psychological recovery from such incidents. (*Tasmania Police*)

The Commissioner for Children commented:

The use of the word ‘relationship’ connotes an emotional and sexual association or partnership between two people and fails in my view to convey the abusive and exploitative nature of such conduct. I am therefore of the view that the offence ... should be renamed ‘persistent sexual abuse of a child’.

4.9.10 Anon 1 supported the name change on the grounds that ‘it is reasonable that the phrasing of the legislation be aligned with other States’ [but noted that ‘changing the wording of the offence will not change the vehemence with which people who abuse children are viewed’]. Bravehearts supported renaming the offence and suggested ‘persistent sexual harm or exploitation of a child’ rather than ‘persistent sexual abuse of a child’:

There is a shift in the language of sexual offences away from ‘sexual abuse’ as the term does not fully encompass the range of behaviours. The sector is moving towards a broader terminology that does not imply just physical contact. We would recommend that the legislation use this broader language and rename the offence as ‘persistent sexual harm or exploitation of a child’. (*Bravehearts*)

4.9.11 Elizabeth Little (*Sexual Assault Support Services (Inc)*) was somewhat ambivalent on the issue. She questioned whether changing the name to persistent sexual abuse would discourage guilty pleas. Because such a small proportion of persistent sexual abuse cases get to court, she was of the view that those cases that are reported and prosecuted should be properly designated. If in fact there is a link between the offence label and the rate of guilty pleas, the solution is to improve court procedures for child witnesses, not to use

inappropriate terminology to describe the charges. On balance she favoured changing the name to persistent sexual abuse of a child.<sup>210</sup>

4.9.12 Two respondents opposed changing the name of the offence. The Director of Public Prosecutions warned that changing the name could discourage pleas of guilty:

I think that some caution ought to be observed [in renaming the crime], as it is my belief that offenders are more inclined to plead guilty to the offence as presently named than to specified charges of the same conduct. The Court of Criminal Appeal in one of several appeals I have brought to ensure the crime is attended by appropriate levels of sentencing seemed to agree with that proposition (*Director of Public Prosecutions v M* [2005] TASSC 14 at [38]). It is reasonable to expect that the naming of the crime may have contributed to the apparently enhanced willingness to plead guilty and thus spare the victim from giving evidence. It follows that although renaming the crime might give the legislature and indeed the community a pleasant sense of having struck a blow against child abuse, if the result is fewer pleas of guilty and more children being cross-examined at trial that satisfaction would be misplaced.

### ***The Institute's view***

4.9.13 The Institute agrees that the name 'maintaining a sexual relationship with a young person' tends to understate the seriousness of the crime because it fails to convey the exploitative and abusive nature of the crime and that consent was compromised or even possibly totally absent. However, it is concerned that changing the name to persistent sexual abuse of a child could have the adverse consequence of discouraging guilty pleas. It is plausible that a defendant would be more likely to plead guilty to maintaining a sexual relationship than to multiple counts (or even a single count) of rape of a child or young person. The benign terminology may even make a conviction for maintaining a sexual relationship more palatable to a defendant than conviction of sexual intercourse with a young person or indecent assault. It is also possible that vagueness associated with the precise number of acts makes a plea of guilty to the composite crime attractive. In the Institute's view the laudable aims of giving the crime a label that better reflects the gravity of the offence is trumped by the concern not to discourage guilty pleas.

### **Recommendation 16**

That the crime of 'maintaining a sexual relationship with a young person' not be renamed 'persistent sexual abuse of a child (or young person)'.

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<sup>210</sup> Consultation, 26 September 2012.

## 4.10 Prostitution offences involving children

4.10.1 As discussed in Part 2, s 9 of the *Sex Industry Offences Act 2005* (Tas) contains a specific crime for procuring, causing or permitting a child to provide sexual services. The IP did not focus on child prostitution offences nor raise the option of introducing an offence for clients of child prostitutes. However, in response to the IP the Institute received a submission from the Coalition Against Trafficking in Women which suggested that the prostitution of children is different from other sexual offences and should be considered separately from child sexual offences and the age of consent:

When a young person under 18 years of age is bought for prostitution by a person of any age, the issue of consent should not arise. The offer of money or other advantages in kind in order to gain access to the bodies of young people should be understood as a form of force. The sexual access obtained in this way cannot be mistaken for an ordinary form of sexual interaction. It is sexual exploitation. The young people who are thus induced into prostitution are not free agents expressing their sexual desires. They most often come from backgrounds in which they have been abused, they may have become homeless and without resources, or have become vulnerable to exploitation by a pimp because of a lack of positive attention, or they are, as in the case of the 12 year old girl in Tasmania, pimped by family members.

4.10.2 As part of an offence regime directed at child prostitution the Coalition recommended an offence criminalising the client:

We recommend that the use of a young person under 18 in prostitution through the offering of money or other inducements should be an offence of absolute liability. The effects of this form of sexual exploitation are so serious both physically and psychologically, that there should be no defence by a perpetrator that he believed the victim to be over 18. (*Coalition Against Trafficking in Women Australia*)<sup>211</sup>

### ***The position in other jurisdictions***

4.10.3 The Institute conducted a brief review to determine if other Australasian jurisdictions have specific offences for the client of child prostitutes. New South Wales makes it a crime to participate as a client with a child in an act of prostitution (s 91D(1)(b) of the *Crimes Act 1900*). In the absence of express language or necessary implication, at a minimum the fault element for the offence would be proof of the absence of an honest and reasonable mistake as to

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<sup>211</sup> CATWA also recommended that Tasmania adopt the Nordic model of prostitution policy, namely one which decriminalises the prostitute and criminalises the pimp.

age.<sup>212</sup> It is a crime under the Queensland *Criminal Code* for a person (a client) to obtain prostitution from a person who is not an adult and who the client knows, or ought reasonably to know, is not an adult (s 229FA(1)). New Zealand also makes the client of a child prostitute criminally responsible. The *Prostitution Reform Act 2003 (NZ)* s 22 makes it an offence punishable by a maximum of 7 years imprisonment to receive commercial sexual services from a person under the age of 18. There is no express provision for a fault element relating to age. There seems to be some confusion as to whether or not this is an offence of strict or absolute liability.<sup>213</sup> However, general principles would suggest that at least the defence of honest and reasonable mistake as to age is a defence.

### ***The Institute's position***

From the Institute's admittedly superficial inquiries, it does not appear that child prostitution in the commercial sex industry sense is a problem in Tasmania. However, it appears that 'transactional sex' (sex in exchange for cash, favours or drugs) is not uncommon.<sup>214</sup> The Institute is reluctant to state a firm view on this issue as it did not invite submissions on the question of whether there should be a specific offence which criminalises the client of a child prostitute. However, consistently with the recommendation we have made above, if the government sees fit to enact such an offence, the Institute would recommend that it expressly include a defence of mistake with a reasonable steps requirement in conformity with Recommendation 4.

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<sup>212</sup> *CTM v The Queen* (2008) 236 CLR 440.

<sup>213</sup> In the Second Reading debate for the Prostitution Reform Bill in 2003, Tim Barnett asserted that the offence is one of absolute liability in relation to the age of the sex worker. He said: 'We removed the defence of reasonableness for clients of under 18-year-old workers who might claim that they thought the sex worker was over 18': New Zealand, *Parliamentary Debates*, House of Representatives, 19 February 2003, 3607 (Tim Barnett). However, in debating the Crimes Amendment Bill 2005, which introduced the reasonable steps requirement for the defence of mistake as to age for sexual conduct with a young person, the Minister of Justice referred to the fact that the defence of honest and reasonable mistake as to age applied to the offence in the *Prostitute Reform Act 2003* which criminalises the client: New Zealand, *Parliamentary Debates*, House of Representatives, Questions to Ministers, 25 May 2004 (Hon Phil Goff, Minister of Justice). The decision in *Police v A* [2004] DCR 631 indicates that honest and reasonable mistake as to age is a defence.

<sup>214</sup> Elizabeth Little, Sexual Assault Support Services (Inc) consultation.

# Appendix 1

## 1. *Criminal Code: child specific sexual offences:*

- s 124 sexual intercourse with a young person
- s 125A maintaining a sexual relationship with a young person
- s 125B indecent act with a young person
- s 125C procuring sexual intercourse with a young person
- s 125D communications with intent to procure young person &c
- s 126 sexual intercourse with a person with mental impairment

## 2. *Criminal Code: general sex offences where consent is a defence for victims aged 17 and over but not for victims under the age of 17.*

- s 127 indecent assault
- s 127A aggravated sexual assault

## 3. *Criminal Code: child pornography offences*

- s 130 involving person under 18 in production of child exploitation material
- s 130A production of child exploitation material
- s 130B distribution of child exploitation material
- s 130C possession of child exploitation material
- s 130D accessing child exploitation material

## 4. *Sex Industry Offences Act 2005: child prostitution offences*

- s 9(4) procuring, causing or permitting a child to provide sexual services in a sexual services business.

## 124. Sexual intercourse with young person

- (1) Any person who has unlawful sexual intercourse with another person who is under the age of 17 years is guilty of a crime.  
Charge: Sexual intercourse with a young person under the age of 17 years.
- (2) It is a defence to a charge under this section to prove that the accused person believed on reasonable grounds that the other person was of or above the age of 17 years.
- (3) The consent of a person against whom a crime is alleged to have been committed under this section is a defence to such a charge only where, at the time the crime was alleged to have been committed –
  - (a) that person was of or above the age of 15 years and the accused person was not more than 5 years older than that person; or

- (b) that person was of or above the age of 12 years and the accused person was not more than 3 years older than that person.
- (4) This section is to be taken to be in force from 4 April 1924.
- (5) Subsection (3) is not a defence to a charge under this section in the case of anal sexual intercourse.
- (6) Nothing in subsection (4) impugns or otherwise affects the lawfulness of a conviction arising from conduct that occurred before the commencement of the *Criminal Code Amendment (Sexual Offences) Act 1987*.

**127. Indecent assault**

- (1) Any person who unlawfully and indecently assaults another person is guilty of a crime.  
Charge: Indecent assault.
- (2) In any case in which it is provided that the consent of a person to the act charged shall be a defence to a charge under section 124, the like consent to an act charged under this section given under the like conditions as to the age of the parties shall be a defence to a charge under this section.
- (3) Except as hereinbefore provided, the consent of a person under 17 years of age shall be no defence to a charge under this section.
- (4) This section is to be taken to be in force from 4 April 1924.
- (5) Nothing in subsection (4) impugns or otherwise affects the lawfulness of a conviction arising from conduct that occurred before the commencement of the *Criminal Code Amendment (Sexual Offences) Act 1987*.

**127A. Aggravated sexual assault**

- (1) A person who unlawfully and indecently assaults another person by the penetration to the least degree of the vagina, genitalia or anus of that other person by –
  - (a) any part of the human body other than the penis; or
  - (b) an inanimate object –is guilty of a crime.  
Charge: Aggravated sexual assault.
- (2) In any case where it is provided that the consent of a person to the act charged shall be a defence to a charge under section 124, the like consent to an act charged under this section given under the like conditions as to the age of the parties shall be a defence to a charge under this section.
- (3) Except as provided by subsection (2), the consent of a person under 17 years shall be no defence to a charge under this section.

## Appendix 2

### LEGISLATIVE PROVISIONS: SEXUAL INTERCOURSE WITH A YOUNG PERSON

| JURISDICTION                            | SECTION   | OFFENCE   | MISTAKE AS TO AGE   | CONSENT  |
|---|---|---|---|--|
| <b>TAS</b><br><i>Criminal Code</i>      | 124 – sexual intercourse with a young person  | Unlawful sexual intercourse with person under 17  | 124(2) – D believed on reasonable grounds that C was 17 or above (onus on D)  | 124(3) – Consent a defence where:<br>(a) C was 15 or over and D was not more than 5 years older than C<br>(b) C was 12 or over and D was not more than 3 years older than C  |
| <b>VIC</b><br><i>Crimes Act 1958</i>    | 45 – sexual penetration of child under 16<br><br>48 – sexual penetration of 16 or 17 year old child | Sexual penetration of child under 16<br><br>Person must not take part in act of sexual penetration with 16 or 17 y.o. C to whom s/he is not married and who is under his/her care supervision or authority (defined in ss(4)) | 45(4)(a) – Consent is not a defence unless the child was 12 or older and D satisfies court on BOP that s/he believed on reasonable grounds that C was 16 or older<br><br>48(2)(a) – consent no defence unless D satisfies court on BOP that s/he believed on reasonable grounds that the child was 18 or over | 45(4) – consent no defence unless the child was 12 or older:<br>(b) the D was not more than 2 years older than the child; or<br>(c) the D believed on reasonable grounds that s/he was married to the child<br><br>48(2)(b) – consent no defence unless D satisfies court on BOP that s/he believed on reasonable grounds that s/he was married to the child |
| <b>QLD</b><br><i>Criminal Code 1899</i> | 215 – Carnal knowledge with or of child under 16  | Any person who has or attempts to have unlawful carnal knowledge with or of a child under the age of 16   | 215(5) – if the child is 12 or older it is a defence to prove that D believed on reasonable grounds that the child was 16 or over   | No consent   |

Sexual Offences Against Young People

| <b>JURISDICTION</b>                                     | <b>SECTION</b>   | <b>OFFENCE</b>   | <b>MISTAKE AS TO AGE</b>   | <b>CONSENT</b>  |
|---|--|--|--|---|
| <b>NSW</b><br><i>Crimes Act 1900</i>                    | 66A – sexual intercourse – child under 10                            | Any person who has sexual intercourse with a child under 10  | No express mistake as to age provision – unclear whether common law applies ( <i>CTM Heydon J at [230]</i> )   | 77 – consent of the child no defence to a charge under 66A or 66C   |
|   | 66C – sexual intercourse – child between 10 and 16                   | (1) Any person who has sexual intercourse with a child between 10 and 14<br><br>(3) Any person who has sexual intercourse with a child between 14 and 16 | No express mistake as to age provision – unclear whether common law applies ( <i>CTM Heydon J at [230]</i> )<br><br>No express mistake as to age but common law defence of honest and reasonable mistake available ( <i>CTM Heydon J at [230]</i> ).   |   |
| <b>SA</b><br><i>Criminal Law Consolidation Act 1935</i> | 49 – unlawful sexual intercourse                                     | (1) unlawful sexual intercourse – child under 14<br><br>(3) unlawful sexual intercourse – child under 17   | No mistake as to age<br><br>49(4) – defence to 49(3) to prove that:<br>(a) the C was 16 or older; and<br>(b) the accused –<br>(ii) believed on reasonable grounds that C was of or above 17  | 49(7) consent no defence<br><br>49(4) – defence to 49(3) to prove that:<br>(a) the C was 16 or older; and<br>(b) the accused (i) was under 17 |
| <b>WA</b><br><i>Criminal Code</i>                       | 320 – child under 13, sexual offences against                        | A person who sexually penetrates a child (under 13)  | No mistake as to age   | No consent  |
|   | 321 – child of or over 14 and under 16, sexual offences against      | A person who sexually penetrates a child (aged 14 or 15)   | 321(9) – subject to (9a) it is a defence to prove the D<br>(a) believed on reasonable grounds that the child was of or over the age of 16 years; and<br>(b) was not more than 3 years older than the child<br><br>321(9a) – 321(9) doesn't apply where the child is under the care, supervision, or authority of the D | No consent  |
| <b>NT</b><br><i>Criminal Code</i>                       | 127 – sexual intercourse or gross indecency involving child under 16 | Sexual intercourse or gross indecency involving child under 16 an offence  | 127(4) It is a defence to prove that the child was of or above the age of 14 and the D believed on reasonable grounds that C was of or above the age of 16 (139: knowledge of age immaterial unless expressly stated)  | 139A Consent is no defence to 127   |

Appendix 2

| <b>JURISDICTION</b>                          | <b>SECTION</b>   | <b>OFFENCE</b>   | <b>MISTAKE AS TO AGE</b>   | <b>CONSENT</b>   |
|--|--|--|--|--|
| <b>NT</b><br><i>Criminal Code</i>            | 127 – sexual intercourse or gross indecency involving child under 16   | Sexual intercourse or gross indecency involving child under 16 an offence  | 127(4) It is a defence to prove that the child was of or above the age of 14 and the D believed on reasonable grounds that C was of or above the age of 16<br>(139: knowledge of age immaterial unless expressly stated) | 139A Consent is no defence to 127  |
| <b>ACT</b><br><i>Crimes Act 1900</i>         | 55 – sexual intercourse with a young person  | (1) A person who engages in sexual intercourse with a young person under 10 is guilty of an offence<br><br>(2) A person who engages in sexual intercourse with a young person under 16 is guilty of an offence   | No mistake as to age<br><br>55(3)(a) Defence to 55(2) if the D establishes that he or she believed on reasonable grounds that the C was of or above the age of 16 and C consented  | No consent<br><br>55(3)(b) Defence to 55(2) to prove that at the time of the offence the C was of or above the age of 10 and the D was not more than 2 years older and C consented |
| <b>UK</b><br><i>Sexual Offences Act 2003</i> | 5 – rape of child under 13<br><br>9 – sexual activity with a child<br><br>13 – child sex offences committed by children or young persons | 5(1) A person commits an offence if he intentionally penetrates the vagina, anus or mouth of another person with his penis, and the other person is under 13.<br><br>9(1) a person aged 18 or over commits an offence if he (a) intentionally touches the C, (b) the touching is sexual and (c) either (i) C is under 16 and A does not reasonably believe C is 16 or over or (ii) C is under 13.<br><br>13(1) a person under 18 commits an offence if he does anything that would be an offence under sections 9-12 if he were 18.<br><br>13(2) sets out different punishments for offenders under 18 | No mistake as to age in Act<br><br>9(1)(c)(i) P must prove A reasonably believes that C is 16 or over, or (ii) B is under 13.  | No consent provision in Act  |

Sexual Offences Against Young People

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| JURISDICTION                                  | SECTION   | OFFENCE   | MISTAKE AS TO AGE   | CONSENT  |
|---|---|---|---|--|
| <p><b>Canada</b><br/><i>Criminal Code</i></p> | <p>151 – sexual interference with a person under 16</p> | <p>Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years is guilty of an offence</p> | <p>150.1(4) – mistake of age<br/>It is not a defence to a charge under section 151 that the A believed that the C was 16 years of age or more at the time the offence is alleged to have been committed unless the A took all reasonable steps to ascertain the age of the C.</p> | <p>150.1 – subject to ss (2) and (2.2) when an accused is charged with an offence under s151 in respect of a complainant under the age of 16, consent is not a defence.</p> <p>150.1(2) – exception – when complainant aged 12 or 13 consent is a defence if A</p> <ul style="list-style-type: none"> <li>a) is less than 2 years older than the C; and</li> <li>b) is not in a position of trust or authority towards C, is not the person with whom C is in a relationship of dependency and is not in an exploitative relationship with C.</li> </ul> <p>150.1(2.1) – exception – when complainant aged 14 or 15 consent is a defence</p> <ul style="list-style-type: none"> <li>a) If A             <ul style="list-style-type: none"> <li>i. Is less than 5 years older than the C; and</li> <li>ii. Is not in a position of trust or authority towards C/ relationship of dependency/exploitative relationship.</li> </ul> </li> <li>b) A is not married to C</li> </ul> <p>150.1(6) – mistake of age<br/>An A cannot raise a mistaken belief in the age of the C in order to invoke a defence under ss 2 or 2.1 unless the A took all reasonable steps to ascertain the age of the C.</p> |

Appendix 2

| <b>JURISDICTION</b>  | <b>SECTION</b>                                  | <b>OFFENCE</b>  | <b>MISTAKE AS TO AGE</b>  | <b>CONSENT</b>  |
|--|---|---|---|---|
| <b>NZ</b><br><i>Crimes Act 1961</i>                              | 132 – sexual conduct with child under 12        | 132(1) every person who has sexual connection with a child (under 12) is liable to imprisonment         | 132(4) it is not a defence to a charge under s132 that the person charged believed that the C was of or over the age or 12.   | 132(5) it is not a defence to a charge under s132 that the C consented.                                       |
|  | 134 – sexual conduct with young person under 16 | 134(1) every person who has sexual connection with a young person (under 16) is liable to imprisonment. |   | 134(4) no person can be convicted of a charge under s134 if at the time they were married to the young person |
|  | 134A – defence to charge under s 134            | 134A(1) it is a defence to a charge under s134 if the A proves –  | 134A(1)It is a defence if A proves:<br>(a) that before the time of the act concerned, he or she had taken reasonable steps to find out whether the young person was of or over the age of 16; and<br>(b) he or she believed on reasonable grounds that the young person was of or over 16; and<br>(c) the young person consented.<br><br>134A(2)(b) except to the extent provided in subsection (1) it is not a defence to a charge under s134 that the A believed that the young person concerned was of or over 16. | 134A(2)(a) except to the extent provided in s134A(1), it is not a defence that the young person consented.    |
| <b>Scotland</b><br><i>Sexual Offences (Scotland) Act 2009</i>    | 18 – Rape of a young child                      | 18 penetration of a child under 13  | 27 belief that the child has attained 13 Is not a defence   | No provision as to consent  |
|  | 28 Having intercourse with an older child       | 28 It is an offence if A penetrates B who has attained the age of 13 but not 16 years                   | 39(7) that A believed b had not attained 13 not a defence (so by implication a belief that B was 16 is a defence  | No provision as to consent  |
| <b>Ireland</b><br><i>Criminal Law (Sexual Offences) Act 2006</i> | 2 – Defilement of a child under 15              | 2 Sexual intercourse with a child under 15 is an offence  | 2(3) honest belief that child had attained the age of 15 is a defence   | 2(5) consent not a defence  |
|  | 3 –Defilement of a child under 17               | 3 Sexual intercourse with a child under the age of 17 is an offence                                     | 3(3) honest belief that child had attained the age of 17 is a defence   | 3(7) consent not a defence  |